Mr P Varadarajan & Ors vs Dr. A. Jawahar Palaniappan & Anr on 18 November, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
(Under Section 421 of the Companies Act, 2013 read with Rule 19 of the National Company Law Appellate Tribunal Rules, 2016)

(Arising out of the Order dated 27.05.2020 - Delivered on 01.06.2020 by the `National Company Law Tribunal', Chennai Bench in CP No. 54 / 2012 (TCP/26/2018)

In the matter of:

1. P. Varadarajan
   Son of Late Sh. P.V. Parthasarathy,
   Resident of No. 3 Luz Avenue,
   Mylapore, Chennai.

2. Dr. P. Srinivasan
   Son of Late Sh. P.V. Partha7sarathy
   Through his POA Holder,
   Mr. P. Varadarajan, Resident of
   No.3, Luz Avenue, Mylapore,
   Chennai

3. Imprint Tech Private Limited
   Through its Director Mr. P. Varadarajan
   3, Luz Avenue, Mylapore,
   Chennai - 600004

4. Kumudam Publications Private Limited
   Through its Chairman and Managing Director
   Mr. P. Varadarajan, No. 306, Purasawalkam
   High Road, Chennai - 600 010 ..... Appellants

v.

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1. Dr. A. Jawahar Palaniappan
   4615, Yantis Drive, New Albany,
   Ohio - 43054
   Through his Power of Attorney Holder

M. Krishna Meyammai,
No. 45 / 27, Luz Avenue,
Mylapore, Chennai - 600004

2. Mrs. A. Kothai,
13/19, Sathyanarayana Avenue
Boat Club Road,
R.A. Puram, Chennai - 600028 ..... Respondents

Present:

For Appellants : Mr. K.G. Raghavan, Senior Advocate
For Ms. Pooja M. Saigal, Advocate

For Respondent Nos. 1 & 2 : Mr. Sudipto Sarkar, Senior Advocate
For Mr. T.K. Bhaskar, Mr. Rigved Prasad &
Mr. Aditya Verma, Advocates

JUDGMENT

(Virtual Mode) Justice M. Venugopal, Member (Judicial):

Company Appeal (AT) No. 83 of 2020:

Preface:

The Appellants have preferred the instant TA No. 283 of 2021 in Comp. App (AT) No. 83 of 2020, as `Aggrieved Persons', on being dissatisfied with the `impugned order' dated 27.05.2020 (delivered on 01.06.2020 through Video Conferencing), in TCP/26/2018 (CP/54/2012), TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 passed by the `National Company Law Tribunal', Division Bench, Chennai.

2. The `National Company Law Tribunal', Division Bench, Chennai, while passing the `impugned order' dated 27.05.2020 (delivered on 01.06.2020 through Video Conferencing), in TCP/26/2018 (CP/54/2012), had observed and held that;

(i) The Resolutions passed by the Board Meeting held on 20.09.2011 of the Respondents without the presence of the Petitioners (`Respondents in TA No. 283 of 2021' (Comp. App (AT) No. 83 of 2020) was invalid and hence, the cancellation of 3,32,400 Equity Shares of Rs.100/- each, held by the 1st Petitioner (1st Respondent in TA No. 283 of 2021 (Comp. App (AT) No. 83 of 2020), was held as an `illegal', `invalid' one and `non-est in Law'.

In the same `Analogy', subsequent cancellation of 200 Shares of the `1st Petitioner' (`1st Respondent') was held to be `invalid' and `illegal'.

(ii) The Register of Members of the `1st Respondent' / `M/s. Kumudam Publications (P) Ltd.' (in TCP/26/2018 in CP/54/2012) / `4th Appellant' in Comp. App (AT) No. 83 of 2020 (TA No.283 of 2021) was to be rectified to restore 3,32,640 Equity Shares of Rs.100/-, in the name of the `1st Petitioner' (in CP/54/2012) / `1st Appellant').

(iii) Form 32, filed by the `2nd Respondent' in TCP/26/2018 (CP/54/2012) / `1st Appellant' in TA No. 283 of 2021 (Comp. App (AT) No. 83 of 2020) with the Registrar of Companies, Chennai, intimating the cessation of `Petitioners' as `Directors' of the `1st Respondent Company' (`M/s. Kumudam Publications Pvt. Ltd.' (in TCP/26/2018 in CP/54/2012) / `4th Appellant' (in TA No. 283 of 2021 in Comp. App (AT) No. 83 of 2020), with effect from 02.01.2012, was held to be `illegal' and `non-est' in law. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

(iv) Clauses 31(a), 32 and 39(b) of the `Articles of Association', were ordered to be deleted.

(v) The `Petitioners' (in TCP/26/2018 in CP/54/2012) / `1st and 2nd Respondents' (in TA No. 283 of 2021 in Comp. App (AT) No. 83 of 2020), were allowed to nominate two more `Directors' in the `Board of Directors' in the `1st Respondent Company' (`M/s. Kumudam Publications Pvt. Ltd.') in TCP/26/2018 (CP/54/2012) / `4th Appellant' in TA No. 283 of 2021 (Comp. App (AT) No. 83 of 2020) , bringing the total Directors to `Six'.

vi) A Chairman was appointed for a period of six months to implement the ``Orders of the Tribunal'', and with these Orders, disposed of the TCP/26/2018 (CP/54/2012) and disposed of the related CAs/IAs.

The Summation of Facts in TCP/26/2018 (CP/54/2012), filed by the `Petitioners' / `Respondent Nos. 1 and 2' in TA/283/2021 (Comp. App (AT) No.83 of 2020):

> 3. The 1st Petitioner in TCP/26/2018 (CP/54/2012) / 1st Respondent in TA/283/2021 (Comp. App (AT) No.83 of 2020) as `Director' of the `4th Appellant' / `1st Respondent' / `Company' held 3,32,640 `Equity Shares' of Rs.100/- each, constituting 64.73% of the `Paid up Capital' of the `4th Appellant / 1st Respondent / `Company'. The split up details of 3,32,640 `Shares', runs as under:

Original Holding	1,100
By inheritance	23,010
Pursuant to the Scheme of amalgamation of Kumudam Printers Private Limited with Kumudam Publications Private Limited as sanctioned by the Hon'ble High Court of Madras	3,08,530
Total	3,32,640

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4. The `2nd Respondent / 2nd Petitioner' is the wife of the Late SAP Annamalai Chettiar, founder of `Kumudam Magazine', holds 9660 `Equity Shares' of Rs.100/-, constituting `1.88% of the Paid up Capital' of the `4th Appellant / 1st Respondent / Company'. In fact, the `2nd Respondent / 2nd Petitioner', is one of the `Subscribers' to the `Memorandum of Association' of the `4th Appellant' / `1st Respondent' / `Company', and was named as one of the `First Directors' of `4 th Appellant' / `1st Respondent' / `Company'. The Second Respondent / 2nd Petitioner was appointed as `Managing Director' of the `4th Appellant' / `1st Respondent' / `Company', in the Board Meeting that took place on 26.09.2011.

5. The authenticity of the said `Board Meeting was dealt with by the City Civil Court in the Order dated 27.04.2012, the `2nd Respondent / 2nd Petitioner', claims to be a `Director', as on date of the Petition.

6. In terms of the `Annual Return' in `Schedule V' for the year ended 31.03.2008 of the `4th Appellant' / `1st Respondent' / `Company' signed and filed by the `1st Appellant'/`2nd Respondent', with the Registrar of Companies, Chennai, Tamil Nadu, the `Respondents / Petitioners' together hold 66.61% of the `Equity Share Capital' of the `4 th Appellant' / `1st Respondent' / `Company'.

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7. The Company has only three `Shareholders' Viz. (a) 1st Respondent / 1st Petitioner (`Dr. Jawahar Palaniappan') (b) 2nd Respondent / 2nd Petitioner (`A. Kothai') (c) 3rd Appellant / 4th Respondent (`Imprint Tech India Pvt. Ltd.') and that the Respondents / Petitioners constitute more than 1/10th of the total number of members. The Respondents/Petitioners are eligible under the Provisions of Section 399 of the Companies Act, to file the Company Petition under Section 397 & 398 of the Companies Act, 1956.

8. The 4th Appellant' / `1st Respondent' / `Company' (`Kumudam Publications Private Ltd.') was incorporated, as a `Private Limited Company' on 31.12.1971, in the State of Tamil Nadu, and is engaged in the `Business of Printing and Publication of Magazines, `Newspapers', `Journals' and `Periodicals', in the State of Tamil Nadu.

9. In terms of the `Memorandum of Association of the Company', the main objects of the Company, are to carry on the business of `Proprietors', `Publishers', `Printers and Sellers of Newspapers', `Journals', `Magazines' and `Periodicals'. The `1st Appellant' / `2nd Respondent' (son of Late Mr. P.V. Parthasarathy), is a `Director' of the `4th Appellant' / `1st Respondent' / `Company'.

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10. The `2nd Appellant / 3rd Respondent (Dr. P. Srinivasan), is the elder brother of the `1st Appellant / 2nd Respondent, is a `Director' of the `4th Appellant' / `1st Respondent' / `Company' and does not directly hold any `Shares' in the `4th Appellant' / `1st Respondent' / `Company'.

11. The `3rd Appellant' (`Imprint Tech India Pvt. Ltd.') is the 4th Respondent, in the main Company Petition. The `1st Appellant / 2nd Respondent' (P. Vardarajan) along with his `Family Members', had promoted the `3rd Appellant / 4th Respondent / Company' and he is the `Managing Director' of the `3rd Appellant / 4th Respondent / Company'.

12. According to the Respondents / Petitioners, Mr. SAP. Annamalai Chettiar (referred to as `SAP'), Late father of the `1st Respondent/1st Petitioner and the husband of the `2nd Respondent' / 2nd Petitioner', was the brain behind the magazine `Kumudam' and he tirelessly worked from 1947 till 1994, for the upliftment of the Magazine throughout his life time, dedicating his whole life, for the development of the Magazine. The `2nd Respondent'/2nd Petitioner, wife of Late Mr. SAP was lending a helping hand to her husband, since the inception of the magazine and being a great source of support from the year 1947.

13. The `Business of the Hindu Undivided Family', was divided through a `Partition Deed' in the year 1968 under two different `Entities' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Viz. `Publishing Business of Kumudam' and `Kumudam Printers Private Limited'. The whole `Paid up Capital' was held by the `SAP' along with his family members till 1990. In both the Companies, Mr. P.V. Parthasarathy, Father of `1st and 2nd Appellants' / `2nd and 3rd' Respondents (working in the Hindu Undivided Family, as an `Employee'), was appointed as `Company Secretary'. Till his death in the year 1994, the `Affairs' of both the Companies were managed by `SAP'.

14. The 1st Respondent/1st Petitioner (a Cardiologist), is residing in `United States of America' and very much interested in the `Business' of the `4th Appellant' / `1st Respondent' / `Company', as it is a Family Business and is a `Brainchild of his late father Mr. SAP'.

15. The 1st Respondent / 1st Petitioner was serving in the `4th Appellant' / `1st Respondent' / `Company', in his position as `Honorary Editor', after the death of `SAP', till Sep'2011. The clear intention of the `Respondents / Petitioners' is to continue to retain 2/3rd interest in `4th Appellant' / `1st Respondent' / `Company', and also to manage the Company, through its `Board', by way of consistently having two `Directors' from the family.

16. The 1st Appellant / 2nd Respondent was inducted into the `Board of the `4th Appellant' / `1st Respondent' / `Company', in 1990 (because of the fact that the `1st Respondent'/`1st Petitioner' was residing outside the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Country) and was given 100 `Equity Shares' in the `4 th Appellant' / `1st Respondent' / `Company'.

17. The 1st Appellant / 2nd Respondent was primarily in charge of the Finance, Administration, besides the `Overall Business Development' of the `4th Appellant' / `1st Respondent' / `Company'. Subsequent to the demise of SAP in the year 1994, the `2nd Respondent / 2nd Petitioner was appointed as `Managing Director of the Companies' and the `1st Appellant / 2nd Respondent' (`PVP') was appointed as an `Alternate Director' to the `1st Respondent / 1st Petitioner'. Since the `1st Respondent / 1st Petitioner' was residing outside India, and the `2nd Respondent / 2nd Petitioner' was not in good health because of her age, the `1st Respondent/1st Petitioner' worked out

an oral arrangement with the `1st Appellant / 2nd Respondent' (`PVP'), by which, the `1st Appellant / 2nd Respondent' (`PVP') and his family members would manage the day-to-day affairs of the `4th Appellant' / `1st Respondent' / `Company' and would become `1/3rd Shareholders' in the `Company' for no consideration.

18. Based on the `Agreement' with the `1st Appellant / 2nd Respondent' (PVP), despite the `2nd Respondent / 2nd Petitioner', was appointed as `Managing Director' of the Company, it was the `1 st Appellant / 2nd Respondent' (PVP), who was looking after the day-to-day affairs of both TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the Companies, it was the `1st Appellant / 2nd Respondent', who filed a `Scheme of Amalgamation' of `Kumudam Printers Private Ltd.' with the `4th Appellant' / `1st Respondent' / `Company' (Kumudam Publications Private Ltd.), as per Sections 391 to 394 of the Act, before the Hon'ble High Court of Madras, which sanctioned the `Scheme' in June 2001.

19. The dissolution of the `Transferor Company' i.e.., `Kumudam Printers Pvt. Ltd.', was ordered in July 2003. As a result of the Merger, `4,64,000 Equity Shares' were allotted to the `Shareholders' of the `Kumudam Printers Pvt. Ltd.', (`Transferor Company') and Form 2 duly signed by the `1st Appellant / 2nd Respondent' was filed with the Registrar of Companies, Chennai.

20. According to the Respondents / Petitioners, there was no change in the `Shareholding Pattern' and in the `Composition of the Board', right from the year 2003 and that the `Transferor Company' (`Kumudam Printers Private Limited') was dissolved, without `winding up' in 2003, by the Hon'ble Court. The `Shares', held by the `1st Appellant / 2nd Respondent' along with his `Family Members' were transferred in favour of the `3rd Appellant / 4th Respondent / Company' (`Imprint Tech India Pvt. Ltd.'), a `Company', that is completely owned and managed by the `Appellants / Respondents'.

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21. The 1st Appellant / 2nd Respondent subsequent to the Merger, having been appointed as `Managing Director', went ahead and systematically started breaching the `basic principles of `Corporate Governance', `Shareholders Democracy', etc., and the `1st Appellant / 2nd Respondent', realising that the `1st Respondent / 1st Petitioner', is `out of India' and the `2nd Respondent / 2nd Petitioner', being quite old and could not take part actively, in the day-to-day affairs of the Company started managing the affairs of the Company, as per his whims and fancies, without paying any heed to the interest of the `Respondents / Petitioners', the majority shareholders of the company (holding almost 67% of the Share Capital). That apart, the Respondents / Petitioners had inherited the Property of the Late `SAP', who had effectively built up the whole Asset Base of both the Companies. Indeed, the `1st Appellant / 2nd Respondent' ignoring the past, had indulged in numerous acts of `Oppression and Mismanagement', with a view to hijack the `4th Appellant' / `1st Respondent' / `Company' (`Kumudam Publications Pvt. Ltd.') from the `Respondents / Petitioners'.

22. On the side of the Respondents / Petitioners, it is brought to the notice of this Tribunal that the `1st Appellant / 2nd Respondent' had amended the `Articles of Association', with a view to keep his

position in tact forever and to have an upper hand over the `Respondents / TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Petitioners'. Added further, the undermentioned `Articles' were inserted in the `Articles of Association' of the company at the `General Meeting' that took place on 19.03.2003, as under:

> ``M/s. Imprint Tech India Private Limited shall, so long as they hold shares in the Company, be entitled to nominate two Directors to the Board. Such nominees shall be entitled to function as Directors from the date their nomination is received by the Company. In the event that one of such nominees is Mr. P. Varadarajan, he shall occupy the post of Chairman of the Board. Notwithstanding anything contained Article 33, such Nominee Directors, shall not be required to hold any share qualification. Such Nominee Directors shall not be liable to retire by rotation. So long as Shri. P. Varadharajan continues to be a Director of the Company, he shall also be the Managing Director of the Company. He shall be paid a monthly remuneration as fixed by the Board by resolution in this behalf. He shall be further entitled to receive a remuneration up to 11% of the net profits of the Company''.

23. It is the version of the Respondents / Petitioners that the aforesaid Clauses were inserted in the `Articles', which are prima facie, `Biased', `Harsh' in nature, and absolutely `Oppressive' to the interest of the `Respondents / Petitioners'. In fact, the Amendments give limitless power to the `1st Appellant / 2nd Respondent', to hold the position, as Managing Director', so as to restrain the `Respondents / Petitioners' (who are the other `Directors' of the `Board') as long as he occupies a position of a `Director' in the `4th Appellant' / `1st Respondent' / `Company', from conducting `Board Meetings' and pass `Resolutions', without the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 presence of the `1st Appellant / 2nd Respondent', to fix his remuneration up to 11% of the Net Profits of the `4th Appellant' / `1st Respondent' / `Company', in addition to the monthly remuneration fixed by the `Board of Directors' of the Company and to be the `Chairman', in his capacity as a `Nominee Director' of the `3rd Appellant / 4th Respondent / Company'.

24. The grievance of the Respondents / Petitioners is that the `1st Appellant / 2nd Respondent' had kept the `Respondents / Petitioners' intentionally and deliberately in dark, without updating them, on the developments that were happening in the `4th Appellant' / `1st Respondent' / `Company'.

25. According to the Respondents / Petitioners, the `1st Appellant / 2nd Respondent' had committed the `acts of mismanagement':

> ``(i) The `4th Appellant' / `1st Respondent' / `Company', in March 2002, gave an undertaking to the Government of India, for availing concessional rate of `Excise Duty', in regard to the `Import of Machineries'. In fact, one of the conditions of the said `Licence', was that the `Company' should earn `Foreign Exchange' equivalent to US $ 45,64,880.25 with a period of 10 years i.e., on or before March 2012. The `1st Appellant / 2nd Respondent' who was managing the affairs of the Company, was not able to fulfill the condition of the Excise Department, as a result of which, the `4th Appellant' / `1st Respondent' / `Company' had received Show Cause Notices dated

22.10.2009, 13.05.2011, 06.07.2011 and TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 07.05.2012 from the `Deputy Director - General of Foreign Trade', `Ministry of Commerce and Industry', Chennai.

The `Export Obligation Period' lapsed on 18/3/2010 and that the `4th Appellant' / `1st Respondent' / `Company' had failed to furnish documents in regard to the fulfillment of the export obligation, the `4th Appellant' / `1st Respondent' / `Company' and its Directors were called upon to Show Cause, as to why Customs Duties plus 15% interest per year ought not to be recovered and action under `Foreign Trade (Development & Regulation) Act, 1992', not be initiated against the `Company' and its `Directors'. The `1st Appellant / 2nd Respondent' is solely responsible for such a failure, and because of his irresponsibility and incompetency, the `Respondents / Petitioners' and the `4th Appellant' / `1st Respondent' / `Company' had to face this `Show Cause Notice'. In fact, the `1st Respondent / 1st Petitioner' suggested that the difference in `Excise Duty', can be paid through availment of loans from Banks, which in turn can be obtained by furnishing `Personal Guarantees' and `Securities', by the `Respondents / Petitioners'.

The `1st Appellant / 2nd Respondent' holding, a responsible position in the `4th Appellant' / `1st Respondent' / `Company' should have assessed the investment made for the purchase of the machineries and the `Foreign Exchange' income that can be generated over a period of ten years. Because of the inefficient and irresponsible act of the `1st Appellant / 2nd Respondent', the `4th Appellant' / `1st Respondent' / `Company' had to pay Rs.6 Crore to the Excise TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Department by means of which payment, the `4th Appellant' / `1st Respondent' / `Company' had to face huge financial crises in 2010.

(ii) In terms of the amended Article 32 of the Articles of Association', the `1st Appellant / 2nd Respondent', shall be paid a monthly remuneration as fixed by the Board by way of passing a `Resolution' in this behalf. The said clause also mentions that the `1st Appellant / 2nd Respondent' shall be further entitled to receive remuneration up to 11% of the net profits. Even in Public Companies, in terms of the ingredients of the Companies Act, the maximum remuneration payable to all the Directors (including Commission, cannot exceed 11% of the net profits of the Company. The Balance Sheets for the year ending from 31.03.2001 to 31.03.2009, exhibits an abnormal increase of the remuneration of the `1st Appellant / 2nd Respondent'. Despite, there being a decrease in circulation, year after year under the Management of the `1st Appellant / 2nd Respondent', there is an increase in remuneration drawn by him.

Though the first sentence in Clause 32 delegates the power to the Board to fix the remuneration of `1st Appellant / 2nd Respondent', the same is nullified in the second sentence by way of prefixing the maximum remuneration as 11% of net profits. As per the provisions of the Act, even in widely held public companies the maximum remuneration payable to all the Directors, whether whole time Director or Non whole time Director, including commission, cannot exceed 11% of the net profits of the Company. In the instant case such tenets of Corporate guiding principles are thrown to wind while fixing the remuneration. The `1st Respondent / 1st Petitioner' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 due to implicit trust imposed on the `1st Appellant / 2nd Respondent' failed to notice the evil design of the `1st Appellant / 2nd Respondent'. The copies of the Balance

Sheet for the years ending from 31.03.2001 to 31.03.2009, which shows the abnormal increase of the remuneration of the `1st Appellant / 2nd Respondent' year after year are kept as Annexure.

(iii) In spite of the decrease in circulation year after year under the Management of `1st Appellant / 2nd Respondent', there is an increase in the remuneration drawn by him.

`The `4th Appellant / 1st Respondent / Company' was entering into transactions with the firm `M/s. Lotus Inks', in which, the `1st Appellant / 2nd Respondent' and `2nd Appellant / 3rd Respondent' are partners. Any transaction with a `Firm' in which the Directors are Partners, requires `prior approval' of the Central Government, as per Section 297 of the Act. Also that, there were several transactions, for availing services from M/s. Devi Press, a Partnership Firm in which the Directors of the Company are partners, requiring previous `Approval' of the Central Government, but that was not complied with, by the Respondent / Managing Director.

(iv) The Income Tax Department's Order had clearly brought out the fact that the `4th Appellant / 1st Respondent / Company', is managed by the `1st Appellant / 2nd Respondent', has purchased the `LED Panel' worth Rs. 8 Lakh from a firm (M/s. Tricom Vision) that is owned by the `1st Appellant / 2nd Respondent' himself, for an inflated value of Rs. 3 Crore and this is another act of `Mismanagement' by the `1st Appellant / 2nd Respondent' and over TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 and above the inflated value of Rs.2.92 Crore which the `4th Appellant / 1st Respondent / Company' has to incur, the `Income Tax Department' had slapped a demand of Rs.1.32 Crore for making a wrong claim of depreciation.

(v) The `Respondents / Petitioners' had not revolted and maintained silence, to protect the interest of the `4th Appellant / 1st Respondent / Company' and its members, had to break their silence when the Board Meeting was held on 22/12/2008, for considering the Annual Accounts of the Company for the year ended 31/03/2008, both the `Respondents / Petitioners' had voted against the `Resolution', adopting the `Accounts' and the `1st Appellant / 2nd Respondent', exercised his vote in favour of the `Resolution' and adopted the Balance Sheet. As the `1st Appellant / 2nd Respondent' to his convenience had amended the articles already to enable him to act as Chairman, he chaired the `Board Meeting' and could exercise his vote in favour of the `Resolution'. Later, the `Respondents / Petitioners' had not approved any `Accounts' in the `Board Meeting' as `Directors', and also in the `Annual General Meetings', as `Shareholders'.

(vi) In the `Annual General Meeting' that took place on 24.12.2009, the `Statutory Auditors' were reappointed to hold office till the conclusion of the next `Annual General Meeting'. But, the said `Auditors' expressed their liability to accept the appointment, as they were not uncomfortable with the maintenance of Books of Account and Statutory compliances. The vacancy was caused by the Resignation of an `Auditor', shall only be filled by the `Shareholders' in the `General Meeting', as per Section 224 (6) TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

(b) of the Act. However, `1st Appellant / 2nd Respondent' had deliberately approached the Central Government as per Section 224 (3) of the Act.

(vii) The Auditors had made `qualifications' in regard to the `Export Promotional Capital Goods (EPCG) Scheme', and the managerial remuneration paid to the `1st Appellant / 2nd Respondent'. The `Qualification' made in the `Balance Sheet' as on 31.03.2009 is a damaging one. The Auditors had brought out the fact that `monies' were given `Interest Free' to `Entities', in which the Directors are interested and the `Company' had no intention to recover the money from the respective entities. The `1st Appellant / 2nd Respondent' has adopted the back door method to `siphon off money' from the `4th Appellant / 1st Respondent / Company', by illegally transferring funds of the `4th Appellant / 1st Respondent / Company'.

(viii) The `1st Respondent / 1st Petitioner', to bring the illegal acts of the `1st Appellant / 2nd Respondent' to an end, had convened a `Board Meeting' on 22.04.2010, after duly serving `Notices' to the `1st Appellant / 2nd Respondent' and `2nd Appellant / 3rd Respondent' (through mail as well as by Speed Post), which was duly acknowledged by them. But, the `1st Appellant / 2nd Respondent' had expressed his inability, to attend the `Meeting', due to his preoccupation and prior engagements and had informed his willingness to be contacted during the `Meeting' through Telephone. The `Board' had discussed the provisions of the `Amended Articles of Association', which were amended only to benefit the `1st Appellant / 2nd Respondent', completely curtailing TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the rights of other `Directors' on the `Board'. With a view to protect the spirit of Section 287 read with Section 9 of the Act, the Board had decided to keep the Amended Articles of Association under suspension. But, had decided to implement the Resolution at a later date. The Board has also expressed its anguish in regard to the allegations made by a section of Employees and a Press Report on the same.

(ix) A case was filed against the `1st Appellant / 2nd Respondent' by the Central Crime Branch, Commissioner's Office, Egmore, alleging an offence under Sections 420, 468, 471 of the Indian Penal Code, 1860. In the said case, `1st Appellant / 2nd Respondent' was arrested on 23.04.2010 and later, let out on Bail. In view of this, the Board met again on 24.04.2010 and had decided to reserve the rights to remove the `1st Appellant / 2nd Respondent', as Managing Director of the Company. In order to clear the impasse which was created by the illegal and unethical actions of the `1 st Appellant / 2nd Respondent' and in order to protect the interests of the `4th Appellant / 1st Respondent / Company' and to save the business from falling to disgrace, the Respondents/Petitioners being the majority Shareholders had entered into an `Arrangement' with the `Appellants/Respondents' Group to arrive at a `Settlement'.

(x) The Respondents/Petitioners and the `Appellants/Respondents' group had agreed in principle that both the Groups cannot manage the Business together and therefore, it was agreed that the `Appellants/Respondents' Group to transfer their `Shares' to the `4th Appellant / 1st Respondent / Company' and move out of the Company and its Management.

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(xi) Also it was agreed that the `Appellants/Respondents' Group would retain few Magazines that were established during their tenure. Hence, a `Memorandum of Understanding', was entered into on 15.08.2010 between the `Respondents / Petitioners' and the `3rd Appellant / 4th Respondent',

represented by the `1st Appellant / 2nd Respondent'.

As per the `Memorandum of Understanding', the `3rd Appellant / 4th Respondent / Company' will transfer the 33.40% Shares of the `4th Appellant / 1st Respondent / Company' in favour of the `Respondents / Petitioners' or their nominees, for a consideration to be decided by the parties, in terms of the `Memorandum of Understanding' and that the `1st Appellant / 2nd Respondent' and the `2nd Appellant / 3rd Respondent' shall resign from the Board of the `4th Appellant / 1st Respondent / Company'. However, to the surprise of the `Respondents / Petitioners', the `1 st Appellant / 2nd Respondent', had continued to indulge in `illegal acts', even after the signing of the `MoU'.

26. The `Respondents / Petitioners' received a notice dated 15/9/2011 from the `1st Appellant / 2nd Respondent', convening a `Board Meeting', on 20/9/2011, with an Agenda (i) to discuss the legal implications of the holding of `Equity Shares' by the `1st Respondent / 1st Petitioner' in his capacity as a `Foreign Citizen', and (ii) to discuss of the issue of the `1st Respondent / 1st Petitioner', holding editorial position in the magazines published by the Company.

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27. The `Respondents / Petitioners' were not able to appreciate as to why the `1st Appellant / 2nd Respondent', after having agreed to exit the `4th Appellant / 1st Respondent / Company', issued such a notice, which is prima facie baseless. The `1st Respondent / 1st Petitioner' was born and brought up in India and is a major `Shareholder'. Having worked with the `1st Respondent / 1st Petitioner' for nearly 16 years, the `1st Appellant / 2nd Respondent' had now raised a issue, which is a baseless one. The `1st Appellant / 2nd Respondent' with the malafide intention of depriving the family members having majority shares of the `4 th Appellant / 1st Respondent / Company' and in order to grab the 100% ownership to his sole advantage had raised these issues at this juncture. The `1st Appellant / 2nd Respondent' realising the fact that it would be very difficult for him to create a new brand in the market, decided to take an illegal control over the `4th Appellant / 1st Respondent / Company' and had illegally cancelled 3,32,440 Shares (64.73%) held by the `1st Respondent / 1st Petitioner'.

28. The `1st Appellant / 2nd Respondent' is a signatory to the List of Allotment filed with the `RoC', in respect of allotment of the majority of the Shares to the `1st Respondent / 1st Petitioner'. The `unwarranted cancellation act' was made to reduce the `Respondents/Petitioners' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Group, to a miniscule minority, in an unauthorized manner and the same being an act of `Oppression'.

29. The `Respondents / Petitioners', later received a letter from the `1st Appellant / 2nd Respondent', mentioning that in the `Board Meeting' that took place on 20/09/2011, the 3,32,440 Shares held by the `1st Respondent / 1st Petitioner', was cancelled and that `Sum' paid on those `Shares', shall be retained in an `Escrow Account' and will be acted upon, as per instructions from the `Enforcement Directorate'.

30. It is the version of the `Respondents / Petitioners' that the `Cancellation of Fully Paid up Shares', can be effected only under specific circumstances and that too, as per Section 100 of the Companies Act, 1956, after securing the `Shareholders' `Approval' and on Affirmation by the Hon'ble High Court, having jurisdiction over the matter. The `Appellants / Respondents' had purportedly cancelled the Shares' in a `Meeting of the Board of Directors' (by violating the Laws and Regulations), in which, the `1st Appellant / 2nd Respondent' and the `2nd Appellant / 3rd Respondent' attended the said `Meeting'.

31. Having acquired 33.34% Shares of the Company virtually as a `Gift', due to the generosity of the `Respondents / Petitioners' family, the `Appellants / Respondents' Greed for enjoying the entire inherited TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 property of `SAP', which was passed on to `1st Respondent / 1st Petitioner', is unlimited. This act of the two `Appellants / Respondents' is an `Oppressive Conduct' and it falls within the definition of ``Oppression'' against the `Respondents / Petitioners'.

32. Indeed, the matter was under examination by the `Enforcement Directorate and the purported cancellation of `Shares' by the `Appellants / Respondents' would amount to pre-judging the determination of the `Regulator of Foreign Exchange' and usurping the powers of the Hon'ble High Court at Madras, as per Section 100 of the Act.

33. The `1st Appellant / 2nd Respondent' also filed the `Annual Return' in Schedule-V for the years ended from 31/03/2009 to 31/03/2011 reducing the number of shares held in the name of the `1st Respondent / 1st Petitioner' as a `Shareholder'. On receipt of such `Letters' from the `1st Appellant / 2nd Respondent', informing the cancellation of the `Shares', the `Respondents / Petitioners' had conducted a `Board Meeting' on 26/09/2011, after issuing due notice to the `1st Appellant / 2nd Respondent' and the `2nd Appellant / 3rd Respondent' and both the `Appellants / Respondents', despite acknowledging the receipt of the notices had failed to attend the Meeting on the said date. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

34. In the meeting that took place on 26/09/2011, the `Board' passed `Resolutions' (i) Removing the `1st Appellant / 2nd Respondent' from the post of `Managing Director' and appointing the `2nd Respondent / 2nd Petitioner' as Managing Director (ii) Keeping in abeyance `Articles 31(a), 32, 39(b) of Articles of Association of `4th Appellant / 1st Respondent / Company' in order to implement the spirit of `Memorandum of Undertstanding dated 15/8/2010 and the Extract of the decisions taken in the `Board Meeting' was sent to all the `Appellants / Respondents'.

35. The `Respondents / Petitioners' also filed the `Annual Returns' for the years ended 31/03/2009, 31/03/2010 and 31/03/2011 reflecting the correct position of the `Shareholders' of `4th Appellant / 1st Respondent / Company'. The `Respondents / Petitioners' (66.61% `Shareholders') was not want to convene a `General Body Meeting', to pass a `Special Resolution', under the provisions of Section 31 of the Act, for amending the said `Clauses, in the `Articles of Association' of the Company, as the `Respondents / Petitioners' knew very that the `Appellants / Respondents' (33.39% `Shareholders'), would not vote in favour of the `Resolution'.

36. The `Respondents / Petitioners' understand that the `1 st Appellant / 2nd Respondent' was debiting all the Legal Expenses, in regard to the `Litigations' and all such personal expenses, shall be repaid by the `1st TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Appellant / 2nd Respondent' and the `2nd Appellant / 3rd Respondent' to the `4th Appellant / 1st Respondent / Company'.

37. Under aforesaid circumstances, the `Respondents / Petitioners' had prayed for passing of Orders, from the `Company Law Board' (`now Tribunal'), in the main Company Petition, which run as under:

> (i) Regulating the conduct and affairs of the `4th Appellant / 1st Respondent / Company in future;
>
> (ii) In deleting Clauses 31(a), 32 and 39(b) of Articles of Association as being harsh and oppressive to the interest of the `Respondents / Petitioners' and consequentially amend the `Articles of Association' of `4th Appellant / 1st Respondent / Company';
>
> (iii) In declaring the `Resolution', passed at the purported Board Meeting alleged to have been held on 20/9/2011 cancelling 3,32,440 equity shares of Rs.100/- each held by the `1st Respondent / 1st Petitioner' as illegal, invalid and non-est in law;
>
> (iv) In rectifying the Register of Members of the `4th Appellant / 1st Respondent / Company', so as to restore 3,32,440 `Shares' of Rs.100/- each in the name of the `1st Respondent / 1st Petitioner'
>
> (v) In declaring the Form 32 filed by the `1st Appellant / 2nd Respondent' with the RoC, Chennai, wrongly intimating the cessation of `Respondents / Petitioners', as `Directors' of the `4th Appellant / 1st Respondent / Company', with effect from 02/01/2012, as an illegal, invalid and non-est in law.;

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Contents of `4th Appellant / 1st Respondent's Counter:

38. The instant `Company Petition', is an exercise in `Forum Shopping', by the `Respondents / Petitioners'. The `Respondents / Petitioners', are `guilty of misrepresentation' and `suppression of material facts'. The averment that the `1st Respondent' / `1st Petitioner', is the `Holder of 3,32,640 `Equity Shares' of the Company or being a `Director' on the `Board', as on the date of the filing of Petition, are denied. Based on the `Resolution', passed by the `Board' in the Meeting held on 20.09.2011, the `1st Respondent / 1st Petitioner', holds only `200 Equity Shares', of Rs. 100/- each, of the `4th Appellant / 1st Respondent / Company', amounting to a mere 0.10% of the Issued, Subscribed and Paid up Share Capital of the `4th Appellant / 1st Respondent / Company'.

39. According to the `4th Appellant / 1st Respondent / Company', the Statement of the `Respondents/Petitioners', that the `1st Respondent / 1st Petitioner', is a `Director' of the `Board' is

a blatant false statement, since the `1st Respondent / 1st Petitioner', was disqualified as per Section 283 (1) (g) of the Companies Act, 1956, and therefore, had vacated the Office of the `Director' of the `Board', on 02.01.2012, before the date of filing of the `Petition'.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

40. The `2nd Respondent / 2nd Petitioner' holds 4.72% of the Paid up Capital of the `4th Appellant / 1st Respondent / Company'. The `1st Respondent / 1st Petitioner' holds 4.82% of the Paid Up Capital of the `4th Appellant / 1st Respondent / Company'. The City Civil Court, Chennai in IA No. 16197 of 2011, by an order dated 27.04.2012, had declared the `Board Meeting', purported to have been held by the `Respondents / Petitioners' on 26.09.2021 as an invalid and illegal one. As a result thereof, all the `Resolutions' passed in the purported `Board Meeting' held on 26.09.2021, including the appointment of the `2nd Respondent / 2nd Petitioner', as Managing Director of the `4th Appellant / 1st Respondent / Company', is non-est in `Law'.

41. The `Respondents / Petitioners' place reliance on a document, which is more than three years, before the `date of filing of the instant Petition' and had ignored to state the various facts which took place and further that the `Respondents/Petitioners', together do not hold more than 4.82% of the Paid up Capital of the `4th Appellant / 1st Respondent / Company'.

42. The `2nd Appellant / 3rd Respondent's place of residence, as per records maintained by the `4th Appellant / 1st Respondent / Company' is 2895, Parkway Court, Galesburg IL, 61401, U.S.A. As per the records TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 maintained by the `4th Appellant / 1st Respondent / Company', `3rd Appellant / 4th Respondent', is the majority Shareholder of the `4th Appellant / 1st Respondent / Company', holding 83.92% of the Issued and Paid up Capital of the `4th Appellant / 1st Respondent / Company'.

43. The `1st Appellant / 2nd Respondent' was appointed as a Managing Director the `4th Appellant / 1st Respondent / Company' on 19.07.2022 and from 19.03.2003 he was appointed as the `Chairman' of the `4 th Appellant / 1st Respondent / Company' and continues to hold the said Positions, the `Respondents / Petitioners' were present at such Meetings of the Board and had approved the `Resolution', appointing the `1 st Appellant / 2nd Respondent' of the Managing Director of the `4th Appellant / 1st Respondent / Company'.

44. It comes to be known that in the `Board Meeting' dated 20.09.2011, after detailed consideration, the following `Resolutions' were passed:

> (a) Cancelling / Annulling transfer of 3,32,440 `Shares' of the `1st Respondent / 1st Petitioner' and passing consequent `Resolutions', thereto; and
>
> (b) Removing the `1st Respondent / 1st Petitioner' from the editorial position and prohibiting him from taking any role in the editorial matters of the magazines published by the Company. The TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Respondents / Petitioners' had accepted that the `1st Respondent / 1st

Petitioner' had occupied the position of the `Honorary Editor' in the `1st Respondent / 1st Petitioner' till 2011, which imply that `Meeting of the Board' dated 20.09.2011 and the `Resolutions' passed direct are valid.

45. According to the `4th Appellant / 1st Respondent / Company', the `Respondents / Petitioners' had complained about `Article 31(a) of the Articles of Association of the `4th Appellant / 1st Respondent / Company', which provides that as long as the `3rd Appellant / 4th Respondent', is a `Shareholder', it shall be entitled to `Nominate two Directors on the Board'. Further, Article 31 (a) of the `Articles of Association' mentions that `1st Appellant / 2nd Respondent', would be entitled to occupy the Post of Chairman of the Board and that the Nominee Directors of the `3rd Appellant / 4th Respondent', shall not be liable, to retire by rotation.

46. In fact, Article 32 of the `Articles of Association' among other things mention that as long as the `1st Appellant / 2nd Respondent' continues to be a Director of the `4th Appellant / 1st Respondent / Company', he also be the Managing Director of the `4 th Appellant / 1st Respondent / Company'

47. The `1st Appellant / 2nd Respondent' is the Managing Director of the `4th Appellant / 1st Respondent / Company' from 19.07.2002 and its TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Chairman' from 19.03.2003 and to continues to hold the same position till date.

48. Article 39 (a) of the `Articles of Association', provides that; in the event of equality of votes at any general body meeting of Board meetings, the Chairman of the `4th Appellant / 1st Respondent / Company' (being the `1st Appellant / 2nd Respondent'), would be entitled to a second or casting vote;

49. Article 39 (b) of the `Articles of Association' of the `4th Appellant / 1st Respondent / Company' provides that the quorum of the Board will be complete for the purpose of transacting any business only if `1st Appellant / 2nd Respondent' is present.

50. It is represented on behalf of the `4 th Appellant / 1st Respondent / Company' that the `Articles of Association' of the `4th Appellant / 1st Respondent / Company', was amended in a unanimous fashion by all the `Shareholders' of the `4th Appellant / 1st Respondent / Company', including the `Respondents/Petitioners' at an Extra-Ordinary General Meeting dated 19.07.2002.

51. The `1st Respondent / 1st Petitioner' chaired both the Board Meetings dated 15.02.2022, in which the `Articles of Association' was proposed to be amended and the `Extra-Ordinary General Meeting dated TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 19.07.2022', at which, the Respondents / Petitioners had `Voted' unanimously in favour of the `Resolutions' passed. Both the Respondents / Petitioners had signed the `Board' and the `Extra-Ordinary General Meeting', and in fact, the 1st Respondent / 1st Petitioner had signed the `every page of the Articles of Association', as amended by the `Resolution', passed by the Members in the Annual General Meeting dated 19.07.2022.

52. The Statement of the Respondents / Petitioners that Articles of Association were carried out by the `1st Appellant / 2nd Respondent', in the absence of `1st Respondent / 1st Petitioner' from India is blatantly false.

53. As a matter of fact, the documents submitted by the `4 th Appellant / 1st Respondent / Company', will show that the `1st Respondent / 1st Petitioner' was in India and present at the several meetings, in which, the Amendments to the Articles of Association were made. Moreover, the Board of Directors of the Company, which included the Respondents/ Petitioners, considering the Scheme available for the import of equipments, for printing and financial position of the company, unanimously approved the import of such equipments `EPCG Scheme'. The company had obtained an extension of time, till Feb'2014 for fulfilling the obligation.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

54. The `Cap on Remuneration', payable by the `4th Appellant / 1st Respondent / Company' to the `1st Appellant / 2nd Respondent' was fixed, as per the `Article 32' of the `Articles of Association', and was increased from time to time, commensurate to the Business growth of the `4th Appellant / 1st Respondent / Company'. The increase in salary was made commensurate with the increased business of the `4 th Appellant / 1st Respondent / Company'.

55. The `Respondents / Petitioners had made an untenable statement to the effect that the `1st Appellant / 2nd Respondent' used to obtain the signatures of the `1st Respondent / 1st Petitioner', in regard to the `Minutes of the Board Meeting', with details of remuneration unfilled. In fact, the `1st Respondent / 1st Petitioner' made a false complaint with false allegations to the Police and the complaint was closed as mistake of facts.

56. Each of the `Annual Report' for the period, for which, the Accounts were approved contains the Statement as per Section 217 (2A) of the Companies Act read with Companies (Particulars of Employees) Rules, 1975 which requires `Disclosure of Names of Employees', who earn more than a certain prescribed amount. The name and details of remuneration earned by the `1st Appellant / 2nd Respondent', was mentioned in the `Annual Report', for the period ending from 31.03.2001 to 31.03.2007 (being the Accounts for the period approved by the `Respondents / TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Petitioners', as admitted by them). In fact, the `2nd Respondent / 2nd Petitioner', was one of the signatories to these Annual Reports.

57. The `4th Appellant / 1st Respondent / Company', Subsidiary is `M/s. Loganatha Trading Pvt. Ltd.' and that the `2nd Respondent / 2nd Petitioner' is its Managing Director (of `LTPL') and `1st Appellant / 2nd Respondent' and `2nd Appellant / 3rd Respondent', are the Directors, on the `Board of Directors of LTPL'.

58. The 2nd Respondent / 2 Petitioner had failed to take any steps, to finalise the `Accounts of LTPL', since the year ended 31.03.2009, till date. In terms of Section 212 of the Companies Act, the `Accounts of the Subsidiary Company', is to be attached to the `Accounts of the Holding Company' and by reason of this requirement, the Accounts in respect of the years ended 31.03.2009,

31.03.2010 and 31.03.2011, could not inturn be finalised by the `4th Appellant / 1st Respondent / Company', which led to a situation where the `4th Appellant / 1st Respondent / Company' is classified as a `Defaulting Company', and the Directors were notified as `Defaulters'.

59. The transactions referred to by the `Respondents / Petitioners' (vide paragraphs 6.19) were carried on by the Company with the knowledge and the consent of the Board of Directors of the Company, including the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Respondents / Petitioners'. All these transactions are duly reflected in the Financial Statements of the Company, which were approved in the Board Meeting of the Company and that `Financial Statements' were signed by the `2nd Respondent / 2nd Petitioner' up to the Financial Year ended 31.03.2007.

60. The fact of the matter is that a partnership firm, in the name and style of `M/s. Tricom Vision', was floated on 07.10.1998 by two Partners Viz. Mrs. A. Kothai (the `2nd Respondent / 2nd Petitioner') and Mr. P. Varadarajan (`1st Appellant / 2nd Respondent'). All the Partners individually or collectively are entitled to manage and conduct the `Partnership Business'. No other `Partner' or `Partners' could be admitted into the `Partnership' except with the mutual consent of all the `existing partners'. The said `Partnership' was duly registered with the `Registrar of Firms', Chennai Central (Certificate No. 896 of 1998 dated 30.10.1998.

61. As a matter of fact, the `Business of the Partnership Firm' as mentioned in the agreement is to run advertisement media in numerous locations. The Partnership was floated as equal partners in 1998 itself. The LED Board was purchased when the `2nd Respondent / 2nd Petitioner' was a partner in the said firm and that the `2nd Respondent / 2nd Petitioner' continued as a Partner till 01.04.2002 and by means of a Retirement TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Deed, retired from the Partnership. On 01.04.2004 in a Board Meeting of the `4th Appellant / 1st Respondent / Company' chaired by the `1st Respondent / 1st Petitioner, attended to by all the `Directors' of the `4th Appellant / 1st Respondent / Company', at that time (including the `2nd Respondent / 2nd Petitioner'), a Resolution was passed for the purchase of the said LED Board for a consideration of Rs.300 Lacs. In that meeting, the `1st Appellant / 2nd Respondent' (a Partner in Tricom Vision), was interested in this Resolution.

62. Indeed, the `Minutes of the meeting', was duly signed by the `1st Respondent / 1st Petitioner' and in the said Board Meeting, it was decided to convene an `Extra-Ordinary General Meeting', on 11.02.2004 and in the said Meeting, the purchase of LED Board was once again affirmed and was recorded by the `1st Respondent / 1st Petitioner' as the Chairman of that Meeting. Later on, on 12.06.2004 in the Meeting of the Board of Directors, chaired by the `1st Respondent / 1st Petitioner', a `Resolution' was passed affirming the purchase of LED Board, for a consideration of Rs.300 Lacs and the consideration was payable in the form of `2% Secured Non Convertible Redeemable Debentures' over a period of 30 months.

63. The `1st Respondent / 1st Petitioner' was authorised to execute the Debentures on behalf of the Company. In the `EGM' of the Company TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 held on 19.06.2004, chaired by the `1st Respondent / 1st Petitioner', the purchase of LED Board was proposed by the `1st Respondent / 1st Petitioner' and seconded by his mother, the `2nd

Respondent / 2nd Petitioner'. In fact, on 01.07.2004, between the Company, represented by the `2nd Respondent / 2nd Petitioner' an agreement was signed in her position, as the Director and `M/s. Tricom Vision' represented by the `1st Appellant / 2nd Respondent' in his capacity as the `Managing Partner'. Moreover, it was recorded that:

> ``The purchaser is looking for a new method for advertising the periodicals to cover the general public to expand the readership base. As an initial measure the purchaser wanted to install an electronic display board in Chennai to telecast their advertisements and had approached the sellers for the purchase of the Board." The sellers shall sell on an as is where is basis."

64. A `Supplementary Agreement', on 03.10.2004, was entered into between the Company, represented by the `2nd Respondent / 2nd Petitioner' `as the Director of the Company' and M/s. Tricom Vision, represented by the `1st Appellant / 2nd Respondent' in his capacity as Managing Partner. The Company had entered into an agreement, in the month of July 2004, after an elaborate discussion although, the negotiation for the transactions began, on 01.02.2004. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

65. In reality, the consideration for the purchase of LED Board was unanimously approved by all the Directors knowing well that the `1 st Appellant / 2nd Respondent' is the Managing Partner of the Sellers Firm. The `Respondents / Petitioners' had burked an important fact that the `2nd Respondent / 2nd Petitioner' was one of the Partners of the Firm. The `Respondents / Petitioners' had withheld the facts that in a validly convened Board Meeting of the Company, it was resolved to purchase the LED Board from the Partnership Firm and as aforesaid, the purchase was proposed by the `1st Respondent / 1st Petitioner' and seconded by the `2nd Respondent / 2nd Petitioner' (mother).

66. M/s. Tricom Vision and the `1st Appellant / 2nd Respondent' got no tangible profit from this transaction and the Company had derived benefit. As reards the demand of Rs.1.32 Crore of the `Income Tax Department', the said order was passed by the Assistant Commissioner of Income Tax, Company Circle, challenged in an Appeal before the `CIT-Appeals'. Moreover, the depreciation claimed by the Company was reflected in the Balance Sheet, duly signed by the `2nd Respondent / 2nd Petitioner'. The Minutes of the Board Meeting dated 01.02.2004, the Minutes of the Extra-ordinary General Meeting dated 11.02.2004, Minutes of Board Meeting dated 12.06.2004, Minutes of the Extra-Ordinary General Meeting dated 19.06.2004, Agreement dated 01.07.2004, Supplementary TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Agreement dated 04.10.2004 and `Form 35 for the Appeal', filed before `CIT - Appeals'. These issues, are past concluded contract, agreed to by all the parties (including the `Respondents / Petitioners') ofcourse, in `writing' and executed in a transparent manner, which cannot be questioned in these proceedings.

67. The `Statutory Auditors' of the Company M/s. S.R. Batliboi and Associates, was the former Auditors of the Company, were proposed to be reappointed at the `Annual General Meeting' of the Company that took place on 24.12.2009, at which the `Shareholders' of the Company had

reappointed the said firm, being the `Statutory Auditors' of the Company.

68. In the instant case, M/s. S R Batliboi Associates, had expressed their unwillingness to be reappointed as the `Statutory Auditors' of the company, and hence, their `Reappointment' was set at naught notwithstanding the `Resolution' passed by the Company.

69. As per Article 39 (b) of the `Articles of Association' of the `4th Appellant / 1st Respondent / Company', the `Coram' for a meeting of the Board is complete for the purpose of transacting any business only, if the `1st Appellant / 2nd Respondent' is present. `4th Appellant / 1st Respondent / Company' is bound by the ingredients of the `Articles of Association' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 and Article 39 (b) of the AoA, was approved by the `Respondents / Petitioners'.

70. The `4th Appellant / 1st Respondent / Company', is not a party to any `Memorandum of Understanding', entered into between the `Parties' and it is a well settled `principle' that a `Company' is not bound by `any Private Contract between its Shareholders'.

71. The `Overseas Citizenship of India', was made operational by the Ministry of Home Affairs, Government of India only from 2nd December 2005. Every person who is registered as an `overseas citizen of India', is issued with a `Registration Certificate' printed like an `Indian Passport' in different colour and an `OCI' Visa Sticker is pasted in the person's Foreign Passport. These two documents were furnished by the `Respondents / Petitioners', to support their claim that the `1st Respondent / 1st Petitioner' is an `Overseas Citizen of India'.

72. The status of the `1st Respondent / 1st Petitioner' as per India Law, from the year 1996, is that of a `Foreign Citizen' and `Non-Resident' from the year 1976 which status continues as on date. The relevant laws governing `Investments in Shares of an Indian company by a foreign citizen / non-resident, is the Foreign Exchange and Management Act, 1999 from 1st June, 2000 and earlier by the Foreign Exchange Regulation TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Act, 1973. The 1st Respondent / 1st Petitioner, as an `Overseas Citizen of India', is not entitled to any special benefits under the Foreign Exchange Management Act, 1999.

73. The `1st Respondent / 1st Petitioner', had acquired 200 Shares in the `4th Appellant / 1st Respondent / Company' through an `Inheritance' from his father Late Mr. SAP Annamalai on 01.03.1995, later the shares of the `4th Appellant / 1st Respondent / Company' were acquired by the `1st Respondent / 1st Petitioner' in the following mode:

S.No.	Date	Acquisition of shares by 1st Petitioner (Nos.)	Cumulative Holding No. of Shares	% of the Total Capital	Mode of Acquisition
1	December 1998	900	1,100	2%	By allotment of shares by the 1st

					Respondent Company.
2	December 1998	1,000	2,100	4%	By transfer from trusts / investment companies.
3	February 1999	22,010	24,110	48%	By transfer from investment companies.
4	20th September 2001	308,530	332,640	65%	Shares allotted in pursuance of a Scheme of Amalgamation of Kumudam Printers Private Limited with Kumudam Publications

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Private Limited. The said Scheme was sanctioned by the Madras High Court by its order dated 12th April, 2001.

Total 3,32,640 65%

74. In regard to the acquisition of shares by the `1st Respondent / 1st Petitioner (other than the 200 Shares inherited by him), the `4 th Appellant / 1st Respondent / Company', earlier to 01.06.2000, is in `breach of FERA' and the acquisition post the said date, is in `Violation of FEMA'. In so far as the `Shares' acquired by the `1st Respondent / 1st Petitioner', based on a Scheme of Amalgamation, the `Allotment of Shares, in pursuance thereof, was subject to the `FEMA Provision' and the Regulations, thereunder. In fact, the `FEMA 1999' contains restrictions in regard to `Allotment of Shares' in `Print Media' to a `Foreign Citizen'.

75. An `Investment' in `Print Media', is allowed only with the `prior approval of the Government of India and that too up to 26% of the `Paid up Equity Share Capital', made effective from 2005. As per the `Foreign Exchange Management (Transfer of issue of Security by a Person Resident outside India) Regulations, 2000, framed under FEMA prohibits TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the `4th Appellant / 1st Respondent / Company' from issuing any Shares to the `1st Respondent / 1st Petitioner' in his `Foreign Citizenship / Non- Resident Status' and that the `4th Appellant / 1st Respondent / Company' was further prohibited from recording `any Transfer of its Shares to the `1st Respondent / 1st Petitioner', except to the extent permissible under the said Regulations. The `Respondents / Petitioners' had not obtained any such `Approval', even as on date and in any event, prior `Approval' is required for acquiring `Shares' in `Print Media'.

76. The `4th Appellant / 1st Respondent / Company' through its 99% Subsidiary holds a substantial `Real Estate Properties' and no `FDI' and `no Form of Investment by NRIs / PIOs / FIIs', is permitted in `Real Estate Business' and therefore, the `1st Respondent / 1st Petitioner / Foreigner' and a `Non-Resident' is disentitled to hold any Shares in the `4th Appellant / 1st Respondent / Company'.

77. The `1st Respondent / 1st Petitioner' had filed an `Application' dated 15.05.2012 to the `Foreign Investment Promotion Board', the Ministry of Information & Broadcasting and the Ministry of Commerce & Industry, seeking to regularise his `Holding'. The act of filing the `Application' to `FIPB', the `Ministry of Information & Broadcasting and the Ministry of Commerce & Industry', by the `1st Respondent / 1st TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Petitioner' is in negation, to the stand taken by the `Respondents / Petitioners'.

78. The `4th Appellant / 1st Respondent / Company' is bound by the `Press & Registration of Books Act', 1867, and the said `Act', prohibits a person, specifically, a person not residing in India from occupying any `Editorial Position', in any `Newspaper', published in India.

79. The `1st Respondent / 1st Petitioner', was illegally, assuming the Post as `Honorary Editor' of the Magazines of the `4th Appellant / 1st Respondent / Company'.

80. The `4th Appellant / 1st Respondent / Company' had convened a Board Meeting on 20.09.2011 at its Registered Office (after issuing Due Notice in this regard to its all Directors together with Agenda) and the `Respondents / Petitioners' had received the Notice for the said Meeting they had not attended the `Meeting', but took a stand that the `Board Meeting' could not be convened.

81. The `1st Appellant / 2nd Respondent' had replied to `Respondents / Petitioners' by requesting them to attend the `Meeting' and the `Board' proceeded with the `Meeting' on 20.09.2011 and ultimately, passed `Resolutions' in (i) cancelling / annulling transfer of 3,32,440 Shares of the `1st Respondent / 1st Petitioner' and passing consequent Resolutions TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 thereto; and (ii) removing the `1st Respondent / 1st Petitioner' from the `Editorial Position' and prohibiting him from taking any role in the editorial matters of the magazines published by the Company. A sum of Rs.2,57,74,295/-, the amount payable upon cancellation of 3,09,430 Shares (Numbers 9861 to 319290), issued / allotted to the `1 st Respondent / 1st Petitioner' by the `4th Appellant / 1st Respondent / Company' was deposited in Indian Bank (Account No. 989786906).

82. By a Letter dated 09.05.2012, the `Enforcement Director' had notified the `Indian Bank', Branch Manager that the amounts so deposited in the said Account, were placed under the `Seizure' and had directed the `Bank', not to permit any `Encashment'/`Withdrawal'/`Transfer' or not, to allow anyone to deal with the `Deposit', in any manner, without an `Express Approval', from the said `Enforcement Directorate'.

83. Based on the `Resolutions' passed by the `Board' in its `Meeting' dated 20.09.2011, the `1st Respondent / 1st Petitioner' presently, holds `200 Equity Shares' of Rs.100/- each of the `4th

Appellant / 1st Respondent / Company', amounting to a mere 0.10% of the `Issued', `Subscribed' and `Paid up Share Capital' of the `4 th Appellant / 1st Respondent / Company'.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

84. The `Respondents / Petitioners' had file three 20B Forms & Schedule V with the Registrar of Companies for the `Financial Years' ended 31.03.2009, 31.03.2010 and 31.03.2011. Moreover, there was no `Board Meeting' on 26.09.2011 and there could be no authorisation to the `Respondents / Petitioners' to file such Forms and therefore these Forms are invalid and an illegal one, etc.

85. The `Enforcement Directorate', had issued a `Show Cause Notice' on 06.06.2012, in regard to the `illegal shareholding of the 1st Respondent / 1st Petitioner', wherein it was mentioned as under:

> ``... Thus Shri. A. Jawahar Palaniappan knowingly had acquired and came into possession of 3,32,640 new / additional shares issued / allotted to him in contravention of Regulation 4 r.w. Regulations 5(1) & 7 of the Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 and Press Note 2 dated 11.2.2000 issued by the Secretariat of Industrial Approval (SIA) (FC Division) Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India r.w. Regulation 5(1) of the `Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000'. Therefore, it appears that Shri. Jawahar Palaniappan had contravened the provisions of Section 42 (1) of FEMA, 1999.'' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

86. The Enforcement Directorate had issued the Show Cause Notice dated 06.06.2012, requiring the concerned Parties to state, as to why; adjudication proceedings under Section 16 of FEMA should not be conducted?

Penalty should not be imposed as per Section 13 (1) of the `FEMA' on the `1st Respondent / 1st Petitioner' for `Breach of the provision of `FEMA'.

3,32,640 Shares, issued by the `4th Appellant / 1st Respondent / Company' to the `1st Respondent / 1st Petitioner', without the specific permission of RBI and in contravention of FEMA, should not be confiscated under Section 13 (2) of FEMA;

Rs. 2,57,70,498 representing the annulled / cancelled Shares issued to the `1st Respondent / 1st Petitioner', kept in the reinvestment plan deposit in a/c no. 989786906 with Indian Bank, Purasawalkam Branch No. 30 / 275 plus interest accrued thereon (totaling to Rs. 2,66,81,479) placed under seizure under Section 37(3) of FEMA read with Section 132 of the Income Tax Act, 1961 should not be confiscated.

87. The `Respondents / Petitioners' had concealed the fact that the `1st Respondent / 1st Petitioner' had already approached `FIPB' for the regularisation of the Shares held by him and thereafter, had

approached the `Company Law Board', on the very same issue.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

88. There are no acts of either `Oppression' or `Mismanagement', on the part of the `Appellants / Respondents' and the issues agitated are matters of dispute, before the other `Forums', and as such, the `Respondents / Petitioners' are not entitled to claim any `Relief'. Pleas of Appellant Nos. 1 and 3 (2nd & 4th Respondents and Adopted by 3rd Respondent in TCP/26/2018 (CP/54/2012):

89. The `1st Respondent / 1st Petitioner' other than inheriting the 200 Shares, the `remainder' of the `Shares', was acquired only through an `Allotment' by the `Company' / acquired from the then `Shareholders' of the `Company'.

90. The `1st Respondent / 1st Petitioner's contribution is that, he mismanaged the `Affairs of the Editorial of the Magazines', and he had contributed to the fall in `circulation' of the magazine. He had assumed the `Office of the Editor of the Magazine' for some time. He became the `Honorary Editor of the Magazine', for a `Collateral Purpose', though such position is impermissible in `Law' and in fact prohibited by `Law', being a `Foreign Citizen' / `Non-Resident'.

91. There was `no oral arrangement', that Mr. P.V. Parthasarathy and his family members would manage the affairs of the `4th Appellant / 1st Respondent / Company' and become 1/3rd Shareholder as alleged. After TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the `1st Respondent / 1st Petitioner', shifted to United States of America in 1976, it is only Mr. P.V. Parthasarathy was managing the Company's affairs and was responsible in building up a reputation for the Magazine.

92. Based on the request of Mr. P.V. Parthasarathy and SAP Annamalai, `1st Appellant / 2nd Respondent', sacrificed his lucrative job in U.S.A., to manage the `Company', and he was fully involved in managing the affairs of the company, and the whole credit for the growth and enviable position enjoyed by the Company today, could go to the `1st Appellant / 2nd Respondent' and neither the `1st Respondent / `1st Petitioner' nor the `2nd Respondent / 2nd Petitioner' had ever came in to the picture, at that point of time or later. Hence, the 1/3 rd Share which was allotted to the `Appellants / Respondents', during the lifetime of Sri. SAP Annamalai were clearly in recognition of the yeoman service rendered by the `1st Appellant / 2nd Respondent' and his father late Mr. P.V. Parthasarathy, for the growth of the Magazine and in making the Company a profitable one and for consideration. The `Respondents / Petitioners' were never concerned about the welfare of the Magazines, Company and its Employees and had `no concern' for Sri. SAP Annamalai, in his last days.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

93. It was the `Board' which took decision for taking steps to amalgamate the two Companies (`Kumudam Printers Pvt. Ltd.' with the `4th Appellant / 1st Respondent / Company'). The `Board', on 20.09.2011 in an `Unanimous Resolution', had cancelled the `Shares', held by the `1st

Respondent / 1st Petitioner'. The `Respondents / Petitioners' had not attended three consecutive `Board Meeting' of the `4 th Appellant / 1st Respondent / Company' and also not sought any leave for absence and hence, vacated the Office of Directors of the Company, as provided under Section 283 (1) (g) of the Companies Act, 1956.

94. The vacation of the Office of Directors was duly communicated to the `Registrar of Companies' and also Form-32 was also filed to that effect. After achieving devious plan to complete the Acquisition of Shares in favour of the `1st Respondent / 1st Petitioner', by suppressing his `U.S. Citizenship', the `Respondents / Petitioners came forward, to appoint the `1st Appellant / 2nd Respondent' as `Managing Director' and clearly agreed for his `Appointment' and his terms of appointment as `Managing Director', by way of `Unanimous Resolutions' passed in the `Board Meeting' and in the `Extra-Ordinary General Meeting'. The `1st Appellant / 2nd Respondent' was appointed as the `Chairman of the Company', by amending the `Articles of Association of the Company', by way of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 passing `Unanimous Resolutions' in the Board Meeting dated 05.03.2003 and in the `Extra-Ordinary General Meeting' dt. 19.03.2003.

95. The `1st Respondent / 1st Petitioner' got the `1st Appellant / 2nd Respondent', arrested on a false complaint and had kept him under pressure, in order to part with the `Shareholding' of the `3rd Appellant / 4th Respondent' in the `4th Appellant / 1st Respondent / Company'. In fact, after being fully aware of the `Amendments' and after unanimously approved the `Minutes', it is not open to the `Respondents / Petitioners' to aware that the `1st Appellant / 2nd Respondent' had amended the `Articles', to secure his position. The Amendments, were in vogue, from the year 2002 / 2003. There is nothing wrong in the `Articles', granting protection to the `1st Appellant / 2nd Respondent' as well as the interest of the `3rd Appellant / 4th Respondent', which is holding the `Shares' on behalf of the `1st Appellant / 2nd Respondent' and his family.

96. The `Respondents / Petitioners' had not taken any steps to assail the `Amendment to the Articles of Association'. From the year 2003 till 2010, the `Respondents / Petitioners' had not found anything wrong with these Amendments. The `1st Respondent / 1st Petitioner' Citizenship was known in the year 2009 and later the `Respondents / Petitioners' become avaricious in taking over the `immovable property belonging to the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 company', to the exclusion of the `Appellants / Respondents', especially the `1st Appellant / 2nd Respondent', who was solely, managing the `Affairs of the Company'.

97. The `1st Respondent / 1st Petitioner' went to the extent of filing a false complaint deliberately against the `1st Appellant / 2nd Respondent' and got him arrested, illegally by the Police on 23.04.2010. The decision to import Printing Machinery under `EPCG Scheme' was taken by the Company, when the `2nd Respondent / 2nd Petitioner' was the `Managing Director' of the Company and this fact was known to all the `Directors' of the Company. The remuneration was fixed for the `1 st Appellant / 2nd Respondent' was duly approved by the `Respondents / Petitioners'. After signing the `Minutes', it is shocking and strange on the part of the `1 st Respondent / 1st Petitioner' to aver, that `his signatures' were obtained without details.

98. The Police had closed the false complaint of the `1st Respondent / 1st Petitioner' against the `1st Appellant / 2nd Respondent', as `Mistake of Fact'.

99. There was no `Board Meeting', which was convened on 22.04.2010. Even assuming that there was a Meeting, that took place on 22.04.2010, cannot and does not have any power to suspend the `Articles TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 of Association'. The `1st Respondent / 1st Petitioner' had addressed a mail on 21.04.2010, to the `1st Appellant / 2nd Respondent' and the `2nd Appellant / 3rd Respondent', requesting for convening a `Board Meeting', to discuss the `complaint' by some `Employees' to the `Commissioner of Police'. The `1st Appellant / 2nd Respondent', had sent a `Reply', on the same day, pointing out that the `2nd Appellant / 3rd Respondent' was out of the Country and that he had prefixed the `Meeting' outside Chennai and further that the `1st Appellant / 2nd Respondent' had suggested a Conference Call or Mail to exchange the views and suggestions.

100. A letter dated 22.04.2010 was sent by the `1st Respondent / 1st Petitioner', misinterpreting the `1st Appellant / 2nd Respondent's offer to have a `Conference Call' or Exchange of emails, as his availability for the `Meeting' through `Conference Call' and taking note of the fact that the `1st Appellant / 2nd Respondent's presence was required for `constituting the Quorum'.

101. The 1st Appellant / 2nd Respondent and the `2nd Appellant / 3rd Respondent', had pointed out that the `Board Meeting', could not be proceeded, in the absence of the `1st Appellant / 2nd Respondent'.

102. The 3rd Appellant / 4th Respondent, on 19.09.2011, had addressed a letter to the `Respondents / Petitioners', stating that the `Memorandum of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Understanding' dated 15.08.2010 was bad and unenforceable. Moreover, the `Respondents / Petitioners', after knowing full well that the `Board Meeting' was convened on 20.09.2011 to discuss the legal implication of `Equity Shares' held by the `1st Respondent / 1st Petitioner', as a `Foreign Citizen / Non Resident' as well as his `Editorial Position', started raising unsustainable objections, in regard to the `Holding of the Board Meeting'.

103. The Respondents / Petitioners could not seek to challenge the `Resolutions' passed at the `Board Meeting', after consciously deciding, not to attend the said Meeting on 20.09.2011.

104. Except the 200 Shares inherited, the `Cancellation of Shares' held by the `1st Respondent / 1st Petitioner' were done, after taking into account the Legal Opinion received, as well as the illegality involved in the Shareholding of the 1st Respondent / 1st Petitioner. Furthermore, knowing full well that the `Cancellation' is consequence to the illegal holding, especially when the allotment is `per se' is void, the `Respondents / Petitioners', continued to raise the `Bogy' of grabbing `Control' of the Company when they were `guilty' of using all means to through the Appellants / Respondents, out of the company, even by having arrested the 1st Appellant / 2nd Respondent, on a `false complaint'. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

105. Till the 1st Respondent / 1st Petitioner gets the `permission', he cannot hold the Shares in the Company. The Respondents / Petitioners have `no locus' to allege, any purported violation of Articles of Association' or the `provisions of the Companies Act', by the `Appellants / Respondents.

Appellants' Submissions:

106. The Learned Senior Counsel for the Appellants contends that the impugned order dated 27.05.2020 (delivered on 01.06.2020) in TCP/26/2018 (CP/54/2012), passed by the `National Company Law Tribunal', Division Bench, Chennai, wrongly places the control of the `4 th Appellant' / `1st Respondent' / `Company', in the hands of the `1st Respondent' (in TA No. 283 of 2021 in Comp. App (AT) No. 83 of 2020) / `1st Petitioner' (in TCP/26/2018 in CP/54/2012), in as much as, it permits the `1st Respondent / 1st Petitioner', a `Foreigner', to hold the majority `Shareholding' in a `Print Media Company', in violation of the provisions of `Foreign Exchange Management Act', and the `Government Policy'.

107. The Learned Counsel for the Appellants submits that the `4th Appellant / 1st Respondent / Company', is engaged in `Print Media Company' and the `Ministry of Information & Broadcasting' (`MIB'), is TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the `Administrative Ministry' for the said Industry and that the view of the said Ministry on `Regularisation of Shareholding of the `AJP' (the `1st Respondent / 1st Petitioner') is that, it should not be approved and in this connection, the Learned Counsel for the Appellants places reliance on the MIB's Letter dated 29.06.2012, addressed to `FIPB', on the request made by the `1st Respondent'/`1st Petitioner' (`AJP') to `FIPB', in the year 2012, to regularise his `Shareholding' in the `4th Appellant / 1st Respondent / Company' (`M/s. Kumudam Publications Pvt. Ltd.' / `Kumudam'), clearly mentions that `Proposal', may not be considered for `Approval'.

108. The Learned Counsel for the Appellants refers to the decision of the Hon'ble Supreme Court of India in National Agricultural Co- operative Marketing Federation of India v. Alimenta S.A., reported in 2020 SCC Online SC at Page 381, wherein at paragraphs 68 & 69, it is observed as under:

> 68. ``It is apparent from above-mentioned decisions as to enforceability of foreign export could have taken place without the permission of the Government, and the NAFED was unable to supply, as it did not have any permission in the season 1980-81 which pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an exigency as provided in clause 14, the Agreement shall be cancelled for the supply which TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 could not be made. It became void under Section 32 of the Contract Act on happening of contingency. Thus, it was not open because of the clear terms of the contract became void. There was no permission to export commodity of the previous year in the next season, and then the Government declined permission to NAFED to supply. Thus, it would be against the fundamental public policy of India to enforce such an award, any supply made then would contravene the public policy of India relating to export for which permission of the Government of India was

necessary.

> 69. In our considered opinion, the award could not be said to be enforceable, given the provisions contained in Section 7 (1)(b) (ii) of the Foreign Awards Act. As per the test laid down in Renusagar Power Co. Ltd. v. General Electric Co. 1994 Sup. 1 SCC 644., its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, we hold that award is unenforceable, and the High Court erred in law in holding otherwise in a perfunctory manner."

109. According to the Learned Counsel for the Appellants, the Reserve Bank of India's views on the specific issue of `Regularisation of Shares', held by `AJP' (the `1st Respondent / 1st Petitioner') in the `4th Appellant's Company / 1st Respondent' (Kumudam) are; (a) RBI's Letter dated 26.09.2012, addressed to `FIPB', refers to the 1st Respondent's Shareholding in `4th Appellant / 1st Respondent / Company' as a `Prohibited Investment' (b) The RBI's Letter dated 28.01.2013, addressed TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 to the `FIPB', on the issue of `Regularisation of Shares', held by `AJP' (`1st Respondent/1st Petitioner'), clearly states that `Shares' are held by `inheritance', `gift', `Transfer', etc., the `Shares' would be still the subject matter of `Foreign Exchange Management Act, 1999', and that the `Print Media Sector', was prohibited for `FDI' / `NRI' / `OCB Investment'.

110. It is represented on behalf of the Appellants that the `Government Policy', since the year 1955 is that, `No Foreigner', shall have control over the `Print Media Company', engaged in News, etc., in India and the `Prohibition' on `Foreigner', `Acquiring the Control', was absolute till the year 2005 and the `Prohibition' was on `Foreigner' and not just `Investment'. Moreover, the `Cabinet Resolution of 1955', had resolved to adopt, a complete bar, on Foreign Holding in `Print Media Industry'.

111. On behalf of the Appellants, it is brought to the notice of this Tribunal and that the `Matter' was referred to the `Standing Committee' and the said `Committee's Report' had advised, against any kind of `Foreign Investment' / `Control' in the `Print Media Sector'.

112. In this background, a `Press Note' dated 05.07.2005 was issued, providing a maximum of `26% Sectoral Cap Limit for Investment', including FDI with a lot of restrictions and conditions. In fact, all the `Acquisition of Shares' in the `4th Appellant's company', by the `AJP' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 (`1st Respondent / 1st Petitioner') was in the year 1998 - 2001, when the limit was `Zero' and not even 26%.

113. The Learned Counsel for the Appellants comes out with a plea that an exclusive jurisdiction is vested as per Section 34 of the Foreign Exchange Management Act, 1999, to adjudicate the `Violations of the Provisions' lies with an `Adjudicating Authority', appointed as per Section 16 read with Section 13 of the Foreign Exchange Management Act, 1999, and there is an express bar as per Section 34 of the said Act for any Civil Court (including the `National Company Law Tribunal') to determine, on any matter pending before the `Authorities', under `FEMA'.

114. The Learned Counsel for the Appellants adverts to a `Scheme of Amalgamation', vide Order dated 22.05.2017, passed by the Adjudicating Authority, wherein, it is inter alia, observed as under:

> ``..... Now in the instant case it is undisputed fact that-
>
> (a) Sh. A. Jawahar Palaniappan i.e. Noticee No.3 became an NRI after May 1976 and has been residing in U.S.A. and continued to remain so till November 1996 and became an U.S.A. citizen from November 1996 onwards. This fact was not even disputed by Noticee No.3 and the Noticee No.3 admitted these facts in his oath statement recorded on 10.10.2011, before the Deputy Director, Directorate of Enforcement, which is part of the relied upon documents and copies of which were provided to all the Noticees.

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(b) P. Vardarajan, Director of Kumudam Publication Pvt. Ltd. was in know of the fact that A. Jawahar Palaniappan was a person resident outside India and U.S. citizen when in the capacity of Managing Director of the company, he issued share certificates to A. Jawahar Palaniappan (AJP) by virtue of which AJP held 66% of shares of the company. His averment that he came to know the non-resident status of noticee no.3 only at the latter stage is baseless and false as is evident from the GPA dated 21.12.1998 wherein P. Vardarajan signed as a witness which showed that he (AJP) was residing in U.S.A. i.e. to say he was a person resident outside India.

(c) The Regulation 7 of FEM (transfer or issue of security by a person resident outside India) Regulation, 2000 does not distinguish between the acquisition of shares of the amalgamated company by way of Foreign Direct Investment or in otherwise manner.

(d) Further Regulation 7 clearly stipulates that the merged / amalgamated company will issue shares to the share holders of the transferor company, resident outside India, on the condition that the percentage of the share holding of the persons resident outside India in new company does not exceed the percentage specified in the approval granted by the Central Govt. or the Reserve Bank or specified in these Regulations. In the instant case as per regulation 5(1), schedule 1, Para 1 (iii) & Sl. No. 14 of the table titled ``Sector Specific Guidelines for Foreign Direct Investment mentioned in Press Note No. 2 dated 11.02.2000 issued by the Secretariat of Industrial approval FC division Department of Industrial Policy and Promotion Ministry of Commerce & Industry Govt. of India- ``No proposals relating to acquisition of shares in an existing Indian company in favour of a foreign / NRI investor was permitted under Automatic route'' and ``No NRI investment was permitted in print media.'' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

115. The Learned Counsel for the Appellants submits that since the Shares was already cancelled / annulled, as noticed by the `Adjudicating Authority', there were no Shares available for confiscation. Moreover, the `consideration' for the cancelled Shares which were kept in `Fixed Deposit' was directed to be used, to pay the `penalty' and `Confiscation is a Discretion to be exercised by the `Adjudicating Authority'.

116. According to the Learned Counsel for the Appellants, the reliance placed by the `Tribunal' (`National Company Law Tribunal') on FIPB Letter dated 19.06.2013 and RBI's Letter dated 15.06.2013 in the `impugned order' in TCP/26/2018 in CP/54/2012 (pronounced on 27.05.2020 and delivered on 01.06.2020) is an erroneous one. In fact, these Letters were placed before the `Adjudicating Authority' by the `Respondents / Petitioners', yet the `Adjudicating Authority' had returned the `Findings of Violation'. Indeed, the Letter dated 15.06.2016 of Reserve Bank of India is completely silent with regard to violation of Regulation 7, which is the case of the `Adjudicating Authority'.

117. The Learned Counsel for the Appellants points out that the Company Law Board, Principal Bench, New Delhi, in the matter of Dr. A. Jawahar Palaniappan & Ors. Kumudam Publications Private Limited & Ors. in CP/54/2012, on 26.05.2015, at Paragraph 20, had observed that TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 ``..... If the Directorate of Enforcement rules against the validity of the acquisition of Shares in R-1 by AJP, a Non-Resident Indian or the cancellation of 3,32,440 Equity Shares held by P-1 in R-1 Company, to avoid conflicting decisions. If the Directorate of Enforcement rules in R-1 company pursuant to the Scheme of Amalgamation of Kumudam Printers Pvt. Ltd. with Kumudam Publications Pvt. Ltd., the oppressive in nature would automatically fall to the ground and the need to rectify the Register of Members in R-1 company as prayed in the Petition shall disappear."

118. The Learned Counsel for the Appellants draws the attention of this `Tribunal' to the Order dated 25.09.2018, passed by the `Tribunal' (`National Company Law Tribunal', Division Bench, Chennai) in TCP/26/2018, wherein it is observed as under:

> ``Submissions made by the counsel for Petitioner, part heard. The counsel for the Respondent's side having not raised objection with regard to hearing the maintainability Application along with the main Company Petition, if this Bench finds that there is merit in the maintainability application, after hearing the application on maintainability and the main Company Petition, then this Bench will decide the maintainability issue without going into the merits of the Company Petition, failing which, this Bench without going into the merits of the Company Petition, failing which, this Bench without pronouncing order on the maintainability issue, the main Company Petition will be dealt with on merits taking maintainability issue as first issue in the order on the Company Petition." and points out that even though an Miscellaneous Application in TCP/26/2018, was filed by the `4th Appellant / Applicant' (1st Respondent TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 in TCP/26/2018 (CP/54/2012), praying for dismissal of the main Company Petition, based on the Order of the Company Law Board and the `Adjudication Order' of the `Enforcement Directorate' dated 22.05.2017 (Adjudication Order No. 01/JD/HIU/2017 in SCN No.T-4/02-

CHE/2012 dated 06.06.2012), the `Tribunal' had not dealt with the said `Application', praying for `dismissal' of the `Company Petition', filed by the `Appellants', which Application was noticed in the Order dated 25.09.2018. Therefore, it is projected on the side of the Appellant that the

`impugned order' passed by the `Tribunal' in the instant case amounts to `Review' of the `Company Law Board Order' and the same is `impermissible', because of the fact that `no Powers of Review' are vested with the `National Company Law Tribunal'.

119. The Learned Counsel for the Appellants submits that the `Enforcement Directorate' through its Order dated 22.05.2017 came to a categorical conclusion that the `Acquisition and Holding' of the `1 st Respondent / 1st Petitioner', is in violation of Regulation 7 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations (FEMA Regulations) and this was reiterated in the `Reply' of the `Enforcement Directorate dated TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 02.11.2018 (before the `Appellate Tribunal' of `Foreign Exchange'), wherein at Paragraph 8, it is mentioned as under:

> 8. ``With regard to para 6 of the Appeal, it is submitted that the Appellant a foreign National is clearly prohibited in acquiring and holding any shares in M/s. Kumudam Publication Pvt. Ltd. The Appellant cannot escape the penalty because the shares are cancelled / annulled subsequently. Shares issued in violation of FEMA at the first place itself is void and as such the subsequent cancellation / annulment does not make any difference. Hence, the Adjudicating Authority rightly levied penalty on the Appellant."
>
> 120. It is the plea of the Appellants that the `Enforcement Directorate' had ruled against the `Acquisition and Holding of 3,32,440 Shares by the `1st Respondent / 1st Petitioner' and imposed a penalty on the Company, the 1st Respondent / 1st Petitioner and the `1st Appellant / 2nd Respondent.

Hence, it is forcefully contended on behalf of the Appellant, by applying the directions issued by the then Company Law Board through its Order dated 26.05.2015, the `Tribunal's proceedings should have met with its end, Viz. automatically fallen to the ground.

121. The Learned Counsel for the Appellants contends that the `Adjudicating Authority', had noted that the `4th Appellant / 1st Respondent / Company' had violated the provisions of Regulation 7 when it issued Shares of Print Media Company `Kumudam' to the 1 st Respondent / 1st Petitioner, as an another Regulation 5 (1) read with TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Scheduled 1 read with prescribed Sectoral limits `had not permitted such issuance of shares'.

122. The clear cut stand of the Appellants is that in as much as persons `Resident outside India', were not allowed to acquire Shares in Print Media / 4th Appellant / Company, when `Shares' were issued to the `1st Respondent / 1st Petitioner' in 2001-2002, Violation of Regulation 4 i.e., `Issuance of Shares' by an `Indian Entity', to a person `Resident outside India', is also proved.

123. The Learned Counsel for the Appellants raises an argument that the `Tribunal' had ignored the `Order' of the `Adjudicating Authority' (Joint Director), Directorate of Enforcement (Foreign Exchange Management Act and Prevention of Money Laundering Act), Government of India, New Delhi dated 22.05.2017, wherein it was observed as under:

``Subsequently, a letter dated 28.2.2012 was received from Shri. P. Vardarajan wherein, he inter-alia stated as follows:

(i). Despite communication to Shri. A. Jawahar Palaniappan, he had not surrendered the Share Certificates which includes the shares that were cancelled, in this Board Meeting held on 20.9.2011, being null and void ab initio. Hence, they would keep the Department informed as soon as the company receives the Share Certificates.

(ii) A sum of Rs.2,57,70,495/- was kept in the F.D. in the name of the company with Indian Bank, Purasawalkam Branch, Chennai. The said money / amount would be released to him (Jawahar TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Palaniappan), based on the consent / instructions of the Directorate of Enforcement or after the outcome of any other legal proceedings.

From the above, it was seen that the Share Certificates issued to Shri. A. Jawahar Palaniappan were not yet surrendered to the company and they were still in the custody of Shri. A. Jawahar Palaniappan. However, the amount of Rs.2,57,70,495/- representing the shares issued to Shri. A. Jawahar Palaniappan was secured by the company in the form of F.D. in Indian Bank, Purasawalkam Branch, Chennai. Therefore, either 3,32,640 Shares or the amount equivalent to the said shares were available for the Department for the purpose of confiscation under the provisions of FEMA, 1999." and further that even in a case where the `Breach' was established like the present case, as per Section 13 (2) of the Foreign Exchange Management Act, 1999, it is at the discretion of the `Adjudicating Authority', as to whether `confiscation of shares', is to be made or not?

124. The Learned Counsel for the Appellants comes out with a plea that since the `Shares' were annulled / cancelled already, as noticed by the `Adjudicating Authority', there were `No Shares available for confiscation'. Moreover, the consideration for the cancelled Shares, which was kept in Fixed Deposit, was directed to be used to pay the penalty of the Company, such a direction in an implied manner, amounts to `confiscation of the Sum paid' as `consideration' for the `cancelled Shares'.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

125. It is represented on behalf of the Appellants that `if the Allotment of Shares', itself is bad, then, the resultant `Shares', in the hands of the `1st Respondent'/`1st Petitioner', is not to be considered as a `valid one'.

126. The Learned Counsel for the Appellants submits that once the `Shareholding' is held to be `illegal' and therefore `invalid', and the `imposition of penalty', by the `Adjudicating Authority', as per Section 13 of the Foreign Exchange Management Act, 1999, subsequently, the action of the `Tribunal', in permitting the 1st Respondent / 1st Petitioner to hold the `Shares of Kumudam' is in violation of the decision of the Hon'ble Supreme Court of India in Asha John Divianathan v. Vikram Malhotra & Ors (2021) SCC Online SC at Page 147, wherein at paragraphs 29, 30 & 35, it is observed as under:

29. ``In the first place, provision for penalty under Section 50 for contravention referred to in Section 31, does not mean that the requirement of previous permission of RBI is directory or a mere formality. It is open to the legislature to provide two different consequences for the violation. As already noted hitherto, despite the absence of express provision declaring the transfer void, the intent behind enacting Section 31 and its purport renders the transfer in contravention thereof unenforceable until permission for such transaction is granted by the RBI.

30. Suffice it to observe that merely because no provision in the Act makes the transaction void or says that no title in the property passes to the purchaser in case there is contravention of the provisions of Section 31, will be of no avail. That does not TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 validate the transfer referred to in Section 31, which is not backed by "previous" permission of the RBI. Further, the Punjab & Haryana High Court erroneously assumed that there was no provision regarding confiscation of the immovable property referred to in Section 31. Section 63 of the 1973 Act clearly refers to property in respect of which contravention has taken place for being confiscated to the Central Government. The expression "property" therein would certainly take within its sweep an immovable property referred to in Section 31 of the Act. The expression "property" in Section 63 is an inclusive term and, therefore, there is no reason to assume that consequence of confiscation may not apply to immovable property in respect of which contravention of the provisions of sub-section (1) of Section 31 had taken place. The basis of that judgment is tenuous and is palpably wrong. For the same reason, the decision in R. Sambasivam (supra) of the Madras High Court is erroneous as it has merely followed the dictum of the Punjab & Haryana High Court. Suffice it to observe that the transaction of gift deed without previous permission of the RBI may not be nullity, but certainly not enforceable in law until such permission is granted.

35. For the view that we have taken, it is not possible to countenance the argument not to disturb the consistent view of different High Courts on the principle of stare decisis by invoking the dictum in Waman Rao (supra), in reference to Section 31 of the 1973 Act. For, there is conflict of opinion and is not a case of consistent view of all High Courts, having occasion to deal with interpretation of Section 31 of the 1973 Act. Resultantly, we had to undertake the exercise of analysing all the decisions so as to give proper meaning to Section 31 of the 1973 Act. In our opinion, the requirement of seeking previous general or special permission of the RBI in respect of transaction covered by Section 31 of the 1973 Act is mandatory. Resultantly, any sale or gift of property situated in India by a foreigner in contravention thereof would be unenforceable in law." TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

127. The Learned Counsel for the Appellants adverts to the Judgment of Hon'ble Supreme Court of India dated 25.11.1976 in Mannalal Khetan v.

Kedar Nath Khetan, reported in India Kanoon, wherein it is observed as under:

``Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See Mellis v. Shirley (1). A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what act the statute prohibits, by what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See St. John Shipping Corporation v. Joseph Rank("). See also Halsbury's Laws of England Third Edition Vol. 8, p.141). It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim 'A pactis privatorum publico juri non derogatur means that 'private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See Mellis v. Shirley L.B.) (Supra). What is done in contravention of the provisions of an Act of the Legislature cannot be made the subject of an action.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

Penalties are imposed by statute for two distinct purposes (1) for the protection of the public against fraud, or for some other object of public policy; (2) for the purpose of securing certain sources of (1) L.R. (1885) 16 Q.B.D, 446. (2) [1957] 1 Q.B. 267 revenue either to the state or to certain public bodies. If it is clear that a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty imposed is not enforceable. The provisions contained in section 108 of the Act are for the reason indicated earlier mandatory."

128. The Learned Counsel for the Appellants refers to an `Appeal' filed by the Enforcement Directorate, in `Union of India' through Assistant Director, Directorate of Enforcement, Chennai, (under Section 19 (1) of the FEMA 1999 against the `Adjudication Order' dated 22.05.2017, passed by the `Joint Director of Enforcement', New Delhi, vide No.01/JD/HIU/2017/2392 - File No.

T-4/02-CHE/2012), against M/s.

Kumudam Publications Pvt. Ltd. & Ors., before the `Appellate Tribunal' for Foreign Exchange, New Delhi, wherein, the following `Grounds' were raised:

> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 vii. ``The Learned Adjudicating Authority having held that Respondents 1 to 3 contravened the provisions of Foreign Exchange Management Act and regulations framed thereunder and imposed penalty under Section 13(1) of the Foreign Exchange Management Act, 1999, ought to have ordered confiscation of shares issued in violation of the provisions of Foreign Exchange Management Act and regulations framed thereunder.
>
> viii. The Learned Adjudicating Authority having appreciated the fact that Respondent No.3 is a person resident outside India during the period when he was allotted Shares in 1 st Respondent in violation of the provisions of Foreign Exchange Management Act and regulations framed there under, had failed to confiscate the shares allotted to him with 1st respondent.
>
> x. The Learned Adjudicating Authority ought to have held that the onus to adhere the provisions of FEMA, 1999 also lies on 3rd Respondent who in violation had obtained 3,32,640 shares in M/s. Kumudam Publications Pvt. Ltd. and as such the shares are liable for confiscation and thereby ought to have confiscated the shares held by 3rd respondent with respondent No.1."
>
> 129. The Learned Counsel for the Appellants relies on the decision of the Hon'ble Supreme Court of India in the matter of Dropti Devi and Another v. Union of India & Ors., (2012) 7 SCC at Page 499 at Spl Pgs:
>
> 529 and 530, wherein at paragraphs 66 to 69, it is observed as under:
>
> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
>
> 66. ``It is true that provisions of FERA and FEMA differ in some respects, particularly in respect of penalties. It is also true that FEMA does not have provision for prosecution and punishment like Section 56 of FERA and its enforcement for default is through civil imprisonment. However, insofar as conservation and/or augmentation of foreign exchange is concerned, the restrictions in FEMA continue to be as rigorous as they were in FERA. FEMA continues with the regime of rigorous control of foreign exchange and dealing in the foreign exchange is permitted only through authorised person. While its aim is to promote the orderly development and maintenance of foreign exchange markets in India, the Government's control in matters of foreign exchange has not been diluted. The conservation and augmentation of foreign exchange continues to be as important as it was under FERA. The restrictions on the dealings in foreign exchange continue to be as rigorous

> in FEMA as they were in FERA and the control of the Government over foreign exchange continues to be as complete and full as it was in FERA.
>
> 67. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange.

The conservation and augmentation of foreign exchange continues to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardizing the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non- compliance results in civil imprisonment of the defaulter. The whole intent and idea behind COFEPOSA is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on the national economy.

68. In today's world physical and geographical invasion may be difficult but it is easy to imperil the security of a State by disturbing its economy. Smugglers and foreign exchange manipulators by flouting the regulations and restrictions imposed by FEMA - by their misdeeds and misdemeanours - directly affect the national economy and thereby endanger the security of the country. In this situation, the distinction between acts where TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 punishments are provided and the acts where arrest and prosecution are not contemplated pales into insignificance. We must remember: the person who violates foreign exchange regulations or indulges in smuggling activities succeeds in frustrating the development and growth of the country. His acts and omissions seriously affect national economy. Therefore, the relevance of provision for preventive detention of the anti-social elements indulging in smuggling and violation and manipulation of foreign exchange in COFEPOSA continues even after repeal of FERA.

69. The menace of smuggling and foreign exchange violations has to be curbed. Notwithstanding the many disadvantages of preventive detention, particularly in a country like ours where right to personal liberty has been placed on a very high pedestal, the Constitution has adopted preventive detention to prevent the greater evil of elements imperiling the security, the safety of State and the welfare of the Nation."

130. The Learned Counsel for the Appellants points out that the Reserve Bank of India had addressed a Letter dated 06.08.2013 to the 1st Respondent / 1st Petitioner (with reference to his letter dated 24.07.2013 on the subject of `Shareholding in Kumudam Publications Pvt. Ltd., wherein it was mentioned that the `issue of allotment of shares of the captioned company is being examined in consultation with the Directorate of Enforcement) and that the communication dated 19.06.2013 from FIPB to 1st Respondent / 1st Petitioner also informs that `all outstanding issues have to be decided by the Competent Authorities'.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

131. The Learned Counsel for the Appellants brings it to the notice of this `Tribunal', that the `Shares' acquired / held by the `1st Respondent / `1st Petitioner' in Kumudam Printers Pvt. Ltd.

(Company which got Amalgamated with `Kumudam') was not through inheritance, but through only by an `Allotment' / `Transfer' after 1976 or after 1996, as evident from the following:

> 1st Respondent / 1st Petitioner's details of Shareholding in Kumudam Printers Pvt. Ltd. (incorporated on 01.08.1972) runs as under:
>
> Date Allotment / Transfer Mode of No. of Cumulative Payment Shares Holding of AJP 1.8.72 Allotment (for Against sale of 10,150 10,150 consideration other properties than cash) 16.8.72 Allotment On Payment 100 10,250 23.3.74 Allotment On Payment 50 10,300 29.6.82 Allotment On Payment 26,000 36,300 24.6.83 SALE of Shares Received 36,300 NIL Payment 28.5.84 Allotment On Payment 100 100 Payment 14.5.86 Purchase of Shares On Payment 50 100 Payment 24.2.99 Purchase of shares On Payment 30,803 30,853 Hence, the entire shareholding held by AJP on 24.2.1999 were acquired and not inherited, as falsely claimed by AJP.

This Company stood amalgamated in Kumudam and AJP being a Shareholder of Kumudam Printers Private Limited was allotted Shares in Kumudam on 20.9.2001. and therefore, it is the stand of the Appellants that the entire `Shareholding' held by the 1st Respondent / 1st Petitioner on 24.02.1999 were `Acquired' and not `Inherited', as falsely claimed by the 1 st Respondent / 1st Petitioner.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

132. The Learned Counsel for the Appellants contends that the aspect of compliance of the ingredients of Section 100 or Section 111 or 391 and 394 of the Companies Act, 1956, will apply only when the allotment is valid in `Law'. In this connection, it is the plea of the Appellants that the `Allotment of Shares' to `1st Respondent / 1st Petitioner' is bad in `Law' and hence, the issue of violation of any of the provisions of the Companies Act, while annulling / effecting cancellation of such illegally allotted Shares to the 1st Respondent / 1st Petitioner to `Kumudam' does not arise.

133. The Learned Counsel for the Appellants refers to the decision in Re Transatlantic Life Assurance Co Ltd., reported in 1979 All England Law Reports (Chancery Division) 352 at Spl Pgs: 354, 355 to 357, wherein it is observed as under:

> g ``These are the circumstances in which the company makes the application before me. Mr Beard states in his affidavit that LACOP consents to it and that it has agreed, on the register of members of the company being rectified, forthwith to subscribe for 50,000 new ordinary shares of £1 each at par. If the order for rectification is made as sought, the company would intend immediately to repay £150,000 to LACOP, which it would apparently regard as being due to LACOP.
>
> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 h The first question that falls to be considered is whether, as counsel for the company submits, the further issue of 200,000 ordinary shares by the company in March 1974 was wholly void. Section 8(I) of the 1947 Act, provides as follows:

``Except with the permission of the Treasury, no person shall in the United Kingdom, issue any security or, whether in the United Kingdom or elsewhere, issue any security which is registered or to j be registered in the United Kingdom, unless the following requirements are fulfilled, that is to say __ (a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside the scheduled territories; and

(b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee'' [Spl Pg : 354] ``LACOP was a person resident outside the scheduled territories a at the relevant time, and the permission of the Treasury was not obtained in respect of the issue of the 200,000 shares. Accordingly, it is clear that this issue did involve a breach of the provisions of s 8 (I). Though Sch 5 to the 1947 Act renders certain breaches of the provisions of the Act a punishable offence, the Act appears to contain no further explicit guidance as to the effect in law of issuing securities without Treasury permission in breach of s 8 (I). Section 8(2), so far as material for present purposes, provides as follows:

b `The subscription of the memorandum of association of a TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 company to be formed under the Companies Act, 1929 ... by a person resident outside the scheduled territories ... shall, unless he subscribes the memorandum with the permission of the Treasury, be invalid in so far as it would on registration of the memorandum have the effect of making him a member of or shareholder in the company ...' c This subsection therefore expressly provides for the invalidity of the subscription to this extent and in these circumstances. I do not, however, think it throws much light, one way or the other, on the construction of s 8 (I).

Far greater assistance, in my judgment, is to be derived from s I 8(I), on which counsel for the company principally relied. This section reads:

d `(I) The title of any person to a security for which he has given value on a transfer thereof, and the title of all persons claiming through or under him, shall notwithstanding that the transfer, or any previous transfer, or the issue of the security, was by reason of the residence of any person concerned other than the first mentioned person prohibited by the provisions of this Act relating to the transfer or issue of Securities, valid unless the first-mentioned person had notice of the facts by reason of which it was prohibited. e `(2) Without prejudice to the provisions of subsection (I) of this section, the Treasury may issue a certificate declaring, in relation to a security, that any acts done before the issue of the certificate purporting to effect the issue or transfer of the security, being acts which were prohibited by this Act, are to be, and are always to have been, as valid as if they had been done with the permission of the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Treasury, and the said acts shall have effect accordingly.

f `(3) Nothing in this section shall affect the liability of any person to prosecution for any offence against this Act.' In my Judgment counsel for the company is correct in submitting that this section, by necessary inference, presupposes that the purported issue of a security in manner prohibited by the 1947 Act is wholly invalid. Were this not so. I could see no point in g the provisions of s I 8 (I) which, when applicable, by their terms operate to validate the title to such a security of a person who has given value on taking a transfer thereof. Were this not so, I could likewise see no point in the provisions of s I 8(2) which empower the Treasury to issue a certificate, inter alia, retrospectively validating acts `purporting to effect' the issue of a security in manner prohibited by the 1947 Act. The very use by the legislature of the phrase `purporting to effect', in s I 8 (2), in my judgment further h illustrates that the acts which purport to effect the issue in a prohibited manner do not in fact operate to effect that issue ab initio. In these circumstances, on a bare reading of the Act, I would conclude that the purported issue of 200,000 ordinary shares by the company in March 1974 was wholly invalid and void.

Counsel for the company has been unable to refer me to any decided case which touches directly on the construction of s 8 of the j 1947 Act, but he has referred me to one decision which, I think, provides some indirect assistance. In Re Fry [1946] 2 All ER 106, Romer J had to consider the effect of a transfer of shares by a father in favour of a son, effected in breach of the restrictions imposed on TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the transfer of securities by para (I) of reg 3A of the Defence (Finance) Regulations 1939 [SR & O 1940 No 1254], Paragraph (I), so far as material for present purposes, provided: a `(I) Subject to any exemptions which may be granted by order of the Treasury no person shall ... transfer ... otherwise than by operation of law or by inheritance, any securities or any interest in securities, unless the Treasury or persons authorized by or on behalf of the Treasury are satisfied that no person resident outside the sterling area has, immediately before the transfer ... any interest in b the securities: Provided that nothing in this paragraph shall prohibit any ... transfer ... which is effected with permission granted by the Treasury or by a person authorised by them or on their behalf.' Paragraph (4) provided:

`(4) Subject to any exemptions which may be granted by order of c the Treasury, no person shall, except with permission granted by the Treasury or by a person authorised by them or on their behalf, enter any transfer of securities in any register or book in which those securities are registered or inscribed unless there has been produced to him such evidence that the transfer does not involve a contravention of this Regulation as may be prescribed by instructions issued by or on behalf of the Treasury.' [Spl Pgs : 355 & 356] `The reasoning of Romer J in Re Fry [1946] 2 All ER 106, mutatis a mutandis, in my judgment, supports the conclusions, which I would have reached in its absence, that the relevant issue of the 200,000 TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 shares to LACOP was wholly invalid and void and that it operated to confer on LACOP no title whatever to any such

shares, either at law or in equity.

Section II6 of the Companies Act 1948, provides as follows:

`(I) If __(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or b

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member; the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

`(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.' c In the circumstances, it seems to me clear that the name of LACOP was entered in the register of members of the company, as the holder of the relevant 200,000 shares, `without sufficient cause' within the meaning of s II6 (I) (a). Indeed by virtue of s I3(a) of the 1947 Act the company was, I think, actually prohibited from making such entry in the absence of the prescribed evidence that the entry did not form part of a transaction which involved the doing of d anything prohibited by that Act. In my judgment the wording of s II6 of the Companies Act 1948 is wide enough in its terms to empower the court to order the rectification of a company's register by deleting a reference to some only of a registered shareholder's shares. The section can, in my judgment still operate, even though the proposed transaction does not involve the entire deletion of the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 name of the registered holder concerned as a member of the e company concerned, in as much as he, or it, is still properly shown as the holder of other shares, to which the rectification does not relate. I therefore conclude that the court has jurisdiction to order the rectification sought in the present case.

Are there then any reasons why the court should, in the exercise of its discretion, decline to make the order sought? Mr Beard's affidavit f contains evidence to the effect that the company no longer writes new insurance business and its insurance liabilities would be amply covered by its available assets, without the net amount of £150,000 which it intends to repay to LACOP in the event of the order for rectification sought being made. This evidence, however, is not very full and is not directed at all to such liabilities of the company (if any) as are not insurance liabilities; in theory, I suppose, these liabilities might be substantial. In these circumstances, the point g which has principally troubled me is the position of creditors of the company, none of whom are represented before me, particularly in the light of the announced intention of the company to repay the £150,000 to LACOP in the event of the proposed order being made. The transaction, viewed at first sight, has some flavor of a reduction of capital, carried through without the protection of the machinery provided for by ss 66 and 67 of the Companies Act, 1948, which is designed in particular to safeguard the interests of creditors of the company concerned.

h I think, however, that there are two answers to any misgivings which may be felt on this account. First, if I am right in concluding that the issue of the 200,000 shares was wholly void, then the

position must, in my judgment, be that, though the issued capital of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the company was, from March 1974 until at least 1977, thought by all concerned to be £250,000, it has in truth, at all material times, been only £50,000, so that in truth no reduction at all is involved by j the order which the court is now asked to make. Secondly, an order in the terms sought would in any event be of only limited scope, in as much as it would embody no more than an order for rectification of the register of members and relief strictly ancillary to the making of such an order. It would not include express approval of the company's announced intention of repaying the £150,000 to LACOP after the order had been made and I do not, as at present minded, propose to give such express approval." and submits that the `Shares Allotted', in violation of `Exchange Regulations' would be `Void' and further that there could only be `Reduction of Capital', if there was `Cancellation of Valid Shares'. Therefore, in the first place, such Shares never formed part of capital of the Company, and that, `Cancellation of such Shares', would not amount to `Reduction'.

134. The Learned Counsel for the Appellants adverts to the decision of the Hon'ble Supreme Court of India in Life Insurance Corporation of India v. Escorts Limited & Ors., reported in 1986 1 SCC at Page 264 at Spl Pgs: 313 & 314 (para 63), 326 to 328 (para 84), wherein it is observed as under:

> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
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> 63. ``We have already extracted sec.29(1) and we notice that the expression used is "general or special permission of the Reserve Bank of India" and that the expression is not qualified by the word "previous" or "prior". While we are conscious that the word 'prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1). On the other hand, the indications are all to the contrary. We find, on a perusal of the several, different sections of the very Act, that the Parliament has not been unmindful of the need to clearly express its intention by using the expression "previous permission" whenever it was thought that "previous permission" was necessary. In Sections 27(1) and 30, we find that the expression 'permission' is qualified by the word 'previous' and in Sections 8(1), 8(2) and 31, the expression 'general or special permission' is qualified by the word "previous", whereas in Sections 13(2), 19(1), 19(4), 20, 21(3), 24, 25, 28(1) and 29, the expressions 'permission' and 'general' or 'special permission' remain unqualified. The distinction made by Parliament between permission simpliciter and previous permission in the several provisions of the same Act cannot be ignored or strained to be explained away by us. That is not the way to interpret statutes. The proper way is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. The significance of the use of the qualifying word in one provision and its non-use in another provision may not be disregarded. In our view, the Parliament deliberately avoided the qualifying word 'previous' in Section 29(1) so as to invest the Reserve Bank of India with a certain degree of elasticity in the matter of granting permission to non-

resident companies to purchase shares in Indian companies. The object of the Foreign Exchange Regulation Act, as already explained by us, undoubtedly, is to earn, conserve, regulate and stored foreign exchange. The entire scheme and design of the Act is directed towards that end. Originally the Foreign Exchange Regulation Act, 1947 was enacted as a temporary measure, but it was placed permanently on the Statute Book by the Amendment Act of 1957. The Statement of Objects and Reasons of the 1957 Amendment Act expressly stated, TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 "India still continues to be short of foreign exchange and it is necessary to ensure that our foreign exchange resources are conserved in the national interest". In 1973, the old Act was repealed and replaced by the Foreign Exchange Regulation Act, 1973, the long title of which reads: "An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange ant securities, transactions indirectly affecting foreign exchange and the import and export of currency and bullion, for the conservation of foreign exchange resources of the country and the proper utilisation thereof in the interest of the economic development of the country." We have already referred to Section 76 which emphasises that every permission or licence granted by the Central Government or the Reserve Bank of India should be animated by a desire to conserve the foreign exchange resources of the country. The Foreign Exchange Regulation Act is, therefore, clearly a statute enacted in the national economic interest. When construing statutes enacted in the national interest, we have necessarily to take the broad factual situations contemplated by the Act and interpret its provisions so as to advance and not to thwart the particular national interest whose advancement is proposed by the legislation. Traditional norms of statutory interpretation must yield to broader notions of the national interest. If the legislation is viewed and construed from that perspective, as indeed it is imperative that we do, we find no difficulty in interpreting 'permission' to mean 'permission', previous or subsequent, and we find no justification whatsoever for limiting the expression 'permission' to 'previous permission' only. In our view what is necessary is that the permission of the Reserve Bank of India should be obtained at some stage for the purchase of shares by non-resident companies.

84. On an overall view of the several statutory provisions and judicial precedents, it is clear that a shareholder has an undoubted interest in a company, an interest which is represented by his share holding. Share is movable property with all the attributes of such property. The rights of a share holder are (i) to elect directors and thus to participate in the management through them; (ii) to vote on TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 resolutions at meetings of the company; (iii) to enjoy the profits of the company in the shape of dividends; (iv) to apply to the court for relief in the case of oppression; (v) to apply to the court for relief in the case of mismanagement; (vi) to apply to the court for winding up of the company; and (vii) to share in the surplus on winding up. A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register. A transfer effective between transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company's register. Indeed until the transfer is registered in the books of the company, the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares. However, on the transfer of shares, the transferee becomes the owner of the beneficial

interest though the legal title continues with the transferor. The relationship of trustee and `cestui que trust' is established and the transferor is bound to comply with all the reasonable directions that the transferee may give. He also becomes a trustee of the dividends as also of the right to vote. The right of the transferee "to get on the register" must be exercised with due diligence and the principle of equity which makes the transferor a constructive trustee does not extend to a case where a transferee takes no active interest "to get on the register". Where the transfer is regulated by a statute, as in the case of transfer to a non-resident which is regulated by the Foreign Exchange Regulation Act, the permission, if any, prescribed by the statute must be obtained. In the absence of the permission, the transfer will not clothe the transferee with the "right to get on the register" unless and until the requisite permission is obtained. A transferee who has the right to get on the register, where no permission is required or where permission has been obtained, may ask the company to register the transfer and the company who is so asked to register the transfer of shares may not refuse to register the transfer, except for bona fide reason, neither TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 arbitrarily, nor for any collateral purpose. The paramount consideration is the interest of the company and the general interest of the shareholders. On the other hand, where, for instance, the requisite permission under FERA is not obtained, it is open to the company, and indeed, it is bound to refuse to register the transfer of shares of an Indian company if favour of a non-resident. But once permission is obtained, whether before or after the purchase of the shares, the company cannot, thereafter refuse to register the transfer of shares. Nor is it open to the company or any other authority or individual to take upon itself or himself, thereafter the task of deciding whether the permission was rightly granted by the Reserve Bank of India. The provisions of the Foreign Exchange Regulation Act are so structured and woven as to make it clear that it is for the Reserve Bank of India alone to consider whether the requirements of the provisions of the Foreign Exchange Regulation Act and the various rules, directions and orders issued from time to time have been fulfilled and whether permission should be granted or not. The consequences of non-compliance with the provisions of the Act and the rules, orders and directions issued under the Act are mentioned in Sections 48, 50, 56 and 63 of the Act. There is no provision of the Act which enables an individual or authority functioning outside the Act to determine for his own or its own purpose whether the Reserve Bank was right or wrong in granting permission under section 29(1) of the Act. As we said earlier, under the Scheme of the Act, it is the Reserve Bank of India, that is constituted and entrusted with the task of regulating and conserving foreign exchange. If one may use such an expression, it is the `custodian-general' of foreign exchange. The task of enforcement is left to the Directorate of Enforcement, but it is the Reserve Bank of India and the Reserve Bank of India alone that has to decide whether permission may or may not be granted under section 29(1) of the Act. The Act makes it its exclusive privilege and function. No other authority is vested with any power nor may it assume to itself the power to decide the question whether permission may or may not be granted or whether it ought or ought not to have been granted. The question may not be permitted to be raised either directly or collaterally. We do not, however, rule out the limited class of cases where the grant of permission by the Reserve Bank may be TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 questioned, by an interested party in a proceeding under Article 226 of the Constitution on the ground that it was mala fide or that there was no application of the mind or that it was opposed to national interest as contemplated by the Act, being an contravention of the provisions of the Act and the rules, orders and directions issued under the Act. Once the permission is granted by the Reserve Bank of India, ordinarily it is

not open to anyone to go behind the permission and seek to question it. It is certainly not open to a company whose shares have been purchased by a non-resident company to refuse to register the shares ever after permission is obtained from the Reserve Bank of India on the ground that permission is obtained from the Reserve Bank of India on the ground that permission ought not to have been granted under the FERA. It is necessary to remind ourselves that the permission contemplated by Section 29 (1) of the Foreign Exchange Regulation Act is neither intended to nor does it impinge in any manner on any legal right of the company or any of its shareholders. Conversely, neither the company nor any of its shareholders is clothed with any special right to question any such permission." and proceeds to point out that without the permission of `Reserve Bank of India', which is necessary, the `Holder' of `Shares', is not clothed with the right to enter the `Register of Members' and till the time, the permission of `Reserve Bank of India' is secured, it is the duty of the `Board of Directors', to refuse `Registration of Shares'.

135. The Learned Counsel for the Appellants urges that the `Tribunal' had not recorded its finding `on satisfaction of the `Just and Equitable Ground', to Windup the Company', while passing the `impugned order' in the main Company Petition and in the absence of the same, it issued further directions either in regard to the `Restoration of Shares' or in TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 regard to the `Appointment of Directors' or `Alteration to the Articles of Association' of `Kumudam'.

136. The Learned Counsel for the Appellants seeks in aid of the decision of the Hon'ble Supreme Court of India in Tata Consultancy Services Limited v. Cyrus Investments Private Ltd. & Ors., reported in 2021 9 SCC at Page 499, wherein at paragraphs 15.26, 15.27, 16.2, 16.43 to 16.54, it is observed and held as under:

> 15.26 ``The change of language and the consequential change of parameters for an inquiry relating to oppression and mismanagement from 1951 to 1956 and from 1956 to 2013 and thereafter can be best understood, if the anatomy of the statutory provisions are dissected and presented in a table:□1913 Act 1956 Act 2013 Act (After the Amendment (with the Amendment Act 52 of 1951) made under Act 53 of 1963) (1)Company's affairs (1)Company's affairs (1)Company's affairs are being conducted in are being conducted in have been or are being a manner - a manner - conducted in a manner-

(a)Prejudicial to the (a)Prejudicial to public (a)Prejudicial to any company's interest; interest; member or members;

or	or	(b)Prejudicial to public interest;
(b)Oppressive to some part of the members;	(b)Oppressive to any member or members;	or
and	or	(c)Prejudicial to the interests of the company;
(2)Winding up will unfairly and materially	(c)Prejudicial to the interests of the	or
		(d)Oppressive to any

prejudice the interests of the company's or any company; and member or members. (2)Winding up will

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 part of its members; (2) Winding up will unfairly prejudice such unfairly prejudice such member or members.

(3)The object should be member or members.

to bring to an end, the matters complained of.

15.27 From the table given above, it could be seen that the changes brought about in India in course of time, were material. These changes can be summarised as follows:

> (i) While the conduct of the company's affairs in a manner that warrant interference, should be "present and continuing", under the 1913 Act and 1956 Act, as seen from the usage of the words "are being", the conduct could even be "past or present and continuous"
>
> under the 2013 Act as seen from the usage of the words "have been or are being" (But the conduct cannot be of a distant past);
>
> (ii) Prejudice to public interest and prejudice to the interests of any member or members were not among the parameters prescribed in the 1913 Act, but under the 1956 Act prejudice to public interest was included both under the provision relating to oppression and also under the provision relating to mismanagement. Prejudice to the interest of the company was included only in the provision relating to mismanagement. But under the 2013 Act conduct prejudicial to any member or prejudicial to public interest or prejudicial to the interest of the company are all added along with oppression;
>
> (iii) Under the 1913 Act, the Court should be satisfied that winding up under the just and equitable clause will not only unfairly prejudice but "also materially prejudice" the interests of the company or any part of its members. But in the 1956 Act and 2013 Act, the words "and materially" do not follow the word "unfairly". Moreover, under the 1956 Act and 2013 Act all that is required to be seen is whether the winding up will unfairly prejudice "such member or members" indicating thereby that the focus was on complaining/affected members.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 16.2 An analysis of the provisions of Section 241(1)(a) read with clauses (a) and (b) of Sub□section (1) of Section 242 shows that a relief under these provisions can be granted only if the Tribunal is of the opinion -

> "(1) that the company's affairs have been or are being conducted in a manner -

(a) Prejudicial to any member or members or

(b) Prejudicial to public interest or

(c) Prejudicial to the interests of the company or

(d) Oppressive to any member or members and (2) that though the facts would justify the making of a winding up order on the basis of just and equitable clause, such a winding up would unfairly prejudice such member or members.

16.43 Interestingly, NCLAT has recorded a finding, though not based upon any factual foundation, that the facts otherwise justify the making of a winding up order on just and equitable ground. But as held by the Privy Council in Loch v. John Blackwood 6, "there must lie a justifiable lack of confidence in the conduct and management of the company's affairs, at the foundation of applications for winding up." More importantly, "the lack of confidence must spring not from dissatisfaction at being out□voted on the business affairs or on what is called the domestic policy of the company". But, "wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter."

16.44 A passage from the opinion of Lord President of the Court of Session (Lord Clyde) in Baird v. Lees1 quoted in Loch (supra), reads as follows:□"A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company."

16.45 If the above tests are applied, the case on hand will not fall anywhere near the just and equitable standard, for the simple reason that it was the very same complaining minority whose representative was not merely given a berth on the Board but was also projected as the successor to the Office of Chairman. 16.46 In Ebrahimi v. Westbourne Galleries Ltd.8, decided by House of Lords, one of the Directors who was voted out of office by the other two Directors (father□son duo) petitioned for an order under Section 210 of the English Companies Act, 1948. The very relief sought by the ousted director was for a direction to the other two persons to purchase his shares in the Company or to sell their shares to him on such terms as the Court should think fit. Alternatively, he prayed for winding up. The Court of the first instance held that a case for winding up had been made out, as the majority was guilty of abuse of power and a breach of good faith which the partners owed to each other not to exclude one of them from all participation in the business. The court of Appeal

reversed it by applying the tests of (i) bonafide exercise of power in the interest of the company; and (ii) whether a reasonable man could think that the removal was in the interest of the Company. While TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 reversing the decision of the Court of Appeal, the House of Lords held, that "the formula 'bonafide interest of the company' should not become little more than an alibi for a refusal to consider the merits of the case." Holding that, "equity always does enable the Court to subject the exercise of legal rights to equitable considerations namely considerations that is of a personal character", the House of Lords added some caution in the following words:□"The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre□existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

16.47 But it must be remembered that the origin of just and equitable clause is to be traced to the Law of Partnership which has developed, according to the House of Lords, "the conceptions of probity, good faith and mutual confidence". Having said that, Ebrahimi pointed out that the reference to quasi partnerships or "in□substance partnerships" is also confusing for the reason that though the parties may have been partners in their 'Purvashrama', they had become co□members of a company accepting new obligations in law. Therefore, "a company, however small, however domestic, is a company and not a partnership or even a quasi partnership".

16.48 That, "for superimposing an equitable fetter on the exercise of the rights conferred by the Articles of Association, there must be TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 something in the history of the company or the relationship between the shareholders", is fairly well settled 9.

16.49 In Lau v. Chu10, the House of Lords indicated, "that a just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap". The first of these is labelled as, "functional dead lock", where the inability of members to cooperate in the management of the company's affairs leads to an inability of the company to function at Board or shareholder level. The House of Lords pointed out that functional dead lock of a paralysing kind was first clearly recognised as a ground for just and equitable winding up In Re Sailing Ship Kentmere Co.11. The second of these is where a company is a corporate quasi partnership and an irretrievable breakdown in trust and confidence between the participating members has taken place. In the first type of these cases, where there is a complete functional dead lock, winding up may be ordered regardless whether the company is a quasi partnership or not. But in the second type of cases, a breakdown of trust and confidence is enough even if there is not a complete functional dead lock.

16.50 Therefore, for invoking the just and equitable standard, the underlying principle is that the Court should be satisfied either that the partners cannot carry on together or that one of them

cannot certainly carry on with the other12.

16.51 In the case in hand there was never and there could never have been a relationship in the nature of quasi partnership between the Tata Group and S.P. Group. S.P. Group boarded the train half□way through the journey of Tata Sons. Functional dead lock is not even pleaded nor proved.

16.52 Coming to the Indian cases, this court held in Rajahmundry Electric Supply Corpn. Ltd. v. Nageshwara Rao13 that for the invocation of just and equitable clause, there must be a justifiable lack of confidence on the conduct of the directors, as held. A mere lack of confidence between the majority shareholders and minority TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 shareholders would not be sufficient, as pointed out in S.P. Jain v. Kalinga Tubes Ltd.14 16.53 It was contended repeatedly that lack of probity in the conduct of the directors is a sufficient cause to invoke just and equitable clause. Drawing our attention to the landmark decision in Needle Industries (India) Ltd. and Ors. v. Needle Industries Newey (India) Ltd. and ors.15, it was contended that even the profitability of the company has no bearing if just and equitable standard is fulfilled and that the test is not whether an act is lawful or not but whether it is oppressive or not.

16.54 But all these arguments lose sight of the nature of the company that Tata Sons is. As we have indicated elsewhere, Tata Sons is a principal investment holding Company, of which the majority shareholding is with philanthropic Trusts. The majority shareholders are not individuals or corporate entities having deep pockets into which the dividends find their way if the Company does well and declares dividends. The dividends that the Trusts get are to find their way eventually to the fulfilment of charitable purposes. Therefore, NCLAT should have raised the most fundamental question whether it would be equitable to wind up the Company and thereby starve to death those charitable Trusts, especially on the basis of un□charitable allegations of oppressive and prejudicial conduct. Therefore, the finding of NCLAT that the facts otherwise justify the winding up of the Company under the just and equitable clause, is completely flawed."

137. The Learned Counsel for the Appellants brings to the notice of this `Tribunal' that a `Civil Suit' in C.S. No. 139 of 2012, on the file of Hon'ble Madras High Court was filed by the 1st Respondent / 1st Petitioner against the 4th Appellant / 1st Respondent / Company (M/s. Kumudam Publications Pvt. Ltd.), Represented by its Managing Director TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Mrs. A. Kothai (2nd Respondent / 2nd Petitioner) and an `Application No. 4914 of 2016' was filed by the 1st Respondent / 1st Petitioner / Applicant, seeking permission being granted to him to withdraw the Prayers (b), (c),

(d) and (e), forming part of the Claim in C.S. No. 139 of 2012 and the said Prayers in the said Suit were granted by the Hon'ble High Court in allowing the said `Application'. Hence, a `plea', is taken on behalf of the Appellants. The Respondents / Petitioners cannot be permitted to re- agitate the correctness of the Resolution dated 20.09.2011.

138. The Learned Counsel for the Appellants comes out with an emphatic plea that at the instance of Respondents / Petitioners MA/543/2019 in TCP/26/2018 (CP/54/2012), on the file of the National Company Law Tribunal, Division Bench, Chennai) was filed and on 24.06.2019, the `Tribunal' had

passed an `Order of Restraint' on holding of any `Annual General Meeting' and consequently no `Accounts' could be either prepared or approved by the `Shareholders'. Furthermore, it is the stand of the `Appellants' that the `Purported Non-compliance with the requirements of Law', having resulted from an `Order' of a `Tribunal' `will not and cannot operate to prejudice the Appellants' Rights'. Therefore, the stand of the Respondents / Petitioners that the Appellant Nos. 1 and 2 are disqualified, as per Sections 164 and 167 of the Companies Act, 2013, is an `incorrect' and an `untenable' one. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

139. The Learned Counsel for the Appellants contends that the Civil Suit CS 139 of 2012 was filed on 24.02.2012 and facts till 24.02.2012 that existed were mentioned in the `Plaint', but no release were sought for. Also no `Leave' to omit the `Reliefs', as required under Order II Rule 3 Civil Procedure Code was obtained in CS 139 of 2012 and as such, when the Respondents in the instant `Appeal', as per Order dated 26.05.2015, passed by the `Company Law Board', `withdrew certain limits' from the CS 139 of 2012, on the file of the Hon'ble Madras High Court which reliefs were overlapping with similar reliefs prayed for in the main Company Petition, however, the facts constituting the `cause of action' was not deleted / amended from the CS No. 139 of 2012.

140. It is represented on behalf of the Appellants that the `Company Law Board' in Para 21 of its `Order' dated 26.05.2015, had noticed that there was a complete commonality of the `cause of action' in the `Suit' and in the Company Petition and further that the `withdrawal of reliefs', without any liberty to agitate the same in the `Company Petition'. Therefore, clearly establishes that the Company Petition Viz. TCP/26/2018 (CP 54 of 2012) is barred, as Order II Rule 2 of Civil Procedure Code, as the issues raised in the CS No. 139 of 2012 and in TCP/26/2018 (CP 54 of 2012) are common and are predicated on the same set of facts.

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141. The Learned Counsel for the Appellants refers to the judgment of the Hon'ble Supreme Court of India in Civil Appeal No. 6372 of 2012 (Arising out of SLP (Civil) 1088 of 2010) between Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited, wherein at Paragraph 16, it is observed and held as under:

> 16. ``The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in the case of R.Vimalchand and M.Ratanchand v.

Ramalingam, T.Srinivasalu & T. Venkatesaperumal (supra), holding that the provisions of Order II Rule 2 of the CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order II, Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order II Rule 2 of the CPC as already discussed by us, namely, that Order II Rule 2 of the CPC seeks to avoid multiplicity of litigations on same cause of

action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order II Rule 2 of the CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order II, Rule 2 of the CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in Murti v. Bhola Ram[7] and by the Bombay High Court in Krishnaji v. Raghunath[8]." TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

142. The Learned Counsel for the Appellants submits that in the `Board Meeting', purported to have been held by `Respondents'/`Petitioners' in the instant `Appeal' on 26.09.2011 (to nullify the Resolutions passed by `Kumudam' on 20.09.2011) a `Disclosure' was made that a `Board Meeting' was held on 23.04.2010 and the `Minutes of the said Board Meeting' of 23.04.2010 were sought to be approved. The date of this `Alleged Meeting' is also suspect as at some places, the Respondents / Petitioners had referred to the `Meetings', held on 22.04.2010 or 24.04.2010, whereas in the Notice of the Board Meeting of 26.09.2011, the reference of the Board Meeting Date was mentioned as 23.04.2010. In fact, the Appellants are unaware of any such meeting, ever been held and till date, the Minutes of any such `Purported Meeting' have not been produced / disclosed'.

143. The Learned Counsel for the Appellants points out that in the Board Meeting of 26.09.2011, a `Resolution' is purported to have been passed to keep in abeyance Articles 31 (a), 32 and 39 (b) of the `Articles of Association' allegedly to give effect to a private arrangement (Memorandum of Understanding dated 15.08.2010). Moreover, according to the `Appellants', the `1st Appellant / 2nd Respondent' was intimated through a Letter dated 27.09.2011 as an `Extract' of the `Decision' taken in the said `Meeting', despite the fact that the `Minutes of the Alleged TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Board Meeting of 26.09.2011', were not placed on `Record'/`Disclosed', in any of the `Proceedings'.

144. On behalf of the Appellants, it is projected before this `Tribunal' that the `Extract' quoted of the Purported Board Meeting of 26.09.2011 refers to suspension of two employees and seeks to reinstate them and in fact, the Suspension Letter dated 26.09.2011 was in fact served on the employees only on 27.09.2011, which reflects clearly that the falsification of the `Minutes of the Purported Board Meeting' said to have been held by the `Respondents' / `Petitioners'.

145. The Learned Counsel for the Appellants submits that the `Suit' in O.S.No.7554 of 2011 before the City Civil Court, Chennai, was filed by the `2nd Respondent / 2nd Petitioner', representing herself, as `Managing Director of Kumudam', against the `Principal Bankers of Kumudam' i.e., Indian Bank, without arraying the `1st Appellant / 2nd Respondent' or `Kumudam' and by an `Order' dated 27.04.2012 in I.A. No. 16197 of 2011 in O.S. No. 7554 of 2011, it was held by the Civil Court that the Alleged Board Meeting dated 26.09.2011 was `Unsustainable in Law'.

146. According to the Learned Counsel for the Appellants, the Respondents / Petitioners preferred a `Civil Miscellaneous Appeal No. 37 of 2012' (against the `Order' dated 27.04.2012 in I.A. No. 16197 of 2011 TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 in O.S. No. 7554 of 2011),

before the City Civil Court, Chennai, which was dismissed on 05.10.2012 and ultimately the Respondents withdrew the `Original Suit No. 7554 of 2011 on 11.11.2013' in effect, the `Alleged Board Meeting of 26.09.2011', purported to have been held by the Respondents / Petitioners, being `non-est in the eye of law', had attained `finality'.

147. The Learned Counsel for the Appellants submits that in a `Notice' convening the `Board Meeting of 10.10.2011, it was sought to be contended by the 2nd Respondent that at `Board Meetings' alleged to have taken place on 22.04.2010 and 24.06.2010, Article 31 (a) and 39 (b) of the Articles of Association were kept in abeyance and a new Chairman was to be elected and referred to the requisition for the said purpose. But, till date, the `Requisition' was not `disclosed' and further the Respondents had not specifically contended that they had really conducted the `Board Meeting' on 10.10.2011. In short, it is the plea of the `Appellants' that the `Purported Meeting of 26.09.2011' was intended to be a complete `Usurpation of Management Rights', even though as per the `Respondents / Petitioners', under the `Articles of Association of Kumudam', the `1st Appellant / 2nd Respondent' has absolute `Rights of the Management of Kumudam'.

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148. The clear cut stand of the Appellants is that, the `Entrenched Rights of Management', could not be taken away by `Altering the Articles', unilaterally, and illegally as was endeavoured by the `Respondents / Petitioners'. If the 1st Respondent / 1st Petitioner had no `Right on the Register of Members', he cannot be heard to complain about `ceasing to be a Shareholder'.

149. As regards the `Amendment to Articles of Association' by amending / inserting Article 31 (a), 32 and 39 (b) vesting `Management Rights' in the hands of the 1st Appellant / 2nd Respondent, was with unanimous concern and hence, no objection, to the same can be raised by the `Respondents / Petitioners', and that too, when both sides are `Parties' to the `Amendment to the Articles of Association', and they could not be heard to complain in regard to the `Amendments', at a later point of time, after a `Decade'.

150. The Learned Counsel for the Appellants contends that the Respondents / Petitioners, in the `Company Petition', that the `Amendments' to the `Articles', vesting `Management Rights' in favour of the `1st Appellant / 2nd Respondent' were given effect to, by taking undue advantage of the 1st Respondent / 1st Petitioner's absence from India and hence, the `Amendment of Articles' itself to be an `act of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 oppression'. However, the Respondents / Petitioners had accepted that they had consented to the `Amendments to the Articles' (during arguments), but submitted that the said `Amended Articles', were used oppressively, against them.

151. The Learned Counsel for the Appellants points out that a `Casting Vote' was used for `Adoption of Accounts', at the `Board Meeting' that took place on 22.12.2008 and 22.12.2009 and in respect thereof, the `Accounts' for the Year ending 31.03.2008 were allowed to be `Adopted' at the `Annual General Meeting' that took place, pursuant to the `Board Meeting' of 22.12.2008, where the `Respondents / Petitioners', had `abstained from voting', purportedly, in the `interest of Kumudam'

and permitted `Adoption of Accounts'.

152. On another occasion, a `Casting Vote', according to the `Appellants' was used, in regard to the `Adoption of Accounts' at the `Board Meeting' held for the `Accounts', prepared for the Financial Year 31.03.2009, but the Accounts could not be adopted as the Respondents / Petitioners had `Voted against these Accounts', at the `Extra-Ordinary General Meeting' that took place on 24.12.2009. Moreover, no `Personal Benefit' was derived by the 1st Appellant / 2nd Respondent by the use of `Casting Vote'.

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153. The Learned Counsel for the Appellants submits that the `Tribunal' in the `impugned order' dated 27.05.2020 (delivered on 01.06.2020) had permitted the `Respondents / Petitioners' in Company Petition, to `Appoint Four Directors', by citing proportionate Representation, purportedly as `Representative of the Majority Shareholders', on the `Board of Kumudam', had granted an `Order', which goes beyond the `Relief' prayed for, by the `Respondents / Petitioners'.

154. The Learned Counsel for the Appellants projects an `Argument' that the `Tribunal' had failed to `Appreciate' that the `Article 29' of the `Articles of Association' limits the `Appointment of Directors', to a `maximum of Four', excluding any `Ex-officio Directors', nominated by any `Financial Institution' and / or `Banks'.

155. The Learned Counsel for the Appellants points out that if the `impugned order' of the `Tribunal' is to be implemented, it will result in `Excess of the Constitution', permitted by the `Articles of Association'. Besides this, the `Tribunal', had not issued any direction, for altering the `Article 29' of the `Articles of Association' of the company.

156. The Learned Counsel for the Appellants contends that the directions issued by the `Tribunal', in `permitting the Nomination of Persons as Directors of Kumudam', will be in negation to Clause 33 of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the Articles of Association', which `mandates Minimum Share Qualification' for being `Appointed as Directors of Kumudam'. In reality, there was no direction issued by the `Tribunal' for altering the `Article 33' of the Articles of Association'.

157. The Learned Counsel for the Appellants points out that the `1st Appellant', became a `Director', in the Company, in the year 1990 itself, and was appointed, to manage the affairs of the `Company'. In fact, the appointment of the `1st Respondent / 1st Petitioner' as a `Director', was in the year 1994, after the death of Mr. SAP Annamalai. Moreover, as per the `Annual Return', filed as of 28.09.1990, for the year ending March 1990, the `2nd Respondent / 2nd Petitioner' (now deceased) and Mr. P.V. Sowmyanarayanan (uncle) of the `1st and 2nd Appellants', had `vacated Office', on 03.07.1990, and the `1st Appellant / 2nd Respondent' and Mrs. P.V. Saroja (Mother of Appellant Nos. 1 and 2 were appointed as `Directors' of `Kumudam'. Even, in the year 1990-91, according to the `Appellants', the majority representation, on the `Board' of the `Company', was that of `Appellants' family and not of `Respondents' family.

158. The Learned Counsel for the Appellants, while rounding up, submits that the `Tribunal' had passed the `impugned order' dated TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 27.05.2020 (delivered on 01.06.2020), after reserving the orders in the Main Company Petition TCP/26/2018 (CP/54/2012) on 14.06.2019. Appellants' Decisions:

> 159. The Learned Counsel for the Appellants relies on the decision of the Hon'ble Supreme Court of India in Income Tax Officer Circle I (2), Kumbakonam & Another v. V. Mohan & Another (2021) SCC Online 1240, wherein at Paragraphs 46, 57 & 67, it is observed as under:
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> 46. ``On the literal construction of this provision, it must follow that it shall not be lawful for any person (as defined in Section 2(2) of the 1976 Act) to whom the Act applies to hold any illegally acquired property (as defined in Section 3(1)(c) of the 1976 Act) either by himself or through any other person on his behalf. It is well settled that when penalty (such as forfeiture of such property) is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable. Such acts of commission and omission become void even without express declaration regarding its voidness, because such penalty implies a prohibition26. Be it noted that Section 4 of the Act posits a clear mandate that the person to whom the Act applies shall not hold any illegally acquired property and there person to whom the Act applies shall not hold any illegally acquired property and there is a corresponding duty on the Competent Authority to initiate process after due inquiry under Section 18 of the 1976 Act for forfeiture of such property_ whether acquired before the commencement of the Act or thereafter.
>
> 57. In the first part of Section 6(2), the expression used is "any person". That is a person to whom primary notice under Section 6(1) is addressed. This person can be none other than person TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 referred to in Section 2(2) of the 1976 Act. He can be a convict or detenu, his relative or associate including the person who is a holder of the property in question at the relevant time. Section 6(2) then refers to the subject property in the notice and the factum of the property being held by concerned person (such person) --

either the primary noticee to whom the Act applies himself or through "any other person" on his behalf. The latter is described as "such other person", in the concluding part of that sub□Section [Section 6(2)]. That, "such other person", is also covered within the ambit of expression "any other person" mentioned earlier and holding the property in question on behalf of the primary noticee. In other words, "such other person" will be a person other than a person to whom the Act applies being merely a holder of illegally acquired property on behalf of the person to whom Act applies. Thus, he may be a person other than a person referred to in Section 2(2) of the 1976 Act. The legislative intent is to cover "such other person" so as to reach up to "illegally acquired property" of the convict/detenu and unravel/lift the veil created by the person to whom the Act applies. We may usefully recapitulate the enunciation of the Constitution Bench, wherein it is held that the legislative

intent is to reach to all illegally acquired properties in whosoever's name they are kept or by whosoever they are held irrespective of the time period of such acquisition. This is to ensure that the persons to whom the Act applies referred to in Section 2(2), do not use mechanism to shield illegally acquired properties from the proposed action of forfeiture.

67. A priori, we are of the considered opinion that Section 6(1) of the 1976 Act nowhere provides that it is "mandatory" to serve the convict or detenu with a primary notice under that provision whilst initiating action against the relative of the convict. Indubitably, if the illegally acquired property is held by a person in his name and is also in possession thereof, being the relative of the convict and who is also a person to whom the Act applies, there is no need to issue notice to the convict or detenu much less primary notice as held by the High Court in the impugned judgment. For, Section 6(1) posits that notice must be given to the person who is holding TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the tainted property and is likely to be affected by the proposed forfeiture of the property. The person immediately and directly to be affected is the person who is the recorded owner of the property and in possession thereof himself or through some other person on his behalf. In the latter case, the burden of proof under Section 8 is not to be discharged by the convict or detenu, but by the person who holds the illegally acquired property either by himself or through any other person on his behalf."

160. The Learned Counsel for the Appellants cites the decision of the Hon'ble Supreme Court of India in Vijay Karia & Ors., v. Prysmian Cavi E Sistemi SRL & Another, reported in (2020) 1 SCC Page 85 at Spl Pgs:

> 85 to 89 and 101, wherein at Paragraphs 84 to 88 and 101, it is observed as under:
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> Violation of FEMA Rules
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> 84. It has been argued by the appellants, based on the Non-Debt Instrument Rules, that a foreign award by which shares have to be purchased at a discounted value, would violate the aforesaid Rules, and therefore, would amount to a violation of the fundamental policy of Indian law. Resultantly, the appellants contended that as a result of this, the award in the present case would not be enforceable in India.
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> 85. The relevant provisions of the aforesaid rules are set out hereinbelow:
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> "2. Definitions:__ (ac) "investment" means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India;

Explanation:-

> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
>
> (i) Investment shall include to acquire, hold or transfer depository receipts issued outside India, the underlying of which is a security issued by a person resident in

India;

(ii) for the purpose of LLP, investment shall mean capital contribution or acquisition or transfer of profit shares;

3. Restriction on investment in India by a person resident outside India.__Save as otherwise provided in the Act or rules or regulations made thereunder, no person resident outside India shall make any investment in India:

Provided that an investment made in accordance with the Act or the rules or the regulations made thereunder and held on the date of commencement of these Rules shall be deemed to have been made under these Rules and shall accordingly be governed by these Rules:

Provided further that the Reserve Bank may, on an application made to it and for sufficient reasons and in consultation with the Central Government, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.

9. Transfer of equity instruments of an Indian company by or to a person resident outside India.- A person resident outside India holding equity instruments of an Indian company or units in accordance with these rules or a person resident in India, may transfer such equity instruments or units so held by him in compliance with the conditions, if any, specified in the Schedules of these Rules and subject to the terms and conditions prescribed hereunder:

(3) A person resident in India holding equity instruments of an Indian company or units, may transfer the same to a person resident outside India by way of sale, subject to the adherence to entry routes, sectoral caps or investment limits, pricing guidelines and other attendant conditions as applicable for investment by a person resident outside India and documentation and reporting TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 requirements for such transfers as may be specified by the Reserve Bank in consultation with the Central Government from time to time;

21. Pricing guidelines - (1) The pricing guidelines specified in these rules shall not be applicable for any transfer by way of sale done in accordance with Securities and Exchange Board of India regulations where the pricing is specified by Securities and Exchange Board of India.

(2) Unless otherwise prescribed in these rules, the price of equity instruments of an Indian company_

b) transferred from a person resident in India to a person resident outside India shall not be less than__

(iii) the valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with the Securities and Exchange Board of India or a practising Cost Accountant, in case of an unlisted Indian company."

86. Based on the aforesaid Rules, the appellants have argued that the transfer of shares from the Karias, who are persons resident in India, to the Respondent No.1, who is a person resident outside India, cannot be less than the valuation of such shares as done by a duly certified Chartered Accountant, Merchant Banker or Cost Accountant, and, as the sale of such shares at a discount of 10% would violate Rule 21(2)(b)(iii), the fundamental policy of Indian law contained in the aforesaid Rules would be breached; as a result of which the award cannot be enforced.

87. Before answering this question, it is important to first advert to the decision of the Delhi High Court in Cruz40. The learned Single Judge was faced with a similar problem of a foreign award violating the provisions of FEMA. In an exhaustive analysis, the learned Single Judge referred to Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644 and then held: (Cruz TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 case Cruz City 1 Mauritius Holdings v. Unitech Ltd., 2017 SCC OnLine Del 7810 Paras 97-98, 102 & 110) "97. It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.

98. It is necessary to bear in mind that a foreign award may be based on foreign law, which may be at variance with a corresponding Indian statute. And, if the expression "fundamental policy of Indian law" is considered as a reference to a provision of the Indian statue, as is sought to be contended on behalf of Unitech, the basic purpose of the New York Convention to enforce foreign awards would stand frustrated. One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

102. Although, this contention appears attractive, however, fails to take into account that there has been a material change in the fundamental policy of exchange control as enacted under FERA and as now contemplated under FEMA. FERA was enacted at the time when the India's economy was a closed economy and the accent was to conserve foreign exchange by effectively prohibiting transactions in foreign exchange unless permitted. As pointed out TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 by the Supreme Court in LIC v. Escorts Ltd.86, the object of FERA was to ensure that the nation does not lose foreign exchange essential for economic survival of the

nation. With the liberalization and opening of India's economy it was felt that FERA must be repealed. FERA was enacted to replace the Foreign Exchange Regulation Act, 1947 which was originally enacted as a temporary measure. The Statement of Objects and Reasons of FERA indicate that FERA was enacted as the RBI had suggested and Government had agreed on the need for regulating, among other matters, the entry of foreign capital in the form of branches and concerns with substantial non-resident interest in them, the employment of foreigners in India etc.

110. The contention that enforcement of the Award against Unitech must be refused on the ground that it violates any one or the other provision of FEMA, cannot be accepted; but, any remittance of the money recovered from Unitech in enforcement of the Award would necessarily require compliance of regulatory provisions and/or permissions."

88. This reasoning commends itself to us. First and foremost, FEMA - unlike FERA - refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being the Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of the Reserve Bank of India may be obtained post-facto if such violation can be condoned. Neither the award, nor the agreement being enforced by the award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 market value, the Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach. Further, even if the Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or Rule would not arise as the award does not become void on that count. The fundamental policy of Indian law, as has been held in Renusagar (supra), must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground." V. Perverse Interpretation of the JVA

101. According to Dr. Singhvi, the tribunal's interpretation of clause 21 of the JVA is perverse. As has been held, referring to some of the judgments quoted hereinabove, in particular Shri Lal Mahal Ltd. v. Progetto Grano SpA, (2014) 2 SCC 433; the interpretation of an agreement by an arbitrator being perverse is not a ground that can be made out under any of the grounds contained in Section 48(1)(b). Without therefore getting into whether the tribunal's interpretation is balanced, correct or even plausible, this ground is rejected."

161. The Learned Counsel for the Appellants refers to the decision of the Hon'ble Supreme Court of India Raja Ram Kumar Bhargava (dead) by LRs v. Union of India 1988 (1) SCC at Page 681 at Spl Pgs: 688 & 689, wherein at paragraph 19, it is observed as under:

> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
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> 19. .....``Generally speaking the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provides a machinery for the enforcement of the right, both the right and the remedy having been created uno-flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil courts' jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil court's jurisdiction, then both the common law and the statutory remedies might become concurrent remedies leaving open an element of election to the persons of inherence. To what extent, and on what areas and under what circumstances and conditions, the civil court's jurisdiction is preserved even where there is an express clause excluding their jurisdiction, are considered in Dhulabhai case."

162. The Learned Counsel for the Appellants refers to the decision of the Hon'ble High Court of Calcutta in Vikram Jairath & Ors. v. Middleton Hotels Pvt. Ltd. & Ors., (2019) SCC OnLine Cal. 6663, wherein at Paragraphs 71 to 75, it is observed as under:

> 71. ``Transferring a share involves a series of steps - first the parties must have an agreement to sell (Share Transfer Deed), then there must be an execution of a deed of transfer and finally registration of the transfer. The first two steps are not enough to make the transferee a member of a company. Neither the agreement to transfer nor the delivery of the signed transfer form and share certificate (or share scrips) will pass legal title to the transferee (though it may pass an equitable interest in the shares to the transferee). The normal rule is that a person becomes a member of a company and the legal owner of the shares when they have agreed on the transfer, and the transfer has been subsequently TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 carried out and the transferee's name has been entered into the register of members of the company (See Gower Principles of Modern Company Law (Tenth Edition) Chap 27-8 (pg. 902)). It follows from this that the mere transfer of the share certificate (or share scrip) without the registration of the transferee in the register of members does not make the transferee a member of the company. If the company rejects or refuses to register a person who seeks to be registered, an appeal mechanism is provided for under limited grounds in section 59 of the Companies Act 2013.

For the instant proceeding, however, it may be important to determine the precise legal position of the transferor and transferee pending registration of the transfer which, for a number of reasons

(like, the internal policies of the company on restrictions and transferability), may never occur. As noted hereinabove, only if and when the transfer is registered will the transferor cease to be a member and the transferee will become a member and a shareholder. However, notwithstanding that registration has not occurred, the beneficial interest in the shares may have passed from the transferor to the transferee. The English courts have held that if an agreement is followed by the delivery of the signed transfer forms, a beneficial interest would accrue in favour of the transferee, if the agreement is one which the courts would order to be specifically enforced (See Re Kilnoore Ltd (In Liquidation) Unidare Plc v. Cohen [2006] 1 Ch. 489). In Wood Preservation Ltd v. Prior reported at [1969] 1 W.L.R. 1077 CA, it was held that the fact that the agreement is subject to fulfilment of a condition beyond the control of the parties will not prevent it from being specifically enforceable, notwithstanding that the condition has not been fulfilled, if the party for whose benefit the condition was inserted is prepared to waive it. It has been held in Hardoon v. Belilios [1901] AC 118 PC, that where the beneficial interest has passed, in terms of what has been discussed hereinabove, without the transferee's name being registered, the seller/transferor then becomes a trustee for the buyer and must account to him for any dividends he receives and vote in accordance with his instructions. This principle has also been taken note of and approved by our Supreme Court in Howrah Trading (supra).

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72. The relationship between a trustee and cestui que trust as recognized in Mathalone (supra) is quite well established today. Killick Nixon (supra) has also recognized it. However, there are several distinguishing features and differences between Killick Nixon (supra) and the present case. Significantly, the proceeding in the instant case is initiated by filing a suit. The proceeding in Killick Nixon (supra) started with a petition under section 397 and 398 of the Companies Act 1956. At the time when Killick Nixon (supra) was decided, there was no provision analogous to section 430 of the 2013 Act and the company court of the Bombay High Court had the jurisdiction to entertain the petition under section 397 and 398 of the 1956 Act. However, that is not the case today. If the appellant, who claims to be the transferee of the shares, wanted to file an action for oppression and mismanagement through the constructive trustee/respondent nos. 2 to 5, like was done in Killick Nixon (supra), that application would today have to be filed by the constructive trustee/respondent nos. 2 to 5 before the NCLT under sections 241 and 242 of the Companies Act 2013. For this reason, the reliefs claimed in the present suit cannot be granted by this court. The proper application would have to be made before the NCLT.

73. In saying so, we must also add that, in addition to the above, it appears that in the present case, the reliefs claimed are being sought directly against the company/respondent no. 1. In Mathalone (supra) as well as in Killick Nixon (supra), the transferee or the cestui que trust was seeking directions against the company through the transferor/constructive trustee. In Mathalone (supra), Sir Padampat sought reliefs against Mr. Reddy to act on his behalf with respect to the company. In Killick Nixon (supra), the transferee, Dhanraj Mills Pvt. Ltd., was acting through the transferor, Bank of India, and the transferor had stated that it was acting at the behest of the transferee. It can be garnered from these two cases cited by Mr. Saha that the reliefs as sought in this suit could not be granted against the respondent no. 1 at the behest of the appellant, since, to use the phrase from

paragraph 14 of Killick Nixon (supra) which is extracted herein above, "the company... TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 recognises only the person who is its member as a share-holder. In other words, the rights that may exist between the Company and its members or shareholders can be exercised only by members." Therefore, for the transferee to have maintained an action against the company for oppression and mismanagement, the reliefs would have had to be couched in terms through the transferor. However, even then, for the reasons indicated in the preceding paragraph, the proper forum to grant those reliefs would be the NCLT. This is another reason, in addition to the reason given in the paragraph above, for the suit to not be maintainable.

74. Additionally, Mr. Banerjee was quick to point out that if the suit were to be entertained by this court, an anomalous situation could possibly arise. The rights of the appellants as the supposed transferees of shares are predicated on them being able to prove that there was an oral agreement in June 2018 and that signed transfer deeds had been made over to them as security. The respondent no. 2 and 3 had contended first that the transfer deeds were merely for comfort and later that they were not signed. From the records herein, it appears that these were the reasons, amongst others, that weighed with the respondent no. 1 in its refusal to register the shares when called upon by the appellants to do so. Under section 58(5) or 59(2) of the 2013 Act, the NCLT could either dismiss the appeal or it could direct the respondent no. 1 to register the shares. The NCLT would do this after following the procedures and making an inquiry into matters of fact. Towards this end, an application has already been filed by the appellants and the reliefs sought in that application has been reproduced herein above. If the present suit was to be decided by this court, in order to answer the question about whether the appellants are entitled to the reliefs sought in the suit, the court would have to go into an inquiry as to the very same facts which the NCLT is already looking into in the application under section 58 and 59 of the 2013 Act. This may result in a situation where, hypothetically, the NCLT could dismiss the application and hold that the appellants are not entitled to be registered as members of the company but the court finds, after an inquiry into the facts, that the appellants ought to be TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 deemed as members and then go on to the grant the reliefs claimed in the suit. This would result in an anomalous situation where even though the appellants have been deemed to not be members by the proper forum, it gets the consequential reliefs in the suit. It results in conflict of decision. In order to become eligible and qualify for any reliefs claimed in the petition, the appellant must pass muster the test of establishing a strong prima facie finding that the appellant has now become a beneficial owner of the shares, which finding can be arrived at necessarily by the NCLT for granting any interim relief to the appellant as prayed for in the said proceeding. It was possible for the appellant to claim relief of oppression and mismanagement under sections 241 and 242, with a prayer for exemption under section 244 by way of amendment of the existing pleadings to demonstrate that the transferor is holding the shares in trust for the appellant and any dilution of the present shareholding at present would adversely affect the rights of the appellant as shareholders of the company. It is on demonstration of such an unimpeachable right to the shares that the NCLT may read down sections 241, 242 and 244 of the 2013 Act for the limited purposes of granting interim reliefs as claimed in the company petition. In fact, all the reliefs claimed in the present proceeding can be considered and allowed in the proceeding pending before the NCLT. The NCLT proceeding is a prior proceeding. In Mathalone (supra) and Killick Nixon (supra), the transferor- transferee relationship was clearly established. All parties had understood the relationship between the

constructive trustee and the cestui que trust to have been in place. However, in the present case, the respondent no. 2 and 3 deny that such a relationship exists. This is another reason why it is difficult to adjudicate the issues in the suit in light of the reliefs claimed. If, however, the NCLT does return a positive finding in favour of the appellants in their application under section 58 and 59 of the 2013 Act and directs the company to register them as members of the company, the NCLT could then also adjudicate and decide on the reliefs sought in this suit on the grounds of oppression and mismanagement.

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75. For the aforesaid reasons, no reliefs as prayed for by the appellant can be granted at this stage since the court is of the prima facie view that if does not have the jurisdiction to try, receive and entertain the suit. During the hearing of the appeal, Mr. Saha submitted that after the filing of the civil suit, the appellants discovered that the respondent nos. 2 to 5 had caused the respondent no. 1 company to execute a deed of sub-lease and to enter into two several development agreements in respect of the Middleton Chambers property, which is the sole asset of the respondent no. 1 company. Mr. Saha submitted that the company petition before the NCLT was listed to be heard out sometime in the middle of November 2019 and that this court ought to protect the appellant, in light of such fraud, from having the company proceedings or the suit proceedings being rendered infructuous. In view of my prima facie finding that this court does not have the jurisdiction to grant any of the reliefs prayed for in the plaint and having regard to the fact that all the reliefs claimed in the plaint could be claimed before the NCLT in the pending proceeding and in fact if the prayer made before the NLCT is allowed it could have the same effect or consequence or bearing, I am not inclined to pass any interim order at this stage. The NCLT is in seisin over the matter. I am of the view that the matter in issue in the suit can be more appropriately and effectively decided and adjudicated by the NCLT. Additionally, in the present case, section 430 of the Companies Act 2013 itself provides an additional bar by stating that no injunction shall be granted by any civil court in respect of any action taken or to be taken in pursuance of any power conferred on the NCLT by the Companies Act 2013."

163. The Learned Counsel for the Appellants refers to the decision of this `Tribunal' in Brookfield Technologies Pvt. Ltd. Rep. by Director Mr. Pawan Kumar Jain & Another v. Shylaja Iyer & Ors., (2020) SCC OnLine NCLAT 829, wherein at paragraph 38, it is observed as under:

> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
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> 38. ``Undoubtedly, the burden is on the petitioner to prove oppression or mismanagement and the 'Tribunal' is to consider the entire material on record and to arrive at a final conclusion. The 'Rights Issue' can be examined by the 'Tribunal' in a petition u/s 241 of the Companies Act, 2013. Also, that, in law the Tribunal is to ascertain when the right to sue / to file an application accrued to the petitioner. There is no impediment for the Tribunal to consider the preliminary objections raised by a party at a later stage of the main proceedings. If maintainability is a triable issue, the acceptance of a petition or rejection of the same has to be decided along with the

issues raised, to be heard with the merits of the case in the considered opinion of this Tribunal."

164. The Learned Counsel for the Appellants falls back upon the Order of the Hon'ble High Court of Andhra Pradesh in WP 8085 of 1984 dated 09.04.1985 in M/s. Avanti Explosives (P) Ltd. v. Principal Subordinate Judge, sitting in the Court of the Principal Sub-Judge, Tirupathi, Chitoor District & Another, wherein at paragraph 10, it is observed as under:

10. ``It will be noted that there is no express provision ousting the jurisdiction of the Civil Court in any particular respect. All that Section 10 does is to state that ``the Court'' having jurisdiction under the Act shall be the High Court in whose jurisdiction, the registered office of the Company is situate, except to the extent to which the jurisdiction has been conferred on any District Court under sub-section (2) by notification issued by the Central Government. The Central Government can empower a District to exercise all or any jurisdiction conferred by this Act ``upon the Court'' except the jurisdiction conferred by Section 237, 391, 394, 395 and 397 to 407 (both inclusive) and not being the jurisdiction conferred in respect of Companies with paid-up share capital of not less than Rs. one lakh by Part-VII and the provisions of the Act relating to winding up of companies." TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

165. The Learned Counsel for the Appellants points out the decision in T.M. Paul v. City Hospital Pvt. Ltd. & Ors. (1999) 97 Comp. Cas. at Page 216, wherein at paragraph 14, it is observed as under:

> 14. ..... ``it is clear that when there is no express provision excluding the jurisdiction of the civil courts, such exclusion can be implied only in cases where the right itself is created and the machinery for the enforcement of that right is also provided by the statute. If the right is traceable to general law of contract or it is a common law right, it can be enforced through the civil court even though the forum under the statute also will have jurisdiction to enforce that right. Even the decision in Rajasthan S.R.T. Corporation v. Krishna Kant, (1995) 5 SCC 75 : AIR 1995 SC 1715, where the policy of law emerging from the Industrial Disputes Act and its sister enactments is taken note of and the advantages in approaching the forums like the Industrial Tribunal or the Labour Court are noticed and resort to such forums is directed, the jurisdiction of the civil courts is recognised and the decrees and orders passed by courts are saved."

166. The Learned Counsel for the Appellants refers to the decision of the Hon'ble High Court of Karnataka in Prakash Roadlines Ltd. v. Vijayakumar Narang, reported in ILR 1994 Kar. at Page 408, at Spl pgs:

> 409 & 410, wherein it is observed as under:
>
> ``..... In the very nature of things the remedy provided under Section 397 of the Act and other similar provisions is not available to the individual member immediately since it requires the member to get consent letters of others, in case he is not possessed of the requisite percentage of shareholdings... Section 397 is not an

> effective forum to grant any relief to an individual member under all circumstances. Similar is the situation under Section 398 also.
>
> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Being a constituent of the Company a shareholder has several individual rights and those rights could be enforced by invoking the civil jurisdiction of the Courts. Further, the Act nowhere specifically excludes the jurisdiction of the Civil Courts. It is true that the Company itself is the creation of law. It is an artificial person. But that does not mean that everything connected with the Company and all matters governing the constitution and management of the Company are special rights and liabilities. When a person has contributed to the shareholding of the Company, which is the very basis of the Company, a right to participate in the matter of electing or removing a director should be considered as a right inherent in the member.... The right sought to be enforced in the instant case is an individual right. The two statutory provisions relied upon by the parties, Section 257 and 284 regulate the exercise of the said right. No particular provision of the Act creates a specific jurisdiction to enforce the said right exclusively. Therefore the Civil Suit filed by the plaintiff is maintainable." [Paras - 9, 10, 12, 13 & 18] Respondents' Contentions:

167. The Learned Senior Counsel for the Respondents contends that the `jurisdiction' of the `Enforcement Directorate' and the `Tribunal' operate in `mutually exclusive domain' and that Section 34 of the Foreign Exchange Management Act, 1999, under the caption `Civil Court not to have jurisdiction', enjoins as under:

> `No Civil Court shall have jurisdiction to entertain any suit or possessing in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 (Appeals) is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.'.

168. Further, it is represented on behalf of the Respondents that the crux of the case `involves the purported cancellation by the `Appellants', in respect of the `1st Respondent / 1st Petitioner's Shares' (comprising 64.73% of the `Shareholding' in the Company) and the alleged removal by the `Appellants' of the `Respondents' from the `Directorship', and the `deletion' of certain `Articles of Association', which were `illegal' in the light of `Appellants' actions.

169. The Learned Counsel for the Respondents takes a plea that the `Order' of the Company Law Board' dated 26.05.2015 is only an `Interlocutory Order' and the `Board' had ordered that `Final Adjudication' of the `Company Petition', shall be `deferred', until (i) An `Adjudication' by the `Enforcement Directorate' on the validity of Acquisition of the 1st Respondent / 1st Petitioner's Shareholding in the Company and (ii) An Adjudication on the Prayer for `Withdrawal of certain Reliefs' by the `Respondents / Petitioners' in Civil Suit No. 139 of 2012, before the Hon'ble High Court of Madras (both of them were completed, prior to the `Final Hearing', before the `Tribunal'.

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170. The Learned Counsel for the Respondents urges that the Company Law Board's Order dated 26.05.2015 is not a `Final Order', but only an `Order' passed as an `interim one' and the said `order' had not determined the `Rights of Parties' and that the `National Company Law Tribunal', is not bound by the said `Order' and even the said `Interlocutory Order', does not operate as `Res Judicata', at the time of passing a `Final Order' in the main `Company Petition'.

171. The Learned Counsel for the Respondents projects an argument that the `Company Law Board' had left the question open for the `Enforcement Directorate' to determine `whether the `Board' was justified in determining that the `Issue of Shares' in the `Company' to the `1st Respondent / 1st Petitioner' was `null and void' in view of the `Violation of Foreign Exchange Management Act, 1999'. Also that, there is no finding rendered by any `Authority' that the `Shareholding' of the `1st Respondent / 1st Petitioner' or the `Allotment of Shares', to him in the Company is an `Invalid' or `Void'.

172. The Learned Counsel for the Respondents points out that the `Enforcement Directorate', had imposed `Penalties' on the `Appellants' as well as the `1st Respondent / 1st Petitioner' for `Violation of Foreign Exchange Management Act', which are assailed in `Appeals', preferred TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 by the `Parties' before the `Competent Forum'. Moreover, the `Enforcement Directorate', according to the `Respondents' had placed the blame for the `Violation in Question on the Appellants' and not on the `1st Respondent / 1st Petitioner', by observing as under:

> ``The onus, to adhere to the provisions of rules and regulations of an existing law (FEMA 1999 in this case), which issuing shares of the amalgamated company to non-resident shareholders, lied on the company issuing such shares and not on the individual shareholders. I therefore, do not order for the confiscation of 3,32,640 Shares / Securities of Kumudam Publications Pvt Ltd allotted to noticee no 3 as well as of Rs.2,57,70,498/- representing the annulled shares. However, I order that the above amount lying in the Bank, and interest accrued thereupon as on a date be adjusted against the penalties imposed as above on the noticee company."

173. The Learned Counsel for the Respondents contends that the `Appellant Nos. 1 and 2' are `Disqualified Directors' of the company, in respect of the period from 01.11.2016 to 31.10.2022, due to the `Default', made by the `Company' in filing the `Financial Statements' / `Annual Returns', for a continuous period of `three Financial Years' and hence, they have vacated their Office as `Directors', in terms of the ingredients of Section 167 (1) (a) of the Companies Act, 2013. Besides this, according to the Respondents, they were the Nominee Directors of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the Appellant No.3 and they do not own any Shares in the Company directly. As such, the instant Comp. App. No. TA/283/2018 (Comp. App No. 83 of 2020), filed in the names of the `Appellant Nos. 1 and 2', is not maintainable in `Law'.

174. The Learned Counsel for the Respondents advances an argument that the 1st Appellant / 2nd Respondent (Mr. Varadarajan) had falsely claimed to the Authorised, to file on behalf of the Company as its `Chairman & Managing Director'. Further, the instant `Appeal' is not applicable in company's name and in any event, the Appellant No. 3 is `not adversely affected or aggrieved by the impugned order', as its `Shareholding' is the same.

175. The Learned Counsel for the Respondents brings it to the notice of this `Tribunal' that the 1st Respondent / 1st Petitioner became a `US Citizen' and from 25.05.2016, he is an `Overseas Citizen' and the `1 st Appellant / 2nd Respondent' knew that the 1st Respondent / 1st Petitioner was not a `Resident of India' and that the `Enforcement Directorate' in its `Order' dated 22.05.2017 (in Adjudication Order No. 01JD/HIU/2017/2391 - vide Respondents Convenience Compliance at Vol I - Respondent Submissions) at Page 185 and 186, had observed the following:

> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `` Sh. A. Jawahar Palaniappan i.e., Noticee No. 3 became an NRI after May 1976 and has been residing in U.S.A. and continued to remain so till November 1996 and became an U.S.A. citizen from November 1996 onwards. This fact was not even disputed by Noticee No. 3 and the Noticee No. 3 admitted these facts in his oath statement recorded in on 10.10.2011, before the Deputy Director, Directorate of Enforcement, which is part of the relied upon documents and copies of which were provided to all the Noticees. P. Vardarajan, Director of Kumudam Publication Pvt. Ltd. was in know of the fact that A. Jawahar Palaniappan was a person resident outside India and U.S. Citizen when in the capacity of Managing Director of the company, he issued share certificates to A. Jawahar Palaniappan (AJP) by virtue of which AJP held 66% of shares of the company. His averment that he came to know the non-resident status of noticee no. 3 only at the latter stage is baseless and false as is evident from the GPA dated 21.12.1998 wherein P. Vardarajan signed as a witness which allowed that he (AJP) was residing in U.S.A. i.e. to say he was a person resident outside India."

176. The Learned Counsel for the Respondents points out that the 1st Respondent / 1st Petitioner is a `64.73% Shareholder' of the Company `holding 33,26,040 Shares' and that the `Board Minutes of 20.09.2011, which was the subject matter of challenge in the main Company Petition, purport to cancel the said `Shares' held by the 1 st Respondent / 1st Petitioner and later the remaining 200 Shares were purportedly cancelled TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 and the said cancellation is in violation of Section 100 of the Companies Act, 1956 (Section 66 of the Companies Act, 2013).

177. The Learned Counsel for the Respondents adverts to Section 100 of the Companies Act, 1956 (Special Resolution for Reduction of Share Capital), which runs to the following effect:

> ``(1) Subject to confirmation by the Court, a company limited by Shares or a company limited by guarantee and having a share capital, may, if so authorised by its articles, by special resolution, reduce its share capital..." and submits that the `Cancellation of Shares', is contrary to the `Scheme of Merger' that was approved by

> the `Hon'ble High Court of Madras through `Order' dated 12.04.2011 and if any `Scheme of Merger' is sanctioned once, it is to be implemented in toto' and the `Cancellation of Shares' is an attempt to `Revoke the Scheme'. Further, the `Cancellation of Shares' issued under an `Order of Court' amounts to a `Violation of the Judicial Order'.

178. The Learned Counsel for the Respondents takes a plea that a `Scheme', approved by the `Shareholders' and `Ordered by a Court of Law', is an `Agreement' and a `Decree' and it binds the `Parties'. Furthermore, according to the `Respondents', except `minor corrections', a `Court of Law has no power to alter a Scheme' other than by following the procedure prescribed in the `Legislation'.

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179. In this connection, the Learned Counsel for the Respondents refers to the decision in Castron Technologies Ltd. v. Castron Mining Limited, reported in (2013) SCC OnLine Cal. 12914, wherein at paragraph 19, it is observed as under:

> 19. ``In any event the Scheme of Arrangement or compromise is sanctioned by the Company Court under Section 391 of the Companies Act. Such a scheme can be enforced by the Court under Section 392 of the Companies Act. The Court has the power to supervise the working of the compromise or arrangement, to make such modifications in the compromise or arrangement as necessary for the proper working of the compromise or arrangement under this Section. When a Scheme of Arrangement sanctioned under Section 391 cannot be worked satisfactorily with or without modifications, the Court may, either on its own motion or on the application of a person interested in the affairs of the company, make an order for winding up for the company. In Meghal Homes (P) Ltd. vs. Shree Niwas Girni K.K. Samiti and Others reported in (2007) 7 SCC 753, the Court has held that a modification in the Scheme of Arrangement can be made in accordance with Section 392 for the proper working of the arrangement. The Court cannot make substantial modifications in the scheme which has been approved by the shareholders in terms of Section 391 of the Companies Act. The Court further held as follows:
>
> "54. It was argued on behalf of the respondents that under Section 392 of the Act, the court has the power to make modifications in the compromise or arrangement as it may consider TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 necessary and this power would include the power to approve what has been put forward by LBPL who has come forward to discharge the liabilities of the Company on the rights in the properties of the Company other than in the office building and in the godown, being given to it for development and sale. As we read Section 392 of the Act, it only gives power to the court to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. This is only a power that enables the court to provide for proper

> working of compromise or arrangement, it cannot be understood as a power to make substantial modifications in the scheme approved by the members in a meeting called in terms of Section 391 of the Act.
>
> "55. A modification in the arrangement that may be considered necessary for the proper working of the compromise or arrangement cannot be taken as the same as a modification in the compromise or arrangement itself and any such modification in the scheme or arrangement or an essential term thereof must go back to the General Meeting in terms of Section 391 of the Act and a fresh approval obtained therefor. The fact that no member or creditor opposed it in court cannot be considered as a substitute for following the requirements of Section 391 of the Companies Act for approval of the Compromise or arrangement as now modified or proposed to be modified."

Thus the only way to modify a Scheme of Arrangement which has been sanctioned by the Company Court is to first have the modifications approved by a general meeting of the shareholders of the company and then to submit the modified scheme under Section TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 391 of the Companies Act to the Court for sanctioning the same. Similarly in the case of Unique Delta Force Security P. Ltd. reported in (2012) 175 Company Case 318 (Bom) it has been held that Section 392 is a complete code so far as the power of the Court to deal with a scheme after it has been sanctioned is concerned. The Court has further held that though the Company Court is empowered to give directions and allow modifications of a compromise or arrangement, no powers have been conferred on the Court to recall/rescind/cancel an order sanctioning the compromise or arrangement."

180. The Learned Counsel for the Respondents cites the decision in Premila Devi, Srimati & Ors. v. The Peoples Bank of Northern India Ltd. (1939) Oudh Weekly Notes 249 (PC) at Pages 259 & 260; (Eq. AIR 1938 (PC) 284), wherein it is observed as under:

> ``In view, however, of the binding character of the scheme sanctioned by the Court, no variation of or departure from that scheme could be validated by the mere acquiescence of the shareholders and creditors, as has already been pointed out in an earlier part of their Lordships' judgment. But even if it be assumed that the forfeitures could be made valid by ratification, there is no evidence to which their Lordships' attention has been called to justify the conclusion that such ratification was in fact given. As was said by Lord Chelmsford in Spackman v. Evans L.R. 3 H.L. 171 (p. 234):
>
> ``To render valid an act of the directors of a company which is ultra vires, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz., the acquiescence of each and every member of the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 company. Of course this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders." By

knowledge of the transaction Lord Chelmsford clearly meant knowledge of the invalidity of the transaction. Lord Cranworth in the same case said this (p. 194):_ ``Looking to all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors; provided it be clear that the shareholders knew that they were illegal or irregular....." Much to the same effect was said by Sir Barnes Peacock in delivering the judgment of this Board in the case of Irvine v. Union Bank of Australia (2 App. Cas. 366 (p. 375):

``Their Lordships think that it would be competent for a majority of the shareholders present..., at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting.'' There can in truth be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. In the present case there is nothing whatsoever to show that in the balance sheets or reports or at any meeting, the attention of the creditors or shareholders was called to any illegality or irregularity in the forfeitures of the shares, or that at any material time they had any knowledge of any such illegality or irregularity. Least of all were they told that they were being invited by their silence or otherwise to ratify the forfeitures that TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 had taken place. It was on these grounds that the plea of ratification was rejected, and in their Lordships' opinion was rightly rejected, by the learned Judges of the High Court."

181. The Learned Counsel for the Respondents contends that the `Company' / `Board of Directors', had no `Authority', to remove the 1st Respondent / 1st Petitioner's name from the `Register of Members' and a `Company' could have rectified its `Register of Members', only by applying under Section 111 (4) of the Companies Act, 1956 (Section 59 (1) of the Companies Act, 2013.

182. The Learned Counsel for the Respondents cites the decision of the Hon'ble Supreme Court of India in P.V. Damodhara Reddy & Another v. Indian National Agencies Ltd., reported in (1945) SCC OnLine Mad. 24 = 1945 58 Law Weekly at Page 527 at Spl Pg: 579, wherein it is observed under:

``Before proceeding further, I may say I am disposed to regard the removal by the company of the applicants' names from the register of members as wholly illegal. The register of the members of a company is a public document and I know of no provision in the Companies Act which permits the directors of a company or any officer of a company to make any alteration to the register in the circumstances alleged in the present case. If these members' names had been improperly added to

> the register, the remedy of the company was to apply to this Court under S. 38 for the rectification of its register and not to take upon itself to alter the register.'' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

183. The Learned Counsel for the Respondents refers to the decision of the Hon'ble Supreme Court of India in Afzal Khan & Ors. v. Mehboob Ayub Khan & Ors., reported in (2016) SCC OnLine Bom. 1445, wherein at paragraphs 14 to 16, it is observed as under:

> 14. `` As is apparent from the provisions quoted above, there are three categories of persons who may file an appeal before the CLB for redressal, namely, (i) the person aggrieved (by such refusal, entry or omission, or default or delay), (ii) any member of the Company and (iii) the Company itself. On the other hand, the grievances themselves may arise in three different ways, namely, as a result of (a) refusal to register any transfer or transmission, (b) entering or omission of a name without sufficient cause and (c) default or delay in entering or omitting any name. In sofar as grievance (a) is concerned, obviously the aggrieved person or any member alone could file an appeal. There is no question of a company carrying the matter before the CLB, since the appeal in this case actually challenges an action of the company, namely, refusal to register a transfer or transmission. So also, in the case of
>
> (c), the appeal could only be by a person aggrieved or a member, since the challenge is to the default or delay on the part of the company. That leaves the company as a prospective applicant (in addition to a person aggrieved or a member) only in the case of
>
> (b), that is to say, where there is any entry or omission in the register without sufficient cause. The subject of challenge even in such case is not the actual making of an entry or omission on the part of a company, but existence of a name or omission in the register. If a name exists on the register, without there being a sufficient cause, or a name which originally existed stands omitted in the register, again without a sufficient cause, the company may be aggrieved and may, in that case, apply to the CLB for rectification of register. In other words, it is not the act of entering or omitting a name, but the subsistence of such entry or omission, TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 which gives rise to a grievance insofar as the company is concerned.
>
> 15. If Mr. Chinoy's arguments were to be accepted, that is to say, if the company could deal with its own grievance of subsistence of any entry or omission without sufficient cause by the simple expedient of omitting such offending entry or undoing the offending omission by making an entry itself, there is possibly no reason to provide for a right to apply to the company. For if it does take any of the aforesaid two actions, only the other two categories, namely, the person aggrieved or any member, would be aggrieved and may have to apply for rectification. Mr. Chinoy suggests that the very fact that entry or omission of a name without sufficient cause is made a

> subject matter of grievance implies that there could be an entry or omission with sufficient cause and who else could do it but the company itself. There is a fallacy in this argument and that arises if we consider Section 111 as a stand-alone provision and not in the back-drop of other provisions. Section 111 finds place in a group of sections, Sections 108 to 112, which is under the title "Transfer of Shares and Debentures". Section 108 deals with the requisites of a valid transfer. It mandates the company not to register a transfer of shares (or debentures) unless the transfer is in accordance with its provisions. Section 108A to 108I deal with restrictions on acquisition or transfer of shares in special cases.

Section 109 enables transfer of shares held by a deceased member by his legal representative without such representative himself being a member. Section 109A provide for nomination of shares by a holder thereof and vesting of the shares in such nominee upon the death of the holder. Section 110 provides for the application for transfer and notice before registration of transfer. In this context, Section 111 deals with the various grievances, which may arise as a result of a wrongful entry or omission or refusal to register, or delay or default in registration. As the scheme of these Sections indicates, a company may refuse to register any transfer or transmission by reason of non-compliance with Section 108 or Sections 108A to 108I or simply delay or default, in which case the aggrieved person or any member may apply for rectification; If a TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 company refuses to register a transfer by a legal representative or delays or defaults in it, such legal representative or his transferee or any member could apply; If the company refuses to register a transfer for non-compliance with Section 110 or registers it in breach of Section 110 or delays or makes a default, the person aggrieved or any member could apply. These are all wrongful refusals or delays or defaults. These are all actions or omissions of the company on applications for transfer or transmission. In addition to these categories of cases, there may be cases where a wrongful entry or omission may be subsisting in the register without a sufficient cause, that is to say, an entry or omission, no doubt made earlier by the company in the first place (though not necessarily on the application of the person aggrieved or any existing member), which has no sufficient cause to subsist in the register. When such entry or omission exists, all three categories of persons are aggrieved, including the company itself. The redressal, in that case, could only be by the CLB in a rectification application. A Company may, in other words, refuse to register or make or omit an entry or delay or default in making or omitting one, all on the applications of (i) a transferor or (ii) a transferee or

(iii) a transmittee or (iv) a legal representative of a holder. Sections 108, 108A to 108I, 109 and 110 apply to such applications. In all these cases, the aggrieved person or any member, as the case may be, may apply to the CLB for rectification. In case, however, any entry or omission previously made subsists on the register, and there is no sufficient cause for its subsistence, any aggrieved person, member or the company may apply to the CLB for rectification. There is no question of any aggrieved person or member applying to the company or the company itself, being aggrieved, acting on such grievance and correcting the register accordingly. That is the scheme of Sections 108 to 111. Accepting Mr. Chinoy's submission would lead to dangerous consequences. In the case of a wrongful refusal to enter or omit or making of a wrongful entry or omission, etc., any member could apply to the company itself for rectifying the register and the company could then proceed to rectify. After all

if the company could rectify suo motu, it may well rectify on the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 application of a person aggrieved or any member. In every such case, Mr. Chinoy would have to admit, the company could well be said to have the power to do so and the only contested question would be of sufficiency of the cause to do so. That, I am afraid, cannot be a correct interpretation of the law.

16. The reason for not reserving unto the company the power to correct a subsisting entry (as opposed to making of an entry or omission occasioned by allotment, transfer or transmission) in the register is not far to seek. The register of members of a company is an important public document and its sanctity cannot be tampered with except in accordance with law. This question was considered by Madras High Court in the case of P.V. Damodara Reddy vs. Indian National Agencies Limited5. In that case, the Applicants before the Court in an application for rectification of register were duly entered on the register of members as allottees of shares. The directors later resolved to cancel the allotment and proceeded to remove their names from the register. This is what Madras High Court said in that case:

> "4. Before proceeding further, I may say I am disposed to regard the removal by the company of the applicants' names from the register of members as wholly illegal. The register of the members of a company is a public document and I know of no provision in the Companies Act which permits the directors of a company or any officer of a company to make any alteration to the register in the circumstances alleged in the present case. If these members' names had been improperly added to the register, the remedy or the company was to apply to this Court under section 38 for the rectification of its register and not to take upon itself to alter the register."

184. The Learned Counsel for the Respondents refers to the decision of Hon'ble Supreme Court of India in Dale and Carrington Investment Pvt. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Ltd. v. P.K. Prathapan, 2005 (1) SCC 212 at Spl Pgs : 232 to 236 and 237, wherein at paragraphs 23 to 25, 30, 31, 33 & 38, it is observed as under:

> 23. ``Tea Brokers (P) Ltd. and Others v. Hemendra Prosad Barooah (1998) 5 Comp LJ 463, was also a case of a minority shareholder who on becoming the Managing Director of the company, issued further share capital in his favour in order to gain control of management of the company. Barooah and his friends and relations were majority shareholders of the respondent company having 67% of the total issued capital of the company.

Barooah personally held 300 equity shares out of 1155 shares issued by the company. He was at all material times a Director of the company. His case was that he was wrongfully and illegally ousted from the management of the company. One Khaund, who initially started as an employee of the company had 110 shares in the company and belonged to the minority group. Khaund was appointed as the Managing Director of the company. Barooah's grievance was that Khaund took advantage of his position as Managing Director and acted in a manner detrimental and prejudicial to the interests of the company and in a manner conducive to his own interest. Khaund had hatched

a plan with other directors to convert petitioner Barooah into a minority and to obtain full and exclusive control and management of the affairs of the company. In a petition filed under Sections 397 and 398 of the Companies Act, 1956, acts of Khaund were found to be by way of 'oppression and mismanagement' within the meaning of Sections 397 and 398 of the Companies Act. Allotment of 100 equity shares by the company to Khaund at a meeting of the Board of Directors said to have been held on 14-1-1971 was held to be illegal. The Board of Directors of the company was superseded and a special officer was appointed to carry on management of the company with the advice of Barooah, Khaund and a representative of the labour union. There were several other directions issued by the court which are not necessary to be mentioned here. The Division Bench considered in detail the relevant legal position. Without using the phrase 'proper purpose doctrine' the principle enunciated therein, TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 was applied. The following observations of Justice A.N. Sen are reproduced:

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

24. Further it was held that if a member who holds the majority of shares in a company is reduced to the position of minority shareholder in the company by an act of the company or by its Board of Directors malafide, the said act must ordinarily be considered to be an act of oppression to the said member. The member who holds the majority of shares in the company is entitled by virtue of his majority to control, manage and run and affairs of the company. This is a benefit or advantage which the member enjoys and is entitled to enjoy in accordance with the provisions of company law in the matter of administration of the affairs of the company by electing his own men to the Board of Directors of the company.

25. On the question of relief, the court observed :

> "A majority shareholder should not ordinarily be directed to sell his shares to the minority group of shareholders, if per chance through fortuitous circumstances or otherwise, the minority group of shareholders comes into power and management of the company. The majority shareholders by virtue of their majority will usually be in a position to TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 redress all wrongs done and to undo the mischief done by the minority group of shareholders, as it will always be possible for the majority group of shareholders to regain control of the company so long as they remain in majority in the company by virtue of the majority. Except in unusual circumstances, the majority group of shareholders, in my opinion, should never be ordered or directed to sell their shares to the minority group

> of shareholders. An order directing the majority group of shareholders to sell his shares to the minority group of shareholders will not redress the wrong done to the majority group of shareholders and will not give him sufficient compensation or relief against the act of oppression complained of by him, and, on the other hand, may add to his suffering and grievance and cause him greater hardship. Such an order will not further the ends of justice and indeed the cause of justice may be defeated."

30. Even the Company Law Board found that the allotment of additional shares by Ramanujam to himself was an act of oppression on his part. The Company Law Board drew this conclusion solely for the reason that no offer had been made to the majority shareholders regarding issue of further share capital. The High Court accepted the finding of oppression. However, it placed it on a much broader base by taking into consideration various other factors. The High Court's finding is based on a much stronger footing. In fact, the High Court has gone on to conclude that Ramanujam has played a fraud on the minority shareholders by manipulating the allotment of shares in his favour. We find no reason to differ with the finding of the High Court.

31. This brings us to the issue regarding locus standi of Prathapan and Prathapan's family to maintain the petition under Sections 397 and 398 of the Companies Act and their failure to obtain permission of Reserve Bank of India as per Section 29 of the Foreign Exchange Regulation Act. So far as the question of permission of the Reserve Bank of India under FERA is concerned, the same can be obtained ex-post facto. This stands concluded by TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 judgment of this Court in LIC of India v. Escorts Ltd [1986] l SCC

264. The statute does not provide any time limit for obtaining the permission. We cannot lose sight of the subsequent development in this connection. FERA stands repealed and the statute brought in force by way of replacement of FERA, i.e. the Foreign Exchange Management Act (FEMA), does not contain any such requirement.

33. It is to be further noted that the entire scheme regarding purchase of shares in the name of mother of Prathapan was suggested by Ramanujam himself. He saw to it that the shares were transferred by the company in the name of Prathapan and his wife. The company has recorded the transfer and corrected its Register of Members in this behalf which, in fact, led Ramanujam to file a petition for rectification of the Register of Members as a counterblast to the petition filed by Prathapan under Sections 397/398 of the Companies Act. It is not open to Ramanujam now to raise the question of FERA Violation, more particularly in view of his having recorded the transfer of shares in the name of Prathapan and his wife Pushpa in the records of the company. This also answers the objection regarding locus standi of Prathapan and his wife to file Sections 397/398 petition before the Company Law Board. Since they were registered as shareholders of the company on the date of filing of the petition and they held the requisite number of shares in the company, they could maintain the petition.

38. On the question of relief, the learned counsel for the parties referred to decisions in support of their respective stands. We do not consider it necessary to refer to these decisions because relief depends on facts of a particular case. We have seen the facts of the present case which to our mind

are so manifestly against Ramanujam that two opinions are not possible on the aspect of relief. The only relief that has to be granted in the present case is to undo the advantage gained by Ramanujam through his manipulations and fraud. The allotment of all the additional shares in favour of Ramanujam has to be set aside. In our view, the High Court was fully justified in granting the relief of setting aside the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 impugned allotments of additional shares in favour of Ramanujam. The approach of the Company Law Board was totally erroneous in as much as after having found that there was oppression on the part of Ramanujam, he was still allowed to take advantage of his own wrong in as much as he was given the option to buy Prathapan's shares and that too not for a proper price. In our view the Company Law Board was wrong in allowing purchase of shares of Prathapan and his wife by Ramanujam. Such an order amounts to rewarding the wrongdoer and penalizing the oppressed party. In the circumstances of this case asking the oppressed to sell his shares to the oppressor not only fails to redress the wrong done to the oppressed, it also results in heavy monetary loss to him. The relief granted by the High Court was a proper relief in the facts of the case." and submits that it is not open to a person at whose behest, the `Issue of Shares', has occurred to later, raised the question of `FEMA Violation'. Apart from that, converting a `Majority' to a `Minority' (as in the instant case) is an `Oppressive' one.

185. The Learned Counsel for the Respondents points out that during the pendency of the Company Petition, the 1st Appellant / 2nd Respondent filed three Compounding Applications before the Reserve Bank of India, and on 26.05.2015, the Company Law Board had passed the following `Order':

> ``An application filed by R-2 [A1] for compounding the offence in relation to the above is pending before the RBI under FEMA Act read with FEMA (Compounding Proceedings) Rules ... As held in LIC v. Escorts Ltd (1986) 1 SCC 264 while the task of enforcement rests with the Directorate of Enforcement, no authority other than the RBI has the power to decide whether permission may or may not have been granted by the RBI for such transfer. Neither the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 company nor any of its shareholders have any special right to question any such permission." and in this connection, the `Reserve Bank of India', on 15.06.2015', had returned the `Compounding Application', filed by the `1 st Appellant / 2nd Respondent' with an observation that the `Shareholding' of the 1 st Respondent / 1st Petitioner does not contravene any provision of `Foreign Exchange Management Act'.

186. The Learned Counsel for the Respondents refers to the `Order' of the Hon'ble High Court of Bombay dated 27.01.2014 in W.P. No. 2542 of 2013 in the matter of Dr. A. Jawahar Palaniappan (Applicant / Proposed Respondent) between P. Vardarajan (Petitioner) v. The Reserve Bank of India & Ors. (Respondents), wherein it is observed as under:

> ``The petitioner has also virtually admitted that the applicant's acquisition of the shares is illegal - a self-serving admission to the applicant's detriment and obviously to gain an advantage in his dispute with the applicant."

187. The Learned Counsel for the Respondents points out that on 28.11.2011, the 1st Appellant / 2nd Respondent wrote a Letter to the `FIPB', asking them not to grant `Approval' to the 1st Respondent / 1st Petitioner and on 19.06.2013, the `FIPB' confirm that there was no requirement to obtain `Prior' or `Ex post facto' Approval for the `Shareholding' of the 1st Respondent / 1st Petitioner, since there was no TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 involvement of `FDI' and the `Shares' were held on `Non-Repatriation Basis'.

188. The Learned Counsel for the Respondents proceeds to point out that the complaint of the `1st Appellant / 2nd Respondent' to the `ED' / `RBI' / `MIB' dated 26.04.2010 was made on the pretext of coming to know of the `Residential / Citizenship Status' of the `1st Respondent / 1st Petitioner' was a sheer counterblast to the criminal complaint of the `1st Respondent / 1st Petitioner dated 23.04.2010' and when no action was taken by the `Enforcement Directorate' on the said complaint dated 26.04.2010, the `1st Appellant / 2nd Respondent' went ahead with the `Cancellation of Shares', on 20.09.2011, during the `pendency of the `Enforcement Directorate' proceedings which was initiated by the `1 st Appellant / 2nd Respondent'.

189. The Learned Counsel for the Respondents submits that a finding of mere `contravention of FEMA', does not by itself render a transaction `void', as per decision of the Hon'ble Supreme Court of India in Vijay Karia & Ors., v. Prysmian Cavi E Sistemi SRL & Another, reported in (2020) SCC OnLine SC 177, wherein at Paragraphs 91 to 93, it is observed as under:

> 91. ``This reasoning commends itself to us. First and foremost, FEMA - unlike FERA - refers to the nation's policy of managing TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 foreign exchange instead of policing foreign exchange, the policeman being Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of Reserve Bank of India may be obtained post facto if such violation can be condoned.

Neither the award, nor the agreement being enforced by the award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the market value, Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach. Further, even if Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or Rule would not arise as the award does not become void on that count. The fundamental policy of Indian law, as has been held in Renusagar Power Co. Ltd. v General Electric Co., 1994 Supp (1) SCC 644], must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised.

"Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground.

92. The Appellants, however, relied upon certain observations in Dropti Devi v. Union of India (2012) 7 SCC 499. In that case, a challenge was made to the constitutional validity of Section 3 of Conservation of Foreign Exchange and Prevention of Smuggling TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Activities Act, 1974 (hereinafter referred to as "COFEPOSA"), stating that by reason of the new legal regime articulated in FEMA, in replacement of FERA, the said provision has become unconstitutional in the changed situation. This submission was repelled by this Court stating:

66. ``It is true that provisions of FERA and FEMA differ in some respects, particularly in respect of penalties. It is also true that FEMA does not have provision for prosecution and punishment like Section 56 of FERA and its enforcement for default is through civil imprisonment. However, insofar as conservation and/or augmentation of foreign exchange is concerned, the restrictions in FEMA continue to be as rigorous as they were in FERA. FEMA continues with the regime of rigorous control of foreign exchange and dealing in the foreign exchange is permitted only through authorised person. While its aim is to promote the orderly development and maintenance of foreign exchange markets in India, the Government's control in matters of foreign exchange has not been diluted. The conservation and augmentation of foreign exchange continues to be as important as it was under FERA. The restrictions on the dealings in foreign exchange continue to be as rigorous in FEMA as they were in FERA and the control of the Government over foreign exchange continues to be as complete and full as it was in FERA.

67. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continue to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardising the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-

compliance results in civil imprisonment of the defaulter. The whole intent and idea behind Cofeposa is to prevent violation of foreign exchange regulations or smuggling TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 activities which have serious and deleterious effect on national economy."

93. It is important to note that this Court recognized that FEMA, unlike FERA, does not have any provision for prosecution and punishment like that contained in Section 56 of FERA. The observations as to conservation and/or augmentation of foreign exchange, so far as FEMA is

concerned, were made in the context of preventive detention of persons who violate foreign exchange regulations. The Court was careful to note that any illegal activity which jeopardises the economic fabric of the country, which includes smuggling activities relating to foreign exchange, are a serious menace to the nation and can be dealt with effectively, inter alia, through the mechanism of preventive detention. From this to contend that any violation of any FEMA Rule would make such violation an illegal activity does not follow. In fact, even if the reasoning contained in this judgment is torn out of its specific context and applied to this case, there being no alleged smuggling activity which involves depletion of foreign exchange, as against foreign exchange coming into the country as a result of sale of shares in an Indian company to a foreign company, it does not follow that such violation, even if proved, would breach the fundamental policy of Indian law." and further that the same principle was adopted in the decision SRM Exploration Pvt. Ltd. v. N & S & N Consultants S.R.O., reported in (2011) SCC Online Del. 1161, wherein at paragraph 12, it is observed as under:

> 12. ``We have perused the provisions of FEMA, 1999 Section 3 thereof prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein or under the Rules & Regulations framed thereunder without general or special permission of RBI. We are unable to find any provision therein voiding the transactions in contravention thereof. We may mention that the predecessor legislation to FEMA namely FERA 1973 vide Section 47 prohibited entering into any contract or agreement TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 directly or indirectly evading or avoiding any operation of the said Act or any provision thereof. However Sub Section (3) thereof also provided that such prohibition shall not prevent legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due. However the legislature while re-

enacting the law on the subject has chosen to do away with such a provision. We are of the view that the same shows a legislative intent to not void the transaction even if in violation of the said Act. Thus we are of the opinion that the plea of the appellant Company in this regard is without any force." Respondents' Citations:

> 190. The Learned Counsel for the Respondents refers to the decision of the Hon'ble Madras High Court in Shoe Specialities (P) Ltd. v. Standard Distilleries & Breweries (P) Ltd., reported in (1996) SCC OnLine Mad.

Page 621, wherein at Paragraphs 28 to 40, it is observed as under:

> 28. ``..... it is clear that though the petitioners had majority shares, they were not allowed to work or manage the company.

Everything was controlled by the employees of the ninth respondent who were acting against the interest of the company. That was the matter which was complained of in C.P. No. 44 of 1993 and the complaint was proved. Therefore, all grounds were made out for invoking the powers under section 397 of the Companies Act.

29. Now, we will consider the scope of section 397 of the Companies Act. Section 397 of the said Act reads thus:

> "Application to Company Law Board for relief in cases of oppression. -
>
> (1) Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.
>
> (2) If, on any application under sub-section(1),the Company Law Board is of opinion -
>
> (a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and
>
> (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up;

the Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

30. That section corresponds to section 210 of the English Companies Act. Commenting on the powers under section 210 of the English Companies Act, Boyle and Sykes - in their book entitled Gore-Browne on Companies, 42nd edition (1972), at page 799, have said thus:

> "Section 210 confers a wide power on the court which is of the opinion that there has been a course of oppressive conduct, etc. Section 210(2) provides that 'with a view to bringing to an end the matters complained of' the court may make such orders as it thinks fit, whether for regulating the conduct of the company's affairs in the future, or for the purchase of the shares of any members of the company by other members of the company or by the company, and, in the case of a purchase by the company for the reduction accordingly of the company's capital, or otherwise'. The power to order the company to purchase the shares of some part of the members is an exception to the general rule prohibiting the return of capital to members."

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31. Pennington's Company Law, fifth edition (1985), deals with the same subject, and at page 751 the learned author deals with the powers of the court. The relevant portion reads thus:

> "The remedies which the court could employ in giving relief under the original statutory provision were left to its discretion, and could include such things as ordering the persons responsible for the oppression to pay compensation to shareholders who had been oppressed, appointing or removing directors, appointing a receiver to manage the company's business temporarily, and altering the voting and other rights of classes of members. The court has an equally wide discretion under the present statutory provision, and the only limitation is that the order it makes must be relevant and appropriate to give relief from the matters complained of. The petitioners must state in their petition what orders they wish the court make and a petition will not be heard if it merely asks the court to make an order regulating the company's affairs, or such order as the court thinks just.
>
> Without affecting the generality of its power to give whatever relief is appropriate in the circumstances, the new statutory provision empowers the court to make any order it thinks fit regulating the conduct of the company's affairs in future; to require the company not to do or not to continue doing any act complained of, or to require it to do any act when the petitioner has complained of the company's omission to do it in the past (injunctive and mandatory injunctive relief)."

32. In Rajahmundry Electric Supply Corporation Limited v. A. Nageswara Rao [1956] 2 An WR 123, the Andhra Pradesh High Court had occasion to consider a corresponding provision of the Indian Companies Act, 1913. Section 153C of the earlier Companies Act corresponds to section 397 of the present Act. In the said decision, it was held thus (at pages 60 and 61 of 26 Comp Cas):

> "If the conditions laid down are satisfied, the court can exercise this power by making suitable orders to put an end to the matters TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 complained of. What are suitable orders would depend upon the circumstances of each case. No doubt, sub-section (5) of section 153C enumerates the various powers the court can exercise under this section. But they are obviously not exhaustive as these powers are without prejudice to the generality of the powers vested in a court under sub-section (4). The nature of the order to be passed by a court, therefore, depends upon the state of mismanagement and the nature of the restrictions required to put an end to that mismanagement. It is no doubt true that so long as a company is not wound up, a court will not interfere with the internal management of that company. But the decisions embodying this principle have no bearing when the court is called upon and when it interferes in exercise of its powers under section 153C of the Act."

33. A Division Bench of our High Court considered a similar question and the decision is Syed Mahomed Ali v. M.R. Sundaramurthy [1958] 28 Comp Cas 554; [1958] ILR 838 (Mad). At page 845, the corresponding sections of the English Act and the Indian Act were compared and the Bench held thus (at pages 561 to 563 of 28 Comp Cas) "The learned Advocate-General referred to the decision in Antigen Laboratories Ltd., In re [1951] 1 All ER 110 (Ch D) and a passage from Buckley's Company Law at page 1091, in support of the proposition that a petitioner seeking relief under section 210 of

the English Companies Act which corresponds to section 397 of the (Indian) Companies Act should state in the prayer in clear terms the general nature of the relief sought, whether it be for the appointment of a director or of some other kind. His contention was that in the petition the only relief prayed for was regulation of the conduct of the affairs of the company in future and not in regard to any action against the directors for the alleged malfeasance and misfeasance. That may be so, but the petition contains an elaborate statement of the charges against the directors and an investigation into those charges would be necessary even for the purpose of regulating the affairs of the company. We do not think that the absence of any formal prayer in the petition under section 397 would entitle the court to refrain TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 from investigating into the various charges levelled against the directors. In Gower's Modern Company Law (second edition), at page 513, the scope of section 210 of the English Act which corresponds to section 397 of the (Indian) Companies Act is discussed and referring to the Cohen Report, on which the section in the English Act was based, the learned author says 'that it was the intention that the court should "have power to impose upon the parties whatever settlement the court considers just and equitable". While recognising that the court could not be expected in every case to find and impose a solution it was thought that its discretion must be unfettered for it is impossible to lay down a general guide in the solution of what are essentially individual cases'. Referring to the decision in Antigen Laboratories Ltd., In re [1951] 1 All ER 110 (Ch D), the learned author says 'that it has been held that the petitioner cannot just ask the court to exercise its discretion but must indicate the nature of the relief wanted. This decision though perhaps inevitable seems regrettable and inconsistent with the intention that the court should have power to find and impose a solution'. The decision of the English court was, as pointed out by the learned author, the result of the procedure of the English High Courts' which was ill adapted for the exercise of the inquisitorial and constructive role thus imposed upon the court'. We are not hampered by such rigid technicalities of procedure and if the minority in a company complains of an oppression and discloses certain grounds of complaint in the petition which are made the basis follow the relief, we would hold that the court should ordinarily investigate the charges. Such investigations may in certain cases be necessary even to regulate the future conduct of the company for providing against recurrence of such abuses of power by the majority. We are, therefore, of opinion that notwithstanding the omission in the petition to pray for relief against the delinquent directors, an enquiry into the charges against them was properly within the scope of the petition. Sections 402 and 406 of the (Indian) Companies Act give ample jurisdiction to the court to dispose of the matter in the larger interests of the company."

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34. The entire power of the company court under sections 397, 398 and 402 of the Companies Act was considered by the Bombay High Court in the decision in Shanti Prasad Jain v. Union of India [1973] 75 Bom LR 778. In that case, the learned company judge reconstituted the board for a period of seven years and the question that came up for consideration was, whether the same is against the provisions of sections 255 and 408 of the Companies Act. While considering the same, the entire law was considered by the Bench. Tulzapurkar J., as he then was, speaking for the Bench, held thus:

"In our view the submissions made by Mr. Sen on the point of legality or otherwise of the impugned orders will have to be appreciated in the context of the principal question as to what are the powers of the court when it is acting in proceedings instituted under sections 397, 398, read with section 402 of the Companies Act. The questions whether a board of directors of the type indicated in the impugned order could be reconstituted by the court or not and whether the court has power to frame an article inconsistent with the provisions of section 255 of the Act or not must in the ultimate analysis depend upon the true ambit of the powers of the court under section 397 or 398 read with section 402 for, if these sections confer upon the court jurisdiction and powers of the widest amplitude to pass appropriate orders which the circumstances of the case may require, it would be difficult to accept Mr. Sen's submission that the impugned orders and directions are liable to be set aside on the basis that the reconstituted board or modified article 95 was not in consonance with section 255 of the Act. To correctly appreciate the ambit of the court's jurisdiction and the amplitude of the court's power under sections 397, 398 read with section 402 of the Companies Act, 1956, it will be necessary to consider the entire scheme of the Act pertaining to corporate management of companies. At the outset, it may be stated that all these concerned provisions occur in Part VI of the Act which deals with the management and administration of companies. It may be further pointed out that in this part there are eight chapters. Chapter I contains general provisions with regard to corporate management and administration of the companies TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 such as registered office, register of members and debenture holders, annual returns, meeting and proceedings, accounts, audit, investigation, etc.; Chapter II, which includes section 255 deals with directors, their qualification, disqualification and remuneration, meetings of the board, board's powers, procedure where directors are interested, etc.; Chapter III deals with managing agents, their appointment, remuneration, restrictions on their powers, etc.; Chapter IV deals with secretaries and treasurers; Chapter IV-A deals with powers of the Central Government to remove managerial personnel from office on the recommendation of the tribunal; Chapter V deals with arbitration, compromises, arrangements and reconstructions; Chapter VI, which includes sections 397 to 409, deals with prevention of oppression and mismanagement; Chapter VII deals with constitution and powers of advisory committee; and Chapter VIII contains miscellaneous provisions. It will thus be seen that section 255 on which substantially the entire argument of Mr. Sen is based is to be found in Chapter II which deals with directors and the constitution of the board, through which agency the corporate management of the affairs of a company is usually undertaken, while Chapter VI, which contains material provisions from sections 397 to 409, deals with matters pertaining to prevention of oppression and mismanagement arising out of corporate management. In other words, it is very clear that Chapter II which includes section 255 deals with corporate management of a company through directors in normal circumstances, while Chapter VI deals with emergent situations or extraordinary circumstances where the normal corporate management has failed and has run into oppression or mismanagement and steps are required to be taken to prevent

oppression and/or mismanagement in the conduct of the affairs of a company. It is in view of this scheme which is very apparent on a fair reading of the arrangement of chapters and the sections contained in each chapter which are all grouped under Part VI of the Act that the question will have to be answered as to whether the powers of the court under Chapter VI (which includes sections 397, 398 and 402) should be read as subject to the provisions contained in the other TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 chapters which deal with normal corporate management of a company and in our view, in the context of this scheme having regard to the object that is sought to be achieved by sections 397, 398 read with section 402, the powers of the court thereunder cannot be so read. Further, an analysis of the sections contained in Chapter VI of Part VI of the Act will also indicate that the powers of the court under section 397 or 398 read with section 402 cannot be read as being subject to the other provisions contained in sections dealing with usual corporate management of a company in normal circumstances. As stated earlier, Chapter VI deals with the prevention of oppression and mismanagement and the provisions therein have been divided under two heads - under head A powers have been conferred upon the court to deal with cases of oppression and mismanagement in a company falling under sections 397 and 398 of the Act while under head B similar powers have been given to the Central Government to deal with cases of oppression and mismanagement in a company but it will be clear that some limitations have been placed on the Government's powers while there are no limitations or restrictions on the court's powers to pass orders that may be required for bringing to an end the oppression or mismanagement in future or to see that the affairs of the company are not being conducted in a manner prejudicial to public interest. In other words, whenever the Legislature wanted to do so it has made a distinction between powers conferred on the Government (vide section 408) and powers conferred on the court (vide section 402) while dealing with similar emergent situations or extraordinary circumstances arising in the management of a company and in the case of the Government it was placed restrictions or limitations on the Government's powers but no restrictions or limitations of anything have been prescribed on the court's powers. If the Legislature had desired that the court's powers while acting under section 397 or 398 read with section 402 should be exercised subject to or in consonance with the other provisions of the Act it would have said so. Moreover, the topics or subjects dealt with by sections 397 and 398 are such that it becomes impossible to read all such restrictions or limitation on the powers of the court acting under TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 section 402. Under section 397 read with section 402 power has been conferred on the court to make such orders as it thinks fit if it comes to the conclusion that the affairs of a company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up 'with a view to bringing to an end the matters complained of'. Similarly, under section 398 read with

> section 402 power has been conferred upon the court' to make such orders as it thinks fit', if it comes to the conclusion that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner, prejudicial to the interests of the company or that a material charge has took place in the management or control of the company by reason of which it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in, a manner prejudicial to the interests of the company 'with a view to bringing to an end or preventing the matters complained of or apprehended'. Both the wide nature of the power conferred on the court and the object or objects sought to be achieved by the exercise of such power are clearly indicated in sections 397 and 398. Without prejudice to the generality of the powers conferred on the court under these sections, section 402 proceeds to indicate what type of orders the court could pass and clauses (a) to (g) are clearly illustrative and not exhaustive of the type of such orders. Clauses (a) and (g) indicate the widest amplitude of the court's power; under clause (a) the court's order may provide for the regulation of the conduct of the company's affairs in future and under clause (g) the court's order may provide for any other matter for which in the opinion of the court it is just and equitable that provisions should be made. An examination of the aforesaid sections clearly brings out two aspects, first, the very wide nature of the power conferred on the court and, secondly, the object that is sought to be achieved by the exercise of such power with the result that the only limitation that could be impliedly read on the exercise of the power would be that nexus must exist TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 between the order that may be passed thereunder and the object sought to be achieved by these sections and beyond this limitation which arises by necessary implication it is difficult to read any other restriction or limitation on the exercise of the court's power. We are, therefore, unable to accept Mr. Sen's contention that the court's powers under section 398 read with section 402 should be read as subject to the other provisions of the Act dealing with normal corporate management or that the court's orders and directions issued thereunder must be in consonance with the other provisions of the Act.

35. There is another aspect of sections 397, 398 and 402 which also shows that no such limitation as is sought to be suggested by Mr. Sen can be read on the court's power while acting under these sections. Section 397 clearly suggests that the court must come to the conclusion that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members of the company and that to wind up the company would unfairly prejudice and member or members, but that otherwise the facts, would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up before any order could be passed that it. In other words, instead of destroying the corporate existence of company the court has been enabled to continue its corporate existence by passing such orders as it thinks fit in order to achieve the objective of removing the oppression to any member or members of a company or to prevent the company's affairs from being conducted in a manner prejudicial to public interest. Similarly, sub-section (2) of section 398 clearly provides that where the court is of the opinion that the affairs of the company are being conducted in a manner suggested in

sub-section (1), then, the court may with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit. In other words, sections 397 and 398 are intended to avoid winding up of the company if possible and keep it going while at the same time relieving the minority shareholders from acts of oppression and mismanagement or preventing its affairs TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 being conducted in a manner prejudicial to the public interest and if that be the objective the court must have power to interfere with the normal corporate management of the company. If under section 398 read with section 402, the court is required by its order to provide for the regulation of the conduct of the company's affairs in future because of oppression or mismanagement that has occurred during the course of normal corporate management, the court must have the power to supplant the entire corporate management or rather corporate mismanagement by resorting to non-corporate management which may take the form of appointing an administrator or a special officer or a committee of advisors, etc., who could be in charge of the affairs of the company. If the court were to have to such power the very object of the section would be defeated. We must observe in fairness to Mr. Sen that it was not disputed by him that powers of the court under section 398 read with section 402 of the Companies Act were wide enough to enable the court to appoint an administrator or a special officer or a committee of advisors for the future management of the company and thereby supplant completely the corporate management through the board of directors and it was conceded that it should be so for the simple reason that if as a result of the corporate management that has been allowed to run for a certain period oppression or mismanagement has resulted, the court should have power to substitute the entire corporate management by some form of non-corporate management and while doing so the court cannot obviously have any regard or be subject to the other provisions dealing with the corporate form of management. But what was urged by Mr. Sen was that if while acting under section 398 read with section 402, the court thought it fit to have recourse to a mode of corporate type of management, for example, if the court felt proper to have the board of directors for future management, then such corporate mode of management to be provided by the court should conform to the other provisions of the Act dealing with the corporate management. It is not possible to accept this contention of Mr. Sen for two reasons. In the first place, if the court's power under these sections is wide enough to have the corporate management supplanted wholly or completely, it is difficult to TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 understand why the court should not have power to make a partial inroad or encroachment and have a truncated form of corporate management if the exigencies of the case required it, and any truncated form of corporate management can never conform to all the provisions dealing with the corporate management. Secondly, it will all depend upon the facts and circumstances of each case as to how, in what manner and to what extent the court should allow the voice of the shareholders' directors on the board of directors to prevail over that of the other directors and we do not think that the court's powers in that behalf could in any manner be curbed. In our view, therefore, the position is clear that while acting under section 398 read with section 402 of the Companies Act, the court has ample jurisdiction and very wide powers to pass such orders and give such directions as it thinks fit to achieve the object and there would be no limitation or restriction on such power that the same should be exercised subject to the other provisions of the Act dealing with normal corporate management or that such orders and directions should be in consonance with such provisions of the Act."

36. In Bennet Coleman and Co. v. Union of India [1977] 47 Comp Cas 92, the Bombay High Court had occasion to consider the same. Their Lordships said thus (at page 116):

> "An examination of the aforesaid sections brings out two aspects; first, the very wide nature of the power conferred on the court, and, secondly, the object that is sought to be achieved by the exercise of such power, with the result that the only limitation that could be impliedly read on the exercise of the power would be that nexus must exist between the order that may be passed thereunder and the object sought to be achieved by those sections and beyond this limitation which arises by necessary implication it is difficult to read any other restriction or limitation on the exercise of the court's power."

37. In Rakhra Sports Pvt. Ltd. v. Khraitilal Rakhra [1993] 76 Comp Cas 545, a Division Bench of the Karnataka High Court, TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 while dealing with the powers of court under section 397 of the Companies Act, had held thus (at page 586):

> "Under section 397 of the Companies Act, 1956, the court is empowered to make an order 'as it thinks fit'; similar is the power vested in the court under section 398. Power under section 402 is a power which may be exercised, without prejudice to the generality of the powers of the court under sections 397 and 398, and, therefore, such a power can in no way be of a limited nature. A power to make an order as the court thinks fit would necessarily comprise within it a power to make an order which is just and equitable in the circumstances of the case, because essentially, this is an unlimited judicial power."

38. Even if the unlimited powers expounded by the various decisions are not exercised, the decision in Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. will be of some help. In that case, their Lordships said that in a given case even if the case of oppression is not proved, substantial justice must be done between the parties and the parties must be placed as nearly as may be in the same position if they could have been placed. The relevant portion of the said paragraph 172 reads thus (at page 845 of 51 Comp Cas):

> "Even though the company petition fails and the appeals succeed on the finding that the holding company has failed to make out a case of oppression, the court is not powerless to do substantial justice between the parties and place them, as nearly as it may, in the same position in which they would have been, if the meeting of May 2, were held in accordance with law."

39. On the basis of the above settled position of law, and on proved facts, it cannot be said that the decision of the Board is in any way improper. Company Petition No. 44 of 1993 was filed to rectify the mismanagement and they wanted an administrator to be appointed after removing the directors. That relief was not granted by the Company Law Board since it was of the view that the majority decision will be respected. If that pious wish of the Board was TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 respected, the board of directors would have been removed long back.

But that was also prevented by various acts and omissions. Under the above circumstances, the petitioners had to move for the appointment of an independent chairman and the Board again thought that the democratic set up will be maintained and wanted an election to be conducted leaving the entire matter to the shareholders under the guidance of an observer. Even that could not be implemented by the partiality of the chairman. We have to approach the decision of the Board in the above background. The purpose of section 397 read with section 402 of the Companies Act has already been explained in the various decisions. The Board has got unlimited power. Learned senior counsel contended that even the petitioners did not want their board of directors to be handed over management and by virtue of the impugned order, the relief that was sought for in Company Petition No. 44 of 1993 is now granted in an interlocutory application. We cannot accept the said argument. At the time when Company Petition No. 44 of 1993 was filed, the extraordinary general meeting was not held and, therefore, that could be the only relief at that time. In view of the subsequent events and that too after the extraordinary general meeting under the guidance of the observer, the only thing that had to be considered was, whether the new directors were duly elected to the board and whether the existing board is to be removed. Company Petition No. 44 of 1993 itself was filed to get management of the company by the majority shareholders and that was the main complaint. We do not find any difficulty in coming to the conclusion that under the provisions of the Companies Act, the Board was legally entitled to and has got the power which it exercised under the impugned order.

40. While exercising the powers under sections 397 and 402 of the Companies Act, the court is considering not only the relief that is sought for, but also considers as to what is the nature of the complaint and how the same has to be rectified. It is the interest of the company that is being considered and not the individual dispute between the petitioner and the respondent. If that be so, the interest TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 of the company requires that the majority shareholders must have their say in the management."

191. The Learned Counsel for the Respondents refers to the decision of the Hon'ble Supreme Court of India in Cosmo Steels Pvt. Ltd. & Ors. v. Jairam Das Gupta & Ors., reported in (1978) 1 SCC Page 215 at Spl Pgs:

> 221 to 223, wherein at Paragraphs 6 to 10, it is observed as under:
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> 6. ``Section 77 prohibits the Company from buying its own shares unless the consequent reduction of capital is effected and sanctioned in pursuance of Sections 100 to 104 or Section 402.

This section places an embargo on the Company purchasing its own shares so as to become its own member but the embargo is lifted if the Company reduces its share capital pro tanto. It is clear that this section envisages that on purchase by a Company of its own shares, reduction of its share capital may be effected and sanctioned in either of two different modes: (i) according to the procedure prescribed in Sections 100 to 104; or

(ii) under Section 402, depending upon the circumstances in which reduction becomes necessary. Sections 100 to 104 specifically prescribe the procedure for reduction of share capital where the Articles of the Company permit and the Company adopts a special resolution which can only become effective on the Court according sanction to it. On the other hand, reduction of share capital may have to be done pursuant to a direction of the Court requiring the Company to purchase the shares of a group of members while granting relief under Section 402. Both the procedures by which reduction of capital of a Company may be effected are distinct and separate and stand apart from each other. It would not, therefore, be correct to say that whenever it becomes necessary to reduce the capital of a Company, the reduction can be brought about only by following the procedure prescribed in Sections 100 to 104. There is another independent procedure prescribed in Section 402 and TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 recognised by Section 77, by which reduction of the share capital of a Company can be effected. But both these procedures have one feature in common, namely, that there is Court's intervention before the Company can reduce its share capital, and this is of vital importance from the stand point of creditors of the Company.

7. Sections 100 to 104 provide a detailed procedure for reduction of share capital. Without being exhaustive Section 100 mentions three modes of reduction of share capital, viz., (i) extinction or reduction of the liability on any of the shares in respect of share capital not paid up, (ii) cancellation of any paid up share capital which is lost or is unrepresented by available assets, and (iii) paying off any paid up share capital. Section 101 provides that a Company which has adopted a special resolution for reduction of share capital has to move the Court by a petition for an order confirming the reduction. A detailed procedure is prescribed which the Court should ordinarily follow before confirming the resolution. This procedure has to be followed where the proposed reduction of share capital involves either the dimunition of liability in respect of unpaid share capital or payment to any shareholder of any paid up share capital and in any other case if the Court so directs. But even in first mentioned two cases, sub-section (3) confers a discretion on the Court to dispense with the procedure if the Court having regard to any special circumstances, thinks proper to do so. The procedure envisages a list of creditors to be settled and a notice to be published which will enable the creditors whose names are included in the list to object to the reduction and a provision has to be made in respect of dissenting creditors.

8. Sections 397 and 398 enable the minority shareholders to move the Court for relief against oppression by majority shareholders. In a petition under Sections 397 and 398, Section 402 confers power upon the Court to grant relief against oppression, inter alia, by providing for the purchase of shares of any of the members of the Company by other members thereof or by the Company and in the case of purchase of its shares by the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Company, the consequent reduction of the share capital of the Company. Rule 90 of the Companies (Court) Rules, 1959, provides that where an order under Sections 397 and 398 involves reduction of capital, the provisions of the Act and the Rules relating to such matter shall apply as the Court may direct.

9. The question is: whether when on a direction given by the Court, while granting relief against oppression to the minority shareholders of the Company, to the Company to purchase the shares of some of its members which would ipso facto bring about reduction of the share capital because a

Company cannot be its own member, is it obligatory to serve a notice upon all the creditors of the Company? It was conceded that the procedure prescribed in Sections 100 to 104 is not required to be followed where reduction of share capital is necessitated by the direction given by the Court in a petition under Sections 397 and 398. Section 77 leaves no room for doubt that reduction of a share capital may have to be brought about in two different situations by two different modes. Undoubtedly, where the Company has passed a resolution for reduction of its share capital and has submitted it to the Court for confirmation the procedure prescribed by Sections 100 to 104 will have to be followed, if they are attracted. On the other hand, where the Court, while disposing of a petition under Sections 397 and 398, gives a direction to the Company to purchase shares of its own members, a consequent reduction of the share capital is bound to ensue, but before granting such a direction it is not necessary to give notice of the consequent reduction of the share capital to the creditors of the company. No such requirement is laid down by the Act. Two procedures ultimately bringing about reduction of the share capital are distinct and separate and stand apart from each other and one or the other may be resorted to according to the situation. That is the clearest effect of the disjunctive `or' in section 77.

10. The scheme of Sections 397 and 406 appears to constitute a code by itself for granting relief to oppressed minority shareholders and for granting appropriate relief, a power of widest TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 amplitude, inter alia, lifting the ban on Company purchasing its shares under Court's direction, is conferred on the Court. When the Court exercises this power by directing a purchase of its shares by the Company, it would necessarily involve reduction of the capital of the Company. Is such power of the Court subject to a resolution to be adopted by the members of the Company which, when passed with statutory majority, has to be submitted to Court for confirmation? No canon of construction would permit such an interpretation in which the statutory power of the Court for its exercise depends upon the vote of the members of the Company. This would inevitably be the situation if reduction of share capital can only be brought about by resorting to the procedure prescribed in Sections 100 to 104. Additionally, it would cause inordinate delay and the very purpose of granting relief against oppression would stand self defeated. Viewed from a slightly different angle, it would be impossible to carry out the directions given under Section 402 for reduction of share capital if the procedure under Sections 100 to 104 is required to be followed. Under Sections 100 to 104 the Company has to first adopt a special resolution for reduction of share capital if its articles so permit. After such a resolution is adopted winch, of necessity must be passed by majority, and it being a special resolution, by a statutory majority, it will have to be submitted for confirmation to the Court. Now, when minority shareholders complain of oppression by majority and seek relief against oppression from the Court under Sections 397 and 398 and the Court in a petition of this nature considers it fair and just to direct the Company to purchase the shares of the minority shareholders to relieve oppression, if the procedure prescribed by Sections 100 to 104 is required to be followed, the resolution will have to be first adopted by the members of the Company but that would be wellnigh impossible because the very majority against whom relief is sought would be able to veto a at the threshold and the power conferred on the Court would be frustrated. That could never have been the intention of the Legislature. Therefore, it is not conceivable that when a direction for purchase of shares is given by the Court under Section 402 and consequent reduction in share capital is to be effected the Procedure, prescribed for reduction of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

share capital in Sections 100 to 104 should be required to be followed in order to make the direction effective."

192. The Learned Counsel for the Respondents adverts to the decision of the Hon'ble Calcutta High Court in Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick & Ors., reported in (1979) SCC OnLine Cal 37, wherein at paragraphs 30 & 31, it is observed as under:

> 30. ``..... Under ss. 397 and 398 read with s. 402 power has been conferred upon the court ``to make such orders'' as it thinks fit. The power conferred upon the court by the above-mentioned sections is very wide and object or objects sought to be achieved by the exercise of such power have been stated in ss 397 and 398. As we read sub-cls. (a) and (g) of s. 402 of the Act we have no doubt in our mind that the intention of the Legislature under the above-

mentioned sections was to confer wide and ample powers upon the court for the regulation of the conducting of a company's affairs and to provide for any other matter which the court thinks just and equitable to provide for in the interest of the corporate body and the general public. Reference in this connection may be made to the case of Bennet Coleman and Company v. Union of India, [1977] 47 Comp Cas 92 (Bom).

31. By reason of what has been stated hereinabove, it appears to us that the court had power to make the order in regard to convening and holding of the meeting, filing of proxies or nominations or any other matter for the purpose of conducting the affairs of a company which might be contrary to the provisions of the articles of the company or the Companies Act, by virtue of the provisions of ss. 397 and 398 read with s. 402 of the said Act."

193. The Learned Counsel for the Respondents seeks in aid of the decision of the Hon'ble Supreme Court of India in Sangramsinh P. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Gaekwad v. Shantadevi P. Gaekwad (2005) 11 SCC at Page 314, wherein, it is observed as under:

> ``The jurisdiction of the Court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may seem fit and proper, is warranted. (See Bennet Coleman & Co. Vs. Union of India and Others [(1977) 47 Comp. Cases 92] and Syed Mahomed Ali Vs. R. Sundaramurthy and others [AIR 1958 Madras 587]."

194. The Learned Counsel for the Respondents refers to the decision of the Hon'ble Supreme Court of India in Bennett Coleman & Co. v. Union of India & Ors., 1973 SCC OnLine Bom. 41, wherein at Paragraphs 18 to 20, it is observed as under:

> 18. ``It was next contended by Mr. Sen that article 95 as framed by the learned judge being in contravention of section 255 would be void under section 9 (b) of the Act and

this indicated that the court's powers under section 398 read with section 402 should be read as subject to the other provisions of the Act. According to him, under section 9 (b) of the Act any provision contained in the memorandum, articles, agreement or resolution of a company, to the extent to which it is repugnant to the provisions of the Act, is declared to be void and relying upon this provision it was urged by Mr. Sen that the court's power to frame a new article 95 and substitute the same in place of the old one, since it contravened the provisions of section 255, would be hit by section 9 (b) and as such it should be held that the court had no power to introduce any such article. In our view, there are two aspects of section 9(b) which have a bearing on the contention; first, section 9 commences with a saving clause, viz., ``Save as otherwise expressly provided in the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Act'', and secondly, under clause, (b) thereof any provision contained in the memorandum, articles, etc., is declared to be void to the extent to which it is repugnant to the provisions of this Act. In our view, essentially it is a question of true and proper construction of the court's powers under section 397 and 398 read with section 402 and having regard to the scheme of Part VI which includes all the sections dealing with management and administration of companies, the language employed in the relevant sections 397, 398 and 402 and the object that is sought to be achieved by these sections if once it is held that on a true construction the court has the widest possible jurisdiction and ample powers to pass such orders as it thinks fit to bring about the desired result in the management of the affairs of a company and that the exercise of such powers is not subject to the other provisions of the Act, there would be no question of the court not being able to reframe or insert a new article which would be in conflict with some provisions of the Act. We are inclined to take the view that sections 397, 398 and 402 by their very nature and contents indicate that they are intended to operate as express provision to the contrary and would be covered by the phrase ``Save as otherwise expressly provided in the Act''. In any case, as discussed earlier the two sets of situations in which the provisions of section 255 and provisions of section 397 and 398 read with section 402 would respectively operate are entirely different and mutually exclusive and as such there will be no repugnancy between any article that may be reframed or inserted by the court while passing orders under section 398 read with section 402 and other provisions of the Act including section 255 which deal with normal corporate management of a company. The contention that the refraining or insertion of a new article like article 95 as done in this case will be hit by section 9(b) cannot be accepted.

19. The only other aspect which was pressed by Mr. Sen was the one emerging from sub-section (2) of section 404. Sub-section (2) of section 404 provides that the alterations made by the court's order in the memorandum or articles of a company shall, in all TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 respects, have the same effect'', as if they had been duly made by the company in accordance with the provisions of the Act. Great emphasis was laid by Mr. Sen upon the expression ``shall, in all respects, have the same effect, occurring in sub-section (2)

and, according to Mr. Sen, this expression clearly suggested that the altered article should not be repugnant to any of the provisions of the Act for otherwise such an article would be hit by the provisions of section 9 (b) of the Act. In our view, the contention is without any substance. The expression ``shall, in all respects, have the same effect'' is to be read in the light of section 36 of the Act which provides for effect of memorandum and articles. Section 36 provides that, subject to the provisions of the Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles. All that sub-section (2) of section 404, therefore, provides is that the altered article that may be introduced by reason of the court's order will have the same binding effect as contemplated by section 36 of the Act. In other words, the altered article will bind the company and the members thereof to the same extent as if it had been signed by the company and by each member and that it contained covenants on its and his part to observe all the provisions thereof. Besides, we have already rejected the contention that reframing or insertion of a new article by the court acting under section 398 read with section 402 will be hit by section 9 (2) of the Act.

20. Having regard to the above discussion, we are clearly of the view that the court had jurisdiction to reconstitute the board in the manner done in this case and such board is not violative of section 255 of the Companies Act and we are also of the further view that the learned judge had ample powers to alter the original article 95 of respondent No. 1 company in the manner done by him while acting under section 398 read with section 402 of the Act.'' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

195. The Learned Counsel for the Respondents cites the decision of the Hon'ble Madras High Court in M. Senthilkumar & Anr. V. Sudha Mills (India) Pvt. Ltd. & Ors., reported in (1995) SCC Online Mad. 551, wherein at Paragraph 17, it is observed as under:

17. ``Winding up of a company on just and equitable grounds should not be ordered except as a last resort, as the presumption is in favour of the desirability of the continued existence and effective functioning of the company. Section 397 provides for relief in case of oppression even where a winding up order on just and equitable grounds is justified, if it is found that the order of winding up would unfairly prejudice the shareholders complaining of such oppression. The reliefs that can be so provided extend to regulation of the conduct of the company's affairs in future, purchase of shares or interest of any of the members by the other members or by the company, altering the articles of association, and relief in respect of any other matter for which the Company Law Board considers just and equitable, to provide. Under section 443(2) of the Act the court may decline to wind up the company on just equitable grounds if the court is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company

wound up instead of pursuing that other remedy."

196. The Learned Counsel for the Respondents refers to the decision of the Hon'ble Supreme Court of India in Kamal Kumar Datta & Anr. v. Ruby General Hospital & Ors. (2006) 7 SCC 613 at Spl Pgs: 616 & 617, wherein, it is observed as under:

> ``Under Sections 397 & 398, it is not necessary that in every case, the relief of winding up should be made. It is an option with TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the Tribunal if it considers that in order to bring to an end the matters complained of, it can pass orders for winding up if it is just and equitable or it can pass such order as it thinks fit. It does not necessarily mean that in every case such winding up order need be passed.
>
> (Para 30) ``Section 398 talks much about the mismanagement, or apprehension of mismanagement in the affairs of the company. As against this, Section 397 deals with oppression of the members. Therefore, both sections 397 & 398 to some extent have commonality for the purpose like, prejudicial to public interest and application for winding up can be made by members as per Section
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> 399. Apart from this commonality, for the purpose of Section 397, if the company acts in a manner oppressive to any member or members and if it otherwise justifies on the ground of just and equitable, then Tribunal can wind up the company or pass such order as it thinks fit. Whereas in Section 398 the basic features are that the management is working in a manner prejudicial to the interest of the company by bringing about the material changes in the management or by alteration in its Board of Directors, then in that case, if it is found by the Tribunal that in order to bring to an end or preventing further mismanagement, it can pass such order as it deems fit including that of winding-up. Therefore, the parameters in both the Sections i.e. Sections 397 & 398 are very clear. It will depend upon case to case. No hard and fast rule can be laid down. In the case of oppression to the interest of member or members, if the Tribunal is satisfied that the winding-up is just and equitable then it can do so or pass any order as it thinks fit.

Likewise in Section 398 if the management wants to bring any material change in the management and control of the company prejudicial to the interest of the company, then in that case, appropriate order can be passed by the Tribunal. The acts which would amount to oppression to the members or mismanagement or TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 material alteration in the control of the company or prejudice to the interest of the company would depend upon facts of each case.

(Paras 30 and 40)

197. The Learned Counsel for the Respondents relies on the decision of the Hon'ble Supreme Court of India in Hind Overseas Pvt. Ltd. v. Ragunath Prasad Jhunjhunwala, reported in (1976) 3 SCC at

Page 259 at Spl Pg: 260, wherein at paragraphs 37 & 38, it is observed as under:

> ``Section 433 (2) bars relief if some other remedy is available to the petitioners and they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. Sections 397 & 398 also show that Section 433 (f) is in the nature of a last resort." (Paras 37 and 38)

198. The Learned Counsel for the Respondents cites the decision of the Hon'ble High Court of Delhi in Pearson Education Inc v. Prentice Hall India (P) Ltd. & Ors. (2005) 10 Comp LJ 319, at paragraphs 28 & 29, wherein it is observed as under:

> 28. ``This judgment was followed by the House of Lords in Re.

A company (No 00709 of 1992) O'Neill and Anr. v. Phillips and Ors., (1999) 2 All.E.R. 961. In Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick, (1980) 50 CC 771 Calcutta High Court has expanded the scope and width of Section 402 of the Act by going to the extent of observing that this provision gives the power to supplant the entire corporate management. The relevant observations in that case reads as under:-

> "It should be borne in mind that when a court passes an order under ss. 397, 398 and 402 as has been done in the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 instant case there could be no limitation on the court's power while acting under the sections. Instead of the winding up of a company, the court under the abovementioned sections has been vested with ample power to continue the corporate existence of a company by passing such orders as it thinks fit in order to achieve the objective by removing any member or members of a company or to prevent the company's affairs from being conducted in a manner prejudicial to the public interest. The court under Section 398 read with Section 402 of the Act has the power to supplant the entire corporate management. Under the aforesaid sections, the court can give appropriate directions which are contrary to the provisions of the articles of the company or the provisions of the Companies Act."

Therefore, there cannot be straight-jacket formula which would fit in all the circumstances. It will depend on the totality of the circumstances as to what kind of relief(s)/direction(s) is/are warranted in a particular case. To find "just and equitable"

> solution, at times even the provision of Articles are to be given go- by. In the impugned judgment itself, it has gone contrary to the Articles while directing that the petitioner's nominee would not be one the Board, because of conflicting interest. However, while considering this aspect it has taken shelter of the very Articles of Association to reject the petitioner's submission and acrimonious relations between the parties. The CLB has thus adopted narrow and incommodious approach to this issue. In the facts of this case, as already observed by me, equity is in favor of the petitioner. Such a situation should not be allowed where the petitioner/Prentice Hall

> is not associated with the company but the company carries on with its name. It is an exceptional kind of a case where the petitioner who is responsible for the incorporation of the Indian company is driven out of the company but the company continues to adopt its name and wants to continue to ride on its goodwill without being associated with it. Such unprecedented situation would call for unprecedented solution and in my opinion the second alternative suggested by the petitioner that in case the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 petitioner has to go out from the company it is willing to do so provided the words ``Prentice Hall'' are also dropped from its name, is not something which is unreasonable. In such a situation, the argument of the learned counsel for the respondent that the company is a separate entity and the appellant's attempt is to identify itself with the company, may also be of no relevance. No doubt, the company has separate legal entity. But we are here concerned with the proceedings under Section 397/398 of the Act and in the process the issue being discussed is as to whether direction can be issued under Section 402 of the Act for change of the name of the company.
>
> Such a direction would be permissible in the facts of this case where the petitioner brought this corporate vehicle to India and gave its name is now asked to pull apart and breakoff and would be no longer associated with it. Width and amplitude of CLB's powers under Section 402 is already delineated above. That apart, if the entity of the company has to be maintained as it is, the 2nd respondent should accept the first alternative by selling his stakes in the company to the petitioner. He cannot be allowed to create a situation of "having a cake and eat it too".

29. Once the power to issue such a direction is found in Section 402, pendency of other suit shall not deter the Court to pass appropriate direction in these proceedings. More so, when the issue of copyright is to be examined on different parameters and the suit was filed when the petitioner was a shareholder in the company. Here, we are discussing the modalities of parting the ways."

199. The Learned Counsel for the Respondents adverts to the decision in Vijay Kumar Narang & Others v. Prakash Coach Builders P. Ltd. & Ors. reported in 2009 SCC OnLine Kar. 641, wherein at paragraph 42, it is observed as under:

> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
>
> 42. ``In respect of the residuary provisions of section 397 Mr. Chinnappa has pointed out that sub-clause (b) of sub-section (2) of section 397 was in existence even at a time when clause (a) of sub-

section (2) of section 397 comprised of the oppressing part on the part of the management or other members of the company and even then it was a requirement on the part of the complaining members complaining oppression to demonstrate that it was inevitably a situation wherein the court finds that it is just and equitable to pass an order to wind up the company and therefore unless a finding that it is a situation wherein it is inevitable to pass an order to wind up operation of the

company is recorded and if it is just and equitable ground and in support of the submission, drawn our attention to paragraph 19 of decision in Shanti Prasad Jain v. Kalinga Tubes Ltd., reported in [1965] 35 Comp Cas 351; AIR 1965 SC 1535."

200. The Learned Counsel for the Respondents refers to the decision in JK Paliwal & Anr. v. Paliwal Steel Ltd. & Ors. [2007] SCC OnLine CLB 35, wherein at Paragraphs 24 & 25, it is observed as under:

> 24. ``The respondents have been oppressive to the petitioners by appointing respondent No.3 and respondent No.4 as directors.

Creating new majority by way of representation on Board of the respondent No.1 and selling off the asset of the respondent No.1 at the back of the petitioners are acts of continuous oppression to the petitioners as well as the mismanagement of the affairs of the respondent No.1 company. The respondents' conduct has been burdensome, harsh and wrongful. Besides, the affairs of the company have been mismanaged as pointed out above.

25. Keeping these circumstances in view, to do substantial justice between the parties, I hereby order as follows:

> (i) Appointment of the respondents Nos. 3 and 4 as Additional Directors is declared null and void and status TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 quo ante is restored. Form No. 32 filed with the Registrar of Companies in respect of the appointment of respondent No.3 and respondent No.4 is also declared as null and void.
>
> (ii) The agreement to sell and purchase dated July 7, 2005 and execution of the same by respondent No.2 on behalf of the respondent-company is declared null and void and the respondent Nos. 2 to 6 are restrained from entering into any mutation of flat in favour of a third party.
>
> (iii) The respondent Nos. 2, 3, 7, 8 and 9 are directed to refund the amount drawn by them illegally from the company's bank account.
>
> (iv) The resolution given to respondents Nos. 12 and 13 bankers for change in authorised signatories is hereby cancelled and declared as null and void and status quo ante is restored.
>
> (v) Respondent No.1 company is directed to give consequential effects in implementing the directions contained in (i) to (iv) above forthwith."
>
> 201. The Learned Counsel for the Respondents cites the decision in Girdhar Gopal Dalmia & Ors. v Bateli Tea Co. Ltd. & Ors. [2007] 136 CompCas 339 (CLB), wherein at paragraphs 28 & 29, it is observed as under:

28. ``Thus, the petitioners have made out a case for a direction for parting of ways which, according to them, could be effected by directing B.L. Dalmia group and Sharaf group to sell their shares in Bateli to the petitioners. On the other hand, the respondents have contended that since they are the majority shareholders, the petitioners should be directed to sell their shares to the respondents. In terms of section 402 (a) of the Act, there is no stipulation that it is the minority, which should be directed to sell TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 their shares to the majority. Whether the minority should sell or purchases depends on the facts of each case. Normally, it is the majority shareholders who would be in control of the company and therefore, directions are normally given to the minority to sell their shares to the majority. In the present case, admittedly there are three companies and I have already given my finding that each company is found to be under the control and management of one group and that the attempt to manage all the companies jointly and equalisation of shares has failed. It is very rare that the shareholders in control of the company whether they are in minority or majority are directed to sell their shares. Shri Sarkar relevantly cited the case of Wonderweld, [2002] 6 CLA 423 [2003] 115 Comp Cas 377 wherein, this Board directed the majority to sell their shares to minority as the latter was in control of the company for a long time. However, where both the sides are in management and the company has more than one separate and identifiable divisions/businesses, this Board had divided the company by allocating one or more divisions/businesses to one group and the remaining to other groups (Achal Nath / Hind Samachar2 / Trackparts / Jaidka Motors2). Likewise, when there were two companies controlled and managed by common shareholders, this Board had directed one group to take one company and the other group the other company (Micromeritics3). In the present case, admittedly there are three groups of shareholders and there are three identifiable independent companies carrying on similar businesses with the three group as shareholders. Therefore, as rightly pointed out by the Learned Counsel for the petitioners, the most equitable way of putting to an end of the disputes would be to direct the group in control of a company to purchase the shares held by the others in that company on a fair value to be determined by an independent valuer. It was vehemently argued by the counsel for the respondents that it would be highly inequitable to direct the respondents holding majority shares in a profitable company (Bateli) to sell their shares as against their controlling of loss making companies. Since, the worth of the companies will be taken into account in the determination of the fair value, no prejudice would be caused to any of the shareholders.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

29. Accordingly, I direct as follows:

1. The B.L. Dalmia group and Saraff group are directed to sell their shares held in Bateli to the petitioners group.

> 2. With effect from the date of this order, the respondent directors shall not interfere in the affairs of Bateli and shall not take any decision in regard to the affairs of Bateli, even though they would continue as directors till full consideration is paid for the shares held by them in Bateli. The petitioners are at liberty to decide about the appointment of the CEO made by the respondents.
>
> 3. The B.L. Dalima group is at liberty to purchase the shares of the petitioners in Belgachi and Saraff group is at liberty to purchase the shares of the petitioners in New Terai, both by giving a 15 days notice to the petitioners, which shall be binding on the petitioners.

In Belgachi, the petitioners are no longer directors and the fact has been admitted by the respondents. In sofar as New Terai is concerned, there are no details of their ceasing to be directors, but by this order, they will be deemed to have ceased to be directors with immediate effect. They will not interfere in the affairs of both these companies with immediate effect.

4. I am not giving any finding on whether the petitioners have acquired 5 per cent shares in Bateli from B.L. Dalmia group or not for the reasons that there are not adequate materials to decide this issue and also that no relief in respect of the same has been sought in the petition.

5. All the financial claims like loans etc. of Bateli and other companies of the petitioners against New Terai and Belgachi may be settled in terms of the respective commercial terms as in this proceeding, I am concerned only with the shareholders rights and not with inter se corporate claims.

6. The petitioners shall indemnify the respondents against any claim in respect of Bateli and likewise, the respondents shall indemnify the petitioners in respect of any claims in respect of the other two companies.

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7. Within 2 months from the date of receipt of full consideration for the shares held by them in Bateli, the Saraff group shall release the petitioners from the guarantees given in respect of New Terai and likewise, B.L. Dalmia group shall release the petitioners from the guarantees given by them in respect of Belgachi.

8. The fair value of the shares of Bateli shall be determined by M/s. Carritt Moran & Co. In case, the Saraff and B.L. Dalmia groups exercise the option of purchasing the shares held by the petitioners in other two companies as per the option given in par 29:3, the fair value of the shares of the other two companies will also be determined by the same valuer.

9. The valuation exercise should be completed within a period of three months from the date of assignment. The fees payable will be negotiated by the concerned companies and paid by them.

10. All the parties are at liberty to make written as well as oral submissions before the valuer which shall be taken into consideration by the valuer in determining fair value of the shares.

11. The parties are at liberty to decide whether they would purchase the shares by themselves or the respective companies would do so. In case the company/ies purchase the shares, consequent reduction in the share capital is authorised by this order.

12. Once the valuation is completed, the consideration should be paid within a period of 2 months in one or more instalments.

13. Liberty given to the parties to apply in case of any difficulty in working out this order." TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Member:

> 202. A `Member' of a `Company' means, a `Shareholder', who holds one or more `Shares' in the company and whose name is entered in the `Register of Members' of the company.

Shareholder:

> 203. A `Shareholder' is the `Owner of Shares', held by him. A `Person' who holds a `Share' in a company is its `Shareholder' or `Holder of a Share', regardless of his `Name' being entered in the `Register of Members'.
>
> 204. A person who holds a `Share', but whose `Name' is not entered on the `Register of Members', is a `Shareholder'. He becomes a `Member' only when his `Name' is entered in the `Register of Members.
>
> 205. Section 2 (55) (i) of the Companies Act, 2013, enjoins that the subscribers of the Memorandum of the Company, shall be deemed to have agreed to become `Members' of the Company and on its registration, shall be entered as `Members' in its `Register of Members'.

FEMA & FERA:

> 206. It is pointed out that `Foreign Exchange Management Act, 1999 (A paradigm shift), is a `Civil Law'. `Section 10 (4) of FEMA 1999', TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 provides that `an Authorised Person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section'.

> 207. `Section 10 (5) of FEMA 1999', enjoins that `an authorised person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the Reserve Bank'.

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208. The `Foreign Exchange Regulation Act', was a `Criminal Law'. In `FEMA', the provisions pertaining to the `Burden of Proof' and `Presumption of Culpable Mental State' are not found. However, the declaration to the effect that the `Transaction' undertaken by a `Person', is not designed for the purpose of `Violation' or `Evasion' of the `Provisions' of the `Act', as was required under `FERA 1977', continues to be there.

209. Under the `Foreign Exchange Regulation Act 1973', there was a presumption of negative intention (`Mens Rea'). In the `Foreign Exchange Management Act, the presumption of `Mens Rea' (`Guilty Mind') is not there. `Mens Rea', is not essential for the purpose of imposition of penalty under `FERA' (Also, `FEMA). Mere providing a blame worthy conduct is enough to attract penalty, as per the decision of the Hon'ble Supreme Court of India, in the Matter of Director of Enforcement v. MCTM Corporation (P) Ltd., AIR 1969 SC 1100. Hon'ble Supreme Court Decision:

210. At this stage, this `Tribunal', points out that the decision of the Hon'ble Supreme Court in Khetan V Parekh v. Special Director, Directorate of Enforcement, 2012 AIR SCW Page 822, wherein it was reiterated that the `Appellants' have exclusive knowledge of their TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 financial condition / status, it was their duty to candidly disclose all their `Assets' (movable and immovable), including those in respect of which, `Orders of Attachment', may have been passed by a `Judicial' and `Quasi- judicial Forum'.

Appeals under `FEMA 1999':

211. The `Adjudicating Authority', `Special Director' (`Appeals') and the `Appellate Tribunal' have `Powers' under Section 16 (5), 17 (6) and 28 (5). All the proceedings before the `Adjudicating Authority' (`Special Director') (`Appeals') and the `Appellate Tribunal', shall be deemed to be `Judicial Proceedings', under Section 193 and 228 of the Indian Penal Code.

Civil Court:

> 212. The `Adjudicating Authority', `Special Director' (`Appeals') and `Appellate Tribunal', is deemed to be a `Civil Court' for the purpose of Section 345 and 346 of

the Criminal Procedure Code.

Exercise of Power:

213. As per Section 14A of the `Foreign Exchange Management Act, 1999', the `Officer of Enforcement', shall exercise `like powers of the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Income Tax Authorities', under `Income Tax Act, 1961', subject to such limitations and such power is given prescribed under that Act.

Equity Investment:

214. As per definition under `NDI Rules', under Clause 2 (k), `Equity Investments', means `Equity Shares', `Convertible Debentures', `Preference Shares' and `Share Warrants', issued by an `India Company'.

215. A `Non-Resident Entity', can `Invest' in `India', subject to `FDI Policy', except in those `Sectors / Activities', which are `Prohibited'.

Scheme of Investment:

216. A `Person' resident `outside India', making an `Investment' in `India', has to look into the `Sector' in which the `Investment', is intended to be made. In terms of `FDI Policy', an `Investment', can be made in `India'. Under `FDI Policy', `Investments', can be made in `Shares', mandatorily and `Fully Convertible Debentures' and mandatorily and `Fully Convertible Preference Shares' of an `Indian Company', under `Two Routes' (i) `Automatic Route and (ii) `Government Route'.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Automatic Route:

217. The `Automatic Route', an `Investment' by a `Person', Resident outside India does not require prior `Approval' of the `Reserve Bank of India' or the `Government Approval'.

Government Route:

218. The `Government Route', is the `Entry Route', through which an `Investment' by a `Person', `Resident Outside India', requires prior `Government Approval'.

Reserve Bank of India:

219. It is for the `Central Bank of India i.e., Reserve Bank of India', to decide on merits whether the violation under `Foreign Exchange Management Act 1999', is to be treated as `technical' and / or `minor' and the need / necessity of referring the

`matter', to the Directorate of Enforcement.

Analysis:

Maintainability of Appeal:

220. According to the `Appellants' / `Respondents', they have preferred the instant Comp. App AT No. 83 of 2020 (TA No. 283 of 2021) as TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Aggrieved Persons', (under Section 421 of the Companies Act read with Rule 19 of NCLAT Rules, 2016) on being dissatisfied with the `impugned order' dated 27.05.2020 (delivered on 01.06.2020) in CP/54/2012 (TCP/26/2018), in allowing the Company Petition against them and because of their personal / private rights are adversely affected, the filing of the instant `Appeal', is maintainable.

221. It is the version of the Respondents / Petitioners that the instant `Appeal', preferred by the `1st Appellant / 2nd Respondent' and the `2nd Appellant / 3rd Respondent', is not `maintainable in law', because of the fact that they have not disclosed that they are `Disqualified' as `Directors' of the Company, for the period from 01.11.2016 to October 2022, due to the `Default' committed by the Company in filing `Financial Statements'/ `Annual Returns', for a continuous period of three Financial Years and therefore, they had vacated their `Office' as `Directors', as per Section 167 (1) (a) of the Companies Act, 2013.

222. Added further, it is projected on the side of Respondents / Petitioners, the `Appellants Nos. 1 and 2' were `Nominee Directors' of the `3rd Appellant / 4th Respondent' / `Company' and they do not own any `Shares' in the Company directly. As such, the instant Comp. App (AT) No. 83 of 2020, filed in the name of Appellant Nos. 1 and 2, is `not TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 maintainable in law' and they ought to be removed from the array of `Parties' altogether.

223. That apart, the plea of the Respondents / Petitioners is that `1st Appellant' is disqualified as `Director' and an independent `Chairman' was appointed to immediately take charge of the `Tribunal'. Therefore, the `Comp. App (AT) No. 83 of 2020), filed in the Company's name is not maintainable, which ought to have been a `Proforma Respondent' by the independent `Chairman'. Besides this, the `3rd Appellant / 4th Respondent' is not an `aggrieved person', by the `impugned order' as its `Shareholding' is the same. Hence, the instant Comp. App (AT) No. 83 of 2020, preferred before this `Tribunal', is not `maintainable' by any of the `Appellants' and the same is to be `dismissed in limine'.

224. Repelling the stand taken by the Respondents / Petitioners, the Learned Counsel for the Appellants contends that the Respondents / Petitioners had omitted

to mention that at their instance, the `National Company Law Tribunal', Division Bench, Chennai, on 24.06.2019, in MA/543/2019 in TCP/26/2018 (CP/54/2012), had passed the following `Order':

``On the consensus arrived between the parties and on having filed the draft terms, this Bench, looking at it, hereby records the terms arrived at in between them as order of this Bench, which is a follows:

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 ``The Applicant submits that the Applicant No.1 / Respondent No.1 intends to participate in the tender floated by Tamil Nadu Textbook and Educational Services Corporation for the purpose of printing Text Books for school children. One of the conditions for participating in the tender is that the bidder has to enclose the Audited Accounts and Income-Tax Returns. Hence, the Applicant No.1 / Respondent No.1 prays that the Applicant No.1 / Respondent No.1 be permitted to Audit the Accounts for the Financial Years 2017-18 and 2018-19 for filing of Income Tax Returns alone.

Accordingly, the Applicant No.1 / Respondent No.1 is permitted to have accounts of the Applicant No.1 / Respondent No.1 for the Financial Year 2017-18 and 2018-19 audited and is permitted to file Income Tax Returns of the Applicant Company for the said Financial Years. The Applicant No.1 / Respondent No.1 is also permitted to enclose the said Income Tax Returns along with the audited accounts for the aforesaid years for participating in Government tenders. The Applicants / Respondents are also directed to furnish copies of the accounts and Income Tax Returns to the Petitioners. Along with the Accounts and Returns, the Applicants / Respondents shall also provide the tender documents with the price specification redacted, to the Respondents / Petitioners.

The Applicant / Respondent Company has by an undertaking recorded by this Hon'ble Tribunal in its Order dated 02.11.2018 proposed that they would not hold AGMs, except to file IT Returns which was not objected to by the Respondents / Petitioners and accepted by this Bench. The same shall apply to the accounts for the Financial Years 2017-18 and 2018-19.

It is made clear that Accounts and Income Tax Returns filed by the Applicant No.1 are without prejudice to the rights and contentions of the Respondents / Petitioners in the above Company Petition as has been directed by this Hon'ble Tribunal vide Order dated 02.11.2018 and any such filing is subject to the outcome of the Company Petition'' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 and `disposed of' the MA/543/2019, accordingly. Hence, it is projected on the side of the `Appellants' that because of the `Restraint Order' dated 24.06.2019 in MA/543/2019 in TCP/26/2018 (CP/54/2012), the `Accounts of Kumudam', could not be `prepared' or `approved' by the `Shareholders'.

225. Moreover, the Appellants come out with a plea that when, at the behest of the Respondents / Petitioners, the aforesaid `Order' in MA/543/2019 in TCP/26/2018, came to be passed by the `Tribunal', it cannot be urged on the side of the Respondents / Petitioners that the `Appellant Nos. 1 and 2', as `Directors of Kumudam' were `Disqualified'.

226. In main Company Petition No. 54 of 2012 (Before the Company Law Board, Chennai Bench) and later numbered as TCP/26/2018 (on the file of `National Company Law Tribunal', Chennai), the `Respondents' in Comp. App (AT) No. 83 of 2020 figure as `Petitioners' and the `Respondents' 1 to 4 figure as `Appellants' (i.e. `1 st Appellant / 2nd Respondent; `2nd Appellant / 3rd Respondent'; `3rd Appellant / 4th Respondent' and `4th Appellant / 1st Respondent').

227. A cursory perusal of the contents of CP/54/2012 (TCP/26/2018), the 1st Respondent / 1st Petitioner has holding 3,32,640 Equity Shares of Rs.100 each, constituting 64.73% of the Paid up Capital of the `4th Appellant / 1st Respondent / Company', the 2nd Respondent / 2nd Petitioner is mentioned as wife of the founder of Kumudam Magazine TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Mr. SAP Annamalai Chettiar', as on date of the `Petition', holding 9660 Equity Shares of Rs.100 each, constituting 1.88% of the Paid up Capital of the `4th Appellant / 1st Respondent / Company'.

228. As a matter of fact, the `4th Appellant / 1st Respondent / Company' (Kumudam Publications Pvt. Ltd.) is mentioned in the main Company Petition, as engaged in the `business of Printing and Publication of Magazines, Newspapers, Journals and Periodicals, etc., in the State of Tamil Nadu'.

229. The `1st Appellant / 2nd Respondent' is described as a `Former Company Secretary', of the `4th Appellant / 1st Respondent / Company', being a `Director' of the said `Company', and does not directly hold any `Shares' in 4th Appellant / 1st Respondent / Company.

230. The `2nd Appellant / 3rd Respondent' is described as a `Director', of the `4th Appellant / 1st Respondent / Company', and not directly holding any `Shares' in the said Company. As a matter of fact, the `1 st Appellant / 2nd Respondent' along with his family members is described as `promoted the `3rd Appellant / 4th Respondent / Company' and further that the `1st Appellant / 2nd Respondent' is described as the `Managing Director' of the `3rd Appellant / 4th Respondent / Company'. Further, the entire `Share Capital' of Rs.1,00,000/- of the `3rd Appellant / 4th Respondent / TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Company' is mentioned, to be held by the `1st Appellant / 2nd Respondent', together with his family members, etc.

231. A mere glance of the Cause Title of CP/54/2012 (TCP/26/2018 -

filed by the `Petitioners / Respondents' in `Appeal'), indicates that the `Respondents / Appellants', do figure as `Appellants', in Comp. App (AT) No. 83 of 2020. Therefore, it is candidly clear that the `Appellants' in Comp. App (AT) No. 83 of 2020, on the file of this `Tribunal', when they were arrayed as `Respondents' in CP/54/2012 (TCP/26/2018) by the `Petitioners / Respondents' in the `Appeal', a `Final Order' was passed by the `Tribunal' dated 27.05.2020 (delivered on 01.06.2020) inter se between the `Parties', they are entitled to prefer an `Appeal', having `Locus Standi', before the `Appellate Tribunal', as per the ingredients of Section 421 of the Companies Act, 2013, as `Any Person' aggrieved by an `Order' of the `Tribunal'.

232. In this regard, this `Tribunal' pertinently points out that the word `Aggrieved' means a `substantial grievance, a `denial of some `personal', `pecuniary' or `private' rights / imposition upon a `Party' of a burden / obligation (vide P. Ramanathan Aiyer Law Lexicon 2nd Edition (Reprint 2001) Page 78).

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Appeal:

233. Section 10F of the Companies Act, 1956, provided that an `Appeal', shall lie against any `Decision' / `Order' of the `Company Law Board', meaning that an `Appeal', can be filed against any `Order', passed by the said Board. However, the Companies Act, 2013, employs the words, an `Order of Tribunal' in sub-section 1 of Section 421, meaning that an `Appeal', against any `Order', passed by the `Tribunal', shall be filed, even if the `Order' of the `Tribunal', had not finally decided the `Rights of Parties'.

234. Continuing further, this `Tribunal' points out that the `Tribunal' in the `impugned order' in the main Company Petition, had held that the Resolutions passed by the Board Meeting held on 20.09.2011 of the Respondents (Appellants in Appeal) without the presence of the `Respondents / Petitioners' were `invalid' and hence the cancellation of 3,32,400 Equity Shares of Rs.100/- each held by the `1st Respondent / 1st Petitioner' was held as `illegal', invalid and non-est in law. In the same analogy, the subsequent cancellation 200 Shares of the 1st Respondent / 1st Petitioner was held to be invalid and illegal, etc.

235. Therefore, when the Appellants / Respondents (including the 3rd Appellant / 4th Respondent) are aggrieved against the `impugned order' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 dated 27.05.2020 (delivered on 01.06.2020), imposing a burden / obligation upon them, in main Company Petition No. 54 of 2012 (TCP/26/2018), passed by the `Tribunal', they are entitled to prefer an `Appeal', before the `Appellate Tribunal', considering the fact that an `Appeal' is a continuation of the `Original Proceedings', in `Law'. Viewed in that perspective, the contra plea taken on the side of the Petitioners / Respondents is not acceded to, by this `Tribunal'.

236. In regard to the plea of the Respondents / Petitioners that no accounts were audited and `no Annual Returns', filed by the `4th Appellant / 1st Respondent / Company' and was in `Default' and therefore, the `Appellant Nos. 1 and 2' were `Disqualified' as per Section 164 read with 167 of the Companies Act, 2013, the same cannot be countenanced because of the fact that the `National Company Law Tribunal', Chennai, in MA/543/2019 in TCP/26/2018 on 24.06.2019, had passed an

`Order' based on the consensus arrived between the parties and on the basis of `Draft Terms', being filed inter alia stating that the `Applicant / Respondent / Company' has by an undertaking recorded by this `Hon'ble Tribunal', in its `Order' dated 02.11.2018, proposed that they would not hold `AGMs', except to file `IT Returns', which was not objected to by the `Respondents / Petitioners' and accepted by this Bench, etc., in the considered opinion of this `Tribunal', in lieu of the fact that the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 restraint on holding of any of the `AGM' was because of the `Order', passed by the `Tribunal', at the behest of the Respondents / Petitioners. Hence, the plea of `Disqualification' of the `Appellant Nos. 1 and 2' as `Directors', put forward on the side of the `Respondents / Petitioners' is unworthy of acceptance by this `Tribunal'. In any event, the aforesaid `Order' of the `Tribunal' in MA/543/2019 in TCP/26/2018 dated 24.06.2019, cannot be pressed in to service, as opined by this `Tribunal'. Bar of Order II Rule 2 of Civil Procedure Code:

> 237. The Learned Counsel for the Appellants submits that the C.S. No. 139 of 2012, was filed by the `1st Respondent / 1st Petitioner' as `Plaintiff', before the `Hon'ble High Court of Madras on 24.02.2012 and facts till 24.02.2012, were mentioned in the `Plaint', but no reliefs were claimed and in fact, no `Leave', to omit the `Reliefs', as required under Order II Rule 3 of the Civil Procedure Code was obtained in C.S. No.139 of 2012.
>
> 238. The Learned Counsel for the Appellants points out that the `Respondents / Petitioners', in the instant `Appeal', as per `Order' dated 26.05.2015, passed by the `Company Law Board', withdrew certain `Reliefs' from the Civil Suit No.139 of 2012, which `Reliefs' were overlapping with similar `Reliefs' claimed in the main Company Petition, TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 but the facts constituting the `Cause of Action' was not amended / deleted from the C.S.No. 139 / 2012, on the file of the Hon'ble High Court of Madras.
>
> 239. In this connection, the Learned Counsel for the Appellants points out while withdrawing four `Prayers'/`Reliefs' from the main Suit in C.S. No. 139 of 2012, on the file of Hon'ble High Court of Madras, no `Liberty' was granted by the Hon'ble High Court to pursue the `Reliefs', before the `National Company Law Tribunal'.
>
> 240. The Learned Counsel for the Appellants submits that the Company Law Board in its Order dated 26.05.2015 in Paragraph 21, had noticed that there was a complete `commonality of the cause of action' in `Suit' and in the Company Petition', and in this regard, the Learned Counsel for the `Appellants' points out that the `Withdrawal of Reliefs', without any `Liberty', to agitate the same in the `Company Petition', clearly proves that the main CP/54/2012 (TCP/26/2018) is barred, as per the ingredients of Order II Rule 2 of the Civil Procedure Code, because of the reason that the issues raised in the CS No.139 of 2012 and in CP/54/2012 (TCP/26/2018) are common and predicated on the same set of facts.

241. The Learned Counsel for the Appellants contends that their `impugned order' dated 27.05.2020 (delivered on 01.06.2020), passed by TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the `Tribunal', had failed to consider the objections, in regard to the `Maintainability of Company Petition', and hence, the same is to be set aside.

242. The Learned Counsel for the Appellants relies on the decision of the Hon'ble Supreme Court in Virgo Industries (Eng.) Pvt. Ltd. v.

Venturetech Solutions Pvt. Ltd., reported in (2013) SCC at Page 625, wherein at Paragraph 17, wherein it is observed that it is not necessary that the earlier `Suit' has to be disposed of and further the Paragraph 17 reads as under:

17. ``However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order 2 Rule 2 CPC as already discussed by us, namely, that Order 2 Rule 2 CPC seeks to avoid multiplicity of litigations on the same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order 2 Rule 2 CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during during the pendency of the first suit. Rather, Order 2 Rule 2 CPC will apply to both the aforesaid situations."

243. The Learned Counsel for the Appellants refers to the decision of the Hon'ble Supreme Court of India in Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior & Ors. (1987) 1 SCC at Page 5 at Spl Pg: 12, wherein at paragraph 9, it is observed as under:

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9. ``..... In the instant case, the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject matter since the earlier writ petition had been withdrawn without permission to file a fresh petition."

244. The Learned Counsel for the Appellants points out the decision of the Hon'ble Supreme Court of India in Masumi Overseas Pvt. Ltd. v.

State Trading Corporation of India Ltd. (2018) SCC Online Bom. 10506, wherein at paragraphs 13 and 18, it is observed as under:

13. `` The issue of applicability of the provisions of Rule1 of Order XXIII of the said Code to a Letters Patent Appeal filed on the Appellate Side of this Court was considered by a Division Bench of this Court in the case of Saraswati Education Society v. Santosh s/o. Bhaulal Rahangdale6 . This was a case where a Letters Patent Appeal preferred before a Division Bench was permitted to be withdrawn and was

> disposed of as withdrawn. After withdrawal of the appeal, the appellants preferred an application for review of the order which was impugned in the earlier Letters Patent Appeal.

The review petition was rejected and thereafter, a fresh Letters Patent Appeal was filed against the same order which was impugned in the Appeal which was withdrawn. The argument before the Division Bench on the issue of maintainability was that the earlier Appeal was withdrawn in the light of the views expressed by the Division Bench that the appellant could seek review of the impugned order. After considering Rule 28 of Chapter-XVII of the Bombay High Court Appellate Side Rules read with Section 107(2) of the said Code, the Division Bench held that the provisions of the said Code and in particular Rule 1 of Order XXIII of the said Code are applicable to the Letters Patent Appeal. As the earlier appeal was withdrawn without obtaining a leave of the Court to file a fresh appeal, the Division Bench applied the bar TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 created by Rule 1 of Order XXIII and upheld the objection regarding maintainability of the Letters Patent Appeal.

18. Even otherwise, Rule 1 of Order XXIII of the said Code being a rule of public policy, the principles analogous to Rule 1 of Order XXIII of the said Code are applicable to the present appeals. We have quoted the order dated 11th July 2017 passed by the Division Bench of this Court wherein while withdrawing the earlier appeals preferred against the same impugned judgment and order, a limited liberty was sought and was granted to prefer review petitions. The review petitions were rejected. SLP was filed against the impugned judgment and order and the order passed on the review petitions. After filing SLP against the impugned judgment and order that the present appeals were preferred by the appellant. On plain reading of the order dated 10th August 2018 passed in the SLP, we find that there was no liberty granted by the Apex Court to prefer appeals against the impugned order before this Court the only liberty granted was to move for interim orders before the Letters Patent Appeal Division Bench."

245. In substance, the plea taken on behalf of the Appellants is that the `Respondents / Petitioners' after unconditionally withdrawing an earlier proceeding cannot be permitted to file a subsequent proceeding on similar facts.

246. The Learned Counsel for the Respondents proceeds to point out that the `Company Law Board' in its `Order' dated 26.05.2015 had not dealt with the issues raised in the Company Petition on merits, but ordered that `Final Adjudication' of the Company Petition, shall be deferred, until completion of two events (a) Adjudicating by the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Enforcement Directorate on the validity of the acquisition of the 1 st Respondent / 1st Petitioners in the Shareholding in the company and the Adjudication on the `prayer' for `withdrawal of certain reliefs' by the `Respondents / Petitioners' in CS No. 139 of 2012, before the Hon'ble High Court of Madras (both of them) were completed before the `Final Hearing' of the main `Company Petition'.

247. The Learned Counsel for the Respondents submits that the `Order' dated 26.05.2015 of the `Company Law Board' is an `Interlocutory one' and hence, the `Tribunal' is not bound by the said

`Order', because of the fact that an `Interlocutory Order' does not operate as `Res judicata', at the time of passing a `Final Order'.

248. The 1st Respondent / 1st Petitioner / Plaintiff in C.S.No. 139 of 2012, on the file of the Hon'ble High Court of Madras (filed against the `4th Appellant / 1st Respondent / Company' (Kumudam Publications Pvt. Ltd. and Others) as `Defendants', had prayed for a `Judgment' and `Decree', against them in respect of the following `reliefs':

> ``(a) For specific performance of the Memorandum of Understanding dated 15.8.2010 entered into between the plaintiff, to transfer the shares of the defendants 2 to 5 to the plaintiff consequent to fixation of fair value by this Hon'ble Court thereby directing the Defendants 2 to 5 to perform their reciprocal obligation.
>
> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
>
> (f) Directing the defendants 2 and 3 to pay a sum of Rs.1,00,00,000/- as compensation for the plaintiff for loss of reputation caused to him.
>
> (g) For a Mandatory injunction directing the defendants 4 and 5 to forthwith remove the Tower put up by them for running a unit styled as Noble Broadcasting Corporation put up on the suit schedule property, as per the terms of MOU dated 15.8.2010.
>
> (h) For a permanent injunction restraining the defendants 2 and 3 from in any manner spending the monies of the first defendant company in connection with litigation revolving round the disputes between the Directors / Shareholders of the first defendant company / from drawing salary or personal expenses."

249. It comes to be known that the 1st Respondent / 1st Petitioner / Plaintiff / Applicant, had filed Appln No. 4914 of 2016 in C.S. No. 139 of 2012 against the `4th Appellant / 1st Respondent / Company' (`Kumudam Publications Pvt. Ltd. & 3 Others as `Respondents'), seeking permission to `Withdraw the Prayers (b), (c), (d) and (e), forming part of the Claim in C.S.No. 139 of 2012 and the Hon'ble High Court of Madras 22.11.2016 at Paragraph 20, had observed the following:

> 20. ``In view of the above discussions that the applicant has not sought for liberty to file a fresh suit, it is like giving up his claim. In such a context of the matter, once the plaintiff files an application TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 to withdraw the suit in full or part, that is the end of the litigation and there can be no objection to it.'' and permitted the `Applicant', to `withdraw the reliefs', claimed aforesaid in C.S. No. 139 of 2012.

Technical Plea:

250. At this juncture, this `Tribunal' pertinently points out that the `Plea of Bar', under Order II Rule 2 of the `Civil Procedure Code', is indeed. a `Technical Plea'. As a matter of fact, it tends to defeat justice and to deprive an `individual' of a `Legitimate Right'.

251. It is not out of place for this `Tribunal' to make a pertinent mention that the Respondents / Petitioners in main Company Petition No. 54 of 2012 (TCP/26/2018 - filed under Sections 111, 397, 398, 402, 403, 404, 406, 408, 237 read with Schedule XI of the Companies Act, 1956), had prayed the following `Final Reliefs':

> a. In regulating the conduct of the affairs of the 1st Respondent / Company, in future:
>
> b. In deleting the Clauses 31(a), 32 and 39(b) of Articles of Association as being `harsh' and `oppressive', to the `interest of the `Petitioners/Respondents in Appeal', and consequentially to amend the `Articles of Association' of 1st Respondent company.
>
> c. In declaring the `Resolution' passed at the purported Board Meeting alleged to have held on 20.09.2011, cancelling 3,32,440 Equity hares of Rs.100/- each held by the 1st Petitioner / 1st Respondent) as illegal, invalid and not-est in `Law' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 d. In rectifying the `Register of Members' of the 1 st Respondent (4th Appellant in Appeal), so as to restore 3,32,440 Shares of Rs.100/- each in the name of the 1st Petitioner (1st Respondent in Appeal).
>
> e. In declaring the Form-32 filed by the 2nd Respondent (1st Appellant in Appeal) with the `RoC', wrongly intimating the cessation of Petitioners (Respondents in Appeal), as `Directors' of the `1st Respondent Company' (4th Appellant in Appeal) with effect from 02.01.2012, as `Illegal', `Invalid' and `Non-est in Law' and sought the following `interim reliefs':
>
> (i) In confirming the Suspension of Clauses 31 (a), 32 and 39(b) of Articles of Association of 1st Respondent company (4th Appellant in Appeal), till the disposal of the company petition;
>
> (ii) In directing the 1st Respondent Company (4th Appellant in Appeal) to maintain status quo with regard to the composition of the board of directors as on 01/01/2012, showing the 1st Petitioner (1st Respondent in Appeal), 2nd Petitioner (2nd Respondent in Appeal), 2nd Respondent (1st Appellant in Appeal) and 3rd Respondent (2nd Appellant in Appeal), as directors of the company and not to take any policy decisions with regard to the affairs of the 1st Respondent Company (4th Appellant in Appeal).
>
> (iii) In directing the 1st Respondent Company (4th Appellant in Appeal) to maintain status quo with regard to the shareholding pattern as on 19/09/2011;

(iv) In permitting the 1st Petitioner (1st Respondent in Appeal) to continue to exercise all his corporate rights including voting rights, right to dividend, bonus, rights issue and other corporate benefits under the Companies Act, 1956, and other economic laws with respect to 3,32,440 Shares that were illegally cancelled at the purported board meeting alleged to have been held on 20/09/2011, till the disposal of the company petition;

(v) To appoint an independent chairman to chair the board and general body meetings and to conduct the affairs of the 1 st TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Respondent Company (4th Appellant in Appeal) in a prudent manner;

(vi) To appoint one or more competent persons as inspectors to investigate the affairs of the 1st Respondent Company (4th Appellant in Appeal);

(vii) In directing the Respondents (Petitioners in Appeal) to furnish financial statements of the 1st Respondent Company (4th Appellant in Appeal) for the years ending 31/03/2010, 31/03/2011 and 31/03/2012 immediately and thereafter from 01/04/2012 on a fortnightly basis to the Petitioners (Respondents in Appeal);

(viii) In restraining the Respondents (Petitioners in Appeal) their men, servants, representatives and agents be restrained from alienating, transferring disposing off, or otherwise deal with any of the movable and immovable assets of the 1st Respondent Company (4th Appellant in Appeal), including intangible assets of 1st Respondent Company (4th Appellant in Appeal), and not to create any encumbrances on any such assets.

252. It is relevantly pointed out that the 1st Respondent / 1st Petitioner in the Plant in CS No. 139 of 2012, on the file of Hon'ble High Court of Madras in respect of the cause of action for the `Suit' at Paragraph 31 had mentioned that ``it arose at Chennai, within the Jurisdiction of this Hon'ble Court where the Defendants are all residing and carrying on their Business on 15.08.2010 when the plaintiff and the defendants 2 to 6 had entered in to a Memorandum of Understanding on 11.02.2011 when the parties to MoU had jointly issued a letter to the Regional Director, Shastri Bhavan, Chennai, seeking approval for appointment of statutory Auditors TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 of the company under Section 224 (3) of the Companies Act, 1956, based upon the MoU dated 15.08.2010, when the plaintiff receive summons from the Enforcement Directorate posting the hearing on 4.2.2011 consequent upon the complaint lodged against him by the defendants 2 to 5, on subsequent dates when the defendants 2 to 5 started going back on implementation of the MoU dated 15.08.2010, when the defendants 4 and 5 agreed to remove the tower put up and still is on the property taken on lease by the first defendant company without taking the requisite approval from the concerned authorities, on 20.9.2011 when the defendants 2 and 3 had conducted an illegal Board Meeting of the first defendant company, on 26.9.2011 when the plaintiff and the sixth defendant held a valid Board Meeting of the first defendant company nullifying the Resolutions passed in the illegal Board Meeting on 20.9.2011,

etc."

253. A mere running of the eye of the averments made at Paragraph 31 of the Plaint in C.S.No. 139 of 2012, filed by the 1st Respondent / 1st Petitioner indicate that the averments so made relate `up to 20.02.2012' and further that the `Suit' was filed on 24.02.2012. But, no `Reliefs' were claimed.

254. Be it noted, that Order II Rule 2 of the Civil Procedure Code is based on the Rule of Law that `no man shall be vexed twice for one and TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the same cause of action'. In fact, Order II Rule 2 of the Civil Procedure Code, requires a `Collection of all Claims', based on the `same cause of action in one Suit', as per decision in State Bank of India v. Gracure Pharmaceuticals Limited, reported in AIR 2014 SC at Page 731. Cause of Action:

255. The term `cause of action' refers to the media upon which the `Plaintiff' asks the Court to arrive at a conclusion in his favour. Furthermore, the term `cause of action' has no relation to the `Defence' that may be set up by an `Defendant' nor it depends upon the `Relief' prayed for by a `Plaintiff'.

256. It cannot be forgotten that the purpose of Order II Rule 2 of Civil Procedure Code is, `to prevent a `Party' from enforcing `Claims' on the `same Cause of Action'. Furthermore, the `cause of action' in two Suits may be considered to be the same, if, in `substance', they are identical.

257. The requirement of Order II Rule 2 (3) of the Civil Procedure Code is that, this omission `debars' the `Plaintiff', to `sue' for the `Omitted Relief', in any further `Suit' or `Proceedings', except when he omits to sue for the `Relief' with `Leave' or `Permission of Court'. In order to attract the ingredients of Order II Rule 2 (3) of the Civil Procedure Code, it must be shown that the `second Suit' is based on `identical cause of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 action', the criterion for judging so, is whether the same evidence would maintain both actions.

258. In the instant case, it cannot be lost sight of when the four prayers were deleted as per the Order of the Hon'ble High Court of Madras dated 22.11.2016 in Application No. 4914 of 2016 in C.S.No. 139 of 2012, the Hon'ble High Court at paragraph 20 had in a crystalline manner had observed that the 1st Respondent /1st Petitioner (Plaintiff) had not sought for `Liberty' to file a fresh `Suit', it is like giving up his `Claim' and further that once the `Plaintiff' filed an `Application' to `Withdraw' the `Suit' in `Full' or `Part', that is the end of `Litigation' and there can `no objection'.

259. It is pointed out that `National Company Law Tribunal' and the `National Company Law Appellate Tribunal' are creatures of `Statute' / `Law' and while `disposing of' `any proceeding', before it or an `Appeal', shall not be bound by the `Procedure', prescribed in the `Civil Procedure Code'. But, they are to adhere to the `principles of natural justice', `Equity' and can regulate their own procedure. Moreover, the `Fetter' of `Civil Procedure Code', is not binding on the `Tribunal' and the `Appellate Tribunal', as opined by this `Tribunal'. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Suit under Civil Procedure Code:

260. When a `Civil Suit', is filed before the `Competent Court of Law', then, all the ingredients of Civil Procedure Code, will `apply', to the `conduct of proceedings', before the said `Forum'.

261. Where matters are to be determined pertain to the `exercise of jurisdiction of `Tribunal' or an `Appellate Tribunal', those matters cannot be determined by a `Civil Court', although, the `Tribunal' or the `Appellate Tribunal' in discharging its functions is to `exercise certain powers vested in Civil Court'.

Company Petition:

262. Before the `Tribunal' / `an Appellate Tribunal', the proceedings files by a `Party', is known as `Company Petition', and the procedure to be adhered to, shall be as `adumbrated in the Rules'.

263. A perusal of the `Reliefs' sought for in CS No. 139 of 2012, by the `Plaintiff, before the Hon'ble High Court of Madras (after deletion of Prayer (b), (c), (d) and (e), withdrawn vide `Order' dated 22.11.2016 and 03.03.2017 in Application No.4914 of 2016, shows that the main `Reliefs' sought for in the CP/54/2012 (TCP/26/2018) filed on 19.05.2012, before the `Company Law Board', now `Tribunal' are quite different.

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264. As a matter of fact, the `Reliefs', prayed for in the main CP/54/2012 (TCP/26/2018), before the `Tribunal' by the `Respondents / Petitioners' are to be sought for only before the `Tribunal', as opined by this `Appellate Tribunal'. Further, in the main Company Petition at paragraph 6.38, it was averred that ``As agreed in the MoU dated 15.08.2010, the 4th Respondent in CP/54/2012 (3rd Appellant in Appeal), shall sell its entire 1,71,600 Shares, constituting 33.40% of the Share Capital to the `Petitioners' (Respondents in Appeal). Though, no specific prayer has been made in the Company Petition in this regard in view of the `MoU' being considered for implementation in CS No. 139 of 2012, the Hon'ble Bench may pass an `Order' under the provisions of Section 402 (b) of the Act, directing the 4th Respondent to sell its 1,71,600 Shares to the Petitioners (Respondents in Appeal)".

265. That apart, the Respondents / Petitioners in the main Company Petition at paragraph 6.36, had averred that `The Respondents (Appellants) have deprived the Respondents / Petitioners group of their legitimate rights as members and directors by illegally removing the Petitioners from the Directorship under the provisions of Section 283 (1)

(g) of the Act and by cancelling the Shares of the 1 st Petitioner (1st Respondent in Appeal).

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266. Also, the Respondents / Petitioners in the main Company Petition, at paragraph 6.37, had averred that the 2nd Respondent (1st Appellant in Appeal) amended the articles of association of company, only to gain personal benefits making a mockery of basic tenets of Corporate Law and

Management of company form of organisation. Also, the Respondents / Petitioners have proceeded to state that the 2nd Respondent (1st Appellant in Appeal) showed persistent negligence and total disregard for the provisions of the Companies Act, 1956, Articles of Association besides acting in a manner oppressive to the interest of the Petitioners (Respondents in Appeal).

267. The Respondents / Petitioners at paragraph 6.40 of the main Company Petition, had averred that the ``affairs of the 1 st Respondent / Company (4th Appellant in Appeal) are being conducted in a manner prejudicial to the public interest and members of the company and prayed for wounding up under just and equitable ground".

268. Indeed, the CS No. 139 of 2012 was filed by the 1st Respondent / 1st Petitioner, before the Hon'ble High Court of Madras as `Plaintiff' on 24.02.2012. The Company Petition 54 of 2012 (TCP/26/2018), on the file of the `Company Law Board' (now `Tribunal) on 19.05.2012. In Application No.4914 of 2016 in CS No. 139 of 2012 on 22.11.2016, the Hon'ble High Court had permitted the 1st Respondent / 1st Petitioner / TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Plaintiff to withdraw `Reliefs' claimed under (b), (c), (d) and (e) forming part of the `Claim' in CS No. 139 of 2012.

269. It is to be remembered that persons who are qualified to apply under the provisions of the Companies Act, 1956 / 2013, cannot approach a `Civil Court'. If matters fall within the purview of Section 397 / 398 of the Companies Act, 1956 (Corresponding to Section 241/242 of the Companies Act, 2013), the `jurisdiction of Civil Court', to deal with such disputes stand barred. It cannot be brushed aside that the `Rights' conferred by the Companies Act, accrue in most cases only to `Members' and not to the `Subscribers'.

270. One cannot remain in `oblivion' to the fact that a `Civil Court', does not `Grant Leave', to file another `Suit' / `Given Proceeding'. If the `Law' permits, the `Plaintiff', may file another `Suit', but not on the basis of observations made by a `Superior Court', as per decision of the Hon'ble Supreme Court of India in Shiv Kumar Sharma v. Santosh Kumari, reported in AIR 2008 SC Page 171.

271. Considering the fact that CP/54/2012 (TCP/26/2018), filed by the Respondents/Petitioners (1st Respondent / 1st Petitioner / Plaintiff in CS No. 139 of 2012) and the (2nd Respondent / 2nd Petitioner in CP/54/2012 (representing as Managing Director of M/s. Kumudam Publications Pvt. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Ltd. in CS No. 139 of 2012), under Sections 111, 397, 398, 402, 403, 404, 406, 408, 237 read with Schedule XI of the Companies Act, 1956, and that the Respondents / Petitioners in the main CP/54/2012 (TCP/26/2018) had exercised their `Proprietary Rights' (because they were recognised / treated as `Shareholders' by the Company, till their cessation), under the Companies Act, there is `no embargo in Law' for the Respondents / Petitioners', to prefer the main CP/54/2012 (TCP/26/2018 by pleading and to prove with sufficient clarity and precision at the time of `Hearing'), to `maintain an action', before the `Company Law Board' / `Tribunal' (`Competent Forum), seeking necessary `reliefs' in respect of the matters / issues falling under the Companies Act (other than the one prayed for by the `1st Petitioner / Plaintiff' in CS No. 139 of 2012, on the file of Hon'ble High Court of Madras, pending as on date (despite, `Deletion of Reliefs', claimed under (b), (c), (d) and (e) in the `Suit') though, the

averments in both the `Suit' and `Company Petition' are cemented on same / commonality of facts.

272. If the term `Member', under Section 241 of the Companies Act, 2013, is countered to exclude all persons who had parted with the `Beneficial Interest' in `Share', there will be `more number of `Members', will be `deprived of remedies', in the considered opinion of this `Tribunal'.

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273. Looking at from the aforesaid perspective, this `Tribunal' without any haziness, comes to a cocksure conclusion that either the ingredients of Order II Rule 2 of the Civil Procedure Code or Order II Rule 3 of the Civil Procedure Code are inapplicable, based on the facts and circumstances of the instant case, which float on the surface and answered accordingly.

Preliminary Issue:

274. In so far as the objections of the Appellants as to the `Maintainability of the main CP/54/2012 (TCP/26/2018)', filed by the `Respondents / Petitioners' is concerned, the same raises mixed questions of `Law' and `Facts' and hence, it cannot be considered as `Preliminary Issues' for the `judicial determination' of the `Tribunal'. As a matter of fact, the objections of the `Appellants', can be considered along with the other issues / points for consideration in the main `Petition', as opined by this `Tribunal'.

Allotment, Cancellation and Restoration of Cancelled Equity Shares:

275. It comes to be known that the 1st Appellant / 2nd Respondent (as Chairman and Managing Director of 4th Appellant / 1st Respondent / Company - M/s. Kumudam Publications Pvt. Ltd.), had enclosed his letter dated 26.04.2010, addressed to the Commissioner of Police, TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Chennai, to the Special Director, Directorate of Enforcement, New Delhi, wherein he had mentioned that the 1st Respondent / 1st Petitioner (Mr. A. Jawahar Palaniappan) is not an `Indian' and holds an `American Citizenship' and further that the said 1st Respondent / 1st Petitioner had obtained the `Shares' allotted by making them to believe that he is an `Indian Citizen'. Therefore, the 1st Respondent / 1st Petitioner's holding of 66.7%, without any permission or clearance from the Government of India and his holdings are not `Fresh Equity' and as on date, his holdings are `illegal', from the initial allotment in the Year 1995 itself, because `no `NRI' holdings or `Foreign Investments' were permitted in `Print Media' till 2006. Moreover, till Nov'1996, the 1st Respondent / 1st Petitioner was an `NRI' and he relinquished his `Indian Citizenship' and became an `American' in Nov'1996.

276. Apart from the above, the 1st Appellant / 2nd Respondent in his letter dated 26.04.2010 (addressed to the Commissioner of Police), which was enclosed before the Special Director (Directorate of Enforcement, New Delhi), had also stated that as per provisions of `Foreign Exchange Management Act', read with Foreign Exchange and Management (Transfer) or Issue of Security by a Person, resident outside India) and read with Press Note No. 2 of 2000, `no Foreign Holding' is permissible in Print Media' and though this was subsequently relaxed through Press TA

No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Note No. 4 of 2006, even though by this relaxation, `a Foreigner is allowed to hold only up to a maximum of 26% of Fresh Equity and this also has to be with the prior permission of the Government of India, including clearance from `Ministry of Home Affairs, Government of India', etc. and made a request for taking appropriate criminal and penal action in respect of the offences committed by the 1 st Respondent / 1st Petitioner.

277. A complaint dated 10.05.2010, under Section 16 (3) of the Foreign Exchange and Management Act, 1999, was made before the Special Director of Enforcement Chennai, (in the matter of T-3/53/CZO/C/2010 by the Deputy Director, Directorate of Enforcement, Chennai, as `Complainant', against (i) `4th Appellant / 1st Respondent / Company' (M/s. Kumudam Publications Pvt. Ltd., Chennai), (ii) 1st Respondent / 1st Petitioner (Shri. A. Jawahar Palaniappan) and (iii) 1st Appellant / 2nd Respondent, inter alia stating that the 1st Respondent / 1st Petitioner (Shri. A. Jawahar Palniappan, a resident outside India i.e., Resident of No.7, Woodlake Trail, Suite-A, Mount Vernon, Ohio 43050, U.S.A. & Director of the Amalgamated M/s. Kumudam Publications Pvt. Ltd. (`4th Appellant / 1st Respondent / Company') was issued / allotted with 3,32,640 shares (3,08,530 fresh Shares issued / allotted on 20.9.2001 on merger + 24,110 Shares held by him in the erstwhile company, M/s. Kumudam TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Publications Pvt. Ltd., during pre-merger period) for Rs.3,32,64,000/- @ Rs.100 per Share by the amalgamated / merged company M/s. Kumudam Publications Pvt. Ltd. (an `Indian Entity', engaged in Print Media) and is in possession of the 3,32,640 Shares).

278. Also, in the aforesaid complaint of the Deputy Director, Directorate of Enforcement, it was mentioned as under:

> ``The 3,32,640 shares / securities issued / allotted for Rs.3,32,64,000/- by the amalgamated / merged company, M/s. Kumudam Publications Pvt. Ltd., New No. 306, Old No.151, Purasawalkam High Road, Chennai - 10 (an Indian Entity also engaged in print media) to Shri. A. Jawahar Palaniappan, person resident outside India without the specific permission of the RBI and in contravention of the provisions of FEMA and Regulations made there under and the guidelines of the Secretariat of Industrial Approval (SIA) (FC Division), Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Govt. of India are liable for confiscation under section 13(2) of FEMA, 1999.'' and a request was made for `issuance of Show Cause Notice', to them.

279. The `Adjudicating Authority' (Joint Director), Directorate of Enforcement (Foreign Exchange Management Act and Prevention of Money Laundering Act), Government of India, New Delhi, had passed an `Order of Adjudication dated 22.05.2017' (in F No.: T-4/02-CHE/2012 TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Adjudication Order No.01/JD/HIU/2017/2391 - vide Book Volume 2 - Docs. Vol. III & IV - Page 662 - Appellants' Compilation), observing among other things that;

``(b) P. Vardarajan, Director of Kumudam Publications Pvt. Ltd. (1st Appellant / 2nd Respondent), was in know of the fact that A. Jawahar Palaniappan was a person resident outside India and U.S. Citizen when in the capacity of Managing Director of the company, he issued share certificates to A. Jawahar Palaniappan (AJP) by virtue of which AJP held 66% of shares of the company. His averment that he came to know the non-resident status of noticee no. 3 only at the latter stage is baseless and false as is evident from the GPA dated 21.12.1998, wherein P.Vardarajan signed as a witness which showed that he (AJP) was residing in U.S.A. i.e. to say he was a person resident outside India.

(c)The Regulation 7 of FEM (transfer or issue of security by a person resident outside India) Regulation, 2000 does not distinguish between the acquisition of shares of the amalgamated company by way of Foreign Direct Investment or in otherwise manner.

(d) Further Regulation 7 clearly stipulates that the merged/amalgamated company will issue shares to the shareholders of the transferor company, resident outside India, on the condition that the percentage of the share holding of the persons resident outside India in new company does not exceed the percentage specified in the approval granted by the Central Govt. or the Reserved Bank or specified in these Regulations. In the instant case TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 as per regulation 5(1), schedule 1, Para 1(iii) & Sl. No. 14 of the table titled ``Sector Specific Guidelines for Foreign Direct Investment mentioned in Press Note No. 2 dated 11.02.2000 issued by the Secretariat of Industrial approval FC Division Department of Industrial Policy and Promotion Ministry of Commerce & Industry Govt. of India-

``No proposals relating to acquisition of shares in an existing Indian company in favour of a foreign / NRI investor was permitted under Automatic route" and ``No NRI investment was permitted in print media" and found that there was a contravention of Regulation 4, namely issuance of shares by an Indian Entity to a person resident outside India which was established (since persons resident outside India were not allowed to acquire shares in Print Media and also as it was not otherwise provided in the act or rules or regulations made thereunder, when shares were issued to AJP (1st Respondent / 1st Petitioner) in the Year 2001-2002. However, the `Adjudicating Authority', had found that there was no violation of the provisions of Regulation 5 (1) of the Foreign Exchange Management (Transfer) or issue of security by a person resident outside India regulation.

280. Suffice it, for this `Tribunal' to point out that the `Adjudicating Authority', Joint Director of the Enforcement Directorate, in his TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Adjudication Order' dated 22.05.2017, had imposed the following penalties on `4th Appellant / 1st Respondent / Company' (Kumudam Publications Pvt. Ltd.), 1st Appellant / 2nd Respondent (Mr. P. Varadarajan), 1st Respondent / 1st Petitioner (Mr. A. Jawahar Palaniappan), which runs as under:

> 1.(a) Kumudam Publications Pvt. Ltd. - Rs.2,50,00,000/- (Rs. Two Crore Fifty Lac only) for contraventions of the provisions of Regulation 4 of FEM (transfer or issue of security by a person resident outside India) Regulation 2000 r/w Section 42 of FEMA, 1999 r/w clause (b) of sub-section (3) of Section 6 & Section 47 of FEMA, 1999.

1.(b) Kumudam Publications Pvt. Ltd. - Rs.2,50,00,000/- (Rs. Two Crore Fifty Lac only) for contraventions of the provisions of Regulation 7 of FEM (transfer or issue of security by a person resident outside India) Regulation 2000 r/w Section 42 of FEMA, 1999 r/w clause (b) of sub-section (3) of Section 6 & Section 47 of FEMA, 1999.

2.(a) Sh. P. Vardarajan, Director of Kumudam Publications Pvt.

Ltd. - Rs.50,00,000/- (Rs. Fifty Lac only) for contraventions of the provisions of Regulation 4 of FEM (transfer or issue of security by a person resident outside India) Regulation 2000 r/w Section 42 of FEMA, 1999 r/w clause (b) of sub-section (3) of Section 6 & Section 47 of FEMA, 1999.

2.(b) Sh. P. Vardarajan, Director of Kumudam Publications Pvt. Ltd. - Rs.50,00,000/- (Rs. Fifty Lac only) for contraventions of the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 provisions of Regulation 7 of FEM (transfer or issue of security by a person resident outside India) Regulation 2000 r/w clause (b) of sub-section (3) of Section 6 & Section 47 of FEMA, 1999.

3.(a) Sh. A. Jawahar Palaniappan, Director of Kumudam Publications Pvt. Ltd. - Rs.50,00,000/- (Rs. Fifty Lac only) for contraventions of the provisions of Regulation 4 of FEM (transfer or issue of security by a person resident outside India) Regulation 2000 r/w Section 42 of FEMA, 1999 r/w clause (b) of sub-section (3) of Section 6 & Section 47 of FEMA, 1999.

3.(b) Sh. A. Jawahar Palaniappan, Director of Kumudam Publications Pvt. Ltd. - Rs.50,00,000/- (Rs. Fifty Lac only) for contraventions of the provisions of Regulation 7 of FEM (transfer or issue of security by a person resident outside India) Regulation 2000 r/w clause (b) of sub-section (3) of Section 6 & Section 47 of FEMA, 1999."

281. Be it noted, that the `Adjudicating Authority' (`Joint Director'), Directorate of Enforcement, in the `Adjudication Order' dated 22.05.2017, had dropped the Charge of Regulation 5 (1) of FEM (transfer or issue of security by a person resident outside India) Regulation 2000 r/w clause (b) of sub-section (3) of Section 6 & Section 47 of FEMA, 1999, against all the three noticees'.

282. As against the said `Adjudication Order' dated 22.05.2017 of the `Adjudicating Authority' in 01/JD/HIU/2017 in SCN No.T4/02- TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 CHN/2012 dated 06.06.2012, the 1st Respondent / 1st Petitioner (Dr. A. Jawahar Palaniappan) has preferred an `Appeal' before the `Appellate Tribunal' (under Foreign Exchange Regulation Act, 1999, New Delhi), seeking to set aside the said order and the same is pending.

283. Likewise, the Union of India through the Asst. Director, Directorate of Enforcement, Chennai - 6, has preferred an `Appeal' under Section 19(1) of the FEMA and Sub Rule (1) of Rule 10 of Foreign Exchange Management (Adjudication Proceedings & Appeal) Rules, 2000, in respect of the `Adjudication Order' dated 22.05.2017 (vide AO No.01/JD/HIU/2017/2392) against the 4th Appellant / 1st Respondent / Company (M/s. Kumudam Publications Pvt. Ltd. and 2 Others), wherein, a prayer was made, for passing of an `Order', for confiscation of 3,32,640 Shares issued by

the 4th Appellant / 1st Respondent / Company in favour of the 1st Respondent / 1st Petitioner or in the alternative to set aside the `impugned Adjudication Order' dated 22.05.2017, in the interest of fair play and justice and the same is pending.

284. It transpires that in the Minutes of the Board Meeting dated 20.09.2011 of the 4th Appellant / 1st Respondent / Company (Kumudam Publications Pvt. Ltd., signed by the 1st Appellant / 2nd Respondent - Chairman and Managing Director), among other things, the following `Resolutions' were unanimously approved:

> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 ``Resolved that as consequence of the issue and allotment of the following equity shares of the Company to Dr. A. Jawahar Palaniappan being null and void ab initio, the same be and are hereby cancelled and annulled.
>
> | Distinctive No(s). | Number of Equity Shares | Share Certificate No(s). |
> |---|---|---|
>
> ``Further Resolved that the transfer of the following equity shares of the Company in favour of Dr. A. Jawahar Palaniappan being likewise null and void ab initio, the same be and are hereby cancelled and annulled.
>
> | Distinctive No(s). | Number of Equity Shares | Share Certificate No(s). |
> |---|---|---|
>
> ``Further Resolved as a consequence of the aforesaid cancellations and annulments, that the Register of Members of the Company be and is hereby rectified by removing / deleting the name of Dr. A. Jawahar Palaniappan in respect of the above shares i.e., aggregating to 3,32,440 equity shares of Rs.100/- each.
>
> 285. As seen from the Minutes of the Board Meeting dated 20.09.2011, in respect of the 4th Appellant / 1st Respondent / Company (Kumudam Publications Pvt. Ltd.), Mrs. A. Kothai (2nd Respondent / 2nd Petitioner) TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 and Dr. A. Jawahar Palaniappan, Directors of the Company were absent and further it was mentioned that the Company had not received any request for `Leave for Absence', from the said `Directors'.

> 286. More importantly, the Minutes of the Board Meeting dated 20.09.2011 in respect of the 4th Appellant / 1st Respondent / Company point out that it was further resolved that the amount paid by the 1 st Respondent / 1st Petitioner (Dr. A. Jawahar Palaniappan has consideration towards the `allotment of 900 Equity Shares of face value of Rs.100/-

each a par and the value of 3,08,530 Equity Shares of Face Vaule of Rs.100/- each of the Company allotted to Dr. A. Jawahar Palaniappan consequent to the Scheme of Amalgamation of M/s. Kumudam Printers Pvt. Ltd., pursuant to the `Order' of the Hon'ble High Court of Madras, April 2011 based on the valuation report of the Chartered Accountant, by which, the Share Exchange Ratio was determined and approved in the Scheme of Amalgamation, aggregating to a sum of Rs.2,57,70,495 (Rupees Two Crores Fifty Seven Lacs Seventy Thousand Four Hundred and Ninety Five only) be kept in a separate `Bank Account' of the Company and the same will be duly acted up on / returned to Dr. A. Jawahar Palaniappan, based on the consent / instructions of the Enforcement Directorate or at the outcome of any other legal proceedings. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

287. Besides the above, it was further resolved that 23,010 equity shares of Face Value of Rs.100/- each, transferred in favour of Dr. A. Jawahar Palaniappan that have been now cancelled and annulled and which are to revert back to the respective transactions, shall be dealt with in accordance with Law.

288. The Respondents / Petitioners in CP/54/2012 had sought the `Relief of Declaration', that the Resolution passed at the `Purported Board Meeting' alleged to have been taken place on 20.09.2011, cancelling 3,32,440 of Rs.100/- each held by the 1st Respondent / 1st Petitioner as `illegal', `invalid' and `non-est in law'. Further, they had prayed for passing of an `Order', to rectify the `Register of Members of the 1st Respondent Company, so as to restore 3,32,440 Shares of Rs.100/- each in the name of the 1st Petitioner (1st Respondent in Appeal).

289. The plea of the Appellants is that the `Cancellation / Nullifying the Shares of the 1st Respondent / 1st Petitioner, allotted pursuant to the `Scheme of Amalgamation', amounts to `modification of the Scheme of Amalgamation' and in the present case, the `Allotment' itself is in negation of Regulation 4 and 7 of FEMA regulation read with the Schedules prescribing Sectoral Caps.' TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

290. Furthermore, it is the plea of the Appellants that all the `Acquisition of Shares', in Kumudam' by the `1 st Respondent / 1st Petitioner (Foreigner)', where in the Years 1998 / 2001, when the limit was `Zero' and not even 26%. In this connection, the Learned Counsel for the Appellants submits that the 1st Respondent / 1st Petitioner, had not obtained any permission, as there is a clear `restraint on a `Foreign Citizen' owning any shares, in a `Print Media' company'.

291. The Learned Counsel for the Appellants emphatically submits that the `prohibition on a Foreigner' acquiring the control was absolute (`Zero' percent holding), till the year 2005, without any distinction being maintained, as to whether the `Shares' are acquired through infusion of

Foreign Funds or through Indian Rupee Funds or through Consideration, other than Cash.

292. It is projected on the side of the Appellants that the `Failure' to take the Reserve Bank of India or Central Government's permission affects the `Allotment', but does not `alter the Scheme', as sanctioned by the Hon'ble High Court.

293. Contending contra, it is the submission of the Learned Counsel for the Respondents / Petitioners, that the `Adjudicating Authority of the `Enforcement Directorate' in the `Order' dated 22.05.2017, had among TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 other things observed that `the onus to adhere to the rules and regulations of an existing law (`FEMA 1999' in this case) while issuing `Shares' of the amalgamated company to non-resident Shareholders, laid on the company, issuing such `Shares' and not on the `Shareholders' and had not ordered the confiscation of 3,32,640 Shares / Securities of Kumudam Publications Pvt. Ltd. allotted to `noticee No. 3' as well as of Rs.2,57,70,498 representing the `annulled shares'.

294. Further, it is the plea of the Respondents / Petitioners that as on date, there is no findings by any `Authority' that the `Shareholding' of the `1st Respondent' or the `Allotment of Shares' to him, in the company is invalid or void.

295. In the instant case on hand, the `Allotment of Shares', to the 1 st Respondent / 1st Petitioner (Foreigner) is not a `legally valid one', as opined by this `Tribunal', because of the fact that the `Acquisition and holding of Shares' by the `1st Respondent / 1st Petitioner' in the `4th Appellant / 1st Respondent / Company' (M/s. Kumudam Publications Pvt. Ltd.), in the Year 2001-2002, is in `violation' of `Regulation 4 and 7 of Foreign Exchange Management (Transfer or Issue of Security by a Person, resident outside India) Regulations (FEMA Regulations)', which TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 clearly `prohibits the issuance of shares of a Print Media company to a person resident outside India', Regulations 2000.

296. It cannot be forgotten that the Regulation 7 of FEM (Transfer or Issue of Security by a Person, resident outside India) Regulations 2000, does not differentiate between the `Acquisition of Shares of the Amalgamated company by way of Foreign Direct Investment or in any other manner', in the considered opinion of this `Tribunal'.

297. If `an act is an unenforceable one', by a substantive `Law' and the said `act / contract', which involves in its fulfillment, the `doing of an act prohibited by `Law' / a `Statute is void'. The legal maxim, `A pact is pro vatorum public juri non derogatur' means, the `Private Agreements' cannot alter the `General Law'.

298. If an act performed in violation of the provision of an `Act' / `Statute' of the Legislature, it cannot be made the subject of an `Action'. At this stage, this `Tribunal' aptly points out that `where a contract express or implied, is expressly or by an implication forbidden by the Statute, the `Tribunal' cannot lend its assistance to give effect'.

299. It is to be remembered that if Section 23 of the Indian Contract Act, 1872, is to apply, it must be forbidden by `Law' or it must be of such a nature that it would defeat the provision of any `Law' or it is fraudulent or TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 it involves injury to `person' or `property of another' or the `Court' regards it, `immoral' or `opposed' to `Public Policy'.

300. The `Doctrine of Public Policy' or the `Policy of Law' is an `Unruly Horse' and the `Doctrine' is extended to a `Harmful Case' and `Harmful Tendencies'. No wonder, the `Doctrine of Public Policy', is only a `Branch of Common Law'.

301. In so far as the plea taken on behalf of the Respondents / Petitioners that under the Foreign Exchange Management Act, it is possible for a transaction to give raise to a penalty and yet remain valid and further that the `contravention of FEMA, does not by itself render a transaction void, this `Tribunal' points out that there was a restraint on a `Foreigner' acquiring the control over Print Media company engaged in news, etc. in our Country till the Year 2005 and the prohibition was on a `Foreigner', and `not mere just Investment alone'.

302. Besides the above, when the fact of the matter is the `Shareholding of the 1st Respondent / 1st Petitioner is in `violation of Regulation 4 and 7 of the FEMA Regulations, in the absence of `prior approval of Reserve Bank of India' for the `Acquisition / Holding / Allotment of Shares' is obtained till date, even when the Foreign Exchange Management Act and Regulations gets attracted in the instant case, the said act / contract TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 prohibited by the `Statute' is a `void one' and the contra plea taken on behalf of the `Respondents / Petitioners' that there is no finding by any `Authority' that the `Shareholding' of the 1st Respondent / 1st Petitioner to him in the company is `invalid' or `void', does not hold water, despite the observation made by the `Adjudicating Authority' in its `Order' dated 22.05.2017, that onus to adhere to the provisions of Rules and Regulations of an existing law (`FEMA 1999' in this case), while issuing `Shares' of the `Amalgamated Company' to `Non-Resident Shareholders', laid on the Company, issuing such `Shares' and not on the `Individual Shareholders', as held by this `Tribunal'.

303. To put it precisely, in the absence of any permission having been obtained from the Reserve Bank of India, in respect of the `Allotment of Shares' to and in favour of the 1st Respondent / 1st Petitioner, the said act of `Allotment' / `Acquisition', is held by this `Tribunal' wholly as a `void one', and for which, `No Declaration', is necessary.

304. It is worthwhile for this `Tribunal' to make a significant mention that when the required permission under Regulation 7 of the FEMA Regulation was not obtained before the Allotment of Shares to the 1 st Respondent / 1st Petitioner, the `Tribunal', while passing the `impugned order' dated 27.05.2020 (delivered on 01.06.2020) in CP/54/2012 TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 (TCP/26/2018), had not borne in mind, the `Official Memorandum' of the `Ministry of Information and Broadcasting, Government of India, dated 26.09.2012' (in respect of the proposal received from the 1st Respondent / 1st Petitioner (Dr. A. Jawahar Palaniappan, U.S.A.), addressed to the Under Secretary, Foreign Investment Promotion Board, Department of Economic Affairs, Ministry of Finance, New Delhi, wherein it was mentioned among other things that the `Shareholding' of Dr. Palaniappan in M/s. Kumudam Publications Pvt. Ltd. was more than the

permissible limit of 26% and hence the `Proposal', may not be considered for approval, which had resulted in prejudice being caused to the `Appellants'.

305. Coming to the plea taken on behalf of the Respondents / Petitioners that the `Cancellation of Shares' of the 1st Respondent / 1st Petitioner is contrary to the `Scheme of Merger', that was approved by the `Hon'ble High Court of Madras', by an `Order' dated 12.04.2001, with effect from the appointed date of 01.04.1999 and therefore, the `Cancellation of Shares' is an `Invalid one', it is pointed out by this `Tribunal' that the `Sanction of Scheme', is independent of the permission that was required to be obtained for an `Allotment of Shares' from the `Reserve Bank of India'. Moreover, only after the `Scheme' is / was `Sanctioned', the `Regulation 7 of FEMA Regulations', will come in to an operative play, TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 in which event, the Reserve Bank of India / the Central Government permission is very much required.

306. In the instant case on hand, there being no permission being obtained from the Reserve Bank of India / Central Government in respect of the `Allotment of Shares' in favour of the 1st Respondent / 1st Petitioner (a Foreign Citizen), the said `Allotment of Shares' is not a `Valid and Proper one'. Also that, not obtaining the necessary / due permission from the Reserve Bank of India / Central Government, does not change the `Scheme' sanctioned by the `Hon'ble High Court', as held by this `Tribunal'.

307. As regards the stand taken by the Respondents / Petitioners that the Company / Board of Directors had no authority to remove the 1 st Respondent / 1st Petitioner's name from the `Register of Members', and that a `Company', could have rectified its `Register of Members', only by the invocation of ingredients of Section 111 (4) of the Companies Act, 1956 (Section 59 (1) of the Companies Act, 2013), this `Tribunal', at this stage, relevantly points out that without obtaining permission from the `Reserve Bank of India', for `Acquiring' / `Holding' / `Allotment of Shares', a `Person' holding the `Shares' is not recognised as a `valid person', to enter his `name' in the `Register of Members' of the TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Company. To put it pinpointedly, the `Board of Directors' of a company, has every `right / duty', to `decline' the `registration of such shares', until the time of the permission of Reserve Bank of India is obtained. Rectification Proceedings:

308. That apart, this `Tribunal', pertinently points out that the `Rectification Proceedings', under Section 111 (4) of the Companies Act, 1956 (59 (1) of the Companies Act, 2013) in `Law', is to be invoked when there are `Apparent Mistakes', in the `Register of Members', which can be settled without `detailed investigation' in a `summary jurisdiction'.

309. The `burden' is on the concerned `Petitioner / Applicant', to show an `error' has taken place and to this extent, if there is any `Dispute' between the `Parties', the `Tribunal' is empowered to decide any matter which is necessary or quite expedient to determine in connection with the `Rectification' alleged.

310. In reality, the nature of proceedings under Section 111 of Companies Act, 1956, are slightly different from the `Title Suit', although, sub-section 7 of Section 111 of the Act, confers the

`Tribunal' the `jurisdiction' to `decide any question'. Further, this `Tribunal' points out that the `Respondents / Petitioners' cannot seek umbrage, under Section 111 of the Companies Act, 1956 (Section 59 of the Companies TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Act, 2013), for `Rectification of Share Register' to put the `Name' of the `1st Respondent / 1st Petitioner', when in `Fact' or in `Law', he could not be called as `Owner of Valid Shares', Meaning of Void:

311. The term `Void' means, an `instrument' or `transaction' is a `nugatory', `invalid', and an `ineffectual' one. Non-Existent:

312. When the `Allotment of Shares' of the 1st Respondent / 1st Petitioner is against the `Public Policy' of the `Government of India' and against the prevailing `Law' of the Country, then, the said `act' is non-existent, from its very inception, as per decision of the Hon'ble Supreme Court of India in Kalawati v. Bisheshwar, reported in AIR 1968 SC Page 269 (vide paragraph 9).

313. In view of the fact that the `Allotment of Shares' to the `1 st Respondent / 1st Petitioner' is not `Valid' in `Law', the `Invocation of Section 100 of the Companies Act, 1956' (`Special Resolution for reduction of Share Capital') or `Section 111 of the Companies Act, 1956' (`Power to refuse registration and appeal against refusal') or `Section 391 to 394 of the Companies Act, 1956' (`Power to compromise or make TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 arrangements with creditors and members'; `Power of High Court to enforce compromises and arrangements'; `Information as to compromises or arrangements with creditors and members'; and `Provisions for facilitating reconstruction and amalgamation of companies') will be of no assistance to the `Respondents / Petitioners', as held by this `Tribunal'. Reduction in Share Capital:

314. In `Law', the aspect of `Reduction of Share Capital' is treated as a matter of `Domestic Concern', and it is the decision of majority that prevails. There is no `Fetter', under the Companies Act, which prohibits the discretion of a company, in adopting the `method', by which, it opts to `Reduce its Capital'. A company even in the case of reducing the `Share Capital' can determine to extinguish some of its `Shares', without dealing in the same manner as all other `Shares' of same clause.

315. When the matter is brought before the `Tribunal', in a given case, the `Tribunal', is to be `subjectively satisfied' that there is / was no `unfair' or `inequitable transaction' and in terms of the provisions of the Companies Act, it is for the company to `determine the extent and mode of reduction and application of monies, etc.', keeping in mind the fairness, justness and reasonableness of the fact situation. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020

316. Besides this, when the very `Allotment of Shares', in respect of the `1st Respondent / 1st Petitioner' is not a `Valid' one, there is `no proper and valid Share Capital' in the `eye of Law' and therefore, in the instant case, there is no need to `fulfill the procedural requirements as enunciated as per Section 100 to 104 of the Companies Act, 1956 or as per the ingredients of Section 66 of the Companies Act, 2013, in the earnest opinion of this `Tribunal'.

317. There is no gain saying of the vital fact that if a `Resolution' is passed `validly' by the `Board of Directors' of the company, the same cannot be questioned in a `Petition' under Section 397 or 398 of the Companies Act, 1956 / 241 of the Companies Act, 2013. No doubt, the `Directors' of a company who possess the `Discretionary Powers' in a company administration are in the character of `Fiduciary Powers' and is to exercise the same in good faith. Their act of `Allotment of Shares' to a `Person', must have a sanction coming with the limits and parameters of `four corners of Law', and added further, their acts which are mala fide in exercising their discretion, the same may be vitiated.

318. It cannot be brushed aside that if any `action of Directors' of a company, is in `violation of law', the company or the shareholders can initiate appropriate action before the `Competent Forum'. However, a TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Petition' for `Oppression and Mismanagement' is not the `Remedy', in the considered opinion of this `Tribunal'.

319. It is an `axiomatic principle in Law', a `Resolution', passed `validly by the Board of Directors' of a Company, cannot be assailed in a `Petition', under Section 397 or 398 of the Companies Act, 1956, or under Section 241 / 242 of the Companies Act, 2013.

320. In so far as the `Minutes of the Board Meeting' that took place on 20.09.2011 (wherein the 1st Appellant / 2nd Respondent - Chairman and Managing Director of M/s. Kumudam Publications Pvt. Ltd.) and the 2 nd Appellant / 3rd Respondent) were present and the 2nd Respondent / 2nd Petitioner and the 1st Respondent / 1st Petitioner were absent, it is pointed out by this Tribunal, in the said `Minutes of the Board Meeting', it was categorically mentioned that `as per the Foreign Direct Investment (FDI) Policy of the Government of India, as applicable from time to time and as per the provisions of Foreign Exchange Management Act, 1999 and Regulations made there under, no FDI / NRI / OCB Investment was permitted in `Print Media' Industry till 05.07.2005 and that the `Foreign Investment Policy' which became effective from 05.07.2005, permitted Foreign Investment up to an extent of 26% in `Print Media' Industry. After obtaining the prior approval of the Foreign Investment Promotion TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Board, subject to the guidelines issued by the Ministry of Information and Broadcasting (MIB) etc.

321. Apart from that, in the aforesaid `Minutes of the Board Meeting' dated 20.09.2011, the `Directors' considered and deliberated on the opinions in relation to the issue / transfer / allotment of equity shares of the company to Dr. A. Jawahar Palaniappan (1 st Respondent / 1st Petitioner), a `Non-Resident' and a `Foreign Citizen', which was clearly against the mandatory provisions of the above enactments. Consequently, the holding by him is null and void ab initio and ultimately, it was resolved to cancel the shares of 1st Respondent / 1st Petitioner, etc.

322. The Learned Counsel for the Respondents submits that as on date there is no finding by any other `Authority' that the `Shareholding' of the 1st Respondent / 1st Petitioner or the `Allotment of Shares' to him in the company is an `Invalid' one and even the `Enforcement Directorate' Order had not rendered the `Shareholding' of the 1st Respondent / 1st Petitioner as `Void' nor does it proceeds on the footing that the `Shares' do not exist.

323. The Learned Counsel for the Respondents points out that the amount of Rs.2,57,70,495/-, representing the `Shares' issued to the 1st Respondent / 1st Petitioner was secured by the company in the form of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Fixed Deposit in Indian Bank and hence either 3,32,640 Shares or the amount equivalent to the said Shares were available to the Department, for the purpose of confiscation under `FEMA 1999'.

324. Expatiating his contention that if the Shares are available for confiscation, it means that they were in existence and that the `Shareholding' was not `Void'. Further, the very fact, `Notional Sum' was credited to the Account of the company necessarily means and implies that the `Shares' continued to be `Validly' held by the 1st Respondent / 1st Petitioner.

325. It is to be pointed out that the term `Forfeiture of Shares' is different from `Cancellation of Shares'. Before the `Forfeiture of Shares', every condition is to be followed strictly and complied with, with a very little inaccuracy being fatal as greatest, as per the decision of the Hon'ble Supreme Court of India in The Public Passenger Service Ltd. v. M.A. Khader & 2 Ors., reported AIR 1966 SC Page 489.

326. In English Law, `Forfeiture' is the term, `applied ordinarily, to the exercise of this Right'. `Confiscation', must be an `act done in some way on the part of the Government of the Country', where it takes place and in some way beneficial to that Government though the proceeds may not TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 strictly speaking be brought in to its Treasury (per Ellen Borough L.J. in Levin v. Allnut 15 East 269).

327. The word `Confiscation', may be used as `Applicable to Appropriation by the Government as an act of State'. The act of making `Void' of a particular act, may be done `Retrospectively' / `Retroactively', as well as `Prospectively', in the considered opinion of this `Tribunal'.

328. Be that as it may, in as much as the Board Meeting dated 20.09.2011 (where the Respondents / Petitioners had remained absent), had resolved `to cancel and annul the `Shares', allotted to the 1 st Respondent / 1st Petitioner, the said `act of the Directors', cannot be found fault with by the Respondents / Petitioners, because of the fact, that it is not an act meant for causing any oppressiveness on the 1st Respondent / 1st Petitioner or other abuse of power and the `Board of Directors', had acted reasonably and the `Minutes of the Board Meeting' dated 20.09.2011 is a `Valid' one in the `eye of Law', as held by this `Tribunal in a categorical manner, although, in the `Appeal', preferred by the `Enforcement Directorate' against the `Order of the Adjudicating Authority' dated 22.05.2017, a ground was taken before the `Appellate TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Authority' that `Confiscation of the Allotted Shares in favour of the 1st Respondent / 1st Petitioner is sought for'.

329. Admittedly, as on date, the `Appeal' filed by the 1st Respondent / 1st Petitioner and the Appeal preferred by the Enforcement Director against the Order of the `Adjudicating Authority' of the Directorate of Enforcement are pending.

330. In this connection, this `Tribunal' relevantly points out that the `Board of Directors' of the company and the `Company' have the power to cancel the `Shares' which was earlier allotted, when it is found to be illegal and this power is recognised as reasonable and indeed in the present case on hand, before this `Tribunal', it is an essential one.

331. In short, the company and the `Board of Directors', do have an option, to `cancel the `Shares' which was originally allotted and later found to be an `illegal allotment', allotted in `violation' of the prevailing Law of the Land'.

332. In as much as the `Allotment of Shares', to and in favour of the 1 st Respondent / 1st Petitioner, made by the 4th Appellant / 1st Respondent / Company (M/s. Kumudam) is not in accordance with the prevailing law of the land (i.e., `FEMA 1999' and its `Regulations'), the said `Allotment', has no sanction in the `eye of Law', as held by this TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Tribunal', and further that the said `Cancellation of Shares', by the 4 th Appellant / 1st Respondent Company, is a valid one, in the `eye of Law' and therefore, the aspect of `Restoration of Cancelled Shares', does not arise on any score. Looking at that point of view, the `impugned order' of the `Tribunal' dated 27.05.2022 (pronounced on 01.06.2022) in setting aside the `Cancellation of the Equity Shares', held by the 1st Respondent / 1st Petitioner, observing that the same is an `Illegal', `Invalid' and `non- est in Law', further the `issuance of direction' by the `Tribunal' in ordering the `Register of Members' of the 4th Appellant / 1st Respondent / Company, is to be `Rectified', to restore 3,32,640 Equity Shares of Rs.100/- in the `Name' of the 1st Respondent / 1st Petitioner, the intimation of cessation of the Respondents / Petitioners as `Directors' of the 4th Appellant / 1st Respondent / Company, by the 1st Appellant / 2nd Respondent, with the `Registrar of Companies, Chennai, from 02.01.2012, being held as `Illegal' and `Non-est in Law' are set aside by this `Tribunal', to secure the `ends of Justice' and answered accordingly. Board Meetings:

> 333. In so far as the three `Board Meetings' dated 20.09.2011, 10.10.2011 and 02.01.2012 are concerned, according to the Appellants, the Respondents / Petitioners had not attended the same, though they had TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 received the `Notice' of `such Meetings'. In this connection, it is the stand of the `Appellants' that the `Notice' of `Board Meeting' dated 02.01.2012 was specifically brought to the attention of the `Respondents / Petitioners', to Section 283 of the Companies Act, 1956, and in short, for the `Three Board Meetings', the `Respondents / Petitioners', `had not attended'.
>
> 334. The `Test of Fairness', rather than `Legality', ought to be applied in desiring whether `Removal of Directors', constitute `an Oppressive Act or not'.
>
> 335. A `Permanent Director' / a `Lifetime Director' by the `Articles of Association' or by `an Agreement', can be `Removed' from a `Company', as per the provisions of the Companies Act, and hence, has no `Security of Tenure', in Office.
>
> 336. It is seen from the `Notice of Board Meeting of Kumudam' dated 15.09.2011 that it was mentioned that `Notice is hereby given that a Board Meeting of the company is

convened on 20.09.2011, inter alia mentioning that it was to `discuss the legal implications of holding of Equity Shares by Dr. A. Jawahar Palaniappan (1st Respondent / 1st Petitioner - Foreign Citizen and a Resident in U.S.A.), in the Equity Share Capital of the Company. Also, it was mentioned in the said TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Notice' that the `Directors' began to have doubts with regard to the eligibility of Dr. A. Jawahar Palaniappan to hold Equity Shares in the Company, once they became aware of his `Foreign Citizenship'.

337. For the aforesaid `Notice' dated 15.09.2011, the Respondents / Petitioners had clearly mentioned at paragraph 6 that they were surely not attending the `Board Meeting', as they were legally advised that such participation was a clear interference with the enquiry of the `Enforcement Directorate', etc. Therefore, it is clear that the Respondents / Petitioners had absented themselves for the Board Meeting of the Company on 20.09.2011.

338. In regard to the purported `Board Meeting' dated 26.09.2011, relied upon by the `Respondents / Petitioners', to say that they had not absented for the three consecutive `Board Meetings' of the 4th Appellant / 1st Respondent / Company, the same is unworthy of acceptance, in the considered opinion of this `Tribunal' because this `Purported Meeting' was held to be bad by the `Order' of the Hon'ble City Civil Court of Madras, and as such, and their contra stand is `negatived' by this `Tribunal'. In effect, the Respondents / Petitioners having failed to fulfil the ingredients of Section 283 (1) (g) of the Companies Act, 1956 had vacated the `Office of the Directorship of the 4th Appellant / 1st TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Respondent / Company, by an `operation of Law'. Hence, Form-32 filed by the 1st Appellant / 2nd Respondent with the `Registrar of Companies', intimating the cessation of `Respondents / Petitioners' as `Directors' of the `4th Appellant / 1st Respondent / Company' from 02.01.2012, is held by this `Tribunal' as a legally `Valid' one, and the contra view taken by the `Tribunal' that the same is set aside by this `Tribunal', and answered accordingly.

339. In fact, the `Reliefs' of `Declaring the Resolutions', passed in the `Board Meeting' of the 1st Defendant / Company, sought for in the main Suit CS No. 139 of 2012 were deleted as per `Order of the Hon'ble High Court of Madras dated 22.11.2016' in Application No. 4914 of 2016 in CS No. 139 of 2012.

340. In this connection, a closure perusal of the `Final Prayer' portion of the CP/54/2012 (On the file of the Company Law Board) and TCP/26/2018 (On the file of the Tribunal) shows that `no relief' of 10.10.2011 Board Meeting is sought for, by the Respondents / Petitioners.

Although, in a `Notice' convening Board Meeting dated 10.10.2011, according to the Appellants, it was sought to be contended by the 2 nd Respondent / 2nd Petitioner that at Board Meetings purportedly took place on 22.04.2010 and 24.04.2010, Article 31 (a) and 39 (b) were kept in TA No.

283 of 2021 in Company Appeal (AT) No. 83 of 2020 abeyance and a new Chairman was to be elected and referred to the requisition for the said purpose, till date, the requisition is not disclosed.

341. Although, on behalf of the Respondents / Petitioners that a plea is taken that the 1st Appellant / 2nd Respondent purported to oust both 1st Respondent / 1st Petitioner and the 2nd Respondent / 2nd Petitioner from the Directorship of the Company altogether by illegally submitting a `Form - 32', with the `Registrar of Companies' and that the 1 st Appellant / 2nd Respondent had abused the amended `Articles of Association' to engage in a burdensome and harsh manner, amounting to wrongful act of oppression, at this juncture, this `Tribunal' points out that it is aptly pointed out by this `Tribunal', no doubt, an `Alteration' prejudices some rights of the `Shareholders' is not itself a reason for assailing `Validity of an Alteration'.

342. As a matter of fact, if a company is unable to `Alter' its either `Memorandum' or the `Articles of Association', to give effect to the `Desired Changes', the `Corporate Enterprise' is likely to get frustrated and the aim / purpose for which the company was formed will get defeated. After all, no `Alteration', is to be `inconsistent with any provision of the act', also that, every `Alteration of Articles' ought not to be `inconsistent' with the `conditions' contained in the `Memorandum'. TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Minutes of Extra Ordinary General Meeting:

343. A perusal of the Minutes of the Extra-Ordinary General Meeting dated 19.07.2022 (in respect of the 4th Appellant / 1st Respondent / Company - M/s. Kumudam Publications Pvt. Ltd.), indicates that the 1st Respondent / 1st Petitioner, and the 1st Appellant / 2nd Respondent were shown as `Present' as `Directors' and the 2nd Respondent / 2nd Petitioner, the 1st Respondent / 1st Petitioner and the 1st Appellant / 2nd Respondent were shown as `Members' Present. In fact, the 1st Respondent / 1st Petitioner took the Chair and the Consent of all `Members' Present in the `Meeting'.

344. After, detailed discussions, the following special `Resolutions' were passed:

> ``(i) RESOLVED THAT the notice for the present extraordinary general meeting of the company shall be three days instead of seven days as required as per clause 26(a) of the Articles of Association. RESOLVED FURTHER THAT the consent of all the members of the company be and hereby accorded for the shorter notice of three days in view of the brief duration of stay of Dr. A. Jawahar Palaniappan in India.
>
> (ii) RESOLVED THAT the new Articles of Association of the Company's copy of which is placed before the meeting duly initiated by the Chairman for the purpose of identification thereof, TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 be and hereby approved and adopted as the Articles of Association of the Company, in substitution of existing Articles of Association.

Further, it was RESOLVED THAT the 1st Appellant / 2nd Respondent was be and hereby authorised to take all steps for giving effect to the `Resolution' Minutes of Extra Ordinary General Meeting:

345. In the Extra-Ordinary General Meeting of M/s. Kumudam dated 19.03.2003 at 10.30 a.m., it was mentioned that the 2nd Respondent / 2nd Petitioner and 1st Respondent / 1st Petitioner (`Proxy) and the 1st Appellant / 2nd Respondent on his own and on behalf of M/s. Imprint Tech India Pvt. Ltd. were `Present' as `Members' and that, the 1st Appellant / 2nd Respondent took the `Chair' and the `Consent of all Members present in the Meeting'. After, detailed discussions, the following `Resolutions' were passed:

> ``Article - 31(a): M/s. Imprint Tech India Private Ltd. shall, so long as they hold shares in the company, be entitled to nominate two Directors to the Board. Such nominees shall be entitled to function as Directors from the date their nomination is received by the Company. In the event that one of such nominees is Mr. P. Varadarajan, he shall occupy the post of Chairman of the Board. Notwithstanding anything contained in Article 33, such Nominee Directors shall not be required to hold any share qualification. Such Nominee Directors shall not be liable to retire by rotation.
>
> TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020
>
> 2. RESOLVED (THAT Article 32 of the Articles of Association of the Company be deleted and replaced with the following:
>
> Article 32: So long as Shri. P. Varadarajan continues to be a Director of the Company, he shall also be the Managing Director of the Company. He shall be paid a monthly remuneration as fixed by the Board by Resolution in this behalf. He shall be further entitled to receive a remuneration up to 11% of the net profits of the company.
>
> Article - 39 (b) of the Articles of Association proceeds to the effect that The `Coram of the Board' to be complete for the purpose for transacting any business shall include `Shri. P. Varadarajan' (1 st Appellant / 2nd Respondent)."
>
> 346. When the `Amendment to the Articles of Association', took place in regard to the `Article 31 (a), 32 and 39 (b), vesting Management Rights in the hands of the `1st Appellant / 2nd Respondent' with the unanimous consent of the Respondents / Petitioners, then, after 10 years later, they cannot complain when they were `Parties' to the `Amendment' and in `Law', it amounts to the `Waiver' / `Abandonment' or `Acquiescence' of their `Right(s)', as held by this `Tribunal'. As such, the Respondents cannot complain about the `Amendment' to Articles 31 (a), 32 and 39 (b) of the Articles of Association and therefore the Respondents / Petitioners are estopped from taking a contra plea and the said plea is unworthy of acceptance. Further, the `Order' passed by the `Tribunal' in holding that TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 the Form-32, filed by the 1st Appellant / 2nd Respondent with the `Registrar of Companies', Chennai, intimating the cessation of `Respondents / Petitioners' as `Directors' of the 4th Appellant (1st Respondent / Company) from 02.01.2012, to be an `illegal' and `non-est in Law', is not a `Valid'

and `Tenable' one in the `eye of Law', and the same is set aside, by this `Tribunal', in furtherance of `substantial cause of justice'.

Oppression:

347. To come within the purview of Section 397 of the Companies Act, 1956, there should be `Material Evidence' of `Oppression', in regard to the `Affairs' of a `Company'.

348. The `Conduct' complained of, should at least involve a `Deviation', from the `Standards of Fair Dealing' and a `Breach of Conditions' of `Fairplay', of which, every `Shareholder', `who entrusts his money to a Company', is entitled to rely as per decision `Elder v. Elder & Watson 1952 SC Page 49.

Laches:

349. It means, an `unreasonable delay and neglect', in enforcing an `Equitable Right'. `Laches' (or `Lasches'), is an old `French Word', for TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Slackness' or `Negligence' or `not doing'. `Laches', in `Law', is `Failure to do something at the proper time', especially, such a dealing will prohibit a `Person' from initiating a `Legal Proceeding', `negligence in observance of duty', `a delay in asserting a `Legal Right' or `Privilege', `lack of promptitude in pursuing a `Legal Remedy'.

350. As a matter of fact, if the `Petitioner / Plaintiff' in a given case, with full knowledge of facts takes unnecessary long time, to bring an `Action', (eg. `To set aside a Contract obtained by Fraud'), the Court will not assist him, because of the `maxim', `The `Law', will not aid those, who sleep on their Rights' Board Meeting dated 26.09.2011:

351. In regard to the purported `Board Meeting' held by the `Respondents / Petitioners' in the instant `Appeal' on 26.09.2011 (to nullify the `Resolutions', passed on 20.09.2011, by the 4 th Appellant / 1st Respondent / Company), the `Appellants/Respondents', are unaware of such meetings ever having been held and till date, the Minutes of any such alleged meeting had not been produced.

352. Moreover, at the purported `Board Meeting' dated 26.09.2011, a `Resolution' is alleged to have been passed to keep in abeyance Article 31

(a), 32 and 39 (b), allegedly to give effect to a `Private Arrangement' i.e., TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 `Memorandum of Understanding' dated 15.08.2010. However, according to the Appellants, the 1st Appellant / 2nd Respondent through a Letter dated 27.09.2011 was intimated in regard to the decision taken in the said Meeting, as an `Extract'.

353. The fact of the matter is that the alleged `Board Meeting' dated 26.09.2011, is `non-est in Law', because of the fact that it was averred in IA No. 16197 of 2011 in O.S.No. 7554 of 2011 by an `Order' dated 27.04.2012, it was held that the said Board Meeting on 26.09.2011 was not `Sustainable in Law'.

354. The Respondents / Petitioners preferred a Civil Miscellaneous Appeal No. 37 of 2012, before the City Civil Court, Chennai (being `aggrieved' against the `Order' dated 27.04.2012) and the said `Appeal', came to be dismissed by the Learned III Addl. Judge, City Civil Court, without costs. Later, the `Respondents / Petitioners', withdrew the `Suit in O.S. No. 7554 of 2011' on 11.11.2013. Hence, even if the purported `Board Meeting' of 26.09.2011 was held by the `Respondents / Petitioners', then, the `Legal Position' is, the same is `non-est in Law', because of the fact that the `Decision' rendered in CMA No. 37 of 2012 became `final' and `binding', between the inter se `Parties', which is clearly an adverse circumstance against the `Respondents / Petitioners', as opined by this `Tribunal'.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Nomination of `Two More Directors':

355. The `Tribunal' in the `impugned order' dated 27.05.2022 (delivered on 01.06.2022) in CP/54/2012 (TCP/26/2018), had permitted the `Nomination of two more Directors' in the `Board of Directors' of the 4th Appellant / 1st Respondent / Company, bringing the total number of Directors to `Six' and this `Direction', according to the `Appellants' goes beyond `Article 29' of the `Articles of Association', which enjoins the `Appointment of Directors' to a maximum of `Four', excluding any ex- officio Directors, nominated by any `Financial Institution' and / or `Banks'.

356. Such a `Direction', issued by the `Tribunal' in the considered opinion of this `Tribunal', is an `untenable' one, especially, when no `Direction' was issued by the `Tribunal', directing the `Alteration' of `Article 29' of the Articles of Association'. Apart from that, the `Direction', issued by the `Tribunal', in nominating the `Persons' as `Directors', is in `violation' of `Article 33' of the `Articles of Association', which visualises a `Minimum Share Qualification', for being `Appointed' as `Director' of the 4th Appellant / 1st Respondent / Company (M/s. Kumudam) and in the absence of any `Direction', being issued, to change the ingredients of `Article 33' of the `Articles of TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 Association', the `impugned order' of the `Tribunal' in `issuing directions in nominating two more Directors in the Board of Directors of the 4th Appellant / 1st Respondent / Company', is not `valid' in `Law', and the same is set aside by this `Tribunal', in the interest of Justice. Appointment of Chairman:

357. The `Tribunal' in the `impugned order' dated 27.05.2020 (delivered on 01.06.2020) in CP/54/2012 (TCP/26/2018), had appointed a `Chairman', in respect of the 4th Appellant / 1st Respondent / Company and fixed his tenure for `six months' and issued directions that he will head the `Board of Directors', hold necessary `AGM' / `EGM' and to conduct the affairs the 4th Appellant / 1st Respondent Company, etc., (to implement its directions) and the same in the considered opinion of this `Tribunal' are `Invalid' and an `Illegal' one, because of the fact that in the main CP/54/2012 (TCP/26/2018) instant case on hand, the `Respondents / Petitioners' have not made out a case / any case for the relief(s) of `Oppression' (unfair prejudice) and also, when they have not

`proved the aspect of `Lack of Probity' or `Fair Dealing to them' (in the matter of their Proprietary Rights) of the `Directors' of the Company (in running the affairs of the company), to the subjective satisfaction of this `Tribunal', they are not entitled to Claim the `Relief' of `Oppression', TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 under Section 397 of the Companies Act, 1956, as an `Equitable Remedy'. Also that, the `Tribunal' in the `impugned order' at Paragraph 27 (e), had observed that the `Counsel for the Petitioners' (Respondents in `Appeal'), had stated that the `Allegations of mismanagement on this account, is not being pursued by the Petitioners (Respondents in `Appeal') as they are pursuing criminal proceedings against the 2nd Respondent (1st Appellant in `Appeal') and hence rendered `no findings', in this regard.

358. In fact, the `Tribunal' cannot restrict the `Directors' and `interfere', in `Day-to-Day Affairs' of the Company. No doubt, the `Tribunal', is entitled to look at the reality and practicality of an overall situation past, present and future. Viewed in that perspective, the `Order' of the `Tribunal', appointing `a Chairman' for the `4th Appellant / 1st Respondent / Company', fixing his tenure, and issuance of directions to him are clearly unsustainable in the `eye of Law' (ofcourse based on the facts and surrounding circumstances of the case, and the same is set aside by this `Tribunal', as they are `not warranted'.

Aspect of Delay:

359. Dealing with the plea of the `Appellants', that the `Tribunal', has passed the `impugned order' in the main CP/54/2012 (TCP/26/2018) TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 dated 27.05.2020 (delivered on 01.06.2020), after reserving the `Orders' on 14.06.2019, after one year, this `Tribunal', pertinently points out that the `Tribunal', is to keep in mind of the ingredients of Rule 150 of the NCLT Rules, 2016, for its `Guidance', since it is to `dispense justice' and `not to dispense with justice'. Also that, the delay in Pronouncement of the `Order' of the `Tribunal', will not vitiate the same, on that score, as opined by this `Tribunal'.

Speaking Orders:

360. In a welfare State, the `Tribunal' (Having the trappings of a Court), is to pass a `Reasoned Order', which is a `Palatable Requirement' of any `Judicial Disposal'. A `Speaking Order', is a `must', `just', `proper' and `reasonable' one and at the extreme, a `plausible one', in the earnest opinion of this `Tribunal', because of the candid fact that the `Stakeholders', `ought not to be deprived of this primordial safeguard'.

361. The requirement of acting `Judicially', in essence, is nothing but, a requirement to act justly and fairly and not arbitrarily and capriciously. No wonder, `Inviolability of Judicial Proceedings' is at the root of everything. The procedures, which are considered inherent in the exercise of Judicial Power are those which facilitate, if not, ensure a just and fair decision, as per decision of the Hon'ble Supreme Court in `Management TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 of M S Nally Bharat Engg. Co. Ltd. v. State of Bihar & Ors.', reported in 1990 (2) SCC 48.

362. An `Order' or a `Judgment' of a `Tribunal', must be written with a `Positive Vein'. A `Reasoned Conclusion' of a `Tribunal' / `an Adjudicating Authority', will have an `Appearance of Justice'. An `Unreasoned Order', may not appear to be `Fair' and `Just', to those who are affected by the same.

363. In regard to the plea taken on behalf of the Appellants that the `Tribunal' at the time of passing the `impugned order' in main CP/54/2012 (TCP/26/2018), had not adverted to the respective contentions advanced on both sides, this `Tribunal' points out that it is the `primordial sacrosant duty' of a `Tribunal', firstly, to render a `Finding of Fact' and later, render `Finding on Law'. Further, the `Tribunal', must apply its mind, to the pleas (both factual and legal), projected by the `Parties', in a given case, take into consideration the contentions advanced on their behalf, while passing `speaking orders' (reasoned one), indicating thereby, an `application of mind', at the time of judicial determination'.

364. In view of the foregoings, detailed deliberations, on a consideration of respective contentions, this `Tribunal', ongoing through the `impugned TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 order' dated 27.05.2020 (delivered on 01.06.2020) in CP/54/2012 (TCP/26/2018), passed by the `Tribunal' (`National Company Law Tribunal', Chennai Bench), in the teeth of attendant facts and circumstances of the case, in an integral, holistic and conspectus fashion, comes to an inescapable, inevitable, and an irresistible conclusion that the said `Order', is an `Invalid', `Untenable' and `Unsustainable' one, bristling with `Legal Infirmities'. Hence, this `Tribunal', sets aside the `impugned order', dated 27.05.2020 (delivered on 01.06.2020) in CP/54/2012 (TCP/26/2018), passed by the `Tribunal' (`National Company Law Tribunal', Chennai Bench). Resultantly, the `Appeal', succeeds.

Result:

> In fine, the instant Company Appeal (AT) No. 83 of 2020 (TA No. 283 of 2021) is allowed. No costs. The `impugned order' of the `Tribunal' in CP/54/2012 (TCP/26/2018) dated 27.05.2020 (delivered on 01.06.2020) is set aside by this `Tribunal', for the reasons ascribed in this `Appeal'. The CP/54/2012 (TCP/26/2018), filed by the `1st Respondent / 1st Petitioner' (on the file of `National Company Law Tribunal', Chennai Bench) is dismissed.

TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020 IA No. 1372 of 2020 (`For Stay'); IA No. 1373 of 2020 (`For Exemption from filing DIM & legible copies) and IA No.1374 of 2020 (`For Exemption from filing Attested Affidavits) are Closed.

Before parting with the case, this `Tribunal', makes it clear that it is open to the respective `Parties', to pursue their respective pending `Appeals', filed against the `Order' of the `Adjudicating Authority' dated 22.05.2017 (`Joint Director'), Directorate of Enforcement (vide Adjudication Order No.01/JD/HIU/2017 in SCN No. T-4/02-CHE/2012 dated 06.06.2012), before the `Competent Forum'(`Appellate Authority)', for redressal of their grievances, in the manner known to `Law' and in accordance with `Law', if they so desire / advised.

[Justice M. Venugopal] Member (Judicial) [Shreesha Merla] Member (Technical) 18/11/2022 SR/TM TA No. 283 of 2021 in Company Appeal (AT) No. 83 of 2020