Messer Holdings Limited vs Shyam Madanmohan Ruia on 1 September, 2010

Author: A.M.Khanwilkar

Bench: A.M.Khanwilkar, A.A.Sayed

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 855 of 2003

IN
NOTICE OF MOTION NO. 534 OF 2002
IN
SUIT NO. 509 of 2001

WITH
NOTICE OF MOTION NO. 1308 of 2005
NOTICE OF MOTION NO. 3956 of 2005
NOTICE OF MOTION NO.4118 OF 2007
NOTICE OF MOTION NO. 1973 of 2008

NOTICE OF MOTION NO.1418 of 2008

Messer Holdings Limited,
having their office at 53,
Friends Colony(E), New Delhi 110014. Appellants
(orig. defendant no.4)

v/s.

1. Shyam Madanmohan Ruia,
   of Mumbai Indian Inhabitant residing at

   96, L. Jagmohandas Marg,
   Mumbai 400 006.

2. Ruia & Company,
   a private limited company having its
   registered office at
   Eucharistic Congress Building, 8th floor,
   5, Convent Street, Colaba,

   Mumbai - 400 001.

3. Shamun Pvt. Ltd.
   a private limited company having its
   registered office at
   Eucharistic Congress Building, 8th floor,

   5, Convent Street, Colaba,
   Mumbai - 400 001.

4. Mr. Ramnarain Pvt. Ltd.,
   a private limited company having its

registered office at
Eucharistic Congress Building, 8th floor,
5, Convent Street, Colaba,
Mumbai - 400 001.

5. Smt. Chandra Shyam Ruia,
of Bombay Indian inhabitant residing at
96, L. Jagmohandas Marg,
Mumbai 400 006.

6. Smt. Uma Maharajsingh Mehta,

of Mumbai Indian inhabitant residing at
26, Navrang Gopalrao Deshmukh Marg,

Mumbai - 400 020.

7. Tya P.P. Cape Pvt. Ltd.,
a private limited company having its
registered office at

A/30, Nanddham Industries Estate,
Marol, Maroshi Road, Andheri East,

Mumbai- 400 059.

8. Smt. (Dr.) Nandini Atul Nathwani,

of Mumbai Indian inhabitant residing at
8-A, Jeevan, Nepean sea Road,
Mumbai - 400 006. ...Respondents 1-8
(Orig. Plaintiffs)

9. Messer Griesheim Gmbh,
having its registered office at
Frankfurt Airport Centre,
1,C9, D 60547, Frankfurt an
Main Germany and its sale office
at 6th floor, Commercial Tower,
Le Meridien, Windsor Place,

New Delhi - 110 001.

10. Bombay Oxygen Corporation Limited,

a public limited company registered
under the Companies Act, 1956 and

having its registered office at
Lal Bahadur Shastri Marg, Mulund West,
Mumbai 400 080.

11. Goyal MG Gases (P) Limited
a company duly registered under the
Companies Act, 1956 and having its
registered office at 53, Friends Colony(E)
New Delhi 110 065. ...Respondents

(orig. defendants 1, 2 & 3)

ALONGWITH
APPEAL NO. 840 of 2003

IN
NOTICE OF MOTION NO. 3230 of 2000
IN

SUIT NO. 2499 OF 1999
WITH

NOTICE OF MOTION NO. 29 of 2006
NOTICE OF MOTION NO. 3112 of 2003

ALONGWITH
APPEAL NO. 841 of 2003
IN
NOTICE OF MOTION NO. 392 of 2001

IN
SUIT NO. 509 of 2001
WITH
NOTICE OF MOTION NO. 3113 of 2003

ALONGWITH
APPEAL NO. 857 of 2003

IN
NOTICE OF MOTION NO.1231 of 2002

IN
SUIT NO. 2499 OF 1999
WITH
NOTICE OF MOTION NO. 3115 of 2003

Goyal MG Gases (P) Limited
a company duly registered under the
Companies Act, 1956 and having its
registered office at 53, Friends Colony East

New Delhi - 110 065. ....Appellants
ig (org. defendant no.3)

v/s.

1. Shyam Madanmohan Ruia,
of Mumbai Indian Inhabitant residing at
96, L. Jagmohandas Marg,
Mumbai 400 006.

2. Ruia & Company,
a private limited company having its

registered office at
Eucharistic Congress Building, 8th floor,
5, Convent Street, Colaba,

Mumbai - 400 001.

3. Shamun Pvt. Ltd.
a private limited company having its
registered office at

Eucharistic Congress Building, 8th floor,
5, Convent Street, Colaba,
Mumbai - 400 001.

4. Mr. Ramnarain Pvt. Ltd.,
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registered office at

Eucharistic Congress Building, 8th floor,
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of Mumbai Indian inhabitant residing at
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Marol, Maroshi Road, Andheri East,
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8. Smt. (Dr.) Nandini Atul Nathwani,
of Mumbai Indian inhabitant residing at

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Mumbai - 400 006. ...Respondents 1-8

(Orig. Plaintiffs)

9. Messer Griesheim Gmbh,

having its registered office at
Frankfurt Airport Centre,
1,C9, D 60547, Frankfurt an
Main Germany and its sale office
at 6th floor, Commercial Tower,

Le Meridien, Windsor Place,
New Delhi - 110 001.

10. Bombay Oxygen Corporation Limited,
a public limited company registered
under the Companies Act, 1956 and
having its registered office at

Lal Bahadur Shastri Marg, Mulund West,
Mumbai 400 080.

11. Messer Holdings Limited,
having their office at

c/o. Goyal MG Gases Limited,
48, Jangpura, A-4, Mathura Road,
New Delhi - 110 014. ....Respondents
(orig. defendants 1, 2 & 4)

CORAM: A.M.KHANWILKAR AND
A.A.SAYED, JJ.

JUDGMENT RESERVED ON :
ig JUNE 30, 2010.
JUDGMENT PRONOUNCED ON : SEPTEMBER 01, 2010.

JUDGMENT :

(Per A.M.KHANWILKAR, J.) :

> Considering the multiple proceedings resorted to by the parties to the two suits, for the sake of convenience, we would refer to them as per the description of the parties given in the suits.

2. This common Judgment will dispose off all the above proceedings between the parties, before us, except Notice of Motion Nos. 2511/2008 and 2512/2008. The above four Appeals have been filed against the common Judgment and order passed by the Learned Single Judge of this Court dated 26th March, 2003 and clarified on 2nd May, 2003 while 7 appeal 855.03 gr..sxw disposing of all the Notice of Motions in the two suits. The Appeals, however, take exception to the order passed in Notice of Motion Nos.

3230/2000, 392/2001, 534/2002 and 1231 of 2002.

3. Appeal No. 840/2003 is filed by the defendant no.3 against the order in Notice of Motion No. 3230/2000 in Suit no. 2499/99. The Appeal No. 841/2003 is also filed by the defendant no. 3, but against the order in Notice of Motion No. 392/2001 in Suit No. 509/2001. Appeal No. 855/2003 is filed by defendant no.4 against the decision in Notice of Motion No. 534/2002 in Suit No. 509/2001. Appeal No. 857/2003 is filed by defendant no.3 against the decision in Notice of Motion

No. 1231/2002 in Suit No. 2499/99. We would for the sake of convenience reproduce the reliefs claimed in the said four Notice of Motions, which is the subject matter of controversy before us in the four appeals. The same reads thus:

N/M NO.3230/2000 in Suit No. 2499/1999 (filed on 15/11/2000) "(a) that this Hon'ble Court may be pleased to grant leave to Defendant No.3 to act pursuant to implement and enforce the consent Arbitral Award dated 21.9.2000.

(b) ad-interim relief in terms of prayer (a) above;

(c) for costs;

(d) For such other and further relies as the nature and

circumstances of the case may require."

N/M NO.392/2001 in Suit No. 509/2001
(filed on 15/02/2001)

"(a) that pending the hearing and final disposal of the suit, the Defendants be restrained from transferring and/or registering and/or taking any steps to transfer and/or register the said 75,001 shares in the name of any person or persons, firm or body corporate including the 1st and/or 3rd and/or 4th defendants without the consent of the plaintiffs;

b) that pending the hearing and final disposal of this suit defendant No.1, 3 and 4 be restrained by an interim order and injunction of this Hon'ble Court from:

ig i) exercising any rights, including as beneficial owner, in, to, upon, or in respect of the said 75,001 shares;

ii) acting pursuant to, and or taking any steps in furtherance of the said Agreement dated 17th February 2000 and the said Consent Award dated 21st September 2000;

c) for ad-interim reliefs in terms of prayers (a) and (b) above;

d) for costs;

e) for such further and other reliefs as the nature and circumstances of the case may require."

N/M NO.534 OF 2002 in Suit No. 509/2001
(filed on 21/02/2002)

"(a) That pending the hearing and final disposal of the above suit, this Hon'ble Court may be pleased to appoint Administrator and/or a Board of Directors of Defendant No.2 having representation from the Plaintiffs and Defendant No.4 with an independent Chairman.

(b) That pending the hearing and final disposal of the above Suit, Court Receiver, High Court, Bombay or some other fit and proper person be appointed as Receiver of Air Separation Plant belonging to the 2nd Defendant company installed at Mukund Ltd. at Kalwa, Thane Dist. with all powers under Order 40 Rule 1 of CPC 1908.

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(c) That pending the hearing and final disposal of the Suit, the 2 nd Defendant be restrained by an order and injunction of this Hon'ble Court from selling, disposing of, encumbering or creating third party interest in its assets and properties including the Air Separation Plant installed at the factory of Mukund Ltd. at Kalwa.

(d) That pending the hearing and final disposal of the suit this Hon'ble Court may be pleased to appoint independent Auditor from the panel of this Hon'ble Court to audit the books of accounts of the 2nd Defendant company and to submit his report to this Hon'ble Court.

(e) That pending the hearing and final disposal of the suit Defendant No.2 be restrained by an order and injunction of this Hon'ble Court from entering into an settlement and/or compromise or agree to pay or admit or acknowledge its liability in any proceedings including arbitral proceedings with Mukund Ltd. without the leave of this Hon'ble Court.

(f) For ad-interim reliefs in terms of Prayers (a), (b), (c), (d) &

(e) above.

(g) For costs of this Notice of Motion.

(h) For such other order and reliefs as this Hon'ble Court deems

fit and proper."

N/M NO.1231/2002 in Suit No. 2499/1999
(filed on 24/04/2002)

"(a) that order dated 29.2.2000 passed by His Lordship Mr.Justice D.K.Deshmukh on Notice of Motion No.1804/99 in the above Suit be set aside and/or varied or modified;

(b) that pending the hearing and final disposal of the above suit order dated 29.2.2000 passed by His Lordship Mr.Justice D.K.Deshmukh on Notice of Motion No.1804 of 1999 in the above suit stayed;

(c) for ad-interim relief in terms of prayer (b) above;

(d) for costs of this Notice of Motion;

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(e) for such other order and reliefs as this Hon'ble Court deems fit and proper."

4. Briefly stated, the Plaintiffs have major shareholding in Bombay Oxygen Ltd.-defendant no.2. They are in the control of management of defendant no.2. The defendant No.2 is a public limited company whose shares are listed on the Bombay Stock Exchange. The defendant No. 2 company is engaged in the business of manufacturing and distributing industrial gases. The dispute pertains to

the control of 75001 shares of defendant no.2 which represents its major shareholding. By Share Purchase Agreement (hereinafter referred to as SPA, for the sake of brevity) dated 23rd June, 1997, the plaintiffs agreed to divest its major control in defendant no.2 in favour of defendant no.1. The defendant no.

1 is a Germany company and is engaged in the business of supplying industrial gases. At the relevant time, the defendant no.1 was looking for business opportunities and/or collaborations in India. By the said SPA dated 23rd June, 1997, the plaintiffs agreed to sell to the defendant no.1 45001 shares of defendant no.2 company held by them and in addition allowing them to purchase 30,000 shares from the public making an aggregate of 75001 shares equivalent to 50% + 1 share of defendant no.2 11 appeal 855.03 gr..sxw company. As per the said SPA as agreed between the plaintiffs and defendant no.1, the defendant no.1 made application to Foreign Investment Promotion Board (hereinafter referred to as FIPB for the sake of brevity) for allowing them to invest in 75001 shares of defendant no.2 company independently.

5. As a matter of fact before executing the said SPA dated 23rd June, 1997, the defendant no.1 had already entered into Share Purchase and Cooperation Agreement with defendant no.3 company on 12th May, 1995.

This fact was not disclosed to the plaintiffs before execution of said SPA dated 23rd June, 1997 with the plaintiffs. The defendant no. 3 is an Indian company engaged in the business of industrial gases. Notably, the defendant no.3 is a competitor in the business conducted by defendant no.

2 company.

6. On the other hand, according to defendant no.3, the defendant no.1 before entering into the said SPA Agreement dated 23rd June, 1997 with the plaintiffs, did not make disclosure thereof to it, which they were obliged to, considering the terms agreed upon between the defendant no.

1 and defendant no.3, as per the agreement dated 12th May, 1995. The 12 appeal 855.03 gr..sxw defendant no. 3 came to know of this design of the defendant no.1 after the public announcement was issued by the defendant no. 1 informing the public that it has agreed to acquire 45001 equity shares of Rs. 100/- each for a price of Rs. 300/- per share representing 30% of the equity shares of defendant no.2. The defendant no.3 initially lodged its protest with the defendant no.1 and eventually filed suit before the Delhi High Court complaining about the breach committed by the defendant no.1 and in particular arriving at an arrangement with the plaintiffs which had the effect of violating the non-competing clause contained in the agreement dated 12th May, 1995 executed in its favour by the defendant no.1.

In addition, it was the case of defendant no.3 that the arrangement agreed upon by the defendant no.1 with the plaintiffs was in violation of the governing laws. At the instance of defendant no.3, the Division Bench of the Delhi High Court restrained the defendant no.1 from acquiring shares of the defendant no.2 company in breach of the agreement dated 12th May, 1995. The said injunction was challenged by defendant no.1 before the Apex Court. In the said Appeal, the parties agreed for

making reference to Arbitrator to decide the matter relating to ownership and registration of the shares of defendant no.2 to be obtained by the defendant no.1 in terms of the said SPA dated 23rd June, 1997 between the defendant no.1 13 appeal 855.03 gr..sxw and the plaintiffs. Until such time the injunction granted by the Division Bench was ordered to be continued. The Apex Court, however, permitted the defendant no.1 to make payment to the public in relation to the 30,000 shares to be purchased by it as per the arrangement agreed between the defendant no.1 and the plaintiffs in terms of SPA dated 23rd June, 1997.

7. The plaintiffs on coming to know of the said arrangement immediately rushed to the Apex Court by way of intervention application. The Apex Court clarified that the arbitration proceedings between defendant no.3 and defendant no.1 and the decision therein will not come in the way of the plaintiffs to pursue their own remedy. As a result the plaintiffs have filed suit in this Court being Suit No. 2499/1999.

The reliefs claimed in the said suit by the plaintiffs as amended read thus:-

> "(a) (i) For a declaration that the acquisition of the said 30,000 shares pursuant to the public offer is illegal, null and void ab-initio and of no legal effect whatsoever.
>
> (ii) For a permanent order and injunction restraining the Defendant from exercising any rights in respect of the said 30,000 shares including and in particular voting rights.
>
> (b) (i) For a declaration that the said agreement dated 23rd June, 1997 (exhibit B hereto) stands validity terminated and/or avoided;

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(ii) that the 1st Defendant be ordered and decreed to deliver/return to the respective Plaintiffs the said 45,001 shares together with all accretions thereto from 23rd June, 1997 on such terms as this Hon'ble Court directs;

(iii) for the purpose aforesaid the 1st Defendant be ordered and decreed to do and perform all acts, deeds, matters, and things and to execute all documents, deeds and writings in furtherance thereof.

(iv) for a permanent order and injunction restraining the Defendant from transferring and/or registering and/or taking any steps to transfer and/or register the said firm or body corporate including the 1st and/or 3rd and/or 4th Defendant without the consent of the Plaintiffs.

(v) for a permanent order and injunction restraining Defendant No.1, 3 and/or 4 from exercising any rights, including as beneficial owner, in, to, upon on in respect of the said 75,001 shares.

(a)1(i) "In the alternative and in the event of prayer (b) not being granted", that it be declared that the negative covenant contained in clause 6.1 of the agreement dated 23rd June 1997 being Ex.`B'

hereto is binding on the Defendant;

(a)1(ii)(b) that the Defendant by themselves their agents and servants be restrained by a perpetual order and injunction of this Hon'ble Court from

(i) committing breach of clause 6.1, of the Agreement dated 23rd June, 1997 being Ex.`B' hereto;

(ii) transferring or selling or alienating the legal and/or beneficial interest in the shares of Defendant No.2 including those mentioned in Ex.`A' hereto without first offering the same to the Plaintiffs in terms of Clause 6.1 of the Share Purchase dated 23rd June, 1997 being Ex.`B' hereto.

(iii) obtaining any award, decree order from any forum or court in violation of clause 6.1 of the Share Purchase Agreement dated 23rd June, 1997 being Ex.`B' hereto.

(iv) making any claim before the Arbitrators or any court which if granted will amount to a breach or violation of the provisions of Clause 6.1 of the said Share Purchase 15 appeal 855.03 gr..sxw Agreement dated 23rd June, 1997 being Ex.`B' hereto;

(v) procuring any breach of the provisions of clause 6.1 of the said Share Purchase Agreement dated 23rd June, 1997 being Ex.`B' hereto;

(b1) (a) In the alternative and in the event of prayer (b) not being granted and". In the event of it being held that the said Agreement is void Defendant No.1 be ordered and decreed to deliver/return to the respective Plaintiffs the said 45001 shares together with all accretions thereto from 23rd June 1977 on such terms as this Hon'ble Court may direct.

(b) For the purpose aforesaid Defendant No.1 be ordered and decreed to do and perform all acts, deeds, matters and things and to execute all documents, deeds and writings in furtherance thereof.

(c) that pending the hearing and final disposal of the suit Defendant Nos.1, 3 and 4 be restrained by an order of injunction of this Hon'ble Court from:

> (i) committing breach of clause 6.1 of the Agreement dated 23rd June, 1997 being Ex.`E' hereto;
>
> (ii) transferring or selling of alienating the legal and/or beneficial interest in the shares of Defendant No.2 including those mentioned in Ex.`A' hereto without first offering the same to the Plaintiffs in terms of Clause 6.1 of the Share Purchase Agreement dated 23rd June, 1997. Being Ex.`B' hereto.
>
> (iii) Obtaining any award, decree from any forum or court in violation of clause 6.1 of the Share Purchase Agreement dated 23rd June 1997 being Ex.`B' hereto.

(iv) Making any claim before the Arbitrators or any court which if granted will amount to a breach or violation of the provisions of Clause 6.1 of the said Share Purchase Agreement dated 23rd June, 1997 being Ex.`B' hereto;

(v) procuring any breach of the provisions of Clause 6.1 of the said Shares Purchase Agreement dated 23 June, 1997 being Ex.`B' hereto.

(d) that pending the hearing and final disposal of the suit Defendant No.2 herein be restrained by an order of injunction from recording any transfer of shares from the 1st Defendant to any party without the Plaintiffs consent.

16 appeal 855.03 gr..sxw (d.1) That pending the hearing and final disposal of the suit it just necessary and proper that the Court Receiver, High court, Bombay or any other fit and proper person be appointed Receiver of the said 45,001 shares with all powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908. "with a specific direction to exercise all rights in respect of the said shares as per directions of the Plaintiffs."

(e) for interim and ad-interim orders in terms of prayers (c) and (d) & (d.1) above;

(f) for costs;

(g) and for such further and other orders and reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case."

8. The plaintiffs took out Notice of Motion in the said suit wherein ad-

interim relief was granted against the defendant no.1 from transferring the shares in question in breach of clause 6.1 of the said SPA dated 23rd June, 1997. The said ad-interim order was continued and has been operating against the defendant no.1.

9. In the meantime, the defendant nos.1 and 3 invited Consent Award before the Arbitrator. Thereafter, the defendant no.1 and 3 formed defendant no. 4 company. On record it has been shown as if the defendant no.1 would hold 51% shares and the subsidiary of defendant no.3 company-Morgan Trade and Commerce Ltd. would hold only 49% 17 appeal 855.03 gr..sxw shares therein. This attempt was essentially to transfer the shares of defendant no.2 company purchased by the defendant no.1 company from the plaintiffs and from the public aggregating to 75001 shares in favour of defendant no.4 company, so as to bring the said transfer within the regime provided by clause 6.1 of the said SPA dated 23rd June, 1997.

When this came to the notice of the plaintiffs, the plaintiffs filed another suit in this Court being Suit No. 509/2001 wherein prayed for the following reliefs.

"a) for a declaration that the Share Purchaser Agreement dated rd 23 June 1997 is liable to be rescinded;

b) for an order of this Hon'ble Court directing the said Share Purchase Agreement dated 23rd June 1997 be rescinded;

c) that in the alternative to prayers (a) and (b) above, for a declaration that the Share Purchase Agreement dated 23rd June 1997 was voidable and has been validly avoided by the Plaintiffs;

d) that in the alternative to prayers (a), (b) and (c) above, for a declaration that the Share Purchase Agreement dated 23rd June 1997 was terminable by the Plaintiffs and has been validly terminated by the Plaintiffs;

e) that in the alternative to prayers (a), (b), (c) and (d) above, for a mandatory order and direction by this Hon'ble Court, directing the 1st Defendant to offer the said 75,001 shares to the Plaintiffs in accordance with the procedure prescribed in Clause 6.1 of the Share Purchase Agreement dated 23rd June 1997;

f) for a declaration that the acquisition of the said 30,000 shares pursuant to the Public Offer is illegal, unlawful, null and void and of no legal effect whatsoever;

g) for a declaration that the said Agreement dated 17th February 2000 and the said Consent Award dated 21st September 2009 are not

18 appeal 855.03 gr..sxw binding on the Plaintiffs and/or Defendant No.2 and/or that the same are illegal, null and void;

h) for a permanent injunction restraining the defendant Nos.1, 3 and 4 from :

(i) acting in pursuance of the Share Purchase Agreement dated 23rd June 1997;

(ii) exercising any rights in respect of the said 75,001 shares (in particular voting rights in connection therewith) and/or from receiving any dividends, rights in respect of the same;

(iii) exercising any rights including its beneficial ownership in, to, upon or in respect of the said 75,001 shares;

i) that the Defendants be restrained by permanent order and injunction of this Hon'ble Court from transferring and/or registering and/or taking any steps to transfer and/or register the said 75,001 shares in the name of any person or persons firm or body corporate including 1st and/or 3rd and/or 4th Defendants, without the consent of the Plaintiffs;

that the 1st defendant be ordered and decreed to deliver/return

j) to the respective plaintiffs the said 45,001 shares together with all accretions thereto from 23rd June, 1997 on such terms as this Hon'ble Court directs;

k) for the purpose aforesaid the 1st defendant be ordered and decreed to do and perform all acts, deeds, matters and things and to execute all documents, deeds and writings in furtherance thereof;

l) that pending the hearing and final disposal of the suit, the Defendants be restrained by an order and injunction of this Hon'ble Court from transferring and/or registering and/or taking any steps to transfer and/or register the said 75,0001 shares to the name of any person or persons, firm or body corporate including the 1st, 3rd and 4th Defendants without the consent of the Plaintiffs;

m) that pending the hearing and final disposal of the suit, the Defendants Nos.1, 3 and 4 be restrained by an interim order and injunction of this Hon'ble Court from :

> (i) exercising any rights including its beneficial owner in to or upon in respect of the said 75,0001 shares;
>
> (ii) from acting pursuant to and/or taking any steps in furtherance of the said agreement dated 17th February 2000 and/or the said Consent Award dated 21st September 2000;

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n) for ad interim reliefs in terms of prayers (l) and (m) above;

o) for costs;

p) for such further and other reliefs as the nature and

circumstances of the case may require."

10. In addition, the plaintiffs amended the first suit to bring in line with the challenge contained in the second suit.

11. In the above two suits several Notice of Motions were filed which have been eventually disposed off by common impugned Judgment and order dated 26th March, 2003 passed by the Learned

Single Judge of this Court and as clarified on 2nd May, 2003. The Appellants, before this Court, are defendant no.3 and defendant no.4. They have filed four separate Appeals challenging the decision in the Notice of Motions already referred to hitherto.

12. During the pendency of the appeals, Notice of Motions have been taken out by the respective parties. The first Notice of Motion was taken out being Notice of Motion No. 3112/2003 and followed by Notice of Motion No. 29/2006 in Appeal 840/2003; Notice of Motion No. 3113/2003 in Appeal 841/2003; Notice of Motion No. 3115/2003 in 20 appeal 855.03 gr..sxw Appeal No. 857/2003; Notice of Motion Nos. 1308/2005, 3956/2005, 4118/2007, 1973/2008, 1418/2008 in Appeal No. 855/2003. The above Motions are filed by the Appellants, praying for the following reliefs.

N/M NO.3112/2003 in Appeal No. 840/2003 (filed on 14/10/2003) "(a) that pending the hearing and final disposal of the Appeal, the operation of the judgment and order dated 26.3.2003 passed on the Notice of Motion No.3230 of 2000 and other connected Notices of Motions be stayed;

(b) that pending the hearing and final disposal of the Appeal, leave be granted to the Appellants to implement and enforce the consent Arbitral Award dated 21.9.2000, subject to the final result of the Appeal;

(c) that pending the hearing and final disposal of the Appeal, the Respondents Nos.1 to 8 (Orig.Plaintiffs) be restrained by an order and injunction of this Hon'ble Court from :-

> (i) directly or indirectly exercising their rights as shareholders of the Respondent No.10 (Orig.Defendant No.2);
>
> (ii) vote in favour of any resolution of the Respondent No.10 for increasing its share capital or do any act so as to change the existing ratio of 75,001 shares (i.e. 50% + 1 shares) of the Respondent No.10 Company qua the remaining shareholders;
>
> (iii) to claim, receive or recover any bonus share, dividend, rights or any other privilege attached to or incidental to the said share; and
>
> (iv) sell, transfer, assign, encumber or otherwise deal with 75,001 shares of the Respondent No.10 referred to in the Plaint in the above suit;
>
> (d) that the Appellants be granted ad-interim reliefs in terms of prayers (a), (b) and (c) above;
>
> (e) that the Respondents be ordered to pay to the Appellants costs of the Notice of Motion; and

(f) that such other and further reliefs be granted to the

Appellants as the nature and circumstances of the case may require."

N/M No. 3113/2003 in Appeal No. 841/2003 (filed on 14/10/2003) "a) that pending the hearing and final disposal of the Suit, the operation of judgement and orders dated 23.6.2003 and 2.5.2003 passed by His Lordship Mr. Justice S.A. Bobde making Notice of Motion No. 392/2001 in Suit No. 509 of 2001 absolute, be stayed;

(b) that the Appellants be granted ad interim reliefs in terms of prayer (a) above.

(c) that cost of the Notice of Motion be provided for;

(d) that such other and further reliefs be granted to the Appellants as the nature and circumstances of the case may require."

N/M NO.3115/2003 in Appeal No. 857/2003 (filed on 07/11/2003) "(a) that pending the hearing and final disposal of the Appeal, the operation of the order dated 29.2.2000 passed by His Lordship Mr.Justice D.K.Deshmukh on the Notice of Motion No.1804 of 1999 in the above Suit be stayed;

(b) that the Appellants be granted ad interim reliefs in terms of prayer (a) above;

(c) that cost of the Notice of Motion be provided for;

(d) that such other and further reliefs be granted to the Appellants 22 appeal 855.03 gr..sxw as the nature and circumstances of the case may require."

N/M NO.3956 OF 2005 in Appeal No. 855/2003 (filed on 13/2/2005) "a. That the Impugned Orders dated 26th March, 2003 and 2nd May, 2003 be set aside forthwith.

b. Alternately, that the said impugned orders dated 26th march, 2003 and 2nd May, 2003 be stayed pending the hearing and final disposal of the Appeal.

c. That this Hon'ble Court be pleased to direct that the suits No. 2499 of 1999 and No.509 of 2001 have abated and/or become infructuous and/or cannot be proceeded with an the same be dismissed.

d.

For ad-interim reliefs in terms of prayers (a), (b) & (c) above.

e. For costs of this Notice of Motion.

f. For such other and further relief as this Hon'ble Court may deem fit in the circumstances of the case."

N/M NO.1308 OF 2005 in Appeal No. 855/2003
(filed on 27/4/2005)

"(a) That pending the hearing and final disposal of the above Appeal this Hon'ble Court may be pleased to restrain the Respondent Nos.1 to 8 by themselves, their servants, agents and all persons claiming through/under them by an order and injunction of this Hon'ble Court from exercising any rights in respect of the said 75001 shares as also from representing to the public at large that they have acquired the said 75001 shares or have any beneficial interest therein.

(b) That pending the hearing and final disposal of the above Appeal this Hon'ble Court may be pleased to restraining the Respondent No.10 by themselves, their servants and agents by an Order and injunction of this Hon'ble Court from giving effect to the resolution passed by its Board of Directors in the meeting held on 11 th March, 2005 and/or from taking any steps to implement and to restructure the Company as mentioned in the Corporate 23 appeal 855.03 gr..sxw Announcement on the BSE website.

(c) That pending the hearing and final disposal of the above Appeal this Hon'ble Court may be pleased to restrain the Respondent No.10 their servants, agents and officers by an Order and injunction of this Hon'ble Court from transferring the said 75001 shares in the name of Respondent Nos.1 to 8 or in the name of any other person except the Appellants.

(d) For ad-interim relief in terms of Prayer (a), (b) & (c) above.

(e) For costs of this Notice of Motion.

(f) For such other order and reliefs as this Hon'ble Court deems fit and proper."

ig N/M NO.29/2006 in Appeal No. 840/2003
(filed on 10/2/2006)

"(a) that the Impugned Order dated 26th March, 2003 and further clarified by order dated 2nd May, 2003 be set aside forthwith.

(b) that the said impugned order dated 26th March, 2003 and further clarified by dated 2nd May, 2003 be stayed pending the hearing and final disposal of the Appeal.

(c) that this Hon'ble Court may be pleased to declare that the suits No.2499 of 1999 and No.509 of 2001 have become infructuous and/or cannot be proceeded with and the same be dismissed.

(d) that the Respondent No.10 be restrained by an order and injunction of this Hon'ble Court from issuing Duplicate Share Certificates in respect of 75,001 shares being subject matter of the suit;

(e) that in the event the Respondent No.10 has issued duplicate Shares Certificates in respect of the said 75,001/- Shares, the same be ordered to be cancelled;

(f) for ad-interim reliefs in terms of prayers (a) to (e) above.

(g) for costs of this Notice of Motion.

(h) For such other and further relies as this Hon'ble Court may deem fit in the circumstances of the case."

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N/M. NO.4118 OF 2007 in Appeal 855/2003
(filed on 29/10/2007)

"(a) That pending the hearing and final disposal of the above Appeal, this Hon'ble Court may be pleased to appoint Administrator and/or a Board of Directors of Respondent No.10 having representation from the Appellants and Respondent No.1 to 8 with an independent Chairman.

(b) That pending the hearing and final disposal of the above Appeal, Court Receiver, High Court, Bombay or some other fit and proper person be appointed as Receiver of Air Separation Plant belonging to the Respondent No.10 Company installed at Mukund Ltd. at Kalwa, Thane Dist. with all powers under Order 40 Rule 1 of CPC 1908.

(c) That pending the hearing and final disposal of the Appeal the Respondent No.10 be restrained by an Order and injunction of this Hon'ble Court from selling, disposing of, encumbering or creating third party interest in its assets and properties including the Air Separation Plant installed at the factory of Mukund Ltd. at Kalwa.

(d) That pending the hearing and final disposal of the suit this Hon'ble Court may be pleased to appoint independent Auditor from the panel of this Hon'ble Court to audit the books of accounts of the Respondent No.10 Company and to submit his report to this Hon'ble Court.

(e) For ad-interim reliefs in terms of prayers (a), (b), (c) & (d) above.

(f) For costs of this Notice of Motion.

(g) For such other order and reliefs as this Hon'ble Court deems fit and proper."

N/M NO.1418 OF 2008 in Appeal No. 855/2003
(filed on 10/4/2008)

"(a) That pending the hearing and final disposal of the above Appeal, this Hon'ble Court may be pleased to appoint an administrator and/or a Board of Directors of Respondent No.10 25 appeal 855.03 gr..sxw having equal representation from the Appellants and Respondent No. 1 to 8 with an independent Chairman.

(b) That pending the hearing and final disposal of the above Appeal, this Hon'ble Court may be pleased to appoint Court Receiver, High Court, Bombay or some other fit and proper person as Receiver of all the assets and properties of Respondent No.10 including the immoveable property of the Respondent No.10 situate at Allahabad Astride Marg, Mulund (W), Mumbai 400 080.

(c) That pending the hearing and final disposal of the above Appeal, the alleged Development Agreement (entered into between the Respondent No.10 and Respondent No.12) mentioned at EXHIBIT `C' may be cancelled. That pending the hearing and final disposal of the above Appeal, Respondent No.10 their servants, agents and subordinate officers be restrained by and order and injunction of this Hon'ble Court from selling, disposing of, encumbering or creating third party interest or parting with possession of its immoveable property situated at Lal Bahadur Shastri Marg, Mulund (W), Mumbai 400 080 and in its all other assets and properties and from creating any Liability over the Respondent No.

10.

(d) That pending the hearing and final disposal of the above Appeal, Respondent No.10 be directed to deposit the said sum of Rs. 200 crores in this Hon'ble court allegedly received from Respondent No.12 towards alleged grant of development right of its immoveable property at L.B.S. Marg, Mulund (W), Mumbai 400 080.

(e) That pending the hearing and final disposal of the above Appeal, Respondent No.1 to 10 & 12 be directed by an order of this Hon'ble Court to furnish copies of all documents executed by Respondent No.10 for allegedly granting development right in respect of its immoveable property at L.B.S. Marg, Mulund (W), Mumbai 400 080, in favour of Respondent No.12.

(f) That pending the hearing and final disposal of the above Appeal, Respondent No.10 and 12 be restrained by an order and an injunction of this Hon'ble Court restraining them from in any manner, whatsoever, acting in pursuance of, in implementation of or in furtherance of the alleged development agreement referred to in the Corporate Announcement dated 05.02.2008 (Exhibit "C") of Respondent No.10.

(g) That pending the hearing and final disposal of the above Appeal, Respondent No.12, their servants, agents be restrained by an order and injunction of this Hon'ble Court from entering upon and/or 26 appeal 855.03 gr..sxw carrying on any development activity or construction activity or from selling, disposing of, encumbering or creating third party interest or parting with possession of its immoveable property of the Respondent No.10 situated at L.B.S. Marg, Mulund (W), Mumbai 400 080.

(h) That pending the hearing and final disposal of the above Appeal, Respondent No.10 their servants and agents and all persons claiming through/under them be restrained by an order and injunction of this Hon'ble Court from assigning their alleged Development right or creating third party right or interest in respect of the immoveable property of the Respondent No.10 situated at L.B.S. Marg, Mulund (W), Mumbai 400 080.

(i) for ex-parte ad-interim reliefs in terms of prayers (a) to (h) above.

(j) for costs of this Notice of Motion.

(k)

for such other order and direction as this Hon'ble Court may deem fit in the circumstances of the case."

N/M NO.1973 OF 2008 in Appeal 855/2003 (filed on 6/6/2008) "(a) That pending the hearing and final disposal of the above Appeal, Respondent Nos.1 to 10, their servants, agents, subordinate officers be restrained by an order and injunction of this Hon'ble Court from placing or considering, adopting and/or approving the audited account of the Respondent No.10 Company for the year ended on 31.03.2008 in its Annual General body Meeting to be held on 23.06.2008 or on any other date;

(b) That pending the hearing and final disposal of the above Appeal, Respondent Nos.1 to 10 their servants, agents, subordinate officers be restrained by an order and injunction of this Hon'ble Court from placing or considering any agenda in respect of approving and/or confirming the grant of development rights and/or sale of its immoveable property situate at L.B.S. Marg, Mulund (W), Mumbai 400 080 in favour of Respondent No.12 in the Annual General Meeting to be held on 23.06.2008 or on any other date;

(c) for ad-interim reliefs in terms of prayer (a) & (b) above.

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(d) for costs of this Notice of Motion.

(e) for such other order and direction as this Hon'ble Court may

deem fit in the circumstances of the case."

13. It was urged that the reliefs claimed in the suits cannot be granted.

In that, if the plaintiffs were asking for rescinding the contract being illegal and void, cannot in the same suit in the alternative ask for the relief of specific performance of the same contract.

14. In so far as motion nos. 2511 of 2008 and 2512 of 2008 are concerned, in our order dated 30/6/2010, as it was agreed that the reliefs claimed therein is to initiate contempt action against the main contemnors and/or initiate action for alleged forgery against the named persons, the same will have to be decided independently.

15. From the reliefs as considered by the Learned Single Judge, essentially two broad points were required to be addressed. Firstly, whether the plaintiffs were entitled for interim-relief of injunction against the defendants as prayed. Secondly, whether the defendant nos. 3 and 4 were entitled for relief of allowing execution and acting upon the Consent Award between defendant no.1 and defendant no.3. We have so far 28 appeal 855.03 gr..sxw referred to only broad aspects of the controversy between the parties.

The detailed events which are necessary to be taken into account would be referred to while considering the arguments advanced on behalf of respective parties at the relevant places.

16. The Learned Single Judge of this Court by the impugned common judgment, on analyzing the materials on record and considering the arguments canvassed by the respective parties, proceeded to answer the controversy in the following manner. In the first place, he has adverted to the main issue between the parties as to whether the first defendant has committed breach of clause 6.1 of the said SPA dated 23rd June, 1997 by transferring the 75001 shares of defendant no.2 company in favour of the 4th defendant. In that, was the transfer of said shares by the defendant no.

1 company in favour of company of Hoechst Group? It has then adverted to the stand of the plaintiffs that although overtly defendant no.1 and defendant no.3 represented that the shares were transferred to defendant no. 4 in which the defendant no. 1 held 51% shares, it was an eye wash. The Learned Single Judge has accepted the claim of the plaintiffs that, considering the circular transactions executed between the defendant no.1, defendant no.3 and defendant no.4, simultaneously, on 29 appeal 855.03 gr..sxw the same day, i.e. 17th February, 2000, it was amply clear that the control of the fourth defendant was given to the Goyal Group who was controlling defendant no.3 and that Group would end up holding 51% of the shares of defendant no. 4 company. If so, the transfer of 75001 shares by defendant no.1 in favour of defendant no. 4 was not a transfer in favour of Hoechst Group of company but in favour of defendant no.4 which was to be controlled by Goyal Group having majority shareholding therein.

17. The Learned Single Judge then adverted to the other arguments of the plaintiffs that even otherwise the first agreement between plaintiffs and defendant no.1 namely SPA dated 23rd June, 1997 was void on account of fraud and misrepresentation practiced by defendant no.1 on the plaintiffs. Further, the agreements executed by defendant no. 1 in favour of defendant no.3 and the transfer of 75001 shares of defendant no.

2 company in favour of defendant no. 4 was also void and illegal being founded on fraud and misrepresentation of the Court. It is held that, in fact, attempt to overreach the Court has been made by the said defendants 1, 3 and 4 in effecting the 2nd transfer of said shares on 17th February, 2000.

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18. The Learned Judge then proceeded to analyze the relevant documents and drew inference that from the events referred to therein. It is seen that the signing of said SPA dated 23rd June, 1997 was preceded by suppression from the plaintiffs that the shares were being acquired in pursuance of the Share Purchase Cooperation Agreement dated 12th May, 1995 between the defendant no.1 and defendant no.3. It is also held that the original plan was to ensure that the defendant no.3 invested in defendant no.2 company with a clear mandate to gain majority within two years. It is further held that the plaintiffs were not told about the ultimate destination of the shares purchased by defendant no.1 and that defendant no.1 had held back the vital information from the plaintiffs that they were to eventually to transfer the shares to defendant no.3 to facilitate them to participate in the business of defendant no.2. The Learned Single Judge then adverted to the arguments of the defendant no.

3 which was founded on the dispute between the defendant no.3 and defendant no.1 filed in the Delhi High Court and the grievance of the defendant no.3 that infact the attempt of defendant no. 1 was to violate the non-competing clause contained in the agreement dated 12th May, 1995 between the defendant no. 3 and defendant no.1. That was the result of 31 appeal 855.03 gr..sxw inserting clause 6.1 in the said SPA dated 23rd June, 1997. The Learned Judge found that the said dispute cannot come in the way of the plaintiffs and the grievance of the plaintiffs will have to be decided on its own merits. That position was clarified even by the Apex Court in its order dated 5th April, 1999.

19. The Learned Judge has noticed that the real dispute between the defendant no.3 and defendant no. 1 was about the manner in which the defendant no. 1 proceeded to acquire the shares of defendant no.2 from the plaintiffs on its own and also incorporating clause 6.1 in the agreement between the defendant no.1 and the plaintiffs so as to prevent the defendant no. 3 from jointly participating in the management of defendant no. 2 company. This act on the part of the defendant no. 1 was in violation of agreed strategy between the defendant no.3 and defendant no.1. The Learned Single Judge has held that from the surrounding circumstances emerging from the record, it was amply clear that the shares in question were acquired by defendant no. 1 for the purpose of joint acquisition by defendant no.1 and defendant no.3. That intention was withheld from the plaintiffs and instead the plaintiffs were assured of the fact that it is the defendant no. 1 company who wanted to provide 32 appeal 855.03 gr..sxw modern technology and technical knowhow to the defendant no.2 company controlled by the plaintiffs. The plaintiffs agreed to sell their shares in the overall interest of the defendant no. 2 company and to relinquish their right of management of the defendant no.2 company.

Thus, the Learned Single Judge reiterated the finding that the intention of defendant no. 1 in entering into the said SPA dated 23rd June, 1997 with plaintiffs was for joint acquisition of the shares with defendant no.3.

20. Notably, the Learned Single Judge disallowed the request of the defendant no. 3 to withdraw the statement made on its behalf in the proceedings to the effect that the defendant nos. 1 and 3 intended to acquire the shares jointly.

21. Learned Single Judge then proceeded to examine the argument of the plaintiffs that the Share Purchase Agreement is in violation of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as SEBI Regulations for the sake of brevity). The said Regulations mandatorily require the disclosure of the names of the joint acquirers. The defendant no. 3 was obviously the joint acquirer alongwith defendant no.1 within 33 appeal 855.03 gr..sxw the meaning of Regulations 2(b), which fact was not disclosed to the plaintiffs before the plaintiffs executed the said SPA dated 23rd June, 1997 with the defendant no.1. The Learned Single Judge has, on analyzing the relevant provisions of the SEBI Regulations, held that, prima-facie, there was force in the argument of the plaintiffs that SEBI Regulations were clearly violated on account of the non-disclosure of the n ame of joint acquirer in the public announcement.

22. The Learned Judge further found that the defendant no.3 was person acting in concert alongwith defendant no. 1 for acquiring the shares of defendant no. 2 company. The Learned Single Judge has placed reliance on the admission of the defendant no. 3 that they intended to jointly acquire the shares in question of the defendant no. 2 company with the defendant no. 1. It is found that there was ample material on record to suggest that there was clear understanding between defendant no. 1 and defendant no.3 that they would purchase the major shareholding in defendant no. 1 and were looking for participation of defendant no. 3 as their preferred vehicle for expansion in India.

23. The Learned Judge has also adverted to subsequent conduct of the 34 appeal 855.03 gr..sxw defendant no. 1 and defendant no.3 company in forming defendant no. 4 company. Besides, by circular transactions effected on the same day, the entire 75001 shares of defendant no. 2 company were transferred by defendant no. 1 in favour of defendant no.4 so that the Goyal Group would be in the control of defendant no.4. The Learned Judge has found that even if the defendant no. 1 wanted to collaborate with defendant no.

3, in future, was obliged to comply with the regime of the SEBI Regulations of public announcement of such intention. The Learned Judge has analyzed the stand taken by the defendant no.3 in the proceedings before the Delhi High Court which clearly suggests that the agreement between the defendant no.3 and defendant no. 1 arrived was that the defendant no. 1 would not have major stand in any new business as it would result in direct competition. Further, the defendant no. 3 asserted that its name ought to have been mentioned as joint acquirer in the public announcement. The Learned Single Judge, therefore, concluded that the said SPA dated 23rd June, 1997 was in breach of the SEBI Regulations as it fails to disclose the name of defendant no. 3 who was acting in concert with defendant no. 1 and the public announcement was bad in law for non-disclosure of the name of the joint acquirer. At any rate, the public announcement failed to disclose the object of 35 appeal 855.03 gr..sxw acquisition was the eventual holding of the shares were to be with defendant no.3.

24. The Learned Single Judge has then adverted to the decision of the Division Bench of our High Court in the case of Shirish Finance & Investment Pvt. Ltd. v/s. M. Srinivasulu Reddy & ors. reported in 109(2002) Company Cases 913. The Learned Single Judge has also adverted to the decision of the Apex Court in the case of Badri Prasad & ors. v/s. Nagarmal & ors. reported in AIR 1959 SC 559 which in turn restates the exposition of Privy Council in Surajmull Nagoremull v/s Triton Insurance Company Ltd. 52 Indian Appeals INB. APP. 126.

Relying on the said decisions, the Learned Single Judge has noticed that the SEBI Regulations must be considered mandatory and its breach would invalidate the transaction. It is further held that on account of violation of SEBI Regulations, the SPA dated 23rd June, 1997 would be prima-facie illegal and void. That would have consequential effect on the subsequent transaction dated 17th February, 2000 whereby the defendant no. 1 purported to transfer the said shares of defendant no. 2 company in favour of defendant no.4.

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25. It is then found that it would not be appropriate to allow the defendants 1, 3 and 4 to enforce the award and that the plaintiffs have a prima-facie right in law to prevent the enforcement of the said award.

26. The Learned Judge then adverted to the argument that even the second transfer of shares dated 17th February, 2000 from defendant no. 1 to defendant no.4 was hit by the provisions of "SEBI Regulations" for want of public announcement. This argument, however, has not been considered.

27. The Learned Judge has then adverted to Section 23 of the Contract Act and held that prima facie the transaction is of such nature that if permitted, it would defeat the provisions of law.

28. It has then referred to the argument as to whether the defendant no.

3 was entitled for relief of enforcement of the Award in its favour or whether the second agreement for transfer of shares is in violation of the orders of the Court. After referring to the order passed in the Notice of Motion filed by the plaintiffs on 6th May, 1999 and 8th June, 1999, the Court observed that there was clear injunction restraining the defendant 37 appeal 855.03 gr..sxw no. 1 from transferring and/or selling the shares without offering the same to the plaintiffs in terms of clause 6.1 or for obtaining any award or decree from any forum in violation of clause 6.1. It has also adverted to the order of this Court dated 29th February, 2000 and the fact that neither the defendant no.1 nor the defendant no.3 brought to the notice of this Court that infact they had already entered into an agreement on 17th February, 2000 purporting to settle their disputes by transferring 75001 shares of defendant no.2 to defendant no.4. The said agreement, however, was disclosed for the first time on 21st July, 2000. The argument of defendant no.3 that it was not necessary to disclose the agreement dated 17th February, 2000 did not find favour with the Learned Single Judge. The Learned Single Judge, however, held that to bypass the orders of this Court, defendant nos. 1 and 3 took out interim applications before the Supreme Court without joining plaintiffs as party thereto and asked for reliefs so as to negate the interim order passed by this Court which was operating against the said defendants. The Learned Single Judge has found that it was an attempt to overreach the orders of this Court. Even for that reason the Learned Single Judge found that the transfer of shares would be illegal.

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29. Insofar as the question as to whether the second transfer dated 17th February, 2000 resulted in "breach of clause 6.1" of the said SPA dated 23rd June, 1997, after considering the effect of disclosure made in the affidavit of Franklyn J. Brunsdon. The Court held that false statement was made to the effect that defendant no. 1 had 51% share in the defendant no. 2 company. That, however, was rectified in the contempt proceedings from which it was clear that defendant no. 1 eventually and in fact held only 49% of shareholding in the defendant no. 4 company and remaining 51% was held by the subsidiary of defendant no. 3 Goyal Group. Thus, the second transfer was not in favour of Hoechst Group of company as such. All the relevant documents indicating circular transactions effected simultaneously on the same day have been adverted to by the Learned Single Judge before coming to this conclusion. It is thus found that there was clear breach of clause 6.1 of

the said SPA dated 23rd June, 1997. The Learned Judge also reiterated that the said transfer, therefore, was in contravention of injunction order passed by this Court dated 6th May, 1999 and dated 8th June, 1999.

30. The Learned Judge has further opined that the transactions dated 17th February, 2000 were entered into by defendant no.1 with defendant 39 appeal 855.03 gr..sxw no.4 in breach of the intention of the plaintiffs and the promises given by defendant no.1-that the shares would not be transferred to anyone without offering the same back to the plaintiffs as per clause 6.1. That transaction resulted in injury to the property in shares of plaintiffs. Moreover, it was in violation of Section 23 of the Indian Contract Act and void on account of Section 24 of the Contract Act. The Learned Single Judge, therefore, concluded that it would not be appropriate to allow enforcement of the Consent Award as prayed by the defendant nos. 3 and 4.

31. He further found that the prima-facie right of the plaintiffs to injunction passed on 29th February, 2000 continues. The Learned Single Judge also deprecated the conduct of the said defendants and adverted to the exposition of the Apex Court in the case of Gujarat Bottling Company Ltd. & ors. v/s. Coca Cola Company & ors. reported in 1995 SC 2372. He has also dealt with the argument of defendant no.3 that Delhi High Court has held that clause 9 of the agreement dated 12th May, 1995 obliged defendant no.1 to offer the shares to defendant no.3 or the Goyals and transfer of shares to defendant no. 4 must be taken as perfectly valid. This argument has been negatived on the opinion that the observations of Delhi High Court were in suit between defendant no.1 and 40 appeal 855.03 gr..sxw defendant no.3 and cannot bind the plaintiffs. Moreover, the dispute between the defendant no.1 and defendant no.3 before the Delhi High Court was entirely different and will be of no avail.

32. As a result, the Learned Single Judge dismissed Notice of Motion No. 1231/2000 filed by the Defendant No. 4 and disposed of Notice of Motion No. 2933/2000 filed by defendant no.1 as not pressed. In view of dismissal of Notice of Motion No. 1231/2000, even Notice of Motion No. 3230/2000 filed by Defendant No. 3 came to be dismissed. The Learned Single Judge then proceeded to deal with the Notice of Motion No. 534/2000 filed by Defendant No. 4 for appointment of Court Receiver in respect of Air Separation Plant belonging to Defendant No. 2 Company.

This Motion has also been rejected on the opinion that defendant no.4 merely claims to be owner of shares of defendant no.2 company in terms of agreement dated 17th February, 2000 between it and defendant no. 1.

Whereas, the claim of defendant no.3 and 4 of enforcement of Consent Award between defendant no. 3 and defendant no. 1 having been rejected, the defendant no. 4 cannot get any relief. The defendant no. 4 was only a prospective shareholder of the defendant no. 2 company and has no right of representing in respect of shares of defendant no.2. The Learned 41 appeal 855.03 gr..sxw Single Judge also accepted the argument of the defendant no. 2 company that interim relief of injunction can be granted only in aid and as ancillary to the main relief which may be available to the parties for final determination of the rights in the suits or the proceedings. To buttress this submission,

reliance was placed on the Apex Court decision in the case of Cotton Corporation of India Limited v/s. United Industrial Bank Limited. & ors. reported in AIR 1983 SC 1272. The Learned Single Judge also accepted the contention of the defendant no. 2 company that the property of the defendant no. 2 company was not the subject matter of the suit. The Learned Single Judge noticed that at best it can be said that the subject matter of the suit was in respect of right to ownership of the shares of the defendant no.2 company. Even then the property of company would not be affected directly, irrespective of the outcome of the suit. Inasmuch as, the question that would be determined in the suit is whether the plaintiffs or the defendant no. 4 would retain the shares in question. It is only if the defendant no. 4 were to retain shares in question, it would get a share in the management of defendant no. 2 company and resultantly over the property of the company. It then went on to observe that it is well established position that the transferee shareholder does not get any rights in the company unless he was brought 42 appeal 855.03 gr..sxw on the register of the company and the shares are registered in his name.

Reference is made to the decisions of the Apex Court in the case of Bajkrishan Gupta & ors. v/s. Swadeshi Polytex Limited & anr.

reported in AIR 1985 SC 520 and M/s. Howrah Trading Company Limited v/s. The Commissioner of Income Tax, Calcuuta, AIR 1956 SC 775.

33. At the end, the Learned Single Judge concluded that the defendant no. 4 who claims to be a shareholder, admittedly, its name has not been entered in the register of the company and that would happen only if the Court were to allow the transfer of shares by permitting implementation of the Consent Award. As a result, the defendant no. 4 cannot claim any relief against the property of defendant no.2. Hence, the Notice of Motion No. 584/2002 filed by the Defendant No. 4 came to be dismissed.

34. Insofar as Notice of Motion No. 392/2001 filed by the plaintiff, the impugned order records that the same was not on Board but was taken on Board and disposed of as not pressed. Therefore, the plaintiffs moved the same Learned Single Judge who by his order dated 2nd May, 2003 recorded the correct position that the said Motion was infact on Board for 43 appeal 855.03 gr..sxw hearing alongwith other proceedings. It is further recorded that the Court intended to allow the said Notice of Motion which is for injunction restraining the defendants from transferring the shares, exercising rights as a beneficial owner and acting under the Consent Award. It has been clarified that the injunction is consistent with the findings recorded in the Judgment already pronounced. As a result, Paragraph 54 of the Judgment came to be deleted and instead substituted by order to the effect that the Notice of Motion No. 392/2001 in Suit No. 509/2001 taken out by the plaintiffs is allowed in terms of prayer clauses (a)&(b).

35. Against this common Judgment and order, the defendants 3 & 4 have filed four Appeals challenging the injunction granted in favour of the plaintiffs and against the defendants and also to challenge the order rejecting the prayer of defendants 3 and 4 for allowing the defendants 3 and 1 to execute the Consent Award between them. In the Appeals more or less same issues have been raised. In addition, it is urged that the plaintiffs have failed to disclose the agreement dated 5th December,

2002 between the plaintiffs and defendant no.1. The plaintiff should be non-

suited on account of suppression of material fact from the Court.

Besides, it is contended that on perusal of the said agreement, it is noticed 44 appeal 855.03 gr..sxw that all allegations against the defendant no. 1 in the two suits filed by the plaintiffs would stand withdrawn. In other words, no cause of action survives against defendant no.1. In such a situation, the suits itself have become infructuous by reason of the said agreement dated 5th December, 2002. By the said agreement amongst others, it has been agreed that all disputes and differences between the plaintiffs and defendant no.1 are fully and finally settled by rescending the said SPA dated 23rd June, 1997 on the terms and conditions set forth in the said agreement. Besides executing this agreement, power of attorney has been executed in favour of the plaintiffs to espouse the cause of the defendant no.1. For that reason, it is urged that the suit itself has become infructuous as no cause of action would survive for consideration and the same be dismissed at the threshold which can be done even in the present pending Appeals. It is also additionally contended that it was not open to the Learned Single Judge to pronounce on the question regarding violation of SEBI Regulations. That question can be decided only by the forum which has exclusive jurisdiction to deal with matters pertaining to SEBI Regulations.

36. We shall refer to the submissions of the respective parties while answering the point in issue at the appropriate place.

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37. The foremost question that needs to be dealt with is whether the two suits should be dismissed at the threshold on account of non-

disclosure of the agreement dated 5th December, 2002 by the plaintiffs?

To examine this question we have to consider as to whether that agreement makes any difference to the controversy on hand and whether it is a material and relevant fact which ought to have been disclosed by the plaintiffs? The plaintiffs on the other hand have asserted that the fact regarding the execution of agreement dated 5th December, 2002 was brought to the notice of the Learned Single Judge at the earliest opportunity. In that, it was pointed out to the Learned Judge taking up Notice of Motions on 13th March, 2003 that the plaintiffs and defendant no. 1 have settled their differences. This was done at the outset during the hearing. That is reinforced from the affidavit dated 17th March, 2003 of Mr. Ajit Shukla seeking disclosure of the said Settlement Agreement.

That application was disallowed by the Learned Single Judge. As the defendants 3 & 4 have admitted disclosure made by the plaintiffs of the said agreement on 13th March, 2003 itself, it is not open for them to urge that the suits should be dismissed at the threshold on account of non-

disclosure of the said agreement. As a matter of fact, the affidavit of Ajit 46 appeal 855.03 gr..sxw Shukla was produced in the present proceedings by the plaintiffs alongwith their reply. Thus

understood, the grievance of the defendants is devoid of merits.

38. The next question is whether the suits have become infructuous due to the agreement dated 5th December, 2002, for which reason the same deserve to be dismissed even while considering the present proceedings.

For considering this issue, we may think it apposite to reproduce the agreement dated 5th December, 2002. The material terms of the said agreement read thus:

> 1. A Share Purchase Agreement dated 23rd June, 1997 was entered into between "MGG" and "Ruias" ("Ruia Agreement"). Clause 6.1 of the "Ruia Agreement"contained a right of first refusal in favour of the Ruias.
>
> 2. Pursuant to the Ruia Agreement, 45,001 (forty five thousand one) shares of Bombay Oxygen Corporation Limited ("BOCL") were delivered by "Ruias" to "MGG" and the consideration provided therein was paid by "MGG" to "Ruias". Additionally, "MGG" acquired 30,000 shares in "BOCL" from the public pursuant to an offer made in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("SEBI Takeover Code") and paid consideration for the same. The said 750001 shares of "BOCL" however continue to be registered in the names of the original registered shareholders.
>
> 3. There have been several disputes and judicial proceedings between the parties and also others claiming through "MGG". "Ruias" have contended that the right of first 47 appeal 855.03 gr..sxw refusal contained in the "Ruia Agreement" has been breached by "MGG" and have sent a notice rescinding the "Ruia Agreement". Ruias have also filed suits being Suit No. 2499 of 1999 and Suit No. 509 of 2001 in the Bombay High Court inter alia for rescinding the "Ruia Agreement"
>
> and consequent return of the shares by "MGG" to "Ruias".

4. Under an agreement dated 17th February, 2000 which was duly concluded on 13th March 2000 ("MHL Agreement") "MGG" agreed to transfer the said 75001 shares of "BOCL"

to Messer Holdings Limited ("MHL"). The MHL Agreement provided for the transfer of the 75001 shares in the name of "MHL" in the Register of Members of "BOCL" withiin 6 months of the date of signing. The said transfer of 75001 shares of "BOCL" in the name of "MHL" did not materalize due to various judicial orders or disabilities.

Subsequently, the "MHL Agreement" culminated into a consent award dated 21st September, 2000 which award cannot be implemented without the leave of the Bombay High Court in view of the order dated 29th February 2000 of the Bombay High Court.

5. Based on the discovery of certain facts, it transpires that the "MHL Agreement" for transfer of 75001 shares of "BOCL" to MHL was contrary to the "SEBI Takeover Code", in breach of Clause 6.1 of the "Ruia Agreement" and also in violation of the orders of the Bombay High Court in Suit No. 2499 of 1999 and therefore void and unenforceable. In view of the aforesaid, the parties agree that the beneficial interest in the said 75001 shares of "BOCL" remains with "MGG"

6. In the circumstances, "MGG" and the "Ruias" have agreed to fully and finally settle all their disputes and differences by rescinding the "Ruia Agreement" on the terms and conditions set forth in this Agreement. However, "MGG" is not in a position to return to the "Ruias" the share certificates and other relevant documents for the 45001 shares of "BOCL" (which is the subject matter of the "Ruia Agreement") as they are not in "MGG's possession. "MGG" has no knowledge of the current whereabouts of the said share certificates and other documents pertaining to the 45001 shares and is not in a position to secure return/delivery of the same.

7. As "MGG" is no longer interested in acquiring any shares in "BOCL", as a further part of the settlement, it is hereby 48 appeal 855.03 gr..sxw agreed that "MGG" hereby sell/reverts/transfers/divests in favour of the "Ruias" all its right, title and interest in the remaining 30,000 shares in "BOCL" which "MGG" had acquired from the public, but which has also not been registered in the name of "MGG" in the records of "BOCL". However, "MGG" has no knowledge of the current whereabouts of the share certificates and other documents/pertaining to the 30,000 shares and is not in a position to secure return/delivery of the same.

8. In consideration for the foregoing, "Ruia" agree to pay "MGG" a sum of US $ 154,642 in respect of the 75001 shares of "BOCL", without any other or further obligation whatsoever on the part of "MGG" to the "Ruias" except as provided in this Agreement. The "Ruias" shall also not have any further obligation to "MGG" except as provided in this Agreement.

9. The aforesaid amount of US $ 154,642 shall be paid/remitted by "Ruias" to "MGG" in US Dollars through wire transfer to "MGG's" bank account with Deutsche Bank, AG Frankfurt am Main, Account Number: 0944488, SWIFT CODE: DEUTDEFF. On receipt of the said sum to the aforersaid bank account, "MGG" shall, within 24 hours thereof, cause Deutsche Bank, Frankfurt to send a written confirmation of receipt of the said sum to Mr. Shyam M. Ruia on behalf of the "Ruias" at fax number (91)(22) 249-33747 with a hard copy sent to Mr. Shyam M. Ruia (at the address of Mr. Shyam M. Ruia given above) with a copy to Ms. Lira Goswami, Associated Law Advisers, 612 Antriksh Bhawan, 22 Kasturba Gandhi Marg, New Delhi-110 001, India (Advocate for "MGG") at fax number (91)(11)3352231 or (91)(11)3352226.

10. The parties agree that "MGG" do hereby full and irrevocable revert/sell, transfer and assign all its beneficial right, title and interest in or in relation to the said 75001 shares in favour of "Ruias" and shall, at the cost and expense of "Ruias", execute and continue to execute such instruments, documents, authorities etc., as may be necessary or expedient in connection therewith and shall refrain from doing anything inconsistent with the foregoing or the rights reverted/assigned/transferred as above on and from the date of execution hereof. To this end and purpose, an irrevocable Power of Attorney duly executed as per draft enclosed herewith as Annexure

I shall be put in escrow with Ms. Lira Goswami, Advocate. Ms. Lira Goswami shall hand over the 49 appeal 855.03 gr..sxw Power of Attorney to the "Ruias" in accordance with written escrow instructions agreed to by "Ruias" and "MGG".

11(a) The parties confirm and acknowledge that as the foregoing 45001 shares of "BOCL" have not been registered in the name of "MGG" in the records of "BOCL", the said shares continue to be registered in the names of the "Ruias". Consequently, the rescission of the "Ruia Agreement" does not involve any transfer from "MGG" to the "Ruias" in the books of "BOCL" as the "Ruias" continue to be the registered shareholders. Nevertheless, if any permission, approval or notification is required under Indian Law for implementing this Agreement, including without limitation, the permission of the "RBI" for making the payment of US $ 154,642, the "Ruias" shall be solely responsible and liable for obtaining all such necessary approvals or permissions or for making the necessary filings/notifications, at the sole cost and expense of the "Ruias".

(b) Similarly, the parties confirm and acknowledge that the foregoing 30,000 shares of "BOCL" have also not been registered in the name of "MGG" and continue to be in the name of the Indian Public shareholders. Consequently, "Ruias" will be solely responsible for doing all acts, deeds and things that may be necessary for effecting the transfer of these shares from the currently registered shareholders to the "Ruias" at the sole cost and expense of the "Ruias".

(c) It is hereby agreed between the parties that an advance copy of the contents of the application to the "RBI" seeking permission for remittance (and any further communication required to be made to the "RBI" in connection with the said application) shall be given to Ms.Lira Goswami, Associated Law Advisers, New Delhi, prior to its filing with the RBI.

(d) Forthwith on receipt of RBI's approval, the "Ruias" shall send a written communication to Ms. Lira Gowami, Associated Law Advisers, New Delhi, along with the copy of the approval letter.

12. Upon execution of this Agreement, as far as "MGG" is concerned, this Agreement shall be an "executed" contract with no further obligations attaching to it under this Agreement and under no circumstances will it be open to the 50 appeal 855.03 gr..sxw "Ruias" to seek return of consideration paid to "MGG" under this Agreement or to make any claim or demand or file any suit or proceeding against "MGG" or any of "MGG"'s affiliates or their respective officers, directors or employees (excluding "MHL" and/or Goyal MG Gases Ltd. But including directors nominated by "MGG" on the Board of "MHL" and/or Goyal MG Gases Ltd.), in respect of any matter relating to or connected with the "Ruia Agreement" or anything contained in this Agreement or the performance or non-performance of this Agreement. It is further agreed between the parties that if for any reason whatsoever the "Ruias" are unable to claim or exercise rights in respect of the said 75001 shares of "BOCL", the "Ruias" shall have no claim or demand of any nature whatsoever (whether in law or in equity) against "MGG" or any of "MGG"'s affiliates or their respective directors, officers or employees (excluding "MHL" and/or Goyal MG Gases Ltd. But including directors nominated by "MGG" on the Board of "MHL"

and/or Goyal MG Gases Ltd.), in respect of anything contained in this Agreement.

13. "Ruias" shall be responsible for all compliances under Indian law in connection with this Agreement, including obtaining of all necessary approvals. "MGG" will cooperate with the "Ruias" in obtaining any necessary approval. It is, however, clarified that nothing contained in this Clause will require the parties to agree to any change in the commercial and payments terms of the settlement recorded in this Agreement.

14. It is further warranted that the parties hereto are competent to and/or have authority to enter into this Agreement to all its effects. The necessary authority/declarations/resolutions/ power of attorneys authorizing either parties' representatives are annexed as Annexure 2.

15. On execution of this Agreement, "Ruias" agree:

> (a) not to prosecute the following proceedings pending in the Bombay High Court and in Supreme Court of India against "MGG" or its affiliates or its directors, officers or employees (excluding "MHL" and Goyal MG Gases Ltd. But including directors nominated by "MGG" on the Board of "MHL"

and/or Goyal MG Gases Ltd.):

> (i) Civil Suit No. 2499 of titled Shyam Madan Mohan Ruia & ors. vs. Messer Griesheim GmbH & ors.

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(ii) Civil Suit No. 509 of 2001 titled Shyam Madan Mohan Ruia & ors. vs. Messer Griesheim GmbH & ors.

(b) withdraw or apply for withdrawal or have the following proceedings dismissed for want of prosecution against "MGG" or its directors or directors nominated by "MGG" on the Board of "MHL" and/or Goyal MG Gases Ltd.:

(i) Civil Contempt Petition No. 101 of 2000 in the civil suit filed by the "Ruias" in Suit 2499 of 1999 titled Shyam Madan Mohan Ruia & Ors. vs. Messer Griesheim GmbH & ors.

(ii) SLP(C) No. 18617/2001 titled Shyam Madan Mohan ig Ruia & ors. Vs. Messer Griesheim GmbH & Ors.

16. The parties shall so far as possible keep in confidence and shall not disclose or divulge to any third party the contents of this Agreement except to the extent required by law or for purposes of obtaining RBI's approval or for implementing this Agreement. In the event of any disclosure, an advance copy shall be given to Ms. Lira Goswami, Associated Law Advisers, New Delhi prior to filing.

17. The remittance of US $ 154,642 to MGG under this Agreement shall be subject to deduction of income-tax at source, if required, under the Income-tax Act, 1961. If any tax is deducted at source, "Ruias" shall provide to "MGG" a certificate under section 203 of the Income-tax Act, 1961 (in the prescribed form and within the prescribed period) in respect of the tax deducted at source. The parties shall also cooperate with each other for purposes of obtaining all necessary income-tax clearances, if required.

18. This Agreement will become null and void if the payment stipulated in Clause 9 is not made to "MGG" in the manner provided in Clause 9 above by December 24, 2002."

According to the defendants the terms in this agreement are contrary to the pleadings in the suit and more so for the nature of arrangement agreed 52 appeal 855.03 gr..sxw upon, the suits against defendant no.1 have become infructuous and no cause of action would survive.

39. We have already adverted to the amended prayer clauses in the respective suits. The plaintiffs are not only claiming reliefs against the defendant no.1 but other defendants to the suit as well. Indeed, so far as reliefs claimed against the defendant no. 1 in the respective suits are concerned, the same may not survive for consideration. However, the question regarding restitution and physical delivery of the respective shares will still have to be adjudicated upon. The defendant no.1 has taken the stand that it has no knowledge about the current whereabouts of the disputed share certificates and other documents. The fact that the defendant no.1 has agreed for reversion/divesting of disputed shares in favour of the plaintiffs, that does not mean that the plaintiffs cannot pursue their claim for restitution, recovery and physical delivery of the disputed shares. That matter will have to still proceed. If so, it is not as if the entire suit has become infructuous and no cause of action whatsoever survives as is sought to be contended.

40. Having regard to the agreement arrived at between plaintiffs and 53 appeal 855.03 gr..sxw defendant no. 1 dated 5th December, 2002, the situation has undergone change and the controversy has become narrow. The defendant no.1 by the said agreement now accepts that transfer of 75001 shares of defendant no.2 company to defendant no.4 by it was contrary to the SEBI Regulations and also in breach of clause 6.1 of the said SPA Agreement dated 23rd June, 1997. The defendant no. 1 also accepts that the transfer of said shares in favour of defendant no.4 were also in violation of the orders passed by this Court in Suit No. 2499/1999. Further, for each of these reasons, the said transfer would be void and unenforceable. The defendant no.1 has admitted that the beneficial interest in the said 75001 shares of defendant no. 2 company remained with it. It further agrees to rescind the said SPA Agreement dated 23rd June, 1997 on the terms agreed upon between the parties. The defendant no. 1 has, however, expressed its inability to return the said shares as it was not in physical possession thereof and had no knowledge of its current whereabouts, but at the same time by the said agreement the defendant no.1 has sold/reverted/transferred/divested the shares in favour of the plaintiffs.

Indeed, if the stand of defendant no. 1 is to be accepted as it is, it would necessarily follow that the second transaction effected by defendant no.1 in favour of defendant no. 4 will have to be ignored as void and non-est in 54 appeal 855.03 gr..sxw law. In that case, in law, the ownership of all the 75001

shares remained with the defendant no.1 until 5th December, 2002. Therefore, the defendant no. 1 would be competent to transfer the same to the plaintiffs, as is the effect of the agreement between the defendant no. 1 and the plaintiffs dated 5th December, 2002. The fact that at the time of executing the contract dated 5th December, 2002 the defendant no. 1 could not deliver the disputed shares, in law, would make no difference.

Irrespective of non-delivery of the said shares to the plaintiffs, the title thereof has passed on to the plaintiffs. The only question would be of recovering possession of physical share certificates-whether lying with the defendant no. 1 or any other contesting defendants. The contesting defendants cannot be heard to claim higher right than the defendant no.1 as they would be only persons claiming though the defendant no.1 and no more-considering the fact that the second transaction in their favour by defendant no. 1 is void and non-est in law.

41. Be that as it may, as per the first transaction between the plaintiffs and defendant no.1 vide SPA Agreement dated 23rd June, 1997, the defendant no. 1 was obliged to first offer the shares to the plaintiffs if it were to sell the same to person other than Hoechst Group of Company.

55 appeal 855.03 gr..sxw That stipulation is found in clause 6.1 of the said SPA. Besides the said clause 6.1, we may usefully refer to the recital of the said SPA. It plainly states that the purchaser (defendant no .1) has agreed with the sellers (plaintiffs) that the purchaser (defendant no.1) will provide modern technology and technical knowhow to Bombay Oxygen Corporation Ltd.

(defendant no. 2 company) to segment its productivity and consequently its profitability only on the condition that the defendant no. 1 were to acquire the substantial shareholding in the company with the right of management.

The plaintiffs agreed to that condition in the over all interest of the company and relinquished their right of management of the defendant no. 2 company. It is not in dispute that the plaintiffs are majority shareholders of the defendant no. 2 company and are in control of the management of the defendant no. 2 company. The plaintiffs agreed to sell substantial number of shares to the defendant no. 1 keeping in mind overall interest of the defendant no. 2 company and the assurance given by the defendant no. 1 to provide modern technology and technical know how to the defendant no. 2 company to segment its productivity and consequently its profitability. The governing condition on which the defendant no. 1 showed interest in sharing modern technology and technical knowhow to defendant no.2 was that the defendant no.1 should 56 appeal 855.03 gr..sxw be given substantial shareholding in the defendant no.2 company with a right of management. When this agreement was executed between the plaintiffs and the defendant no.1, from the record as has been rightly adverted to by the Learned Single Judge, it is noticed that at no point of time, the defendant no . 1 disclosed the fact that they have already entered into Share Purchase Cooperation Agreement with defendant no.3 on 12th May, 1995. This is inspite of the fact that it was made clear in unmistakable terms to the defendant no.1 that the plaintiffs would part with substantial shareholding in favour of defendant no.1 only, if the defendant no. 1 alone were to acquire substantial shareholding in the defendant no. 2 company. At no point of time, the plaintiffs had agreed for inclusion or association of defendant no. 3 with the right of management of defendant no. 2 company. That could not have

been agreed by the plaintiffs as the defendant no.3 is the business rival of the defendant no. 2 company, which is controlled by the plaintiffs. If the fact that defendant no.1 has already entered into Share Purchase Agreement dated 12th May, 1995 were to be disclosed to the plaintiffs, the plaintiffs would not have entered into any agreement with the defendant no. 1 at all.

42. We may now usefully refer to clause 4.2 of the said SPA which 57 appeal 855.03 gr..sxw provides that no representation or warranty by the defendant no. 1 in the said agreement and no document executed by the defendant no.1 concurrently with the said agreement or at the closing contents any untrue statement of any material fact. In other words, the defendant no. 1 represented to the plaintiffs that they alone would acquire substantial shareholding in the defendant no. 2 company with a right of management.

The clause 6.1 of the said SPA will have to be understood in the backdrop of the above understanding arrived at while executing the SPA between plaintiffs and defendant no.1. Clause 6.1 reads thus:-

> "6.1 Right of first refusal : With effect from the date this Agreement becomes effective, neither party shall sell any shares in the Company held or acquired by it without first offering the Shares to the other party. The offer shall be in writing and shall set out in the price and other terms and conditions. If the offeree does not agree to purchase the Shares so offered the offerer shall be free to sell the Shares to any person (other than a competitor of the offeree), but at the same price and on the same terms as offered to the offeree. This right of first refusal does not apply to any sale of shares by the Purchaser to a company of the Moachst Group. In a company directly or indirectly controlled by or under direct or indirect common control with the Maochst Group. For the purposes of this definition "control" means ownership, directly or indirectly, or more than 50 percent of the issued and outstanding voting stock or ownership interest of the Company."

43. The understanding arrived at as per this clause is that as and when the plaintiffs or defendant no.1 intended to sell entire or any part of the shares of the company held or acquired by it, it shall first offer such 58 appeal 855.03 gr..sxw shares to the other party. Only in the event of the other party not agreeing to purchase the shares so offered for the price and other terms and conditions, it would be open to sell the said shares to any person other than the competitors of the offeree. However, this right of first refusal was not made applicable to sale of shares by the defendant no.1 to a company directly or indirectly controlled by or under direct or indirect common control with the Hoechst Group.

44. The real question is whether clause 6.1 has been breached by the defendant no.1 by effecting the transfer of said shares of defendant no.2 acquired by it to defendant no.4. Until the authorised officer of defendant no.1 filed affidavit in this Court, there was some doubt whether the defendant no.1 had major shareholding of defendant no.4 to the extent of 51% and the subsidiary of defendant no.3 had only 49% of shares therein. If the shares held by the defendant no.1 were to be in excess of 50% of the shares of defendant no.4, it would follow that the defendant no. 4 is a Hoechst Group

Company. However, defendant no. 1 has taken a clear stand that by circular transactions effected on the same day on 17th February, 2000, the net result is that the shares held by defendant no.1 of defendant no. 4 company are only to the extent of 49%, whereas the 59 appeal 855.03 gr..sxw shares held by the subsidiary of defendant no. 3 is to the extent of 51% with right of management of the defendant no.4. In other words, it is the Goyal Group who is in control of the defendant no.4 company. The circular transactions have been graphically explained by a pictorial sketch at Exhibit A to the written submissions filed on behalf of defendant no.1.

In view of the stand taken by the defendant no.1 on affidavit, there is no manner of doubt that the defendant no.4 was never intended to be and cannot be treated as Hoechst Group Company. If so, transfer of disputed shares in favour of defendant no.4 would be clearly in breach of clause 6.1 of the said SPA dated 23rd June, 1997.

45. Besides the quantum of shares held by the subsidiary company of defendant no. 3, as per the arrangement agreed between defendant no.3 and defendant no.1, the nominee of Goyal Group would be in the control of management of defendant no. 4 company. That arrangement is also indicative of the fact that it is the Goyal Group who is in complete control of defendant no.4 company. If it were to be otherwise, there is no reason why defendant no.4 should toe the line of defendant no. 3 and resist grant of any relief to the plaintiffs. Moreso when the defendant no. 1 has entered into amicable arrangement with the plaintiffs as recorded in 60 appeal 855.03 gr..sxw agreement dated 5th December, 2002. We are conscious of the fact that defendant no.4 is a company and a separate juristic person. However, if it were to be a Hoechst Group of Company, by no stretch of imagination, it would take stand contrary to what is taken by defendant no.1. The fact that in proceedings before this Court, the defendant no. 3 and defendant no. 4 are pursuing remedy together, inference can be drawn that the Goyal Group has complete control over the defendant no. 4. In other words, there is material to take prima-facie view that the defendant no. 4 is not and was never intended to be a Hoechst Group of Company. Instead, it has been formed only to enable the defendant no. 1 to extricate from its obligation under clause 6.1 of SPA and at the same time enable the defendant no. 3 to accomplish its design to some how take over the control of defendant no. 2 company. On this finding, it would necessarily follow that the transfer of shares in favour of defendant no.4 was not consistent with the arrangement provided in clause 6.1 of the said SPA between plaintiffs and defendant no.1. As a result, that transfer is in breach of order of injunction passed by this Court which is still in force.

46. The next question is whether clause 6.1 itself is illegal and void.

The defendants 3 & 4 contend that by virtue of Section 111A of the 61 appeal 855.03 gr..sxw Companies Act, the shares or debentures and any interest therein of a company shall be freely transferable. Whereas, the arrangement provided by clause 6.1 infracts the principle of free transferability of shares.

Resultantly, the said clause 6.1 is in the teeth of Section 111A of the Companies Act. To buttress this submission, reliance has been placed on the decision of the Apex Court in the case of V.B.Rangaraj v/s.

V.B.Gopal Krishnan & ors. reported in AIR 1992 SC 453 and Western Maharashtra Development Corporation Ltd. v/s. Bajaj Auto Ltd. reported in (2010) 154 Company Cases 593 (Bom). The plaintiffs on the other hand have placed reliance on the decision of the Apex Court in M.S. Madhusoodhanan v/s. Kerala Kaumudi Pvt. Ltd. reported in AIR 2004 SC 909. However, since the decision in the case of Western Maharashtra Development Corporation (supra) of the Learned Single Judge of this Court is directly on the point, it was argued that the conclusion reached in the said decision is not correct.

47. We shall first refer to the decision in the case of Western Maharashtra Development Corporation (supra). In that case, the parties had incorporated clause 7 in the Protocol Agreement which provided that right of preemption is created between the petitioner and the respondent 62 appeal 855.03 gr..sxw in the event that either of them seeks to part with or transfer its shareholding in the joint venture company formed by them. In view of certain disputes the matter was referred to the Arbitrator. The contention was that clause-7 of the Protocol Agreement provides for right of preemption. That was against Section 111 A of the Companies Act. For, the joint venture being a public company, the shares or debentures of such a company and any interest therein ought to be freely transferable. The decisions of the Apex Court both in the case of Rangaraj and Madhusoodhanan (supra) have been considered. The Learned Single Judge of this Court has taken the view that the dictum in the said decisions were of no avail as the case on hand was in relation to a public company. It is held that in case of public company, Section 111 A provides that the shares or debentures and any interest therein of the company shall be freely transferable. Reliance is also placed on Section 9 of the Companies Act which stipulates that provisions of the Act shall have the effect notwithstanding anything to the contrary contained in the Memorandum or Articles of the Association. The Learned Judge has then adverted to the dictionary meaning of expression "transfer" and "transferable". The Learned Judge has distinguished the exposition of the Privy Council in the case of Ontario Jockey Club Ltd. v/s. Samuel 63 appeal 855.03 gr..sxw McBride reported in AIR 1928 PC 291. It is held that the Privy Council was considering the case in which the legislation authorised the Board of Directors to regulate the transfer of shares and transferability of the shares of the company. The bye-laws specifically contemplated a restriction of transferability otherwise than to a member of the company.

While considering the legal position in India, the Learned Single Judge adverted to the decision of the Supreme Court in Rangaraj (supra) wherein the agreement between the members of the family, who was the only shareholder of the private company which imposed a restriction on the shareholders' right to transfer the shares was contrary to the articles of association and was not binding on the company or its shareholders. The Learned Single Judge has then analyzed the case of Madhusoodhanan (supra) and extracted portion of the said decision. Thereafter, the Learned Single Judge proceeded to hold that both these cases deal with a private company. It is further held that the dictum of Apex Court in Madhusoodhanan's case expressly clarified that as far as private companies are concerned, the Articles of Association restrict shareholders' rights to transfer the shares and prohibit invitation to the public to subscribe to shares or debentures of the company. The Learned Single Judge has then adverted to the opinion of the Apex Court whereby the 64 appeal 855.03 gr..sxw dictum in Rangaraj's case has been distinguished on the ground that there was no restriction on the transferability of the shares in the Karar and the Karar itself was an agreement

between the particular shareholders relating to transfer of specified shares which was capable of specific performance. The Learned Single Judge then proceeded to observe that a situation involving a restriction of transferability of shares in a private company has to be contrasted with cases involving public companies where the law provides for free transferability. It is thus held that free transferability of shares is the norm in the case of shares in a public company. The Learned Single Judge has then held that provision contained in the law for the free transferability of shares in a public company is founded on the principle that the members of the public/every shareholder must have the freedom to purchase and every shareholder the freedom to transfer. We would think it apposite to reproduce the relevant extract of the opinion of the Learned Single Judge in support of this conclusion that clause-7 (which is similar to clause 6.1 of the SPA) is void. The same read thus:-

> "60. ..... A situation involving the restriction on the transferability of shares in a private Company has to be contrasted with cases involving public Companies where the law provides for free transferability. Free transferability of shares is the norm in the case of shares in a public Company.
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> 61. The provision contained in the law for the free transferability of

65 appeal 855.03 gr..sxw shares in a public Company is founded on the principle that members of the public must have the freedom to purchase and, every shareholder, the freedom to transfer. The incorporation of a Company in the public, as distinguished from the private, realm leads to specific consequences and the imposition of obligations envisaged in law. Those who promote and manage public companies assume those obligations. Corresponding to those obligations are rights, which the law recognizes as inhering in the members of the public who subscribe to shares. The principle of free transferability must be given a broad dimension in order to fulfill the object of the law. Imposing restrictions on the principle of free transferability, is a legislative function, simply because the postulate of free transferability was enunciated as a matter of legislative policy when Parliament introduced Section 111A into the Companies' Act, 1956. That is a binding precept which governs the discourse on transferability of shares. The word "transferable" is of the widest possible import and Parliament by using the expression "freely transferable", has reinforced the legislative intent of allowing transfers of shares of public companies in a free and efficient domain.

62. The effect of Clause 7 of the Protocol Agreement is to create a right of preemption between the Petitioner and the Respondent in the event that either of them seeks to part with or transfer its shareholding in MSL. In that event, the party desirous to transfer its shareholding is obligated to furnish a first option to the other for the purchase of the shares at such rate, as may be agreed to between the parties or decided upon by arbitration. The consequence of Clause 7 of the Protocol Agreement, which has been incorporated in the Articles of Association, is to preclude sale to or purchase by the members of the public of the shares, which are offered for sale if the offer is accepted by the Petitioner, or as the case may be, by the Respondent within thirty days of the receipt of the notice. The effect of a clause of preemption is to impose a restriction on the free transferability of the shares by subjecting the norms of transferability laid down in Section 111A to a preemptive right created by the agreement between the parties. This is impermissible. Section 9 of the Companies' Act, 1956 gives overriding force and effect to the provisions of the Act, notwithstanding

anything to the contrary contained in the Memorandum or Articles of a Company or in any agreement executed by it or for that matter in any resolution of the Company in general meeting or of its Board of Directors. A provision contained in the Memorandum, Articles, Agreement or Resolution is to the extent to which it is repugnant to the provisions of the Act, regarded as void.

65. Counsel appearing on behalf of the Respondent submitted that Section 111A has no application to contracts for the transfer of particular shares between particular shareholders when incorporated in 66 appeal 855.03 gr..sxw the Articles of Association. The submission is that restrictions which bind third parties are bad. Section 111A was intended to curb the power of the Board of Directors to obstruct transfers and clearer words would be required to destabilize bargains which are the heart of commerce.

66. The submission that Section 111A would not interdict "an agreement between particular shareholders relating to the transfer of specified shares" is based on the judgment of the Supreme Court in Madhusoodhanan (supra). In that case, as already noted earlier, the Supreme Court noted that the Karar was an agreement between "particular shareholders relating to the transfer of the specified shares".

What is significant is that the Company in that case was a private Company. The Supreme Court noted with some emphasis that in the case of a private Company, the Articles of Association would restrict the right of shareholders to transfer shares and prohibit invitation to the public to subscribe for shares or debentures of the Company. The position in law of a Public Company is materially different. By the provisions of the Companies' Act, 1956, restrictions on the transferability of shares which are contemplated by the definition of a "private company" under Section 3(1)(iii) are expressly made impermissible in the case of a public company by the provisions of Section 111A. Once that be the position, the submission urged on behalf of the Respondent cannot be accepted. In essence, the submission of the Respondent is that the provisions of Section 111A should be read as being subject to a contract to the contrary. A restriction to that effect cannot be read into the provision of Section 111A; firstly because, such a restriction is not mentioned in the statutory provision; secondly, the word "transferable" is of the widest import; and thirdly, the context in which the provision has been introduced, is susceptible to the inference that it should be given a wide meaning. Where the language of the statute is plain and unambiguous, neither the consequence nor the conduct of parties would be of relevance. Reliance was sought to be placed on a notification that was issued on 27th June 1961 by which, in exercise of powers conferred by Section 28(2) of the Securities Contracts (Regulation) Act, 1956, the Central Government specified contracts of preemption as contained in promotion or collaboration agreements or in the Articles of Association of a Limited Company as contracts to which the said Act shall not apply. That notification, it has to be noted, related to an exemption from the provisions of the SCRA and cannot override the plain mandate of Section 111A. Besides, Section 111A was introduced in the Companies' Act, 1956 by the Depositories Act, 1996 with effect from 20th September 1995. The plain intendment and meaning of Section 111A must prevail."

The Learned Single Judge has then adverted to the Delhi High Court 67 appeal 855.03 gr..sxw Judgment in the case of Smt. Pushpa Katoch vs. Manu Maharani Hotels Ltd. reported in 2005(121)

DLD 333 which has taken a similar view.

48. The Counsel appearing for the plaintiffs submits that the decision in the case of Western Maharashtra Development Corporation Ltd.(supra) does not lay down the correct law. For, it is founded on misreading of the Judgment of the Apex Court in Madhusoodhanan's case (supra).

According to the plaintiffs, the Apex Court in Madhusoodhanan's case has distinguished the dictum in Rangaraja's case on the finding that in Rangaraja's case there was a blanket restriction on all the shareholders present and future. Therefore, in that case the Court held that agreement imposed a restriction on shareholders right to transfer shares present as well as future. Whereas, in Madhusoodhanan's case, the Supreme Court pointed out that, in agreement between particular shareholders relating to the transfer of specified shares did not impose a restriction on the transferability of shares and it was unnecessary for the company or any other shareholders to be a party to the agreement. It is contended that this crucial distinction drawn by the Apex Court in Madhusoodhanan's case has been glossed over by the Learned Single Judge of this Court. In 68 appeal 855.03 gr..sxw other words, an agreement by a particular shareholder or between two shareholders relating only to their own shares (by way of pledge, sale or for preemption) is a consensual arrangement entered into by them, in exercise of their right of free transferability and it consequently imposes no restriction on transferability. The company or any other shareholder of the company does not have to be a party to such agreement. For the same reason such agreement need not be embodied in the Articles of Association. Whereas, if arrangement by a particular shareholder relating to his own shares by way of pledge or preemption was to be restricted, then there ought to be an express provision in that behalf. Inasmuch as, the sweep of Section 111A was intended mainly to restrict the right of Directors of the Company to refuse transfer of a members shares. It is not intended to and does not affect the right of shareholders to deal with their specific shares or to enter into any consensual arrangement or agreement regarding their shares (by way of pledge, preemption, sale or otherwise). That position is reinforced even from the objects and reasons of the Act in question. Further, reliance is placed on the legislative history which indicates that prior to coming into force of Section 111 A of the Companies Act, similar provision was introduced in the Securities Contracts (Regulations) Act, 1985. Section 22A thereof 69 appeal 855.03 gr..sxw provided that Securities of Companies shall be freely transferable. The said provision also restricted companies right to refuse registration of transfer only on four specified grounds mentioned therein. That is reinforced from the objects and reasons of the amending Act of 1985. It makes it clear that the provision was intended to restrict the right of the Board of Directors to refuse registration of transfer of shares only on the specified reason. Sans those reasons, bestowed wide discretion in the Board. That places an undue burden on small investors and was not conducive to free marketability of listed securities and healthy growth of the capital market. It states that unrestricted transferability is particularly necessary for securities of public limited companies which are listed on the Stock Exchange. Further, under the proposed provision, companies would be entitled to refuse registration of transfer in specified circumstances only. It is by Depositories Act, 1996, Section 22A of the Securities Contracts (Regulation) Act, 1956 came to be deleted and simultaneously 111A of the Companies Act, 1956 was introduced, which declares the shares of a company to be freely transferable. Section 111A (3) simultaneously restricted the right of a company to seek rectification of a transfer of shares, only on specified grounds. Our attention was also invited to clause-14 of the

notes on clauses of the Companies 70 appeal 855.03 gr..sxw Amendment Bill, 2001. In addition, reliance was placed on the decision of the Apex Court in that case of Dove Investments (P) Ltd. & ors. v/s.

Gujarat Industrial Investment Corporation & anr. reported in (2006) 2 SCC 619 wherein the Apex Court has held that the company may refuse to register shares for various reasons. In that case, the shares were freely transferable. It was held that refusal for transfer of such shares can be made only on limited grounds such as Section 22A(3) of the Securities Contracts (Regulation) Act, 1956. According to the plaintiffs when a shareholder deals with a share or enters upon a contract to pledge, sale or principle of first refusal, he does so in exercise of his right of free transferability of shares. He does that in the same manner as in the case of any other movable or immovable property in India which is also freely transferable. That right would include right to pledge, mortgage or preemption regarding his property. That right of any person would be intrinsic in his right of free transferability. If the statute made by Parliament intended to affect such right, ought to have made express provision in that regard. Only upon making such express provision that legal right of the owner can be taken away. There can be no presumption that the legislature has taken away that right while making provision to restrict the right of Directors of a company to refuse transfer of members 71 appeal 855.03 gr..sxw share. Reliance has been placed on the decision in the case of ICICI Bank Ltd. v/s. SIDCO Leathers Ltd. reported in 2006 (10) SCC 452 at paras 41-43 and in the case of Byram Pestonji Gariwala vs. Union Bank of India (1992) I SCC page 31 and at paras 28-30 and 35.

Reliance has also been placed on the exemption notification dated 27th June, 1961 issued under Section 28 of the Securities Contracts (Regulation) Act, 1956 by the Central Government exempting contracts for preemption or similar rights contained in the Promotion or Collaboration Agreements or any Articles of Association of limited company on the ground that such contracts were in the interest of trade and commerce or the economic development of the country. Even for this reason, it is contended that, it cannot be presumed that legislature while enacting Section 111 A impliedly intended to make the agreements referred to in the abovementioned notification illegal or invalid.

49. As is noticed earlier, the plaintiffs and defendant no. 1 have already amicably resolved their disputes inter se by agreement dated 5th December, 2002. Neither the defendant no. 3 nor the defendant no. 4 is party to the said agreement. Challenge to the terms contained in the said agreement between plaintiffs and defendant no. 1 at the instance of 72 appeal 855.03 gr..sxw defendants 3 and 4 who are not party to the agreement that too in these proceedings is itself doubtful.

50. The question is: whether clause 6.1 of SPA can be said to be violative of free transferability of shares provided by Section 111 A of the Act. For that, we may have to consider the objects and reasons for which Section 111 A has been introduced in the Companies Act. Prior to introduction of Section 111 A, Section 111 of the Companies Act, 1956 provided for remedy of appeal to a transferor or transferee seeking relief in respect of a transfer/transmission of shares in public or private company. They could apply for rectification of register of members under Section 155. With effect from January 17, 1986, Section 22 A was inserted in the Securities Contracts (Regulations) Act,

1956. It provided that the shares of the registered company to be freely transferable.

However, the company could refuse transfer only on four specified grounds. The said provision was introduced in the backdrop of series of complaints regarding arbitrary powers exercised by the Board of Directors in refusing or non-consideration of request for transfer/transmission of shares in favour of the transferee. It thus follows that the provision of Section 22 A of the Act of the Securities Contracts 73 appeal 855.03 gr..sxw (Regulation) Act 1956 was intended to regulate the right of the Board of Directors of the company to refuse transfer of members shares. That was not a provision to restrict the right of shareholders to deal with their shares or to enter into consensual arrangement/arrangement regarding their shares (by way of pledge, preemption, sale or otherwise). Suffice it to observe that the intention behind introducing Section 22 A in 1986 was to regulate the right of the Board of Directors to refuse transfer of members share and it was not to impose restriction on the right of shareholder to deal with his shares by entering into consensual arrangement with the third party to which the company need not be a party.

51. Section 22 A was deleted by Depositories Act, 1996 and at the same time Section 111 A in the Companies Act came to be introduced.

Section 111A as applicable at the relevant time (prior to amendment of 2003) reads thus:

> "[111-A. Rectification of register on transfer.--(1) In this section, unless the context otherwise requires, "company" means a company other than a company referred to in sub-section (14) of Section 111 of this Act.
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> (2) Subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable:
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> 6[Provided that if a company without sufficient cause refuses to register transfer of shares within two months from the date on which the instrument of transfer or the intimation of transfer, as the case may be, is delivered to the company, the transferee 74 appeal 855.03 gr..sxw may appeal to the Company Law Board and it shall direct such company to register the transfer of shares.] 7[(3) The Company Law Board may, on an application made by a depository, company, participant or investor or the Securities Exchange Board of India, if the transfer of shares or debentures is in contravention of any of the provisions of the Securities and Exchange Board of India Act, 1992 (15 of 1992), or regulations made thereunder of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), or any other law for the time being in force, within two months from the date of transfer of any shares or debentures held by a depository or from the date on which the instrument of transfer or the intimation of the transmission was delivered to the company, as the case may be, after such inquiry as it thinks fit, direct any depository or company to rectify its register or records.] (4) The Company Law Board while acting under sub-section (3), may at its discretion make such interim order as to suspend the voting rights before making or completing such enquiry.

(5) The provisions of this section shall not restrict the right of a holder of shares or debentures, to transfer such shares or debentures and any person acquiring such shares or debentures shall be entitled to voting rights unless the voting rights have been suspended by an order of the Company Law Board.

(6) Notwithstanding anything contained in this section, any further transfer, during the pendency of the application with the Company Law Board, of shares or debentures shall entitle the transferee to voting rights unless the voting rights in respect of such transferee have also been suspended.

(7) The provisions of sub-sections (5), (7), (9), (10) and (12) of Section 111 shall, so far as may be, apply to the proceedings before the Company Law Board under this section as they apply to the proceedings under that section.]"

> Even the sweep of Section 111 A is the same as Section 22 A of the Securities Contracts Act. In that, it is a provision regarding rectification of register on transfer. Sub-Section (2) opens with the expression "subject to the provisions of this section". In other words, it is a provision restating that the shares or debentures and any interest therein of a company shall be freely transferable subject, however, to the stipulation provided in the other part of Section 111 A of the Act. The proviso to sub-
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> section (2) reinforces the position that Section 111 A is to regulate the powers of the Board of Directors of the company regarding transfer of 75 appeal 855.03 gr..sxw shares or debentures and any interest therein of a company. The Board of Directors cannot refuse to register transfer of shares unless there is sufficient cause to do so. In other words, the setting in which Section 111A is placed in part IV of the Act under heading "transfer of shares and debentures", it is not a provision to curtail the rights of the shareholders to enter into consensual arrangement with the purchaser of their specific shares. The right to enter into consensual arrangement must prevail so long as it is in conformity with the terms of Articles of Association and other provisions of the Act and the Rules. Whereas, Section 111A is a provision mandating the Board of Directors of the company to transfer shares in the name of the transferee, subject to the stipulations in Section 111A of the Act. The expression "freely transferable" therein is in the context of the mandate against the Board of Directors to register the transfer of specified shares of the members in the name of the transferee, unless there is sufficient cause for not doing so. The said provision cannot be construed to mean that it also intends to take away the right of the shareholder to enter into consensual arrangement/agreement with the purchaser of their specific shares. If the legislature intended to take away that right of the shareholder, it would have made an express provision in that regard. Reliance has been rightly placed on the decision 76 appeal 855.03 gr..sxw of the Apex Court in the case of Byram Pestonji Gariwala (supra) which takes the view that the freedom of contract generally, the legislature does not interfere except when warranted by public policy, and the "legislative intent is expressly made manifest". Even in the case of ICICI Bank Ltd.

> (supra), the Apex Court has in unmistakable terms expounded that while enacting a Statute, Parliament cannot be presumed to have taken away a right in property and deprivation of legal right existing in favour of a person. That cannot be presumed in construing the Statute. In fact, it is the other way round and a contrary presumption must be raised. The concept of free transferability of shares of a public company is not affected in any manner if the shareholder expresses his willingness to sell the shares held by him to another party with right of first purchase (pre-

emption) at the prevailing market price at the relevant time. So long as the member agrees to pay such prevailing market price and abides by other stipulations in the Act, Rules and Articles of Association there can be no violation. For the sake of free transferability both the seller and purchaser must agree to the terms of sale. Freedom to purchase cannot mean obligation on the shareholder to sell his shares. The shareholder has freedom to transfer his shares on terms defined by him, such as right of first refusal, provided the terms are consistent with other regulations 77 appeal 855.03 gr..sxw including to repurchase the shares at the prevailing market price when such offer is made. The fact that shares of public company can be subscribed and there is no prohibition for invitation to the public to subscribe to shares, unlike in the case of private company, does not whittle down the right of the shareholder of a public company to arrive at consensual agreement which is otherwise in conformity with the extant regulations and the governing laws.

52. In the case of Madhusoodhanan (supra) no doubt the Apex Court was dealing with the case of a private company. However, at the same time, it has considered the general question regarding the right of shareholder-not limited to shareholder of a private company-to enter into such consensual arrangement which is not in violation of Articles of Association or the provisions of Act or Rule. In Paragraph 140 of the decision while referring to the Judgment of S.P. Jain v/s. Kalinga Tubes reported in AIR 1965 SC 1535, the Court has noticed two different situations. In the first case, it is the company which issues and allots the new shares and the second situation is of recognition of private arrangement between the existing shareholder by way of sale of share in favour of new shareholder. In the latter case, the company comes into the 78 appeal 855.03 gr..sxw picture only for the purpose of recognition of transferee as the new shareholder. It is also noted that it is not necessary for the company to be a party in any agreement relating to the transfers of issued shares for such arrangement to be specifically enforced between the parties to the transfer. Notably, in S.P. Jain's case, the company was a public company at the relevant time during which alleged oppression was caused in violation of the agreement by the two shareholders qua S.P. Jain. In Paragraph 142 of the reported decision, the Apex Court has noted that the Judgment in the case of S.P. Jain (supra) does not in any way hold that transfer of shares agreed between shareholders inter se does not bind them or cannot be enforced like any other agreement. That means that it is open to the shareholders to enter into consensual agreements which are not in conflict with the Articles of Association, the Act and the Rules, in relation to the specific shares held by them; and such agreement can be enforced like any other agreement. That does not impede the free transferability of shares at all.

53. Thereafter, the Apex Court went on to analyze the Rangaraja's case and has distinguished the same on the opinion that in that case there was a blanket restriction on all the shareholders present and future. There 79 appeal 855.03 gr..sxw was no such restriction in the case before it. In the case

before it was an agreement between particular shareholders relating to the transfer of specified shares and it was unnecessary for the company or the other shareholders to be party to the agreement. In other words, the decision in Madhusoodhanan's case is an authority on the proposition that consensual agreements between particular shareholders relating to their specific shares do not impose restriction on the transferability of shares. Further, such consensual agreements between particular shareholders relating to their shares can be enforced like any other agreements. It is not required to be embodied in the Articles of Association.

54. We shall now turn to the opinion of the Learned Single Judge in the case of Western Maharashtra Development Corporation Ltd. (supra).

The Learned Single Judge after adverting to the Supreme Court decision in Madhusoodhanan's case in the first place noted that the said case dealt with a private company. In case of private companies, the Articles of Association restrict shareholders' right to transfer the shares and prohibit invitation to the public to subscribe shares or debentures of the company.

He has held that the scheme relating to transfer of shares of a private company and in contradistinction a public company, is different. The 80 appeal 855.03 gr..sxw Learned Single Judge went only by the expression "freely transferable"

> occurring in Section 111A(2) of the Act. It is held that principle of free transferability must be given a broad dimension in order to fulfill the object of the law. For that, reliance is placed essentially on Section 111 A and Section 9 of the Companies Act.
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> 55. Insofar as Section 9 of the Companies Act is concerned, it contemplates that provisions of the Act shall have effect notwithstanding anything to the contrary contained in the Memorandum or Articles of Association or in any agreement executed by it or in any resolution passed by the company in General Meeting or by its Board of Directors, whether the same be registered, executed or passed as the case may be, before or announcement of the Act. Clause (a) thereof, which refers to any agreement executed, is in respect of an agreement executed by the company; and not by the shareholder with third party-which is a private consensual arrangement/agreement to which the company is not a party.
>
> As aforesaid, Section 111A is not a law dealing with the right of the shareholders to enter into consensual arrangement/agreement by way of pledge, preemption/sale or otherwise. If that right is not covered by Section 111 A of the Act as has been found by us, then consensual

81 appeal 855.03 gr..sxw arrangement/agreement between shareholder and third party or shareholders inter se to which company is not a party, Section 9 of the Act will not come into play at all. Thus, the expression "freely transferable"

in Section 111A does not mean that the shareholder cannot enter into consensual arrangement/agreement with the third party (proposed transferee) in relation to his specific shares If the company wants to even prohibit that right of the shareholders, may have to provide for an express condition in the Articles of Association or in the Act and Rules, as the case may be, in that behalf. The legal provision as obtained in the form of Section 111 A of the Companies Act does not expressly restrict or take away the right of shareholders to enter into consensual arrangement/agreement in respect of shares held by him.

56. We find force in the argument of the plaintiffs that the logic applied by the Learned Single Judge is founded on the erroneous premise that an agreement of preemption, even if freely entered into by a shareholder and third party or between shareholders, imposes a restriction on the free transferability of shares.

57. The Learned Single Judge has then distinguished the exposition in

82 appeal 855.03 gr..sxw Madhusoodhanan's case on the basis that the Karar referred to therein was an agreement between particular shareholders relating to the transfer of the specified shares. It is noted that in that case the company was a private company and restriction on the right of the shareholders to transfer shares and prohibit invitation to the public to subscribe for shares and debentures of the company is materially different. The main thrust is that in case of public company there can be no restriction whatsoever and if any other argument was to be accepted, it would mean that Section 111 A is being read as being subject to a contract to the contrary. The notification dated June 27, 1961 has been discarded on the opinion that, that cannot have any bearing in relation to Section 111 A of the Companies Act as it is issued in exercise of powers under Depositories Act, 1996. With utmost humility at our command, we do not agree with this reasoning of the Learned Single Judge in the case of WMD Corporation Ltd. (supra) for the reasons recorded hitherto.

58. Apriori, the argument of defendant no. 3 and 4 that clause 6.1 of the said SPA is invalid and void cannot be countenanced. Going by the plain language of the said clause it predicates that if the transfer of shares were to be in favour of person other than the Hoechst Group of Company, the 83 appeal 855.03 gr..sxw plaintiffs would have right of first refusal. That right of the plaintiffs have been clearly breached by the defendant no. 1 by directly transferring the shares in favour of defendant no.4 by Agreement dated 17th February, 2000. As a result, the said transfer will not be binding on the plaintiffs and in fact in violation of the Agreement between plaintiffs and defendant no.1 which was in force during the relevant period.

59. The matter can be viewed from another perspective. Admittedly, the disputed shares have still not been transferred in the name of defendant no. 4. So long as the said transfer does not take place, the defendant no.4 cannot claim any right whatsoever. If the defendant no. 4 were to lodge the shares for transfer with the defendant no. 2 company, the Board of Directors may be within its right to refuse to register transfer inter alia on the ground that the transfer if granted would cause serious prejudice to the company as the transferee is controlled by the management who are business rivals of defendant no. 2 company. We, however, express no opinion on that matter.

60. It was then contended that both the suits will have to be dismissed on the principle laid down by the Apex Court in the case of Prem Raj v/s.

84 appeal 855.03 gr..sxw D.L.F. Housing and Construction (Private) Ltd. & anr. reported in AIR 1968 SC 1355. In the said case the Court had occasion to consider some what similar situation. On construing Section 37 of the Specific Relief Act, the Court opined that the same expressly provides that a plaintiff suing for Specific Performance of the contract can alternatively sue for rescission of the contract but the converse is not provided. It went on to hold that it is not open to the plaintiffs to sue for rescission of agreement and in the alternative sue for specific performance. We, however, cannot be oblivious to the fact that the two suits filed by the plaintiffs ask for diverse reliefs. The relief of rescission of the SPA dated 23rd June, 1997 could be taken forward only till the defendant no.1 was in complete control of the disputed shares in all respects. However, the defendant no. 1 having transferred those shares by agreement dated 17th February, 2000 to defendant no. 4; and if the said transfer were to be valid, the relief of rescission of SPA dated 23rd June, 1997 may not survive and cannot be considered. However, the transfer of disputed shares by defendant no. 1 to defendant no.4 vide Agreement dated 17th February, 2000 was valid or otherwise could be tested on the touchstone of clause 6.1 of the SPA dated 23rd June, 1997 or on the ground of fraudulent transfer not binding upon the plaintiffs. In view of this 85 appeal 855.03 gr..sxw complex position, the plaintiffs must have been advised to pursue two suits before this Court. It cannot be disputed that the plaintiffs have option of election which request can be considered at appropriate stage.

In the light of subsequent development of amicable settlement of all the differences between the plaintiffs and defendant no. 1, it is possible that the plaintiffs may elect their remedy. In the circumstances, it will not be appropriate to non-suit the plaintiffs and more so when the relief of direction against defendant nos. 3 and 4 prayed by the plaintiffs including for return of shares would survive notwithstanding the settlement with the defendant no.1. In any case, the Court can mould the relief at the appropriate stage. It is not as if the entire suit can be dismissed or plaint can be rejected by taking recourse to provisions of Order 7 , Rule 11 as was argued by the Counsel for the contesting defendants.

61. We will now revert back to the findings recorded by the Learned Single Judge in the impugned Judgment. He has held that transaction was vitiated on account of misrepresentation and fraud caused to the plaintiffs. This will have to be considered in two parts. Firstly, misrepresentation and fraud at the time of execution of the first agreement with plaintiffs i.e. SPA dated 23rd June, 1997. Going by the material on 86 appeal 855.03 gr..sxw record, we have no hesitation in upholding the opinion of the Learned Single Judge that at no point of time any disclosure was made by the defendant no. 1 about the agreement already executed with defendant no.

3. As per the said agreement, the Goyal Group were to eventually take over the management of defendant no.2 company. Had that position been disclosed, the plaintiffs would not have ventured into executing the SPA dated 23rd June, 1997 in favour of defendant no.1. There was no compulsion for the plaintiffs to sell their shares. The plaintiffs agreed to sell the shares to defendant no.1 on the solemn hope given to them that the defendant no.1 would take over the substantial majority shareholding of the defendant no.2 so as to segment the productivity of defendant no. 2 company

and consequently its profit. The record also reinforces the stand of the plaintiffs that after they were informed about the possible involvement of defendant no.3 or the Goyal Group, it was made clear to the defendant no.1 that such association was unacceptable to the plaintiffs. Suffice it to observe that the finding recorded by the Learned Single Judge that it was a case of misrepresentation and fraud committed on the plaintiffs at the time of execution of the first SPA dated 23rd June, 1997 is unexceptionable.

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62. Even the finding regarding misrepresentation or fraud committed posterior to the SPA dated 23rd June, 1997, the Learned Single Judge has adverted to the relevant documents such as letter dated 1st April, 1997 sent by defendant no.1 to defendant no.3, fax dated 9th September, 1997 sent by defendant no. 1 to defendant no.3, communication dated 19th July, 1997 sent by defendant no.3 to defendant no.1, agreement dated 8th November, 1997 entered between defendant no.1 and defendant no.3, letter dated 9th December, 1997 sent by officer of defendant no.1 to Suresh Goyal of defendant no.3 and letter dated 5th May, 1998 sent by defendant no.1 to defendant no.3. All these documents have been properly analyzed by the Learned Single Judge. In our view it is not possible to interfere with the said analysis and the conclusion based thereon, which is against the contesting defendants. In other words, we are in agreement with the prima-facie opinion recorded by the Learned Single Judge that the contesting defendants acted in concert with common design to take over the management of defendant no. 2 company and the ultimate destination was to be the Goyal Group. If the disputed transactions are shrouded by misrepresentation and fraud, it is well established position that such transactions would be void. Reliance has been rightly placed on the decision in the case of Shriniwas Shankar Potnis vs. Raghukul 88 appeal 855.03 gr..sxw Sahakari Griharachana Sanstha Maryadit & anr. reported in 2009 (6) Bombay Case Reporter 731. The argument of the defendant no.3 that infact the defendant no. 3 was victim of fraud as even though the defendant no. 1 had entered into agreement of Share Purchase Cooperation Agreement on 12th May, 1995 and had incorporated non-

compete clause, yet, unilaterally, the defendant no. 1 proceeded to strike the deal with plaintiffs for purchase of shares of defendant no. 2 company.

The plaintiffs cannot be thrown out because the defendant no. 1 had misrepresented or committed fraud also on defendant no. 3. The defendant no. 3 cannot be allowed to challenge the conduct or act of defendant no. 1 qua it, in the present proceedings where the principal issue is whether the plaintiffs are right in asserting that the first SPA dated 23rd June, 1997 itself is the product of fraud and misrepresentation. In any case, the Learned Single Judge has analyzed the subsequent conduct of the contesting defendants in particular defendant no.1 and 3 which reinforces the position that it was a concerted effort by defendant no. 1 and 3 to take over the management of defendant no. 2 company. It is noticed that the defendant no. 3 is controlled by Goyal Group who are known to be business rivals of the plaintiffs. The plaintiffs are till date controlling the defendant no. 2 company. As a result, the prima-facie 89 appeal 855.03 gr..sxw opinion recorded by the Learned Single Judge on the factum of misrepresentation and fraud committed on the plaintiffs merits no interference.

63. The argument that at some stage the defendant no.1 unilaterally proceeded to strike the deal with plaintiffs would make no difference to the said conclusion. As noticed earlier, the Learned Single Judge has found that even the subsequent acts of the defendant no.1 and defendant no. 3 and of forming defendant no. 4 Joint Venture Company was nothing short of misrepresentation and fraud and in furtherance of the common design of the defendant no. 1 and defendant no. 3 to take over the management of defendant no. 2 company. The principal actor in the said concerted effort and the beneficiary were to be the Goyal Group.

Accordingly, the plaintiffs have made out prima-facie case that the first SPA dated 23rd June, 1997 is vitiated on account of misrepresentation and fraud as also the second transfer in favour of defendant no. 4 is also vitiated for the same reason.

64. Insofar as second transfer in favour of defendant no. 4 dated 17th February, 2000, the Learned Single Judge has adverted to all the relevant 90 appeal 855.03 gr..sxw affidavits and documents. It has considered the affidavit of Stephen Cox as to how the arrangement was to be worked out so as to put Goyal Group in control of defendant no. 4 company. Learned Judge has also referred to agreement between defendant no. 1 and subsidiary of defendant no. 3 Morgan Trade and Commerce Ltd.-which makes it amply clear that defendant no. 1 advanced amount to said Morgan Trade to enable them to purchase 49% shares of defendant no.4. The subsidiary of defendant no. 3 did not itself contribute any amount for purchase of the said shares. The third document considered by the Learned Single Judge is Loan Agreement whereby the defendant no. 1 granted loan for acquiring two percent shares of defendant no. 4 to Morgan Trade and Commerce Ltd. The fourth document considered by the Learned Single Judge is the agreement between defendant no. 1 Morgan Trade and defendant no. 4. That provides that Morgan Trade will have no obligation to repay loan of DM 4.9 Million and 0.2 Millions given by defendant no.1 as the defendant no. 1 has received that amount directly from defendant no.4 in pursuance of letter of Deutsche Bank AG. The bank documents have also been considered by the Learned Single Judge.

On the basis of all these documents the Learned Single Judge has concluded that by resorting to circular transactions effected on the same 91 appeal 855.03 gr..sxw day i.e. 17th February, 2000 Morgan Trade and Commerce Ltd. which is subsidiary of defendant no. 3 company and controlled by Goyal Group eventually came in control of 51% shareholding in defendant no. 4 company. Whereas, defendant no. 1 held only 49% of shares of defendant no. 4 company. These circular transactions were effected and documents were prepared with clear intention to circumvent the mandate in clause 6.1 of the SPA dated 23rd June, 1997 and in particular the order of injunction operating against the contesting defendants.

65. The next question is whether the finding recorded by the Learned Single Judge that the transactions effected between defendant no. 1 and defendant no. 3 and in particular subsidiary of defendant no. 3 so as to transfer the shares held by defendant no. 1 in favour of defendant no. 4 was in breach of order of injunction. Ordinarily, this issue could have been answered at the outset. For, if it were to be answered against the contesting defendants no other enquiry would be necessary. However, the order of injunction in this case is to restrain transfer of shares held by defendant no. 1 in breach of clause 6.1 of the SPA. For that reason it became necessary to first consider the efficacy

of Clause 6.1 of SPA and also to ascertain whether the transfer effected on 17th February, 2000 by 92 appeal 855.03 gr..sxw defendant no. 1 in favour of defendant no.4 violated that clause. On both these aspects we have answered the issue in favour of the plaintiffs. In our opinion, the transfer of shares in favour of defendant no. 4 by defendant no. 1 were only subterfuge to show as if it was in conformity with the injunction order passed by this Court which was operating at the relevant time and continues to operate even till now. The defendant no.

4, in view of the affidavit filed by the authorised officer of the defendant no. 1, is, admittedly, not a subsidiary of defendant no. 1 or Hoechst Group of Company. As a result, the second transfer dated 17th February, 2000 of disputed shares in favour of defendant no. 4 is in violation of the order of the Court. Prima-facie, therefore, as has been rightly found by the Learned Single Judge, the second transfer of disputed shares in the name of defendant no. 4 is vitiated and void. If any authority is required in support of this proposition, we may usefully refer to the exposition in the case of Keshrimal Jivji Shah v/s. Bank of Maharashtra Reported in 2004 (3) Mh.L.J. 893. In the said decision on analyzing the settled legal position expounded by the Apex Court, the Court concluded that if the transaction was in violation of the order of the Court, the same would be void.

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66. At any rate, whether it be on account of violation of clause 6.1 of the SPA Agreement dated 23rd June, 1997 or for violation of the Court's order dated 6th May, 1999, 8th June, 1999 and 29th February, 2000, the second transfer of shares in favour of defendant no.4 on 17th February, 2000 is void. Therefore, the plaintiffs are entitled for interim-relief as prayed and on the other hand, the relief claimed by defendant nos. 3 and 4 will have to be negated.

67. The Learned Single Judge has also found that the first transaction was violative of provisions contained in SEBI Regulations. That conclusion is reached on the finding that the real intention behind the SPA Agreement dated 23rd June, 1997 entered with plaintiffs by defendant no.

1 was to jointly acquire the shares of defendant no. 2 with defendant no.

3. The Learned Single Judge, in our opinion, has rightly answered this controversy relying on the assertions made by the defendant no.3 in the proceedings before the Delhi High Court as well as the opinion of the Delhi High Court on that issue. It is noticed that the case of defendant no. 3 all throughout has been that the shares of defendant no. 2 were to be jointly acquired by the defendant no.1 along with defendant no.3 from the plaintiffs herein; and for that reason the defendant no. 1 was obliged to 94 appeal 855.03 gr..sxw notify that intention in the public announcement. The Learned Single Judge has, in our opinion, rightly rejected the prayer of defendant no. 3 to withdraw from the said plea. The fact that the Learned Single Judge has not thought it necessary to consider as to whether there was violation of SEBI Regulations even in respect to the second transfer would make no difference to the ultimate conclusion reached by the Learned Single Judge. It has come on record that the defendant no.3 had filed suit in Delhi High Court challenging the SPA dated 23rd June, 1997. The said suit, however, has been withdrawn on the premise that in view of the settlement between plaintiffs and defendant no.1 dated 5th December, 2002 of rescinding the SPA

dated 23rd June, 1997, nothing survives in the said suit. The defendant no.3 has, however, not challenged the agreement arrived at between the defendant no.1 and plaintiffs on 5th December, 2002. If that agreement prevails and for the opinion recorded by us hitherto, that the second transfer of shares by defendant no. 1 in favour of defendant no.4 on 17th February, 2000 was violative of order of injunction passed by this Court dated 6th May, 1999, 8th June, 1999 and 29th February, 2000, the inevitable effect would be to ignore the agreement between defendant no. 1 and defendant no. 4 dated 17th February, 2000 as being void and non-existant in law. In that case, it is 95 appeal 855.03 gr..sxw unnecessary to examine the question of violation of SEBI Regulations in relation to the second transaction.

68. It was argued that the Civil Court had no jurisdiction to answer the controversy which was within the purview of SEBI Regulations. That contention could be answered only by the designated forum under the said enactment and not by ordinary Civil Court. The argument though attractive does not commend to us for more than one reason. Firstly, even without moving for a formal declaration before the authority under the SEBI Regulations, the Civil Court can incidentally examine the question to answer the controversy on hand. In any case, the conclusion reached by the Learned Single Judge that the plaintiffs have made prima-

facie case for grant of relief of injunction and on the other hand, the contesting defendants would fail to get any relief, on the finding of misrepresentation and fraud and also in breach of order of injunction, does not merit any interference. We may also place on record the argument of the plaintiffs that by virtue of clause-14 of the Letters Patent, it was open to this Court to examine the question while answering the claim of the plaintiffs. Moreover, it is not open to the defendant no.3 to take inconsistent plea than the one taken by him before the Delhi High 96 appeal 855.03 gr..sxw Court and on which plea invited finding in its favour.

69. That takes us to another significant issue. According to the contesting defendants, even if the plaintiffs were to succeed, they ought to get relief only in respect of 45001 shares transferred by them in favour of defendant no.1. Plaintiffs, however, cannot get any relief in respect of 30,000 shares purchased by the defendant no. 1 from the public. This argument does not commend to us for more than one reason. Firstly, it overlooks that now there is agreement between plaintiffs and defendant no.1 dated 5th December, 2002 whereunder the defendant no.1 agreed to restore all the 75001 shares in favour of the plaintiffs. In view of our finding that the second transfer in favour of defendant no.4 will have to be treated as non-est in law, as the same is in violation of order of injunction of the Court which include 30,000 shares purchased by the defendant no.1 from the public. Those shares will have to be treated as, in law, having always remained with the defendant no.1. Thus, the defendant no.1 could always enter into agreement such as agreement dated 5th December, 2002 with the plaintiffs, whereunder those shares stood transferred to the plaintiffs. Hence, all the 75001 shares will have to be returned to the plaintiffs. Moreover, in view of our finding that the public announcement 97 appeal 855.03 gr..sxw issued by the defendant no.1 in furtherance of the SPA dated 23rd June, 1997 was invalid, the 30,000 shares so purchased will have to be restored to the seller thereof. However, that exercise may be impractical as the individual shareholders who have sold those 30,000 shares to defendant no. 1 may not be contactable and even if contacted may not be interested in taking back the shares in view of the changed market

conditions. The shares purchased by the defendant no.1 was at the rate of Rs. 3000/- per share. However, at the same time, neither the defendant no.1 nor any person claiming through the said person can be allowed to take advantage of his own wrong. That may be necessary in public interest and to preserve public policy. The plaintiffs can compensate the defendant no. 1 for the price to be paid in respect of those 30,000 shares to the defendant no .1. That is a matter which has already been resolved between the plaintiffs and defendant no.1. In any case, at the appropriate stage, the Court can always issue such directions as may be necessary in that regard.

Taking any view of the matter, therefore, even if 30,000 shares have been purchased by the defendant no.1 from public, the plaintiffs are entitled to ask for appropriate relief even in respect of those shares. This is also on account of the fact that said 30,000 shares could be purchased by the defendant no. 1 only because of the arrangement agreed between the 98 appeal 855.03 gr..sxw plaintiffs and defendant no.1 in that regard as recorded in SPA dated 23rd June, 1997. Besides the recital, it may be useful to advert to clauses 1.2, 1.3 and 1.4. On conjoint reading of said clauses alongwith clause 6.1, it leaves no manner of doubt that it was one package, whereby the defendant no. 1 became entitled to purchase aggregate 75001 shares of the defendant no.2 company so that it would acquire a substantial shareholding in that company with a right of management. Accordingly, the relief granted by the Learned Single Judge in favour of the plaintiffs also in relation to these shares purchased by defendant no. 1 from public does not merit any interference.

70. That takes us to appeal filed by defendant no. 4 challenging the decision of the Learned Single Judge rejecting its prayer for appointment of Court Receiver in respect of assets of defendant no.2. In view of the finding recorded by us while dealing with other issues, this appeal ought to fail. In any case, we are in agreement with the argument of the defendant no.2 company that the defendant no. 4 is not one of its shareholder. In that sense, the defendant no. 4 has no right whatsoever over the assets of the defendant no. 2 company. Even if the defendant no.

4 were to be shareholder of the defendant no. 2 company, it would make 99 appeal 855.03 gr..sxw no difference-as it is well established position that the shareholder does not have direct right over the assets of the company of which he is a shareholder. In the case of Mrs. Bacha Guzdar, Bombay v/s.

Commissioner of Income-tax, Bombay reported in AIR 1955 SC 74 it has been held that the company is a juristic person and is distinct from the shareholders. The dividend, as share of the profits declared by the company, is liable to be distributed amongst the shareholders. The true position of the shareholder is that on buying shares, he becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed amongst the shareholders. Even in the case of Zora singh and ors. vs. Amrik Singh Hayer reported in (2009) 149 company cases 328 (P & H), the Court observed that the shareholders who buys shares are not entitled to the property of the company. As of now, the defendant no.4 are not even shareholders. Even if they were justified in contending that in the event they succeed in getting registration of shares in its name as a shareholder, its right would be limited to attending and voting at meetings to get dividend when declared and share in the distribution of the surplus assets on the winding up of

the company.

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71. It is rightly argued on behalf of the plaintiffs as well as defendant no.2 company that the application taken out by the defendant no.4 was not within the purview of order 39 Rule 1 (a). In any case, that application could not have been filed by the defendant no .4 in the face of order passed by this Court dated 26th March, 2003 restraining them from claiming any right in respect of the disputed shares. If the relief claimed by the defendant no.4 were to be granted, it would result in overlooking the injunction operating against them in terms of order dated 26th March, 2003.

72. Taking any view of the matter, therefore, the relief as claimed by the defendant no.4 cannot be countenanced. The Learned Single Judge in our opinion has rightly considered this material aspect to reject the claim of the defendant no .4 and hold that the defendant no. 4 has no right to represent. Further, the subject matter of two suits pending in this Court were not property of defendant no. 2 and interim-relief can be considered only in aid of and to preserve the subject matter of the suit.

For that reason, even the conclusion reached by the Learned Single Judge for dismissing the Notice of Motion taken out by defendant no. 4 merits 101 appeal 855.03 gr..sxw no interference.

73. We have already adverted to the Notice of Motions filed in the respective appeals and reproduced the reliefs contained therein. Those reliefs were prayed essentially during the pendency of appeals. Now that the appeals have been finally disposed of by this Judgment, even these Motions ought to be disposed of. In any case, we do not intend to enlarge the scope of proceedings before the Appellate Bench than the one which was involved in the Notice of Motions against which the present four Appeals have been filed. In the circumstances, no further discussion is necessary. It will be open to the parties to apply for appropriate relief before the trial Court as may be available to them. The same will be considered on its own merits.

74. We may also note that we have proceeded to answer the controversy with reference to the core issues dealt with by us in this judgment. We do not think it necessary to elaborate on factual matters in detail as on analysis of the material on record we are in agreement with the prima-facie findings recorded by the Learned Single Judge at this stage. Taking any view of the matter, the conclusion would remain 102 appeal 855.03 gr..sxw unchanged-that the defendants 3 & 4 are not entitled for any relief, whereas the plaintiffs are entitled for the interim relief as is granted to them by the Learned Single Judge.

75. For the reasons recorded hereinbefore, we proceed to pass the following order:-

ORDER

1) All the four Appeals being Appeal Nos. 855/2003, 840/2003, 841/2003 and Appeal No. 857/2003 are dismissed with costs.

2) Notice of Motion Nos. 1308/2005, 3956/2005, 4118/2007, 1973/2008, 1418/2008, 29/2006, 3112/2003, 3113/2003 and Notice of Motion No. 3115/2003 in the respective Appeals are also disposed of with the above observations.

3) Ordered accordingly.

(A.A.SAYED, J) (A.M.KHANWILKAR, J)

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