2019 INSC 678

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3934 OF 2017

RAM PARSHOTAM MITTAL & ORS. ... APPELLANTS

VERSUS

HOTEL QUEEN ROAD PVT. LTD. & ORS. ... RESPONDENTS

WITH

CIVIL APPEAL NO.3935 OF 2017

J U D G M E N T

ARUN MISHRA, J.

1. The appeal arises out of the judgment dated 31.5.2013 passed by the High Court of Delhi, setting aside an order dated 31.1.2006 passed by the Company Law Board in Company Petition No.64/2005.

2. The backdrop facts indicate that the Government of India took a policy decision on 5.7.2002 to disinvest its shares in the Indian Tourism Development Corporation (in short, 'the ITDC') which owns various hotel properties; one of them being Indraprastha Hotel, formerly known as Hotel Ashok Yatri Niwas, (hereinafter referred to as "the hotel").

3. In terms of an approved scheme of Arrangement of Demerger the hotel was transferred to the Respondent No.1 - Hotel Queen Road Pvt.

Ltd. (in short, 'HQRL') which was created as a Special Purpose Vehicle to enable disinvestment. The paid up capital of HQRL was Rs.90 lakhs comprising 9 lakh equity shares of Rs.10 each, of which the Government of India held 89.97% shares. Indian Hotels Co. Ltd. (IHCL) held 10% shares and the balance shares were held by the employees of hotels of ITDC under a Voluntary Retirement Scheme.

4. Pursuant to its decision to disinvest, the Government invited bids for sale of shares in HQRL. The appellant No.3 - Moral Trading & Investment Ltd., in short hereinafter referred to as 'Moral', a public limited company, was declared the successful bidder.

5. By a share purchase agreement dated 8.10.2002 Moral acquired the shares of Government of India and IHCL in HQRL for a sum of Rs.45 crores. Out of this, Rs.33.37 crores was obtained by way of loans from banks. 99.97% shares of HQRL being held by Moral, HQRL became Moral's subsidiary.

6. Appellant No.1, Mr. R.P. Mittal, and the appellant No.2, Mrs. Sarla Mittal, who held the controlling interest in Moral, and the Respondent No.3, Mr. Ashok Mittal, younger brother of the Appellant No.1, Mr. R.P. Mittal were appointed as Additional Directors of HQRL on 8.10.2002, and later, regular Directors at the Annual General Meeting of HQRL held on 28.12.2002.

7. On 30.9.2002 HQRL passed a resolution in its Extra Ordinary General Meeting (EOGM) to change its status from 'private limited' to 'limited' company. The said resolution was rejected by the Registrar of Companies on the ground of late filing and according to the appellants, HQRL had not filed it again with the Registrar of Companies nor had removed the defects.

8. On 21.12.2002 a Board meeting of HQRL was held. Moral transferred 13 equity shares valued at Rs.10 per equity share of HQRL to 7 persons, *i.e.* 2 shares to the appellant No.1, Mr. R.P. Mittal, 3 shares to the appellant No.2, Mrs. Sarla Mittal, one share to the respondent No.3, Mr. Ashok Mittal and 7 shares to 4 daughters of the appellant Nos.1 and 2, R.P. Mittal's family thus held 99.97% equity shares, as against one equity share held by his brother, Mr. Ashok Mittal.

9. On 28.12.2002 Annual General Meeting (AGM) of HQRL was held in which authorised capital was increased from Rs.90 lakhs to Rs.33 crores. The AGM was attended by Mr. Ashok Mittal. There was an increase of 71 lakh equity shares of Rs.10 each and 25 lakh preference shares of Rs.100 per share and a Special Business Resolution No.10 was passed under section 81(1A) of the Companies Act, 1956 (hereinafter referred to as 'the Companies Act'). The appointment of Mr.

R.P. Mittal, Mrs. Sarla Mittal and Mr. Ashok Mittal to the Board of Directors was approved by the majority of the shareholders of Moral. Mr. R.P. Mittal and Mrs. Sarla Mittal were appointed as whole time Directors. The Memorandum of Association of HQRL was also amended. Article IV (4) of Articles of Association was amended to state that the preference shares would not carry any voting rights.

10. On 19.3.2003, Mr. R.P. Mittal, Chairman of HQRL issued letter to the Respondent No.2 - Hillcrest Realty SDN BHD Malaysia (for short, 'Hillcrest') inviting subscription in 8.5% cumulative redeemable preference shares of Rs.100 each up to Rs.30 crores. On 3.4.2003, the hotel was closed for renovation and upgradation. On 30.4.2003, Hillcrest accepted and applied for subscription requesting for allotment of 23,65,000, 8.5% redeemable preference shares in the company. On 5.5.03 HQRL approved the issuance of 23,65,000 redeemable preference shares to Hillcrest.

11. On 25.6.2003 in order to facilitate issue of preference shares, HQRL increased authorised capital by Rs.5 crore comprising 5 lakh preference shares of Rs.100 each. On 19.7.2003 HQRL approved the issuance of 4,64,290 redeemable preference shares to Hillcrest respondent No.2. In or about August-September, 2003, to fund the redevelopment of the hotel, a term loan of Rs.40 crores was raised from

Indian Overseas Bank. According to the appellants the loan was secured by the joint personal guarantees of Mr. R.P. Mittal, Mrs. Sarla Mittal and Mr. Ashok Mittal, the corporate guarantee of Moral and the collateral security of personal assets of Mr. R.P. Mittal and Mrs. Sarla Mittal.

12. On 27.7.2004, HQRL in compliance of resolution dated 28.12.2002 passed under section 81(1A) of the Act, issued 23.90 lacs equity shares at par to Moral, the single shareholder holding 99.97% of equity. On 7.1.2005 HQRL in compliance of resolution dated 28.12.2002 passed under section 81(1A) of the Act issued 41.51 lakh equity shares to Moral, 1.10 lakh equity shares to Mr. R.P. Mittal and 4.5 lakh equity shares to Mrs. Sarla Mittal.

13. On 14.1.2005 an Extra Ordinary General Meeting (EOGM) was held wherein a shareholder's resolution was adopted pursuant to which HQRL increased its authorised capital from existing Rs.38 crores to Rs.40 crores, with an increase of 2 lakh equity shares of Rs.10 each. On 10.5.2005 HQRL allotted 10 lakh equity shares to the respondent No.4 Pondy Metals and Rolling Mills Pvt. Ltd., hereinafter referred to in short as Pondy Metals. Further, HQRL registered transfer by Moral of 32,88,181 equity shares in favour of Mr. R.P. Mittal.

14. On 26.5.2005, M/s. Ashok Mittal & Co. issued a notice to Moral for repayment of Rs.4,91,58,762/- along with interest claiming that the same was due since 2000 from running account for share trading for the years prior to 2000. It is the case of the appellants that Mr. Ashok Mittal, on realizing the bright prospects of development of the hotel, because of its location, in the heart of capital of India, turned dishonest to the R.P. Mittal group and hatched a conspiracy with preference shareholder Hillcrest to control the management of HQRL, It is alleged by the appellants that, in contravention of the provisions of the Companies Act and terms of issue of preference shares as prescribed in Articles of Company and correspondence exchanged, Mr. Ashok Mittal caused Hillcrest to issue notice under section 169(4) of the Act for EOGM to oust the duly elected board of HQRL and to appoint their nominee on the ground of non-payment of dividend on the redeemable preference shares as provided under section 87(2)(b) of the Companies Act. Section 87 of the Companies Act is extracted below:

> "Sec 87 - Voting rights
> (1) Subject to the provisions of section 89 and sub-section (2) of section 92 :
>
> (a) every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company ; and
>
> (b) his voting right on a poll shall be in proportion to his share of the paid-up equity capital of the company.
>
> (2)
>
> (a) Subject as aforesaid and save as provided in clause (b) of this sub-section, every member of a company limited by shares and holding any preference share capital

therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares.

Explanation.: Any resolution for winding up the company or for the repayment or reduction of its share capital shall be deemed directly to affect the rights attached to preference shares within the meaning of this clause.

(b) Subject as aforesaid, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, be entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such capital or any part of such dividend has remained unpaid:

(i) in the case of cumulative preference shares, in respect of an aggregate period of not less than two years preceding the date of commencement of the meeting; and

(ii) in the case of non-cumulative preference shares, either in respect of a period of not less than two years ending with the expiry of the financial year immediately preceding the commencement of the meeting or in respect of an aggregate period of not less than three years comprised in the six years ending with the expiry of the financial year aforesaid.

Explanation.: For the purposes of this clause, dividend shall be deemed to be due on preference shares in respect of any period, whether a dividend has been declared by the company on such shares for such period or not,

(a) on the last day specified for the payment of such dividend for such period, in the articles or other instrument executed by the company in that behalf; or

(b) in case no day is so specified, on the day immediately following such period.

(c) where the holder of any preference share has a right to vote on any resolution in accordance with the provisions of this sub-section, his voting right on a poll, as the holder of such share, shall, subject to the provisions of section 89 and sub-section (2) of section 92, be in the same proportion as the capital paid up in respect of the preference share bears to the total paid-up equity capital of the company."

15. A Board meeting of HQRL was conducted on 4.7.2005 which was attended by Mr. R.P. Mittal, Mrs. Sarla Mittal and Mr. Ashok Mittal. Mr. Ashok Mittal attended the meeting for the first time. The Respondent No.6 Mr. N.P. Gupta and the Respondent No.5, Mr. Suman Jain were appointed as Additional Directors. On 8.7.2005 Hillcrest issued notice under section 169(6) of the Companies Act to call for EOGM on 4.8.2005.

16. HQRL filed a civil suit being CS (OS) 992 of 2005 before the High Court of Delhi for declaration, cancellation and mandatory injunction against the requisition under section 169 of the Companies Act.

17. On 4.8.2005 Hillcrest proceeded to convene EOGM and passed a resolution *inter alia* removing Mr. R.P. Mittal and Mrs. Sarla Mittal from the Board of HQRL. On 12th August, 2005, Delhi High Court passed an order in an interlocutory application being IA 5505 in the said suit being CS (OS) No.992 of 2005 restraining Hillcrest from giving effect to the resolution passed in the EOGM held on 12.8.2005. Delhi High Court restrained Hillcrest from giving effect to the resolution passed in the EOGM.

18. On 22nd August, 2005 Hillcrest and Ashok Mittal filed a petition bearing No.64/2005 in the Principal Bench of the Company Law Board at Delhi and under Sections 397 and 398 of the Companies Act alleging

oppression and mis-management of HQRL by the R.P. Mittal Group. The Resolution passed in Board meetings regarding allotment/ transfer of shares was also challenged amongst others on the ground that no notice had been issued to Ashok Mittal who was, at the material time, a Director.

19. The present case arises out of the said petition filed by Hillcrest and Mr. Ashok Mittal against the appellants in the Company Law Board in September, 2005 under Sections 397/398 of the Act, challenging the allotment/transfer of shares effected on 27.7.2004, 7.1.2005 and 10.5.2005 on *inter alia* grounds of (i) financial mismanagement of HQRL by Mr. R.P.Mittal and Mrs. Sarla Mittal; (ii) Invested in Cumulative Redeemable Preference Share (CRPS) on the understanding that HQRL would remain a subsidiary of Moral and that in the event of HQRL failing to pay any dividend for two years, Hillcrest would be entitled to exercise its voting rights in all resolutions; (iii) illegality of allotments made on 27.7.2004, 7.1.2005 and 10.5.2005. In the absence of notice under Section 286 of the Companies Act to Mr. Ashok Mittal, who was a Director of HQRL; (iv) the allotments having been made by the remaining Directors without disclosing their obvious interest in violation of section 300 of the Companies Act; (v) the allotments being made without any valuation of equity shares of HQRL; (vi) no money being paid for transfer of shares and (vii) the eventuality of the transfer

bringing about a situation where HQRL would no longer remain a subsidiary of Moral and thus deprive Hillcrest of any voting right under section 87(2)(b) of the Act.

20. It is alleged by the appellants that, in spite of various hurdles created by Hilcrest and Mr. Ashok Mittal by sending notices to various Government departments asking them not to grant licenses, the hotel had become operational, with the sole efforts of Mr. R.P. Mittal and had been granted all the requisite licenses.

21. On 31.1.2006, C.P. No.64/2005 was dismissed, inter alia, on the ground that it was a mala fide petition by Hillcrest and Mr. Ashok Mittal to take over the company. In 2006 three cross appeals were filed against the order dated 31.1.2006 passed by the Company Law Board.

22. In August, 2006 Hilcrest filed a suit being CS (OS) No.1832/ 2008 in Delhi High Court for a declaration that Hilcrest had voting rights in HQRL in view of the Resolution dated 30th September, 2002 passed by HQRL whereby HQRL had been converted from a private company limited by shares to a public company limited by shares. Hilcrest filed an application being IA No.12164/ 2008 in the said suit being CS (OS) No.1832/ 2008 contending that HQRL had obtained an order of injunction on 12th August, 2005 by fraudulently and concealing the fact that it had acquired the status of a public company in 2002. Hilcrest

also made an application in suit being C.S. No.992/2005 for vacating of the interim order dated 12th August whereby Hilcrest had been restrained from giving effect to the Resolution passed at the meeting of HQRL on 4th August, 2005.

23. Being aggrieved by the order dated 12th August, 2005 in C.S. (OS) No.992/ 2005 Hilcrest filed an appeal therefrom being FAO (OS) No.282/2005 before the Division Bench of Delhi High Court.

24. On or about 1st October, 2008, Hilcrest filed an application being IA No.12164/ 2008 in C.S. (OS) No.1832/ 2008 *inter alia* praying that Hilcrest be allowed to participate in the Extraordinary General Meeting of HQRL to be held on 16th October, 2008 and further praying for appointment of an Administrator to look after the affairs of the company.

25. On 15th October, 2008 the Delhi High Court passed an interim order in the said IA No.12164 of 2008 in C.S. (OS) 1382 of 2008 allowing Hilcrest to vote in the Extraordinary General Meeting to be held on 16th October, 2008 and also appoint Administrator to look after the day to day affairs of HQRL.

26. On 16th October, 2008, Mr. R.P. Mittal, Mrs Sarla Mittal and HQRL filed an appeal against the orders dated 15th October, 2008 and

24th October, 2008 passed by the Delhi High Court in IA No.12164/ 2008 in C.S. (OS) 1832 of 2008 before the Division Bench.

27. The appellants state that on or about 21st October, 2008, Mr. R.P. Mittal filed an application under the Right to Information Act whereupon the Registrar of Companies, by letter dated 21st October, 2008 informed the appellant that the status of HQRL had not been changed from private company limited by shares to public company limited by shares for the technical reasons specified in the said letter.

28. On 24th October, 2008 the interim order passed by the Delhi High Court on 5th October, 2008 in IA No.12164/ 2008 in C.S. (OS) No.1832 of 2008 was made absolute.

29. On 14th January, 2009, the Division Bench of Delhi High Court by a common order disposed of FAO (OS) No.282/2005, FAO (OS) 426 of 2008 and 440 of 2008 upholding the right of Hilcrest to vote in the meetings of HQRL. The question of whether HQRL was a private company limited by shares of public limited company was left open for adjudication in the suit. On 14th January, 2009, Hilcrest took over the management of HQRL from R.P. Mittal Group through Ashok Mittal.

30. Appellant Nos.1 and 2 filed a special leave petition in this Court being SLP (C) No.1069 of 2009 under Article 136 of the Constitution. By a judgment and order dated 20th July, 2009, a Division Bench of the

High Court upheld the right of Hilcrest to vote on the ground that HQRL was *prima facie* a public limited company.

31. On 30th July, 2009, Hilcrest and Ashok Mittal sent notice to the existing shareholders of HQRL under Section 81 (21) of the Companies Act to allot further equity shares.

32. On 14th August, 2009 the appellants filed an interim application being IA No.9920/ 2009 in C.S. (OS) 1832 of 2008 seeking injunction against Hilcrest and Mr. Ashok Mittal from going ahead with the rights issue.

33. By a judgment and order dated 18th August, 2009 a Single Bench of Delhi High Court declined to interfere with the right issue and the application No.9920/2009 in C.S. (OS) 1832/2009 was dismissed.

34. On 20th August, 2009, the appellant appealed against the order dated 18th August, 2009 referred to above. The Division Bench, however, declined to restrain the rights issue but only directed issuance of notice to HQRL and Ashok Mittal.

35. On 31.5.2013, the High Court by the impugned order allowed CoA (SB) 4/2006 of Hillcrest and cancelled the allotment and transfers made on 27.7.2004, 7.1.2005 and 10.5.2005 on the grounds that Hillcrest had voting rights and there was breach of sections 286, 300 and 108 of the Companies Act.

36. HQRL has contended that the claim of the appellants that they have funded HQRL at the time of acquisition of the hotel is incorrect. Rs.33.25 crores was obtained by way of bank loans, loan of Rs.5.5 crores was advanced by Mr. Ashok Mittal, loan of Rs.6.23 crores was advanced by Mr. R.P. Mittal. When the hotel was bought it required extensive renovation and thus further funds were required. Hillcrest contributed Rs.28.29 crores in preference share capital, Rs.40 crores bank loan from IOB on personal guarantee of Mr. Ashok Mittal, Mr. R.P. Mittal and Mrs. Sarla Mittal. HQRL has claimed that the net worth of Mr. Ashok Mittal was much higher than others.

37. HQRL has further contended that the management changed hands from R.P. Mittal group on 15.1.2009 vide order of Delhi High Court. Prior to leaving the management of HQRL, Mr. R.P. Mittal and Mrs. Sarla Mittal with the help of their accomplices, removed and did away with the books of account and statutory records of HQRL. Thereafter, a number of third parties, all related to Mr. R.P. Mittal started claiming to have lent monies to HQRL. Most of these demands were based on 'oral agreements' with Mr. R.P. Mittal. When the new management assumed charge of HQRL, the financial position of HQRL was weak, there being only Rs.2.82 lacs in the bank account of HQRL; the immediate liabilities including government dues, taxes and salaries

of staff were Rs.98,62,563; HQRL had defaulted on payment of interest to the bank amounting to Rs.4,73,98,446 along with total bank liability of about Rs.30 crores; and its account was on the verge of becoming Non Performing Asset (NPA), due to defaults in repayment of interest and principal and it was already in litigation with the bank.

38. In these circumstances, funds were brought in by Mr. Ashok Mittal. A sum of Rs.5 crore was brought as loan by Mr. Ashok Mittal before 31.3.2009; Rs.4.5 crore further loan by Mr. Ashok Mittal before 31.3.2009; and Rs.40 crore by Mr. Ashok Mittal through Rights Issue. Offer was given to the appellants who refused to subscribe to rights issue but litigated against the company. Prayer for grant of injunction was refused by Delhi High Court on the Rights Issue in 2009.

39. According to the respondents, it is crystal clear from the above facts, that the entire funding was on the basis of investment either by Hillcrest or on the basis of creditworthiness of Mr. Ashok Mittal or investment made by him. The R.P. Mittal Group's argument that they funded the project is incorrect. They have not been able to show how such funds have been brought in the company. Said group had neither funds nor creditworthiness to buy the hotel of HQRL.

40. It was urged by Mr. Pinaki Misra, learned senior counsel on behalf of the appellants that the claim of Mr. Ashok Mittal that he had funded

Rs.5.5 crores to Moral out of Rs.12.03 crores for acquisition of HQRL was false and an afterthought. In order to mislead this Court, he had made a false statement. The claim of Mr. Ashok Mittal that loan of Rs.33 crores to Moral was only on his personal guarantee was also wrong. The action of Mr. Ashok Mittal and Hillcrest was detrimental to the interest of HQRL.

41. Mr. Misra argued that the High Court has erred in relying on decisions of this Court in interim injunction matters which did not decide finally the rights of parties. Suit is still pending. He urged that it is well settled by this Court in *State of Assam v. Barak Upatyaka D.U. Karamchari Sanstha* (2009) 5 SCC 694 that any interim order which does not finally and conclusively decide an issue cannot be a precedent.

42. It was urged that admittedly, there was no financial mismanagement in the affairs of HQRL by appellants or R.P. Mittal group. The High Court while passing the impugned judgment has acted as a Civil Court and not as Company Court under section 10F of the Companies Act, 1956. The test as to whether an action is oppressive or not is not based on whether it is legally permissible or not since even if legally permissible, if the action is otherwise against probity, good conduct or is burdensome, harsh or wrong or is *malafide* or for collateral purpose, it would amount to oppression under section 397.

Reliance has also been placed on *Needle Industries (India) Ltd. & Ors. v. Needle Industries Newey (India) Holding Ltd. & Ors*. (1981) 3 SCC 333; *Sangramsinh P. Gaekwad & Ors. v. Shantadevi P. Gaekwad (Dead) through LRs. & Ors*. (2005) 11 SCC 314; and *V.S. Krishnan & Ors. etc. v. Westfort Hi-tech Hospital Ltd. & Ors.* (2008) 3 SCC 363.

43. Shri Misra, learned senior counsel further urged that no oppression was caused to Mr. Ashok Mittal by allotment of shares on 27.7.2004, 7.1.2005 and allotment/transfer of shares on 10.5.2005 to majority shareholders having 99.97% equity. It was further submitted that there could not be any oppression caused to Mr. Ashok Mittal by inter se transfer of shares from Moral to Mr. R.P. Mittal as the said transaction was between Moral and Mr. R.P. Mittal, whereby HQRL only records the transfer. The argument on behalf of Mr. Ashok Mittal and Hillcrest that the allotment was done at undervalue was also not correct. The transfer of shares from Moral to Mr. R.P. Mittal on 10.5.2005 was between two separate legal entities i.e. Moral and Mr. R.P. Mittal, whereby HQRL only had the authority to record transfer. HQRL could not have raised any objection and also Hillcrest would have no locus to challenge the same. The only issue qua Hillcrest is when it was entitled to vote on every resolution placed before the company in terms of Section 87(2)(b) of the Companies Act. It was submitted that

the first allotment made to Hillcrest was on 5.5.2003 hence as per the submissions of Hillcrest, two years period in terms of Section 87(2)(b) of the Companies Act, came to an end on 5.5.2005 and as per Hillcrest, if the dividend was not paid for 2 years, whether there is profit or not, Hillcrest were entitled to vote on resolution dated 10.5.2005 effecting transfer is not correct proposition of law. Section 205 of the Companies Act provides that no dividend shall be declared or paid by a company for any financial year except out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section.

44. It was urged that the position of shareholders in a company is of analogous to that of partners *inter se*. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders.

45. It was submitted on behalf of appellant that on 10.5.2005 Hillcrest had no voting right under section 87(2)(b) of the Companies Act, as there was no profit and no dividend due. Accordingly, no oppression can be said to have been caused to Hillcrest by inter se transfer of shares by resolution dated 10.5.2005. Moreover, Hillcrest

had no right to requisition an EOGM under section 169(4) of the Companies Act. Thus, action of not calling of EOGM does not amount to oppression. Hillcrest's contention that preference shareholders had acquired voting rights under section 87(2)(b) to requisition a meeting under section 169(4) is misconceived, in that section 98(2)(b) only provides that preference shareholders would only be entitled to vote on every resolution placed before the company at any meeting. Even otherwise, the ground of HQRL not remaining subsidiary of Moral (a public company) has itself been diluted by Hillcrest, as can be seen from the note with the heading "Shareholding pattern of R1 (HQRL)". It is relevant to mention here that it was held by the High Court of Bombay in *CDS Financial Services (Mauritius) Ltd. v. BPL Communications Ltd. & Ors*. (2004) 121 Comp Case 374, that RBI's special permission under the special laws of FEMA will prevail over the provisions of the Companies Act, 1956. If the analogy of the High Court in impugned order is applied then all earlier meetings of HQRL deserve to be declared void as violative of sections 286 and 300.

46. It was also urged by Mr. Misra, learned senior counsel, that the finding of the High Court as to provision under section 108 of the Companies Act, 1956 and thereafter initiating the proceedings under section 340 Cr.P.C. against Mr. R.P. Mittal was also erroneous, as the High Court had itself recorded that there was no record available with

the bank to ascertain when the certificates were released to the Mr. R.P. Mittal. The Rights Issue in 2009 was illegal and was only brought in to give the majority to Mr. Ashok Mittal, even though the issue was not part of these proceedings.

47. In the wake of aforesaid submissions, the appellants prayed that the impugned order of the High Court passed in Co.A. (SB) No.4/2006 be set aside. The appellants have also sought a declaration that Hillcrest as preference shareholder, is not entitled to vote under section 87(2)(b) of the Companies Act, 1956, nor can requisition a meeting under section 169(4)(A) of the said Act. Mr. Misra submitted that the appellants be sent back into the management of HQRL.

48. It was submitted by Mr. Jaideep Gupta, learned senior counsel for HQRL that the interest of the company must be uppermost in the mind of the Court while granting relief in a petition under Section 397 of the Companies Act.

49. It was argued that it is well settled that the company does not merely represent the interest of the shareholders but also a much wider group of entities which would include employees, creditors and public in general. Reliance was also placed on *National Textile Workers' Union & Ors. v. P.R.Ramakrishnan & Ors.* (1983) 1 SCC 228.

50. Mr. Gupta further submitted that HQRL runs a prime hotel in New Delhi. It is desirable that the interest of business of the hotel be protected by this Court while giving relief under section 397/398 of the Companies Act. At the time of purchase of undertaking in 2002-03 the entire investment was made through Moral. The amount involved was about Rs.45 crores. Moral financed this sum through a bank loan of about Rs.33.25 crores obtained on the credit worthiness of Mr. Ashok Mittal and against personal guarantee of Mr. R.P. Mittal and Mr. Ashok Mittal. Mr. Ashok Mittal has substantial interest in the company, he only held one share in the company and was on the Board of Directors of the Company.

51. Mr. Jaideep Gupta, also argued that with a view to operationalise the hotel further funds to the tune of Rs.68 crores were raised including investment of Rs.28.29 crores made by Hillcrest. Hillcrest was persuaded to make this investment at the behest of Mr. Ashok Mittal as is evident from the record. Balance sum of Rs.40 crores was raised by way of bank loans against personal guarantee of Mr. R.P. Mittal and Mr. Ashok Mittal. In or about 2004-05 the R.P. Mittal group through the three impugned resolutions sought to increase its shareholding in the company. Pursuant to an Extra Ordinary General Meeting Mr. Ashok Mittal and Hillcrest took over the management of the company. The actual change in management, hence, took place on or about

15.1.2009. After takeover of management by Mr. Ashok Mittal further investment amounting to Rs.49.5 crore was made by him out of which Rs.9.5 crores was directly invested by Mr. Ashok Mittal to pay out bank dues and other pressing creditors. In addition, on or about 30.7.2009 another Rs.40 crores were raised through a rights issue. R.P. Mittal group was offered shares in proportion to the shareholding in the company but declined to take any share or make any investment in the company. Hence, the entire amount was brought in by Mr. Ashok Mittal. As of now Mr. Ashok Mittal holds 92% of equity shares of HQRL whereas Moral and Mr. R.P. Mittal own about 8% shares of HQRL. The main disputes between the parties pertain to (i) allotment and transfer of shares to R.P. Mittal Group and Moral in 2005; (ii) takeover of management by Ashok Mittal and Hillcrest in 2009 and (iii) rights issue which took place on or about July, 2009. With reference to (ii) above, it was stated that there is an interim arrangement which is binding on both the parties and which has been affirmed all the way up to this Court by a judgment and order dated 20.7.2009 in *Ram Parshotam Mittal & Anr. v. Hillcrest Realty SDN. BHD. & Ors*. (2009) 8 SCC 709. It was also submitted that the said interim arrangement cannot be gone into or modified at this stage.

52. Mr. Gupta further contended that the only question in the present proceedings is validity of allotment and transfer which took place in

2004 and 2005 made by company in favour of Mr. R.P. Mittal, his wife Mrs. Sarla Mittal and Moral. These transactions are contained in three resolutions dated 27.7.2004, 7.1.2005 and 10.5.2005.

53. It has been submitted on behalf of Mr. Ashok Mittal that the aforesaid transactions which were conducted in the meetings of the Board of Directors of which no notice had been given to him, though he was then a Director of HQRL, are illegal, null and void and oppressive. In *Sri Parmeshwari Prasad Gupta v. The Union of India* (1973) 2 SCC 543, this Court held Section 286 of the Companies Act to be mandatory and violation thereof has been held to render the resolution passed in such meeting void.

54. He submitted that Resolutions passed in aforesaid meetings are also violative of section 300 of the Companies Act as in all of them arrangements and contracts in favour of two Directors namely Mr. R.P. Mittal and Mrs. Sarla Mittal have been discussed and voted upon by said two persons themselves. It is well settled that Directors act as fiduciaries when they conduct a Board meeting and as fiduciaries they cannot participate in decisions in their own favour. It is not only an established principle of law of equity relating to fiduciaries but is expressly forbidden by section 300 of the Companies Act. Reliance has been placed upon *Dale & Carrington Invt. (P) Ltd. & Anr. v. P.K.*

Prathapan & Ors. (2005) 1 SCC 212; *Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd. & Ors.* (1971) 41 Co. Cases 377 and *Madras Tube Co. Ltd. & Ors. v. Hari Kishon Somani & Ors.* (1985) 1 Comp Law Journal 195 (Mad).

55. He further submitted that the decision to transfer shares from Moral to Mr. R.P. Mittal on 10.5.2005 is in violation of section 108 of the Companies Act because it has been found as a fact by the High Court that physical share certificate was not in possession of Moral on the relevant date. In proceedings under section 397 filed by Hillcrest and Mr. Ashok Mittal, the Company Law Board found that the resolution had been passed illegally but it declined to set aside the allotment and transfer on unsustainable grounds. It is well settled that in a petition under section 397 of the Companies Act it is normally desirable unless any special circumstances exist, to pass an order which to all intents and purposes would be beneficial to the company itself and the majority of its members.

56. It was finally contended that the High Court order be upheld without upsetting the existing position in relation to management of company.

57. It was submitted by Mr. Mihir Kumar, learned counsel for Hillcrest that the appellants have filed two appeals namely C.A. No.

3934/2017 and C.A. No.3935/2017. The sole legal question arising in the instant matters is whether the 3 meetings of the Board of Directors of HQRL held on 27.7.2004, 7.1.2005 and 10.5.2005 were legal and valid. The following issues were not germane to the question:

(1) whether HQRL is a public limited company or a private limited company?

(2) whether Hillcrest, a preference shareholder had any voting rights in terms of section 87 of Companies Act, 1956?

58. Learned counsel would contend that the aforesaid three Board meetings before the Company Law Board were gravely vitiated and invalid for the reasons that they were in violation of Sections 286 and 300 of the Companies Act which operate independently. The resolutions passed in the impugned meetings were basically for allotment of shares by the appellants to themselves and one of the meetings held on 10.5.2005 also concerned with purported transfer of shares from Moral to Mr. R.P. Mittal. These meetings constituted continuous acts calculated to prejudice and oppress Hillcrest and Mr. Ashok Mittal. The appellants had limited financial investment in HQRL and Hillcrest and Mr. Ashok Mittal have substantially invested in HQRL. Moral transferred the bank loan to HQRL, and the latter repaid it.

59. Learned counsel further contended that the appellants' argument that the High Court had reached its conclusions on the basis of this Court's prima facie view in the matter of grant of interim injunction, was incorrect and erroneous. The findings in the impugned judgment are based entirely on the settled legal propositions. It was submitted that the appellants' reliance on FEMA is erroneous. It was further submitted that the appellants had on 30.8.2018 sought to file certain documents which were neither placed on record before the Company Law Board or the High Court; neither pleaded nor relied upon before courts below and not even pleaded before this Court. Finally, it was prayed that the appeals be dismissed.

60. It was also submitted by learned counsel for Mr. Ashok Mittal that the appeals were decided by the High Court under section 10F of the Companies Act, 1956 and confined to questions of law. Reliance was placed on *Sri Parmeshwari Prasad Gupta v. Union of India* (supra). On the anvil of decision in *M.S. Madhusoodhanan v. Kerala Kaumudi (P) Ltd.* (2004) 9 SCC 204, the aforesaid 3 Board meetings were vitiated and invalid on account of being in violation of sections 286, 300 and 108 of the Companies Act, 1956. Strong reliance was also placed on *Firestone Tyre & Rubber Co. v. Synthetics & Chemicals Ltd. & Ors.* (supra).

61. It was also contended by learned counsel for Mr. Ashok Mittal that he had seriously been oppressed as he admittedly had substantial interest in HQRL; allotment of shares by appellants allotted shares to themselves without providing any opportunity of representation to Mr. Ashok Mittal and also without providing any opportunity to Mr. Ashok Mittal to participate in the offer; said allotment was at gross undervaluation and in breach of the fiduciary position of Mr. R.P. Mittal and Mrs. Sarla Mittal as Directors of HQRL; the 3 meetings violated Section 286 thereby ipso facto invalidating the meetings. Mr. Ashok Mittal had a right to participate in the offer of shares to any extent irrespective of his existing equity shareholding of 1 share; and that transfer of shares by Moral to Mr. R.P. Mittal was against loan. Even Mr. Ashok Mittal had granted loan to Moral but against that Moral did not transfer any shares. Appellants' reliance on section 81(1A) is unmerited. It was further contended that the appellants' argument of Mr. Ashok Mittal holding only one share is manifestly erroneous. The Company Law Board concluded that inasmuch as Mr. Ashok Mittal was substantially interested and invested in HQRL, the shares ought to be allotted (as well as transferred by Moral) to him as well. As against Hillcrest's investment of Rs.28,29,29,000/-, the appellants had invested only Rs.90 lakhs in the share capital of HQRL. The said 3 meetings had a direct bearing on shareholding of Hillcrest. The parent-subsidiary

relationship between Moral and HQRL was independent of the status of HQRL as a public company limited by shares and as a consequence of the shareholders' resolution dated 30.9.2002. The appellants sought to negate not only the rights of Mr. Ashok Mittal but also voting rights of Hillcrest. That the appellants had limited financial investment in HQRL. Factually, there was no substantial investment by Moral out of its own funds in HQRL; whereas Hillcrest and Mr. Ashok Mittal had substantially invested in HQRL. That the appellants' reliance on FEMA is erroneous.

62. Before dilating on the issue of validity of aforesaid three impugned resolutions, it is a common ground and it was stated by learned counsel appearing for the parties that two civil suits are pending consideration; one being OS No.992/2005 filed by HQRL for injunction to restrain Hillcrest Realty from proceeding with the proposed resolutions of EOGM and from exercising voting rights therein; the other Suit No.1832/2008 seeking declaration that HQRL had become a limited company by virtue of the resolution passed on 30.9.2002. The matter travelled to this Court in the matter of grant of injunction which has been decided in *Ram Parshottam Mittal v. Hillcrest Realty* (supra). Rival contentions were raised before this Court as to whether HQRL is a private limited or public limited company. This Court has observed that the decision on the aforesaid question would be dependent upon the decision of the

issue whether by resolution adopted on 30.9.2002, HQRL had lost its private character and had been converted into a public limited company. While the issues are the same in the two suits, this Court has observed that the interim order dated 12.8.2005 had been obtained by suppression of material facts and prima facie finding recorded by the Division Bench of the High Court was that by resolution adopted on 30.9.2002, HQRL had shed its private character and had been converted into a public limited company. This Court without meaning to decide the issue finally prima facie observed that an application was filed before the Registrar in Form 23 along with resolution dated 30.9.2002 is sufficient to arrive at a prima facie conclusion that HQRL had altered its status and had become a public company. It was further observed by this Court that since the number of members exceeded 50 as the shares were said to have been allotted to 134 persons on 30.9.2002, prima facie HQRL lost its private character. However, this Court also observed significantly as this issue has to be decided in the two pending suits, it would not be proper for this Court to dwell into the question further. This Court held that considering the explanation to section 87(2)(b) gives Hillcrest as a cumulative preference shareholder the right to vote on every resolution. This Court also made it clear that the observations were prima facie in the nature of limited only for disposal of special leave petition and should not influence the final

decision in the suits. The question relating to HQRL whether it is a private or public company has been left open for decision in the suits. This Court in *Ram Parshotam Mittal & Anr. V. Hillcrest* (supra) has made the following observations:

> "66. As will be evident from the pleadings in both the suits, the reliefs sought for in the two suits are dependent on the question as to whether by the resolutions adopted on 30th September, 2002, Hotel Queen Road had lost its private character and had been converted into a Public Company. While the issues are the same in the two suits, the interim orders passed therein operate in contradictory fields.
>
> 70. We are unable to appreciate the methodology adopted by the Division Bench of the High Court, but we are in agreement with the end result by which the Division Bench had set aside the interim order dated 12th August, 2005, passed in Suit No. 992 of 2005. In our view, apart from endorsing the view of the learned Single Judge that the interim order of 12th August, 2005, had been obtained by suppression of material facts, in order to decide the appeals, the Division Bench had to arrive at a prima facie finding as to whether by virtue of the resolutions adopted on 30th September, 2002, Hotel Queen Road had shed its private character and had been converted into a public company with all its consequences.
>
> 71. From the materials on record, we are prima facie of the view that by the said resolutions, a final decision had been taken by Hotel Queen Road to convert itself into a public company with immediate effect without having to wait for any decision to be rendered by the Registrar of Companies who, in any event, had no authority to make any decision in that regard.
>
> 72. The very fact that Form 23 was filed along with the resolutions dated 30th September, 2002, coupled with the fact that a Statement in lieu of Prospectus, which is required to be filed by a private company when it converts itself into a public company, was filed on behalf of Hotel Queen Road, is sufficient for the purpose of arriving at a prima facie conclusion that Hotel Queen Road had altered its status and had become a public company even though the necessary alterations had not been effected in the records of the Registrar of Companies.

74. Having regard to the definition of "private company" in Section 3(1)(iii), as soon as the number of its members exceeds 50, it loses its character as a private company. Since in the instant case shares were said to have been allotted to 134 persons on 30th September, 2002, on which date the resolutions were passed by Hotel Queen Road Pvt. Ltd., the company lost its private character requiring the subsequent resolutions to be passed regarding alteration of the share capital.

77. The moment the resolutions were passed by the company on 30th September, 2002, the provisions of the Companies Act became applicable and by operation of law, Hotel Queen Road simultaneously ceased to be a private limited company and under the conditions prescribed in the Act, Hillcrest Realty acquired voting rights in the meetings of the company by operation of Section 87(2)(b) and Section 44 of the said Act. The right of a preference shareholder to acquire voting rights is also indicated in clear and unambiguous terms in the Explanation to Section 87(2)(b).

78. Since the question as to whether Hotel Queen Road ceased to be a private company upon the resolutions being passed on 30th September, 2002, is the crucial issue for decision in both the two suits referred to hereinabove, it would not be proper for this Court to delve into the question further.

79. However, for the purpose of disposing of these Special Leave Petitions, we are prima facie of the view that by virtue of the resolutions dated 30th September, 2002, Hotel Queen Road had become a public company thereby attracting the provisions of Section 87(2)(b) of the Companies Act, 1956, upon the bar under Section 90(2) thereof having been lifted. A natural consequence is that in the event dividend had not been declared or paid for a period of two years as far as Hillcrest is concerned, the Explanation to Section 87(2)(b) would come into play thereby giving Hillcrest Realty, as a cumulative preference shareholder, the right to vote on every resolution placed before the Company, at any meeting, in keeping with Clause (i) of Section 87(2)(b) of the aforesaid Act.

80. In keeping with the aforesaid principle, while dismissing the Special Leave Petitions filed by Hotel Queen Road and Hillcrest Realty, we make it clear that the observations made in this judgment are of a prima facie nature only for disposal of the Special Leave Petitions and should not influence the final decision in the suits, where the question relating to the status of Hotel Queen Road has been left

> open for decision. We, however, request the High Court, functioning as the Trial Court, to dispose of the suits at an early date so that the management and affairs of Hotel Queen Road are not left in a state of uncertainty."

63. It was jointly prayed by learned counsel appearing for the parties that the issues involved in the said two civil suits need not be dilated upon and decided in this matter as that may prejudice the outcome of the pending civil suits.

64. This Court in the aforesaid decision has itself observed that it was deciding only interim injunction matter and the findings recorded in the order were prima facie not binding at the time of decision of civil suit and the question to be decided whether HQRL has lost its private character and has become a public limited company by virtue of resolution dated 30.9.2002.

65. In view of the observations made by this Court, the order in *Ram Purshottam Mittal* (supra) is not final and is only a prima facie view in the matter of injunction. We find force in the submission of learned counsel appearing for the appellants that the observations in interim order cannot be taken as binding even for the purpose of deciding this matter as held in the *State of Assam v. Barak Upatyaka D.U. Karamchari Sanstha* (2009) 5 SCC 694:

> "21. A precedent is a judicial decision containing a principle, which forms an authoritative element termed as

> ratio decidendi. An interim order which does not finally and conclusively decide an issue cannot be a precedent. Any reasons assigned in support of such non-final interim order containing prima facie findings, are only tentative. Any interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve the status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a fait accompli, before the final hearing."

66. The Company Law Board as well as the High Court have found that the provision of notice under Section 286 of the Companies Act was not complied with. The High Court has observed that the interested Directors have participated in the meeting. Mr. R.P. Mittal and Mrs. Sarla Mittal were in a fiduciary capacity they could not participate in the decision where shares were transferred to their own group/company. Even if HQRL were a private limited company, the compliance with the provisions of section 300 of the Act was mandatory. The High Court has also observed that there was undervaluation of HQRL shares. The allotment of shares at par to Moral in the meeting on 10.5.2005 and on the same very date, shares of Moral were transferred to Mr. R.P. Mittal @ Rs.20 per share. Thus, the High Court has opined that these acts in overall factual matrix of the case, were sufficient to conclude that ground under section 397 had been made out.

67. The High Court has also found that HQRL did not have the share certificates along with duly executed share transfer forms when a

decision was taken at the Board meeting held on 10.5.2005 to transfer shares from Moral to Mr. R.P. Mittal. The decision has been held to be invalid for violation of provisions contained in Section 108 of the Act of 1956 for the aforesaid reason also. The Court has recorded *suo motu* proceedings under section 340 Cr. PC against Mr. R.P. Mittal. The Court has invalidated the impugned resolutions dated 27.7.2004, 7.1.2005 and 10.5.2005 and the decision of the Company Law Board has been set aside.

68. Coming to the submission as to oppression whether the Act was oppressive or not within the purview of section 397 on behalf of the appellant, it was submitted that Mr. Ashok Mittal did not fund Rs.5.5 crores to Moral out of Rs.12.03 crores for acquisition of HQRL, as claimed. His claim that a loan of Rs.13 crores was obtained on basis of his personal guarantee was wrong. It was also urged that there was no financial mismanagement by the appellants. The test whether action was oppressive or not, is based on whether it is legally permissible or not. Reliance has been placed on *Needle Industries* (supra) in which this Court has observed:

> "49. 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, Bhagwati, J., in a decision of the Gujarat High Court in *Seth Mohanlal Ganpatram v. Sayaji Jubilee Cotton & Jute Mills Co. Ltd.* [1964] 34 Company Cases 777 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* (supra) 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 biased; 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 biased and that

> the party complaining of the orders will not get justice at his hands.
>
> 52. It is clear from these various decisions that on a true construction of Section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder. It may be mentioned that the Jenkins Committee on Company Law Reform had suggested the substitution of the word 'Oppression' in Section 210 of the English Act by the words 'unfairly prejudicial' in order to make it clear that it is not necessary to show that the act complained of is illegal or that it constitutes an invasion of legal rights (see Gower's Company Law, 4th edn., page 668). But that recommendation was not accepted and the English Law remains the same as in Meyer and in Re H.R. Harmer Ltd., [1959] WLR 62 as modified in Re Jermyn St. Turkish Baths (supra). We have not adopted that modification in India.
>
> 111. Whether one looks at the matter from the point of view expressed by this Court in *Nanalal Zaver* (AIR 1950 SC 172) or from the point of view expressed by the Privy Council in *Howard Smith*, (1974 AC 821, 831) the test is the same, namely, whether the issue of shares is simply or solely for the benefit of the Directors. If the shares are issued in the larger interest of the Company, the decision to issue shares cannot be struck down on the ground that it has incidentally benefited the Directors in their capacity as shareholders. We must, therefore, reject Shri Seervai's argument that in the instant case, the Board of Directors abused its fiduciary power in deciding upon the issue of rights shares."
>
> (emphasis supplied).

69. Reliance has also been placed on a decision of this Court in *Sangramsinh* (supra) in which this Court has observed:

> "196. The Court in an application under Sections 397 and 398 may also look to the conduct of the parties. While enunciating the doctrine of prejudice and unfairness borne in Section 459 of the English Companies Act, the Court stressed

> the existence of prejudice to the minority which is unfair and not just prejudice per se.
> 197. The Court may also refuse to grant relief where the petitioner does not come to court with clean hands which may lead to a conclusion that the harm inflicted upon him was not unfair and that the relief granted should be restricted. (See London School of Electronics, Re [1986] Ch. 211).
> 198. Furthermore, when the petitioners have consented to and even benefited from the company being run in a way which would normally be regarded as unfairly prejudicial to their interests or they might have shown no interest in pursuing their legitimate interest in being involved in the company. (See RA Noble & Sons (Clothing) Ltd., Re [1983] BCLC 273)."
>
> (emphasis supplied).

70. Reliance has also been placed on *V.S. Krishnan* (supra) in which this Court has observed:

> "14. In a number of judgments, this Court considered *in extenso* the scope of Sections 397 and 398. The following judgments could be usefully referred to:
>
> (a) *Needle Industries (India) Ltd. and Ors. v. Needle Industries Newey (India) Holding Ltd. and Ors.* [1981] 3 SCC 333.
>
> (b) *M.S. Madhusoodhanan and Anr. v. Kerala Kaumudi (P) Ltd.* (2004) 9 SCC 204.
>
> (c) *Dale and Carrington Investment (P) Ltd. v. P.K. Prathapan* (2005) 1 SCC 212.
>
> (d) *Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad* 2005 (11) SCC 314
>
> (e) *Kamal Kumar Dutta v. Ruby General Hospital Ltd.* 2006 (7) SCC 613.
>
> From the above decisions, it is clear that oppression would be made out:
>
> (a) Where the conduct is harsh, burdensome and wrong.
>
> (b) Where the conduct is mala fide and is for a collateral purpose where although the ultimate objective may be in the interest of the company, the immediate purpose would result in an advantage for some shareholders vis-a-vis the others.
>
> (c) The action is against probity and good conduct.
>
> (d) The oppressive act complained of may be *fully permissible under law but may yet be oppressive* and, therefore, the test as to whether an action is oppressive or

> not is not based on whether it is legally permissible or not since even if legally permissible, if the action is otherwise against probity, good conduct or is burdensome, harsh or wrong or is mala fide or for a collateral purpose, it would amount to oppression under Sections 397 and 398.
>
> (e) Once conduct is found to be oppressive under Sections 397 and 398, the discretionary power given to the Company Law Board under Section 402 to set right, remedy or put an end to such oppression is very wide.
>
> (f) As to what are facts which would give rise to or constitute oppression is *basically a question of fact* and, therefore, whether an act is oppressive or not is fundamentally/basically a question of fact."

71. It was also urged that by inter se transfer between Moral and Mr. R.P. Mittal, no oppression could be caused to Mr. Ashok Mittal. The finding as to undervaluation is also not correct. HQRL could not have raised any objection regarding the aforesaid transaction between Moral and Mr. R.P. Mittal. The claim made by Hillcrest that they were entitled to vote on resolution dated 10.5.2005 is not correct proposition of law. In this regard reliance has been placed upon section 205 of the Companies Act. Learned counsel has also urged that position of shareholders in a company is analogous to that of partners *inter se*, is wholly inaccurate. Company is a separate juristic entity from shareholders. For this purpose, he has relied upon a decision of this Court in *Mrs.Bacha F. Guzdar, Bombay v. Commissioner of Income Tax, Bombay* AIR 1955 SC 74.

72. It was contended on behalf of respondents that out of Rs.45 crores that Moral financed the amount raised through Bank loans

approximately Rs.33.25 crores which was obtained on the credit worthiness of Mr. Ashok Mittal and against personal guarantees of Mr. R.P. Mittal, and Mr. Ashok Mittal. Mr. R.P. Mittal contributed approximately Rs.6.23 crores to Moral and Mr. Ashok Mittal approximately Rs.5.5 crores. Thus they had substantial interest in the company. Though he held only one share in the company. Mr. Ashok Mittal was one of the Directors of the company. Investment of Rs.28.29 crores was made by Hillcrest and remaining amount of Rs.40 crores was raised by way of bank loans against the personal guarantees of Mr. R.P. Mittal and Mr. Ashok Mittal. The EOGM was held on 4.10.2005. The resolution taken at the EOGM has prima facie been upheld by the court. After taking over, Mr. Ashok Mittal has invested Rs.49.5 crores which consists of Rs.9.5 crores directly invested by Mr. Ashok Mittal to pay out bank dues and other personal creditors and on 13.7.2005 another Rs.40 crores was raised through rights issue. R.P. Mittal group was offered shares in proportion to the shareholding but they declined to take any shares. Mr. Ashok Mittal is the major investor in the company. He holds 92% of the equity shares and Mr. R.P. Mittal owns approximately 8% of the shares. The matter as to taking over of management by Mr. Ashok Mittal in 2009 and rights issue in July, 2009 are the subject matter of separate proceedings and are not required to be gone into in the present matter. The interim arrangement

ordered by this Court in Ram Purshottam Mittal v. Hillcrest (supra) is binding. No notice was given to Mr. Ashok Mittal, the then Director of the company. Accordingly, all the three meetings convened under Section 286 of the Companies Act. For this purpose, reliance has been placed on *Sri Parmeshwari Prasad Gupta v. Union of India* (1973) 2 SCC 543. The resolutions are also violative of section 300 of the Companies Act of 1956. There was repeated violation. The action taken as per the impugned resolutions were oppressive as they involved repeated violation of the mandatory provisions of the Companies Act of 1956 and was done surreptitiously without giving any notice to Mr. Ashok Mittal or Hillcrest. The attempt to convert the statutory status of HQRL vis-à-vis public company, Moral by transferring the shares of Moral in HQRL was against the interest of the preference shareholders of Hillcrest, therefore, it is oppressive. Hillcrest and Mr. Ashok Mittal have also supported the aforesaid submissions.

73. Mr. Jaideep Gupta, learned senior counsel to carry home the aforesaid submission has placed reliance on following paragraph of *Sangramsinh P. Gaekwad* (supra) thus:

> "181. 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 [(1977) 47 Comp Cases 92 (Bom)] and Syed Mahomed Ali v. R. Sundaramoorthy; 1958 2 MLJ 259). But the same would not mean that Section 397 provides for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the situation and the court must arrive at a conclusion upon analyzing the materials brought on records that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The conduct, thus, complained of must be such so as to oppress a minority of the members including the petitioners vis-à-vis the shareholders which a fortiori must be an act of the majority. Furthermore, the fact situation obtaining in the case must enable the court to invoke just and equitable rules even if a case has been made out for winding up for passing an order of winding of the company but such winding up order would be unfair to the minority members. The interest of the company vis-à-vis the shareholders must be uppermost in the mind of the court while granting a relief under the aforementioned provisions of the Companies Act, 1956."

He has also relied upon the decision in *Parameswari Prasad Gupta v. Union of India* (supra), the Court observed:

> "10. Now, it cannot be disputed that notice to all the Directors of meeting of the Board of Directors was essential for the validity of any resolution passed at the meeting and that as, admittedly, no notice was given to Mr. Khaitan, one of the Directors of the Company, the resolution passed terminating the services of the appellant was invalid."

Reliance has also been placed on *M.S. Madhusoodhanan v. Kerala Kaumudi (P) Ltd.* (supra) thus:

> "125. In the circumstances, we hold that Madhusoodhanan and his group were not served with the notice dated 1.8.1986. It is, therefore, unnecessary to decide whether the period

prescribed in the notice to apply for the shares was too short or contrary to the Articles of Association of Kerala Kaumudi.

126. Once we have held that Madhusoodhanan and his group, all of whom held shares in Kerala Kaumudi, were not given notice to apply for allotment of the additional shares, it must be held that the subsequent allotment of the shares to Ravi and Srinivasan at the meeting held on 8-8-1986 and the affirmation of such allotment at the meeting allegedly held on 16-8-1986 were vitiated thereby and invalid."

Reliance has also been placed on *Union of India v. Allied International Products Ltd. & Anr.* (1970) 3 SCC 594:

"15. The application for allotment of shares and acceptance thereof constitute a contract between the Company and the applicant. Section 73(1) of the Companies Act imposes a penalty whereby the allotment of shares becomes void on the happening of the contingency specified therein. The imposition of penalty depends upon the violation of the Exchange and when imposed operates to invalidate all contracts resulting from allotment of shares between the applicants for shares and the Company. Such a provision must be strictly construed. Unless the statute in clear terms so provides, when the Exchange intimates its desire to consider the application further, an inference that the Exchange has still rejected the application, cannot be made."

(Emphasis supplied)

74. Section 286 of the Act of 1956 dealing with requirement of notice to Director, is as under:

"**Sec 286 - Notice of meetings.**

(1) Notice of every meeting of the Board of directors of a company shall be given in writing to every director for the time being in India, and at his usual address in India to every other director.

(2) Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to one thousand rupees."

It has not been disputed that no notice under section 286 had been given to Mr. Ashok Mittal, the Director when impugned resolutions were passed.

75. In *Needle Industries* (supra), it has been observed by this Court that the resolution passed by the Director may be perfectly legal and yet oppressive and conversely a resolution which is in contravention of the law may be in the interest of the shareholders of the company. Every illegality will not make it oppressive. Prejudice has to be shown. No complaint of oppression could be entertained merely on the ground of failure to attach notice of Board meeting was an act of illegality. It has to be shown that the action was unfair to the person to whom notice has not been given and causes prejudice to him in the exercise of legal and proprietary rights as shareholders.

76. In *Sangramsinh P. Gaekwad* (supra), it has been observed that their conduct is harsh, burdensome, wrong, mala fide or and is for a collateral purpose against probity and good conduct. The impugned resolutions are unfair to Mr. Ashok Mittal in the facts and circumstances of the case even otherwise the absence of the notice is enough to invalidate the same as mandated by section 286.

77. The provisions of section 300 of the Companies Act has also been pressed into service which provides that interested Director is not to participate or vote in the Board's proceedings. Section 300 is extracted hereunder:

> "**Sec 300 - Interested director not to participate or vote in Board's proceedings.**
>
> (1) No director of a company shall, as a director, take any part in the discussion of, or vote on, any contract or arrangement entered into, or to be entered into, by or on behalf of the company, if he is in any way, whether directly or indirectly, concerned or interested in the contract or arrangement; nor shall his presence count for the purpose of forming a quorum at the time of any such discussion or vote; and if he does not, his vote shall be void.
>
> (2) Sub-section (1) shall not apply to
>
> (a) a private company which is neither a subsidiary nor a holding company of a public company;
>
> (b) a private company which is a subsidiary of a public company, in respect of any contract or arrangement entered into, or to be entered into, by the private company with the holding company thereof;
>
> (c) any contract of indemnity against any loss which the directors, or any one or more of them, may suffer by reason of becoming or being sureties or a surety for the company;
>
> (d) any contract or arrangement entered into or to be entered into with a public company, or a private company which is a subsidiary of a public company, in which the interest of the director aforesaid consists solely
>
> (i) in his being a director of such company and the holder of not more than shares of such number or value therein as is requisite to qualify him for appointment as a director thereof, he having been nominated as such director by the company referred to in sub-section (1), or
>
> (ii) in his being a member holding not more than two per cent of its paid-up share capital;

> (e) a public company, or a private company which is a subsidiary of a public company, in respect of which a notification is issued under sub-section (3), to the extent specified in the notification.
>
> (3) In the case of a public company or a private company which is a subsidiary of a public company, if the Central Government is of opinion that having regard to the desirability of establishing or promoting any industry, business or trade, it would not be in the public interest to apply all or any of the prohibitions contained in sub-section (1) to the company, the Central Government may, by notification in the Official Gazette, direct that that sub-section shall not apply to such company, or shall apply thereto subject to such exceptions, modifications and conditions as may be specified in the notification.
>
> (4) Every director who knowingly contravenes the provisions of this section shall be punishable with fine which may extend to fifty thousand rupees."

78. It was urged on behalf of the respondents that the decisions were taken in the impugned resolution in favour of two Directors namely, Mr.R.P. Mittal and Mrs. Sarla Mittal. They have been discussed and voted upon by said two persons themselves. As the Directors act as fiduciaries when they conduct Board meeting, they cannot participate in decisions in their own favour. For this purpose, reliance has been placed upon *Dale & Carrington Invt. (P) Ltd. & Anr. V. P.K. Prathapan & Ors.* (supra), this Court observed:

> "13. On the role of Directors, the law is well settled. The position has been the subject matter of various decisions. Some of them are:
>
> In Regal (Hastings) Ltd. v. Gulliver 1942 (1) All ER 378 (HL) Lord Russell of Killowen observed as under (All ER p. 387 G):
>
> "Directors of a limited company are the creatures of statute and occupy a position peculiar to themselves. In

some respects, they resemble trustees, in others they do not. In some respects, they resemble agents, in others they do not. In some respects, they resemble managing partners in others they do not."

The said judgment quotes from Principles of Equity by Lord Kames. In one sentence the entire concept is conveyed. The sentence runs: (All ER p. 391 H)

"Equity prohibits a trustee from making any profit by his management, directly or indirectly."

Ultimately the issue in each case will depend upon the facts of that case.

14. Lindley, M.R. observed in Alexander v. Automatic Telephone Co. (1900) 2 Ch. 56:

"The Court of Chancery has always exacted from Directors the observance of good faith towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim "caveat emptor" has no application to such cases, and Directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company, so that all the shareholders may participate in them."

16. In Needle Industries case (supra) the Board of Directors had resolved to issue 16,000 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 shareholder concerned. The holding company held 18,990 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 16,000 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. (supra) 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 were unjustifiably enriched, namely Rs. 90 x 9495 which comes to Rs. 8,54,550/- to the holding company.

17. In *Needle Industries* case (supra) this Court referred to some old English decisions with approval. *Punt v. Symons* (1903) 2 Ch. 506 was quoted (at SCC p. 394, para 105) in which it was held:

> "Where shares had been issued by the Directors, not for the general benefit of the company, but for the purpose of controlling the holder of the greater number of shares by obtaining a majority of voting power, they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used."

18. *Piercy v. S. Mills & Co. Ltd.* (1920) 1 Ch.77 applied the same principle while holding: (All ER p. 316 D-E)

> "The basis of both cases is, as I understand, that Directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders."

19. *In Hogg v. Cramphorn Ltd.* (1967) 1 Ch 254, Buckley, J. reiterated the principle in Punt (supra) and in Piercy (supra). It was held that if the power to issue shares was exercised for an improper motive the issue was liable to be set aside and it was immaterial that the issue was made in a bona fide belief that it was in the interests of the company.

20. The principle deduced from these cases is that when powers are used merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company, the same cannot be upheld.

21. Courts in the Commonwealth countries including England and Australia have emphasized that the duty of the Directors does not stop at "to act bona fide" requirement. They have evolved a doctrine called the 'proper purpose doctrine' regarding the duties of company directors. In Hogg v. Cramphorn (supra), explicit recognition was given to the proper purpose test over and above the traditional bonafide test. In this case the Director had allotted shares with special voting rights to the trustees of a scheme set up for the benefit of company employees with the primary purpose of avoiding a takeover bid. Buckley, J. found as a fact that the Directors had acted in subjective good faith. They had indeed honestly believed that their actions were in the best interests of the company. Despite this it was observed: (All ER p. 427 E)

> "An essential element of the scheme, and indeed its primary purpose, was to ensure control of the company by the Directors and those whom they could confidently regard as their supporters."

22. As such, he concluded that the allotment was liable to be set aside as a consequence of the exercise of the power for an improper motive. He also held that the power to issue shares was fiduciary in nature. In Howard Smith Ltd. v. Ampol Petroleum Limited 1974 AC 821, the Privy Council confirmed the above view expressed by Buckley, J. which shows a preference for the proper-purpose doctrine. The Privy Council felt that the bona fide test was not sufficient to meet the challenge because it failed to encompass the obligation of directors to be fair. The Directors' acts should not only satisfy the test of bona fides, they should also be done with a proper motive. Any lingering doubts over the status of the proper purpose doctrine as a separate and independent head of Directors duty within the common law jurisdiction have been laid to rest by two decisions of the Court of Appeal in England in Rolled Steel Products (Holdings) Limited v. British Steel Corporations 1986 Ch 246 and Bishopsgate Investment Management Ltd. (in liquidation) v. Maxwell (No. 2) (1994) 1 All ER 261 (CA). It was held by the Court of Appeal in Bishopsgate (supra) that the bona fides of the Directors alone would not be determinative of the propriety of their actions. In a parallel development in Australia the proper purpose doctrine has been approved in a decision of the High Court in Whitehouse v. Carlto Hotel Pty. Ltd. (1987) 162 CLR 285.

23. Tea Brokers (P) Ltd. v. Hemendra Prosad Barooah (1998) 5 Comp LJ 463 was also a case of a minority

shareholder who on becoming Managing Director of the company, issued further share capital in his favour in order to gain control of management of the company. Barooah and his friends and relations were majority shareholders of the respondent company having 67% of the total issued capital of the company. Barooah personally held 300 equity shares out of 1155 shares issued by the company. He was at all material times a Director of the company. His case was that he was wrongfully and illegally ousted from the management of the company. One Khaund, who initially started as an employee of the company had 110 shares in the company and belonged to the minority group. Khaund was appointed as the Managing Director of the company. Barooah's grievance was that Khaund took advantage of his position as Managing Director and acted in a manner detrimental and prejudicial to the interests of the company and in a manner conducive to his own interest. Khaund had hatched a plan with other Directors, to convert petitioner Barooah into a minority and to obtain full and exclusive control and management of the affairs of the company. In a petition filed under Sections 397 and 398 of the Companies Act, 1956, acts of Khaund were found to be by way of 'oppression and mismanagement' within the meaning of Sections 397 and 398 of the Companies Act. Allotment of 100 equity shares by the company to Khaund at a meeting of the Board of Directors said to have been held on 14 January, 1971 was held to be illegal. The Board of Directors of the company was superseded and a special officer was appointed to carry on management of the company with the advice of Barooah, Khaund and a representative of the labour union. There were several other directions issued by the Court which are not necessary to be mentioned here. The Division Bench considered in detail the relevant legal position. Without using the phrase 'proper purpose doctrine' the principle enunciated therein, was applied. The following observations of Justice A.N. Sen are reproduced:

> "It is well settled that the Directors may exercise their powers bona fide and in the interest of the company. If the Directors exercise their powers of allotment of shares bona fide and in the interest of the company, the said exercise of powers must be held to be proper and valid and the said exercise of powers may not be questioned and will not be invalidated merely because they have any subsidiary additional motive, even though this be to promote their advantage. An exercise of power by the Directors in the matter of allotment of shares, if made

mala fide and in their own interest and not in the interest of the company, will be invalid even though the allotment may result incidentally in some benefit to the company."

27. Reference has been made to the case of *Piercy v. S. Mills & Co. Ltd.* [1920 1 Ch 77] where Directors, who controlled merely a minority of the voting power in the company allotted shares to themselves and their friends not for the general benefit of the company, but merely with the intention of thereby acquiring a majority of the voting power and of thus being able to defeat the wishes of the existing minority of shareholders. It was held that, even assuming that the directors were right in considering that the majority's wishes were not in the best interests of the company, the allotments were invalid and ought to be declared void. It follows from this case that the exercise by Directors of fiduciary powers for purposes other than those for which they were conferred is invalid. It may be said that although the power of issuing shares is given to Directors primarily for the purpose of enabling them to raise capital when required for the purpose of the company, this was not the object of the Directors in this case.

28. It will be seen from the judgments in Needle Industries (supra) and Tea Brokers (supra) that the courts in India have applied the same tests while testing exercise of powers by Directors of companies as in other Commonwealth countries.

29. In the present case we are concerned with the propriety of issue of additional share capital by the Managing Director in his own favour. The facts of the case do not pose any difficulty particularly for the reason that the Managing Director has neither placed on record anything to justify issue of further share capital nor has it been shown that proper procedure was followed in allotting the additional share capital. Conclusion is inevitable that neither was the allotment of additional shares in favour of Ramanujam bona fide nor was it in the interest of the company nor was a proper and legal procedure followed to make the allotment. The motive for the allotment was mala fide, the only motive being to gain control of the company. Therefore, in our view, the entire allotment of shares to Ramanujam has to be set aside."

(emphasis supplied)

79. In *Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd. & Ors.* (supra), it was observed:

> . "Section 300 of the Companies Act, 1956, embodies, just as section 91B of the Indian Companies Act, 1913, did, the general rule of equity (see Pratt (T.R.) (Bombay) Ltd. v. M.T. Ltd. [1938] 8 Comp. Cas. 137. The clearest exposition of this rule is to be found in Aberdeen Rly. Co. v. Blaikie. [1854] 1 Macq. 461-471-72 (H.L.). In that case, Lord Cranworth said:
>
> > "A corporate body can only act by agents and it is course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principle. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of cestui que trust, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person, - they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted."
>
> Though this was a case from Scotland, the rule of English law is the same, for, as observed by Swinfen Eady. L.J., in Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company, [1914] 2 Ch. 488, 502 (C.A.), the doctrine rests on such obvious principles good sense that it is difficult to suppose that there could be any system of law in which it would not be found, In Transvaal Land Company's case it was held at page 503 that:
>
> "Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards, and owes a duty to, another company which is

> proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others."
>
> This rule was characterised by Lord Cairns L.C. in Parker v. McKenna [1874] LR 10 Ch. App. 96, 118, as not a technical or arbitrary rule but a rule founded upon the highest and truest principle of morality. Thus, this rule applies not only where there in a conflict of interest or conflict of interest and duty but also where there is a conflict to two duties. It is immaterial whether the interest is a personal interest or arises out of a fiduciary capacity or whether the duty which is owed is in a fiduciary capacity. Actual conflict is also not necessary. A possibility of conflict is enough to bring the case within the ambit of this rule nor does the application of this rule depend upon the extent of the adverse interest. Directors stand towards the company in a fiduciary position In India this fiduciary character has received statutory recognition in section 88 of the Indian Trusts Act, 1882. The reason underlying this rule is that the company has a right to the unbiased voice, advice and collective wisdom of its directors. (See Benson v. Heathorn; [1842] 1 Y. & C. Ch. Cas. 326, 341-42; Imperial Mercantile Credit Association v. Coleman and Victors Ltd. v. Lingard [1927] 1 Ch 323, 330)."
>
> (emphasis supplied)

80. In *Madras Tube Co. Ltd. & Ors. v. Hari Kishon Somani & Ors.* (supra), it was observed:

> "I do not think the pattern of section 91(a) and 91(B) should be superimposed on the enactment of the present group of sections 299, 300 and 301. Section 301, in terms, refers to a register being kept of contracts and arrangements to which section 297 or section 299 applies. It does not refer, in terms, to section 300. This is because the purpose of a register of contracts is to put the shareholder upon notice of the contract and arrangements in which the directors are interested and which they have disclosed whereas the function of section 300 is quite different which is to render invalid any resolution of a Board Meeting in which an interested director participates or votes.

The result of this discussion is that the appointment of an additional director by a resolution of the Board in terms of the power given to the Board under the company's articles must be regarded as an arrangement rendered by or on behalf of the company if in that appointment a director who is interested in the appointee participates or votes, then two consequences flow. One is that he could not form the quorum; the other is that the resolution itself is void. In this case H M Periwal being the brother of P C Periwal must be regarded as interested in the appointment of his brother in the board of directors in the real sense of that expression. As the Supreme Court had occasion to point out in the Firestone case (1970) 2 Company Law Journal p 200), the expressions 'interested or concerned' are fairly wide in their connotation and they include not merely a financial concern or interest, but include any interest arising out of the closeness of relationship as between father and son, father and daughter, husband and wife, brother and sister and the like. I am therefore satisfied that in this case the first resolution was wanting in quorum because H M Periwal was not entitled to participate in the voting and the resolution itself was not valid because H M Periwal has voted that resolution. It follows that P C Periwal was not validly appointed as Additional Director.

x x x x x

As I earlier remarked the fundamental principle of equity which runs right through like a golden thread in all the decisions of courts is that no director can participate or vote in a Board meeting where he is aware that his duties and interests conflict or are likely to be in competition. This rule attaches to the very office of a director which is of a fiduciary character. Corporate enterprises, in which the ultimate properties are the shareholders, are entrusted completely in the hands of the Board of Directors. The only basis for the Board being given the management and administration of the corporate enterprise is the trust and confidence reposed by the shareholders in the directors. It is, therefore, of prime importance that in any transaction in which the directors participate as directors of the company they should not only declare their personal interests therein, buy they must desist from participation in any decision-making. The theory is that the Board acts as a body. How the act of the Board as a body is shaped is a matter left to the inter-play of the minds of the directors, and the respective strength or weakness of each to carry the others along with him. If, therefore, a director who could sway the decision of the Board, one way or the other is a

> person interested in the subject matter of the deliberations and nevertheless participates in the meeting, and the interests of the director are not identical with those of the company, the ultimate damage to the company and the shareholders could well be imagined. This principle that where a director has a personal interest, he ought not to participate in the Board's deliberation is so sacred that no further inquiry is necessary to set at naught decisions brought about in violation of the principles. No harm might result to the company by allowing participation of an interested director, and yet the participation, per se, is vicious."
>
> (emphasis supplied)

81. In the light of the aforesaid decisions it was improper for the Directors to allot shares to themselves and to the exclusion of Mr. Ashok Mittal in the facts and circumstances of the case and that too without issuance of notice to him.

82. It was also submitted that Hillcrest would have no right to vote as no dividend was declared in view of the provisions contained in section 87 of the Companies Act of 1956. Reliance has been placed on following decisions:

(a) In *Mrs. Bacha F. Guzdar, Bombay* (supra), the Court observed:

> "9. It was argued that the position of shareholders in a company is analogous to that of partners 'inter se'. This analogy is wholly inaccurate. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders. In Halsbury's Laws of England,

Volume 6 (3rd Ed.), page 234, the law regarding the attributes of shares is thus stated:

> "A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the nature of real estate."

(b) This Court in *National Textile Workers Union & Ors. v. P. R. Ramakrishna & Ors.* (1983) 1 SCC 228 has observed:

> "9. Considerable reliance was however placed on behalf of respondent Nos. 6 to 9 on the statement of the law on this point contained in the leading text books on company law. Respondent Nos. 6 to 9 drew our attention to Palmer Company Precedents (17th Edn.) volume 2 at page 77 where it is stated that any creditor or shareholders may appear to support or oppose the petition but no one else can do so even if he has an indirect interest in the continued existence of the company. So also in Buckley on the Companies Act (14th Edn.) at page 546 the law has been stated in the following terms, namely, "the only persons entitled to be heard are the company, its creditors and contributories...the court may in its discretion hear other persons who have an interest in order to learn what public grounds there are in favour of, or in opposition to, the winding up but such persons can be heard only as amicus curiae and cannot appeal" Our attention was also invited to Halsbury's Laws of England 4th Ed. Vol. 7 where a similar statement of the taw is to be found at page 614 paragraph 1028. Now it is undoubtedly true that according to the statement of the law contained in these three leading text books, it is only the company, the creditors and the contributories who are entitled to appear on the winding up petition and no other persons have a right to be heard, but this statement of the law is based on the old decision in Re. Bradford Navigation Company which was carried in appeal and decided as Re.

Bradford Navigation Company. This decision given by the English Courts over a hundred years ago when a company was regarded merely as a legal device brought into being as a result of a contractual arrangement between the shareholders for the purpose of carrying on trade or business and the workers were looked upon as no more than employees of the company working under a master and servant relationship and the interest of the public as consumers or otherwise was a totally irrelevant consideration and it can have no validity in the present times when the entire concept of a company has changed and it has been transformed into a dynamic socio-economic institution in which capital and labour are both equal partners, possibly with heavy weightage in favour of labour and the interest of the public as consumers as also the general welfare and common good of the community constitute a vital consideration. We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living, tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adopting itself to the fast changing society and not lag behind. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation. We cannot therefore mechanically accept as valid a legal rule which found favour with the English courts in the last century when the doctrine of laissez faire prevailed. It may be that even today in England the courts may be following the same legal rule which was laid down almost a hundred years ago, but that can be no reason why we in India should continue to do likewise. It is possible that this legal rule might still be finding a place in the English text books because no case like the present one has arisen in England in the last 30 years and the English courts might not have

> had any occasion to consider the acceptability of this legal rule in the present times. But whatever be the reason why this legal rule continues to remain in the English text books, we cannot be persuaded to adopt it in our country, merely on the ground that it has been accepted as a valid rule in England. We have to build our own jurisprudence and though we may receive light from whatever source it comes, we cannot surrender our judgment and accept as valid in our country whatever has been decided in England. The rule enunciated in re: Bradford Navigation Company case (supra) does not commend itself to us and though it has been followed by a single Judge of the Bombay High Court in re Edward Textiles Limited (supra), we do not think it represents correct law.

(c) He has also referred to Halsbury's Laws of England, Volume 6 (3rd Ed.), page 234, the law regarding the attributes of shares is thus stated:

> "A share is a right to specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the nature of real estate."

(d) Reliance has also been placed on *M/s. Kothari Textiles Ltd., Madras & Ors. v. Commissioner of Wealth Tax, Madras*; AIR 1963 Mad. 274 in which the High Court observed as under:

> “25. Article 147 also provides that no dividend shall be payable except out of the profits of the year or any other undistributed profits except as provided by Sections 205 and 208. It is obvious that the dividend payable to holders of preference shares must necessarily depend upon there being distributable profits and in terms of the relevant article, what the preference shareholders get is only a priority to payment over the equity shareholders. That they are

> entitled to certain special rights on the winding up of the company does not make any difference. Whether or not there are distributable profits is for the general body to decide and only if the general body declares a dividend will the preference shareholders be entitled to be paid."

(e) In *Trojan Equity Ltd. v. CMI Ltd.* [2009] QSC (Supreme Court of Queensland) 114 with respect to rights of shareholders, it was observed:

> "16. The argument that the commercial purpose of the rules is supported by construing "in arrears" as applying to the situation where dividends have not been paid, rather than only where they have been declared and not paid, was developed by reference to ASX listing rule 6.3 which provides that the holder of a preference share must be entitled to a right to vote during a period in which a dividend or part of a dividend is in arrears. That seems to me, however, simply to beg the question. The argument was that the purpose of the rules, where no dividends could be paid because there were no profits, was enhanced by adopting the interpretation that would permit Class A shareholders to vote when dividends had not been paid, regardless of whether there had been a declaration by the directors. The submission was that those rules have the function of setting requirements for the organisations whose securities are to be publicly traded. The commercial purpose of both the restriction on voting of preference shares and the exceptions from that restriction, as set out in the listing rules, was said to be to leave the voting control of the company in the hands of ordinary shareholders, except when the situations identified in the listing rule arose, when the additional right and protection of being entitled to vote was conferred on the preference shareholder. Mr Jackson QC submitted that nothing about that purpose dictated or suggested that it would be better served by restricting the operation of r. 30.16(c) to dividends declared but not paid.

> 18. Mr McKenna's response was that the proper focus was the meaning of the words in the constitution and what they revealed about the balance struck between the preference shareholders' understandable wish to vote at every possible occasion when their shares were at risk, and the general regime which is that they did not have the right to vote at all. He submitted that a particular balance had been struck between the differing groups of shareholders which created a strong incentive for the company to declare dividends because when dividends were not paid to the preference shareholders the ordinary shareholders were not paid either and for a longer period. In drawing attention to the constitution's use of language he concluded that dividends could not be in arrears in any ordinary use of English if they had never been payable and never would be payable." (emphasis supplied)

(f) Reliance was also placed by Shri Misra on *Indore Development Authority v. Shailendra (Dead) through LRs. & Ors*. (2018) 3 SCC 412 thus:

> "40. In *J. Dalmia v. CIT*, AIR 1964 SC 1866, this Court has observed that the expression "paid" does not contemplate actual receipt of the dividend by the member. The dividend may be said to be paid within the meaning of Section 16(2) when the company discharges its liability and makes amount unconditionally available the members entitled thereto: (AIR p. 1869, para 10)
>
> > *"10. …The expression "paid" in Section 16(2) it is true does not contemplate actual receipt of the dividend by the member. In general, dividend may be said to be paid within the meaning of Section 16(2) when the company discharges its liability and makes the amount of dividend unconditionally available to the member entitled thereto."*
> >
> > (emphasis supplied)"

(g) In *CDS Financial Services* (supra) it was observed:

> "48. Regarding plaintiff's right to vote on preference shares:
>
> Now the only question that remains to be considered is whether the plaintiff is entitled to exercise voting rights on preference shares held by it. The case of the plaintiff in short is that the dividend has not been paid in respect of the preference shares for financial year ending March 3l, l998, l999, and 2000 and, therefore, by virtue of section 87(2)(b)(ii), the plaintiff is entitled to vote on the said preference shares. The company has not disputed that the dividend in respect of the preference shares has remained unpaid and, therefore, the plaintiff as shareholder has acquired voting rights. However, it is the case of the company that exercising of voting right would violate conditions imposed by Reserve Bank of India. It is the submission of the company that plaintiff cannot vote beyond the limit of 49%. In order to appreciate this issue, it would be necessary to state few admitted facts. When the plaintiff purchased preference shares, it had applied and obtained permission from the Reserve Bank of India under section 29(l)(b) of the Foreign Exchange Regulations Act, l973 ("FERA"). While granting such permission under section 29(l)(b) of the FERA, the Reserve Bank of India vide letter dated l2.1.l998 imposed several conditions. Two conditions which are relevant for our purpose are as follows:
>
> (l) that no shares be acquired by CDC without the prior permission of the Reserve Bank of India;
>
> (2) that the conditions contained in the letter dated 6.1.l998 shall be complied with.
>
> The letter dated 6.1.l998 stipulates that foreign equity shall not exceed 49% as is permissible under the policy for investing in companies. Further the licence granted by the DOT when amended by letter dated 29.1.200l stipulated that certain conditions shall always be complied with and shall not be violated, including inter alia that there shall be a cap of 49% of foreign equity and the management control of the company shall remain with the Indian shareholders.
>
> 50. According to Mr. Chidambaram the conditions contained in the special permission of the Reserve Bank of India will prevail over the provisions of the Companies Act in view of section 29(l)

of FERA which contains a non-obstante clause. He pointed out that FERA has been replaced by Foreign Exchange Management Act, l999 ("FEMA") and by virtue of section 49 of FEMA, the special permission is saved and now deemed to have been granted under the corresponding provisions of sections 6 of FEMA read with Regulation 5 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India), Regulations, 2000 and Schedule I thereto read with Annexure B to the said Schedule. Mr. Chidambaram's contention is that the special permission is a statutory order passed by a statutory authority viz. Reserve Bank of India on which power to grant such permission was conferred by Parliament under section 29 of FERA and the special permission will prevail over the provisions of the Companies Act.

56. Mr. Chagla also submitted that the stage to consider whether there would be violation of conditions of Reserve Bank of India would arise only when the plaintiff actually exercise voting rights and its rights cannot be pre-empted prematurely merely on the basis of the apprehension that it would result in violation of the conditions laid down by the Reserve Bank of India. We cannot accept the submission of Mr. Chagla for the simple reason that granting such voting rights would necessarily have the effect of breach of the condition viz. cap of 49% equity and will result in virtually transferring the management to the non-Indian shareholders. Moreover, if the relief claimed by the plaintiff is granted, it would virtually amount to passing a decree at the interim stage. Therefore, the prayer of the plaintiff for permitting it to exercise voting rights in respect of the preference share cannot be accepted."

83. Section 19(2) of the Companies Act provides that nothing in sections 85 to 89 shall apply to a private company unless it is a subsidiary of a public company and this question has to be finally decided whether it is a private or public limited company in the pending civil suit which have been stated to be transferred to NCLT for decision in accordance with law. Otherwise, section 87 provides that notice has

to be issued to preference shareholders also for the meeting and they have a right to participate in the meeting. It appears prima facie even if dividend has not been declared. In that case also, preference shareholders shall have a right to vote in the meeting.

84. Reliance has also been placed on the provisions of section 169(4) of the Companies Act regarding calling of EOGM on requisition. The resolution with respect to EOGM is not in issue in the present case. As such we need not dilate upon the provisions of section 169(4) and the submissions.

85. Coming to the submissions based upon the provisions of section 108 of the Act of 1956. Section 108 is extracted hereunder:

> "Sec 108 - Transfer not to be registered except on production of instrument of transfer.
>
> (1) A company shall not register a transfer of shares in, or debentures of, the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures :
>
> Provided that where, on an application in writing made to the company by the transferee and bearing the stamp required for an instrument of transfer, it is proved to the satisfaction of the Board of directors that the instrument of transfer signed by or on behalf of the transferor and by or on behalf of the transferee has been lost, the company may register the transfer on such terms as to indemnity as the Board may think fit :

Provided further that nothing in this section shall prejudice any power of the company to register as shareholder or debenture-holder any person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law.

(1A) Every instrument of transfer of shares shall be in such form as may be prescribed, and:

(a) every such form shall, before it is signed by or on behalf of the transferor and before any entry is made therein, be presented to the prescribed authority, being a person already in the service of the Government, who shall stamp or otherwise endorse thereon the date on which it is so presented, and

(b) every instrument of transfer in the prescribed form with the date of such presentation stamped or otherwise endorsed thereon shall, after it is executed by or on behalf of the transferor and the transferee and completed in all other respects, be delivered to the company,

(i) in the case of shares dealt in or quoted on a recognized stock exchange, at any time before the date on which the register of members is closed, in accordance with law, for the first time after the date of the presentation of the prescribed form to the prescribed authority under clause (a) or within twelve months from the date of such presentation, whichever is later;

(ii) in any other case, within two months from the date of such presentation.

(1B) Notwithstanding anything contained in sub-section (1A), an instrument of transfer of shares, executed before the commencement of section 13 of the Companies (Amendment) Act, 1965 (31 of 1965) or executed after such commencement in a form other than the prescribed form, shall be accepted by a company,

(a) in the case of shares dealt in or quoted on a recognized stock exchange, at any time not later than the expiry of six months from such commencement or the date on which the register of members is closed, in accordance with law, for the first time after such commencement, whichever is later;

(b) in any other case, at any time not later than the expiry of six months from such commencement.

(1C) Nothing contained in sub-sections (1A) and (1B) shall apply to:

(A) Any share : (i) which is held by a company in any other body corporate in the name of a director or nominee in pursuance of sub-section (2), or as the case may be, sub-section(3), of section 49, or (ii) which is held by a corporation, owned or controlled by the Central Government or a State Government, in any other body corporate in the name of a director or nominee, or (iii) in respect of which a declaration has been made to the Public Trustee under section 153B, if : (1) the company or corporation, as the case may be, stamps or otherwise endorses, on the form of transfer in respect of such share, the date on which it decides that such share shall not be held in the name of the said director or nominee or, as the case may be, in the case of any share in respect of which any such declaration has been made to the Public Trustee, the Public Trustee stamps or otherwise endorses, on the form of transfer in respect of such share under his seal, the date on which the form is presented to him, and (2) the instrument of transfer in such form, duly completed in all respects, is delivered to the : (a) body corporate in whose share such company or corporation has made investment in the name of its director or nominee, or (b) company in which such share is held in trust, within two months of the date so stamped or otherwise endorsed ; or

(B) any share deposited by any person with : (i) the State Bank of India, or (ii) any scheduled bank, or (iii) any banking company (other than a scheduled bank) or financial institution approved by the Central Government by notification in the Official Gazette (and any such approval may be accorded so as to be retrospective to any date not earlier than the 1st day of April, 1966), or (iv) the Central Government or a State Government or any corporation owned or controlled by the Central Government or a State Government, by way of security for the repayment of any loan or advance to, or for the performance of any obligation undertaken by, such person, if : (1) the bank, institution, Government or corporation, as the case may be, stamps or otherwise endorses on the form of transfer of such share : (a) the date on which such share is returned by it to the depositor, or (b) in the case of failure on the part of the depositor to repay the loan or advance or to perform the obligation, the date

on which such share is released for sale by such bank, institution, Government or corporation, as the case may be, or (c) where the bank, institution, Government or corporation, as the case may be, intends to get such share registered in its own name, the date on which the instrument of transfer relating to such share is executed by it ; and (2) the instrument of transfer of such form, duly completed in all respects, is delivered to the company within two months from the date so stamped or endorsed.

Explanation. : Where any investment by a company or a corporation in the name of its director or nominee referred to in clause (A)(i) or clause (A)(ii), or any declaration referred to in clause (A)(iii), or any deposit referred to in clause (B), of this sub-section is made after the expiry of the period or date mentioned in clause (a) of sub-section (1B) or after the expiry of the period mentioned in clause (b) of that sub-section, as the case may be, the form of transfer, in respect of the share which is the subject of such investment, declaration or deposit, means the prescribed form ;

or

(C) any share which is held in any company by the Central Government or a State Government in the name of its nominee, except that every instrument of transfer which is executed on or after the 1st day of October, 1966, in respect of any such share shall be in the prescribed form.

(1D) Notwithstanding anything in sub-section (1A) or sub-section (1B) or sub-section (1C) where in the opinion of the Central Government it is necessary so to do to avoid hardship in any case, that Government may on an application made to it in that behalf, extend the periods mentioned in those sub-sections by such further time as it may deem fit whether such application is made before or after the expiry of the periods aforesaid ; and the number of extensions granted hereunder and the period of each such extension shall be shown in the annual report laid before the Houses of Parliament under section 638.

(2) In the case of a company having no share capital, sub-section (1) shall apply as if the references therein to shares were references instead of the interest of the member in the company.

(3) Nothing contained in this section shall apply to transfer of security effected by the transferor and the transferee both

> of whom are entered as beneficial owners in the records of a depository."

86. It was also submitted that there is violation of section 108 of the Companies Act of 1956. It was submitted on behalf of Hillcrest that the Board meeting was held on 10.5.2005 in which 32,88,181 shares of HQRL were purportedly transferred by Moral to Mr. R.P. Mittal. Out of 32,88,181 shares, 8,98,166 shares were lying with the Overseas Bank and were available before the Board of HQRL for recording of transfer. Shares can be transferred only in accordance with section 108 of the Companies Act which provides for filing of the share certificate which was a mandatory requirement as observed in *Mannalal Khetan & Ors. v. Kedar Nath Khetan & Ors.* (1977) 2 SCC 424 thus:

> "16. The provision contained in Section 108 of the Act states that a company shall not register a transfer of shares...unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee .... has been delivered to the company along with the certificate relating to the shares or debentures ... or if no such certificate is in existence along with the letter of allotment of the shares.
>
> There are two provisos to section 108 of the Act. We are not concerned with the first proviso in these appeals. The second proviso states that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law. The words shall not register" are mandatory in character. The mandatory character is strengthened by the negative form of the language. The prohibition against transfer without complying with the provisions of the Act is emphasised by the negative language. Negative language is worded to emphasise the insistence of compliance with the provisions

of the Act. (See State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga [1952] SCR 889; K. Pentiah v. Muddala Veeramallappa [1961] 2 SCR 295 and unreported decision dated April 28, 1976 in Criminal Appeal 279 of 1975 and Additional District Magistrate, Jabalpur v. Shivakant Shukla (1976) 2 SCC 521.) Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative.

17. In Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur. (1965) 1 SCR 970 this Court referred to various tests for finding out when a provision is mandatory or directory. The purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the general inconvenience or injustice which may result to the person from reading the provision one way or the other, the relation of the particular provision to other provisions dealing with the same subject and the language of the provision are all to be considered. Prohibition and negative words can rarely be directory. It has been aptly stated that there is one way to obey the command and that is completely to refrain from doing the forbidden act. Therefore, negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. (See *Maxwell on Interpretation of Statutes* 11th Ed. p. 362 seq.; *Crawford: Statutory Construction, Interpretation of Laws* p. 523 and *Seth Bikhraj Jaipuria v. Union of India* [1962] 2 SCR 880.

18. The High Court said that the provisions contained in Section 108 of the Act are directory because non-compliance with section 108 of the Act is not declared an offence. The reason given by the High Court is that when the law does not prescribe the consequences or does not lay down penalty for noncompliance with the provision contained in Section 108 of the Act the provision is to be considered as directory. The High Court failed to consider the provision contained in Section 629(A) of the Act. Section 629(A) of the Act prescribes the penalty where no specific penalty is provided elsewhere in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or merely to make the person who did it liable to pay the penalty."

87. Section 108 operates independently of section 286 or section 300.

The invalidation of meeting is dependent under the provisions of section

108. There was violation of section 108 of the Companies Act. HQRL did not file share certificate along with the duly executed share transfer form as on 10.5.2005, the date of Board resolution. The plea of Mr. R.P. Mittal has been disbelieved that share certificates were returned on 23.6.2003. The High Court has also ordered the proceedings under section 340 Cr.P.C. against Mr. R.P. Mittal for filing an affidavit to the contrary. The High Court has relied on the affidavit of Mr. Vivek Dixit and Mr. Deepak Sudan, the concerned officials of the Indian Overseas Bank. The High Court has found that the share certificates were delivered to Mr. R.P. Mittal not on 23.6.2003 but on 23.6.2005. No doubt about it that there was violation of the provisions of section.

88. With respect to the appropriate order to be passed under section 397 of the Companies Act of 1956, reliance has been placed upon *M.S.D.C. Radha Ramanan v. M.S.D. Chandrasekara Raja & Anr.* (2008) 6 SCC 750 thus:

> "23. Sections 397 and 398 of the Act empower the Company Law Board to remove oppression and mismanagement. If the consequences of refusal to exercise jurisdiction would lead to a total chaos or mismanagement of the company, would still the Company Law Board be powerless to pass appropriate orders is the question. If a literal interpretation to the provisions of Section 397 or 398 is taken recourse to, may be that would be the consequence. But jurisdiction of the Company Law Board having been couched in wide terms and as diverse reliefs can be granted by it to keep the company functioning; is it not desirable to pass an order which for all intent and purport would be beneficial to the company itself and the majority of the members? A court of

> law can hardly satisfy all the litigants before it. This, however, by itself would not mean that the Company Law Board would refuse to exercise its jurisdiction, although the statute confers such a power on it.
>
> 24. It is now a well settled principle of law that the Courts should lean in favour of such construction of statute whereby its jurisdiction is retained enabling it to mould the relief, subject of course, to the applicability of law in the fact situation obtaining in each case."

There can be no dispute with the aforesaid proposition.

89. In the fact and circumstances of the case, taking into consideration the overall scenario, the impugned order calls for no interference. However, direction to prosecute appellant Ram Parshotam Mittal in the facts of the case is set aside.

90. The appeals are accordingly disposed of. The parties to bear their own costs.

.....J.
(Arun Mishra)

New Delhi; **.....J.**
May 10, 2019. **(Indira Banerjee)**