NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH
(APPELLATE JURISDICTION)

TA (AT) No. 94/2021
(Company Appeal (AT) No.363/2019)
(IA No.517/2023)
(Under Section 421 of the Companies Act, 2013)

(Arising out of the Impugned Order dated 27.11.2019 in CP No.486/BB/2018), (Filed under Sections 59, 210, 213, 216, 241 & 242 of the Companies Act, 2013, passed by the National Company Law Tribunal, Bengaluru Bench)

IN THE MATTER OF:

Jitendra Virmani
R/o 341, Embassy Woods
6/A, Cunnigham Road
Bangalore – 560 052

Through Power of Attorney Holder
A.B. Mandanna
Office at 150, Embassy Point
Infantry Road, Bengaluru – 560001 **…Appellant**

Versus

1. **MRO – Tek Reality Limited**
   A company registered under the
   Companies Act, 1956
   And having its Registered Office at:
   Maruthi Complex, No. 6,
   New BEL Road, Chikkamaranahalli,
   Bangalore – 560 094

   Represented by its Authorized Signatory
   CFO Mr. Srivatsa Ganesh **…Respondent No.1**

2. **S. Narayanan**
   12, CIL Layout, A Block, Sanjay Nagar
   Bangalore – 560 094 **…Respondent No.2**

3. Ms. Jayashree Narayanan
12, CIL Layout, A Block, Sanjay Nagar
Bangalore – 560 094 **…Respondent No.3**

4. Murari Narayanan
12, CIL Layout, A Block, Sanjay Nagar
Bangalore – 560 094 **…Respondent No.4**

5. Himadri Nandi
389, 4th Main 15th Cross
2nd Block, R.T. Nagar
Bangalore – 560 032 **…Respondent No.5**

6. Shyamali Nandi
389, 4th Main 15th Cross
2nd Block, R.T. Nagar
Bangalore – 560 032 **…Respondent No.6**

7. Ms. Prakrity N
365, 5th Street, 1st Block,
1st Main, R.T. Nagar
Bangalore – 560 032 **…Respondent No.7**

8. Srivatsa Ganesh
275, AMS Layout, Chikka Bettahalli
Vidyaranayapura
Bangalore – 560 097 **…Respondent No.8**

9. N.K. Rajasekaran
109/B, 4th Main, NGEF Layout,
Sanjay Nagar, Bangalore – 560 097 **…Respondent No.9**

10. Krishnan Rajamani
81-203, Sriram Shreyas Apt
Telecom Nagar, Koodigehalli
Bangalore – 560 097 **…Respondent No.10**

11. M/s Umiya Builders & Developers
Through its Proprietor
Mr. Anirudha Bhanuprasad Mehta
Having its office at:
29/3 HM Strafford, 2nd Floor, 7th Cross
Bangalore – 560 052 **…Respondent No.11**

12. Umiya Builders & Developers Private Limited
A company registered under the Companies act, 1956
Having its Registered office at:
29/3 HM Strafford, 2nd Floor, 7th Cross
Bangalore – 560 052 **…Respondent No.12**

13. Mr. Anirudha Bhanuprasad Mehta
3 India House, 2nd Floor
Floor No.6, KEMPS Corner
Mumbai – 400 026 **…Respondent No.13**

14. Sudhir Kumar Hasija
No. 7, Wellington Street,
Richmond Town
Bangalore – 560 025 **…Respondent No.14**

15. Gauri Anirudha Mehta
3 India House, 2nd Floor
Floor No.6, KEMPS Corner
Mumbai – 400 026 **…Respondent No.15**

16. Mohan Subramanium
East End D Main Road
29th Cross, 9th Block, Jayanagar
Bangalore – 560 069 **…Respondent No.16**

17. M. Venkatachala Sampath Kumar
163/6, 1st Main Road,
Opp. Fortis Hospital, Seshadripuram
Bangalore – 560 020 **…Respondent No.17**

18. Sudipto Gupta
D-1405, Purva Venezia Apartments
Next to Mother Dairy
Major Sandeep, Unnikris
Yelahanka New Town
Bangalore – 560 064 **…Respondent No.18**

19. Barun Pandey
House No. 47/33

Near Ganesh Temple, 2nd Cross,
Venkateshwara Layout, Sg Palya,
Bangalore – 560 029 **…Respondent No.19**

20. Serious Fraud Investigation Office
2nd Floor, Paryavaran Bhavan
CGO Complex, Lodhi Road,
New Delhi – 110 003 **…Respondent No.20**

21. The Registrar of Companies – Karnataka
2nd Floor, Kendriya Sadan
Koramangala
Bangalore – 560 054 **…Respondent No.21**

Present:

For Appellant : Dr. U.K. Chaudhary, Senior Advocate
Mr. Manisha Chaudhary, Advocate
Mr. Mansumyer Singh, Advocate
Mr. Manisha Sharma, Advocate
Mr. Shravan Chandrashekhar, Advocate

For Respondents : Mr. P.H. Arvindh Pandian, Senior Advocate
For Mr. Pawan Jhabakh, Advocate, For R1, R11, R13 & R15
Ms. Parina Lalla, Advocate, For R2 to R8 & R14

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Background

The Appellant has preferred the instant TA No. 94 of 2021 (Comp. App. (AT) 363 of 2019) in CP No. 486/BB/2018 as an 'aggrieved person', in respect of the impugned order dated 27.11.2019 passed by the 'National Company Law Tribunal' Bengaluru Bench.

2. The 'National Company Law Tribunal' Bengaluru Bench while passing the impugned order dated 27.11.2019 in CP No. 20/2016 (TP No.248/2017) and CP No. 486/BB/2018 at paragraph No. 21 to 25 had observed the following: -

> "*21. It is on record that in pursuant to the Special Resolution which includes offers obtained from reputed developers and evaluation proposal was also tabled and viewed. It was also discussed that Company started discussion with prominent builders in India for development of property situated at Hebbal, Bengaluru. In order to avoid conflict of interest, duly following Corporate governance follows hitherto by the Company, the Company did not invite in Embassy Group since its Chairman and Managing Director Mr. Jitendra Virwani had 655538 shares and RBD shelters LLPs since its managing partner Mr. Austin Roach had 110350 shares and 957 shares respectively as on 06.11.2015, which is a cutoff date considered for issue of postal ballot notice to the shareholders. On scrutiny of the offers received, it is found highest offers in terms of square feet is 238005 made by M/s. Ummiya Builders and Developers, and the Second highest is 212166 square feet from victory infrastructure. However, the proposal from Victory Infrastructure is not considered on the basis of lack of credentials in the market and the lack of presence of sufficient commercial project of similar size in India and the third highest offer is received is 185000 square feet from Brigade Group. Therefore, Brigade Group and Ummiya Builders and Developers was invited for second round of discussions.*

Accordingly, Brigade Group participated for second round of discussions on 21.12.2015 at 2.30 p.m. Similarly, the Company has represented Mr. Srivastava invited M/s. Ummiya Builders and Developers for discussion, thus offered better consideration the other participant namely Shri Puravankara made revised offer of 197011 sq. ft., with revised estimates sales value of Rs. 200,00,00,000/- on 22.12.2015. However, the Company did not invite them for further discussion on the ground its offer lower than to better offers in hand. The comparative statement of offers from Ummiya Builders and Developers and Brigade Group is as follows:

Parameter	**Ummiya Builders**	**BRIGADE GROUP**	**DIFFERENCE**
Land owner's Share	238005	180000	58505
Deposit Amount	Rs.9 Crs.	Rs.10 Crs.	(Rs. 1 Cr.)
Estimated Rent per sft.	Rs. 60	Rs.80	(Rs.20)
Estimated Rent per month	Rs. 152 lacs	Rs.144 Lacs	Rs.8 Lacs
Estimated Sales Value per Sft.	Rs.10000	Rs.12000	(Rs.2000)
Estimated Sales Value	Rs.250 Crs.	Rs.216 Crs.	Rs.34 Crs.

Duration of Constructive Period	42 months	42 Months	No Difference

Therefore, the impugned Development Agreement cannot be found fault with and thus it is held to be valid legal document and thus no interference is called for.

22. So far as the issue of sale Purchase Agreement dated 19th March, 2016 in question is concerned, it is to be stated that it is prerogative of shareholders to sell their assets for appropriate consideration duly following extent Articles of Association of the Company and the extent provisions Companies Act, 1956/2013 accordance with law. Accordingly, the parties have sold their share for consideration for the amount of Rs. 29,64,02,240/- and the petitioners have no locus standi to question it and the grounds raised by them are not tenable and liable to be rejected. In fact, Mr. Virwani has also improved his shareholding in the Company by purchasing its shares in instalments. Therefore, the allegation of Petitioner selling of shares also constitutes acts of oppression and mismanagement is misconceived and liable to be rejected. Moreover the SEBI has also rejected the contention of the Petitioner when he approached the SEBI vide his complaint dated 16.06.2016.

23. It is to be pointed out here that any member of a Company seeking equitable relief, U/s 241-242 of the Companies Act 2013, has to come to the Tribunal with clean hands. In the instant case, as detailed supra, both the Petitioners at initial

stage started approaching Civil Courts with regard to the affairs of the Company even though Company Law Board/High Court/Tribunal have jurisdiction over the issue, under the provisions of the Companies Act 1956/2013. The Petitioners, admittedly lacking to possess the requisite percentage of shares in the Company, at the time of filing their suits. However, after obtaining the requisite percentage especially by Mr. Jitender Virwani, as per law, has approached the then CLB/High court and that too after they have failed to get interim orders in the suits they have filed. As stated supra, vide orders dated 28th April, 2016 passed in CA No. 176 of 2016 in COP No. 20 of 2016, the Hon'ble High Court of Karnataka, while vacating the interim orders dated 26.02.2016 has directed to Petitioner to deposit a sum of Rupees five (5) Lakhs within a period of one month by way of a demand draft drawn on Scheduled Bank with Registrar General of High Court in order to show the bona fides of the Petitioner. However, it is not known whether the Petitioner has complied with the above directions. Similarly, Mr. Jitendra Virwani has again suffered with costs of Rs 50,000 to be payable to Library of Appellate Tribunal, vide order dated 15.05.2017, passed in I.A.No.221 of 2017 in Company Appeal (AT) No.138 of 2017. It is also not known whether the Petitioner paid or not. The Petitioners continuously drag on the Company on every action it initiates right from the day, the Company initiated steps to explore the possibilities of utilising property of the Company for its sustenance i.e., from the year 2015, when he could not get the contract for development of Company's

property. Therefore, it is to be held that the Petitioners have come to the Tribunal with unclean hands, and they are not entitled to seek for any equitable relief as provided Under Sections 397/398 of Companies Act, 1956, R/w Sections 241/242 of the Companies Act, 2013.

24. In order to seek relief(s) under Sections 241/242 of the Companies Act, Applicant/Petitioner, who is eligible to file Application/Petition, has to make out a case in which the affairs of the Company have been or are being conducted in a manner prejudicial or oppressive to any members or prejudicial to public interest or in a manner prejudicial to the interest of the Company, and that to wind up the Company would unfairly prejudicial such member or members but otherwise the facts would justify the making of wind up order on the ground it was just and equitable that the Company should be wound up, and in those circumstances, the Tribunal is empowered to pass appropriate order(s) so as to end the affairs of Company complained of. As stated supra, the Petitioners have suffered various disqualifications even to maintain the instant main Company Petition. The facts and circumstances as detailed supra clearly established that the affairs of the Company are not being conducted in any manner prejudicial or oppressive either to the Petitioners or any of its shareholders or stake holders. On the contrary, the Petitioners are interfering in the usual business decisions being

taken by the Company by filing various vexatious litigations before various courts and Tribunal.

25. It is also to be stated here that the Tribunal has perused various judgements cited by both the parties, as mentioned supra, and by keeping the ratio as decided in those cases, the instant case is decided."

and resultantly dismissed the 'Company Petitions No. 20/2016 (T.P. No. 248/2017) & C.P. No. 486/2018', but without costs.

Appellant's Submissions

3. The Learned Counsel for the Appellant, (in TA No.94/2021) (Comp. App. (AT) No. 363/2019 in CP No.486/BB/2018) submits that the 'Tribunal', had erroneously, dismissed the 'Company Petition' of the Appellant, primarily and substantially on the ground, that the Appellant, despite possessing 19.83% shareholding in the 1st Respondent / Company, at the time of filing the present petition, does not possess the 'Requisite Shareholding', necessary to maintain the underlying petition, against the Respondents.

4. The Learned Counsel for the Appellant, contends that the 'Tribunal' had committed an 'error', in coming to the conclusion that the 'shareholding' at the time of accruing of 'cause of action', would be determinative, of the 'maintainability of the petition' and in 'sequel', had also held, that the Appellant,

at the relevant point of time, due to less than 10% shareholding at such time, could not have maintained the 'petition' and eventually determine the said point, as well as the underlying petition against the 'Appellant' herein.

5. The Learned Counsel for the Appellant points out that issue of 'maintainability' was already settled by the 'Tribunal', in IA 360/2018 and IA 17/2019 of 30.05.2019. In this connection, on behalf of the Appellant, it is pointed out that the said 'order', was assailed by the Respondents in Comp. App. (AT)(Nos.) 144 and 179 /2018 but this Tribunal, had refused to interfere with the order dated 30.05.2019 and that the Respondents, had to withdraw the said 'Appeals'.

6. According to the Learned Counsel for the Appellant, the 1st Respondent Company, was incorporated as Private Ltd. Company, by shares in the year 1984, and later, it became a 'public Company' and its name was changed to MRO-TEK Limited. However, in the year, 2016, the name of the Company was changed to MRO-TEK Reality Ltd. and that the 1st Respondent / Company, as per Balance sheet, as on 31.03.2015 was having a positive network with reserves and surpluses, to an extent of INR, 11,17,38,040. But the Respondents, in 'collusion' with the present management of the Company had 'orchestrated' and elaborate 'fraud' detriment to its shareholders and public at large. Moreover, the entire

assets of a 'public listed company' were alienated, without following the 'due process of law' and without giving any material information to the shareholders, in this regard.

7. The Learned Counsel for the Appellant, points out that as part of their fraud, the Board of Directors of the1st Respondent /Company, in breach of the fiduciary duties, towards the 'Company' and the 'Shareholders', through Board Meeting 19.02.2015, had decided that in order to tide over the alleged prevailing financial distress, faced by the Company, the land and manufacturing facility of the 1st Respondent Company, situated at 'Hebbal' and 'Electronic City', could be disposed of and the Corporate Office of the 1st Respondent / Company, could be relocated.

8. It is represented on behalf of the Appellant, that this act was nothing but a subterfuge to strip away the only valuable asset of the Respondent No. 1 Company and to hand over the same, to the Respondents, who are presently in the management of the Company, who subsequently had received the majority shareholding of the Promoters in the 1st Respondent / Company. It is the contention of the Learned Counsel for the Appellant that the Management, knew that outright sale and disposal of the entire undertaking would be beyond its

competence and the same is prohibited as per Section 180 of the Companies Act, 2013 and read with Section 179 of the said Act.

9. The Learned Counsel for the Appellant, points out that when the said matter was allegedly considered by the 'Board' on 04.11.2015, the tenor of the 'Agenda' was completely changed and in a 'volte face', the management, junked the idea of 'disposal of asset', as was countenanced, in the meeting of the Board dated 19.02.2015 and for the first time, brought in, the idea of a possible joint venture agreement, to dispose of the entire undertaking / substratum of the Company, in favour of an unknown person with no material information to the shareholders.

10. According to the Appellant, the Respondents, without any authorisation, sought the 'Shareholder's Approval' on the possible joint venture through a 'tricky', uninformed and statutorily non-compliant notice, as well as explanatory statement that had not even mentioned the basic 'contours of the joint venture' including the relevant details thereof and its potential impact, on the working of the 1st Respondent / Company. Also that the Board of 1st Respondent / Company and never approved any such 'draft notice' or date of the meeting, in the purported minutes dated 04.11.2015.

11. Advancing his argument, the Learned Counsel for the Appellant, points out that the so-called 'Special Resolution' is void and non-est in law for the reason that:

(i) no Authority to issue notice dated 10.11.2015 as neither any date for the meeting was fixed nor a draft notice agenda are explanatory statement, was approved by the Board in violation of Secretarial standards, which are mandatory, as per Section 118 of the Companies Act;

(ii) no disclosure of any name with whom joint venture is to be entered into;

(iii) no terms and conditions of joint venture particularly price and other monetary considerations / terms, development of area and benefits to the Company etc. were placed before the Board or the shareholders;

(iv) notice was thus void / ineffective and tricky as it does not permit 'application of mind' by the 'shareholders' whose 'approval' is required and that the 'majority shareholders' were devoid of any information;

(v) The purported 'Explanatory Statement', does not disclose any material or relevant information and, therefore, the alleged 'notice', is illegal and void; and

(vi) The purported 'Joint Venture Agreement' was never placed before the 'shareholders' and 'blanket approval' was sought.

12. According to the Appellant, the said Special Resolution, which was purportedly passed, as per scrutiniser's report, apart from the 'infirmities', as pointed, was marred with calculation errors, in as much as that the petitioner was holding 7,68,88 number of Equity Shares, at the relevant time and had voted against the said Resolution. Furthermore, the e.voting results have suggested only 94,759 votes were cast against the 'motion' and 6,55,538 number of polling votes were cast against the motion. In fact, the final analysis, combining both polling papers and e.voting, showed only 750,297 were voted against the resolution, whereas the petitioner, himself was having 768,880 shares and had voted against the Resolution.

13. According to the Learned Counsel for the Appellant, the worse Act of operation and mis management, against the interest of shareholders and prejudicial to public interest was illegal and unlawful transfer of promoter shareholding by the Respondent No. 227, along with their relatives and persons acting in 'concert'.

14. Also that the Respondent No. 13 to 15 were appointed as 'Directors', on 08.08.2016, and later, on 21.09.2016 and 15.11.2017, the Respondent No. 17 and 16 were appointed as the Directors, and as a result of which, the whole substratum of the Company, including its assets controlling share and management was

handed over to the Joint Venture Partner of the 1st Respondent / Company being Respondent No. 11 and other personnel connected with the said entity, which led to public offer under SEBI(take over Court).

15. The Learned Counsel for the Appellant, points out that the 'Joint Venture Agreement' was executed on 01.01.2016, whereas the 1st Respondent / Company amended its 'object clause' only on 19.03.2016 by passing a resolution, on 19.03.2016 among other things, changing the name of the said Company to MRO-TEK Reality Ltd. and 'alter' the main objects by including the Real Estate Business. The Resolution, passed to amend the object clause would not validate the illegality, puportrated by the Respondents on 01.01.2016, when the 'Joint Venture Agreement' was entered into.

16. The Learned Counsel for the Appellant, points out that the combined effect of the Joint Venture Agreement followed in quick succession, with the 'Share Purchase Agreement' is that the contractual safeguards of the such Respondent Company in the 'Joint Venture Agreement' were severely compromised and are rendered vulnerable, for the reason that all such safeguards, as provided for the 1st Respondent Company in the Joint Venture Agreement or virtually rendered ineffective, because the individual developer, being the 11th Respondent is also

in De-Facto control of the Respondent No. 1 Company and would, case of a conflict, axiomatically defect the interest of the Respondent No. 1 Company.

17. The Learned Counsel for the Appellant, refers to the Appellant, filing a Civil Suit in OS No. 10303/15, seeking orders for restraining the illegal development of assets of the 1st Respondent / Company but the said 'suit' was withdrawn as per order dated 28.04.2016. Also that, the Learned Counsel for the Appellant points out that the Appellant had filed a civil suit in OS No.25572/2016 on the file of City Civil Court, seeking a declaration, against the sale of 'Equity Shares' of the Respondents to the Promoters/stakeholders of the Respondent No. 11 along with interim reliefs. An ex-parte ad-interim order was passed by the Hon'ble City Civil Court restraining the 'alienation of shares'.

18. The Learned Counsel for the Appellant, points out that the Respondents had approached the Hon'ble High Court of Karnataka against the ex-parte ad-interim order granted by the City Civil Court and the said Appeal was disposed of with an undertaking of the learned Counsel for the Appellant, to withdraw the said suit with liberty to urge all such grounds, as pleaded in the said suit, before the appropriate Forum.

19. The Learned Counsel for the Appellant, proceeds to point out that the Appellant on 29.08.2016, also moved a 'special notice', to the 1st Respondent /

Company as per Rule 23 of Companies (Management and Administration) Rules 2014 seeking the inclusion of a resolution in the Company's AGM dated 21.09.2016 for 'termination of Development Agreement'. Also that the moving of the said 'Resolution' was opposed by the Respondent No. 1 Company before the Regional Director of Companies and the Regional Director of Companies vide order dated 20.10.2016 allowed the Respondent No. 1 Company's Application.

20. The Learned Counsel for the Appellant, brings to the notice of this Tribunal that Appellant had moved a grievance before the Market Regulator Securities Exchange Board of India, on 16.06.2016 pointing out therein, the 'infractions', in the purported sale of equity shares from the SEBI perspective but, knowledge of the Appellant no cognizance, save and except inviting the 1st Respondent / Company to specify its comments on the said grievance.

21. According to the Appellant, the issue of 'maintainability' was decided by the Tribunal, through an order dated 30.05.2019 in IA 360/2018 and IA 17 of 2019 filed by the Respondent. The said order was assailed by the Respondents in Comp. Appls. (AT) Nos. 144 and 179 of 2019, but this 'Tribunal' had refused to interfere with the order dated 30.05.2019 and the Respondents had to withdraw the said 'Appeals' by an order dated 02.08.2019.

22. According to the Learned Counsel for the Appellant, the 'matter' was always heard by a Division Bench constituted by the orders of the President of the 'National Company Law Tribunal'. Despite the non-availability of the Division Bench, on 25.10.2019, the matter was heard 'singly' and 'orders' were reserved by the Hon'ble single Member on very date, when the validly constituted Bench was not available and, therefore, there was no Bench on 25.10.2019.

Appellant's Decisions

23. The Learned Counsel for the Appellant, refers to the order of the Hon'ble Supreme Court dated 20.06.2019 in WP(Civil)No. 722/2019 in ***"Sonu Cargo Movers (I) Pvt. Ltd. & Ors. Vs. Union of India & Ors." dated 20.06.2019*** followed by the Principal Bench of this Tribunal in ***"Raj Singh Gehlot, Director of Ambience Pvt. Ltd. vs. Vistra ITCL (India) Ltd. and Another"*** (vide order dated 25.10.2019 in Company Appeal (AT) (Insolvency)No.971 of 2019 – Three Member Bench) reported in 2019 SCC OnLine NCLAT 760 wherein it is observed as under:

> "The 'Vistra ITCL(India) Ltd.' filed an application Under Section 7 of the Insolvency & Bankruptcy Code, 2016 ('I&B' Code, for short) for initiation of 'Corporate Insolvency Resolution Process' against 'Ambience Pvt. Ltd.' ('Corporate Debtor'), the Divisional Bench of one Hon'ble Member (Judicial) and another Hon'ble Member (Technical) of 'National Company Law Tribunal' Bench No. III, New Delhi

heard the application on 26th November, 2018 and passed different orders as detailed below as shown in chart below:-

LIST OF DATES OF ORDERS

Vistra ITCL (India) Limited & Anr Versus Ambience Pvt. Ltd. (NCLT) NCLT

Case No. IB-1600(ND)2018

Date	Coram	Particuars
26.11.2018	Mr. R. Vardharajan Mr. V.K. Subbaraj	Vistra to file documents
12.12.2018	Ms. Deepti Mukesh Mr. V.K. Subbaraj	Matter be posted before regular bench.
17.12.2018	Mr. R. Vardharajan Mr. V.K. Subbaraj	CD of file reply
22.01.2019	Mr. R. Vardharajan	Absence of Coram. Matter adjourned
18.02.2019	Ms. Deepti Mukesh	Matter to be posted before regular bench
25.02.2019	Mr. R. Vardharajan	Absence of Coram. Matter Adjourned
11.03.2019	Mr. R. Vardharajan Ms. Deepa Krishan	Adjourned at joint request.
09.04.2019	Mr. R. Vardharajan Ms. Deepa Krishan	Final Arguments heard. Parties directed to file written submission.
22.04.2019	Mr. R. Vardharajan	Written submissions filed.

		Reserved for order.
19.07.2019		Ms. Deepa Krishan retires.
27.08.2019		Order delivered & pronounced by Mr. R. Vardharajan

The Appeal was admitted by Hon'ble Member (Judicial) on 27th August, 2019 as in the meantime one of the Hon'ble Member(Technical) Ms. Deepa Krishan retired on 19th July, 2019.

The order of 'admission' is challenged on the ground that the matter having been heard by two Hon'ble Members and the final order could not have been passed by Hon'ble Member(Judicial).

Dr. Abhishek Manu Singhvi, Learned Senior Counsel appears on behalf of the Appellant referred to Section 419(3) of the Companies Act and Rule 152(4) of 'NCTL' Rules, 2016 in support of its claim.

Mr. Arun Kathpalia, Learned Senior Counsel has appeared on behalf of 'Vistra ITCL(India) Ltd.' ('Financial Creditor') accepts the aforesaid fact.

In the facts and circumstances, as suggested by Learned Counsel for the parties and we are also of the opinion that the matter may be remitted back for fresh hearing on merit relating

to admission of application Under Section 7 of the 'I&B' Code after giving liberty to the parties.

Mr. Sandip, 'Resolution Professional' has appeared with Mr. Mritunjay Kumar, Learned Counsel and submitted that he has incurred certain expenses and entitled for fee of last one month 20 days. However, we are not deciding his claim at this stage as we intend to remit the matter to the Adjudicating Authority.

We accordingly, set aside the impugned order dated 27th August, 2019 without extending any opinion on merit of the claim and counter claim of the parties. The matter is remitted back to the 'National Company Law Tribunal' Bench III, New Delhi should be heard by Divisional Bench of Hon'ble Member(Judicial) and Hon'ble (Technical) as per the provisions of the Act and after notice and hearing, the Adjudicating Authority pass appropriate order in accordance with Law uninfluenced by an impugned order dated 27th August, 2019. It is expected that the application will be taken up and disposed of on early date preferably within three weeks from the date of appearance of the parties. Both the parties will appear before the Hon'ble President of 'NCLT' on 6th November, 2019 and bring this order to the notice of Hon'ble President."

Also the Learned Counsel for the Appellant cites the order of this Tribunal dated 24.08.2020 – (Three Member Bench) in ***"Indison Agro Foods Ltd. vs.***

Registrar & Anr." *(vide Company Appeal (AT) (Insolvency) No. 726-727 of 2020)* reported in **2020 SCC OnLine NCLAT 1153** wherein it is observed as under:

> *"After hearing Mr. Abhijeet Sinha, learned counsel for the Appellant for a while, we find that the appeal has turned infructuous in-asmuch-as the matter, in terms of impugned order, stood adjourned to 18th August, 2020 and that date is over. We are informed by learned counsel representing the Appellant that the matter is now posted for 27th August, 2020 before a Single Bench of the National Company Law Tribunal, Indore Bench at Ahmedabad. He invites our attention to an order passed by Hon'ble Apex Court in Writ Petition No. 722 of 2019 dated 20th June, 2019, wherein the Hon'ble Apex Court, in a case of identical nature directed it to be heard by a Bench comprising of a Judicial Member and a Technical Member. This appeal is accordingly disposed of with request to the President, National Company Law Tribunal, New Delhi to constitute a Bench comprising of a Judicial Member and a Technical Member for disposal of the matter in hand in conformity with and compliance with the direction passed by Hon'ble Apex Court in the Writ Petition No. 722 of 2019.*
>
> *Copy of the order be communicated to President, NCLT, New Delhi for information."*

24. The Learned Counsel refers to the 'List of Dates hearing and orders passed by the NCLT, Bengaluru Bench' in C.P. No. 20/2016 (T.P. No.248/2017), and C.P. No. 486/BB/2018, and the same are mentioned, in a 'Tabular Form' as under:

Date	Coram	Particulars
10.09.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Notice issued; Respondents to file reply
11.10.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
25.10.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
29.10.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
30.10.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
02.11.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned at request of Respondents
09.11.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
26.11.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned at request of Petitioner
11.12.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
19.12.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
26.11.2018	Shri Rajeswara Rao Vittanala	Adjourned

	Dr. Ashok Kumar Mishra	
20.12.2018	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
11.01.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
28.01.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned with direction that main Petition will be taken up for arguments on the next date
18.02.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Respondents directed to place on record the orders passed by Karnataka High Court in their Writ Petition regarding hearing of interlocutory applications by the Tribunal
01.03.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
08.03.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned with direction to argue maintainability along with main Petition
29.09.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
24.04.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned for deciding maintainability as per order of Karnataka High Court dated 16.04.2019 in W.P.

		12746/2018-748/2019
27.05.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Orders reserved in IA No. 360 of 2018 and I.A. No. 17 of 2019
30.05.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Orders passed in I.A. No. 360 of 2018 and IA NO. 17 of 2019; Petitions held to be maintainable
17.06.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
02.07.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Arguments commenced on Petition on behalf of the Petitioner
18.07.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Adjourned
08.08.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Continuation of arguments; Part-Heard
29.08.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Continuation of arguments; Part-Heard
25.09.2019	**Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra**	**Petitioner concluded arguments; Part-Heard**
09.10.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Respondents' arguments; Part-Heard
25.10.2019	Shri Rajeswara Rao Vittanala	Reserved for orders

	Dr. Ashok Kumar Mishra	
27.11.2019	Shri Rajeswara Rao Vittanala Dr. Ashok Kumar Mishra	Impugned Order passed and pronounced

25. The Learned Counsel for the Appellant, submits that the matter was always heard by a Division Bench, constituted by the orders of the President of the 'NCLT' New Delhi. Also that the Learned Counsel for the Appellant refers to the decision in:-

i. *Island Export Finance Ltd. Vs. Umunna and Ors., [1986] BCLC 460 (QBD);*
ii. *Shri Kishore Kundan Sippy and Shri Kundan Hashmatria Sipply Vs. Samrat Shipping and Transport Systems Pvt. Ltd. & Ors. 2004 118 Comp Cas 472 CLB; and*
iii. *Dale and Carrington Invt. Vs. PK Prathapan, 2004 Supp(4) SCR 334.*

26. To fortify the contention that the 'impugned notice dated 10.11.2015', is 'malafide' in nature and has the effect of elevating the entire substratum of the 1st Respondent Company, also that the execution of the 'Agreement', reflects a conduct in breach of the fiduciary duties of Directors owed towards 1st Respondent / Company as per Section 166 of the Companies Act, 2013.

27. The Learned Counsel for the Appellant, cites the decision in ***'Vaishnav Shori Lal Puri and Ors. And Seaworld Shipping and Logistics P. Ltd. And Anr.***

Vs. Kishore Kundanlal Sippy and Ors.' reported in **2004, 120 Comp Cas 681 Bom**; wherein paragraphs 55-60 & 65, it is observed as under:

> *"55. The main argument that needs to be addressed is whether the Puri group has rebutted the presumption of fact regarding its fiduciary duty. According to counsel for the Puri group, it had rebutted that presumption, as it is seen from the records that Contship had terminated the agency of SSTS, there was no corporate opportunity to SSTS; no attempt was made by SSTS to approach Contship, because both parties knew that there was no corporate opportunity to SSTS, whereas the only grievance in the petition was using domain and name "SAMRAT". There is no substance in this defence. The presumption of fact will have to be rebutted and could have been done so by the Puri group by adducing positive evidence that the business opportunity was not available to SSTS and that the agency was given to SSL, after disclosure to the Sippy group and SSTS and that there was refusal or waiver by the Sippy group or SSTS. The materials pressed into service on behalf of the Puri group would only indicate that Contship was keen to deal only with the Puris. That material, however, does not positively point out that Contship was unwilling to deal with SSTS with whom, admittedly, the Puri group continued to be the managing director and director of the companies (SSCO and SSTS). Even accepting the case of Contship that it was keen to deal only with the Puri group, no explanation is forthcoming as to why the arrangement presently obtaining with SSTS, with whom the Puri*

group was still associated, was required to be terminated and given to SSL, which was newly formed and fully controlled by the Puri group. Understood thus, the presumption of fact remains unrebutted. If it is so, the Puri group being fiduciary of SSCO and SSTS were obviously in breach of their duties to the companies.

56. The next question is whether, even if the agency is not subsisting, or, in fact, was terminated, can SSTS or the Sippy group complain of breach of fiduciary duty by the Puri group. This question stands substantially answered by the discussion in the foregoing paragraphs. The fact that Contship had terminated the agency of SSTS or that the agency agreement with them was not subsisting on December 1, 2001, is of no consequence and cannot be the sole basis of answering the issue of fiduciary obligations and duty of the Puri group. However, taking the totality of the established facts, conclusion as reached by the Board relating to the breach of fiduciary duties by the Puri group is inescapable.

57. The next aspect that needs to be addressed is whether SSL, a newly formed company fully controlled by the Puri group, is accountable to SSTS for the benefits derived by it from the contract with Contship. Even this question will have to be answered against the Puri group and SSL. The substance of the view taken by the Board is that SSL was created only as a vehicle to take away the business of Contship agency from SSTS. Besides, the finding of fact as recorded and which cannot be

disturbed is that SSL is a newly formed company and is fully controlled by the Puri group only. More so, SSL has been established by the Puri group to do the same business as that of SSTS and its incorporation procedure was initiated much prior to the termination of the agreement of SSTS. All this has been done "clandestinely". The Board has then lifted the corporate veil of SSL and has found that it is the Puri group who has received the entire benefit by using the corporate entity of SSL as a shield. Understood thus, no fault can be found with the conclusion reached by the Board for requiring the SSL to account for the benefits derived by it from the contract with Contship. Such a direction is possible in the wake of finding recorded that the conduct of the Puri group resulted in oppression of the Sippy group and of the two companies within the meaning of Section 397 of the Act and also mismanagement within the meaning of Section 398, relating to the affairs of the companies, which was in a manner prejudicial to the interests of the company, proceedings such as the present one, there would be no limitation or restriction of power of the Board. Reliance has been rightly placed by counsel for the Sippy group on the Division Bench decision of our High Court in Shanti Prasad Jain v. Union of India [1973] 75 Bom LR 778, which deals with the scope of power to be exercised by the court in the proceedings under Sections 397 and 398 of the Act. Section 402 of the Act is a provision without prejudice to the generality of the powers of the Board under Sections 397 and 398 to bring to an end or prevent the matters complained of or apprehended

and make such orders, as it thinks fit. On a conjoint reading of Sections 397, 398, 402 and 406 with Sections 539 to 544 of the Act, it would appear from the legislative scheme that the Board has plenary powers to pass such equitable orders not only to remedy the mischief, but to prevent recurrence thereof.

58. The question, however, is: Can such direction be parsed against the person other than the company or the members of the company. As mentioned earlier, SSL has been created by the Puri group, who continue to be managing director and director of SSCO and SSTS. To put it differently, SSL is none other than the Puri group or its alter ego ; and the direction as passed ostensibly against SSL was, in fact, against the Puri group and such direction can be justified even by virtue of expansive provisions contained in the Act, including Sections 542, 543 and 544, which empowers the Board to pass appropriate directions against "any person" engaged in the objectionable activity so as to affect the company. Viewed in this perspective, there is no substance in the independent appeal preferred by SSL, making a grievance that no direction could have been passed against it at all.

59. It was argued on behalf of the Puri group that in the absence of a clear finding on the issue of the conduct of the Puri group being oppressive or resulting in mismanagement of the affairs of the companies, no directions could be passed under Sections 397, 398 of the Act. This submission proceeds on the premise that the Board has only found as a fact that there

was deadlock between the two groups. According to counsel for the Puri group, mere finding of deadlock cannot be the basis for invoking powers under Sections 397, 398, 399 of the Act. In the first place, the submission is founded on wrong assumptions. Whereas my understanding of the conclusion reached by the Board is that, it proceeded to pass directions having found that there was oppression of the Sippy group and mismanagement in the affairs of the companies. More so, as is rightly contended on behalf of the Sippy group, that the provisions of Sections 397 and 398 cannot be given restricted meaning, whereas, the plain language of the said provisions would suggest that the conduct of the Puri group as alleged and established from the record was fully covered by the purport of the said provisions. Understood thus, there is no substance in the grievance made on behalf of the Puri group to assail the conclusion reached by the Board justifying legitimate exercise of its powers under Sections 397 and 398 of the Act.

60. The next aspect that needs to be considered is whether the Board could have issued the directions, as have been issued in the present case, having regard to the nature of proceedings under Sections 397, 398 and 399 of the Act. Before we proceed to examine this aspect, it needs to be recalled that the direction issued by the Board is qua the SSL to account for the benefits derived by it from the Contship agency. I have already taken the view that such a relief could be legitimately granted if the facts

of the case so warrant; and has been rightly granted in the present case.

65. The next direction passed by the Board is to purchase the shares of the other group by the respective groups. Even this direction can be sustained having regard to the conclusion reached by the Board that it was obvious that there was deadlock in managing the affairs of the companies, SSCO and SSTS. There seems to be substance in the reasoning adopted by the Board that deadlock results in conduct, which is prejudicial to the interests of the companies and can be the basis to wind up the company on just and equitable grounds. To overcome this position, it was contended on behalf of the Puri group that neither Clause (a) nor Clause (b) of Section 397(2), nor Clause (a) or Clause (b) of Section 398(1) of the Act was attracted in the matters of deadlock. Moreover, no adjudication has been done especially in the context of Clause (a) of Section 397(1) or positive finding recorded that to wind up the company would be unfair prejudice to the Sippy group. In my opinion, this submission is obvious misreading of the judgment of the Board. The Board has recorded a clear conclusion that there has been oppression of the Sippy group and the companies and which clearly attracted provision of Section 397 of the Act, in which case, the company would deserve to be wound up. But, such a course would unfairly prejudice the Sippy group and more so, the company as such. The approach of the Board, on the other hand, was not only to adjust the equities between the two

groups, but to ensure that the mischief was brought to an end or to prevent the matters complained of or apprehended and more so, to sustain the companies. Viewed in this perspective, the direction issued by the Board which would enable the Puri group to take over SSTS, which was doing the same business as SSL, the newly formed company fully controlled by the Puri group. On the other hand, the Sippy group would take over the control and management of SSCO of which M/s. Meridian was the subsidiary. It is in that context the Board has issued direction that the Puri group would purchase shares of the Sippy group in SSTS by paying the fair value; and Sippy group shall purchase shares of the Puri group in SSCO by paying fair value therefor. Such a course was the appropriate relief and direction to be passed in the fact situation of the present case.

28. The Learned Counsel for the Appellant, refers to the judgement of the Hon'ble Supreme Court in ***'Rajahmundry Electric Supply Corporation V. A. Nageshwara Rao & Ors. Reported in AIR 1956 SC 213*** wherein at paragraph 5 it is observed as under:-

"5. This point is not dealt with in the judgement of the trial court, and the argument before us is that as the objection went to the root of the matter and struck at the very maintainability of the application, evidence should have been taken on the matter and a finding recorded thereon. We do not find any substance in this contention. Though the objection was raised in the written statement, the respondents did not press the same

at the trial, and the question was never argued before the trial judge. The Learned judges before whom this contention was raised on appeal decline to entertain it, as it was not pressed in the trial court, and there are no grounds for permitting the appellant to raise it in this appeal. Even otherwise, we are of the opinion that this contention must, on the allegations in the statement, assuming them to be true, fail on the merits excluding the names of 13 persons who are stated to be not members and the two who are stated to have signed twice, the number of members who had given consent to the institution of the application was 65. The number of members of the company is stated to be 603. If, therefore, 65 members consented to the application in writing, that would be sufficient to satisfy the condition laid down in Section 153-C, sub clause (3)(a)(i) but it is argued that as 13 of the members who had consented to the filing of the application add, subsequent to its presentation, withdrawn their consent, it thereafter, ceased to satisfy the requirements of the statute, and was no longer maintainable. We have no hesitation in rejecting this contention. The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to the defect in the statute, cease to be maintainable, by reason of events subsequent to its presentation. In our opinion, the withdrawal of consent by 13 of the members, even if true, cannot affect either the right of the applicant to proceed

with the application or the jurisdiction of the court to dispose of it on its own merit."

29. The Learned Counsel for the Appellant, refers to the decision of **Hon'ble High Court of Madras in *L.Rm. K. Narayanan and Ors. Vs. Pudhuthotam Estates Ltd. and Ors.*** reported in ***MANU/TN/0083/1992*** wherein at paragraph 16 and 17 it is observed as under:-

"16. I now propose to deal with the judgements referred to above:

Rajahmundry Electrical Supply Corporation Ltd.'s case MANU/SC0008/1955 : [1955] 2SCR1066 was filed under the old Act (VII of 1913) under sections 153C, 162(vi). The Supreme Court held thus (at page 95):

Held, that the validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation.

The withdrawal of consent by thirteen of the members, even if true, could not affect jurisdiction of the court to the dispose of it on its own merits.

17. It is thus seen from the judgement of the apex court that the validity of a petition must be judged on the facts as they were at the time of presentation. It is not the case of the respondents that the company petition was not validity presented. If that is

so, when a petition is validly presented, in the absence of a provision to that effect in the statute, it does not cease to be maintainable by reason of events subsequent to its presentation."

30. The Learned Counsel for the Appellant, refers to the decision of ***Hon'ble Supreme Court in M/s. Jawahar Singh Bikram Singh Pvt. Ltd., Delhi v. Smt. Sharda Talwar,*** *reported in* ***1973 SCC Online Del 48*** wherein it is held as under:-

"*the petition cannot be held to be non-maintainable merely because the petitioner has died and one of the consenting respondents has been transposed. The transposed petitioner was always constructively a petitioner, and, therefore, it is not necessary for her to satisfy the same conditions as would be necessary, if a new petition were to be filed. The contention on behalf of the Company that the transposed party must also satisfy the same conditions as the original petitioner does not seem to be justified on any principle. If she was constructively a petitioner initially then she continues to be a petitioner, and a change in the situation vis.a.vis, the provisions of section 399 of the Companies Act, 1956, will not make the petition non-maintainable(p-777 I-p.778AC)".*

31. The Learned Counsel for the Appellant, refers to the decision of the Hon'ble Supreme Court in '***National Spot Exchange Ltd.' Vs. 'Anil Kohli', Resolution Professional for Dunar Foods Ltd., reported in 2022 11SCC 761*** wherein at paragraph 15.1 and 15.2 it is observed as under:-

"*15.1. In Mishri Lal (**BSNL v. Mishri Lal, (2011)14 SCC 739: (2014) 1 SCC (L&S) 387)***, it is observed that the law prevails over equity if there is a conflict. It is observed further that equity can only supplement the law and not supplant it.

*15.2. In Raghunath Rai Bareja **(Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230),** in paras 30 to 37, this Court observed and held as under: (SCC pp. 242-43)*

*"30. Thus, in Madamanchi Ramappa v. Muthaluru Bajjappa **(AIR 1963 SC 1633)** (vide para 12) this Court observed: (AIR p. 1637)*

"12…[W]hat is administered in Courts is justice according to law, and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law.'

31. In Council for Indian School Certificate Examination v. Isha Mittal (2000) 7 SCC 521) (vide para 4) this Court observed: (SCC p.522)

"4…. Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law."

32. Similarly, in P.M. Latha v. State of Kerala (2003) 3 SCC 541: 2003 SCC (L&S) 339 (vide para 13) this Court observed : (SCC p. 546)

"13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law."

33. In Laxminarayan R. Bhattad v. State of Maharashtra (2003) 5 SCC 413 (vide para 73) this Court observed : (SCC p. 436)

"73. It is no well settled that when there is a conflict between law and equity the former shall prevail.'

34. Similarly, in Nasiruddin v. Sita Ram Agarwal (2003) 2 SCC 577 (vide para 35) this Court observed: (SCC p. 588)

"35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom.'

35. Similarly, in E.Palanisamy v. Palanisamy (2003) 1 SCC 123 (vide para 5) this Court observed: (SCC p. 127)

"5. Equitable considerations have no place where the statute contained express provisions.'

36. In India House v. Kishan N.Lalwani ((2003) 9 SCC 393 (vide para 7) this Court held that: (SCC p. 398)

"7……. The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations".

37. In the present case, while equity is in favour of the respondent Bank, the law is in favour of the appellant, since we are of the opinion that the impugned order (Punjab National Bank v. Bareja Kripping Fasteners, 2005 SCC OnLine P&H 552) of the High Court is clearly in violation of Section 31 of the RDB Act, and moreover the claim is time-barred in view of Article 136 of the Limitation Act read with Section 24 of the RDB Act. We cannot but comment that it is the Bank itself which is to blame

because after its first execution petition was dismissed on 23.8.1990 it should have immediately thereafter filed a second execution petition, but instead it filed the second execution petition only in 1994 which was dismissed on 18.8.1994. Thereafter, again the Bank waited for 5 years and it was only on 1.4.1999 (sic 11.1.1999) that it filed its third execution petition. We fail to understand why the Bank waited from 1990 to 1994 and again from 1994 to 1999 in filing its execution petitions. Hence, it is the Bank which is responsible for not getting the decree executed well in time."

In the case before this Court, the claim made by the Bank was found to be time-barred and to that this Court observed that while the equity is in favour of the Bank, the law is not in favour of the borrower, however, since the claim is time-barred, as the execution petition was barred by the limitation, this Court set aside as such the execution petition."

32. The Learned Counsel for the Appellant, points out the decision of the Hon'ble Supreme Court in the ***Premanand and Ors. Vs. Mohan Koikal and Ors. Reported in 2011 4SCC 266*** wherein at paragraph 7 it is observed as under:-

"7. In our opinion, Rule 27(c) of the Rules is plain and clear. Hence, the literal rule of interpretation will apply to it. No doubt, equity may be in favour of the respondents because they were selected earlier, but as observed earlier, if there is a conflict between equity and the law, it is the law which must prevail. The

law, which is contained in Rule 27(c), it is clearly in favour of the appellants. Hence, we cannot accept the submission of the learned Senior Counsel for the private respondents. The language of Rule 27(c) of the Rules is clear and hence we have to follow that language."

33. The Learned Counsel for the Appellant, points out the decision of the Hon'ble Supreme Court in ***PM Latha & Anr. V. State of Kerala & Ors., (2003) 3 SCC 541*** at spl. Pg. 546 & 547 wherein at paragraph 13 it is observed as under:-

"*13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written are settled law. The Division Bench forgot that in extending relief on equity to BED candidates who were unqualified and yet allowed to compete and seek appointments contrary to the terms of the advertisement, it is not redressing the injustice caused to the appellants, who were TTC candidates and would have secured a better position in the rank list, to get appointment against the available vacancies had BED candidates excluded from the selections. The impugned judgement of the Division Bench is both illegal inequitable and patently unjust. The TTC candidates before us as appellants have been wrongly deprived of due chance of selection and appointment. The impugned judgement of the Division Bench, therefore, deserves to be set aside and of the learned single judge restored."*

34. The Learned Counsel for the Appellant, cites the decision of the Hon'ble Supreme Court in ***Messer Holdings Limited v. Shyam Madanmohan Ruia Others, (2016)11 SCC 484*** at spl. Pg. 501 wherein at paragraph 34 it is observed as under:-

> "*34. Suit 1 is admittedly withdrawn, therefore, any order passed during the pendency of the said suit by any Court (including this Court) in any proceeding arising out of the said suit automatically lapses with the withdrawal of the suit. A logical consequence flowing from such lapsing of the orders is that any act or omission of any party, to the said suit, either in pursuance of or in obedience to such interlocutory orders, would be without any legal efficacy."*

35. The Learned Counsel for the Appellant, refers to the decision of the Hon'ble Supreme Court in ***Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors. reported in 2010 9 SCC*** at pg. 437, 446 and 451 wherein at paragraph 15 and 35 it is observed as under: -

> *"15. No litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the court. The fact that the case is found, ultimately, devoid of any merit or the party withdrew the writ petition, shows that a*

frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the Court shall prejudice no one becomes applicable in such a case. In such a situation, the court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the court [vide A.R. Sircar (Dr.) v. State of U.P.(1993 Supp. (2) SCC 734), Shivshanker V. U.P.SRTC (1995 Supp.(2) SCC 726) Arya Nagar Inter College Vs. Sree Kumar Tiwary ((1997) 4 SCC 388), GTC Industries Ltd., v. Union of India (1998) 3 SCC 376 and Jaipur Municipal Corpn. V. C.L. MIAHE (2005) 8 SCC 423."

"35. 'Withdrawal' means 'to go away or retire from the field of battle or any contest' thus the word withdrawal is indicative of the voluntary and conscious decision of a person. Therefore, if the said writ petitioners (Respondent 1 to 5) have voluntarily abandoned their claim withdrawing the said writ petition, they cannot take any benefit of the orders passed by the High Court or Statutory Authority in pursuance thereof. Once the foundation is removed, superstructure is bound to fall. Interim Relief is granted only in aid of and as ancillary to the main relief, which may be available to the party at the time of final adjudication of the case by the court. In case, the orders passed by the High Court and consequently by the Corporation are accepted, to be

in effect even today, it would tantamount to allowing the writ petition without any adjudication on the issues involved therein."

36. The Learned Counsel for the Appellant, points out the decision of Hon'ble Supreme Court in ***Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing Quota Vs. Shukla & Brothers reported in 2010 4 SCC at page 785*** at spl. Pages 791, 93 wherein at paragraph 12, 13, 19 it is observed as under: -

"12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the Courts in India. The Administrative Authority and Tribunals are obliged to give reasons; absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from an absolute principle of law that the Courts should record reasons for their conclusions to enable the appellate or higher courts, to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone that can enable a higher or appellate court to appreciate the controversy in issue in its correct prospective and to hold whether the reasoning recorded by the court whose order is impugned is sustainable in law and whether it has adopted the correct approach to sub-serve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for their conclusions, whether disposing of the case at admission stage or after regular hearing.

13. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons 'is an essential feature of dispensation of justice'. A litigant who approaches the court with any grievance is entitled to know the reasons for grant or rejection of his prayer. Reasons are the sole of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected parties and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative actions but they apply with equal force and in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher court in the event of challenge to that judgment. Now, we may refer to certain judgments of this Court as well as of the High Courts which have taken this view.

19. In the cases, where the courts have not recorded reasons in the judgment, legality, propriety and correctness of the orders by the court of competent jurisdiction are challenged in the absence of proper discussion. The requirement of recording reasons is applicable with greater rigour to the judicial proceedings. The orders of the court must reflect what weighed with the court in granting or declining the relief claimed by the

applicant. In this regard we may refer to certain judgments of this Court."

37. The Learned Counsel for the 'Appellant', points out the decision of the Hon'ble Calcutta High Court in the ***Calcutta Municipal Corporation & Ors. Vs. Paresh R. Kampani & Ors. reported in 1998 SCC OnLine Cal 38***, wherein at paragraph 4, it is observed as under:

"4. The learned Trial Judge, in our opinion, has rightly held that the said order is not a reasoned order. The Hearing Officer while disposing of the objection filed by an assessee is statutorily obliged to pass a reasoned order. It is now well settled principles of law that assignment of reason is also one of the limbs of principles of natural Justice and an unreasoned order is nullity particularly when an appeal lies therefrom. When an unreasoned order is passed, even the Appeal Court would feel great difficulty in considering the same in its proper perspective."

38. The Learned Counsel for the Appellant adverts to the decision of the Hon'ble Supreme Court in ***Kranti Associates Private Limited & Anr. Vs. Masood Ahmed Khan & Ors. reported in (2010) 9 SCC 496***, at Spl page 510 & 511 wherein at paragraph 47 it is observed as under:

51. Summarizing the above discussion, this Court holds:

a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions.

c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and

was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 *of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".*

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

39. The Learned Counsel for the Appellant, places reliance upon the decision of the Hon'ble Supreme Court in ***Biswasnath Prasad Khaitan Vs. New Central Jute Mills, 1960 SCC OnLine Cal 148,*** *wherein at paragraph 18, it is observed as under:*

18. In view of my finding that the Articles forbid a declaration of further dividend the question whether there was an explanatory statement to the notice is of less importance. In view of the arguments of the counsel I propose in short to discuss the rival contentions. Mr. Sen, counsel on behalf of the plaintiff, did not contend that it was a 'tricky' notice but that the notice was misleading and did not correctly set out the facts. He relied on the decisions in Tiessen v. Henderson (2) reported in (1899) 1 Ch. 861, Baillie v. Oriental Telephone & Electric Co. (3) reported in (1915) 1 Ch. 503 and Kaye v. Croydon Tramways (4) reported in (1898) 1 Ch. 358 in support of the

propositions that the notice did not fairly disclose the purpose for which it was called and secondly that the notice of extraordinary meeting should be one to enable the shareholder to determine if he ought to attend it. In other words counsel for the plaintiff contended that the test would be whether the real fact was placed before the shareholders. Thirdly, counsel for the plaintiff contended that there was no full and frank disclosure of facts on which the shareholders were asked to vote. Mr. Advocate- General relied on the unreported decision of the Appeal Court in Appeal from Original Decree Nos. 142 and 143 of 1953. where all these cases were considered. Two broad principles can be extracted from the authorities. First, that notice must be fairly and intelligently framed and it must not be misleading or equivocal. A benevolent construction cannot be applied. Secondly, some matters must be brought pointedly to the attention of the shareholders, for example, where the directors are interested in a contract or matter which is to be submitted to a meeting for confirmation or approval, it appears to be desirable and in certain cases absolutely necessary to disclose the fact in the notice convening the meeting or in some accompanying circular. In the present case counsel for the plaintiff did not allege 'trickery' or fraud but he did contend that the notice was misleading in the sense that the facts set out in the affidavit affirmed by Shyamlal Agarwal were not there. I agree with the contention of counsel for the plaintiff. I cannot help observing that if the company really wanted to put up before the shareholders what the company stated in the

affidavit of Shyamlal Agarwal there was nothing to prevent them from saying so. The test laid down by Kekewich, J., is that "the man I am protecting is not the dissentient but the absent shareholder." Mr. Advocate-General contended that the notice could not be characterised as misleading the shareholders. In the present case the facts disclosed in the affidavit of Shyamlal Agarwal, in my opinion, should have been disclosed before the shareholders. On this ground also I am of opinion that the plaintiff is entitled to succeed. I, therefore, make an order declaring that the resolution passed at the extraordinary general meeting on March 31, 1960 appearing in P.D. 5, D.D. 6 and also set out in the plaint in paragraph 12 declaring further dividend in respect of the year ending 31st March, 1959 is illegal, void and ultra vires the Articles of Association and the Companies Act. There will be an injunction restraining the defendants its servants and agents from impleading or giving effect to the said resolution. Apart from this question no other question was canvassed at the trial. The plaintiff is entitled to the costs in this suit. Certified for two counsel."

40. The Learned Counsel for the Appellant, refers to the decision of the Hon'ble Bombay High Court in ***Narayanlal Bansilal Vs. Maneckji Petit Manufacturing Co. Ltd. reported in 1930 SCC OnLine Bom 187,*** wherein at paragraphs 3, 4, 16, 19, 22, 24, 26 & 27, it is observed as under:

"3. The only question in this case is of ??? sufficiency of the notice convening an meeting. The meeting in question as

convened for the purpose of adopting new Articles of Association and entering into an agreement with the managing agents of the company. The case for the plaintiff is that the notice convening the meeting and the circular accompanying it did not give the shareholders information that important changes were in contemplation. Consequently they did not attend the meeting, and in their absence resolutions were passed bringing into force new Articles of Association and sanctioning an agreement with the managing agents by which the interests of the shareholders were seriously affected to their detriment. It is admitted that three of the directors are members of the firm of the managing agents D.N. Petit Sons & Co., and it is argued that this fact was concealed from the shareholders. The managing agents of the company have admittedly been the agents for fifty years ever since the mills were started but up till now there had been no formal agreement between them and the company. It was at this meeting that a formal agreement was entered into and the Articles of Association were brought up to date. There is no doubt that the alteration of the Articles of Association and the agreement entered into with the managing agents are matters of the greatest importance to the interests of the company. In the course of the arguments in this case counsel had dealt in detail with the numerous Articles which have been altered and the new articles and the terms of the agency agreement. It will be necessary to go into details, but put broadly, the changes in the articles are alleged to increase the powers and lessen the responsibilities of the directors and servants of the company

imposing a corresponding obligation upon the shareholders, and with regard to the agreement with the managing agents the two main points are first that an agreement for compensation in the event of the mill being wound up has been made by which the agents are entitled to receive as compensation their average bonus for seven years prior to the date of winding up and what is almost as important, a clause has been inserted by which in the event of the mills changing hands, it is to be a condition of the sale that the purchaser should employ the same managing agents. The managing agents are also given the power to assign or transfer the agency and the company is compelled to employ as agents their transferees or assigns. Of course, if the shareholders so desire, they can enter into any agreement they like with the managing agents and we are only concerned with the question of notice but in considering the sufficiency of notice it is necessary to go into some of these details, especially in view of the large number of decisions of the Court of Chancery and the Court of Appeal in England which have been quoted in this case. I shall begin by setting out the notice and the circular accompanying it because in judging of the sufficiency of the notice the terms of the notice and circular are material. The notice Ex. A, states the resolutions which are to be put before the shara-holders, viz. (1) the adoption of the new Articles of Association and sanctioning the agency agreement referred to in Article 147 of the new Articles and (2) alteration of the provisions of the Memorandum of Association of the company by

authorizing the investment of the funds in banks. No objection has been taken to the latter. The notice states that:

> *"A copy of the new Articles of Association together with a copy of the said agency agreement may be inspected at the registered office of the company at any time during office hours prior to the date of the meeting.*

4. This is a provision on which very great stress has been laid by the learned counsel for the company. This notice was accompanied by a circular Ex. B, and as the case depends to a great extent on the terms of the circular, it will be necessary to give the substance of it. The circular says:

> *"Accompanying this letter is a notice convening an extraordinary general meeting of the company for 15th February 1927, to consider and if thought fit to approve the adoption of new Articles of Association in substitution for and to the exclusion of all the existing Articles of Association, to approve an agency agreement between the company and the agents and to alter certain of the provisions of the Memorandum of Association.*
>
> *The share-holders of the company will no doubt desire to know the reason for the proposed changes.*
>
> *The company was incorporated and registered in the year 1876 with the existing Articles of Association as its regulations since when the Companies Act 1882 and the Companies Act 1913 have been passed and considerable alteration in the law of companies has been made.*

Your directors have therefore thought it advisable to bring the articles of association of the company more up to date and into line with the provisions of the Companies Act 1913 as amended up to 1920.

Your directors would assure you in the first instance that no greater powers are conferred upon the Board by the new Articles except as regards the proposal to increase the power of investment of surplus funds, which is confined at present to Government securities, so as to permit the placing of surplus funds on deposit at interest with banks.

The principal alterations in the existing Articles are as follows:

Provision is now made for the holding of shares in joint names and also for the holding of as many shares as may be desired in any one or more name or names. The existing Articles oblige a member who desires to sell his shares ??? offer them in the first instance to the Board of Directors. This Article has now been omitted.

Under the existing Articles the voting power of members was according to a graduated ???, but opportunity has now been taken to follow the more usual practice of giving to each member one vote upon a show of hands and upon a poll one vote for every share held by him.

Under the existing Articles, the vote of a member being a lunatic, an idiot, or a minor cannot be recorded,

but under the new articles the more usual practice of permitting a vote in such a case to be recorded by the committee, curator bonis, or other legal guardian of the member, has been adopted.

The opportunity has been taken of including in the new Articles the usual provisions for the creation of a Provident Fund and for granting pensions and annuities to employees and exemployees of the company, Opportunity has also been taken of incorporating in the new Articles the usual provision for the appointment of a debenture director, which appointment is usually now required if and when a debenture loan is raised.

The agents of the company having ??? a desire to have an agreement with the company which will fix the duration of their agency and define more clearly their powers, the directors recommend to the approval of the share holders an agreement on the lines of the draft agreement which has been prepared and has been approved by the agents and is open to in ??? by any share-holder at the register office of the company at any time during office hours, when the draft new Articles of Association can also be inspected.

Apart from the fixing of the duration of ??? agency at 30 years from 1st January 1927, the only real difference between the existing term of the agency and the proposed agreement ??? be found in Cl. 17 which provides for the payment of compensation to the agents in ??? event of the

company being wound up ??? for the purpose of reconstruction or???. This is in accordance with the preset day practice in Bombay, which practice ??? directors consider should be followed in the ca of this company more particularly having ??? to the long and valuable services extern ??? over more than 50 years rendered by ??? agents and their predecessors in business to ??? company.

"As regards the proposed alteration in the memorandum of ??? para, (o) and (p) of Cl. 3 have become illegal and therefore inoperative by reason of Section 55(1) of the Companies Act, 1913. Para. (n) restricted the investment of surplus funds to Government Securities. The directors are of opinion that this restriction is too narrow under present day conditions and that batter use can be made-of the surplus funds of the company if the power of investment is enlarged so as to permit the surplus funds to be placed on deposit at interest with banks."

16. The directors therefore plainly put before the shareholders the fact that the proposed agreement included a clause for compensation and even the number of Cl. 17 is intimated to the shareholders and it is stated in the preceding paragraph that the proposed agreement is open to inspection by any shareholder at the registered office of the company during office hours. I should ordinarily regard this as sufficient notice of the proposed agreement, but it is contended by the learned counsel for the plaintiff that the circular should have stated that the

compensation proposed to be given was calculated on the average commission for seven years. I am of opinion that inasmuch as the question of compensation to the agents was specifically brought to the notice of the shareholders, even the clause in which it was to ??? found being stated, the omission to state the amount of compensation, which is not a fixed amount but dependent on the average commission for seven years preceding the winding up, was not a fatal defect, and if that were the only objection on this point I should have put aside this objection as not sufficient in law to invalidate the notice in spite of the ruling in Normandy v. Ind. Coope & Co., Limited, . There are numerous other rulings to which I shall refer later, in which it has been held that notices should not be too strictly construed. Unfortunately the statement in the circular that this clause as to compensation is the only real difference between the existing terms of the agency and the proposed agreement is not strictly correct in view of the clauses to which I have already referred in the agency agreement. The commission remains the same. Cl. 4 of the agreement refers, to the powers of the managing agents in conducting the business and affairs of the company, and I am not prepared to hold, although the powers are more particularly stated, that they go substantially beyond the powers in Article 99. It is contended that Cl. 4(k), "to purchase and sell and for that purpose to sign, endorse and transfer Government promissory notes or other securities issued by the Government of India and standing in the name of the company or any bonds of any public authority and to collect and give receipts for the dividends or

interest from time to time due or to become due on any such securities gives power to the managing agents to raise money, but it is contended that it is not so. Cl. 10 of the proposed agreement says:

"It shall be lawful for the said firm to assign this agreement and the rights of the said firm hereunder to any person firm or company having authority by its constitution to become bound by the obligations undertaken by the said firm hereunder and upon such assignment being made and notified to the company the company shall be bound to recognize the person firm or company aforesaid as the agents of the company in like manner as if the name of such person firm or company had appeared in these presents in lieu of the names of the partners of the said firm and as if such persons firm or company had entered into this agreement with the company and the company shall forth with upon demand by the said firm enter into an agreement with the person firm or company aforesaid appointing such person firm or company the agents of the company for the then residue of the term outstanding under this agreement and with the like powers and authorities remuneration and emoluments and subject to the terms and conditions as are herein contained."

19. It is contended that by thus drawing the major portion of their commission half -yearly the company is deprived of interest on the amount. This, I think, is a minor point, but it is very doubtful whether the clause in the circular, which says that the only real difference between the existing terms of the agency and

the proposed agreement is Cl. 17 for the payment of compensation, can be regarded as sustainable in view of the omission to refer to the clauses regarding the power of assignment of the managing agency during its continuance in the same firm in the case of a transfer of the company. There is some dispute as to whether this clause refers to sale or amalgamation. It is not necessary to go into that. The cases on which the learned counsel for the plaintiff has relied are: Normandy v. Ind, Coope & Co., Ltd. to which I have already referred, Baillie v. Oriental Telephone and Electric Co. Ltd., MacGonnell v. E. Prill & Co., Ltd., Tiessen v. Henderson, and Kaye v. Croydon Tramways Company . The learned counsel for the company has argued that the terms of the notice should not be strictly construed, and he-refers to Palmer on Companies, pp. 166 and 168, at which the learned author refers to Normandy v. Ind, Coope & Co., Ltd. as being contrary to this proposition. He further refers to Young v. South African and Australian Exploration and Development Syndicate, Par-shuram D. Shamdasani v. Tata Industrial Bank (Shah J.'s judgment), Henderson v. Bank of Australasia , Alexander v. Simpson , Grant v. United Kingdom Switchback Baihvays Gompany , and his main submissions-are as follows:

1. The notice must be in conformity with the Articles of each particular company.

2. Sufficiency of the notice must be decided with reference to the particular circumstances of each case.

3. Where the notices have been challenged, there was some arrangement for secret commission.

4. Except in Normandy v. Ind, Coope & Co., Ltd. the proposed resolutions were never offered for inspection prior to the meeting.

22. It was held that the notice did not give a sufficiently full and frank disclosure to the shareholders of the facts upon which they were asked to vote; and that the resolutions were invalid and not binding upon the company. This was a case in which a sum of upwards of £40,000 had been received by the directors in respect of the subsidiary company, a fact which was not referred to in the circular, and it was held by the Master of the Bolls that if any attempt is to be made by the directors to get the sanction of the shareholders, it must be made on a fair and reasonably full statement of the facts upon which the directors are asking the shareholders to vote, and that the notice coupled with the circular was not frank, not open, not clear, and not in any way satisfactory. In MacGomiell v. E. Prill & Co., Ltd. , it was held that notice of a meeting of a company to increase or sanction the increase of the share capital of a company is not sufficient if it merely refers generally to a proposed resolution to increase the share capital; it must show an intention to make the specific increase embodied in the resolution that is actually passed. In Tiessen v. Henderson it was held that notice of an extraordinary general meeting must disclose all facts necessary to enable the share-holders receiving it to determine in their own interest whether or not they ought to attend the meeting, and pecuniary interest of a director in the matter of a special resolution to be

proposed at the meeting is a material fact for this purpose. Kaye v. Croydon Tramways Company was a case in which part of the purchase-money of the company was to be paid not to the share-holders but to the directors, and it was held that the notice was artfully framed to mislead the share-holders. That is a very extreme case. The learned counsel for the company has referred to Young v. South African and Australian Exploration and Development Syndicate in which there was a notice of a special general meeting and thereby given in general terms notice of the character of the business to be submitted to it. That seems to be sufficient within Article 35, Table A; and besides that it was apparent on the face of the notice that the intention was to substitute new regulations, and the members of the company were told that they were at liberty to inspect a copy of the proposed regulations at the office of the solicitors of the company, whose address was given, and it was held to be a sufficient notice. Henderson v. Bank of Australasia only says that the notice fairly and reasonably expressed to the share-holders what matters were going to be discussed at the meeting. In Alexander v. Simpson it is laid down that the test is, what is the fair businesslike construction which businessmen in the position of shareholders would place on the document when they received it. Grant v. United Kingdom Switchback Bailtoays Company held that the resolution of the general meeting was not invalidated by the fact that the notice convening it did not suggest any reason why the contract could not be carried into effect without the sanction of a general meeting. In Parshuram D. Shamdasani v.

Tata Industrial Bank it was held by Shah, J., after a reference to most of the cases to which I have referred (p. 1003 of 26 Bom. L.R.):

"The net result is that where there is any secret agreement or any interest of the directors in the agreement not disclosed in the circular, or in the notice, the Court will view with strictness any omission to refer to it in the notice or in the circular accompanying the notice; and the omission to mention any secret arrangement would constitute a serious defect in the notice. But where no secret agreement is proved or suggested and where there is no indication that there was anything to conceal the Court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken a notice for some defect, which might have been avoided, but which was not avoided on account of some honest mistake."

24. In that case however it was held that there was no essential matter which could be said to have been omitted. In this case the real difficulty is that while the circular pointedly calls the attention of the shareholders to the proposed arrangement for compensation to the managing agents in the event of the company being wound up, it refers to para. 17 of the proposed agreement as containing the only real difference between the existing terms of the agency and the proposed agreement. I hold that so far as the question of compensation to the managing agents is concerned, the share-holders had sufficient notice and the omission to mention the amount of the compensation is not

sufficient to invalidate, the notice. The share-holders were put on inquiry to see what the nature and extent of the proposed compensation was. They were given an opportunity of inspecting the resolutions to be proposed at the meeting, and if they did not avail themselves of it and did not attend the meeting, that is their own fault. But the difficulty arises from the fact that no reference is made in the circular to the other alteration in the terms of the agreement with the agents, viz., the power of assignment and the compulsory continuance of the same agency by any company which took over the business. And the question is whether the omission to refer in this circular to these alterations renders the notice insufficient. It might be contended that a shareholder might approve of the proposal to compensate the managing agents for the cessation of their interest, and therefore he might not think it necessary to attend the meeting, but it does not necessarily follow that he would approve of the clauses regarding assignment and the compulsory continuation of the agency in the event of a sale of the mill by the new proprietors, and it might therefore be argued that he was misled by this reference in the circular to Cl. 17 as constituting the only real difference between the existing terms of the agency and the proposed agreement. On the other hand it is quite clear that the directors did give notice to the shareholders that there was to be a change in the terms on which the managing agents were working for the company by the introduction of an agreement with them which contained one important clause regarding compensation which might conceivably involve the company in a

large payment and therefore shareholders were put upon inquiry, and given an opportunity of examining the proposed memorandum of agreement. There is no question of any secrecy here, because any shareholder who went to the company's office to see the proposed memorandum of agreement with a view to examine the proposals regarding compensation would in all probability look at the other terms so that the other proposals regarding assignment and the continuance of the agency would be brought to his notice. I think myself it would have been better if in the circular the directors in calling attention to Cl. 17, of the proposed memorandum of agreement, had also called attention to the clauses regarding the powers of assignment and the compulsory continuance of the agency in all events. The question is whether this is sufficient to invalidate the notice. There is no question of a secret agreement here as in some of the cases above quoted, but there is an interest of the directors in the agreement which is not disclosed in the circular or notice, an interest apart from the compensation clause. Now turning to the alterations in the Articles of Association, they are of a minor character. It was at one time contended that by the new Articles of Association the directors were given power to raise money on behalf of the company which they did not possess under the Articles of Association, but that argument has had to be given up since under Articles 75-A and 75 B of the old Articles and Cls. 3(k) and 3(1) of the old Memorandum of Association the power of raising money by debentures was given to the directors: of p. 19 of the old Articles, S. 75, Cl. (i). The learned counsel for the plaintiff

had to admit this was a complete answer to his argument on that point. Various objections have been taken to the alterations in the Articles of association, but they are really none of them of very great importance. The one to which much argument has been devoted is the question of the indemnity of the directors under the old and the new Articles. Under the old Articles 85 and 86 and the new Articles 183 and 184 the exceptions to wilful acts and defaults have been omitted, and the words wilful dishonesty substituted. There is nothing about this in the circular. The restrictions on the right of transfer, old Article 30, new Article 44, and the regulations as to the appointment of directors, old Article 78, new Article 133, also the restrictions on the inspection of accounts and discovery of trade secrets, Articles 161 and 180, which are not in the old Articles, are all minor points, but the new indemnity clauses undoubtedly go further than the old by the omission of the clause as to wilful default, there being a considerable difference in law between wilful negligence and dishonesty, as laid down in In re Brazilian Rubber Plantations Estates, Limited . It is further contended that the restriction on transfer in Article 44, where the directors have a new power of affecting the share-holder's rights and the right is again restricted by Article 130, which, however requires 14 clear days' notice of candidates for the office of director confer new powers. The assurance in the circular that "no greater powers are conferred upon the Board by the new Articles except as regards the proposal to increase the power of investment of surplus funds."

26. However liberal a view is taken of the notice and circular, and eliminating those of the changes in the Articles of Association which are more or less of a formal character or such as are usually found in modern Articles, there are two points, first, alteration in the indemnity given to the directors and officers of the company, and, secondly, as regards the agency agreement the omission to mention the power of assignment and the power conferred on the managing agents to insist on the continuance of their agency in the event of a transfer, both of which are, in my opinion, changes of which no notice was given to the share holders, and are even proposals which the terms of the circular might be said to conceal, and in that respect the circular is misleading. To put the matter as simply as possible, if the directors issue a circular in which they refer to certain alterations, and say that the only important alteration is with regard to cl, 10, whereas there are equally important alterations in cl. Y, can it be said that the shareholders have sufficient; notice of the proposed alterations in cl. Y? I do not think so.

27. The result is that I find on issue 1 that the notice was insufficient, and consequently on issue 2 that the meeting was not duly convened and the resolutions are not valid and operative. The plaintiff will be granted the declarations and injunctions sought in prayers (a) and (b) of the plaint together with costs of the suit."

41. The Learned Counsel for the Appellant, brings to the notice of this Tribunal, the decision of the Hon'ble Madras High Court in ***V.G. Balasundaram***

and Others Vs. New Theatres Carnatic Talkies Pvt. Ltd. and Others reported in ***(1993) 77 Comp Cas 324,*** wherein at paragraph 29, 33 & 39, it is observed as under:

> *"29. In two decisions of our High Court and the Patna High Court respectively Self Help Private Industrial Estate Private Ltd., In re, [1972] 42 Comp Cas 605 (Mad) and Parikh Engineering and Body Building Co. Ltd., In re, [1975] 45 Comp Cas 157, it has been held by two learned judges that for want of proper or sufficient notice or other defect in procedure a special resolution is not effective.*
>
> *33. It is also seen that the petitioners sent a telegram on January 5, 1981, itself. There is also a dispute as to what happened on January 5, 1981, in the said meeting. It is seen from the proceedings of the first respondent company under subject No. 3 that according to the members as soon as this subject was taken up Shri V.G. Sundar Raj moved a resolution that subject No. 1 of the agenda to be deferred to another date and that the same may be considered by the general body at the adjourned meeting. The above said resolution was seconded by Sri V.G. Muniraj. The chairman of the meeting Sri V.B. Padmanabhan, the second respondent herein stated that the accounts have already been passed by the board of directors, that this, meeting has been called pursuant to an undertaking given in the High Court and the proceedings before the High Court and that it is not proper to defer the subject and that, therefore, the chairman*

has stated that he was putting the resolution for adjournment to vote. It is also stated in the minutes that the resolution for adjournment was lost by only two members voting for the resolution and four members voting against the resolution and accordingly, the chairman declared the resolution as lost. At this stage, Sri V.G. Sundar Raj, Sri V.G. Muniraj and Sri V.G. Krishnaswamy Naidu (proxy for Sri V.G. Balasundaram) staged a walk out from the meeting and thereupon it was resolved that the profit and loss account for the year ended June 30, 1979, and the balance-sheet as on that date and the reports of the board of directors and the auditors be and they are thereby received, adopted and approved. Shri V.B. Jagadeesan seconded the above resolution and the resolution was then put to vote and declared carried by the chairman on show of hands unanimously. Likewise, subject No. 3 which relates to appointment of directors resolved that Shri V.B. Padmanabhan, the second respondent, was appointed as director of the company. The said resolution was proposed by Mr. V.B. Jagadeesan and seconded by V.B. Devarajan. It is stated in the minutes that at that stage Sri V.B. Padmanabhan intervened and stated that it would not be proper for him to be the chairman while considering the resolution concerning his appointment as director and, therefore, he stepped down from the chair. Again, Shri V.B. Padmanabhan proposed and Shri V.B. Jagadeesan seconded that V.B. Gopalakrishnan be voted to the chair unanimously. After Sri V.B. Gopalakrishnan assumed the chair, the resolution relating to the appointment of Sri V.B. Padmanabhan as director was put to vote

and declared carried by the chairman on show of hands unanimously. At this stage, Sri V.B. Gopalakrishnan stepped down from the chair and Sri V.B. Padmanabhan assumed the chair, having already been elected to the chair and he moved the following resolution:

(a) That Shri V.G. Sundara Raj be appointed as director of the company.

(b) The said resolution was seconded by Sri V.B. Jagadeesan and the resolution was then put to vote and declared and carried by the chairman on show of hands by three members voting for the resolution and Sri V.B. Gopalakrishnan voting against the resolution.

(c) Sri V.B. Jagadeesan proposed another resolution, proposing to appoint Sri V.B. Gopalakrishnan as director of the company.

(d) The said resolution was seconded by Shri V.B. Devarajan and then the said resolution was put to vote and declared and carried by show of hands unanimously.

(e) The meeting terminated with a vote of thanks to the chair. The minutes of the meeting was signed by the chairman of the meeting.

39. Let me now deal with the validity of the meeting said to have been held on June 11, 1973."

42. The Learned Counsel for the Appellant, points out the decision of the Hon'ble Bombay High Court, in ***Firestone Tyre and Rubber Co. Vs. Synthetics***

and Chemicals Ltd. and Others reported in ***1969 SCC OnLine Bom 49,*** wherein at paragraphs 68, 69 to 72, 77 & 81, it is observed as under:

> *"68. According to the plaintiffs the said notices ought to have set out the nature of the concern or interest of the solicitor-director in the matter of the appointment of the private company for a further term as the sole selling agents of the company and the correspondence which took place between the company and the Company Law Board during 1965 and 1966, particularly the said letter dated July 28, 1965, and June 15, 1966, from the Company Law Board to the company. It was submitted that these were material facts concerning the item of business to be transacted at the said meetings and the non-disclosure, therefore, in the explanatory statement to the said notices invalidates the said notices. That the item of business to be transacted at the said meetings was special business is not disputed. The questions to be considered are whether the above facts were material facts and if either of them was a material fact, the consequence of the non-disclosure thereof in the explanatory statement. If the solicitor-director was an interested or a concerned director, the nature of his concern or interest in the further appointment of the sole selling agents was a material fact which was required to be disclosed in the explanatory statement, and this position is not disputed. The contention of the contesting defendants, however, is that the solicitor-director was not a concerned or an interested director. This point has already been considered by me in connection with the resolution of the board of directors at its*

meeting on November 14, 1968, and I have already expressed the prima facie conclusion reached by me that he had a concern or an interest in this matter. The only question, therefore, which remains to be considered in this connection is the consequence of such non-disclosure. First, however, I will deal with the question whether the correspondence with the Company Law Board can be said to be a material fact concerning the business to be transacted at the said meetings. Now, the first meeting was for approving the private company's appointment as sole selling agents for a further term. The second meeting, namely, the meeting requisitioned by the plaintiffs, was for not approving the said appointment. Any fact which would have a relevance or bearing upon the approval or a non-approval of the said appointment would, in my opinion, be a material fact concerning the said items of business. The facts relating to this correspondence may be briefly recapitulated from this angle. The said letter dated July 28, 1965, was a show cause notice issued by the Company Law Board under section 294(5) on the ground that it appeared to the Company Law Board that the terms of appointment of the private company were prejudicial to the interests of the company. By this letter the company was required to show cause why under section 295(5)(c) the terms and conditions of the appointment of the private company should not be varied. This matter was at that time considered so important that a sub- committee of the directors was formed to consider it. Ultimately, by its said letter dated June 15, 1966, the Company Law Board decided not to take any further action in the matter

at that stage. The said communication, however, expressly stated that:

> *"The Board would suggest, however, that at the time of the renewal of the agreement with the sole selling agents in 1968, your company should bear in mind the views of the Board which were communicated to you in their letter of even number dated the 28th July, 1965, read with their letter of even number dated the 18th September, 1965."*

69. It was submitted by the contesting defendants that this was merely a suggestion and not a directive or an order and that the proceedings commenced by the show-cause notice under section 294(5) having terminated, there was no obligation to disclose this correspondence in the explanatory statement. This argument cannot be accepted. Under section 294(5) the Central Government has the power to require such information regarding the terms and conditions of the appointment of the sole selling agent as it considers necessary for the purpose of determining whether or not such terms and conditions are prejudicial to the interests of the company. Thereafter, if it is of the opinion that they are prejudicial to the interests of the company, it has the power to make such variations in those terms and conditions as would in its opinion make them no longer prejudicial to the interests of the company. If a company refuses to furnish such information, the Central Government has the power to appoint a suitable person to investigate and report on the terms and conditions of the appointment of the sole selling

agents. Thus, the Central Government is conferred wide and extensive statutory powers of control over the sole selling agencies of companies and is constituted the statutory authority to determine whether the terms and conditions of a sole selling agency are prejudicial to the interests of the company or not. Under section 10E these powers of the Central Government have been delegated to the Company Law Board. Where, therefore, a statutory authority empowered to decide whether the terms and conditions of the appointment of a sole selling agent are prejudicial to the interests of the company or not, had already opined that certain provisions of the said agreement dated September 24, 1963, were prejudicial to the interests of the company and had expressly required the company to bear its views in mind at the time of the renewal of the agency, it cannot be said that the disclosure of the views of the Company Law Board to the shareholders at the time of further appointment on terms which contained the very features objected to by the Company Law Board was not material. The object underlying section 173(2) is that the shareholders may have before them all facts which are material to enable them to form a judgment on the business before them.

70. Any fact which would influence them in making up their minds, one way or the other, would be a material fact under section 173(2) and had to be set out in the explanatory statement to the notice of the meeting. The views expressed by the Company Law Board would have certainly played a part, and perhaps an important part, in enabling the company's shareholders to make

up their minds whether to vote for approval of the further appointment or not.

71. The contention that the matter was closed by the said letter dated June 15, 1966, is too naive and is belied by subsequent events. By its letter dated April 9, 1969, headed "Sole selling agents; terms and conditions of appointment under section 294(5) of the Companies Act, 1956", the Company Law Board called upon the company to clarify how the renewed agreement was proposed for approval of the shareholders without reference to the views of the Board communicated to the company earlier. The concluding paragraph of that letter stated:

> *"From the perusal of the renewed agreement, it appears, prima facie, that the terms are prejudicial to the interests of your company and this Board will have to examine to what extent the terms and conditions require modification or abrogation. You are, therefore, hereby informed that if any such variation is ultimately made by the Company Law Board, the terms of the said agreement would be effective from 1st October, 1968."*

72. There was further correspondence pursuant to this letter to which I will refer later.

77. It is alleged in the affidavits in reply filed on behalf of the company and Tulsidas that the explanatory statements to the notices of the meeting held on April 28, 1968, and April 29, 1968, respectively, were placed and generally approved at the board meeting held on March 27, 1969, at which Reighley was also

present, the suggestion being that Reighley and through him the plaintiffs had approved both the said explanatory statements. It was submitted that even in their requisition dated

March 17, 1969, for calling an extraordinary meeting, in the explanatory statement

which the plaintiffs required to be included in the notice convening such meeting, they

had not required the fact either of the interest or concern of the solicitor-director or

the said correspondence with the Company Law Board to be set out. Now, when one

turns to the minutes of the board meeting held on March 27, 1969, it is apparent that

the only discussion about the explanatory statements was with respect to the requisitionists' meeting, when the solicitor-director pointed out that the statement of facts set out in the requisition should be sent to the shareholders with the notice of the requisitioned meeting and, as the said statement was silent regarding the directors' interests in the resolution, the same should be added. There is no mention in the minutes of the explanatory statement in respect of both the said meetings being placed before or generally approved by the board as alleged. Further, by their said requisition dated March 17, 1969, the plaintiffs did not set out the whole of the explanatory statement to be incorporated in the notice. What they did was to make a request that in the explanatory statement which would be annexed to the notice the statement set out by them should be

included. They were thus anxious that certain facts should be included and not that they did not want other material or relevant facts to be excluded. It is the duty of the company acting through its board to incorporate in the explanatory statement all material facts concerning the item of special business to be transacted at a meeting. At the said board meeting held on March 27, 1969, one of the resolutions passed was that the secretary of the company should send out notices of the said two meetings together with the explanatory statements in consultation with the solicitors of the company. This shows that neither the explanatory statements nor their drafts thereof were placed before the board meeting, much less approved.

81. This again is a misleading statement, for the relevant and important words in the Company Law Board's communication, namely, that "your company should bear in mind the views of the Board which were communicated to you in their letter of even number dated 28th July, 1965, read with their letter of even number dated 28th September, 1965", were omitted and substituted by dots, thus suggesting that the Company Law Board had no objection to the renewal of the agreement in the same form in 1968. In my opinion, this omission is deliberate and made with the intention to mislead, particularly in view of the letter dated April 9, 1969, from the Company Law Board to which I have already referred above, which letter was certainly known to Tulsidas but most certainly not known to the other shareholders of the company. This statement of the private company appeared

in the newspaper "Indian Express" of April 15, 1969, and in the newspaper "Financial Express" of April 16, 1969, that is, after the receipt of the said letter of April 9, 1969. Secondly, in the light of what was stated in the said communication from the Company Law Board of June 15, 1966, the statement that the Company Law Board had cleared the terms of the sole selling agency was hardly a fair or a true statement. All that the Company Law Board did was to say that it had decided not to take any further action under section 294(5) at that stage but had clearly indicated that unless the objections raised by the Company Law Board were taken into account at the time of the renewal of the agreement, further action would be taken. The shareholders had thus before them a conflicting picture and at least with respect to the relevant facts a misleading picture as presented by the Kilachand group and those supporting it. The plaintiffs' objection to the validity of the notice, therefore, cannot be dismissed so lightly on the ground of their own knowledge of its infirmity as contended by the contesting defendants. On the contrary, in my opinion, the plaintiffs' objections are well-founded and, consequently, the said notices and meetings, particularly the notice for the meeting of the 28th April and the meeting held on that day, and the resolution passed at that meeting are invalid. Closely connected with this point is the objection of the plaintiffs with reference to the non-disclosure of the Company Law Board's said letter of April 9, 1969, to the shareholders at the meeting of the 28th April. Tulsidas as the chairman of the board of directors took the chair at the said

meeting of the 28th April. It was submitted on behalf of the plaintiffs that, since Tulsidas was vitally interested in the said resolution, he deliberately suppressed from the shareholders the receipt of the said letter so as to keep back from them the knowledge that the Company Law Board was objecting to the said further appointment. Tulsidas's answer is to be found in paragraph 15 of his affidavit-in-reply affirmed on August 14, 1969. The relevant portion is:

> *"I say that by the said letter, the Company Law Board only sought clarification from the 1st defendant company which was given by the 1st defendant company by its letter dated 22nd April, 1969. I say that there was no necessity for the said letter dated the 9th April, 1969, being circulated to the board of directors of the 1st defendant company as the same had been adequately dealt with and, as no further communication had been received from the Company Law Board, the said letter dated the 9th April, 1969, was dealt with in the ordinary course after consulting the solicitors of the 1st defendant company. I deny that the said letters dated the 9th April, 1969, and 22nd April, 1969, were wrongfully or with mala fide intention suppressed as alleged. I say that the said letter and the reply was placed at the first board meeting of the 1st defendant company held thereafter."*

43. The Learned Counsel for the Appellant, adverts to the decision of the Hon'ble Calcutta High Court in ***Asansol Electric Supply Co. and others Vs.***

Chunnilal Daw reported in ***AIR 1972 Cal 19***, wherein at paragraphs 34 to 38, it is observed as under:

> *"34. In the instant case, the resolution to the effect that the post of Supervisor was to be abolished and that Chunnilal Daw was to be appointed a store-in-charge from May 1, 1963 and that he ceased to hold and to continue to hold his present office as store-in-charge of the company with effect from May 1, 1963 was never notified to the shareholders. Accordingly for default in compliance with the mandatory provisions of Section 172 of the Act the said resolution cannot but be held as invalid and void. It may be noted that resolutions which were notified to the shareholders were not moved at all and it has not been and cannot be argued that the impugned resolutions were amendments to the resolutions notified as indeed they are not so nor claimed as such.*
>
> *35. Mr. Banerjee has drawn my attention to a decision of the Court oil Appeal in re: Trench Tubeless Tyre Co. 1900-1 Ch. 408. In this case a resolution for voluntary winding up of the company by special resolution was legally passed. The notice of the confirmatory meeting included the appointment of a named person as liquidator; at the meeting the resolution for the appointment of the named liquidator was dropped and another person was appointed liquidator without further notice. This appointment was objected to by some debenture-holders but the Court of appeal overruling the objection held that:*

"When a resolution for the voluntary winding-up of a company has been passed at a meeting called upon proper notice any one can at that meeting either with or without notice, propose the appointment of a liquidator ....."

Everyone connected with companies should know that, as soon as a resolution for voluntary liquidation has been passed, the appointment of liquidator can be proposed and carried."

36. The above decision was cited in support of the validity of the impugned resolution.

37. It does not clearly appear from the above decision whether there was any mandatory provision in the statute regarding appointment of a liquidator after a voluntary resolution for winding up is passed. In case of the Companies Act of our country, the provisions are expressly mandatory. In case of companies incorporated or deemed to be so incorporated under the Companies Act, which are accordingly bodies created by the statute, there is this express obligation provided in the Section 172 of the Act before a resolution can be adopted. The language of the obligation in Section 172 as already observed, clearly indicates its mandatory nature and accordingly the non-compliance will have the fatal consequence of rendering the resolution void and ultra vires. In the eye of law, such resolution is to be deemed as being never in existence.

38. Such an event took place when the company, in the instant case, purported to pass a resolution which was not at all notified

in gross violation of the mandatory obligations under the statute. The resolution impugned in the suit is accordingly void and ultra vires and has no existence in law. The plaintiff accordingly became entitled to a declaration prayed for in prayer (a) of the plaint. As consequential reliefs the plaintiff is also entitled to further reliefs as decreed by the courts below."

44. The Learned Counsel for the Appellant, falls back upon the decision of the Hon'ble Gujarat High Court, in ***Mohanlal Ganpatram and another Vs. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. and others*** reported in ***AIR 1965 Guj 96***, wherein at paragraph 60, it is observed as under:

60. It is, therefore, clear that regard must be had to the whole scope and purpose of the statute for the purpose of determining whether the statute is mandatory or directory. Judged by that test, the conclusion is irresistible that Section 173 enacts a provision which is mandatory and not directory. The object of enacting Section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The provision is enacted in the interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders and they also know what is the nature of the concern or interest of the management in such item of business, the idea being that the shareholders may not be duped by the management and may not be persuaded to act in the

manner desired by the management unless they have formed their own judgment on the question after being placed in full possession of all material facts and apprised of the interests of the management in any particular action being taken. Having regard to the whole purpose and scope of the provision enacted in Section 173 I am of the opinion that it is mandatory and not directory and that any disobedience to its requirements must lead to nullification of the action taken. If, therefore, there was any contravention of the provisions of Section 173, the meeting of the Company held on 5th September, 1961 would be invalid and so also would the resolution passed at that meeting be invalid. Mr. C.C. Gandhi and the learned Advocate General, therefore, contended that there was no non-compliance with the requirements of Section 173. Non-compliance with the requirements of Section 173 was alleged on behalf of the petitioners in three respects. It was first alleged that the agreement of sale between the Company and Bharat Kala Bhandar Limited was not available for inspection to the shareholders and the time and place where the said agreement could be inspected was not specified in the explanatory statement. This contention was based on sub-section (3) of Section 173. But that sub-section applies only where the item of business consists of according of approval to any document by the meeting. In the present case the item of business before the meeting of the Company held on 5th September, 1961 was not according of approval by the meeting to the agreement of sale between the Company and Bharat Kala Bhandar Limited. The

item of business was whether the undertaking of the Company should be sold to Bharat Kala Bhandar Limited for the price of Rs. 11,40,000/- on certain terms and conditions. Whether there was already an agreement between the Company and Bharat Kala Bhandar Limited was immaterial. It was equally immaterial whether the agreement was oral or in writing. All that the meeting was concerned with was whether to accord consent to the sale of the undertaking by the Company to Bharat Kala Bhandar Limited. The agreement of sale between the Company and Bharat Kala Bhandar Limited was not required to be placed for approval of the meeting. Sub-section (3) of Section 173 had, therefore, no application and there was accordingly no non-compliance with the requirements of that sub-section."

45. The Learned Counsel for the Appellant, refers to the 'order of the Company Law Board', Principal Bench, New Delhi dated 29.10.2003(vide CP No. 40 & 41 of 2002) between **Kishore Kundan Sippy and Ors. vs Samrat Shipping and Transport Systems Pvt. Ltd. and Ors.** reported in MANU/CL/0028/2003, wherein at paragraph 18 to 24, it is observed as under:

"18. *These observations from the four cases referred to above apply to Section 397 also which is almost in the same words as Section 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just*

and equitable cause for winding up the company, though that must be shown as preliminary to the application of Section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to Section 397.

19. *The main plank of the appellants case to prove oppression is the agreement of July 27, 1954 between himself and Patnaik and Loganathan. At that time he was not a member of the Company. It is not disputed that the Company was not a party to that agreement and is thus strictly speaking not bound by its terms. But even apart from this strict legal aspect of the matter, let us see what exactly the agreement provides. At that time Patnaik and Loganathan groups held shares of the value of Rs 21 lakhs*

in the Company, and the main provision of the agreement is that the share capital would be increased and the appellant would be given shares of the face value of Rs 10,50,000 so that his holding should be equal to the holdings of the other two groups. It also provides that the three groups would have an equal number of representatives on the Board of Directors and the appellant would be its Chairman. Other provisions of the agreement refer to matters of detail to which it is unnecessary to refer. It will be seen, however, that there is no provision in the agreement as to what would happen if and when the share capital was actually increased beyond the increase envisaged at the time of the agreement. There is also no provision in the agreement to the effect that the articles of association of the private company as it then was would be amended suitably to bring the provisions of the agreement with respect to shareholding and the Board of Directors into line with the agreement. Thus there is nothing in the agreement about the future in the matter of allotment of shares in case capital was actually increased thereafter. In this connection our attention is drawn to the fifth term of the agreement which is in these terms:

> *"Ordinary shares of the face value of Rs 4 lakhs held by the French company (Rs 3,75,000) and Mr Rath (Rs 25,000) will continue to be held by them as heretofore, and none of the parties hereto will have any interest therein so that the shareholding in the Company of all the three*

parties hereto will remain equal and in the same proportion."

It is urged that this term shows that the intention was that the shareholding of the three groups would remain equal for ever. We are not prepared to read this implication in this term. It was easy to provide in the agreement that whenever capital was actually increased, it would be divided equally between the three parties thereto. In the absence of such a provision we do not think that the fifth term is capable of the interpretation which is put on it on behalf of the appellant. It only deals with the shares worth Rs 4 lakhs held by the other two persons and provides that besides those shareholdings capital shares would be held equally by the three parties. Therefore as we read the agreement we cannot come to the conclusion that it provides that if in future there was an actual increase in capital that will necessarily be shared equally by the three parties.

20. *However, it is said that the conduct of the three parties later on shows that when there was actual increase of capital to Rs 61 lakhs sometime after July 1954, this increase was shared equally by the three parties and further when Mr Rath sold his holdings in the Company they were purchased equally by the three parties so much so one odd share out of 250 shares was held by the three parties jointly. This is undoubtedly so, and does give some colour to the argument that the three parties concerned in the agreement intended that their shareholdings should remain equal even later. But this intention cannot be said*

to bind the Company, muchless so when the Company was not bound strictly speaking even by the express terms of the agreement. So far as the Company is concerned, it was free to dispose of shares as the directors or the shareholders in general meeting considered proper without regard to this agreement.

21. *Another element came into the picture in January 1957 when the Company was converted into a public limited company. It is obvious that a public limited company was even much less bound by the agreement of July 1954 as compared to the private company. We have already pointed out that even when the Company was private its articles of association were not amended to bring them into line with the agreement and that shows that the agreement was only between two groups of shareholders and Jain with respect to the state of affairs as it was at the time of the agreement. When the Company became a public limited company and it was decided to issue new shares of the value of Rs 39 lakhs the question of allotment of these shares arose. By then some differences had developed between the three groups. The appellant wanted the shares to be allotted to the existing shareholders while the Patnaik and Loganathan groups wanted the matter to be decided by a general meeting as evidenced by what happened in the meeting of the Board of Directors dated March 1, 1958. It appears that the decision to issue new shares was taken sometime in 1956 when the Company was a private company. At that time the authorised capital was rupees one crore though only Rs 61 lakhs had been issued. The*

fresh issue of Rs 39 lakhs worth of shares was thus intended to bring the subscribed capital up to the limit of the authorised capital. The application to the Controller of Capital Issues was made for that purpose on September 17, 1956. At that time the intention was that the issue would be private and would be made to the existing shareholders, directors and/or their nominees. This was bound to be so as the Company was then private. As, however, the Company wanted a loan from the Industrial Finance Corporation and as that Corporation would only grant loans to a public company, the Company was converted into a public company, as already indicated, in January 1957.

22. *The contention of the appellant, however, is that when the share capital was decided to be increased by fresh issue within the limit of rupees one crore, Regulation 42 of the First Schedule to the 1913 Act was in force and that regulation required that direction to the contrary as to allotment of shares should be given by the resolution sanctioning increase of share capital. This was however not done at the time when the authorised share capital was decided to be increased in 1954 and consequently the new shares had to be allotted to the existing shareholders under Regulation 42. At that time, however, the Company was private and the shares had to be issued to the existing shareholders and no question of any direction to the contrary arose if the Company was to retain its private character. The sanction of the Controller of Capital Issues came in December 1957 when the Company had become a public limited company, and the question of allotment*

arose thereafter. By that time the Act (i.e. the 1956 Act) had been passed and Regulation 42 of the First Schedule to the 1913 Act was no longer in force. Instead it had been replaced by Section 81 of the Act, which provides that "where at any time subsequent to the first allotment of shares in a company, it is proposed to increase the subscribed capital of the company, by the issue of new shares, then, subject to any direction to the contrary which may be given by the company in general meeting and subject only to those directions, such new shares shall be offered to the persons who at the time of the offer are holders of equity shares of the company, in proportion as nearly as circumstances admit, to the capital paid up on those shares at that time". Further sub-section (3) of Section 81 provides that the section shall not apply to a private company. Thus Section 81 specifically applies to public companies only and comes into play when subscribed capital (as distinct from authorised capital) has to be increased. Therefore when the question of actually issuing new shares arose after the sanction of the Controller, Regulation 42 was no longer in force as it had been repealed, and action had to be taken in accordance with Section 81 of the Act. Section 81 does not require that direction to the contrary must be given by the resolution sanctioning the increase of share capital as under Regulation 42 of the First Schedule to the 1913 Act. Consequently it was open to the public company in 1958 when it proposed to increase the subscribed capital after the sanction of the Controller to act under Section 81 and this was what was done by the resolution of March 28, 1958 at the general meeting.

The general meeting decided that new shares should not be issued to the existing shareholders but should be issued to others privately. The resolution of March 29, 1958 was in accordance with the law as it stood when it was passed and cannot be said to be vitiated in any way.

23. *It is however urged that the notice for the general meeting of the 29th March, 1958 was not in accordance with Section 173, and so the proceedings of the meeting must be held to be bad. This objection was however not taken in the petition and we have therefore not permitted the appellant to raise it before us, as it is a mixed question of fact and law. We may add that, though the objection was not taken in the petition, it seems to have been urged before the appeal court. Das, J. has dealt with it at length and we would have agreed with him if we had permitted the question to be raised. This attack on the validity of what happened on March 29, 1958 must thus fail.*

24. *We have already said that the public company which came into existence in 1957 was not bound by the agreement of 1954 and could offer shares to such persons as it decided to do in general meeting in accordance with Section 81. The mere fact that in the meeting of March 29, 1958 it was decided to offer shares to others and not to the existing shareholders would not therefore necessarily mean oppression of the minority shareholders. The majority shareholders were not bound to accept the view of the minority shareholders that new shares should be allotted only to the existing shareholders. It also*

appears that the Patnaik group was afraid at the time when the new shares were being issued that as they had no money the appellant group would take up the entire new issue and would thus obtain majority control of the Company. This they wanted to avoid and that is why the new issue was resolved in general meeting to be issued to others and not to the existing shareholders. If this was the reason why new shares were not issued to the existing shareholders it can hardly be said that the action of the majority shareholders in passing the resolution which they did on March 29, 1958 was oppressive to the minority shareholders. The matter would have been different if the seven persons to whom shares were eventually allotted in July 1958 were benamidars or stooges of the Patnaik or Loganathan group, for in that case it may be said that these two groups forming the majority in the general meeting had acted fraudulently and unfairly by depriving the appellant of what he would have got under Section 81. But there can be no doubt that the seven persons to whom the shares were eventually allotted are respectable persons of independent means. There is nothing to show that they were stooges or benamindars of the Patnaik and Loganathan groups. The action of the majority shareholders in allotting the new shares to outsiders and not to the existing shareholders cannot therefore in the circumstances be said to be oppressive of the appellant and his group."

46. The Learned Counsel for the Appellant, adverts to the decision of the Hon'ble High Court of Bombay in ***Centron Industrial Alliance Ltd. vs Pravin***

Kantilal Vakil & Anr. reported in ***1985(57) Comp. cases 12 Bom*** wherein at paragraph 4, 24, 25 it is observed as under:-

> *4. "In order to consider whether an injunction as prayed for can be granted or not, it is necessary to consider the nature of the requisition which has been received by the petitioner-company and the purpose for which the requisition is made. The resolution which is proposed to be considered at the requisitioned meeting is in two parts. The first part of the resolution calls upon the company to renegotiate with M/s. Brooke Bond India Ltd. and/or to examine alternate schemes in the interest of the company. The main part of the resolution, however, calls upon the company to withdraw Company Petition No. 84 of 1981 (See [1984] 55 Comp Cas 731 (Bom)). The main purpose of requisitioning the meeting of shareholders is to compel the company to withdraw Company Petition No. 84 of 1981 (See [1984] 55 Comp Cas 731 (Bom)) which is a petition for sanctioning the scheme of amalgamation. The resolution itself makes it quite clear that unless Company Petition No. 84 of 1981 is withdrawn, the company cannot either renegotiate with M/s. Brooke Bond India Ltd. or examine any alternative schemes. It was strongly argued by Mr. Bhabha, the learned counsel for the opponents, that the requisitioned meeting has been called mainly for the purpose of considering alternative schemes which may be beneficial to the company. On a perusal of the said resolution and the explanatory statement attached to it, it becomes quite clear that the requisitionists have not put forth*

before the shareholders any alternative scheme whatsoever. The explanatory statement sets out the following:

> *(i) That one of the shareholders of the company, Mr. Joseph Sabastian D'Mello has filed an affidavit setting out the facts and figures for the proposed scheme of amalgamation with M/s. Brooke Bond India Ltd. as not fair and equitable to the shareholders of the company. Under sub-paras. (a) to (e), the explanatory statement sets out why, according to the requisitionists, the scheme of amalgamation is not beneficial to the shareholders of the petitioner-company.*
>
> *(ii) In the next paragraph, it is stated that the final sanctioning of the scheme will not be granted before September, 1982, and this delay is very long. It then sets out that the company should either renegotiate the terms of merger with M/s. Brooke Bond India Ltd. or it should examine any alternative course of action. There is nothing in this explanatory statement which would show either that there are any alternative proposals more beneficial to the company, or that there is any possibility of renegotiation, with M/s. Brooke Bond India Ltd. Quite clearly, the purpose of requisitioning the meeting of the shareholders is to get rid of the company petition which is pending before this court for considering the scheme of amalgamation with M/s. Brooke Bond India Ltd.*

24. *Lastly, learned counsel appearing for the opponents and for the secured creditors have urged that the requisitioned meeting has been called to consider alternative schemes. Even if I accept this submission, it is clear from the requisition that no alternative schemes are being put before the shareholders at the requisitioned meeting. The resolutions which are proposed to be moved themselves do not refer to any specific alternative scheme. In the explanatory statement annexed to the requisition by the requisitionists, there is no reference to any specific alternative proposal. The explanation is confined mainly to pointing out in very vague and general terms why, according to the requisitionists, the Brooke Bond Scheme should not be approved. The requisitionists have not put forth any alternative or better scheme for the consideration of the shareholders at the requisitioned meeting. If the purpose of calling the requisitioned meeting is for the shareholders to consider an alternative proposal which may be more beneficial to the company, that purpose is not going to be served by calling the requisitioned meeting. It has been argued before me that in the 30th annual report of the company for the year ending December 31, 1980, it has been mentioned that a modified proposal to lease the company's factory at Aurangabad to M/s. Harbans Lal Malhotra and Sons Ltd. had again been revived and that this has been forwarded to the solicitors and chartered accountants for advice. In the 31st annual report of the company for the year ended December 31, 1981, it has been stated that a proposal to lease the company's undertaking by Harbans Lal Malhotra & Sons*

Ltd., which has been dealt with in the last annual report, has not been further considered in the light of legal advice that such a scheme of leasing would also require the approval of the Government of India under the MRTP Act. Learned counsel for the opponents and for the secured creditors have submitted that in view of the statements made in the two annual reports, it must be presumed that the shareholders knew what was the alternative scheme; and, hence, in the requisition or in the explanatory statement, it was not necessary to set out any alternative scheme. This contention cannot be accepted. In the first place, I have not been shown in either of the two annual reports in question, the alternative scheme of Harbans Lal Malhotra and Sons Ltd. set out in detail anywhere. Secondly, in the explanatory statement, there is not even a reference to the proposal of Harbans Lal Malhotra and Sons Ltd. If the purpose of calling the requisitioned meeting was to consider the scheme proposed by Harbans Lal Malhotra and Sons Ltd., it should have been so stated. The explanatory statement, in my view, is extremely vague and somewhat tricky. In fact, the explanatory statement is insufficient and misleading. If this is so, then the requisition for calling the meeting must be considered as bad in law. In this connection, reference may be made to the decision in the cases of Laljibhai C. Kapadia v. Lalji B. Desai, [1973] 43 Comp Cas 17 (Bom) and Firestone Tyre and Rubber Co. Ltd. v. Synthetics and Chemicals Ltd., [1971] 41 Comp Cas 377 (Bom). The explanatory statement which is required to be annexed under s. 173 is for the purpose of ensuring that all facts which have a bearing on the question

on which the shareholders have to form their judgment are brought to their notice. If this requirement is not complied with and all relevant facts in the present case, and the alternative schemes are not put before the shareholders fairly, then the resolutions will become bad in law. Calling such requisitioned meeting, assuming that the requisitioned meeting is to consider alternative schemes, will, in any case, be bad in law.

25. *To sum up, the requisitioned meeting which is being called is not to consider matters which affect the company's management or which affect only the company and its members. In view of the several features of the meeting requisitioned in the present case, which distinguished it from ordinary requisitioned meetings, this is a fit case where shareholders can be prevented from holding the requisitioned meeting."*

47. The Learned Counsel for the Appellant, cites the decision of the Hon'ble Supreme Court in ***Dale and Carrington Invt. (P) Ltd. and Ors. Vs P.K. Prathapan and Ors.*** reported in ***2004 Supp.(4) SCR at pg. 334*** wherein at paragraph 11, 16 it is observed as under:-

11. ***"****This is the main issue which arises for consideration in this case. As already noted Ramanujam who was the Managing Director of the company got allotted 6865 equity shares to himself in a meeting of the Board of Directors of the company alleged to have been held on 24th October, 1994. Again on 26th March, 1997 he managed to get allotted further 9800 equity*

shares to himself. Prathapan has challenged these allotments of shares in favour of Ramanujam as acts of oppression on the part of Ramanujam, the Chairman and Managing Director of the company for which he filed a petition under Sections 397 and 398 of the Companies Act before the Company Law Board. A doubt has been cast about whether the alleged meetings in which additional Equity shares were allotted to Ramanujam were held at all. In this behalf the following facts are noticeable:-

(a) The appellants have filed a photocopy of the minutes of the alleged meeting of the Board of Directors said to have taken place on 24th October, 1994. As per the photocopy the minutes appear to be signed by Ramanujam as Chairman. The presence of Suresh Babu as a Director of the Company has been shown in the minutes. However, there is no evidence of presence of Suresh Babu in the said meeting. Article 36 of the Articles of Association of the company requires that a notice convening the meetings of the Board of Directors shall be issued by the Chairman or by one of the Directors duly authorized by the Board in this behalf. Suresh Babu filed an affidavit in the proceedings before the Company Law Board wherein he has categorically stated that at no point of time he was involved in the affairs of the company and in running the business of the company. Further he has stated in the said affidavit that at no point of time he was informed that he had been appointed as Director of the company. He had never received any notice of any Board Meetings nor had

he ever attended any Board meeting. In view of this categorical denial by Suresh Babu about attending any meetings of the Board of Directors of the company, it was incumbent on the part of Ramanujam who was the Chairman and Managing Director of the company and was in possession of all the records of the Company, to place on record a copy of a notice calling a meeting of the Board of Directors in terms of Article 36. No copy of the notice intimating Suresh Babu about the meeting of the Board of Directors and asking him to attend the same, has been placed on record to show that Suresh Babu was informed about holding of the meeting in question

Here reference is required to be made to certain other Articles of the company which are relevant for the controversy. Article 8 provides that shares of the company shall be under the control of the Directors who may allot the same to such applicants as they think desirable of being admitted to membership of the company. Article 10 provides that allotment of shares "shall exclusively be vested in the Board of Directors, who may in their absolute discretion allot such number of shares as they think proper..." Article 38 requires that the Directors present at the Board Meeting shall write their names and sign in a book specially kept for the purpose. Article 4 (iii) prohibits any invitation to the public to subscribe for any shares or debentures of the company. The above provisions of the

Articles of Association show that the Board of Directors have an absolute discretion in the matter of allotment of shares. But this presupposes that such a decision has to be taken by the Board of Directors. The decision is taken by the Board of Directors only in meetings of the Board and not elsewhere. Ramanujam, the Managing Director cannot take a decision on his own to allot shares to himself. If Suresh Babu was present in the meeting, as is the case of Ramanujam, he must have signed a book specially kept for recording presence of the Directors at the Board Meeting in terms of Article 38.Ramanujam should have been the first person to produce such a book to show the presence of Suresh Babu at the alleged Board meeting said to have been held on 24th October, 1994 specially when Suresh Babu was denying his presence at the meeting. Nothing has been produced. Thus neither a copy of a notice convening the Board meeting nor the log book meant to record signatures of Directors attending the meeting of the Board of Directors were produced. In the absence of these documents and any other proof to show that a meeting was held as alleged we are unable to accept that a meeting of the Board of Directors was held on 24th October, 1994. If no meeting of the Board of Directors took place on that date, the question of allotment of shares to Ramanujam does not arise. We are inclined to believe that photocopy of the minutes of the alleged meeting dated 24th October, 1994 produced by appellants, is sham and

fabricated. The alleged allotment of additional equity shares of the company in favour of Ramanujam is, therefore, wholly unauthorized and invalid and has to be set aside.

Normally this Court would not have gone into these questions of fact. However, the learned counsel for the appellant in the course of his arguments drew our attention to the various Articles of Association of the company, which unfortunately neither the Company Law Board nor the High Court considered. We cannot help referring to them, particularly in view of the fact that the Articles of a company are its constituent document and are binding on the company and its Directors.

The facts on record show that the company was being run as one man show and Ramanujam was maintaining the Minutes Book of meetings of Board of Directors only to comply with the statutory requirement in this behalf. The minutes were being recorded by him according to his choice and at his instance. The minutes do not reflect the actual position. Article 38 mandated that a book should be maintained to record presence of Directors at meetings of the Board of Directors. If a book for recording signatures of Directors attending meetings of the Board of Directors was not maintained, it was in clear violation of Article 38 of the Articles of Association of the company. The Company Law Board without going into these relevant

aspects, proceeded on an assumption that a meeting of the Board of Directors did take place on 24th October, 1994. This assumption of the Company Law Board is clearly without any basis.

(b) When no meeting of the Board of Directors of the company was held on 24th October, 1994, the question of validity of the meeting does not arise. On the relevant date Suresh Babu was the only other Director of the company. He denies having attended any meeting of the Board of Directors of the company. There is nothing to rebut this stand of Suresh Babu. In his absence no valid meeting of the Board of Directors could be held.

(c) For considering this point let us assume that a meeting of the Board of Directors of the company did take place as alleged by Ramanujam. First question that arises is whether the company required additional funds for which the shares were issued. We have already referred to Balance Sheets of the company, copies whereof have been placed on record. Till 31st March, 1993 the Balance Sheets did not show any investment of substantial amounts of money in the company. It is the Balance Sheet for the year ending 31st March, 1994 which for the first time shows an advance of Rs. 6,86,500/- towards share capital pending allotment. Nothing has been placed on record to show that during the financial year 1993-94 i.e. 1st April, 1993 to 31st March, 1994 suddenly need had arisen for a substantial investment. The company was running a hotel,

the property whereof was owned by the company. No particular reason for making a major investment has been shown. Nothing has been shown as to how the amount of Rs. 6,86,500/- was utilised. It appears that Ramanujam who was managing the affairs of the company single handedly, realized that the company had turned around and the Hotel property had appreciated in terms of its market value. He started working on a strategy to get controlling shares in the company. It was in furtherance of this objective that Ramanujam managed to show the entry regarding advance against shares in the Balance Sheet as on 31st March, 1994. For this amount, he allotted equity shares to himself to gain control of the company. In these facts it is difficult for us to appreciate that the additional funds were required by the company. In our view the finding of the High Court that no funds were needed by the company is fully justified. The only purpose was to allot additional shares in the company to himself to gain control of the company and to achieve this objective, the books of the company appear to have been manipulated. The High Court was right in holding that the entire manipulation of records of the company by Ramanujam was an act of fraud on his part.

(d) We may also test the alleged act of allotment of equity shares in favour of Ramanajum from a legal angle.

Could it be said to be a bonafide act in the interest of the Company on the part of Directors of the Company?

16. *In the* ***Needle Industries case*** *(supra) the Board of Directors had resolved to issue 16000 equity shares of Rs.100/- each to be offered as rights shares to the existing shareholders in proportion to the shares held by them. The offer was to be made by a notice specifying the number of shares to which each shareholder was entitled to. The notice further said, in case the offer was not accepted within 16 days from the date on which it was made, it was to be deemed to have been declined by the concerned shareholder. The Holding Company held 18990 shares and it was entitled to 9495 rights shares. The Holding Company could not avail its right to exercise the option for purchase of rights shares offered to it. As a result the whole of the Rights Issue consisting of 16000 shares was allotted to the Indian shareholders. The Holding Company filed a petition under Sections 397 and 398 of the Companies Act, 1956 in the High Court. The Single Judge held in favour of the Holding Company that it had suffered a loss in view of the fact that the market value of the rights share was Rs. 190/- whereas the shares were allotted at par i.e. at Rs. 100/-. The grievance of the Holding Company was that on account of postal delays it failed to receive the notice containing the offer of rights shares in time, and therefore, it could not exercise its option to buy the share. On appeal the Division Bench held that the affairs of* ***Needle Industries India Ltd.*** *were being conducted in a manner*

oppressive to the Holding Company. The Division Bench ordered winding up of the company. A further appeal to the Court was allowed mainly on the ground that there was no oppression. However, a direction was issued that the Indian shareholders pay an amount equivalent to that by which they unjustifiably enriched, namely Rs. 90 x 9495 which comes to Rs. 8,54,550/- to the Holding Company."

48. The Learned Counsel for the Appellant, refers to the decision of Hon'ble Supreme Court in ***Shanti Prasad Jain Vs. Kalinga Tube Ltd. AIR 1965*** at pg. 1535 wherein at paragraph 13 to 18 it is observed as under:-

13. "We shall first take up the case under Section 397 of the Act and proceed on the assumption that a case has been made out to wind up the company on just and equitable grounds. This is a new provision which came for the first time in the Indian Companies Act, 1913, as Section 153. That section was based on Section 210 of the English Companies Act, 1948, which was introduced therein for the first time. The purpose of introducing Section 210 in the English Companies Act was to give an alternative remedy to winding up in case of mismanagement or oppression. The law always provided for winding up, in case it was just and equitable to wind up a company. However, it was being felt for some time that though it might be just and equitable in view of the manner in which the affairs of a company were conducted to wind it up, it was not fair that the company should always be wound up for that reason,

particularly when it was otherwise solvent. That is why Section 210 was introduced in the English Act to provide an alternative remedy where it was felt that, though a case had been made out on the ground of just and equitable cause to wind up a company, it was not in the interest of the shareholders that the company should be wound up and that it would be better if the company was allowed to continue under such directions as the court may consider proper to give. That is the genesis of the introduction of Section 153C in the 1913 Act and Section 397 in the Act.

14. Section 397 reads thus :

" 397. Application to court Joy relief in cases of oppression.--(1) Any members of a company who complain that the affairs of the company are being conducted in a manner oppressive to any member or members (including any one or more of themselves) may apply to the court for an order under this section, provided such members have a right so to apply in virtue of Section 399.
(2) If, on any application under Sub-section (1), the court is of opinion--
(a) that the company's affairs are being conducted in a manner oppressive to any member or members; and
(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;
the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit."

15. It gives a right to members of a company who comply with the conditions of Section 399 to apply to the court for relief under Section 402 of the Act or such other reliefs as may be suitable in the circumstances of the case, if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The court then has power to make such orders under Section 397 read with Section 402 as it thinks fit, if it comes to the conclusion that the affairs of the company are being conducted in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts might justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. The law, however, has not defined what is oppression for purposes of this section, and it is left to courts to decide on the facts of each case whether there is such oppression as calls for action under this section.

16. We may in this connection refer to four cases where the new Section 210 of the English Act came up for consideration, namely : Elder v. Eider and Watson, [1952] S.C.49 ; George Meyer v. Scottish Co-operative Wholesale Society Ltd., [1954] S.C. 381 ; Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1958] 3 All E.R. 56; [1959] 29 Comp. Cas. 1 (H.L.) which was an appeal from Meyer's case, and In re H. R. Harmer Limited, [1938] 3 All E.R. 689 ; [1959] 29 Comp. Cas 305 (C.A.). Among the important considerations which have to be kept in view in

determining the scope of Section 210, the following matters were stressed in Elder's case as summarised at page 394 in Meyer's case :

" (1) The oppression of which a petitioner complains must relate to the manner in which the affairs of the company concerned are being conducted; and the conduct complained of must be such as to oppress a minority of the members (including the petitioners) qua shareholders.

(2) It follows that the oppression complained of must be shown to be brought about by a majority of members exercising as shareholders a predominant voting power in the conduct of the company's affairs.

(3) Although the facts relied on by the petitioner may appear to furnish grounds for the making of a winding up order under the just and equitable' rules, those facts must be relevant to disclose also that the making of a winding up order would unfairly prejudice the minority members qua shareholders.

(4) Although the word 'oppressive' is not defined, it is possible, by way of illustration, to figure a situation in which majority shareholders, by an abuse of their predominant voting power, are ' treating the company and its affairs as if they were their own property ' to the prejudice of the minority shareholders--and in which just and equitable grounds would exist for the making of a winding up order . . . but in which the ' alternative remedy ' provided by Section 210 by way of an appropriate order might well be open to the minority shareholders with a view to bringing to an end the oppressive conduct of the majority.

(5) The power conferred on the court to grant a remedy in an appropriate case appears to envisage a reasonably wide discretion vested in the court in relation to the order sought by a complainer as the appropriate equitable alternative to a winding-up order."

17. Meyer's case was between a parent company and a subsidiary company and it was held that : " (1) when a subsidiary company is formed with an independent minority of shareholders, the parent company must, if engaged in the same class of business, conduct the affairs of the subsidiary, even though these are in a sense its own, in such a way as to deal fairly with the subsidiary ; (2) that, if the parent company deliberately pursues a course calculated to destroy its subsidiary, with resulting loss to the minority shareholders, this may amount to oppression within the meaning of Section 210 to ; (3) that the conduct of a majority shareholder may amount to oppression notwithstanding the fact that his own shares depreciate in value pro rata with those of the minority ; and (4) that, even if the majority shareholder has virtually destroyed the substratum of the company by his oppressive conduct and it is conceded by all parties to be just and equitable that the company be wound up, the oppressed minority may nevertheless be entitled to a remedy under Section 210. "

18. These observations were approved by the House of Lords in appeal and it was held that " whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of

business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with the subsidiary."

49. The Learned Counsel for the Appellant, cites out the decision of the Hon'ble High Court of Kerala in ***K Meenakshi Amma K Vs. Sreerama Vilas Press and Publications(P) Ltd. & Ors.*** reported in (***1992) 73 Comp Cas 285***, wherein at paragraph 10-13, 15-17 & 19, it is observed as under:

10. "*It has to be remembered that the chairman appointed by the company court was seeking directions in the matter of conducting the meeting. The company court gave certain directions for the proper conduct of the meeting. The former managing director, Sri N. Madhavan Nair, filed Application No. 187 of 1990 to stop the convening of the meeting on the ground that the notice is not in conformity with sections 171, 173 and 257(1A) of the Companies Act The company court overruled the objections, found the notice in order and dismissed the application of the former managing director. He filed an appeal, M.F.A. No. 333 of 1990. The appeal was dismissed by a Division Bench of this court observing that it will be open to the appellant to urge various contentions including the contention regarding the order in Company Application No. 187 of 1990 in the course of trial of the main Application No. 253 of 1990. So even though the company court has found that the notice sent by the chairman appointed by the company court was not defective, that matter was left open to be considered by the company court at the final*

stage of the main application, viz., Application No. 253 of 1990. But it has to be noted that the meeting was held as early as on March 10, 1990, and the period of appointment of the board of directors and managing director of the company has expired by efflux of time and an election to a new board of directors and managing director became necessary.

11. *Nevertheless, we feel that we are bound to consider the correctness of the judgment challenged in this appeal. The company court, in its order, has extracted in full the notice issued by the chairman appointed by the company court and we do not want to repeat it in this judgment. The purpose for which the meeting is held is clearly stated in the notice. The purpose is for conducting an election to the board of directors and managing director of the company. There is no difficulty to hold that the notice was issued following the provisions contained in the articles of association and no argument was advanced by counsel for the appellant stating that the notice is defective on account of the fact that it has not complied with the provisions contained in the articles of association.*

12. *The gravamen of the charge against the notice is that it has not complied with the provisions contained in section 173 of the Companies Act. The articles of association provide for the nature of the notice to be sent to the effect that what has to be done is to inform the members of the company of the general nature of the business to be transacted at the meeting. The learned single judge observed that since there is a specific*

provision in the articles of association regarding the notice of a general meeting where special business is to be transacted, section 173 of the Companies Act may not apply to the present case. Further, the company court said that the notice issued contains all material facts concerning the business that was to be transacted in the meeting, viz., election of managing director and directors and that the order to convene the meeting was passed after hearing all parties and the notice itself was approved by the company court. It was also pointed out that the meeting was convened by the chairman appointed by the company court and not exactly by the company. The intent and purpose of section 173 of the Companies Act is to give directions to the shareholders in the matter of holding a meeting by the management.

13. *In Sitaram Jaipuria v. Banwarilal Jaipuria, AIR 1972 Cal 105, the Calcutta High Court has held that the provisions like section 173(2) of the Companies Act should not be construed in a rigid manner and an interpretation should not be made so as to hamper the conduct of business. The notice has to be section 173 of the Companies Act, the meeting should not be invalidated on the technical ground that the notice has not complied with the provisions of section 173 (2) of the Companies Act. The intention behind the provisions contained in section 173 of the Companies Act has to be understood in a meaningful manner. Of course, if a transaction of business has not been sufficiently notified or which is substantially different from the notification, it would be invalid. Beyond that on technicalities the meeting should not be*

invalidated. It is clear from the notice that the transaction of business to be carried out in the meeting is the election of the board of directors and managing director. That was the only transaction scheduled in the meeting and for which alone the meeting was called.

15. *The provisions contained in section 173 of the Companies Act making some requirements for a valid notice is to enable the members to understand and appreciate the nature of the business or items of business proposed to be considered at the meeting and make up their mind whether to go to and attend and vote at the meeting or abstain from voting (see Pearce, Duff and Co. Ltd., In re, [1960] 3 All ER 222 (Ch D)). We feel that the requirement of section 173 of the Companies Act is that the members of the company should be informed truly of the nature of business to be transacted at the general meeting. Too rigid an interpretation would not advance the object of the provision which will only hamper the conduct of business.*

16. *In this case, it has to be noted that the meeting was called by the chairman appointed by the company court and all proceedings were subjected to scrutiny and directions of the company court. No one can attribute any mala fide motive on the part of the chairman to cover up or to mislead the members as to the object and purpose of the meeting. In our view, the learned single judge has rightly rejected the contention of the appellant based on section 173(2) of the Companies Act.*

17. *Counsel for the appellant submitted before us that the provision contained in section 257(1A) of the Companies Act has not been complied with. It is contended that section 257(1A) of the Companies Act mandates the company to inform its members of the names of the persons who proposed to stand for election to the board of directors. In order to understand this submission of counsel for the appellant, we feel that it is apposite to quote section 257 of the Companies Act.*

> *"257. Right of persons other than retiring directors to stand for directorship.— (1) A person who is not a retiring director shall, subject to the provisions of this Act, be eligible for appointment to the office of director at any general meeting, if he or some member intending to propose him has, not less than fourteen days before the meeting, left at the office of the company a notice in writing under his hand signifying his candidature for the office of director or the intention of such member to propose him as a candidate for that office, as the case may be, along with a deposit of five hundred rupees which shall be refunded to such person or, as the case be, to such member, if the person succeeds in getting elected as a director.*
>
> *(1A) The company shall inform its members of the candidature of a person for the office of director or the intention of a member to propose such person as a candidate for that office, by serving individual notices on the members not less than seven days before the meeting:*

Provided that it shall not be necessary for the company to serve individual notices upon the members as aforesaid if the company advertises such candidature or intention not less than seven days before the meeting in at least two newspapers circulating in the place where the registered office of the company is located, of which one is published in the English language and the other in the regional language of that place.

(2) Sub-section (1) shall not apply to a private company, unless it is a subsidiary of a public company."

19. *Sub-section (2) of section 257 of the Companies Act makes it clear that subsection (1) shall not apply to a private company unless it is a subsidiary of a public company. There is no point in saying that sub-section (1) is not applicable by virtue of the provisions contained in sub-section (2) of section 257 of the Companies Act as far as this company is concerned, but nevertheless, sub-section (1A) of section 257 of the Companies Act is applicable to this private company. If such a construction is adopted, it will lead to manifest absurdity. The learned judge also found so. We see no error in this interpretation of the provision. In view of this, we see no merit in the second ground urged by counsel for the appellant."*

50. The Learned Counsel for the Appellant, relies on the decision of the Hon'ble High Court of Calcutta in ***Shalagram Jhajharia Vs. National Co., Ltd.,***

& Others reported in ***(1965) 35 Comp Cas 706***, wherein at paragraphs 7, 8, 38, 39, 47 & 69, it is observed as under:

> ***7.*** ***"****None of the Directors has any interest in the aforesaid resolution save to the extent that they are members and directors of the company.*
>
> ***8.*** *Resolution No. 8:— Since the production of wide loom cloth of the company has been increasing day by day, the Directors negotiated and finalised an arrangement with Messrs. Delca International Corporation of Delwara, U.S.A. having their principal place of business at New York on the terms and conditions set out in the resolution. The territories of operation are North America and South America. A Director of Messrs. B.M.T. Commodity Corporation is also a Director of this concern. Further an American who has experience for quite a long number of years in the trade of jute products is also a Director of Delca International Corporation. As such your Directors have thought it fit that they would be in a position to market the products of your company which they have undertaken, in larger areas. If this arrangement is approved by the Reserve Bank of India, Messrs. B.M.T. Commodity Corporation have agreed for termination of their agreement entered into with your company by mutual consent. Further Delca International Corporation have agreed to take over all the outstanding forward contracts entered into between B.M.T. Commodity Corporation and the Company. The terms fixing the selling price are reasonable and are being allowed by others in*

the trade. The share-holders are requested to give their approval for this resolution.

38. *Section 173(1)(a) provides as follows:—*

Section 173(1): "For the purposes of this section—

(a) In the case of an annual general meeting, all business to be transacted at the meeting shall be deemed special, with the exception of business relating to (1) the consideration of the accounts, balance-sheet and the report of the Board of Directors and Auditors, (ii) the declaration of a dividend, (iii) the appointment of directors in the place of those retiring, and (iv) the appointment of, and the fixing of the remuneration of, the auditors."

39. *Section 173(1)(b) provides that— "in the case of any other meeting, all business shall be deemed special."*

In this connection section 173(2) may also be set out:— Section 173(2): "Where any items of business to be transacted at the meeting are deemed to be special as aforesaid, there shall be annexed to the notice of the meeting statement setting out all material facts concerning each such item of business, including in particular the nature of the concern or interest, if any, therein, of every Director, the Managing Agents, if any, the Secretaries and Treasurers, if any, and the Manager, if any; Provided that where any item of special business as aforesaid to be transacted at a meeting of the company relates to, or affects any other company, the extent of shareholding interests in that other

company of every Director, the Managing Agent, if any, of the Secretaries and Treasurers, if any, and the Manager, if any, of the first mentioned company shall also be set out in the statement if the extent of such shareholding interest is not less than twenty per cent, of the paid up share capital of that Company."

47. *The company is a manufacturer of jute goods and products to wit jute backing cloth and burlap over the width of 100" as well as below that figure. The material seems to be used mostly for the manufacture of carpet and had a large market in U.S.A. and other parts of the two American Continents. The defendants 2 to 5 are its directors while the plaintiff is a holder of ordinary shares numbering seventy five whose complaint in the suit is that the directors have violated mandatory provisions in the Indian Companies Act of 1960 and purported to appoint sole selling agents of the company's products disregarding provisions in the Act as to informing the shareholders of the arrangements entered into and trying to get the same approved at a general meeting in violation of the law.*

69. *The important change to note is that the appointment of a sole selling agent need not be brought before the company within six months as under the Act of 1956. The other important deviation is that there is no express provisions as to what is to happen if at the general meeting at which the matter is brought up before the company the share-holders do not expressly disapprove of the appointment. In my opinion this omission is of no significance. In such a case under the agreement itself the*

appointment would cease to be valid by virtue of the operation of sub-section (2) of section 294. The net result seems to be that the period of six months is done away with but the Directors are not free to make the appointment except on condition that it would cease to be valid if not approved by the company in a general meeting. The general meeting was to decide the fate of the appointment. If it disapproves the same it would cease to be valid under sub-section 2(A) and if it did not approve of it, it would cease to be valid by the operation of the agreement itself. It was argued before us that section 294 was only directory and not mandatory as no penal provision was attached thereto. I find myself unable to accept this argument. The words of the Statute are quite clear in that it prohibits the Directors from entering into a contract with a sole selling agent without being obliged to bring the matter of the appointment before the company at the first general meeting thereafter. The only limitation imposed on the company's power of appointing a sole selling agent is that the period of agency must not exceed five years. The clear provision in the Act that the appointment by the Directors is not to be valid unless approved by the company in the first general meeting shows the obligatory nature of the enactment. It is well-known that the use of the negative language generally leads to the conclusion that the provision is mandatory. According to Craies on Statute Law, 6th Edition, page 263 "If the requirements of a Statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the Statute enacts that it shall be done in such a manner and in no

other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding." In my opinion, it is not necessary that the Statute should expressly lay down that a thing is not to be done except in the manner prescribed for it to be held mandatory in operation. It is sufficient if the Statute shows that one particular course of action only is to be resorted to."

51. The Learned Counsel for the Appellant, points out the decision of the Hon'ble High Court of Calcutta, in ***Bimal Singh Kothari and Anr. Vs. Muir Mills Co., Ltd., and Ors.*** reported in ***(1952) 22 Comp Cas 248*** wherein at paragraph, 14, 22-26 & 39, it is observed as under:

14. ***"****Notice is hereby given that an Extraordinary General Meeting of the abovenamed Company will be held at the registered office of the Company, Kanpur, on Monday, the 20th day of, October, 1947, at 3 P.M. to consider and, if thought fit, to pass, with or without modification, the following Resolutions:—*

1. (As a Special Resolution)— that the Regulations contained in the document submitted to this Meeting, and for the purpose of identification subscribed by the Chairman thereof, be and the same are hereby approved and that such Regulations be and they are hereby adopted as the Articles of Association of the Company in substitution for and to the exclusion of all existing Articles thereof.

2. (As a Special Resolution)— that Indian Textile Syndicate Ltd., be appointed Managing Agents of the Company for the period, at the remuneration, and on the terms contained in the draft of an agreement, providing for the same, submitted to this Meeting and signed in the margin by the Chairman of the Meeting by way of identification, which said agreement be and the same is hereby approved and that the Directors shall be and they are hereby authorised to carry the said agreement into effect as on and from the 1st day of October, 1947, with full liberty, subject nevertheless to the provisions of the Indian Companies Act, 1913, to agree to any modification of such agreement before the same is executed……."

22. *But Mr. Mitter has overlooked a further statement which occurs in the same paragraph in Mr. Palmer's book:*

> *"And in some cases it may be deemed expedient to send printed copies of the proposed new Articles with the Notices. According to the decision of Kekewich, J., in Normandy v. Ind. Coope & Co (1) [(1908) 1 Ch. 84], the notice should call attention to any material alterations and in Baillie v. Oriental Telephone and Electric Co. (2) [(1915) 1 Ch. 503], the Court of Appeal (in England) Held that the notice of a proposed resolution to after Articles involving a large increase in the remuneration of the Directors was invalid on the ground that the proposed increase was not fully and frankly disclosed."*

23. *In Baillie's case, a shareholder brought an action on behalf of himself and all the other shareholders of a Company for a declaration that certain resolutions were not binding on the ground of insufficient notice of the Meeting at which they were passed, and for an injunction to restrain the Company and the Directors from acting upon them. The plaintiff moved for an interim order. The Court of Appeal held that the notice did not give a sufficiently full and frank disclosure to the shareholders of the facts upon which they were asked to vote; and that the resolutions were invalid and not binding upon the Company. Baker, J., considered this case in Narayan Lal v. Maneckji Petit Manufacturing Co. Ltd. (3) [(1931) 33 Bom. L.R. 556] and also reviewed other English cases. In that case the Directors convened an Extraordinary General Meeting of the shareholders to pass the necessary resolution for substitution of a new set of up-to-date Articles for the old ones and fixing the duration of the Agency and denning the Agent's power. The Notice convening the Meeting set out the necessary resolutions and was accompanied by a Circular, but sufficient particulars regarding important changes to be effected were not set out. The resolutions were passed and confirmed. In a suit by a shareholder suing on behalf of himself and other shareholders for a declaration that the resolutions Were inoperative on the ground of insufficiency of notice and for injunction restraining the Directors from acting upon them, it was held that the notice should have given sufficiently full and frank disclosure of the facts and the effect of the resolutions and the agreement, and consequently the*

resolutions were inoperative and not binding upon the Company. The learned Judge observed that if the Directors issued a Circular in which they referred to certain alterations and said that the only alterations were with regard to clause "X" of the Articles of Association, whereas there were equally important alterations in clause "Y", it could not be said that the shareholders had sufficient notice of the alterations in clause "Y".

24. *In the case before us, the documents referred to in the clauses of the notice which we have set out above, were not sent to the shareholders. Mr. Mitter's contention was that that might be so, but the shareholders had notice that the new Regulations were lying at the registered office of the company; so it was not necessary to send the documents to them. According to Counsel it was quite sufficient to tell them that they could have inspection of the new Regulations at the registered office of the Company, and for this contention he relied on Mr. Palmer's observation which I have already set out.*

25. *But it should be observed that Mr. Palmer did not say that it was not necessary to send copies of the proposed Articles with the Notice. All that he said was that where a large number of alterations had to be made, it was generally more convenient to adopt a new set of Articles altogether and that where this course was adopted, a copy of the new Regulations should lie for inspection at the registered office of the Company, and the notice convening the Meeting should state that fact. But nowhere did he*

say that it was not necessary to send copies of the new proposed Regulations with the notices. On the other hand, from the latter passage which I have quoted, it is clear that the learned author said that in some cases it was expedient to send printed copies of the proposed new Articles with the notices and he has cited two English cases for that proposition. Assuming, however, that Mr. Palmer's observation supports Mr. Mitter's contention, it may not be possible for us to adopt that view in India, having regard to the local conditions and a variety of other considerations that prevail in India. It will not in all cases be sufficient in India to leave a copy at the registered office and state that fact in the notice, inviting the shareholders to inspect the proposed changes at the registered office. The travelling facilities here are not the same as in England, neither the country is so small as England. There are various difficulties that prevent the shareholders from going to the registered office and having inspection. Besides whether such a course should be adopted or not depends on the facts of each case. For example, it may be that the shareholders of a Company live very near the registered office. In such a case possibly it would be sufficient to give them notice that the proposed changes could be inspected at the registered office. But in a case like the one under our consideration, where there is a large body of shareholders who reside at great distances from the registered office of the Company, we do not think it would be fair on the part of the Company to leave the proposed Regulations at the registered office and give the shareholders notice of that fact. In a case like this we entirely agree with Mr.

Palmer that printed copies of the proposed new Articles should be sent with the notice. In this case that was not done, and therefore, we take the view that the notice did not disclose fully and frankly the facts upon which the shareholders were asked to vote.

26. *It is quite possible to argue in this case that the notice in question was a 'tricky' notice, as was said in Kaye v. Croydon Tramways Co. (4) [(1898) 1 Ch. 358], and in Baillie's case (p. 515) (2) [(1915) 1 Ch. 503]. In this case there is no dispute that there was a partnership between defendant No. 5 and the two Nepalese gentlemen. There is no dispute further that they acquired a very large number of shares in the defendant Company. There is no dispute that the partners have acquired and now control the majority of the shares in the two Companies, namely, the Indian Textile Syndicate Ltd., and the Cotton Textile Corporation Ltd., one of which companies has been appointed the Selling Agent of the defendant company. It is quite clear therefore that the three partners through the said two Companies have acquired a preponderance of voting power in the defendant Company and is in a position to divide practically the entire profit of the Company amongst themselves. On these facts we are of opinion that it was necessary for the defendant Company to disclose to the shareholders the controlling interest of the partners in the two Companies. But that was not done. An argument is quite plausible that the notice deliberately withheld material facts from the knowledge of the shareholders including*

the plaintiffs and committed fraud on the plaintiffs. In this case it may be fairly argued that not only there has been a suppression of true facts, but also a false suggestion. Such an argument, we cannot say, would be unreasonable."

52. The Learned Counsel for the Appellant, relies on the decision of the Hon'ble High Court of Kerala in ***Mathrubhumi Printing & Publishing Company vs. Vardhman Publishers Ltd.*** reported in ***1991 SCC OnLine Ker 453,*** wherein at paragraphs 37-39 it is observed as under:-

37. ***"****In the light of our finding that there was no proper lodgement and the transfer has not become effective as against the company, the transferees cannot be heard to contend for the position that the company in exercise of the power conferred on it under section 31 of the Act cannot alter the articles to their detriment. It should in this connection be remembered that the right of a shareholder to transfer his shares is always subject to the provisions in the articles of association as well as section 31 of the Act. The transferee, therefore, cannot have a better right than-the transferor and, therefore, his right as a transferee until the transfer becomes effective as against the company will again be subject to the provisions in the articles of association and the relevant provisions of the Act. The alterations effected to the articles of association in exercise of the said power cannot, therefore, be challenged by the transferee on the ground of mala fide. The transferees in other words have no manner of right to challenge the resolution.*

38. *Now, we shall consider the question as to whether the transferors have any right other than the one recognised under sections 397 and 398 read with section 399 to challenge the resolution amending the articles in a proceeding under section 155. As answer to this question it can be conceded that they have certain rights which can be called as "individual shareholder's right". Such individual shareholder's right pressed into service in this case by the transferors have been dealt with by the learned single judge in paragraphs 28, 29 and 30 of the judgment. They can be formulated thus: The questions that were considered in this connection are: Whether the notice and explanatory statement of the extraordinary general meeting are legal and valid, whether the resolution as passed was materially different from the resolution as proposed in the notice. The learned single judge, after considering the various aspects of these questions and also the relevant provisions contained in sections 171, 172, 173(2) and 189 has found that the notice and explanatory statement of the extraordinary general meeting were legal and valid. We shall in this connection reproduce the findings as regards question No. 1.*

> *"... As such, there was no suppression of any material fact. The personal concern or interest of the directors in the special resolution suggested by learned counsel, for the petitioner is far-fetched. Sub-section (2) of section' 173 only mentions 'the nature of the concern or interest, if any' of every director in the concerned item of business. By the*

alteration the power is conferred on the board of directors as a whole and not on any single director. In any view of the case the wording of the resolution itself was self-explanatory which did not require any further explanatory statement about the powers to be conferred on the board of directors. Accordingly I hold that the notice and explanatory statement of the extraordinary general meeting were legal and valid."

39. *The findings based on which the learned single judge answered the second question in favour of the company are extracted hereunder:*

"In the resolution as proposed in the notice there were two clauses in the new article 17. Clause (b) related to forfeiture of equity shares. The minutes of the extraordinary general meeting (Annexure R-1(e) to the counter affidavit on behalf of the first respondent in C.P. No. 29 of 1989 dated 9th November, 1989), shows that the alteration as proposed in the notice was proposed, duly seconded and the chairman said that the formal special resolution was before the meeting. Subsequently, Dr. N.V. Krishna Warrier as well as Sri P. Kumaranunni moved amendments to the special resolution. The amendment proposed by Sri Kumaranunni was supported by the transferors of shares as well as Sri P.R. Krishnamoorthy, Executive Director of the Times of India and Dr. Ram S. Tarneja, who were allowed to participate in the meeting

on the basis of the powers of attorney in their favour. The amendment proposed by Sri Kumaranunni was rejected after putting it to vote. The amendment proposed by Dr. Krishna Warrier was approved by the general body. The proposed clause (b) in article 17 was accordingly not approved. There was also some variation in the wording of clause (a) by which the board was given absolute discretion to decline to register the transfer without assigning any reasons. This was an amendment which was duly moved in the extraordinary general meeting in which the petitioners also participated. They cannot now be heard to say that the resolution as passed was different from the resolution as proposed in the original notice, even though the power given to the board to decline to register transfer without assigning any reasons in its absolute discretion was not envisaged in the original proposal."

Pleas of Respondent No. 1, 11, 13 and 15 & Citations

53. Per Contra, it is the submission of Learned Sr. Counsel for R1, 11, 13 and 15, that by means of an order dated 22.10.2019, the 'Principal Bench of NCLT, New Delhi' had passed an order dated 22.10.2019, whereby and where under it was mentioned that 'consequent to order no. PFA/7/2016 dated 21.10.2019 and letter no A-12023/1/2019-Ad-IV-MCA dated 16.10.2019. The NCLT Bengaluru Bench is hereby reconstituted in the manner that Bench at Bengaluru will be that

of Shri Rajeswara Rao Vittanalla, Member (Judicial) and further that the Constitution of the Bench was made as per Section 419(3) of the Companies Act, 2013. As such, the order dated 22.10.2019 of the Principal Bench of 'National Company Law Tribunal', New Delhi was in modification of even number dated 25.07.2019 for 23.10.2019 to 25.10.2019 only'. Added further, the order dated 22.10.2019 had the 'Approval' of the President of the 'National Company Law Tribunal', New Delhi.

54. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, takes an emphatic stand, that the Appellant, had failed to point out any provision of Law, which prohibits a matter i.e. part heard by the Division Bench of a Court from being heard further by the single Bench of the said court.

55. Expatiating his submission, the Learned Counsel for Respondents No. 1, 11, 13 and 15 comes out with a stance that the Appellant had not raised any objection before the Hon'ble Member (Judicial) of the 'National Company Law Tribunal', Bengaluru Bench 'Hearing' the Part Heard matter on 25.10.2019, sitting singly on the said date of 'Hearing', nor did he assailed, the same at any time, thereafter, until the filing of the 'Appeal'.

56. The Learned Counsel for Respondents No. 1, 11, 13 and 15, takes an emphatic stand that the Appellant had not objected to the Hon'ble Member

(Judicial) of Bengaluru Bench, hearing the 'part-heard' matter on 25.10.2019, sitting singly either on the said date of hearing, and further the Appellant had not questioned the same, at any point of time, subsequently, till the 'filing of the instant Appeal'.

57. In this connection, the Learned Counsel for the Respondents No. 1, 11, 13 and 15, points out that the 'Appellant' had willingly participated in the proceedings before the 'Tribunal', and 'permitted the proceedings' to continue, raising the said issue only after the 'impugned order', came to be passed.

58. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, raises a legal argument, that the 'Appellant', had 'acquiesced,' to the 'proceedings of 25.10.2019', being conducted, in the aforesaid manner, by the 'Tribunal', and hence, the Appellant is now 'estopped by his conduct' from challenging the same before this 'Tribunal', and in this regard, he relies, upon the decision of the Hon'ble Supreme Court in ***Tamil Nadu Generation and Distribution Corporation Ltd. Vs. PPN Power Generating Company Pvt. Ltd.,*** reported in 2014 11 SCC, at page 53 wherein at paragraph 47 it is observed as under:-

> *47. These observations, however, do not in any manner affect the jurisdiction exercised by the State Commission in the present matter. It has been rightly pointed out by the respondent that having filed the written statement in reply to the petition filed by*

the respondent, the appellant willingly participated in the proceedings and invited the findings recorded by the State Commission. It would be too late in the day, to interfere with the jurisdiction exercised by the State Commission in these proceedings

59. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, also places reliance upon the decision in **C.Y. Parthasarathy v. Syndicate of the Mysore University** reported in **MANU/KA/0244/1994** wherein at paragraphs 19 to 22, it is observed as under:-

19. "It is true, that jurisdiction cannot be conferred by consent, of the parties where it does not otherwise inhere in the authority concerned; but it is equally true that the High Court can while exercising its extraordinary and discretionary powers under Article 226 of the Constitution decline to interfere with an order of a subordinate authority if it is satisfied that an objection relating to a defect of procedure or jurisdiction which would have been and ought to have been raised at the earliest opportunity was not so raised by the party complaining before it. The Rule that acquiescence of the party belatedly making a grievance about the jurisdiction of the subordinate authority disentitles him to invoke the Writ jurisdiction of the High Court, does not rest on the foundation that acquiescence, confers jurisdiction but on the rationale that the High Court will be justified in refusing to exercise its jurisdiction in favour of a person who has either by reason of lack of diligence or by design

remained on the fence, allowed the authority to pass an order and seeing that the same has gone against him turned round to challenge its competence, to have done so.

20. In any such situation, it would be reasonable to infer that the party making the grievance about the competence of the subordinate authority, acted unfairly in not raising the objection at the very outset; It would also be reasonable to assume that he did so, deliberately hoping that the final order to be passed by the authority would be in his favour, but finding it go against him, he attacks the same as being without jurisdiction. In other words the person concerned indulges in what may be termed as 'diluted deception' by keeping quite, when he was, in fairness to all those concerned with the proceedings before the authority, under an obligation to speak out. He attempts by his silence to secure a favourable verdict, which if given, would have buried for ever the question of competence of the authority to handle the subject matter. It is this trickery which the Courts have frowned upon by declining to interfere with the actions of subordinate authorities, where acquiescence or acceptance of their jurisdiction is manifested by the facts of a given case.

21. D'Smith in his Book "Judicial Review of Administrative Action" 3rd edition at pages-372-373 has brought out the distinction between the two situations namely cases where the decisions are, void for want of jurisdiction and could be avoided and others were even though they are void but with which the

Court will not interfere on account of the applicant's conduct. The Author states thus:-

> *"A decision made without jurisdiction is void, and it cannot be validated by the express or implied consent of a party to the proceedings. It does not always follow, however, that a party adversely affected by a void decision will be able to have it set aside. As we have seen, certiorari and prohibition are, in general, discretionary remedies, and the conduct of the applicant may have been such as to disentitle him to a remedy."*
>
> > *"Whether the tribunal lacked jurisdiction is one question; whether the court, having regard to the applicant's conduct, ought in its discretion to set aside the proceedings is another. The confused state of the present law is due largely to a failure to recognise that these are two separate questions."*

22. He also states in the same Book that a person who though aware of the defect or lack of jurisdiction does not raise any objection on that account and acquiesces and takes a chance of getting a decision in his favour will be disentitled to a Writ of Certiorari. It is fruitful to reproduce the following passage from the Book:-

> *"The right to certiorari or prohibition may be lost by acquiescence of implied waiver. Acquiescence means participation in proceedings without taking objection to the jurisdiction of the tribunal once the*

facts giving ground for raising the objection are fully known. It may take the form of failing to object to the statutory qualification of a member of the tribunal, or (exceptionally) appealing to a higher tribunal against the decision of the tribunal of first instance without raising the question of jurisdiction."

60. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, points out that, in a 'petition' filed u/s 241of the Companies Act, 2013 the 'Petitioner', must satisfy, not just qualitative, qualifications, mentioned in Section 244 of the said Act, 2013, but also the qualitative aspect of the 'shareholding' viz., the mode, method and manner in which the petitioner had acquired shares for the purpose of maintaining his 'petition' and this position was laid down in the context of Section 399 of the Companies Act, 1956 (now Section 244 of the Act of 2013) in an unreported order of the Principal Bench of Company Law Board in CP No. 57 of 2004 through an order dated 19.10.2009 in Shri Jodh Raj Laddha & Ors. Vs. Birla Corporation Ltd. & Ors., as seen, from the order dated 20.04.2011, of the Hon'ble High Court of Calcutta, in ***Shri Jodh Raj Laddha & Ors. Vs. Birla Corporation Ltd. & Ors.*** APO No. 399 of 2009 and APO 274 of 2009, reported in ***MANU/WB/0269/2011***(vide paragraph 3) wherein it is observed as under:

3. ***"****In this matter, the Appellants' case has been argued by Mr. S. B. Mukherjee, Mr. Sudipto Sarkar and Mr. P. S. Sengupta,*

learned Counsel whereas on behalf of the Respondents argument has been advanced mainly by Mr. Anindya Kumar Mitra, Mr. P. C. Sen, Mr. Pratap Chatterjee, Mr. Abhrajit Mitra and Mr. Soumen Sen, learned Counsel. In this order, however, I shall refer to the submissions of the learned Counsel of the respective parties in a composite manner instead of dealing with their submissions individually as there are many overlapping points in their submissions. At the threshold a preliminary objection has been taken by the learned Counsel appearing for the Respondents as regards maintainability of the appeal itself. It has been argued on behalf of the Respondents that the appeal ought not to be admitted since in the judgment under appeal, the CLB has come to a finding that the petition is not maintainable and such finding is based on factual issues. Argument of the Respondents on this count has been that CLB has come to its finding that the petition was filed mala fide, and such finding was finding on fact. Referring to the provisions of Section 10F of the Act, it has been contended that the appeal should not be admitted as no appeal lies against a finding on fact under the aforesaid provision of the Act. In the judgment, (at pages 70-72) it has been inter alia held:

> ***18.*** *Shri Sarkar argued that as long as the petition has been filed/supported by 100 members, the question of qualitative aspect does not arise. He relied on Shaw Wallace and also on Killick Nixon cases. In Shaw Wallace, the issue raised was that the Petitioners therein held insignificant percentage of shares and therefore they could*

not maintain the petition when majority shareholders had no complaint. The qualitative issue never arose. As a matter of fact it could not have arisen at all in that case. The Petitioners therein were employees of Shaw Wallace and the Employees Union had complained to the Government about the mismanagement in the company. The government ordered an inspection and on the basis of the inspection report, while the employee shareholders filed a petition under Section 387/398, the government itself filed a petition under Section 408. Since the Petitioners therein were employees of the company itself, they had vital interest in ensuring better management in the company. Further, the petition was essentially a one under Section 398 and a large number of instances in the affairs of the company had been alleged as mismanagement. In so far as the reliance of Shri Sarkar on Killick Nixon case is concerned, it is to be noted that in that case, the transferor of the shares whose name continued in the register of members gave a power of attorney to the transferees to file a petition under Sections 397/398. A challenge was taken that the transferees, not being the members, had no personal interest in the affairs of the company. On this contention the court held "In the present case, there is nothing in Section 397 Or Section 398 To indicate that any special personal skill, judgment or quality of a member is required to be used when a member exercises his right under Section 397 Or Section

398. In a broad sense every person who is required to exercise any right or privilege is required to apply his mind. But this does not disable him from appointing an agent to exercise that right or privilege. In fact, there may be a number of cases where a person concerned may be unable to apply his mind, e.g., an illiterate person who is not aware of the facts or a person who is too ill or infirm to exercise the power. Such persons are entitled to appoint an agent to look after their affairs. It is the agent who will apply his mind to the affairs of his principal and use his own judgment. Members who are given a right to file a petition under Sections 397 And 398 can, therefore, delegate their right to an agent who can exercise that right on their behalf". In this judgment, the statutory provision has been examined in facts of that case. While I do agree that Section 399 does not talk of the quality of a member, I have explained below as to why the quality of the member is necessary in a proceeding under Sections 397/398.

19. "In many of the proceedings before this Board, motive had been questioned, I do not remember that in any case, the qualitative aspect, as a point of law had been raised or considered by this Board. Shri Sarkar argued that there is no statutory provision regarding the qualitative aspect of a petition. I agree that Section 399 does not deal with the qualitative aspect. Yet, since in a proceeding under Sections 397/398, this Board exercises

equitable jurisdiction with enormous powers, I am of the firm view that while examining the eligibility under Section 399, the qualitative aspect of a member should also be taken into account. It is more so in case of listed companies, as with no marketable lot now in force, any one holding shares could transfer a part of his shares and create 100 members, and file a petition on flimsy grounds just to harass the management or for publicity.

20. In the present case, the Petitioners have not denied any of the facts alleged by the Respondents in regard to the consenters. Shri Sarkar argued that no court can enquire as to how the Petitioners got qualification. I would have given some thought, if the Petitioners had gathered or collected existing members to meet the qualification. However in the present case, 109 members were created, that too, by a single member, who himself had acquired shares only a few days before he transferred the shares to the consenters. Thus it is quite obvious that a single shareholder became 109 shareholders. As a court of equity, this Board cannot shut its eyes when a person creates 100 members only to qualify to file a petition under Sections 397/98. While, as a proposition of law, I do not want to hold that there should be personal interest for the Petitioners, yet, in the present case, the consenters do not have real interests in the affairs of the company as shareholders, but acquired shares only to lend their

signatures to enable filing of this petition. Shri Datar relevantly referred to the judgment of the Supreme Court in Gwalior Sugar (MANU/SC/0927/2004 : 2005 1 SCC 172) case, wherein regarding Section 399, the Supreme Court has observed "The object of prescribing a qualifying percentage of shares in the Petitioners and their supporters to file petitions under Sections 397 and 398 is clearly to ensure that frivolous litigation is not indulged in by persons who have no real stake in the company. However, it is of interest that the English Companies Act contains no such limitation. What is required in these matters is a broad common-sense approach. If the court is satisfied that the Petitioners represent a body of shareholders holding the requisite percentage, it can assume that the involvement of the company in litigation is not lightly done and that it should pass orders to bring to an end the matters complained of and not reject it on a technical requirement". This would show that a petition under Section 397/398 can be filed only by those, even if qualified under Section 399, having some real stake in the company. As I have observed earlier in this paragraph, from the manner, mode and method of acquisition of shares, it is clear that the consenters have no real stake or interests in the company and therefore their fulfilling the requirements of Section 399 is of no consequence. In other words, in real sense, considering the equitable nature of

the proceedings under Sections 397/398, it can be held that the Petitioners cannot maintain the petition".

and the said order, of the 'Company Law Board', was subsequently relied upon by the Company Law Board in its order dated 29.09.2014 in CP No. 258/2011, in the matter of ***Rajiv Garg and Ors. Vs. Waxpol Industries Limited and Ors*** **.**(vide paragraph 6), wherein it is observed as under:

6. "Another important aspect which needs to be considered is the conduct of the petitioners in lodging the instant petition. The petitioner No. 1 joined the company as management trainee in the year 1976 and he was elevated to Executive Director of the company together with respondent No. 2 in 1986. Thus, the petitioner was very much in know of the development in the company since 1995 and he preferred not to exercise any legal rights against rights issue of shares in the year 1995 which caused prejudice to his interest and he has canvassed the issue about the said allotment in the instant petition filed on 22nd March, 2011. He had attempted to justify the same by placing reliance on the purported assurance given by father of respondent No. 2 who had since passed away. While on one hand, petitioners have challenged that the affairs of the company have been mismanaged, on the other hand, it is an admitted position that the petitioners have bought shares of the respondent company from the shareholders just before lodging the petition. The petitioners have purchased the shares prior to filing of the petition but not lodged the said shares for registration raises the

presumption that they were purchased merely to meet the threshold of entitlement for filing the petition. The respondents have submitted that the petitioners have approached the Board with unclean hands and their shareholdings are tainted calling for rejection of the petition. Reliance in this respect has been placed on M.C. Duraiswami v. Sakthi Sugars Ltd. [MANU/TN/0529/1978 : [19800 50 Comp. Cas. 154, (Mad)] and an unreported judgment of Principal Bench, CLB in C.P. No. 57/2004 vide order dated 19.10.2009 in Shri Jodh Raj Laddha & Ors. v. Birla Corporation Ltd. & Ors., wherein the proposition has been laid down that quantitative qualification in Section 399 is not the only criteria for determining maintainability but qualitative aspect of the shares should also be considered. Relying thereon, the respondents have submitted that the mode and manner of obtaining consent from other shareholders that predates the filing of the present petition is proof enough to show that the petitioners have not satisfied the qualitative requirement of shareholdings. On the other hand, the petitioners' case is solely based on the concept of the parties acting as a group and equal partnership. However, before rendering any opinion, it will be worthwhile to consider other aspects canvassed before the Board."

61. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, proceeds to make a pertinent mention that the 'alleged cause of action' for the Appellant, filing his petition, making an averment of 'oppression and mis-management',

before the Tribunal, at first arose on 19.02.2015 and later, on 10.11.2015, 22.12.2015 and 01.01.2016, respectively and that the Appellant's shareholding in the Company, on each of the aforesaid dates was less than 10%. As on 19.02.2015, the Appellant had not even possessed any shareholding in the Company.

62. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, advances an argument that if the 'Appellant', was really 'aggrieved' by the aforesaid acts of alleged 'oppression and mis-management', the 'Appellant' should have immediately approached the then 'Company Law Board', on any of the aforesaid dates, by filing necessary /appropriate 'petition', under Section 399(4) of the Act of 1956. But the Appellant was aware that he had no grounds for claiming the waiver for maintaining a petition u/s 397 of the Companies Act, 1956 and that, therefore, his petition would be rejected at the very threshold. Resultantly, the Appellant, and also through his associate Mr. Kumar Dinesh Sheth, had resorted to foreign shopping by approaching not justly Hon'ble High Court of Karnataka in Comp. No. 20/2016, but also the City Civil Court, Bangalore, in filing original suit bearing OS Nos. 10302/2015 and OS 10303/2015, seeking an ex-parte injunction against the Respondents without disclosing material facts.

63. According to the Respondents No. 1, 11, 13 and 15, the 'Appellant' had failed in his endeavour to secure the 'Ex-parte Relief' before the Hon'ble City

Civil Court in the aforesaid suits and the Appellant had gradually increased its shareholding 1st Respondent / Company thereby allowing the joint development transaction to conclude and after obtaining the requisite 10% shareholding had approached the Company Law Board, to file its earlier CP No. 22/2016, on 21.03.2016 and later, withdrew the said petition on 20.08.2018 and projected CP No. 486/18 before the Tribunal, in respect of purported acts of 'oppression and mismanagement' that said to have taken place, on the relevant dates, of 'cause of action' mentioned supra.

64. Proceeding further, the learned Counsel for Respondents No. 1, 11, 13 and 15, comes out with a plea, that the 'Appellant' had no real interest in the affairs of the 1st Respondent / Company and he had 'acquired shareholding' in the Company, for the main purpose of maintaining his frivolous petition, that too, in respect of the events that took place before the Appellant having 10% shareholding. Although, the Appellant had 10% shares, as on date of filing of his petition, before the Company Law Board, Tribunal he had not met the qualitative criteria to sustain his petition, as he had not possessed the requisite shareholding, at the 'relevant point of time', when the alleged 'cause of action' arose. Furthermore, meeting a qualitative criterion is an established fact in equitable proceedings, under Section 397of the Companies Act, 1956 and Section 241 of the Act of 2013, the Appellant's petition, was not maintainable, as held, in the

decision in ***Kishore Samrite V. State of U.P. and Ors.*** reported in (2013)2SC C 398, wherein at paragraphs 29, 33-36, it is held as under:

> ***Abuse of the process of Court:***
>
> *29. Now, we shall deal with the question whether both or any of the Petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:*
>
> *(i) Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.*

(ii) The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

(iii) The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

(iv) Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

(v) A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

(vi) The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

(vii) Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine

public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

(viii) The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it.
[Refer: Dalip Singh v. State of U.P. and Ors. MANU/SC/1886/2009 : (2010) 2 SCC 114; Amar Singh v. Union of India and Ors. MANU/SC/0596/2011 : (2011) 7 SCC 69 and State of Uttaranchal v. Balwant Singh Chaufal and Ors. MANU/SC/0050/2010 : (2010) 3 SCC 402].

33. The party not approaching the Court with clean hands would be liable to be nonsuited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of

facts". (Refer: Tilokchand H.B. Motichand and Ors. v. Munshi and Anr. [MANU/SC/0127/1968: 1969 (1) SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and Anr. [MANU/SC/0336/2012: (2012) 6 SCC 430]; C handra Shashi v. Anil Kumar Verma [MANU/SC/0558/1995: (1995) 1 SCC 421]; A bhyudya Sanstha v. Union of India and Ors. [MANU/SC/0612/2011: (2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan and Anr. [MANU/SC/0599/2011: (2011) 7 SCC 639]; Kalyaneshwari v. Union of India and Anr. [MANU/SC/0217/2011: (2011) 3 SCC 287)].

34. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

35. No litigant can play 'hide and seek' with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the

Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. K.D. Sharma v. Steel Authority of India Ltd. and Ors. [MANU/SC/3371/2008: (2008) 12 SCC 481].

36. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (Buddhi Kota Subbarao (Dr.) v. K. Parasaran, MANU/SC/0678/1996: (1996) 5 SCC 530)."

That apart, the Learned Counsel for R1, 11, 13, and 15, refers to the decision, in Srikanta Datta Narasimharaja Wadiyar V. Sri Venkateswara Real Estate Enterprises (Pvt.) Ltd. and Ors., reported in [1991] 72 Comp Cas 211(Kar), wherein, at paragraph 18, 20, it is mentioned as under:

18. "A consideration of all these legal issues will necessarily take me to the detailed objections filed by the respondents. But the question is whether, on the facts of these cases, this court

should go into the objections and determine the issues for consideration on merits. In my considered view, this petition could be disposed of on the preliminary issue, viz., whether the petitioner has filed this petition in good faith in order to work out his rights within the framework of the Act. It is well-settled that the relief under sections 397 and 398 of the Act is an equitable relief which is entirely left to the discretion of the company court. In the 5th edition of Pennington's Company Law, dealing with relief from acts of oppression, it is stated (at page 750):

> *"A petition for relief from oppression under the original statutory provision would be dismissed if it was not presented in good faith solely in order to obtain such relief, and because of the equitable and therefore discretionary character of the court's jurisdiction under both the original and the present provision, the requirement of good faith on the part of the petitioner undoubtedly continues. Thus, even if the directors or majority shareholders have been guilty of improper or irregular conduct, so that there is a prima facie case for relief, it will be refused if the real purpose of the petitioner is to obtain payment of a debt owed by the company, or to force the directors to accept his views as to the way in which the company's business should be managed; or if the petitioner has submitted to the conduct complained of without protest and has acquiesced in the improper management of the company affairs. Likewise, delay by the petitioner in initiating proceedings after he must have*

realised that he was the victim of a scheme of oppression or unfair treatment will induce the court to refuse relief, because this indicates that the petitioner has acquiesced in the respondents' conduct and that his complaint is, therefore, not made in good faith."

20. That takes me to the question of good faith of the petitioner in presenting these company petitions. The question of good faith has to be tested by the conduct of the petitioner as reflected not only in the proceedings before this court but also in the parallel proceedings in the civil courts and in other civil litigations in other courts".

Moreover, on behalf of R1, 11, 13 & 15, a reference, is made to the decision in ***K.R.S. Mani V. Anugraha Jewellers Ltd.*** reported in [2005]126 Comp Cas 878(Mad), wherein, the Hon'ble High Court of Madras at paragraphs 14 & 15 has observed he following:

14. "Further, it is seen that the appellants/petitioners have not approached the Company Law Board with clean hands. Even though in their company petition under the column 'matters not previously filed or pending with any other courts' a reference is made that Original Suit is filed in O.S. No. 945 of 1996 which is concerned only proceedings of the Annual General Meeting of the 1st respondent Company held on 4-9-1996 and O.S. No. 788 of 1996 on the file of the Sub Court, Coimbatore, which concerns only the issue as to the 2nd respondent holding Office as

Managing Director of the 1st respondent. However, the relief claimed in the said suit is almost identical with the relief claimed in the Company Petition. It is only when a preliminary objection is raised about the maintainability of the company petition, the said suit seems to have been withdrawn later on. Merely because, the appellants/petitioners have withdrawn the suit on subsequent date, the same will not absolve them about their conduct in not approaching the Company Law Board with clean hands. Hence, we do not agree for the grant of relief the appellants on this score also.

15. Further, as per the various decisions rendered by this Court as well as the Supreme Court, it is the duty of the courts to recognize the Corporate Democracy of a company in managing its affairs. The court should not restrict the powers of the Board of Directors and it shall not interfere with the day to day affairs and management and administration of the company. The principles laid down in the decisions rendered by this court in Vivek Goenka v. Manoj Sonthalia [1992] 2 ML J 163; G. Kasturi v. N. Murali MANU/TN/0075/1990 : [1992] 74 Comp. Cas. 661 (Mad.); and in Nurcombe v. Nurcombe [1983] 3 CL J. 163 (CA), makes it clear that the appellants/petitioners are not entitled to the relief as claimed for in the company petition."

65. The other plea taken on behalf of Respondents No. 1, 11, 13 and 15, is that for sustaining a 'petition', u/s 397, of the Companies Act, 1956, (and now under section 241 of the Companies Act, 2013), the Petitioner, is to approach a

'Tribunal' with clean hands by proving his Bonafides''. If the Petition is 'borne out of malafides' and 'unclean' conduct, the said 'petition' 'will not be maintainable', although the allegations of the petitioners, if proved, would otherwise, make out a case for 'Oppression' / 'Mismanagement'.

66. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, points out that the Appellant, had indulged in forum shopping, by indulging in plurality of proceedings, suppression of material facts and collusive legal actions with Mr. Kumar Dinesh Seth, failing to get a favourable outcome or orders in any of the said proceedings. In fact, the Appellant had initiated the said proceedings based on the sequence of events mentioned in paragraph 3.1 of the 1st Respondent's Reply Affidavit and vide paragraphs 15-18 in Respondent No. 5's Affidavit before this Tribunal.

67. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, contends that the 'Final Order' dated 27.11.2019, passed by the 'Tribunal', especially with reference to paragraph 16-18, 23 and 24, will patently and latently, indicate that the 'Tribunal', had considered the aspect of maintainability of the Appellant's 'petition', not on the basis of his conduct, but also the 'qualitative analysis of his shareholding' and came to the right conclusion, that the Appellant, lacked 'Locus

standi', at the 'relevant point of time', and that the 'petition' was 'not maintainable', on the aforesaid grounds.

68. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, contends that the interim order, of the 'Tribunal', in IA 360 of 2018 that the 'Appellant' had 'requisite shareholding', to maintain his 'petition', the same, was assailed, in Company Appeal (AT)/144/2019, and by an order dated 02.08.2019, this Appellate Tribunal, had permitted the Respondent No. 11 to withdraw its Appeal, leaving all the contentions and issues to argue before the Tribunal, which may be decided at the stage of 'Final Hearing', uninfluenced by the decision, made in the 'impugned order'.

69. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, brings to the notice of this Tribunal, that while passing the final order, on 27.11.2019 in CP No. 486/2018, the 'Tribunal' was required to reconsider the 'issue of maintainability', because of the directions issued by the 'Appellate Tribunal' and the 'Tribunal', uninfluenced of its earlier order dated 30.05.2019, rightly had reconsidered, the 'question of maintainability', of the Appellant's petition, at the stage of 'Final Hearing' coupled with the consideration of matters, touching upon the merits of the case, including the Appellant's conduct, and qualitative, analysis

of its shareholding, therefore, no fault, can be found in the Tribunal's order, as contended by the Respondents No. 1, 11, 13 and 15' side.

70. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, points out that there is no infirmity in the 'Postal Ballot Notice' dated 10.11.2015, issued by the 1st Respondent / Company and a mere perusal of the Minutes of the Board Meeting, of 04.11.2015 the Board had approved, the issuance of 'Postal Ballot Notice', clearly mentioning the reasons for opting for 'joint development' of the property and the said explanation was also contained in the 'Explanatory Statement' enclosed along with the postal ballot notice, as per Section 102 of the Companies Act, 2013, thus providing the shareholders all the requisite information in regard to the 'nature of transaction' proposed and thereby enabling them, to make an 'informed decision' while voting in favour of the Joint Development.

71. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, contends that the decisions on commercial details of transactions, proposed to be entered into by the Company, including the details of contracting party, essentially relate to the 'Business of the Company' and/or a matter of negotiation between the 'Board of Directors' of the Company, and third parties, often concerning 'sensitive information'. As such, there is no mandate, for the Board to disclose

the said information to the shareholders, nor are the shareholders competent to analyse and determine such matters, as held, in ***Rajiv Nag V Quality Assurance Institute (India) Ltd.*** reported ***in (2000) 4 Comp LJ385(CLB)***, wherein at paragraph 11, it is observed as under:

> *11. Learned counsel for the petitioner had, however submitted that as the provisions of Section 173(2) of the Act were mandatory, it is the explanatory statement which should be given prominence as the same is supposed to disclose all the material facts on which the mind of the shareholders has to be made. Referring to item No. 8 of the explanatory statement quoted above learned counsel has contended that the said explanation mentions that, "it is planned to reward the existing shareholders by way of issue of bonus shares in such ratio as the board of directors may deem fit". Therefore, according to learned counsel it is evident from the explanatory statement that the existing shareholders as on September 1, 1999, were to be rewarded by the issue of bonus shares, and the petitioner was an existing shareholder on that date. So far as this submission is concerned it has to be stated that the explanatory statement is a part of the notice and cannot be read de hors the same. While it is necessary that an explanatory statement should be annexed to the notice in respect of any item of business, which is special, it is not necessary to include in it the text of the resolution or the draft of the resolution to be proposed at the meeting. Its purpose is that the members should be informed of the nature of the business to be transacted at the general meeting. As held by the Calcutta*

High Court in the case of East India Commercial Co. Private Ltd. v. Raymon Engineering Works Ltd., MANU/WB/0055/1966: AIR 1966 Cal 232, it is not the function of an explanatory statement to travel beyond the scope of the proposed resolution. Material facts have to be given but not detailed particulars. Considered in that light item No. 8 of the explanatory statement if read harmoniously with the contents of the resolution quoted in paragraph 8 of the notice, discloses no contradiction in terms. Existing shareholders will be those members holding equity shares as per the register of members on the date to be decided by the board of directors, as indicated in the proposed resolution quoted in item No. 8 of the notice. It is well settled that provisions like Section 173(2) of the Act should be understood in a meaningful manner and not to be construed rigidly so as to hamper the conduct of business."

Added further on behalf of R1, 11, 13 & 15, a reference, is made to the decision in ***K. Meenakshi Amma V Sreerama Vilas Press and Publications (P.) Ltd. and Ors.*** reported in ***MANU/KE/0087/1991***, wherein paragraph 11, it is observed as under:

11. It has to be remembered that the chairman appointed by the company court was seeking directions in the matter of conducting the meeting. The company court gave certain directions for the proper conduct of the meeting. The former managing director, Sri N. Madhavan Nair, filed Application No. 187 of 1990 to stop the convening of the meeting on the ground

that the notice is not in conformity with Sections 171 173 and 257(1A) of the Companies Act. The company court overruled the objections, found the notice in order and dismissed the application of the former managing director. He filed an appeal, M. F. A. No. 333 of 1990. The appeal was dismissed by a Division Bench of this court observing that it will be open to the appellant to urge various contentions including the contention regarding the order in Company Application No. 187 of 1990 in the course of trial of the main Application No. 253 of 1990. So even though the company court has found that the notice sent by the chairman appointed by the company court was not defective, that matter was left open to be considered by the company court at the final stage of the main application, viz., Application No. 253 of 1990. But it has to be noted that the meeting was held as early as on March 10, 1990, and the period of appointment of the board of directors and managing director of the company has expired by efflux of time and an election to a new board of directors and managing director became necessary".

72. According to the Respondents No. 1, 11, 13 and 15, the Appellant was well aware that as on 10.11.2015, being the issuance of 'Postal Ballot Notice', the 1st Respondent / Company, was still in the 'process of collating Bids from the 'prospective Developers', for the joint development of its property. Therefore, the said information could at any event not having, been disclosed to the shareholders in the aforesaid notice or explanatory statement.

73. That apart, from the facts and documents available on record, according to the Learned Counsel for the Respondents No. 1, 11, 13 and 15 that as of the date of issuance of Postal Ballot Notice, there was no intention for R2 to R7, to sell their shareholding in the 1st Respondent / Company, much less to R12, 13 and 15, who are total strangers to the 1st Respondent /Company at the said 'point of time'. Therefore, there arose no question of disclosing such information in the 'Postal Ballot Notice', of 10.11.2015. In effect, there was no infirmity in the contents of Postal Ballot Notice nor was any material fact supressed by the 1st Respondent / Company by issuing notice.

74. According to the Respondents No. 1, 11, 13 and 15, it is not the case of the Appellant that if the information was made known to him before the Postal Ballot voting, then he would have voted in a different manner, with a view to prevent such joint development. But the fact of the matter is that the Appellant had voted against the Resolution for Joint Development and that the Appellant has miserably failed to prove as to how he is aggrieved, in his capacity as shareholder of the 1st Respondent / Company, by the 'Postal Ballot Notice' and the alleged 'non-disclosure of material information' therein.

75. The Learned Counsel for Respondents No. 1, 11, 13 and 15, points out that an overwhelming 91.13% of the shareholders of the 1st Respondent / Company,

present and voting, appreciating and understanding the need for entering into a development, with regard to the Company's properties to ensure recurring cash flow took an 'informed decision' leading to the Resolution being passed on 22.12.2015, for the benefit of the 1st Respondent / Company and all its shareholders, including the Minority shareholders. Indeed, not a single shareholder for the last 8 years, other than the Appellant has approached the Tribunal or any other Forum, disputing the actions of the 1st Respondent / Company or assailing the Joint Development Transaction, by alleging any infirmity in the 'Postal Ballot Notice', 'all the actions of the Respondents'.

76. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, takes a forceful stand, that even assuming without admitting that there was any 'infirmity or illegality', in the Postal Notice dated 10.11.2015, as averred by the Appellant, the law is clear that an isolated instance / single instance will not form a ground for sustaining an action in respect of an oppression and mismanagement as per Section 241 of the Companies Act, 2013 or justify passing of any orders u/s 242 of the Companies Act, 2013, as per decision of Hon'ble Supreme Court in ***Needle Industries (India) Pvt. Ltd. v. Needle Industries Newey (India) Holdings Ltd. & Ors.*** reported in AIR 1981 SC 1298, wherein at paragraph 51 it is observed as under:.

51. The question sometimes arises as to whether an action in contravention of law is per se oppressive. It is said, as was done by one of us, N.H. Bhagwati J. in a decision of the Gujarat High Court in S.M. Ganpatram v. Sayaji Jubilee Cotton & Jute Mills Co. [1964] 34 Company Cases 830-31 that "a resolution passed by the directors may be perfectly legal and yet oppressive, and conversely a resolution which is in contravention of the law may be in the interests of the shareholders and the company". On this question, Lord President Cooper observed in Elder v. Elder [1952] S.C. 49:

> *The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the 'just and equitable' jurisdiction, and, conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding up, especially where alternative remedies are available. Where the 'just and equitable' jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy.*

Neither the judgment of Bhagwati J. nor the observations in Elder are capable of the construction that every illegality is per

se oppressive or that the illegality of an action does not bear upon its oppressiveness. In Elder a complaint was made that Elder had not received the notice of the Board meeting. It was held that since it was not shown that any prejudice was occasioned thereby or that Elder could have bought the shares had he been present, no complaint of oppression could be entertained merely on the ground that the failure to give notice of the Board meeting was an act of illegality. The true position is that an isolated act, which is contrary to law, may not necessarily and by itself support the inference that the law was violated with a mala fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed. This may usefully be illustrated by reference to a familiar jurisdiction in which a litigant asks for the transfer of his case from one Judge to another. An isolated order passed by a Judge which is contrary to law will not normally support the inference that he is biassed; but a series of wrong or illegal orders to the prejudice of a party are generally accepted as supporting the inference of a reasonable apprehension that the Judge is biassed and that the party complaining of the orders will not get justice at his hands."

77. The Learned Counsel for the Respondents No. 1, 11, 13 and 15, points out that the Appellant, had never pleaded in respect of the Explanatory Statement

enclosed to the 'Postal Ballot Notice', purportedly, not being in conformity, with Section 102 of the Companies Act, 2013, the provisions of the Companies (Management and Administration) Rules, 2014 and the 'Secretarial Standards' are only raised for the first time in the Appellant's written submissions before this Tribunal. In this connection, the Learned Counsel for the Respondents No. 1, 11, 13 and 15, points out that the instances of purported oppression and mismanagement must necessarily be pleaded in the petition and that the matters not pleaded in the petition cannot be looked into nor considered by the Court or Tribunal as the case may be, as per decision in ***Bachhaj Nahar v. Nilima Mandal and Ors.*** reported in ***2008 (17) SCC 491,*** wherein at paragraphs 8 to 10, it is observed as under:

> *8. "The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:*
>
> > *(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.*
> >
> > *(ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in*

pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation, should not be a ground to float the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.

9. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

10. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief."

Also the Learned Counsel for the R1, 11, 13 & 15, refers to the decision, in ***Sangramsingh P. Gaekwad v. Shantadevi P. Gaekwad reported*** in ***2005 11 SCC 314,*** wherein at paragraph 185, it is observed as under:

185. "The jurisdiction of the Court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may seem fit and proper, is warranted. (See Bennet Coleman & Co. v. Union of India and Ors. MANU/MH/0054/1977 and Syed Mahomed Ali v. R. Sundaramurthy and Ors., MANU/TN/0089/1958 : (1958) 2 MLJ 259."

Furthermore, in the decision, ***Akella Lalitha v. Konda Hanumantha Rao and Anr.*** reported in ***2022 SCC OnLine SC 928***, wherein at paragraph 17, it is observed as under:

17. "In the case of Trojan & Co. Ltd. v. Rm.N.N. Nagappa Chettiar, this Court considered the issue as to whether relief not asked for by a party could be granted and that too without having proper pleadings. The Court held as under:—

> *"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."*

As such the 'Tribunal' could not have traversed into the matters, that were not specifically pleaded by the 'Appellant' through his Petition filed under Section 241 and 242 of the Companies Act, 2013, before the 'Tribunal', especially when the 'Respondents' had no opportunity to counter the same.

78. The Learned Counsel for the Respondents No.1, 11, 13 & 15, points out that the Respondent No.11 was selected as the successful developer for the joint development transaction through a fair and transparent process, as is evident from the minutes of the Board Meeting dated 24.11.2015. As a matter of fact, much after the execution of 'Joint Development Agreement' dated 01.01.2016 that Respondent No.2 to 7 intending to dispose of their shares in 1st Respondent / Company had entered into share purchase agreement, with the Respondent No. 12,13 & 15 for selling the said shares and in fact, in compliance with the provisions of the SEBI Regulations, including the (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and other related guidelines and compliances, the Respondent No. 12, 13 & 15 when through the process of open offer and in reality, the Appellant could himself have participated in the open offer process and purchased the shares of the Respondent Nos. 2 to 7, which the Appellant had not resorted to.

79. The Learned Counsel for Respondent No. No.1, 11, 13 & 15, points out that had the Respondent No. 11, 12, 13 & 15 indeed, intended to take over control of the company, as alleged, the said 'Respondents' could have directly proceeded to purchase the shares of the Company without going through the process of submitting a 'proposal', for developing the Company's Hebbal property (that too a proposal which was more competent than proposals of other Developers), risking non-selection through such process, entering into the Development Agreement by incurring stamp duty of over Rs.4.3 Crores, and ultimately risking the uncertainty of being able to purchase the above shares, given the applicability of open offer process.

80. The Learned Counsel for Respondent No. 1, 11, 13 & 15, contends that the matters relating to 'transfer of shares' and validity thereof are beyond ambit of consideration of the 'Tribunal', in the teeth of ratio, prescribed, by the Hon'ble Supreme Court of India in the matter of **IFB Agro Industries Limited V. SICGIL India Limited and Ors.** reported in AIR 2023 SC 247, wherein at paragraph 37, 38, it is observed as under:

> *37. The position with respect to the SEBI (SAST) Regulations is similar to that of the SEBI (PIT) Regulations. Regulation 7 of Chapter III obligates the acquirer of more than 5% shares in a company to disclose the same to the company and the stock exchange. This is the prohibition, and non-disclosure is punitive.*

Chapter V deals with investigation and action by the Board, which includes the power of the Board to appoint an investigating officer (Regulation 38), the issuance of show-cause notice to the acquirer (Regulation 39), the obligation of the investigating authority to submit a report at the earliest (Regulation 41), the duty to supply the report to the acquirer and give him an opportunity of hearing before passing penal orders (Regulation 42) and lastly, the powers of the Board to take action/pass directions under Chapter VI-A and Section 24 of the SEBI Act (Regulation 44). It is significant to note that Regulation 45 provides for penalties for non-compliance with the said Regulations. The liability will be in terms of the Regulations and the SEBI Act. Here again, the SEBI (SAST) Regulation is a comprehensive scheme providing for inquiry, investigation, submission of report by the investigating officer, procedural safeguards in favor of the acquirer, and finally, the restitutionary order/directions to be passed by the Board. This whole procedure cannot be short-circuited by making an application Under Section 111A of the 1956 Act on the ground that there exists parallel jurisdiction with the SEBI and CLB/Tribunal. The transaction complained of must suffer scrutiny by the regulator, and it is only for the regulator to determine a violation of the provisions of the SEBI Act and the Regulations.

38. Having considered the matter from a different perspective, we are of the opinion that the Appellant is not justified in invoking the jurisdiction of the CLB Under Section 111A of the

Act for violation of SEBI Regulations. We are also of the opinion that the Tribunal committed an error in entertaining and allowing the company petition filed Under Section 111A of the 1956 Act. Though we are not in agreement with the reasoning adopted by the Appellate Tribunal in the impugned order, we are in agreement with its conclusion that the Tribunal exceeded its jurisdiction and therefore, the Appellate Tribunal was correct in setting aside the judgment dated 05.07.2017.

81. The Learned Counsel for the Respondent No. 1, 11, 13 & 15, submits that the 'Appellant', before agitating the matter pertaining to share transfer, before the 'Tribunal', the 'Appellant' had already filed two complaints before the 'SEBI' but in 'vain'. Also the Appellant filed a 'civil suit' to disrupt the share acquisition process, which he subsequently, withdrew, through her 'undertaking' before the Hon'ble High Court of Karnataka, in the Appeal proceedings, and hence, is 'estopped', 'by his conduct', from re-agitating the same matter, before the Tribunal, and before this 'Appellate Tribunal', especially, in the light of the decision of Hon'ble Supreme Court of India in Agro Industries Limited mentioned (supra) and it is pertinent to make a mention that share purchase was also duly approved by 'SEBI'.

82. The Learned Counsel for Respondent No. 1, 11, 13 & 15, points out that as seen from the 'Annual Report', of the 1st Respondent / Company, for the

Financial Year 202-23, the 1st Respondent / Company, is engaged in the 'Business of products', solutions and Electronic Contract Manufacturing Service, and that even as on 31.03.2023, had 'Annual Turnover, of Rs. 3,334.81 Crores, from the same, out of which 'income' from 'real estate', comprises only Rs.534.20 Crores. Therefore, it is the plea of Respondent No. 1, 11, 13 & 15, that the 1st Respondent / Company, owns, another 'property' at Electronic City, Bengaluru, which the Appellant, had not disclosed, before this 'Tribunal' and as such, the Appellant's, contention, that the said 'Joint Development Property', comprises of the entire 'Assets' and substratum, of the 1st Respondent / Company, is a misleading and baseless one.

83. The Learned Counsel for Respondent No. 1, 11, 13 & 15, projects an argument that the Joint Development transaction complained of by the Appellant, has resulted in construction / development of a commercial building, of commercial complex, of which the 1st Respondent / Company once more than 2 lacs sq. ft. and also continues to retain ownership over proportionate undivided share in the land comprising the said development. Furthermore, through utilisation officer of such developed property, the company had already garnered potential, to generate rental revenue of Rs.1.25 crores per month, thereby fructifying the original intent of the complained transactions.

84. Besides the above, the Learned Counsel for Respondent No. 1, 11, 13 & 15, points out that simultaneous with the execution of Joint Development Agreement, on 01.01.2016, the 1st Respondent / Company, had received funds to an extent of Rs. 9 crores, as none-refundable security, which funds the 1st Respondent / Company, used to resolve its cash crunch and help keep its business 'afloat'. Hence the allegation that the 1st Respondent / Company has not derived any benefit from the development and that the said transaction had effectively led to the winding up of the 1st Respondent / Company is an incorrect one.

85. The Learned Counsel for the Respondent No. 1, 11, 13 & 15 points out that the aspect of 'Good Faith' being a 'sine qua non' for maintaining a petition under Section 241 of the Companies Act, 2013, has to be tested by the Appellant's conduct as reflected not only in the proceedings before the 'Tribunal' but also in the parallel proceedings, in the civil courts and in other 'civil litigations', in other 'foras'.

86. The Learned Counsel for the Respondent No. 1, 11, 13 & 15, comes out to the plea that the Tribunals order dated 27.11.2019, will exhibit that the 'Tribunal' had not merely placed reliance on the orders passed in earlier TP. No.88/2016, but has in fact, independently, assessed the 'conduct' and 'Bonafides' of the Appellant in numerous proceedings, initiated by him, before

different forums, before approaching the 'Tribunal', and hence, no fault or infirmity can be attributed to the 'Tribunal', in this regard.

87. The Learned Counsel for the Respondent No. 1, 11, 13 & 15, points out that COP No. 20/2016, was filed by the Appellant's associate Mr. Kumar Dinesh Seth, the Appellant prior to the passing of the order, by the Hon'ble High Court of Karnataka, in COP No. 20/2016, had filed an 'application', seeking to be impleaded as a 'party' in the said proceedings and specific adverse observations were made by the Hon'ble High Court, regarding the Bonafides and conduct of the Appellant (vide paragraph 7 to 9 of the said order) and that the said observations remained unchallenged by the 'Appellant'. Moreover, the TP No. 248/2017 was also not withdrawn by Mr. Kumar Dinesh Seth at any point of time, and ultimately was dismissed along with the Appellants CP No. 486/2018 through a common order dated 27.11.2019 of the 'Tribunal'. Therefore, the stand of the Respondent No. 1, 11, 13 & 15, is that the 'Tribunal' is entitled to place reliance on the earlier order passed in COP No. 20/2016, including the observations made therein, pertaining to the Appellant's, 'Bonafides'.

88. The Learned Counsel for the Respondent No. 1, 11, 13 & 15, points out that along with Mr. Kumar Dinesh Seth, the 'Appellant' had filed Original Suit No. 10303/ 2015 praying for an injunction 'reliefs' against the 'Respondents', in

regard to the Joint Development Transaction, and upon failing to obtain any Ex-parte an interim order against the respondent, latter, 'suit' was withdraw, without seeking any liberty.

89. Apart from the above, the Appellant filed a suit in OS. No. 25572/2016, before the Civil Court, Mayo Hall Unit, Bangalore, praying for an Ex-parte interim order of a temporary injunction against the Respondents and the said suit, was later on withdrawn by the Appellant. Therefore, it is contended on behalf of the Respondent No. 1, 11, 13 & 15, that the contra stand of the Appellant, that 'no' / 'any suit', was filed, before the 'Civil Court', and that the such 'suit', was filed by the Mr. Kumar Dinesh Seth, is a misleading one.

90. The Learned Counsel for R1, 11, 13 and 15, points out that the Appellant has not made out any grounds whatsoever depicting that any actions of the Respondents complained of has in any manner been prejudicial to the shareholders and further that the actions complained are of the year 2015-16 and no other shareholder has raised any grievance, in respect of the actions complained of by the Appellant till date.

91. The Learned Counsel for R1,11,13 and 15, submits that it is the actions of the Appellant that have been 'oppressive' and prejudicial to the interest of the 1st Respondent / Company. Also that the Appellant, has forced the 1st Respondent /

Company to contest one frivolous litigation after the other for a seven years' period and being the Chairman and Managing Director of the Embassy Group, the Appellant is a competitor, who is interested in acquiring the Hebbal Property of the 1st Respondent / Company for the benefit of the Embassy Group.

92. While rounding up the Learned Counsel for R1, 11, 13 and 15, prays for dismissal of the instant 'Appeal' because of the fact that the 'Appellant' had not set out legally tenable grounds for maintaining the 'Appeal'.

Evaluation

93. According to the Appellant, the impugned order dated 27.11.2019 passed by the 'National Company Law Tribunal', Bengaluru Bench in CP 20/2016 (TP No. 248/2017) and CP No. 486/BB/2018 is 'non-est' and 'abinitio' void 1 besides being an 'illegal one' because of the fact, that the impugned order, was passed by Hon'ble Member (Judicial) of the 'Tribunal', sitting singly, in the absence of the Hon'ble Member (Technical).

94. It is represented on behalf of the Appellant, that Section 419(3) of the Companies Act, 2013 categorically, mentions that the powers of the 'Tribunal' shall be exercisable by Benches, consisting of two Members(Judicial) and (Technical) except in the case of Hon'ble President of the 'Tribunal' by general or special order may authorise the Hon'ble Judicial (Member), to singly constitute the Bench.

95. Conversely, it is the submission of the Learned Counsel for the R1, 11, 13 and 15, that by means of an order dated 22.10.2019, passed by the Tribunal, (in terms of Section 419(3) of the Act, 2013), the Hon'ble Member (Judicial) of the Tribunal, was entitled to hear the matter, sitting singly, on the relevant date and this is evident from the order of the 'NCLT', New Delhi dated 22.10.2019(file No. 10/03/2019-NCLT and in short, the 'NCLT', Bengaluru Bench, was 'Reconstituted' as 'Bench at NCLT, Bengaluru' Shri Rajeswara Rao Vittanalla, Member (Judicial) and this constitution of the Bench as per Section 419(3) of the Companies Act, 2013 and this was in modification of order of even no. dated 25.07.2019 for 23.10.2019 to 25.10.2019.

96. The contention of the Learned Counsel for the R1, 11, 13 and 15, is that the 'Appellant', has failed to point out, 'any provision of Law' which bars a matter i.e. part-heard by the Division Bench of a 'Tribunal', from being heard further by the Hon'ble 'Single Bench' of the said 'Tribunal'.

97. It is represented on behalf of the Learned Counsel for the R1, 11, 13 and 15 that the Appellant had not objected to the Hon'ble Member (Judicial) of the Tribunal, hearing the part heard matter on 25.10.2019 sitting singly, either on the date of hearing nor the Appellant had challenged the same, at any time, thereafter, till the filing of the 'Appeal'.

98. According to the Learned Counsel for the R1, 11, 13 and 15, that the Appellant had willingly participated in the proceedings before the Tribunal and allowed the proceedings to continue and is now raising the same, only after the impugned order came to be passed by the 'Tribunal'.

99. It is the version of the Learned Counsel for the R1, 11, 13 and 15, that the Appellant had also acquiesced to the proceedings of 25.10.2019, being conducted in the Tribunal (the matter being heard by the Hon'ble Member (Judicial) of Bangalore), now he is estopped from assailing the same before this Appellate Tribunal.

100. On behalf of the Appellant, a reference, is made to the order of the Hon'ble Supreme Court dated 20.06.2019, in writ petition (Civil) No. 722 of 2019 in ***'Sonu Cargo Movers (I) Pvt. Ltd. & Ors. Vs. Union of India & Ors.'*** wherein it is observed as under:-

> *"The grievance of the petitioners was that their matter was being heard by a Bench in which there was no technical member. Today it is pointed out that an order has been issued by the Ministry of Corporate Affairs appointing the technical members in the Bench of the National Company Law Tribunal ("NCLT") at Ahmedabad.*
>
> *We therefore, dispose of these petitions with a direction that the case of the Petitioners be heard by a Bench comprising of a judicial member and a technical member."*

101. The Learned Counsel for the Appellant' relies upon the order dated 25.10.2019, of this 'Tribunal' in **Company Appeal (AT)(Ins.) 971/2019 between Raj Singh Gehlot Vs. Vistra ITCL (India) Ltd. & Ors.**(3 Member Bench) wherein at paragraph 8, it is observed as under:-

> "*8. We accordingly, set aside the impugned order dated 27th August, 2019, without extending any opinion on merit of the claim and counter claim of the parties. The matter is remitted back to the National Company Law Tribunal Bench III, New Delhi should be heard by the Division Bench of Hon'ble Member (Judicial) and Hon'ble Member (Technical) as per the provisions of the Act and after notice and hearing, the Adjudicating Authority pass appropriate orders in accordance with law, uninfluenced by an impugned order dated 27th August, 2019."*

102. The Learned Counsel for the Appellant cites the order of this 'Tribunal', dated 24.08.2020, in Indison Agro Foods Ltd. Vs. Registrar and Ors., wherein it is observed as under:-

> "*After hearing Mr. Abhijeet Sinha, Learned Counsel for the Appellant for a while, we find that the Appeal has turned infructuous in as much the matter, in terms of the impugned order, stood adjourned to 18.08.2020 and that date is over. We are informed by Learned Counsel representing the Appellant that the matter is now posted for 27th August, 2020 before a single bench of the National Company Law Tribunal, Indore Bench of Ahmadabad. He invites our attention to an order passed by*

Hon'ble Apex Court in writ petition No. 722/2019 dated 20.06.2019, wherein the Hon'ble Apex Court, in a case of identical nature directed it to be heard by a Bench comprising of a judicial member and a technical member. This appeal is accordingly disposed of with request to the President, National Company Law Tribunal, New Delhi to constitute a Bench comprising of a judicial member and the technical member for disposal of the matter in hand in conformity with and compliance with a direction passed by the Hon'ble Apex Court in Writ Petition No. 722 of 2019."

103. On behalf of the Learned Counsel for the R1, 11, 13 and 15, a reliance is placed upon the decision, in ***Tamilnadu Generation and Distribution Corporation Ltd. Vs. PPN Power Generating Company Pvt. Ltd. reported in 2014 11 SCC 53*** wherein at paragraph 47 it is observed as under:-

"*47. These observations, however, do not in any manner affect the jurisdiction exercised by the State Commission in the present matter. It has been rightly pointed out by the Respondent that having filed the written statement in reply to the petition filed by the Respondent, the Appellant willingly participated in the proceedings and invited the findings recorded by the State Commission. It would be too late in the day, to interfere with the jurisdiction exercised by the State Commission in these proceedings."*

104. The Learned Counsel for the R1, 11, 13 and 15, adverts to the decision, in ***CY Parthasarathy V. Syndicate of Mysore University***, reported in ***MANU/KA/0244/1994*** wherein at paragraph 19 to 22, it is observed as under:-

> *19. "It is true, that jurisdiction cannot be conferred by consent, of the parties where it does not otherwise inhere in the authority concerned; but it is equally true that the High Court can while exercising its extraordinary and discretionary powers under Article 226 of the Constitution decline to interfere with an order of a subordinate authority if it is satisfied that an objection relating to a defect of procedure or jurisdiction which would have been and ought to have been raised at the earliest opportunity was not so raised by the party complaining before it. The Rule that acquiescence of the party belatedly making a grievance about the jurisdiction of the subordinate authority disentitles him to invoke the Writ jurisdiction of the High Court, does not rest on the foundation that acquiescence, confers jurisdiction but on the rationale that the High Court will be justified in refusing to exercise its jurisdiction in favour of a person who has either by reason of lack of diligence or by design remained on the fence, allowed the authority to pass an order and seeing that the same has gone against him turned round to challenge its competence, to have done so.*
>
> *20. In any such situation, it would be reasonable to infer that the party making the grievance about the competence of the subordinate authority, acted unfairly in not raising the objection*

at the very outset; It would also be reasonable to assume that he did so, deliberately hoping that the final order to be passed by the authority would be in his favour, but finding it go against him, he attacks the same as being without jurisdiction. In other words the person concerned indulges in what may be termed as 'diluted deception' by keeping quite, when he was, in fairness to all those concerned with the proceedings before the authority, under an obligation to speak out. He attempts by his silence to secure a favourable verdict, which if given, would have buried for ever the question of competence of the authority to handle the subject matter. It is this trickery which the Courts have frowned upon by declining to interfere with the actions of subordinate authorities, where acquiescence or acceptance of their jurisdiction is manifested by the facts of a given case.

21. D'Smith in his Book "Judicial Review of Administrative Action" 3rd edition at pages-372-373 has brought out the distinction between the two situations namely cases where the decisions are, void for want of jurisdiction and could be avoided and others were even though they are void but with which the Court will not interfere on account of the applicant's conduct. The Author states thus:-

> *"A decision made without jurisdiction is void, and it cannot be validated by the express or implied consent of a party to the proceedings. It does not always follow, however, that a party adversely affected by a void decision will be able to have it set aside. As we have seen, certiorari*

and prohibition are, in general, discretionary remedies, and the conduct of the applicant may have been such as to disentitle him to a remedy."

> *"Whether the tribunal lacked jurisdiction is one question; whether the court, having regard to the applicant's conduct, ought in its discretion to set aside the proceedings is another. The confused state of the present law is due largely to a failure to recognise that these are two separate questions."*

22. He also states in the same Book that a person who though aware of the defect or lack of jurisdiction does not raise any objection on that account and acquiesces and takes a chance of getting a decision in his favour will be disentitled to a Writ of Certiorari. It is fruitful to reproduce the following passage from the Book:-

> *"The right to certiorari or prohibition may be lost by acquiescence of implied waiver. Acquiescence means participation in proceedings without taking objection to the jurisdiction of the tribunal once the facts giving ground for raising the objection are fully known. It may take the form of failing to object to the statutory qualification of a member of the tribunal, or (exceptionally) appealing to a higher tribunal against the decision of the tribunal of first instance without raising the question of jurisdiction."*

105. It is to be borne in mind, that Section 419(3) of the Companies Act, 2013, enjoins that the 'powers, of Tribunal', shall be exercisable by 'Benches' consisting of two Members, out of whom, one shall be a 'Judicial Member' and other shall be a 'Technical Member'. As a matter of fact, the proviso to sub-section 3 of Section 419 of the Companies Act, 2013 points out that it shall be competent for the 'Members of the Tribunal' authorised in this behalf to function as a Bench comprising of a single 'Judicial Member' and exercise the powers of 'Tribunal', in respect of such class of cases or such matters relating to 'such class' of cases as the President, may, by general or special order specify.

106. Also, in the second proviso it is mentioned that if at any stage of 'hearing' of any such case or matter, it appears to the Member', that the case or matter is of such nature / character, that it should be Heard, by a Bench consisting of two members, the case or matter may be transferred by the President, or as the case may be, referred to him for transfer to such Bench, as 'President', may deem fit. Hence, considering the importance of issues / controversies / disputes involved in a case, a 'single member', of the Tribunal, may 'transfer' or refer the matter to the President, for hearing by a Bench consisting of two Members or to such Bench as the President may deem fit.

107. It cannot be gainsaid that the 'Principal Bench' of Tribunal, shall be at New Delhi, whose powers, shall be exercised by 'Two Members' it shall be competent

for the Members, authorised in this behalf to function as Bench consisting of a single Judicial Member, in respect of such class of cases, as 'President', may by 'general' or 'special order' specify.

108. To be noted, the term, 'Acquiescence' is nothing more than 'absolute' or 'Positive Waiver'. Further, it amounts to an 'abandonment of rights', as per decision in ***Govindsa Marotise V. Ismail,*** reported in ***AIR 1950 Nag. Pg. 22***.

109. A 'person' may be precluded by 'way of his actions' or 'conduct' or 'silence' when it is his 'duty to speak', from 'asserting a right', which he would have otherwise had. Also, that 'Estoppel' is a 'Principle of justice' and 'Equity'. It is not a 'cause of action', and it is 'not a rule of evidence' as opined by this 'Tribunal'.

110. At this juncture, this Tribunal, pertinently points out that the 'principle of waiver', or of 'Approbation', and 'Reprobation' lies at the 'root of conduct', productive change, of activation and this 'principle', is akin to the 'rule of 'Constructive' *Res judicata',* as per explanation IV of Section 11 of the Civil Procedure Code, 1908

111. In so far as, the present case is concerned, although, the 'plea', is taken on behalf of the Appellant, that the impugned order dated 27.11.2019, in CP No.

20/2016 (TP No. 248/2017) and Company Petition No. 486/BB/2018, passed by the Hon'ble Member (Judicial) of the National Company Law Tribunal, Bengaluru Bench, is 'nonest', 'illegal' and ''*void ab initio',* because of the fact that Section 419(3) of the Companies Act, 2013, enjoins, that the 'powers of the Tribunal', shall be exercisable by Benches, comprises of 'Two Members ('Judicial' and 'Technical'), in case the Hon'ble President by 'general' or 'special' order may authorise the Hon'ble Member, to singly, constitute the Bench, this Tribunal, points out, that as per 'order of NCLT, Delhi dated 22.10.2019' (vide File No. 10/03/2019-NCLT, New Delhi) consequent to the Order No. PFA/7/2016 dated 21.10.2019 and letter No. A-12023/1/-Ad-IV-MCA dated 16.10.2019, the NCLT, Bengaluru Bench was reconstituted with Shri Rajeshwara Rao Vittanala, Member (Judicial), in terms of Section 419(3) of the Companies Act, 2013 and in fact, the said order, was in modification of order of even number dated 25.7.2019 for 23.10.2019 to 25.10.2019 only (which was issued with the approval of President, NCLT, New Delhi, keeping in mind of a primordial fact, that there is no provision under the Companies Act, 2013 which prohibits a matter that was 'Part Heard' by the 'Hon'ble Division Bench of a Tribunal' from being Heard, further by the 'Single Member Bench' of the said 'Tribunal'. Also, the 'Appellant', had not raised 'any objection', to the Hon'ble Member (Judicial) of NCLT, Bengaluru Bench, sitting singly, in Hearing, the

'Part Heard', 'matter' on 25.10.2019, also that the 'Appellant' had 'willingly' participated in the proceedings, before the 'Tribunal' 'without any murmur', by his own conduct, the Appellant, is now 'estopped', from 'assailing the 'impugned order', and also tacitly took part in the proceedings, cannot 'Approbate' and 'Reprobate' because of the fact, he had acquiesced to the 'proceedings of 25.10.2019 and viewed in that prospective, this 'Tribunal' holds that the 'impugned order' dated 27.11.2019, in Company Petition No. 20/2016 (TP No. 248/2017) passed by the Hon'ble Member (Judicial) of NCLT, Bengaluru Bench, sitting singly, cannot be found fault, with because of the fact that Section 419(3) of the Companies Act, 2013 empowers, the 'Judicial Member', of the 'Tribunal' to 'Hear the case', based on the order dated 22.10.2019 of the NCLT, New Delhi, which had the 'Approval', of 'President of NCLT', New Delhi and hence, the impugned order dated 27.11.2019, passed by the 'Tribunal' is not a 'nonest', 'illegal' and 'void ab initio' one and the point, is so answered.

112. As regards the plea of the Appellant that the 'impugned order', dated 27.11.2019, in effect, overrides, the earlier order, which categorically held that the 'petition' of the Appellant/Petitioner, is maintainable, the Learned Counsel for the Appellant points out that the issue of maintainability already got settled by virtue of the order dated 30.05.2019 in IA 360/2018 and IA 17/2019, the said order was assailed in Comp. Appeals (AT) No. 144 and 179/2019, by the

Respondents, the Appellate Tribunal had refused to 'interfere' with the order dated 30.05.2019, through an order dated 02.08.2019, and that the Respondents' had to withdraw the said Appeals.

113. The primary plea of the Appellant, is that the Learned Single Member of the Bench of the 'Tribunal', had effectively over ruled the said order passed by the Division Bench and upheld by this Tribunal. In effect, the said point according to the Appellant, vitiates the impugned order of the Tribunal, and hence, the 'impugned order' of the Tribunal, is liable to be set aside.

114. It is represented on behalf of the Appellant, that the matter, was always Heard, by the Division Bench, constituted by the 'orders of the President of the National Company Law Tribunal, New Delhi' and despite the non-availability of the Division Bench on 25.10.2019, the matter' was heard, singly and 'orders' were reserved by the Learned Member of the 'Tribunal', on very date, when validly constituted Bench was unavailable. That apart, there was no 'Bench' on 25.10.2019 when, the orders were reserved which renders the order dated 27.11.2019 as void, 'inoperative' and 'non-est' in Law.

115. The Learned Counsel for the Appellant' refers to the order dated 30.05.2019, in IA 360/2018 and IA 17/2019 filed by the Respondents against the Appellant / Petitioner, in CP No. 486/BB/2018, the NCLT Bengaluru Bench, at

paragraph 16, had observed that; '*so far as the filing of the instant Company Petition is concerned', the Tribunal is permitted to withdraw the earlier CP No. 22 of 2016 (TP No. 88/2016) with a liberty to file a fresh petition and thus the instant Company Petition is maintainable and it is required to be decided as per merits, after hearing both the parties. Admittedly, the Tribunal is competent to decide the issues raised in CP as jurisdiction of Civil Courts is ousted by the provisions of the Companies Act, 2013".*

116. The Learned Counsel for the Appellant, adverts to the order dated 02.08.2019, in Company Appeal (AT) 144 and 179 of 2018 wherein this Tribunal, had passed the following order wherein at paragraph 2 and 3, it is observed as under:-

> *"2. Dr. U.K. Chaudhary, Ld. Sr. Counsel appearing on behalf of 1st Respondent submits that Respondent has 19.83% of total shareholding as on the date of filing of the petition and further submits that he has no objection if the Appeal is allowed to be withdrawn for immediate decision pending before the Tribunal.*
>
> *3. In the facts and circumstances, we allow the Appellant to withdraw the Appeal leaving all the contentions and issues to argue before the Tribunal which may be decided at the stage of final hearing uninfluenced by the decision made in the impugned order".*

117. Contending contra, it is the submission of the Learned Counsel for the R1, 11, 13 and 15, the 'Tribunal', uninfluenced of its earlier order dated 30.05.2019, had rightly considered the question of maintainability of the 'Appellant's petition', at the stage of Final Hearing, along with consideration of matters, touching upon the merits of the case, including the 'Appellant's conduct', and 'qualitative analysis', of his shareholding. Hence, the Appellant's submission' that having held the 'petition', being not maintainable the Tribunal's findings on merits of the matter were allegedly 'prejudged' and 'prejudicial' is a baseless and a reckless one.

118. Because of the fact that the 'Appellate Tribunal', in Company Appeal (AT) 144 and 179 of 2018 on 02.08.2019 had permitted the Respondent No. 11 to withdraw its Appeal, leaving all the contentions and issues to argue before the 'Tribunal', which may be decided, at the stage of Final Hearing, uninfluenced by the decision, made in the impugned order and viewed in that perspective, the 'Tribunal', while passing the final order on 27.11.2019 in CP 486/2018, was perforced to reconsider the 'Issue of Maintainability' in terms of the directions issued by this 'Appellate Tribunal' and as a logical corollary, the 'Tribunal' had given a 'Relook' by considering the question of maintainability of the Appellant's petition, at the stage of 'Final Hearing', along with other matters being considered, covering the merits of the main case (including the Appellant's

conduct and qualitative analysis of its shareholding), which in the considered opinion, of this Tribunal, cannot be construed, in any manner, that the impugned order passed by the 'Tribunal' in the order dated order dated 27.11.2019 in Company Petition No. 20/2016(TP No. 248/2017) and the Company Petition No. 486/BB/2018, effectively, 'over rides', the earlier order passed by the Tribunal in IA 360/2018 and 17/2019, dated 30.05.2019, wherein it was held, that the Petition of the Appellant, was held to be maintainable and accordingly, this 'Tribunal', turns down the 'plea of the Appellant', as it is 'unworthy of acceptance'. Also, when the Tribunal, passes a 'Final Order' in the main 'Company Petition', the 'interim order' passed by it, will lose its 'sanctity', and pales into insignificance as opined by this Tribunal.

119. In regard to the stand of the 'Appellant', that the 'Tribunal', through its order dated 27.11.2019, had erroneously dismissed the company petition no. 486/BB/2018 resting upon the ground that the shareholding at the time of accrual of cause of action will be decisive of the maintainability of the petition, this Tribunal points out that it is the Appellant's plea that the Appellant's holding 19.83% shareholding at the time of filing of the petition could have maintained the underlying petition as per 'Law' and that the 'Tribunal' had erred in holding, that the 'shareholding', at the time of 'accrual of cause of action' will be 'determinative' of the 'maintainability of the petition' and consequently, had

wrongly held that the Appellant at the relevant point of time, was having less than 10% 'shareholding', at the relevant point of time, could not have maintained the 'petition.

120. The Learned Counsel for the R1, 11, 13 and 15, takes a 'plea', that the 'purported cause of action', in preferring the 'petition', in respect of the allegation of oppression and mis-management before the 'Tribunal' arose on 19.02.2015 and later, on 10.11.2015, 22.12.2015 and on 01.12.2015, respectively in reality, the Appellant's 'shareholding' in the Company, on each of the aforesaid dates was below 10% and indeed, as on 19.02.2015 the Appellant 'did not possess any shareholding' in the Company.

121. A perusal of Annexure R1 (vide volume 1 of the 1st Respondent's paper Book vide Dy. No. 17435 dated 03.01.2020) in respect of the Appellant's 'share movement' (consolidated) (Annexure R1) shows that the Appellant, on 19.02.2016 had 9.56% and 30.09.2016 possessed 19.83% of shareholding also in the order dated 30.05.2019 in IA No.360/2018 and IA No.17/2019 in CP No.486/2018 at paragraph 18, the 'Tribunal', had observed that the 'Applicants' / 'Respondents' had admitted in their pleading by contending that the Respondent/Petitioner, hold 10.32% of total 'paid up share capital', even at them of filing, earlier CP No.22/2016, and not it stands at 19.83%. Therefore, we are

of the view that the Respondent/Petitioner holds the required percentage as per law to maintain the main Company Petition. As per law, litigation cannot be thrown at threshold without going into the merits of the case'.

122. In this regard, it is pertinently pointed out, by this Tribunal, that the Appellant, after securing the 10% shareholding, had approached, the then 'Company Law Board' by preferring CP No. 22/2016, on 21.03.2016 and later, withdrew the said company petition on 20.08.2018 and projected the CP No. 486/2018 before the National Company Law Tribunal, Bengaluru Bench, pertaining to the purported action of 'oppression and mismanagement' which took place on the relevant dates.

123. A cursory perusal of the impugned order dated 27.11.2019 passed by the 'Tribunal', shows that in Company Petition No. 486/BB/2018 at paragraph 13(3) to (7) it was mentioned that:

> (3) It is settled *that as on 10.11.2015, Mr. Jitendra Virwani, the Petitioner admittedly was in possession of only 3.51% shareholding in the Respondent No.1 Company. Hence, the Petitioner is not entitled for any discretionary interim relief in the present petition.*
>
> *(4) That the Respondent No.11 M/s. Umiya Builders & Developers, is engaged in the business activities such as Real Estate Development, sales, marketing and property management*

is the Sole Proprietary concern of Mr. Aniruddha Mehta, the Respondent No. 13 herein. Further, the Respondent No. 13 along with Respondent No.15 Mrs. Gauri Mehta and Umiya Holding Private Limited, a sister concern of Umiya Group have purchased the shares of the promoters of the Respondent No.1 Company vide a Share Purchase Agreement dated 19.05.2016 after completion of all the procedures, approvals, formalities as per the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and other related guidelines and compliances, and accordingly the Respondent No.13 & 15 became the members of the Board of Directors of the Respondent No.2 Company with effect from 08.08.2016.

(5) The Petitioner was continuously perusing his grievance before the Hon'ble Civil Court till he acquired requisite 10% share holdings in the Respondent No.1 Company and thereafter also continued to accumulate the shares in the open market. After completing the accumulation of 10% shareholding, the Petitioner Mr. Jitendra Virwani also approached erstwhile Hon'ble CLB in C.P.No.22/2016 under section 397 of the Companies Act, asking for the nullification of the Resolution dated 22.12.2015, and the Joint Development Agreement dated 01.01.2016, along with prayer for certain interim reliefs. It is pertinent to note that the Hon'ble CLB vide its order dated 29.03.2016 has refused to grant any interim reliefs. Further, it is pertinent to note that the Hon'ble High Court vide its detailed order dated 28.04.2016 was pleased vacate the order of status quo vide its detailed order dated 28.04.2016 with specific

observation regarding the conduct of the Petitioner herein and Mr. Kumar Dinesh Seth against the Respondent No.1 Company and its activities for joint development of its properties.

(6) It is contended that in order to invoke the provisions of section 241 & 242, a person should have requisite number of shareholding in the Company on the date when alleged acts of oppression and mismanagement are complained of. In the instant case, cause of action or alleged acts of oppression and mismanagement were occurred on 22.12.2015 & 01.01.2016 and as stated above as on that dates, the Petitioner had only 4.12% & 4.27% shareholding respectively in the Respondent No.1 Company and hence, on this ground alone, the instant petition under Section 241 and 242 of the Companies Act, 2013 fails and liable to be rejected as not maintainable.

(7) The Petitioner being a minority shareholder at that point of time, if really was aggrieved by the actions of the Respondents, nothing prevented him from seeking relaxation or waive off of the mandatory requirements under section 244 (1) (a) & (b) to enable him to invoke the jurisdiction of this Tribunal under section 241 at that relevant point of time itself.

124. In this connection, this Tribunal relevantly points out that although Section 399 of the Companies Act, 1956 does not deal with the 'qualitative' aspect, but the Hon'ble High Court of Calcutta in the decision ***Jodh Raj Laddha and Ors. V. Birla Corporation Limited & Ors.*** reported in ***MANU/WB/0269/2011*** at

paragraphs 3(19) had clearly observed that *"……while examining the eligibility under Section 399, the qualitative aspect of a member should also be taken into account etc."*. More importantly, this Tribunal, points out that, the National Company Law Tribunal, Bengaluru Bench exercises equitable power with wide powers and it cannot be said that the 'qualitative' aspect of a Member, is not to be seen / examined by the 'Tribunal', at the time of filing of the Company Petition by a person concerned, seeking necessary relief.

125. Viewed in the above real perspective, this Tribunal, is of the 'cocksure' considered opinion, that although, the 'Appellant', held 10% as on date of filing of the CP No.486/2018, on 06.09.2018, but in respect of the events, that took place, before the 'Appellant', held 10% shareholding, then, it is held by this Tribunal, that he had not fulfilled the qualitative 'criteria', to sustain the 'Company Petition', in as much as, he had not possessed, the 'requisites shares', at the particular point of time, when the 'purported' 'cause of action' arose. As such, it is, 'safely' and 'securdly' concluded by this Tribunal, that the Appellant's / Petitioner's petition, in CP No. 486/2018, on the file of National Company Law Tribunal, Bengaluru Bench, on the date of filing of the petition, (on 06.09.2018), is, perfectly, 'maintainable', but he is precluded, from adverting, to the 'events', which took place, 'before he possessed / acquired, 10% shareholding in the Company'.

126. According to the Learned Counsel for the Appellant, the 'Tribunal', had committed an error, in not considering that the Notice dated 10.11.2015 and the 'Special Resolution' dated 22.12.2015 as 'void', inoperative' and 'nonest' in the 'eye of Law'.

127. In this connection the Learned Counsel for the Appellant points out that the 'Genesis', of the whole series of acts of 'oppression and mismanagement' lies in the 'illegal' and unlawful acts of the 'Board of Directors', in a 'purported meeting' that the took place on 19.02.2015, and that the management, knew the 'sale' and 'disposal' of the entire undertaking 1st Respondent / company was beyond its competence and is prohibited by Section 180 of the Companies Act, 2013, read with the Section 179 of the said Act and to save itself from the 'rigours' of the aforesaid provisions, the management brought the idea of a possible 'Joint Venture Agreement', to dispose of the entire undertaking / substratum of the company in favour of an unknown person, 'with no material information to the shareholders' for the first time by the Board, on 04.11.2015 while completely changing the Agenda, as was countenanced in the 'Meeting of the Board' dated 19.02.2015.

128. The Learned Counsel for the Appellant, proceeds to point out that at a purported 'Board Meeting', that took place, on 04.11.2015, another decision was taken, to dispose of, the entire undertaking/substratum of the company, in favour

of unknown person, 'with no material information to the shareholders' and put up the proposal of a 'Joint Venture Agreement', for development, of the entire land of the 1st Respondent /Company, through Postal Ballot, vide notice dated 10.11.2015 and in fact, the Board Resolution, dated 19.02.2015 was passed for disposal /sale of the property, and not for execution of 'Joint Venture Agreement'. Moreover, it did not authorise, Respondent No.2 & 5 to enter into a Joint Venture Agreement and that the Tribunal, had committed an error in not declaring the notice dated 10.11.2015, the explanatory note attached thereto and the consequent resolution passed by the shareholder on 22.12.2015, as invalid, non-operative and nonest, on account of statutorily non-compliance, insufficient information and 'opaque' in rendering the resolution passed in sequel thereto, as legally and statutorily invalid. Advancing his argument, of the Learned Counsel for the Appellant, contents that a special resolution is void and nonest in the eye of Law, as there was 'No Authority', to issue Notice dated, 10.11.2015, as neither any date for meeting was fixed nor a draft notice, Agenda or Explanatory statement was approved by the Board in violation of secretarial standards which are mandatory under Section 118 of the Companies Act.

129. The Learned Counsel for the Appellant, contends that, it has no disclosure of any name, as to with, whom the 'Joint Venture' was to be entered into and no terms and conditions of joint venture particularly, 'price' and other monetary

consideration/terms, Development of Area and Benefits to the company, were placed before the Board or the Shareholders, as an individual cannot be authorised to approve the said terms. As such, the 'notice', is 'ineffective' and void, and further it does not permit Application of mind, by the shareholders, whose Approval, is required. Indeed, the majority shareholders were 'devoid of any information'. Besides, this, the purported 'Explanatory Statement', does not disclose any material or relevant information and hence, the alleged notice, is an illegal and void one. Moreover, the purported Joint Development Agreement' was ever placed before the 'shareholders' and 'blanket approval' was sought.

130. According to the Appellant, the impugned 'Ballot notice' was not issued, or circulated, as per Rule 15, 20, 22 of the Companies (Management and administration) Rules, 2014. As a matter of fact, 'voting' via postal ballot was not conducted as per Rule 21, of the Companies (Management and Administration) Rules, 2014 which obligates that two scrutinisers should remain present during the time, when voting takes place. Rule 21, further stipulates that the votes shall be counted by two scrutinisers and Report to be submitted to the Chairperson of the Meeting, shall be counter-signed by both the scrutinisers.

131. Repelling the submissions of the Learned Counsel for the Appellant, the Learned Counsel for R1, 11, 13 & 15 contends that the 'Board', as per the Minutes of its Meeting on 04.1.2015, had approved the issuance of Postal Ballot notice,

(vide page 710 of Appeal Paper Book, Vol. –V, of the Appellant), clearly explaining the reasons for entering into Joint Venture / Joint Development Arrangement and further, the said 'Explanation' was mentioned in the Explanatory, statement enclosed with the 'postal ballot notice', in terms of Section 102 of the Act (vide Annexure-6, page 714, Vol-V, of Appellant's Paper Book, thus, providing to shareholders, the requisite information in regard to the nature of the transactions proposed and thereby enabled them, to make an informed a decision, while voting in favour of joint development.

132. The clear cut stand of the R1, 11, 13 & 15 is that the 'determinations', in respect of 'commercial details', proposed to be entered into by the 'Company', including the details of the contracting party, essentially, relate to the Business of the Company and these are all matters of negotiations between the 'Board of Directors' of the Company, and third parties, concerning, 'sensitive information'.

133. The Learned Counsel for R1, 11, 13 & 15, points out that there is no requirement for the 'Board', to disclose the 'information' to its shareholders', and in fact, 'shareholders' are 'not competent to delve into and determine' these matters'. Moreover, Section 173(2) of the Companies Act, 1956 (similar to Section 102 of the Companies Act, 2013) ought to be understood in a 'meaningful manner' and not to be construed rigidly, so as to hamper the Conduct of the

Business. As such, the Postal 'Ballot Notice' and the enclosed Explanatory statement, were complied with, as per requirement of Section 102 of the Companies Act, 2013.

134. It is pointed out by this Tribunal, that any Resolution passed without fairly disclosing the 'facts and information', will be 'void' as per decision, in ***Kaye vs Croyden Tranways Co. (1898) 1 CH 358***. Also that, in respect of the allotment of the fact of 30,55,329 shares, to the 2nd Respondent, for surplus of medical equipment, was actually known to the petitioner, failure to give an 'Explanatory', along with Notice, the 'Company Law Board' held that the 'Meeting' and the 'Resolutions' would make no difference passed on 16.09.2006 and therefore, would not become void for want of 'Explanatory' statement with Notice as per decision in ***Sajal Dutta V. Ruby General Hospital Ltd., reported in (2010) 194 Comp. Cas. 16 (CLB)***.

135. It is to be remembered that Section 102 of the Companies Act, 2013 (173 (8) of the 1956 Act.) is 'Mandatory', and not 'Directory'. Further, if a 'shareholder' was 'aware of facts, relating to Resolution', later on, he cannot complain of 'insufficiency' of notice, or irregularity. Such a shareholder if he is present, in a 'Meeting', must point out to the 'Chairman' of the 'Meeting', about such an irregularity, before, the Meeting', proceeds with the 'Agenda'.

136. The intention of Section 102 of the Companies Act, 2013, is to enable the 'shareholders', to take an Informed Decision, in respect of each 'item of business', to be transacted and in case, 'any Director', 'Manager' or Key Managerial personal is interested in any item, he ought not to participate in deliberation or in a 'decision process', when such item being considered in the 'Meeting'. It is just necessary to 'Annexe' 'A Statement' of Material Facts, of 'items of special Business' along with Notice of Meeting.

137. At this stage, this Tribunal, ongoing through the Minutes of the Board Meeting of the Directors of 1st Respondent / MRO-Tech Limited dated 04.11.2015 and also looking into the 'Postal Ballot Notice' and the enclosed 'Explanatory statement', is of the considered view' that in respect of the Business of the Company, the shareholders cannot take a call or any decision in the matter and it is for the Board of Directors of the Company, to have talks / negotiations with parties concerned and in any event, the 'Postal Ballot Notice' and the enclosed 'Explanatory statement', are fulfilling the requirements of Section 102 'statement to be annexed to Notice'. As such, the 'contra plea', taken on behalf of the Appellant, is not acceded to by this Tribunal.

138. In this connection, this Tribunal, points out that the Appellant, in his 'Reply' dated 09.12.2015 (for the e-mail dated 18.11.2015 (DP ID & Client ID: IN302-15) addressed to him as a shareholder of MRO-Tech Limited) had stated

that, ‘as a shareholder of the Company’, this notice does not allow him to exercise, any informed choice, while participating in the voting etc. and in fact, the Appellant, had mentioned that he had not received the physical copy of the ‘Notice’ or the ‘Postal Ballot’ form and was not provided with the password, which was required for participating in the ‘e-voting’.

139. At this stage, this Tribunal, points out that the Reply, dated 09.12.2015 (while responding to the e-mail dated 18.11.2015), was furnished by the Appellant, which indicates, that the Appellant, was in the ‘know of thing’, as on 10.11.2015, being the date of issuance of the ‘Postal Ballot Notice’, and further that the 1st Respondent/ Company, was in the process of collating, the information from ‘prospective developers’, in respect of the ‘Joint Development’ of its property. In any event, the ‘information’, cannot be ‘’parted’ or shared’, with the ‘shareholders’, either in the aforesaid ‘Notice’, or ‘Explanatory Statement’ as opined by this ‘Tribunal’.

140. In so far as, the plea pertaining to the non-mentioning, in the ‘Postal Ballot Notice’, of the intention of the R2 to R7, to sell the shares, in the 1st Respondent Company to the R12, 13 & 15, taken on behalf of the Appellant, it is pointed out by this Tribunal, that as on the date of issuance of ‘Postal Ballot Notice’, there was no intention on R2 to R7’s or R12, 13 & 15 part, to sell their ‘shares’ on the 1st Respondent Company, and the averment made in the absence of any

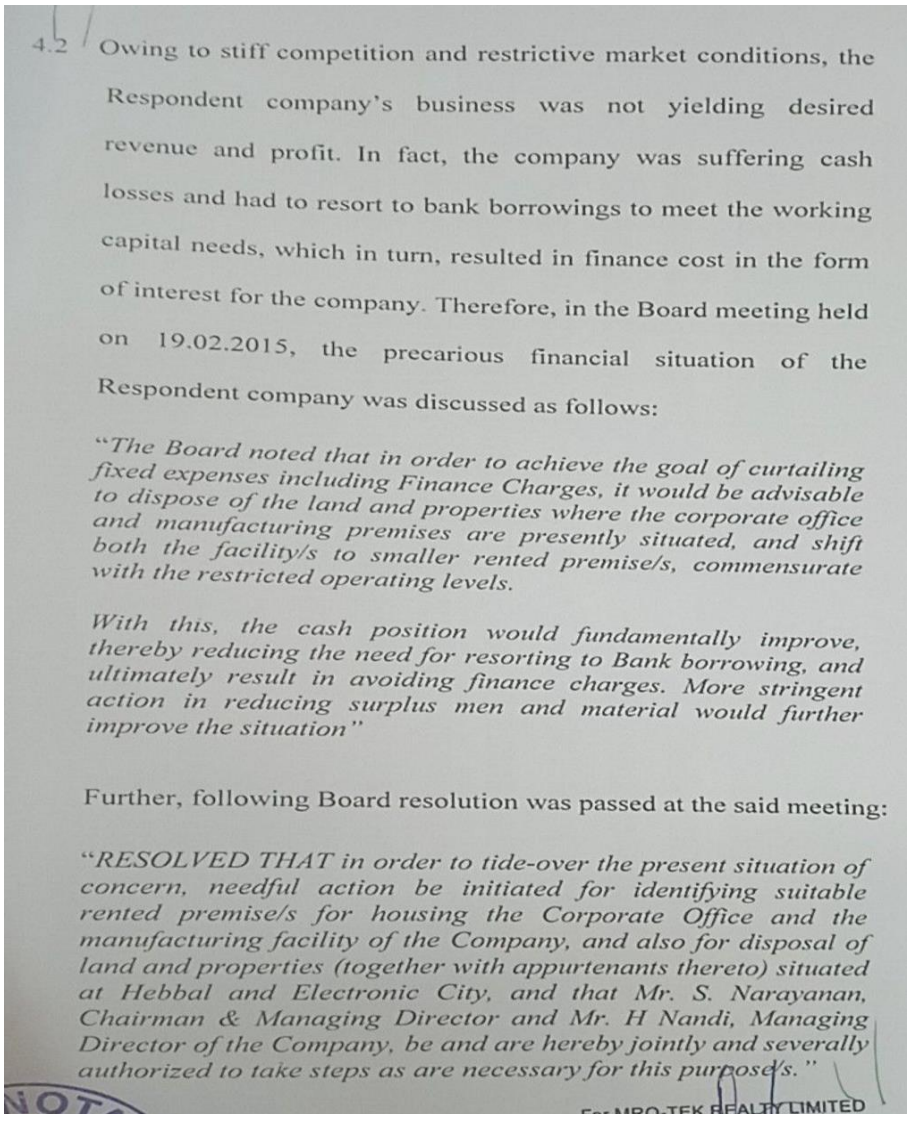
intimation, falling back upon 'assumptions' cannot hold water. Looking at from any angle, there is, no requirement on the part of Appellant, to assume things, in his own manner. Viewed in this background, there is no requirement, to part with information, in respect of the 'Postal Ballot Notice', of 10.11.2021. Resultantly, the non-disclosure of the contents of 'Postal Ballot Notice', cannot be termed as an 'irregularity' or any legal 'infirmity', as opined by this Tribunal.

141. It is relevantly pointed out by the Tribunal, 91.13% of the shareholder / 1st Respondent Company, being present, and 'voted for', had realised, the requirement for entering into a development, in regard to the Company's property with a view to enable the recurring cash flow, finally took an informed decision, which culminated, in passing a Resolution, dated 22.12.2015 benefitting the '1st Respondent / Company' and all its 'majority' and 'minority' shareholders.

142. The Learned Counsel for the Appellant, points out that the whole series of acts of 'Oppression and Mismanagement' lies, in the illegal, and unlawful acts, of the 'Board of Directors' in a purported meeting, that took place on 19.02.2015. But the' Management' knew that 'sale and disposal' of the 'whole undertaking' of the 1st Respondent / Company, was beyond its competence and is prohibited by Section 180 of the Companies Act, 2013, read with Section 179 of the Companies Act, 2013 and to save itself, from the rigours of the above mentioned provisions, the management, brought the idea of a possible Joint Venture

Agreement, to dispose of the entire undertaking/substratum of the Company in favour of unknown person with no material information to the shareholders for the first time by the Board on 04.11.2015 while completely changing the agenda as was countenanced in the meeting of Board dated 19.02.2015.

143. In this regard, this Tribunal, points out that the 1st Respondent / Company in its Reply, to Company Appeal (AT) (CH) No. 363/2019 at paragraph 4.2 had averred as under:



4.2 Owing to stiff competition and restrictive market conditions, the Respondent company's business was not yielding desired revenue and profit. In fact, the company was suffering cash losses and had to resort to bank borrowings to meet the working capital needs, which in turn, resulted in finance cost in the form of interest for the company. Therefore, in the Board meeting held on 19.02.2015, the precarious financial situation of the Respondent company was discussed as follows:

"The Board noted that in order to achieve the goal of curtailing fixed expenses including Finance Charges, it would be advisable to dispose of the land and properties where the corporate office and manufacturing premises are presently situated, and shift both the facility/s to smaller rented premise/s, commensurate with the restricted operating levels.

With this, the cash position would fundamentally improve, thereby reducing the need for resorting to Bank borrowing, and ultimately result in avoiding finance charges. More stringent action in reducing surplus men and material would further improve the situation"

Further, following Board resolution was passed at the said meeting:

"RESOLVED THAT in order to tide-over the present situation of concern, needful action be initiated for identifying suitable rented premise/s for housing the Corporate Office and the manufacturing facility of the Company, and also for disposal of land and properties (together with appurtenants thereto) situated at Hebbal and Electronic City, and that Mr. S. Narayanan, Chairman & Managing Director and Mr. H Nandi, Managing Director of the Company, be and are hereby jointly and severally authorized to take steps as are necessary for this purpose/s."

For MBO TEK REALTY LIMITED

144. According to the 1st Respondent / Company, after the passing of the Board Resolution, the 'Appellant', got in touch with the management of Respondent / Company and expressed a desire, to purchase the Company's property is Hebbal. Further, due to the low price offered by the Appellant and certain other considerations, the management of the Company had not sold its 'Hebbal property' and that apart, the 'Appellant' was not a shareholder in the Respondent / Company at the time of offering to purchase the 'Hebbal property'. Later, on the Appellant offered to purchase the 'Hebbal property' was turned down, he began to 'acquire' the shares of the 1st Respondent / Company, through open market transactions, only from 13.09.2015 and had come to own about 31.6% shareholding (5,90,675 shares) by 02.10.2015.

145. Also that, according to the 1st Respondent / Company, in the 'Board Meeting' that took place on 04.11.2015, it was decided that the company should explore the possibility of a 'Joint Venture Agreement' with a reputed Business House for Joint Development / Lease / Sale of Company's properties or any part thereof and the following 'Board Resolution' was passed:

> *"RESOLVED THAT subject to the approval of the Shareholders as envisaged under Section 180(1)(a) of the Companies Act, 2013 and in continuation of the deliberations held earlier in the Board Meeting on 19th February, 2015, and in order to meet the fund needs, approval be and is hereby accorded to enter in to suitable*

Joint Venture Agreement with any reputed Business House to be finalized after careful negotiation on all the terms and conditions and that such Arrangement may include development of the properties of the Company in any manner including, but not limited to, the Company acting as Joint Developer along with the Business House or lease or sell, or dispose off, the whole or substantially whole or part of the undertakings of the Company, wherever, along with the appurtenants thereto.

RESOLVED FURTHER THAT in terms of Sections 180 and 110 of the Companies Act, 2013 read with the applicable Rules thereto, approval of the Shareholders be sought for the above proposal by way of Special Resolution through Postal Ballot."

146. According to the Learned Counsel for the R1, 11, 13 and 15, the 11th Respondents, was selected as the Successful Developer, for the 'Joint Development transaction' through a 'fair and transparent process', as seen, from the Minutes of the Board Meeting, dated 24.11.2015.

147. In reality, a mere glance of the 'Minutes of the 4th Meeting for the Financial year, 2015-16 of the Board of Directors / MRO-Tech Limited, that took place on 24.12.2015 at 9:30 a.m. at the registered office of the Company at Bellary Road, Hebbal Bangalore, indicates that the 'Board' had noted, and took on record of the Minutes of the Previous Audit Committee meeting that took on 04.11.2015 and also that the Board had reviewed the Scrutinisers Report dated 22.12.2015

furnished by the Scrutinizers appointed for the purpose of 'Postal Ballot' and it was informed that due notification of these results was made to the stock exchanges. As a matter of fact, the 'Board' had noted that the Resolution Proposed was passed with the requisite 'majority'.

148. According, to the 1st Respondent / Company Shareholders approved by the requisite majority through the Postal Ballot the proposal, as per the scrutinizer's report dated 22.12.2015. Further, in the interregnum, the Company, had commenced, discussed, with prominent builders, in India, for the development of property, situated at Hebbal, Bangalore. In fact, the 'Management', took the view that the shareholders of the Company, are disqualified for participation, in the development project to avoid the conflict of interest, which is in line with 'Corporate Governance', followed hitherto.

149. Added further, the 1st Respondent / Company had not invited the 'Embassy Group', since, its Chairman and Managing Director, Mr. Jitu Virmani, had 655538, shares, and RBD Shelters LLPs, since its Managing Partners, Mr. Austin Roach, Mrs. Hilma Road, had 110350 shares & 957 Shares respectively, as on 06.11.2015, the 'cutoff' date considered for issue of Postal Ballot Notice to the shareholders.

150. According to the Learned Counsel for the R1, 11, 13 and 15, after the execution of the 'Joint Development Agreement' dated 01.01.2016, R2 to R7, with a view to the dispose of a shares in the 1st Respondent / Company, entered into a Share Purchase Agreement with the R12, 13 & 15 for filling the shares and the R12, 13 & 15 undertook the process of 'open offers' and that the 'Appellant' could have taken part, in the 'Open Offer Process' and purchased the 'shares' of the R2 to R7, but the 'Appellant', had not resorted to such a 'course of action'.

151. The Learned Counsel for the R1, 11, 13 and 15, points out that the allegations of the 'Appellant', that the 'selling' of entire shareholding by the erstwhile promoters to the R12, 13 & 15 and after entering into the 'Development Agreement', was a 'subterfuge' and part of purported devious scheme, are emanating, out of pure 'conjuncture' and 'surmises', without any material brought forth in support of such allegations, by the 'Appellant'.

152. The Learned Counsel for R1, 11, 13 and 15 refers to the judgment of the Hon'ble Supreme Court in ***IFB Agro Industries Limited V. SICGIL India Limited and Ors.*** (vide Civil Appeal No. 2030/2019 dated 04.01.2023), wherein at paragraph 37 & 38, it was observed, that 'such actions', 'which fall' within the jurisdiction of 'SEBI' and the 'National Company Law Tribunal' cannot under

Section 59 of the Companies Act, 2013 cannot exercise, a parallel jurisdiction, with 'SEBI', for addressing the 'breach' of 'SEBI Regulations'.

153. The Learned Counsel for R1, 11, 13 and 15 points out that the Appellant had filed two complaints, before SEBI, before agitating the issue of share transfer, before the Tribunal, but they proved 'futile'. In regard to the share acquisition process, being disrupted, the Appellant, filed a civil suit, and later he withdrew the same through an undertaking, before the Hon'ble High Court of Karnataka, in the 'Appeal' proceeding (vide Annexure R7, Pg. 85 and 93 of R1's 'Appeal' paper book, Vol.-1). Also that, as per R1, 11, 13 & 15 version is that such 'share purchase,' was approved duly by the 'SEBI'.

154. It is projected on the side of R1, 11, 13 & 15, that the 'Joint Development Transaction', as averred by the Appellant had culminated, in construction / development of a commercial building, of a commercial complex of which, the 1st Respondent / Company owns more than Rs.2 lakhs sq. ft. and continues to retain ownership, in respect of 'proportionate undivided shares', in the Land comprising the said development, and through the utilisation of its share, of such developed property, the 1st Respondent / Company, had garnered potential, to generate rental revenue, of Rs.1.25 Cr. per month, and thereby fructifying, the original intention, of the 'complained transaction'.

155. Besides the above, the simultaneous with the execution of Joint Development Agreement, on 01.01.2016, the 1st Respondent / Company had received funds to extent of Rs. 9 cr. as non-refundable security deposit, which funds the 1st Respondent / Company used to resolve the cash crunch and help keep in its business afloat and profitable. Therefore, the averment that 1st Respondent / Company has not received any benefit from the Joint Development and that the said transaction affectively let to the winding up of the 1st Respondent / Company is an incorrect one as contended on behalf of R1, 11, 13 & 15.

156. It must borne in mind, that a mere irregularity, or any infirmity, or any illegality on the part of a 'Company', in its governance relating to its affairs, that will not be characterised as a harsh or burdensome one and in any event, a petition for an 'oppression' and 'mismanagement' will not lie before a 'Tribunal'.

157. As far as the present case is concerned the 'Postal Ballot Notice', dated 10.11.2015, issued by the 1st Respondent / Company along with its 'Explanatory statement', satisfies the ingredient of Section 102 of the Companies Act, 2013 and further, that the 91.13% of the shareholders of the 1st Respondent / Company who were present, and voted, appreciated and understood the requirement for entering into a development, in regard to the company's properties with a view to enable the company to have a recurrence of cash flow and ultimately passed

the resolution 12.12.2015 , in benefiting the 1st Respondent / Company and its shareholders (inclusive of majority/minority shareholders). In the instant case, the Appellant, had 'voted' against the Resolution, for 'Joint Development'. Viewed in that prospective, without any haziness, this Tribunal, holds, that the 'Notice dated 10.11.2015, and the 'Special Resolution' dated 22.12.2015, are just, fair and valid one, in the eye of Law and the point is so answered.

158. Coming to the aspect of the plea of the Appellant, that the 'decision', to enter into a 'Joint Venture Agreement' and 'Joint Development Agreement' dated 01.01.2016, was in negation, of the 'Memorandum' of Association, of the Company, and violative of 'Fiduciary Duties of 'Directors' of the Company. This tribunal pertinently points out that the 1st Respondent / Company had invited, leading Land Developers, in Bengaluru, to make the best possible offers, commensurate, with the total area of land, offer of constructed area to the 'Landlord', 'FAR', ''adopted', advance Amount, 'Rental Value', and offer validity period and on this aspect, numerous rounds of negotiations, took place, between the 1st Respondent / Company, and the aspiring Developers, and as a matter of fact, the 1st Respondent / Company had received proposals from victory infrastructure, Umiya Builders & Developers (Respondent No.11 herein), 'Brigade Group', 'Puravankara', and 'Salarpuria' & 'Sattva Group' for the 'Joint Development' of the aforesaid properties, of the Respondent No.1 / Company and

in fact, the majority of the shareholders viz. 91.13% of the shareholders of the 1st Respondent / Company, (consequent to the issuance of 'Postal Ballot' dated 12.11.2015, and voting thereto), had voted in favour of entering into Joint Development of the properties, and resting upon the 'majority, consent of the shareholders' a 'Special Resolution' was passed on 22.12.2015, authorising the 'Board of Directors', to enter into a 'Joint Venture' with reputed 'Business House' to develop the properties, of the 1st Respondent / Company.

159. It comes to be known, that the 'Board of Directors', of the 1st Respondent / Company after 'shortlisting', (in respect of the various proposals received thereto) and made complete assessment of the prospective developers, had passed the Resolution, in its Board Meeting, that took place on 24.12.2015, to execute a 'Development Agreement' with 'M/s Umiya Builders' and 'Developers', (11th Respondent) for the 'Joint Development' of the 1st Respondent / Company's property, 'Hebbal'.

160. According to the R1, 11, 13 & 15, 'M/s Umiya Builders' and 'Developers' possesses the 'Technical' and 'Financial' capability to finish any project, being undertaken by it, including the development project under issue. Also that, it is brought to the notice of this Tribunal, but ''M/s Umiya Builders', had successfully completed 'sixteen construction projects' and further seven

construction projects, (commercial and residential) are going on Bengaluru and Goa.

161. It is the version of the R1, 11, 13 & 15, that the 1st Respondent / Company had entered into a Registered Development Agreement, with 11th Respondent ('M/s Umiya Builders and Developers') on 01.01.2016, in respect of the 'Joint Development' of the Property at 'Hebbal' whereby and where under. It was agreed that the 1st Respondent / Company would provide the above said property to the 11th Respondent for the purpose of development, and 'M/s Umiya Builders and Developers' would at its expense, construct a 'Multi Storey Commercial Complex', thereon, comprising of Lower Basement, Upper Basement, Ground floor plus 12th Floors.

162. On behalf of R1, 11, 13 & 15, it is pointed out before this Tribunal, that a 'Power of Attorney', document, was executed by the 1st Respondent / Company, to and in favour of 'M/s Umiya Builders and Developers', to facilitate the development of its property, as aforesaid in the manner has prescribed in the 'Joined Development Agreement'. Further, the 11th Respondent had paid, the 'non-refundable deposit of Rs.9 crores, by means of a Supplementary Agreement, dated 04.01.2016 (Registered one), and Registration cost of Rs.434,16,22/- was

incurred, in regard to the 'Registration of Development and Supplement Agreement'.

163. According to the R1, 11, 13 & 15, the 11th Respondent / 'M/s Umiya Builders and Developers', being the 'Sole Proprietary concern' of the 13th Respondent (Mr. Aniruddha Mehta) and that the 13th Respondent together with the 15th Respondent (Ms. Gauri Mehta and Umiya Holding Pvt. Ltd. / sister concern of Umiya Group) had purchased the shares of the promoters of the 1st Respondent / Company as per Share Purchase Agreement dated 19.05.2016, after fulfilling all the procedures, formalities and approval, in terms of the 'SEBI' Regulations, 2011 etc. Thus, the 13th and 15th Respondents, became the 'Members of the Board of Directors' of the 2nd Respondent / Company, from 08.08.2016.

164. It is projected on the side of R1, 11, 13 & 15, that the Appellant / Petitioner began, acquiring the shares of the 1st Respondent / Company from 30.09.2015 in the open market, and he made a halt, in regard to the acquiring of shares after he had reached the accumulation, of 19.83% shareholding, on 30.09.2016. In this connection, it is brought to the notice of this Tribunal, that the Appellant / Petitioner, (within a year) had increased a 'shareholding' from 3.16% (5,90,675 shares) on 30.09.2015 to 19.83% (37,04,684 shares) on 30.09.2016, by acquiring in the open market. Also that the current shareholding pattern of the Promoter and

Promoter Group is (53.89% shareholding in the company) and also the General Public including the Appellant / Petitioner (46.11% shareholding in the Company).

165. According to the R1, 11, 13 & 15, the reason for the Appellant / Petitioner acquiring shares, is only to have a say, in the affairs of the 1st Respondent / Company, and to harass, the Respondents, and to stall the development of the property, of the Company.

166. It cannot be gainsaid, that the original 'Memorandum of Association', of 1st Respondent / MRO-Tech Reality Ltd. / Company deals with Part-III(B) under the caption objects incidental ancillary to the main objects and enjoins B(2) 'to enter into partnership or into any arrangement with any person or firm or Company whose objects of the Company'. Indeed, clause 24 points out 'to sell or let out on hire all or any of the property of the Company, whether moveable or immovable including all and every description of apparatus or appliances, and to hold, use, cultivate, work, manage, improve, carry on and develop the undertaking, land and immovable and movable properties and assets of any kind of the Company or any part thereof.

167. Moreover, another Ballot Notice dated 09.02.2016, was issued, in terms of Section 110 of the Companies Act, 2013, to the Members of the Company, among

other things, proposing to alter the 'name of the Company', from 'MRO Tech Ltd.' to 'MRO-Tech Reality Ltd.' to alter the Memorandum of Association' of Company, including its main 'objects'. A Report, dated 19.03.2016 was filed by the scrutiniser, whereby it was declared, that the 'Proposed Resolutions' were passed with the requisite majority and based on the scrutinised report, the 'Chairman' proceeded with the 'Resolution' by altering the name of the Company and altering the objects, suitably, as per his Report dated 19.03.201.

168. It is brought to the Notice of this 'Appellate Tribunal', that the Tribunal (NCLT) had not interfered with the 'Development Agreement' because it was conclusive, viz., the project was completed without any interference.

169. In the light of detailed forgoing's, on a careful consideration of respective contentions advanced on either side, this 'Tribunal', comes to an 'inescapable and irresistible' that the joint transaction, had culminated in the 'construction / development of a commercial building of a commercial complex' and that 'just on a transparent process, was undertaken, in regard to the selection of the '11th Respondent' as 'Successful Developer', for the 'Joined Development, transaction, as seen from the Minutes of the Board Meeting, dated 24.11.2015 (vide pg. 293, Vol.-II of the Appeal Paper Book). Viewed in this background, the contra plea, taken on behalf of the Appellant, that the determination, to enter into

'Joint Venture Agreement' and 'Joint Development Agreement' dated 01.01.2016 were in breach of 'Memorandum of Association' of a Company, and against the 'Fiduciary' duties of Directors, are not acceded to, by this 'Tribunal' and the point is so answered.

170. Dealing with the plea of the Appellant, that the 'Tribunal', went wrong, in not holding that 'invalid', 'illegal' and 'malafide' transfer of the entire shareholding of R2 to R10, constituting 39.66% in favour of R12 & 13 was an 'oppressive' one, the submission of the Learned Counsel for the Appellant, is that after the 'transfer of land', by way of 'Joint Venture' to the 12th Respondent, the execution of a 'Share Purchase Agreement' dated 19.05.2016, by R2 to R7, transferring entire promoter shareholding , in favour of R12 & 13, thereby effecting, an 'entire change of control', within a period of 5 months, of alienating the whole substratum of the 1st Respondent / Company and further that among the numerous acts, of 'oppression' and 'mismanagement', the worst act of 'Oppression' and 'Mismanagement', against the interest of shareholders and prejudicial to public interest was illegal and unlawful transfer of promoter shareholding by R2 & 5 along with the relatives etc., it is pointed out on behalf of R1, 11, 13 & 15, that after the execution of Joint Development Agreement dated 01.01.2016, R2 to R7, to dispose of their shares, in the 1st Respondent / Company had entered into a Share Purchase Agreement, with the R12, 13 & 15

for selling the said shares and R12, 13 & 15, had undergone the 'process of open offer' by satisfying the requirements of 'SEBI Regulations', (inclusive of the 'substantial Acquisition of Shares' and Takeovers, Regulations, 2011) and other related 'Guidelines'.

171. Before this Tribunal, the 5th Respondent, by way of 'objections', in the instant 'Appeal', had mentioned that the 'Transfer of shares', by the promoters, under the 'Share Purchase Agreement', dated 19.05.2016, was as per 'Law' and was followed by the 'mandatory', 'public offer' as per 'SEBI Takeover Code and Regulations'. More specifically, it is brought to the notice, of this Tribunal, on behalf of R1, 11, 13 & 15, that such 'share purchase' was duly 'approved' by the 'SEBI'. Furthermore, according to R5, 2 to 4, 6 to 10, 17 & 19, the said 'Transfer of Shares', is not an act of 'oppression' and 'mismanagement' against the 'shareholders' of the '1st Respondent / Company', because of the candid fact that subsequent to 'Transfer of Shares' the Appellant / Petitioner, went on purchasing the shares of the 1st Respondent / Company from 'open market'. In fact, the Appellant's 'shareholding' in the Company as on 19.05.2016, was 10.34% and today, his shareholding is 19.83%.

172. When there is a violation, of 'SEBI Regulations', a 'Member' of a 'Company' cannot ask for, 'Rectification of Register', although, the 'Company', itself, can apply for such 'Rectification'.

173. Under the ‘Companies Act, 2013’, a Member of a Company, is not one of them, competent, to prefer an ‘Application’, for ‘Rectification’. (i) ‘Any Depositary’, (ii) ‘The Company’, (iii) ‘The Depositary Participant’, (iv) ‘The Holder of Securities’ and / or the ‘Securities and Exchange Board of India’, can seek for ‘Rectification’ of ‘Register’.

174. In granting the Application for ‘Rectification’, it is necessary, to determine other issues concerning ‘complicated’, ‘questions of Law and Fact’, and ‘disputed questions of title’, right etc. then the ‘Company Court’ / ‘Tribunal’ may direct the parties to get their disputes, decided by the ‘Competent Civil Court’, in a Trial, in appropriate proceedings as the case may be.

175. At this juncture, this Tribunal, pertinently points out that, the Appellant, had filed ‘two complaints’ before SEBI, in relation the ‘Share Transfer Issue’, but it proved ‘futile’. Also, this Tribunal, on a meticulous rumination, of respective contentions, advanced, on either side, holds, that in regard to the ‘controversies’ / ‘disputes’, relating to the ‘Transfer of shares’, which fall within the ambit of SEBI jurisdiction, the ‘National Company Law Tribunal’, is ‘not the Competent Fora’, to go into the aspects of ‘purported breach’ of ‘SEBI Regulations’. Looking at from any angle, this Tribunal comes to a consequent conclusion the Appellant the transfer of shares by the ‘promoters’, as per ‘Share Purchase

Agreement' dated 19.05.2016 executed by R2 to 4 transferring their promoter shareholding, constituting 39.66% in favour of R12, 13 & 15 is 'not an invalid', 'illegal' and 'malafide transfer' of the entire shareholding of R2 to 10 and in any event, such 'Transfer of Shares', cannot be construed, to be an act of 'oppression' and 'mismanagement' in the 'Eye of Law' and the point is accordingly answered.

176. It is pointed out by this Tribunal, that under Section 241 of the Companies Act, 2013, a remedy, is available to a 'minority shareholder' against an act of 'oppression', by the majority, shareholders, by their continuous acts. It has no application for redressal of 'grievances' and 'wrong acts' of management of the Company, as per decision Suresh Kumar Sanghi v. Supreme Motors Ltd., 1983, 54 Comp.cas 235 (Del).

177. A shareholder, who claims relief under Section 397, 398 of the Companies Act, 1956 (now Section 41, 242 under the Companies Act, 2013) must satisfy the Court / Tribunal, that he is a 'shareholder' of a company, by means of allotment of Shares, in his favour, which is evidenced not only by the Register of Members, but also, by the 'Statutory Returns' and 'Documents', maintained by the Company. Also that, the jurisdiction of a 'Tribunal', under Section 241 of the Companies Act, 2013 is an 'equitable jurisdiction' and governed by 'Regulations' framed under 'Law' and 'Principles of Natural Justice', in the 'earnest opinion', of this 'Tribunal'.

178. The ‘onus’, to establish ‘Membership’ is on the Petitioner, and it is up to him to prove, that he is a Member, of a Company, ‘on the day’ of filing of petition. When he is not a Member of Company, he cannot allege ‘Oppression’, to invoke, Section 241 of the Companies Act, 2013, against the Company, as opined, by this ‘Tribunal’.

179. There is ‘no straight jacket cast iron formula’, specified, to define the ‘term’, ‘oppression’ and ‘mismanagement’. A ‘single act’ may not be enough for the grant of relief of ‘oppression’, and ‘continuous course, of oppressive code of conduct’, on the part of the ‘Majority Shareholder’, is very much necessary.

180. In respect of the Appellant / Petitioner, in CP No. 22/2016, when the ‘cause of action’ had arisen, to enable him, to commence the litigation, in February, 2015, in terms of the ‘consolidated’ shares movement statement filed by the Respondent, showed, that the Appellant / Petitioner, as on 02.10.2015 was possessing 590695 shares (3.16%), which by efflux of time, rose to 9.65% as on 26.02.2016 and later, increase to 10.34% onwards.

181. It is significantly pointed out by this Tribunal, that in CP No. 22/2016 (TP No. 8/2016), filed before the then, Company Law Board, Chennai (under Sections 379, 398, 40, 403, 406 of the Companies, Act, 1956), was preferred on 21.03.2016. The Appellant / Petitioner had averred, that he was the ‘shareholder’

of the Company by possessing 19,32,596 shares, equal to 10.34% of the paid up share capital.

182. When the Appellant / Petitioner filed CP No. 486/BB/2018, on 06.09.2018, he averred that, he holds, 37,05,684, Equity Shares of Rs.5/- each, amounting to 19.83%, of the 'paid up share capital'. The Appellant, withdrew his former petition, in CP No. 22/2016, on 20.08.2016 and filed CP No. 486/2018 before the NCLT, Bengaluru Bench, in regard to the purported acts of 'oppression' and 'mismanagement' that took place, on the specific dates of 'cause of action' that had 'arisen'.

183. The ingredients of Section 242 of the Companies Act, 2013 has 'no application', whatsoever, for redressal of 'grievances of wrong acts', of the management of a company. A mere, 'illegal' or invalid acts would not be termed as acts of 'oppression'.

184. It is relevantly pointed out by this Tribunal, that the term, 'shareholder', for the purpose of Section 241 of the Companies Act, 2013, is to be understood in widest import, to 'include persons', 'whose names', are not 'borne', on the Register of Members, but who have an 'indefensible' right, to 'shares', as per decision in ***Shree Balaji Textile Mills (P) Ltd. v. Ashok Kaule*** reported in ***(1989) 66 Comp. cas. 654 (Kar)***.

185. A ‘petition’ ought not to be dismissed, at the initial level, because no ground of ‘oppression’ and ‘mismanagement’ is made out. Also, that Section 241 of the Companies Act, 2013, is available, to protect the interest of ‘shareholders’ if their, interest, rights, are ‘unfairly’, and malafide dealt with, to cause ‘prejudice’.

186. As far as the plea, of the Appellant, that the ‘Tribunal’ had placed reliance on ‘orders’ relating to earlier litigations, to find out the Appellant’s conduct, this Tribunal, relevantly, points out, that the NCLT (Tribunal) in the order dated 27.11.2019, had not only looked into the orders, granted in earlier TP No. 88/2016 but also, separately / independently, took into consideration of the Appellant’s ‘bonafide’, in preferring, various proceedings, before numerous forums, before approaching it, and that the ‘Tribunal’ is well within the ambit, ‘to look into the same’, with its ‘inherent powers’, in the earnest opinion of this Tribunal.

187. Furthermore, the ‘Tribunal’ is within its powers, to look into the earlier order passed in COP No. 20/2016 and the observations made, to ascertain the bonafides of the ‘Appellant’, and there is no fetter, in Law, in this regard. Besides this, the observations, made in COP No. 20/2016, made by the Hon’ble High Court of Karnataka in regard to the conduct and bonafide of the Appellant, were not assailed before the earlier forum. Apart from that, TP No. 248/2017 was not

withdrawn by Mr. Kumar Dinesh Seth and ultimately, it was dismissed along with Appellant's CP No. 486/2018, through an order dated 27.11.2019. Looking at from all these angles, 'no fault' can be attributed to the 'Tribunal's role, in taking in to account of the Erstwhile legal proceedings, to find out the Appellant's conduct, as held by this 'Tribunal'.

188. Be that as it may, in the light of qualitative, and quantitative, detailed discussions, keeping in mind, that the 'onus of proof', in proving the 'affairs of the Company', were / are being, 'conducted in a manner prejudicial or oppressive to 'any Members', or against the 'public interest' / or in any way, 'prejudicial', to the interest of the Company etc. and this Tribunal, ongoing through the impugned order dated 27.11.2019 passed by the NCLT, Bengaluru Bench in CP No. 486/BB/2018, comes to a consequent conclusion, that the Appellant / Petitioner has not established to the subjective satisfaction of this 'Tribunal', that 'affairs of the Company', are conducted, in 'any manner prejudicial' or 'oppressive' either to the Appellant, or other 'shareholders' / stakeholders. Viewed in that prospective, the 'ultimate conclusion', arrived at by the NCLT, Bengaluru Bench, in dismissing the CP No. 486/BB/2018 through its order dated 27.11.2019, without costs is free from any legal flaws. Accordingly, the instant 'Appeal' fails.

Disposition

189. In fine, the TA (AT) No. 94/2021 (Company Appeal (AT) No.363/2019) is dismissed, of course, for the reasons assigned by this 'Tribunal' in this 'Appeal', No costs. The connected pending IA(s) No. 4295/2019 (for status quo), 4296/2019 (for Exemption), 517/2023 (for stay) are closed.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

4th October, 2023

ss/pks