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manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,

may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

242. *Powers of Tribunal.*—(1) If, on any application made under section 241, the Tribunal is of the opinion—

(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company ; 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 Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—

(a) the regulation of conduct of affairs of the company in future ;

(b) the purchase of shares or interests of any members of the company by other members thereof or by the company ;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital ;

(d) restrictions on the transfer or allotment of the shares of the company ;

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case ;

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e) :

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned ;

(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference ;

(h) removal of the managing director, manager or any of the directors of the company ;

(i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims ;

(j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h) ;

(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct ;

(l) imposition of costs as may be deemed fit by the Tribunal ;

(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

(3) A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

(4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

(5) Where an order of the Tribunal under sub-section (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(6) Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

(7) A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

(8) If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both."

99 The aforesaid provisions make it clear that if any member of a company complains that the affairs of the company have been or are being conducted in a manner "prejudicial to public interest" or in a manner "prejudicial" or "oppressive" to him or any other member or members or "prejudicial to the interests of the company" may file application under section 241(1) of the Companies Act, 2013.

100 The test as to when the proposed measure can be subject of the proceedings under sections 241 and 242 of the Companies Act, 2013 is dependant on two factors, namely—(i) whether the affairs of the company have been or are being conducted in a manner "prejudicial" or "oppressive" to any member or members or "prejudicial to public interest" or "in a manner prejudicial to the interests of the company" ; and (ii) 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.

101 Mr. Harish Salve, learned counsel for the second respondent placed reliance on *Saul D. Harrison and Sons Plc, In re* Chancery Division (Companies Court), Court of Appeal (Civil Division) [1994] BCC 475 and *O'Neill* v. *Phillips* [1999] 97 Comp Cas 807 (HL) ; [1999] WL 477304 (HL) and submitted that in Indian Law, the word "unfairly prejudicial" has not been used but the word "prejudicial" used in section 241, therefore, the appellants cannot make out a case of "unfairly prejudicial" on the ground

that their rights got infringed due to breach of some promises or undertaking.

It is true that the word "unfairly prejudicial" has not been used in section 241. Unfairness may arise or may not arise from what the parties have agreed upon, but in the context of Indian Law, it is only to be seen whether the power exercised by majority in circumstances to which the minority can reasonably say that it is "prejudicial" or "oppressive" to their interest or interest of any member or interest of the company or public interest.

102 The Indian Law (sections 241 and 242 of the Companies Act, 2013) does not recognise the term "legitimate expectations" to hold any act prejudicial or oppressive.

103 In *Shanti Prasad Jain* v. *Kalinga Tubes Ltd.* [1965] 35 Comp Cas 351 (SC) ; AIR 1965 SC 1535, the hon'ble Supreme Court held that the Indian Companies Act, 1913 complies with section 210 of the English Companies Act, 1948 and observed (page 363 of 35 Comp Cas) :

> "We shall first take up the case under section 397 of the Act and proceed on the assumption that a case has been made out to wind up the company on just and equitable grounds. This is a new provision which came for the first time in the Indian Companies Act, 1913 as section 153C. That section was based on section 210 of the English Companies Act, 1948, which was introduced therein for the first time. The purpose of introducing section 210 in the English Companies Act was to give an alternative remedy to winding up in case of mismanagement or oppression. The law always provided for winding up, in case it was just and equitable to wind up a company. However, it was being felt for sometime that though it might be just and equitable in view of the manner in which the affairs of a company were conducted to wind it up, it was not fair that the company should always be wound up for that reason, particularly when it was otherwise solvent. That is why section 210 was introduced in the English Act to provide an alternative remedy where it was felt that though a case had been made out on the ground of just and equitable cause to wind up a company, it was not in the interest of the shareholders that the company should be wound up and that it would be better if the company was allowed to continue under such directions as the court may consider proper to give. That is the genesis of the introduction of section 153C in the 1913 Act and section 397 in the Act.
>
> Section 397 reads thus :
>
> '*Application to court 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 mariner oppressive to any member or members (including any one or more of themselves) may apply to the court for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the court is of opinion—

(a) that the company affairs are being conducted in a manner oppressive to any member or members ; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up ;

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

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

We may in this connection refer to four cases where the new section 210 of the English Act came up for consideration, namely, (1) *Elder* v. *Elder and Watson* [1952] SC 49 (SC), (2) *George Meyer* v. *Scottish Co-operative Wholesale Society Ltd.* [1954] SC 381 (SC), (3) *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] 29 Comp Cas 1 (HL), which was an appeal from *George Meyer* v. *Scottish Co-operative Wholesale Society Ltd.* [1954] SC 381 (SC) and (4) *H. R. Harmer Ltd., In re* [1959] 29 Comp Cas 305 (CA). Among the important considerations which have to be kept in view in determining the scope of section 210, the following matters were stressed in

Elder v. *Elder and Watson* [1952] SC 49 (SC) as summarised at page 394 in *George Meyer* v. *Scottish Co-operative Wholesale Society Ltd.* [1954] SC 381 (SC) :

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

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

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

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

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

In *H. R. Harmer Ltd., In re* [1959] 29 Comp Cas 305 (CA), it was held that 'the word "oppressive" meant burdensome, harsh and wrongful'. It was also held that 'the section does not purport to apply to every case in which the facts would justify the making of a winding up order under the "just and equitable" rule, but only to those cases of that character which have in them the requisite element of oppression'. It was also held that 'the result of applications under section 210 in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision'. The

circumstances must be such as to warrant the inference that 'there had been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy'. The phrase 'oppressive to some part of the members' suggests that the conduct complained of 'should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely . . . But, apart from this, the question of absence of mutual confidence per se between partners or between two sets of shareholders, however relevant to a winding up seems to have no direct relevance to the remedy granted by section 210. It is oppression of some part of the shareholders by the manner in which the affairs of the company are being conducted that must be averred and proved. Mere loss of confidence or pure deadlock does not . . . come within section 210. It is not lack of confidence between shareholders per se that brings section 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involves . . . at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder'.

These observations from the four cases referred to above apply to section 397 also which is almost in the same words as section 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs

from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to section 397."

104 The difference between the English Law and the Indian Law was also noticed by the hon'ble Supreme Court in *Needle Industries (India) Ltd.* v. *Needle Industries Newey (India) Holding Ltd.* [1981] 51 Comp Cas 743 (SC) ; [1981] 3 SCC 333. In the said case, the hon'ble Supreme Court while referred to its earlier decision in *Shanti Prasad Jain* v. *Kalinga Tubes Ltd.* [1965] 35 Comp Cas 351 (SC) ; AIR 1965 SC 1535 held (page 777 of 51 Comp Cas) :

"Coming to the law as to the concept of 'oppression' section 397 of our Companies Act follows closely the language of section 210 of the English Companies Act of 1948. Since the decisions on section 210 have been followed by our court, the English decisions may be considered first. The leading case on 'oppression' under section 210 is the decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] 29 Comp Cas 1 (HL). Taking the dictionary meaning of the word 'oppression', Viscount Simonds said at page 342 that the appellant society could justly be described as having behaved towards the minority shareholders in an 'oppressive' manner, that is to say, in a manner 'burdensome, harsh and wrongful'. The learned Law Lord adopted, as difficult of being bettered, the words of Lord President Cooper at the first hearing of the case to the effect that section 210 'warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view'. Dealing with the true character of the company, Lord Keith said at page 361 that the company was in substance, though not in law, a partnership, consisting of the society, Dr. Meyer and Mr. Lucas and whatever may be the other different legal consequences following on one or other of these forms of combination, one result followed from the method adopted, 'which is common to partnership, that there should be the utmost good faith between the constituent members'. Finally, it was held that the court ought not to allow technical pleas to defeat the beneficent provisions of section 210 (page 344 per Lord Keith ; pages 368-369 per Lord Denning) . . .

In an application under section 210 of the English Companies Act, as under section 397 of our Companies Act, before granting relief the

court has to satisfy that to wind up the company will unfairly prejudice the members complaining of oppression, but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up. The rule as regards the duty of utmost good faith, on which stress was laid by Lord Keith in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] 29 Comp Cas 1 (HL) received further and closer consideration in *Ebrahimi* v. *Westbourne Galleries Ltd.* [1973] AC 360 (HL), wherein Lord Wilberforce considered the scope, nature and extent of the 'just and equitable' principle as a ground for winding up a company. The business of the respondent-company was a very profitable one and profits used to be distributed among the directors in the shape of fees, no dividends being declared. On being removed as a director by the votes of two other directors, the appellant petitioned for an order under section 210. Allowing an appeal from the judgment of the Court of Appeal, it was held by the House of Lords that the words 'just and equitable' which occur in section 222(f) of the English Act, corresponding to our section 433(f), were not to be construed ejusdem generis with clauses (a) to (e) of section 222 corresponding to our clauses (a) to (e) of section 433. Lord Wilberforce observed that the words 'just and equitable' are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own ; and that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure :

'The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations ; considerations, that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way' (page 379).

Observing that the description of companies as 'quasi-partnerships' or 'in substance partnerships' is confusing, though convenient, Lord Wilberforce said :

'A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in'. (page 380)

Finally, it was held that it was wrong to confine the application of the just and equitable clause to proved cases of mala fides, because to do so would be to negative the generality of the words. As observed by the learned Law Lord in the same judgment, though in another context (page 374) :

'Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances'. . .

In *Shanti Prasad Jain* v. *Kalinga Tubes Ltd.* [1965] 35 Comp Cas 351 (SC) ; AIR 1965 SC 1535, Wanchoo J. referred to certain decisions under section 210 of the English Companies Act including *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] 29 Comp Cas 1 (HL) and observed :

'These observations from the four cases referred to above apply to section 397 also which is almost in the same words as section 210 of the English Act, and the question in each is whether the conduct of the affairs of the company, by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity of fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts . . . with reference to section 397.' (page 737)

At pages 734-735 of the judgment in *Shanti Prasad Jain* v. *Kalinga Tubes Ltd.* [1965] 35 Comp Cas 351 (SC) ; AIR 1965 SC 1535, Wanchoo J. has reproduced from the judgment in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] 29 Comp Cas 1 (HL), the five

points which were stressed in *Elder* v. *Elder and Watson* [1952] SC 49 (SC). The fifth point reads thus :

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

It is clear from these various decisions that on a true construction of section 397, an unwise, inefficient or careless conduct of a director in the performance of his duties cannot give rise to a claim for relief under that section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder. It may be mentioned that the Jenkins Committee on Company Law Reform had suggested the substitution of the word 'oppression' in section 210 of the English Act by the words 'unfairly prejudicial' in order to make it clear that it is not necessary to show that the act complained of is illegal or that it constitutes an invasion of legal rights (see *Gower's Company Law*, 4th edition, page 668). But that recommendation was not accepted and the English Law remains the same as in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] 29 Comp Cas 1 (HL) and in *H. R. Harmer Ltd., In re* [1959] 29 Comp Cas 305 (CA), as modified in *Jermyn Street Turkish Baths Ltd., In re* [1971] 41 Comp Cas 999 (CA). We have not adopted that modification in India."

The questions that arise for consideration are : **105**

(i) Whether the company's affairs have been or are being conducted in a manner "prejudicial" or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company ? ; and

(ii) If that be so, whether 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.

If both the aforesaid questions are answered in affirmative, the power **106** can be exercised by the Tribunal under section 242 of the Companies Act, 2013 with a view to bringing to an end the matters complained of, and make such order as it thinks fit.

107 To find out whether there is any direct control of "Tata Trusts", the majority shareholders on the company ("Tata Sons Ltd."), as alleged, we have noticed the relevant provisions of articles of association of the company, as discussed below.

108 Article 86 of "Tata Sons Ltd." relates to "Quorum at general meetings", as follows :

> "86. *Quorum at general meetings*
>
> No quorum at a general meeting of the holders of the ordinary shares of the company shall be constituted unless the members who are personally present are not less than five in number including at least one authorised representative jointly nominated by the Sir Dorabji Tata Trust and the Sir Ratan Tata Trust so long as the Tata Trusts hold in aggregate at least 40 per cent. of the paid-up ordinary share capital, for the time being, of the company.
>
> *Explanation.*—the words 'jointly nominated' used in this article shall mean that the Sir Dorabji Tata Trust and the Sir Ratan Tata Trust shall together nominate the authorized representative. In the case of any difference, the decision of the majority of the trustees in the aggregate of the Sir Dorabji Tata Trust and the Sir Ratan Tata Trust shall prevail."

The aforesaid provision shows that no quorum at a general meeting of the shareholders is complete in absence of authorised representative of "Tata Trust" which holds aggregate of at least 40 per cent. of the paid-up ordinary share capital.

109 Article 104B relates to "nomination of directors", as under :

> "104. *General provisions*
>
> A. *Number of directors . . .*
>
> B. *Nomination of directors*
>
> So long as the Tata Trusts own and hold in the aggregate at least 40 per cent. of the paid-up ordinary share capital, for the time being, of the company, the Sir Dorabji Tata Trust and Sir Ratan Tata Trust, acting jointly, shall have the right to nominate one third of the prevailing number of directors on the board and in like manner to remove any such person so appointed and in place of the person so removed, appoint another person as director.
>
> The directors so nominated by the Sir Dorabji Tata Trust and Sir Ratan Tata Trust shall be appointed as directors of the company.
>
> *Explanation.*—The words 'acting jointly' used in this article shall mean that the Sir Dorabji Tata Trust and Sir Ratan Tata Trust shall

together nominate such directors. In the case of any difference, the decision of the majority of the trustees in the aggregate of the Sir Dorabji Tata Trust and Sir Ratan Tata Trust shall prevail."

Article 121 mandates that the majority decision of the board required **110** affirmative vote of nominated directors of "Tata Trusts", otherwise majority decision cannot be given effect :

"121. *Matters how decided*

Matters before any meeting of the board which are required to be decided by a majority of the directors shall require *the affirmative vote of a majority of the directors appointed pursuant to article 104B present at the meeting and in the case of an equality of vote's the Chairman shall have a casting vote."

Provision engrafted in this article is unequivocal that affirmative vote of majority of directors nominated by "Tata Trusts" is indispensable for matters required to be decided by a majority of directors. This amply demonstrates the pre-eminent position, the directors nominated by "Tata Trusts" hold on the board of directors. This is the reason, the appellants have termed the power of the nominated directors of the "Tata Trusts" as "veto power", over the majority decision of the board of directors'.

Article 121 is depended on aggregate paid-up ordinary share capital of **111** "Tata Trust". However, if it is read along with article 121A, particularly clause (g), it will be evident that it is difficult to change the shareholding of "Tata Trust" to make it less than 40 per cent., as in the board's meeting, the nominated directors of "Tata Trust" have affirmative vote (veto power) :

121A. *The following matters shall be resolved upon by the board of directors :*

'(a) a five-year strategic plan that should include an assessment of the proposed strategic path of the company, business and investment opportunities, proposed business and investment initiatives and a comparative analysis of similarly situated holding companies, and any alterations to such strategic plan.

(b) an annual business plan structured to form part of the strategic plan, that should include proposed investments, incurring of debts, debt to equity ratio, debt service coverage ratio, projected cash flow of the company and any alterations to such annual business plan.

(c) the incurring or renewal of any debt or other borrowing by the company, which debt or borrowing causes the cumulative outstanding debt of the company, to exceed twice its net worth or which debt/

borrowing is incurred/renewed at a time when the cumulative outstanding debt of the company has already exceeded twice its net worth, if not already approved as part of the annual business plan.

(d) any proposed investment by the company in securities, shares, stocks, bonds, debentures, financial instruments, of any sort or immovable property of a value exceeding Rs. 100 crores if not already approved as part of the annual business plan.

(e) any increase in the authorized, subscribed, issued or paid-up capital of the company and any issue or allotment of shares by the company (whether on a rights basis or otherwise).

(f) any sale or pledge, mortgage or other encumbrance or creation of any right or interest by the company of or over its shareholding in any Tata Company or of or over any part thereof, if not already approved as part of the annual business plan.

(g) any matter affecting the shareholding of the Tata Trusts in the company or the rights conferred upon the Tata Trusts by the articles of the company or the shareholding of the company in any Tata Company if not already approved as part of the annual business plan.

(h) exercise of the voting rights of the company at the general meetings of any Tata Company, including the appointment of a representative of the company under section 113(1)(a) of the Companies Act, 2013 in respect of a general meeting of any Tata Company and, in any matter concerning the raising of capital, incurring of debt and divesting or acquisition of any undertaking or business of such Tata Company, instructions to such representative on how to exercise the company's voting rights.

Explanation.—the term 'Tata Company' used in this article shall, as the context requires, mean each or any of the following companies.'

Tata Consultancy Services Ltd., Tata Steel Ltd., Tata Motors Ltd., Tata Capital Ltd., Tata Chemicals Ltd., Tata Power Co. Ltd., Tata Global Beverages Ltd., Indian Hotels Co. Ltd., Trent Ltd., Tata Teleservices (Maharashtra) Ltd., Tata Industries Ltd., Tata Teleservices Ltd., Tata Communications Ltd., Titan Co. Ltd., and Infiniti Retail Ltd., and any other company in which the company (or its subsidiaries) holds twenty per cent. or more of the paid-up share capital and whose name is notified in writing to the company by the directors nominated under article 104B".

Article 121A(h) relates to voting rights of the company at the general meeting of any "Tata Company", including appointment of a representative of the company ("Tata Company") under section 113(1)(a) of the Companies Act, 2013 in respect of a general meeting of any Tata Company named therein. In the meeting of the "Tata Company", or the group companies in which the "Tata Sons Ltd." (company) holds twenty per cent. or more of the paid-up share capital, names of director are to be notified in writing by the directors nominated under article 104B. **112**

The aforesaid provision makes it clear that the nominated director of "Tata Trusts" are in the direct control of "Tata Companies", group companies or its subsidiaries.

Article 121A(g) relates to shareholding of the "Tata Trusts" in the company or the rights conferred upon the "Tata Trusts" by the articles of the company, which are required to be resolved by the "board of directors" in which nominated directors of "Tata Trusts" have affirmative vote (veto power). **113**

Therefore, no decision can be taken to reduce the shares of the "Tata Trusts", in terms of article 75, as referred below, till "Tata Trusts" decide to reduce its shares. **114**

Aforesaid provisions show that in the general meeting of the shareholders of "Tata Sons Ltd." or the board of directors, the majority decision is fully dependant upon affirmative vote of nominated directors of "Tata Trusts". Independently, no majority decision can be taken either in the general meeting of the shareholders or by majority decision of the board of directors. **115**

Article 121B mandates an advance notice of fifteen days to be given to the company ("Tata Sons Ltd."), its directors and the board about any matter/resolution which is to be placed for deliberation by the board. Decision of majority of Board on such matter/resolution is dependant upon affirmative vote of the nominee directors of the "Tata Trust". **116**

Article 75 empowers the "Tata Sons Ltd." at any time to transfer "ordinary shares" of any of the shareholders without following the normal procedure of transfer : **117**

> "75. *Company's power of transfer*
>
> The company may at any time by special resolution resolve that any holder of ordinary shares do transfer his ordinary shares. Such member would thereupon be deemed to have served the company with a sale notice in respect of his ordinary shares in accordance with article 58 hereof, and all the ancillary and consequential provisions of

these articles shall apply with respect to the completion of the sale of the said shares. Notice in writing of such resolution shall be given to the member affected thereby. For the purpose of this article any person entitled to transfer an ordinary share under article 69 hereof shall be deemed the holder of such share."

118 Power of the company ("Tata Sons Ltd.") to transfer "ordinary shares" of any shareholders including the appellant's without notice can be exercised through a special resolution in the general meeting of the holders of the ordinary shares of the company which requires presence of nominated directors of the "Tata Trusts", who have affirmative vote. The nominated directors of "Tata Trusts", to look into the interest of the "Tata Trusts", may not allow majority decision of the company ("Tata Sons Ltd.") to reduce the paid-up ordinary share capital of "Tata Trusts" below 40 per cent. aggregate, which otherwise will result into their exit (exit of the nominated directors).

119 The Tribunal or this Appellate Tribunal has no jurisdiction to hold any of the articles illegal or arbitrary, the terms and conditions being agreed upon by the shareholders. However, if any action is taken even in accordance with law which is "prejudicial" or "oppressive" to any member or members or "prejudicial" to the company or "prejudicial" to the public interest, the Tribunal can notice whether the facts would justify the winding up of the company and in such case, if the Tribunal holds that it would unfairly prejudice member or members or public interest or interest of the company, may pass appropriate order in terms of section 242.

120 According to the appellants, nominated members of "Tata Trusts" including Mr. Nitin Nohria (seventh respondent) who are empowered with affirmative vote, since 2012, have taken decisions which are "prejudicial" to the interest of the company adversely affecting the interest of the members, including the minority members (appellants). Such acts are "prejudicial" and "oppressive" to the members, including the minority shareholders (appellants).

121 In favour of such allegations, the following "prejudicial" and "oppressive" acts have been highlighted :

"(a) Board with the affirmative vote of nominated members of 'Tata Trusts' granted Rs. 600 crores for procurement 'management consultancy contracts' without calling for bids in violation of normal procedure and standard expected of a large public company ;

(b) Board with the affirmative vote of nominated members of 'Tata Trusts' issued equity shares of 'Tata Teleservices Ltd.' (Tata Company) at a steep discount in comparison to the price at which shares

were issued to other investors within few days. Such discounted investment was substantially funded by the 'Tata Companies' ;

(c) Loans of Rs. 200 crores extended to one 'Siva's' companies by 'Tata Capital Ltd.' when Mr. Ratan N. Tata (second respondent) was Chairman. Said 'Tata Capital Ltd.' subsequently suffered a loss of Rs. 200 crores, when 'Siva' defaulted to pay the loans and the shares of 'Tata Tele Services Ltd.' fully eroded in value ;

(d) 'Tata Tele Services Ltd.', an overvalued company was purchased from the 'Siva group', which had to be written off ; and

(e) A penthouse apartment at 'IHCL's' apartment hotel was let out at a price significantly lower than market price ; all of which caused objective, discernible and serious prejudice to the company."

122 On the other hand, according to counsel for the company ("Tata Sons Ltd."), Mr. Ratan N. Tata (second respondent), Mr. Nitin Nohria (seventh respondent) and others, the allegations are incorrect. In fact, the company incurred loss due to failure and mismanagement by Mr. Cyrus Pallonji Mistry (eleventh respondent).

123 Before the Tribunal, respondents-Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) took specific plea that articles 121 and 121A mandated a "prior consultation" and "pre-clearance" from them.

124 The appellants have highlighted wide range of topics which Mr. Ratan N. Tata (second respondent), Mr. N. A. Soonawala (fourteenth respondent) and others brought up with Mr. Cyrus Pallonji Mistry (eleventh respondent) where their guidance was sought for. Written record of interventions by Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) and collateral correspondence from other respondents, including the group legal counsel of the "Tata group" and interactions between Mr. Cyrus Pallonji Mistry (eleventh respondent), Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) has been highlighted.

125 Some of the documentary evidence of correspondence between Mr. Cyrus Pallonji Mistry (eleventh respondent), Mr. Ratan N. Tata (second respondent), Mr. N. A. Soonawala (fourteenth respondent) and Mr. Nitin Nohria (seventh respondent), are set out hereunder :

"(i) By e-mail dated July 18, 2013 Mr. Ratan N. Tata (second respondent) as CMO/TIL in reply to the request of Mr. Cyrus Pallonji Mistry (eleventh respondent) informed his view relating to cap exmade to the board by the TME Management. In the said e-mail, he

asked Mr. Cyrus Pallonji Mistry (eleventh respondent) as to how the matter to be dealt with relating to on-going product development expenses on a product over five years when Mr. Cyrus Pallonji Mistry (eleventh respondent) has not deflected but he went on to develop on that product. It was also stated that there are several justifications for expenditure which should be considered as unacceptable and no effort was made to show how product volume, product wise, on the basis of documentation alone would be difficult for a Board member to approve.

(ii) By an e-mail dated February 28, 2014 Mr. Cyrus Pallonji Mistry (eleventh respondent) informed Mr. Ratan N. Tata (second respondent) relating to affairs of 'Docomo' which have suddenly taken a very rigid stance with respect to the put option. In the said e-mail, Mr. Cyrus Pallonji Mistry (eleventh respondent) made it clear to Mr. Ratan N. Tata (second respondent) that in 'Tata Chem', the company-'Tata Sons Ltd.' have a risk of further write down due to non-performance. At paragraph 5 of the said e-mail, Mr. Cyrus Pallonji Mistry (eleventh respondent) intimated Mr. Ratan N. Tata (second respondent) that 'Tata Motors' will soon face a severe liquidity crunch. It was also informed that because of the bad results during the year of 'Tata Motors', the JLR Team has got very nervous.

(iii) By another e-mail dated March 11, 2015 Mr. Cyrus Pallonji Mistry (eleventh respondent) informed Mr. Ratan N. Tata (second respondent) about his (Mr. Ratan N. Tata) deep concern about the loss of sales and market share. While Mr. Cyrus Pallonji Mistry (eleventh respondent) also shown concern intimated that a few months ago, 'Tata Sons Ltd.' asked TBEM to go for deep dive into sales effectiveness and one Mr. Mayank was working on all those matters. Mr. Cyrus Pallonji Mistry (eleventh respondent) intimated that the matter requires more talent to do so.

(iv) There were discussion relating to association of the company with 'Ola' and 'Uber'. In reply to e-mail dated May 28, 2015 Mr. Ratan N. Tata (second respondent) informed Mr. Cyrus Pallonji Mistry (eleventh respondent) that in his limited experience of having been associated with similar entities, companies like 'Uber' are interesting platform to explore from a technology and service delivery perspective.

(v) Mr. Cyrus Pallonji Mistry (eleventh respondent) by e-mail dated November 3, 2015 intimated Mr. Ratan N. Tata (second respondent) that there are a number of initiatives in multiple areas

which can be taken to pull 'Tata Motors' out. The C. V. of a potential managing director of the 'Tata Motors' was also forwarded with observation that unless Mr. Ratan N. Tata (second respondent) has any objection he may be called for an interview.

(vi) E-mail from Mr. Cyrus Pallonji Mistry (eleventh respondent) to Mr. Nitin Nohria (seventh respondent) dated January 29, 2015 shows that Mr. Cyrus Pallonji Mistry (eleventh respondent) expressed concern that if everything is to be presented to Mr. Ratan N. Tata (second respondent) then what the board of directors of the company will do, as an investment decision is to be taken by the 'Tata Sons Ltd.'. In response, Mr. Nitin Nohria (seventh respondent), a trustee nominee director vide e-mails dated January 31, 2015 and February 4, 2015 agreed to formulate a governance framework.

(vii) E-mail dated February 16, 2015 was sent by Mr. N. A. Soonawala (fourteenth respondent) to Mr. Cyrus Pallonji Mistry (eleventh respondent) wherein views expressed by Mr. Cyrus Pallonji Mistry (eleventh respondent) with respect to 'Tata Motors', Mr. N. A. Soonawala (fourteenth respondent) expressed the need for an appropriately structured mechanism or process for communication between the company ('Tata Sons Ltd.') and the Trustees for consultation/ approval of all issues as required under the amended articles of 'Tata Sons Ltd.'.

(viii) The letter from Mr. Cyrus Pallonji Mistry (eleventh respondent) dated February 18, 2015 to Mr. N. A. Soonawala (fourteenth respondent) shows that Mr. Cyrus Pallonji Mistry (eleventh respondent) expressed the need to understand the process of consultation and stage at which the decision making the Trusts would be involved and asked as to who would convey the views of the 'Tata Trusts'."

126 Aforesaid correspondences show that Mr. Cyrus Pallonji Mistry (eleventh respondent) was unaware and not in a position to understand as to how decisions are taken by the "Tata Trusts" before the decision of the board of directors of "Tata Sons Ltd.". In this background, Mr. Cyrus Pallonji Mistry (eleventh respondent) reiterated the need for development of a governance framework and volunteered to assist with the document on which Mr. Nitin Nohria (seventh respondent) and Mr. Ratan N. Tata (second respondent) were working on.

127 E-mails dated March 13, 2016 ; April 30, 2016 and May 10, 2016 between Mr. Cyrus Pallonji Mistry (eleventh respondent) and Mr. Nitin Nohria (seventh respondent) show that Mr. Cyrus Pallonji Mistry (eleventh respondent) formulated a governance framework after obtaining the

feedback from Mr. Nitin Nohria (seventh respondent) to clarify the role of the trustees of "Tata Trusts" in the decision making processes of "Tata Sons Ltd.". It was followed by e-mail dated May 15, 2016 sent by Mr. Cyrus Pallonji Mistry (eleventh respondent) to Mr. Ratan N. Tata (second respondent) forwarding a draft of the governance framework.

128 Mr. Cyrus Pallonji Mistry (eleventh respondent) by e-mail dated June 27, 2016 to Mr. Nitin Nohria (seventh respondent) informed after learning that Mr. Ratan N. Tata (second respondent) was upset as not being consulted about the "Welspun" acquisition, and in the matter of "Welspun" it would be difficult to move forward unless there are clear written instructions on how the articles be operationalised. Mr. Nitin Nohria (seventh respondent), stressed the importance of the governance framework that was shared by Mr. Cyrus Pallonji Mistry (eleventh respondent) with Mr. Ratan N. Tata (second respondent).

129 The aforesaid communications between the respondents from 2013 to 2016 show that there was complete confusion in the board about the governance framework of the company ("Tata Sons Ltd.") as before deciding any matter or for taking any resolution by the board decision used to be taken by Mr. Ratan N. Tata (second respondent) for "Tata Trusts", in which Mr. Nitin Nohria (seventh respondent) and Mr. N. A. Soonawala (fourteenth respondent), were taking active part.

130 This is also apparent from the stand taken by Dr. Abhishek Singhvi, learned senior counsel appearing on behalf of the company ("Tata Sons Ltd.") that prior to the board's meeting held on October 24, 2016 before removing Mr. Cyrus Pallonji Mistry (eleventh respondent), on the same date decision had already been taken by Mr. Ratan N. Tata (second respondent) in presence of Mr. Nitin Nohria (seventh respondent) to remove Mr. Cyrus Pallonji Mistry (eleventh respondent), who asked him to step down from the post of the "executive chairman" of the company ("Tata Sons Ltd."). However, Mr. Cyrus Pallonji Mistry (eleventh respondent) in absence of any decision of board or any ground refused to accede to such dictate.

131 Dr. Abhishek Manu Singhvi, learned counsel appearing on behalf of the first respondent-company ("Tata Sons Ltd.") and contesting respondents submitted that the aforesaid refusal constrained the nominated directors to bring the motion to replace Mr. Cyrus Pallonji Mistry (eleventh respondent) in the board meeting held on October 24, 2016. It is accepted that there was no such agenda before the board nor any document was circulated relating to performance of Mr. Cyrus Pallonji Mistry's (eleventh respondent) with any of the directors, including the independent directors.

Even no intimation was given to Mr. Cyrus Pallonji Mistry's (eleventh respondent) and other directors.

This is also apparent from the proceedings of the board of directors **132** dated October 24, 2016 held between 2.00 p.m. to 3.00 p.m., which reads as follows :

"Minutes of the sixth meeting of the board of directors of Tata Sons Ltd., for financial year 2016-17 held on Monday, October 24, 2016 from 2.00 p.m. to 3.00 p.m. in the Board Room, Bombay House, 24, Homi Mody Street, Mumbai-400 001

Present

Mr. R. N. Tata, Chairman Emeritus

Mr. C. P. Mistry, Executive Chairman

Mr. Ishaat Hussain

Mr. Vijay Singh

Dr. Nitin Nohria

Mr. Ronen San

Mrs. Farida Khambata

Mr. Venu Srinivasan

Mr. Ajay Piramal

Mr. Amit Chandra

Mr. F. N. Subedar, Company Secretary

The Chairman Mr. C. P. Mistry was informed that Mr. R. N. Tata will be joining the board meeting. Before commencement of considerations of items in the agenda which was circulated to the directors on October 16, 2016. Dr. Nitin Nohria mentioned that the Tata Trusts has asked its nominees on the board of Tata Sons to bring a motion to the board of Tata Sons Ltd. Mr. Amit Chandra mentioned that in a meeting of the trust directors held earlier in the day it was agreed to move a motion to request Mr. C. P. Mistry to step down from the position of executive chairman of Tata Sons Ltd., as the trusts had lost confidence in him for a variety of reasons. Mr. Amit Chandra stated that given that Mr. R. N. Tata had just met Mr. C. P. Mistry and had requested him to step down, Mr. Amit Chandra requested Mr. C. P. Mistry to reconsider his decisions not to step down as conveyed to Mr. Tata before the board gets into a formal process in this regard. Mr. C. P. Mistry first requested Mr. R. N. Tata to say a few words. However, Mr. R. N. Tata commented that he was an observer at this stage. Mr. Amit Chandra thereafter sought the views of Mr. C. P. Mistry

on the said motion. In response, Mr. Mistry sought 15 days' notice for taking up such an item for the consideration of the board and stated that the present action was illegal. Mr. Amit Chandra mentioned that the Trusts had obtained legal advice stating the such a notice is not necessary Mr. C. P. Mistry also said he would like to obtain legal advice since the legal opinions were not made available to him and he did not agree with the legal opinions since Mr. C. P. Mistry was an interested party in relation to the motion.

Mr. Amit Chandra requested Mr. Vijay Singh to act as the Chairman. Mr. Ishaat Hussain mentioned that he would like to abstain from the voting on this proposal. Mrs. Farida Khambata mentioned that she would also like to abstain from the voting on this proposal. All other directors (other than Mr. C. P. Mistry interested, Mr. Ishaat Hussain and Mrs. Farida Khambata) supported the motion, Mr. Amit Chandra proposed that Mr. Vijay Singh be elected as the chairman for the board meeting in place of Mr. C. P. Mistry. This proposal was seconded by Mr. Venu Srinivasan and the following resolution was put to vote :

1. Election of Mr. Vijay Singh as chairman for the board meeting.

'Resolved that Mr. Vijay Singh be and is hereby elected as the chairman of the board of director of the company for the purpose of this board meeting.'

Mrs. Farida Khambata abstained from voting on this resolution. Mr. C. P. Mistry recorded his objections by stating his view that it was not legal for the resolution to be taken up. All the other directions voted in favour of the resolution and the resolution was carried by the requisite majority.

2. Resolution to include additional matters on the agenda Mr. Vijay Singh (as chairman of the meeting) proposed inclusion of matters that were not on the agenda circulated to the board of director on October 15, 2016 and which Mr. Vijay Singh proposed should be taken up first. Accordingly, he moved the following resolution which was seconded by Mr. Ronen Sen.

'Resolved that the consent of the board be and is hereby accorded to consider and resolve upon, in this meeting of the board, the following matters which were not included in the agenda circulated for this meeting of the board :

(a) Replacement of Mr. Cyrus P. Mistry as the chairman of the Board and from each committee of the board ;

(b) While the board has adopted and put in place certain age criteria for retirement of directors of the company, to approve the cessation of applications of the age criteria for retirement of directors in relation to the company ;

(c) Reconstitution of the nomination and remuneration committee to consist of the following directors (i) Mr. Ronen Sen (independent director) ; (ii) Mr. Ajay Piramal (independent director) ; (iii) Mrs. Farida Khambata (independent director) ; (iv) Mr. Vijay Singh ; and (v) Mr. Venu Srinivasan ;

(d) Appointment of Mr. Ratan N. Tata as additional director ;

(e) Election of Mr. Ratan N. Tata as Interim Chairman of the board until selection and appointment of a new Chairman of the board in terms of the Companies Act, 2013 and the articles of association of the company ;

(f) To take appropriate steps in terms of the Companies Act, 2013 and the article of association of the company to appoint a new chairman, including by formation of a selection committee comprising of (i) Mr. Ratan N. Tata (nominee of Tata Trust) ; (ii) Mr. Amit Chandra (nominee of Tata Trust) ; (iii) Mr. Venu Srinivasan (nominee of Tata Trusts) ; (iv) Mr. Ronen Sen (independent director) ; and (v) Lord Kumar Bhatthcharya (independent outside person) ; and

(g) Until selection and appointment of a new chairman of the Board in terms of the Companies Act, 2013 and the article of associations of the company to vest substantial powers of management of the company with Mr. F. N. Subedar chief operating officer, and/or one or more senior officials and/or directors of the company, subject to the overall supervisions and directions of the board, in such manner as the board may decide from time to time.

Mrs. Farida Khambata abstained from voting on this resolution. Mr. C. P. Mistry recorded his objection by stating his view that it was not legal for the matter to be taken up. All the other directors voted in favour of the resolution and the resolution was carried by the requisite majority.

3. Replacement of Mr. Cyrus P. Mistry as executive chairman.

Dr. Nitin Nohria proposed the following resolution for replacement of Mr. C. P. Mistry as executive chairman, which was seconded by Mr. Ajay Piramal.

'Resolved that in accordance with the applicable provisions of the Companies Act, 2013 as amended from time to time (the "Act" the

Rules framed under the Act, and the memorandum and articles of association of the company, Mr. Cyrus P. Mistry be replaced and released with no residual executive powers or authority and with immediate effect, as chairman of the board and from every committee of the board (including but not limited to the nomination and remunerations committee) for the reasons discussed at the meaning of the board. However, it is clarified that the board resolves that Mr. Cyrus P. Mistry shall notwithstanding his ceasing to be the chairman of the company continue to be a director of the company.

Resolved further that any and all powers of attorney and/or other authorizations which permit or enable Mr. Cyrus P. Mistry to represent the company or to take any decisions or actions on behalf of the company are hereby revoked with immediate effect.'

Mr. C. P. Mistry recorded his objection to moving the resolution by stating his view that it was not legal for the resolution to be taken up. Mrs. Farida Khambata abstained from voting on this resolution. The other directors voted in favour of the resolution and the resolution was carried by the requisite majority.

4. Retirement policy shall cease to apply

Mr. Amit Chandra proposed the following resolution, which was seconded by Dr. Nitin Nohria.

'Resolved that while the Board has adopted and put in place certain age criteria for retirement of directors of the company, it is hereby approved that with immediate effect, the age criteria for retirement of directors shall cease to apply in relation to the company.'

Mr. C. P. Mistry recorded his objection to moving the resolution by stating his view that it was not legal for the resolution to be taken up, Mrs. Farida Khambata abstained from voting on this resolution. The other director voted in favour of the resolution and the resolution was carried by the requisite majority.

5. Reconstitute of nominations and remuneration committee

Mr. Vijay Singh proposed the following resolution for reconstitution of the nomination and remuneration committee which was seconded by Mr. Ronen San.

'Resolved that the nomination and remuneration committee of the company be reconstituted with immediate effect, with the following directors as members (i) Mr. Ronen San (independent director) ; (ii) Mr. Ajay Piramal (independent director) ; (iii) Mrs. Farida Khambata (independent director) ; (iv) Mr. Vijay Singh ; and (v) Mr. Venu Srinivasan.'

Mr. C. P. Mistry recorded his objection to moving the resolution by stating his view that it was not legal for the resolution to be taken up. Mrs. Farida Khambata abstained from voting on this resolution. The other director voted in favour of the resolution and the resolution was carried by the requisite majority.

6. Appointment of Mr. Ratan N. Tata as additional director

Mr. Ronen San proposed the following resolution for appointment of Mr. Ratan N. Tata as additional director, which was seconded by Mr. Ajay Piramal.

'Resolved that in accordance with section 161 and other applicable provision of the Companies Act, 2013 and the rules framed thereunder read with article 106 and other applicable provisions of the article of associations of the company Mr. Ratan N. Tata Director Identification No. 00000001) be and is hereby appointed as additional director on the board of director of the company.'

Mr. C. P. Mistry recorded his objection to moving the resolution by stating his view that it was not legal for the resolution to be taken up, Mrs. Farida Khambata abstained from voting on this resolution. The other director voted in favour of the resolution and the resolution was carried by the requisite majority.

7. Election of Mr. Ratan N. Tata as interim chairman

Mr. Vijay Singh proposed the following resolution for appointment of Mr. Ratan N. Tata as interim chairman which was seconded by Mr. Ajay Piramal.

'Resolved that Mr. Ratan N. Tata, additional director (Director Identification No. 00000001) be and is hereby elected as Interim Chairman of the board of director of the company and be appointed on all committees of the board, with immediate effect and until a new Executive Chairman is selected and appointed in terms of the Companies Act, 2013 and the articles of association of the company.

Mr. C. P. Mistry recorded his objections to moving the resolution by stating his view that it was not legal for the resolution to be taken Lip. Mrs. Farida Khambata abstained from voting on this resolution. The other directors voted in favour of the resolution and the resolution was carried by the requisite majority.

8. Constitution of a selection committee

Mr. Ronen San proposed the following resolution for constitution of a Selection Committee, which was seconded by Mr. Vijay Singh.

'Resolved that appropriate steps be taken to appoint a new Chairman in terms of the Companies Act, 2013 and the articles of association of the company including by formation of a selection committee comprising of (i) Mr. Ratan N. Tata (nominee of Tata Trust) ; (ii) Mr. Anil Chandra (nominee of Tata Trust) ; (iii) Mr. Venu Srinivasan (nominee of Tata Trust) ; (iv) Mr. Ronen San (independent director) ; and (v) Lord Kumar Bhattacharya (independent outside person).

Mr. C. P. Mistry recorded his objection to moving the resolution by stating his view that it was not legal for the resolution to be taken up Mrs. Farida Khambata abstained from voting on this resolution. The other directors voted in favour of the resolution and the resolution was carried by the requisite majority.

9. Vesting of substantial powers of management on Mr. F. N. Subedar and/or other senior official and/or directors

Dr. Nitin Nohria proposed the following resolution which was seconded by Mr. Amit Chandra

'Resolved that until selection and appointment of a new chairman of the company in terms of the Companies Act, 2013 and the articles of association of the company, substantial powers of management of the company may be vested with Mr. F. N. Subadar, chief operating officer of the company (who shall be a "manager" of the company so long as substantial powers of management are vested with him) and/or one or more senior officials and/or directors of the company, subject to the overall supervision and direction of the board in such form and manner as the board may decide from time to time.'

Mr. C. P. Mistry recorded his objection to moving the resolution by stating his view that it was not legal for the resolution to be taken up. Mrs. Farida Khambata abstained from voting on this resolution. The other directors voted in favour of the resolution and the resolution was carried by the requisite majority.

Mr. R. N. Tata mentioned that there was a need to recognize what Mr. C. P. Mistry had done over the last 4 years and that it was important for the group to move forward in a seamless manner as one can. He also said that Mr. C. P. Mistry's choice on whether he would like to continue as non-executive director of Tata Sons Ltd., having been removed from his executive role.

Mr. C. P. Mistry said he would continue on the board.

Mr. Amit Chandra thereafter asked if the meeting should be adjourned to consider this, Mr. Cyrus P. Mistry enquired if anything was planned for issuing the press announcement.

Mr. Hussain queried about Mr. Mistry continuing in the role of the chairman of other Tata Companies since, if not, it was stated that the matter had to be reported to the stock exchanges. As regard his directorship on Tata Sons Ltd. Mr. Tata said that to a great extent. It would be Mr. Mistry prerogative. As regard other Tata Companies, Mr. Mistry responded by saying that he shall decide on the same and revert.

Mrs. Khambata asked whether the decisions taken at the meeting could be announced immediately since Mr. C. P. Mistry had said he should have been given advance notice of his removal. Mr. Amit Chandra said that he was not carrying the opinions which he said were given by eminent lawyers and ex-Supreme Court judge. Mr. C. P. Mistry asked for copies of the written opinion and wondered how the rest of the Board could set without these opinions being made available to them, Mr. C. P Mistry asked for the opinions to be provided today. It was agreed to share these opinions with Mr. C. P. Mistry after checking with the lawyers.

Mr. R. N. Tata stated that the development at the meeting would need to be reported by way of a press conference as far as the company was concerned. The board decided to move ahead with the press announcement. Since the development were material.

As regard the items in the agenda the board agreed that given the aforesaid developments, matters on the agenda including signing of the minutes of the board meeting held on September 15, 2018 could be deliberated at the subsequent meeting.

2. Tata AIA Life Insurance Co. Ltd.

With the permission of the chairman and consent of all other directors Mr. Ishaat Hussain updated the Board on an opportunity which had been presented to Tata AIA Life Insurance Co. Ltd., to acquire a stake in a life Insurance company, PNB Metlife, for which a non binding bid was being sought.

The board was informed that PNB Metlife was currently held by the following shareholders Punjab National Bank Ltd., 30 per cent.

Elpro 21 per cent.

M. Pallonji and Co. P. Ltd., 18 per cent.

Jammu and Kashmir Bank Ltd., 5 per cent.

Met 28 per cent.

Mr. Hussain proposed the following deal structure

*Tata Sons and AIA to buyout the existing stake of all the shareholder in PNB MetLife aggregating to 70 per cent. other than Punjab National Bank Ltd., followed by a merger of the two insurance entities.

*PNB to sell its stake in the merged entity through a 'put' option within 3 years or Tata and AIA can exercise a 'call' option in 4 to 5 years postmerger.

*Tata Sons initial outgo on the deal being Rs. 1,500 crores to Rs. 2,700 crores with Tata Son holding in Tata AIA Life Insurance Co. Ltd. expected to dilute from 51 per cent.% to 45 per cent.

Mr. Hussain took the board through the valuation related benchmarks

The Board noted that Tata AIA Life Insurance Co. Ltd., would be putting in the non-binding bid on the above lines and Mr. Hussain informed the Board that Tata AIA would come back to the Board on further developments.

Mr. Amit Chandra provided to Mr. F. N. Subedar the names of the persons who gave the legal opinion, viz., (i) Justice R. P. Ravindran (ii) P. Chidambaram and (iii) Former Solicitor General Mohan Parasaran, for purpose of recording the name, in the minutes.

Mr. C. P. Mistry requested that the press release proposed to be issued by the company be discussed prior to release. This was agreed.

The meeting then concluded with a vote of thanks to the chairman of the meeting at 3 p.m.

Chairman

Mumbai

17-11-2016."

133 The proceedings of the meeting dated October 24, 2016 and the facts as stated by Dr. A. M. Singhvi, learned counsel for the company show :

(i) Mr. Ratan N. Tata (second respondent) was determined to remove Mr. Cyrus Pallonji Mistry (eleventh respondent) prior to the meeting of the Board and asked Mr. Cyrus Pallonji Mistry to step down.

(ii) Mr. Ratan N. Tata (second respondent) during the course of the meeting mentioned that there was a need to recognize what Mr. Cyrus Pallonji Mistry (eleventh respondent) had done over the last 4 years. He specifically stated that 'it was important for the group to move forward in a seamless manner as one can'.

(iii) The majority shareholders of 'Tata Trusts' represented by Mr. Ratan N. Tata (second respondent) were knowing that advance notice was required for his removal, therefore, opinion had been obtained from eminent lawyers and the hon'ble ex-Supreme Court Judge, as apparent from the proceedings of the meeting wherein 'Mr. Amit Chandra said that he was not carrying the opinions which he said were given by eminent lawyers and ex-Supreme Court Judge. Mr. C. P. Mistry asked for copies of the written opinion and wondered how the rest of the Board could sit without these opinions being made available to them, Mr. C. P. Mistry asked for the opinions to be provided today. It was agreed to share these opinions with Mr. C. P. Mistry after checking with the lawyers'.

(iv) The development would have global ramification which was known to Mr. R. N. Tata, therefore, in the said proceedings, Mr. Ratan N. Tata (second respondent) stated that 'the development at the meeting would need to be reported by way of a press conference as far as the company was concerned. The Board decided to move ahead with the press announcement'."

134 There is nothing on the record to suggest that the board of directors or any of the trusts, namely—Sir Dorabji Tata Trust or the Sir Ratan Tata Trust at any time expressed displeasure about the performance of Mr. Cyrus Pallonji Mistry (eleventh respondent). On the other hand, the record suggests that on October 24, 2016 Mr. Ratan N. Tata (second respondent) wanted that Mr. Cyrus Pallonji Mistry (eleventh respondent) should step down, so Mr. Cyrus Pallonji Mistry was called for and in presence of Dr. Nitin Nohria (seventh respondent) was asked to step down from the post of executive chairman.

135 The proceedings of the board of director's dated October 24, 2016 also show that "Tata Trusts" asked its nominee directors to bring a motion to request Mr. Cyrus Pallonji Mistry (eleventh respondent) to step down from the post of the executive chairman on the ground that "Tata Trusts" had lost confidence. Reasons have not been discussed or recorded in the proceeding of the meeting held in the afternoon of October 24, 2016 between 2.00 p.m. to 3.00 p.m. for removal of Mr. Cyrus Pallonji Mistry (eleventh respondent).

136 Statement of "Tata Sons Ltd." published in the newspaper on November 10, 2016 shows that the decision so taken had global effect, as is apparent from the said statement :

"A statement from Tata Sons

Mumbai, November 10, 2016

We have received e-mails and calls from many across the globe since the board of Tata Sons decided to change its chairman.

Some have shared concerns following the decision, while many have asked questions about the future course of the group and its companies and operations. We understand and appreciate that a period of change like this can lead to a sense of uncertainly and would like to put forward some facts so that the decision is seen in the desired perspective.

1. Tata Sons related matters

The directors of Tata Sons are primarily concerned with the results of Tata Sons and their duty to all its shareholders, particularly, the Tata Trusts, who hold 66 per cent. of the equity capital. The following points are being made in this context—

(a) Mr. Cyrus P. Mistry has been the Executive Vice Chairman (for one year) and Executive Chairman for nearly four years now a period long enough to show results in Tata Sons itself, which was his primary executive responsibility.

(b) For assessing the results during his tenure, it would indeed be appropriate to exclude the income (i. e., dividend) from Tata Consultancy Services (TCS) because Mr. Mistry does not really contribute materially to TCS's management and TCS has needed no funds from Tata Sons for its growth. In this way, it will be seen what Tata Sons has been getting from all the other 40 companies (listed and unlisted) in its portfolio.

(c) Dividends received from all the other 40 companies (many non-dividend paying) has continuously declined from Rs. 1,000 crores in 2012-13 to Rs. 780 crores in 2015-16 but the latter figure includes additional interim dividend of Rs. 100 crores which would have been normally received in 2016-17 (due to budgetary changes). This surely reflects the decline in the total profits of those operating companies from which dividends are paid, during the last four years.

(d) While dividend income was declining, expenses (other than interest on debt) on staff increased from Rs. 84 crores to Rs. 180 crores and other expenses increased from Rs. 220 crores in 2012-13 to Rs. 290 crores in 2015 (excluding exceptional expenses).

(e) There was little or no profit on sale of investments during these years, i. e., no significant divestments from Tata Sons portfolio, despite a planned list of divestments indicated from time to time.

(e) Impairment provisions increased from Rs. 200 crores in 2012-13 to Rs. 2,400 crores in 2015-16 indicating inability to stem falling values and turn around the 'hot spots' referred to by Mr. Mistry.

(f) Thus, but for the TCS dividend and even before Impairment provisions, Tata Sons would have shown operating losses over the last 3 years (with a small surplus in between), showing the significant dependence on TCS. This dependence was indeed a source of concern for the directors and its shareholders.

2. Selection of the chairman

It is also relevant to refer to the basis of selection of Mr. Mistry as chairman in 2011 by the Selection Committee as provided under the company articles. Without going into the details, the Committee's original, objective was to look for a person with the experience of running large (and preferably diverse) businesses with considerable international exposure and other criteria. During the meetings, Mr. Mistry made any relevant comments and submitted a detailed note in October, 2010 setting out his views on how a large and complex group like Tatas should be managed and gave a comprehensive management structure with details of the composition and objectives of each component of the structure. This fitted with the views of the committee and having failed to find an alternative candidate, the Committee decided to recommend Mr. Mistry partly because of his recorded views and plans and also his associations with the group.

After four years, it is unfortunate that hardly any of his major views on the management structure (which had impressed the Committee favourably) have been implemented. In fact, even the then existing structure of the group which had stood the test of a long period of nearly 100 years by the visionary founders and generations of Tatas seem to have been consciously dismantled so that now the operating companies are drifting farther away from the promoter company and their major shareholder (except for periodic presentations) through systematically reducing the effective control and influence of the promoter. Tata Sons has historically exercised control over its group companies through its shareholding and commonality of senior directors (apart from the Chairman) which had acted as a binding force in the group for many years and which has enhanced the credibility and creditworthiness of the group companies. We now have an unacceptable new structure where the Chairman alone is the only common director across several companies and this situation could not be allowed to go on.

In addition, there were some significant issues of conflict of interest in relation to the Shapoorji Pallonji group which he did not fully address.

3. Mr. Mistry's role in the past four years

Unlike in the past, Mr. Mistry constantly used the strong public relations network of Tata to emphasize the supposedly good work being done by and under the new leadership and particularly and repeatedly highlighting the major problem areas in the group inherited by him (commonly referred to by him as 'legacy' issues and 'hot spots') from the previous Chairman, to account for any perceived lack of his performance.

The articles and interviews are littered with text-bookish directives and objectives, e. g., growth with profits', 'target to be among the top 25 groups in the world' by market capitalization, 'cater to the lives of many millions' and other such nice-sounding phrases with no indications on how these ambitious targets are to be achieved, is all this relevant when there are so many major problems which need urgent attention and action ? Would it not be more appreciated if the reports talked specifically on these problem Issues and their solutions rather than continuously harping on the past versus the present ?

Nobody will deny that there were some problem companies but surely Mr. Mistry was fully aware of them since he was associated with the parent company, Tata Sons Ltd., as a director on the board for many years prior to his appointment as Executive Vice Chairman in 2011 and then as Executive Chairman in 2012. He voluntarily took this position, knowing the composition of the Tata group and its many strong companies as well as the weaker and problem companies—which he presumably took on as a challenge for 'turning around' those difficult situations.

Yet, after four years of full-time Involvement and executive authority, we continue to be told how these 'legacy' problem areas are a major drag on Mr. Mistry's otherwise good performance. How many more years would we be told this same story ?

The three major problem companies are Tata Steel Europe, Tata Teleservices/Docomo and the Indian operations of Tata Motors. The fact is that even after four years, there is no noticeable improvement in the operations of these companies and in fact they have got worse as shown by continuing huge losses, increasing high debt levels and declining share in their respective markets. There are a few other

companies which are also having different problems—and are these also to be excused as legacy issues ?

Even with no turn-around in these major problem areas, the only action taken was to write-off huge amounts against these companies—which is no solution because the problem companies continue to exist with their continuing losses and high debt and only the shareholders suffer from these write-offs.

The media is fed with the total group figures over the past four years as evidence of the progress but it is not highlighted that these aggregate figures which show a good picture are largely (if not only) due to the excellent performance on all parameters of just two companies, namely; TCS and Jaguar and Land Rover (JLR) which is a wholly-owned U. K. subsidiary of Tata Motors. There is no-complaint about these good legacies. These two jewels in the Tata crown were also inherited by the new Chairman from the previous Chairman, Mr. R. N. Tata, who was also responsible for the acquisition of JLR by Tata Motors in 2008-09 and personally worked with the then management of Tata Motors to turn JLR around. These too companies probably account for around 50 per cent. of the total turnover and probably over 90 per cent. of the total profits of the whole group and have been performing successfully continuously over the past many years, for which Mr. Mistry cannot take credit.

It is evident that the group under Mr. Mistry's leadership was intolerant to critical reports about the actions taken under his aegis. Over the past four years, only a very law such partially negative reports have appeared in some parts of the media—the most recent one being by the highly respected 'Economist' magazine of the U. K., which was really a well-balanced and critical review of the Tata group's performance in recent years and which was reproduced by another respected Indian daily. Even this report was vociferously refuted in the strongest terms by the PR machinery of Tatas as being biased and incorrect. In short, those who analyze the overall position of the group in an unbiased and professional way which may differ from the version put out by Bombay House (the Tata headquarters) are uniformly wrong, even if they only seek to present an overall balanced picture which may (and rightly should) include the negative aspects. This attitude does not befit an old and venerable house like Tatas known for their fair play and transparency.

Insiders in Bombay House who have been with the group for many years silently and helplessly watched the conscious departure from

old, proven and successful structures within the group and the Induction of very senior executives from outside the group with little or no experience of running large companies and being paid amounts reportedly running to several crores for purely functional positions at the very top. Some changes always accompany a change at the top and some may even be considered necessary but the ultimate test is whether these changes have shown improvement and success which is not visible even after four long years.

The stellar performance of TCS and JLR have more than compensated for the drop in returns in the other operating companies under Mr. Mistry's tenure. Some strategic initiatives have been articulated repeatedly but the implementation is too slow to show results. Such of these initiatives which are good and worthwhile need to be pursued more vigorously by the companies concerned.

From a recent, well-articulated interview with Mr. Mistry published on the Tata group website, one cannot help but feel that there is a very selective reference only to achievements and in the interest of transparency and balance, one feels compelled to highlight some of the areas which emerged over the last four years, which have not keen mentioned at all.

4. Group Indebtedness and Return on Investment—Group Indebtedness has increased by Rs. 69,877 crores to Rs. 225,740 crores over the last four years. Despite huge investments by companies, the returns are not visible in increased profits, though, in all fairness, some major growth projects like the new steel plan at Kalinganagar will show results only in coming years.

5. Market share drop in Tata Motors—There has been a perilous drop in market share in both passenger cars and commercial vehicle areas over the past three years. In passenger cars, In the year ended March 2013, the market share was 13 per cent. which now stands at 5 per cent. It will be difficult if not impossible to retrieve the market share losses. However, even more concerning, is the market share in commercial vehicles which in March, 2013 stood at 60 per cent. and now stands at 40+ per cent-the lowest in the company's history as the market leader in commercial vehicles.

The two passenger car launches of good products like Bolt and Zest introduced as turnaround products for the company have both been lackluster in market acceptance-achieving current sales levels more or less equal to those of the Indica and Indigo which are around 15-year-old vehicles. The third launch of Tiago has been well received

in the market but its sustained steady state volumes are yet to be determined.

These details are masked by the performance and profitability of JLR as most references to Tata Motors are in consolidated form.

6. Group write-offs/write-downs/provisions/asset sale—During the past three years, the group has written down, written off or made provisions for impairment worth thousands of crores. Tata Steel alone, has written off a large part of its investment in its UK/Eurogean assets, it is interesting to not that the new buyers of some of the steel assets for £1. In the U. K. have claimed a dramatic turnaround in the very first year of their take over. In our view these sub-par results cannot be blamed on the commodity cycle or economic conditions but on his leadership ?

Mr. Mistry repeatedly talks of 'bad' acquisitions but he forgets that his own firm had acquired South India Viscose Ltd. and Special Steals Ltd. many years ago from which they walked away, while Tatas always standby their companies in difficulties.

7. Handling of critical issues—critical reports have been received of the handling of the Tata Steel Europe problems in the U. K. and the negotiations with Docomo of Japan in the respective countries.

8. Other issues

(a) The accusation of interference by the Trusts is not only wrong in reality but has been twisted to mislead people. One of the important duties and obligations of the trusts and the Trustees is to protect the assets of the Trusts, the most important and valuable being Investments in Tata Sons donated by the founders and their successors many decades ago and which is a major source of the income of the Trusts, it is only to fulfil this duty that information relating to the operations of Tata Sons which is an unlisted investment holding company need to be kept track of the continuous decline in the income of Tata Sons from its large portfolio of investments other than TCS during the last four years of Mr. Mistry's regime (as elaborated above), reflected the corresponding decline in the many operating companies in which Tata Sons holds a significant shareholding. It also reflects a disturbing overdependence—on one single company, i. e., TCS, over a long period of four years. This was not only disturbing but needed corrective action in the management of Tata Sons. In fact, many practical suggestions made to Mr. Mistry for the benefit of Tata Sons vis-a-vis some of his major investments have often been ignored.

(b) Mr. Mistry conveniently forgets that he was appointed as the chairman of the Tata operating companies by virtue of and following his position as the Chairman of Tata Sons. Therefore, It was fair expectation of Tata Sons that Mr. Mistry would gracefully resign from the boards of other Tata companies on being replaced from the position of the Chairman of Tata Sons, this expectation was in line with convention, past practice as well as the Tata governance Guidelines that were approved and adopted by Tata Sons under the aegis of Mr. Mistry. However, his departure from these requirements and conduct since his replacement as Chairman of Tata Sons demonstrates his absolute disregard of long standing Tata traditions, values and ethos.

(c) The recent developments in the Indian Hotels Co. Ltd. (IHCL) now seems to reveal the true colours of Mr. Mistry and his ulterior objective. Having been replaced as the Chairman of Tata Sons, where the majority of the board and the major shareholders had expressed lack of confidence, Mr. Mistry is trying to gain control of IHCL with the support of the independent directors of the board. He has cleverly ensured over these years that he would be the only Tata Sons representative on the board of IHCL in order to frustrate Tata Sons ability to exercise influence and control on IHCL in hindsight, the trust reposed by Tata Sons in Mr. Mistry by appointing him as the chairman four years ago has been betrayed by his desire to seek to control main operating companies of the Tata group to the exclusion of Tata Sons and other Tata representatives. Indeed, this strategy of being the only Tata Sons representative on the Boards of the operating Tata companies, seems to have been a clever strategy planned and systematically achieved over the last four years, it is unfortunate that Tata Sons, acting in good faith, did not anticipate such devious moves by Mr. Mistry and thereby did not inform the other directors of the operating companies about its dissatisfaction with Mr. Mistry at the level of Tata Sons. However, we will now do whatever is required to deal with this situation.

Mr. Mistry has been consistently indicating that companies have performed well during his four-year term but the figure quoted by him always refers to the total of the group companies including TCS and JLR which account for over 90 per cent. of the groups profits. Since he hardly contributed to the management of these two companies, it would be more important and relevant to look at the totals of the rest of the group which will show that while there has been an increase in turnover, the more telling figures are the facts that the

profits of the rest of the group in fact declined materially during his four year tenure and equally importantly the total borrowings of the group increased from Rs. 158,863 crores in March, 2012 to Rs. 225,740 crores in March, 2016. He continuously talks of the bad legacy issues but never mentions the two top performers of the group, viz., TCS and JLR which were given to him when they were showing excellent results and which helped to cover up the deficiencies of the rest of the group.

In our capacity as the main promoter of the major listed Tata Companies and as the largest shareholding group, we have to express our very serious concern on the personal e-mail dated October 25, 2016 from Mr. Mistry, addressed to the directors of Tata Sons and purportedly to the trustees of the Tata Trusts and which simultaneously, appeared in full in various newspapers.

Here, we are only referring to the shocking statement of five or six major Tata Companies having to take potential write downs of $18 billion in future in their assets investments and the following points/ queries need to be raised—

(a) Has Mr. Mistry, the chairman, informed the Boards of these companies at any time in the past specifically of the abovementioned potential write-downs ? if so, when was this done and why was it not made public as this is clearly a major item of information—apart from disclosing only the write-offs required to be made to date. Surety he could not have discovered such a large potential liability only a day or two after he was replaced as the Chairman of Tata Sons. Therefore, he must have been aware of this potential large provision much earlier but did not disclose it. It presumably relates to possible future provisions to he made (with no firm basis) but only his own expectation, i. e., a forward-looking statement which is normally not permissible due to its uncertainty, it also suggests that he had no intention of or given up any attempt to revive the value of these companies. It is unfortunate that the BSE/NSE have asked the companies to explain this statement and not Mr. Mistry as the author of this statement.

(b) On the same point, it has been widely reported that this statement of potential write-downs of this magnitude has been largely responsible for the loss in the total market value of these five or six companies of an amount of over Rs. 25,000 crores and all the shareholders would naturally be unhappy at this loss in their own value for ho fault of theirs but mainly due to this shocking and sudden statement

on the part of the chairman of these companies which may or may not have been shared with the Board and certainly not publicly disclosed, earlier. Here again, it is unfortunate that the shareholders and regulatory authorities would put the onus on the companies and not Mr. Mistry as the author of the statement for being responsible for this large loss in market value.

As a group, we are committed to upholding the highest standards of ethics and value systems which the founders and the subsequent leaders have always strived to uphold, it is the spirit of the employees which has made the group what it is today and we are committed to resolving the current situation by doing whatever it takes and in a manner that ensures the protection of interests of all stakeholders of the Tata group.

Issued by
Debasis Ray
Group Spokesperson
+919223386824"

137 From the opening sentence of "press statement" dated November 10, 2016 it is clear that sudden and hasty removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) as executive chairman of "Tata Sons Ltd." raised concern in the industrial group. Therefore, in the said "press statement", it has been specifically mentioned that "some have shared concerns following the decision, while many have asked questions about the future course of the group and its companies and operations". The company in its turn has mentioned that "we understand and appreciate that a period of change like this can lead to a sense of uncertainty and would like to put forward some facts so that the decision is seen in the desired perspective".

138 If we accept the stand taken by the contesting respondents that the removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) is directorial in nature, in the interest of company, in such case, there was no occasion to issue a "press statement" where it is noticed that many across the globe have raised concern in the manner Mr. Cyrus Pallonji Mistry (eleventh respondent) was removed. The company and its board also understood that such removal may lead to a sense of uncertainty of "Tata Sons Ltd." and "group companies" and result in winding up.

139 The allegations as made in the "press statement" dated November 10, 2016 appears to be an afterthought as the aforesaid matter was not discussed in any of the meeting of the board of directors. No records have been placed by the respondents with regard to the aforesaid loss nor any

discussion took place in the board meeting of the "Tata Sons" and Mr. Cyrus Pallonji Mistry (eleventh respondent) to suggest that it was of serious concern. The allegations in the "press statement" as not supported by record cannot be accepted.

140 On the other hand, the correspondences between Mr. Cyrus Pallonji Mistry (eleventh respondent), Mr. Ratan N. Tata (second respondent), Mr. Nitin Nohria (seventh respondent) and Mr. N. A. Soonawala (fourteenth respondent) show that all the time Mr. Cyrus Pallonji Mistry (eleventh respondent) had been pointing out that some of the "Tata Companies" were suffering loss and if appropriate steps were not taken, it may aggravate in future. In spite of such communications made between the period of 2013 to 2016, there is nothing on the record to suggest that the board of directors which could take decision only with affirmative vote of nominee directors of the "Tata Trusts" had taken any decision for the revival or restructuring of Tata Companies which were facing losses.

141 If there was a failure and loss caused to one or other Tata Company which also affected the "Tata Sons Ltd.", the "Tata Trusts" or the board of directors could not be absolved of its responsibility, particularly when the nominee directors of the Tata Trusts who have affirmative vote to reverse the majority decision.

142 Record show that the "Tata Trusts" were required to be informed of all the matters, in advance, on the ground that it can take advance decision to counter any action which may jeopardise their dividend flow.

143 Mr. Cyrus Pallonji Mistry (eleventh respondent) intimated the nominee director that "independent members" of the board should not feel that they are irrelevant in any way. But, if all major decisions are taken in advance by the "Tata Trusts" and for taking every decision, matters are to be placed before the "Tata Trusts", in such case, independence of the board of directors of the company becomes irrelevant. Mr. Cyrus Pallonji Mistry (eleventh respondent) specifically informed respondents Nos. 2, 7 and others that the "nominee directors should use their judgment to add value to the discussions at the board's meeting and not to operate like telegraphic relays". He requested not to change the fundamental character of the first respondent-company the "Tata Sons Ltd." that enables it to manage the diversity it had.

144 The aforesaid suggestions made by Mr. Cyrus Pallonji Mistry (eleventh respondent) for good governance by the board and to take care of Tata Companies, including "Tata Motors", "Docomo" etc., were not taken in its letter and spirit by Mr. Ratan N. Tata (second respondent) of "Tata Trusts"

which resulted in no confidence on Mr. Cyrus Pallonji Mistry (eleventh respondent).

145 Apart from the e-mails, as discussed earlier, with regard to Tata Companies, following facts emerge from other e-mail :

"Bidding for spectrum by Tata Teleservices Ltd. ('TTSL') and editing the board note

(i) In e-mail dated May 23, 2016 from the eleventh respondent to second respondent with a copy marked to the fourteenth respondent it is recorded that because the trustees were not convinced on the strategy of TTSL going forward, the eleventh respondent had to change an item that was to be placed for approval before the board of the first respondent, into an item that was noted to be 'only for information'.

(ii) E-mail dated June 7, 2016 marked to the eleventh respondent is from the company secretary of the first respondent, wherein it is recorded that the second respondent had objections to any investment proposal for TTSL being taken to the board of the first respondent. The e-mail also documents that the trustees particularly the second respondent and fourteenth respondent even made changes to the board agenda item and note to the board regarding investment in spectrum for TTSL. This clearly shows that without the pre-clearance of the second respondent and of the fourteenth respondent nothing could be taken to the board of first respondent.

Banking license

(iii) Letter dated June 24, 2013 from the second respondent to eleventh respondent—In connection with the baking application to be filed with the RBI by the first respondent for a proposed banking license, the second respondent claims that he cannot add anything at this late stage on a decision already taken, but states that he has asked the twentieth respondent, executive trustee of the Tata Trusts, to raise issues 'which have repercussions on the trusts or any other company'.

(iv) E-mail dated June 26, 2013 from the second respondent to eleventh respondent-second respondent sets specific conditions for the first respondent to submit an application or a banking license. The second respondent states that 'the approval would be on the clear understanding that the Trusts would have the opportunity to have a full presentation on the pros and cons of the proposed bank as also the alternative options on the basis of which the Trusts could debate

and decide on their position in the matter'. This was after two rounds of discussions were already held with the second respondent.

IPO of Tata Sky

(v) E-mail dated March 30, 2016, from the second respondent to eleventh respondent—second respondent states that he has reservations on a proposal for an IPO of Tata Sky that was to be brought before an upcoming board meeting of first respondent. In a follow-on e-mail dated April 4, 2016 the second respondent seeks to table his views prior to the board meeting and seeks a note with all options and the recommendations that is proposed to be put up to the board of first respondent. The eleventh respondent adheres to the request for prior consultation so that the matter may be cleared to be taken up at the upcoming board meeting.

Rights issue of Tata Motors

(vi) Letter dated January 30, 2015 from the second respondent to eleventh respondent stating that the rights issue of Tata Motors Ltd. (a listed company) had not been explicitly discussed with the Trusts and hence could be seen as a breach of the amended articles of first respondent. The second respondent insisted that 'before such an issue is cleared by the underlying operating company', approval of the board of the first respondent would have to be taken, thereby insisting on prior consultation.

14. According to appellants, the letter was issued despite :

(a) The board of the first respondent (in the presence of Trustee Nominee Directors) had discussed and approved funding requirements of Tata Motors on September 30, 2013 and the same was reflected in the cash plan of the first respondent ;

(b) A presentation on the need for a rights issue by Tata Motors was also presented to the board of the first respondent, where the Trust Nominee Directors were present ;

(c) Agenda and minutes of meetings of the first respondent were sent to the second respondent as 'Chairman Emeritus' ;

(d) The fourteenth respondent (a trustee) views were also sought by senior officials, of Tata Motors and thereafter the matter was taken to the board of Tata Motors.

(vii) E-mail dated January 31, 2015 from the eleventh respondent to a Trust Nominee Director seventh respondent wherein eleventh respondent raises concerns about maintaining the integrity of the Board decision making process. The eleventh respondent asked : 'the

question one will have to ask is then are we going to present all of this to RNT or the Trusts ? As an investment company, then what will the board of Tata Sons take decisions on ?'."

146 The record suggests that the removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) had nothing to do with any lack of performance. On the other hand, the material on record shows that the company under the leadership of Mr. Cyrus Pallonji Mistry (eleventh respondent) performed well which was appraised by the "nomination and remuneration committee" a statutory committee under section 178, on June 28, 2016, i. e., just few months before he was removed.

147 The "nomination and remuneration committee" is required to appraise performance of senior management and also deals with remuneration. The "Nomination and Remuneration Committee" comprised of Mr. Cyrus Pallonji Mistry (eleventh respondent), two independent directors, namely—Mrs. Farida Khambhata (tenth respondent) and Mr. Ranendra Sen (eighth respondent) and one director, Mr. Vijay Singh (ninth respondent), a nominee director of "Tata Trust". The "Nomination and Remuneration Committee" consisting of aforesaid members in its meeting held on June 28, 2016 appreciated the performance of Mr. Cyrus Pallonji Mistry (eleventh respondent) and observed :

> "Mr. Vijay Singh mentioned that Tata Motors have come up with some of their best models in recent years. *Mrs. Khambata and Mr. Sen complimented Mr. Mistry on his role as group chairman. Mr. Sen added from his experience from site visits that Mr. Mistry had earned the respect not only of CEOs and senior management but operational personnel. After reviewing the performance of the executive chairman, the Members unanimously recorded their recognition of his significant contributions across group companies and expressed their appreciation of his multifaceted initiatives aimed at preserving and promoting cohesive functioning of the group in accordance with its distinctive values.*" (emphasis[1] supplied)

148 The members of the "Nomination and Remuneration Committee" also stressed the need for clarity on the functioning of the board of "Tata Sons Ltd." and the role of the "Tata Trusts" in relation to "Tata Sons Ltd." and the "Tata group companies".

149 The aforesaid fact shows that nominee director Mr. Vijay Singh (ninth respondent) on behalf of "Tata Trusts" was well aware that performance of Mr. Cyrus Pallonji Mistry was satisfactory and there was need for a framework for operationalizing the articles.

1. Here printed in italics.

150 The annual performance review of the "Nomination and Remuneration Committee" was unanimously approved by the board of directors of "Tata Sons" in its meeting held on the next day, i. e., on June 29, 2016. Besides, at the level of the board of directors of "Tata group companies", the performance of Mr. Cyrus Pallonji Mistry (eleventh respondent) has been endorsed and praised by nearly 50 independent directors of group companies.

151 It is relevant to note that three directors who also voted for removal of Mr. Cyrus Pallonji Mistry (eleventh respondent), including Mr. Amit Chandra (third respondent), who spearheaded the removal proceedings and Mr. Ajay Piramal (fifth respondent) and Mr. Venu Srinivasan (sixth respondent), had been inducted into the board of "Tata Sons Ltd." only on August 8, 2016, i. e., after the appraisal report of "Nomination and Remuneration Committee". They attended just one board meeting prior to the meeting held on October 24, 2016.

152 Two of the directors, Mr. Ranendra Sen (eighth respondent) and Mr. Vijay Singh (ninth respondent), a trust nominee director, who voted for the removal of Mr. Cyrus Pallonji Mistry (eleventh respondent), were members of the "Nomination and Remuneration Committee" which just four months' prior to his removal on June 28, 2016 praised the performance of Mr. Cyrus Pallonji Mistry (eleventh respondent) as executive chairman. These two directors also voted against Mr. Cyrus Pallonji Mistry just four months thereafter which has not been explained by Mr. Ranendra Sen (respondent No. 8) and Mr. Vijay Singh (respondent No. 9). Further, what is accepted is that prior to the meeting held on October 24, 2016 between 2.00 p.m. to 3.00 p.m., in the forenoon, the "Tata Trusts" in a separate meeting decided to remove Mr. Cyrus Pallonji Mistry (eleventh respondent). Even before decision of "Tata Trusts", Mr. Ratan N. Tata (second respondent) in presence of Mr. Nitin Nohria (seventh respondent) called Mr. Cyrus Pallonji Mistry (eleventh respondent) and asked him to resign.

153 There are various examples and instances cited by the appellants and records enclosed, but they are not required to be discussed as certain relevant instances have already been noticed.

154 As per the articles of association (article 121) the nominated directors of the "Tata Trusts" have affirmative voting rights over the majority decision. The voting rights of the company ("Tata Sons Ltd.") at a general meeting of any Tata companies, i. e., "Tata Consultancy Services Ltd.", "Tata Steel Ltd.", "Tata Motors Ltd.", "Tata Capital Ltd.", "Tata Chemicals Ltd.", "Tata Power Co. Ltd.", "Tata Global Beverages Ltd.", "The Indian Hotels Co. Ltd.", "Trent Ltd.", "Tata Teleservices (Maharashtra) Ltd.", "Tata

Industries Ltd.", "Tata Teleservices Ltd.", "Tata Communications Ltd.", "Titan Co. Ltd." and "Infiniti Retail Ltd." etc., is also vested with the board of directors (article 121A(h)). Therefore, for any policy decision of the "Tata Companies", including appointment of representatives of the company ("Tata Sons Ltd.") under section 113(1)(a) of the Companies Act, 2013, affirmative vote of the nominated directors is must (article 121A read with article 121). The affirmative vote of the directors nominated by "Tata Trusts" has an overriding effect and renders the majority decision subservient to it.

155 In view of the aforesaid provisions, it is not open to the respondents to state or allege that loss in different "Tata Companies" was due to mismanagement of Mr. Cyrus Pallonji Mistry (eleventh respondent). If that be so, why the nominated directors who have affirmative voting right over the majority decision of the Board or in the annual general meeting of the shareholders allowed the "Tata Companies" to function in a manner which caused loss, as accepted in the press release dated November 10, 2016. The consecutive chain of events coming to fore from the correspondence referred elsewhere in this judgment amply demonstrates that impairment of confidence with reference to conduct of affairs of company was not attributable to probity qua Mr. Cyrus Pallonji Mistry but to unfair abuse of powers on the part of other respondents.

156 The "Press Statement" of "Tata Sons Ltd." dated November 10, 2016 facts of which were never discussed by Board is an afterthought of respondents to put all blame on Mr. Cyrus Pallonji Mistry (eleventh respondent). The board of directors' majority decision of which is guided by the affirmative vote of the nominated members, have failed to explain as to why the Board failed in its duties and not noticed the loss of any of the "Tata Companies".

157 It is not in dispute that "Shapoorji Pallonji group" ("appellants" herein) are the minority shareholders. They are in business with Tata Group, i.e.,—"Sir Dorabji Tata Trust" and "Sir Ratan Tata Trust" for more than four decades. There is mutual understanding and good relationship between them. For the said reason, earlier for a number of years. Mr. Pallonji Shapoorji Mistry, father of Mr. Cyrus Pallonji Mistry (eleventh respondent) was appointed as the executive chairman of the "Tata Sons Ltd".

158 Earlier when the matter fell for consideration before this Appellate Tribunal in Company Appeal (AT) Nos. 133 and 139 of 2017, the order of waiver was allowed in favour of the appellants having noticed that out of Rs. 6,00,000 crores of total investment in the company ("Tata Sons Ltd."), "Shapoorji Pallonji group" had invested approximately Rs. 1,00,000 crores.

It was noticed that except Mr. Ratan N. Tata (second respondent) and two other members all the other members have less than 10 per cent. share-holding and the allegations were serious, therefore, the order of waiver was passed by this Appellate Tribunal on September 21, 2017.

In the present case, we have noticed the aforesaid fact of investment of **159** Rs. 1,00,000 crores out of Rs. 6,00,000 crores by "Shapoorji Pallonji group" to consider the effect of absence of a nominee director of minority group ("Shapoorji Pallonji group") or a director who can take care of minority members (group). On the other hand, in terms of article 104B read with articles 121 and 121A, the nominee directors of the "Tata Trusts" have control over the meeting of the board of directors, having power to annul the majority decision by refraining from exercise of affirmative vote.

Even in absence of such right of minority members ("Shapoorji Pallonji **160** group"), because of healthy atmosphere and clear understanding between two groups, i. e., "Tata group" and "Shapoorji Pallonji group" for last 40 years, except for few years in between thereof, one of the persons of "Shapoorji Pallonji group" was made as the executive chairman or director, which includes Mr. Cyrus Pallonji Mistry (eleventh respondent) and his father Mr. Pallonji Shapoorji Mistry.

In the aforesaid background, "Shapoorji Pallonji group", minority share- **161** holders, all the time had confidence on the decision making power of the board of directors of the "Tata Sons Ltd." as amity and goodwill prevailed inter se the two groups.

However, because of recent actions of "Tata Trusts", its nominee direc- **162** tors, and Mr. Ratan N. Tata (second respondent) and Mr. Nitin Nohria (seventh respondent) taken since the year 2013, as noticed and discussed above, and sudden and hasty removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) on October 24, 2016 without any basis, and without following the normal procedure under article 118, the minority group ("Shapoorji Pallonji group") (the appellants), and others have raised no confidence and sense of uncertainty which was the reason for the "Tata Sons Ltd." to issue a "press statement".

In the opening sentence of the "press statement" dated November 10, **163** 2016 it has been accepted that "some have shared concerns following the decision, while many have asked questions about the future course of the group and its companies and operations". The company in its turn has mentioned that "we understand and appreciate that a period of change like this can lead to a sense of uncertainty and would like to put forward some facts so that the decision is seen in the desired perspective".

164 The language of the company ("Tata Sons Ltd.") in its "Press Statement" show that the company and contesting respondents also know that the action taken is "prejudicial" and "oppressive" to the interest of the members of the company and a large number of members, investors and interested parties have raised concern. The "Tata Sons Ltd." has accepted that there is sense of uncertainty at the global level.

165 The prejudicial action, as noticed, did not come to an end, after October 24, 2016 when Mr. Cyrus Pallonji Mistry (eleventh respondent) was removed as executive chairman and director of the company ("Tata Sons Ltd."). It continued even thereafter, as detailed below :

> "(a) On December 12, 2016 Mr. Cyrus Pallonji Mistry (eleventh respondent) was removed from the post of director of "Tata Industries" (a group company). Next day, on December 13, 2016 he was removed from the post of director "Tata Consultancy Services", another group company. The third day, i. e., December 14, 2016 Mr. Cyrus Pallonji Mistry (eleventh respondent) was also removed from the post of director of "Tata Tele Services".
>
> (b) Because of the aforesaid consecutive orders of sudden removal from one after another "Tata Company" (group companies) as Mr. Cyrus Pallonji Mistry (eleventh respondent) had no option, resigned from the posts of director(s) of rest of the group companies.
>
> (c) It further proceeded with certain unexplained actions taken thereafter converting "Tata Sons Ltd." from "public company" to "private company", after the decision of the Tribunal and discussed below."

Conversion of "Tata Sons Ltd." from "public company" to "private company"

166 "Tata Sons Ltd." was initially a "private company" but after insertion of section 43A(1A) in the Companies Act, 1956 on the basis of average annual turnover, it assumed the character of a deemed "public company" with effect from February 1, 1975 as follows :

> 43A. *Private company to become public company in certain cases.*—(1) Save as otherwise provided in this section, where not less than twenty-five per cent. of the paid-up share capital of a private company having a share capital is held by one or more bodies corporate, the private company shall,—
>
> (a) on and from the date on which the aforesaid percentage is first held by such body or bodies corporate, or

(b) where the aforesaid percentage has been first so held before the commencement of the Companies (Amendment) Act, 1960 (65 of 1960), on and from the expiry of the period of three months from the date of such commencement unless within that period the aforesaid percentage is reduced below twenty-five per cent. of the paid-up share capital of the private company,

become by virtue of this section a public company :

Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be reduced, below seven :

Provided further that in computing the aforesaid percentage, account shall not be taken of any share in the private company held by a banking company if, but only if, the following conditions are satisfied in respect of such share, namely :

(a) that the share—

(i) forms part of the subject matter of a trust,

(ii) has not been set apart for the benefit of any body corporate, and

(iii) is held by the banking company either as a trustee of that trust or in its own name on behalf of a trustee of that trust ; or

(b) that the share—

(i) forms part of the estate of a deceased person,

(ii) has not been bequeathed by the deceased person by his will to any body corporate, and

(iii) is held by the banking company either as an executor or administrator of the deceased person or in its own name on behalf of an executor or administrator of the deceased person ;

and the Registrar may, for the purpose of satisfying himself that any share is held in the private company by a banking company as aforesaid, call for at any time from the banking company such books and papers as he considers necessary.

Explanation.—For the purposes of this sub-section, 'bodies corporate' means public companies, or private companies which had become public companies by virtue of this section.

(1A) Without prejudice to the provisions of sub-section (1), where the average annual turnover of a private company, whether in existence at the commencement of the Companies (Amendment) Act,

1974, or incorporated thereafter, is not, during the relevant period, less than such amount as may be prescribed, the private company shall, irrespective of its paid-up share capital, become, on and from the expiry of a period of three months from the last day of the relevant period during which the private company had the said average annual turnover, a public company by virtue of this sub-section :

Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be reduced, below seven.

(1B) Where not less than twenty-five per cent. of the paid-up share capital of a public company, having share capital, is held by a private company, the private company shall,—

(a) on and from the date on which the aforesaid percentage is first held by it after the commencement of the Companies (Amendment) Act, 1974, or

(b) where the aforesaid percentage has been first so held before the commencement of the Companies (Amendment) Act, 1974 on and from the expiry of the period of three months from the date of such commencement, unless within that period the aforesaid percentage is reduced below twenty-five per cent. of the paid-up share capital of the public company,

become, by virtue of this sub-section, a public company, and thereupon all other provisions of this section shall apply thereto :

Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be reduced, below seven.

(1C) Where, after the commencement of the Companies (Amendment) Act, 1988, a private company accepts, after an invitation is made by an advertisement, or renews, deposits from the public other than its members, directors or their relatives, such private company shall, on and from the date on which such acceptance or renewal, as the case may be, is first made after such commencement, become a public company and thereupon all the provisions of this section shall apply thereto :

Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be, reduced below seven.

(2) Within three months from the date on which a private company becomes a public company by virtue of this section, the company shall inform the Registrar that it has become a public company as aforesaid, and thereupon the Registrar shall delete the word 'private' before the word 'limited' in the name of the company upon the register and shall also make the necessary alterations in the certificate of incorporation issued to the company and in its memorandum of association.

(2A) Where a public company referred to in sub-section (2) becomes a private company on or after the commencement of the Companies (Amendment) Act, 2000, such company shall inform the Registrar that it has become a private company and thereupon the Registrar shall substitute the word 'private company' for the word 'public company' in the name of the company upon the register and shall also make the necessary alterations in the certificate of incorporation issued to the company and in its memorandum of association within four weeks from the date of application made by the company.

(3) Sub-section (3) of section 23 shall apply to a change of name under sub-section (2) as it applies to a change of name under section 21.

(4) A private company which has become a public company by virtue of this section shall continue to be a public company until it has, with the approval of the Central Government and in accordance with the provisions of this Act, again become a private company.

(5) If a company makes default in complying with sub-section (2), the company and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues . . .

(8) Every private company having a share capital shall, in addition to the certificate referred to in sub-section (2) of section 161, file with the Registrar along with the annual return a second certificate signed by both the signatories of the return, stating either—

(a) that since the date of the annual general meeting with reference to which the last return was submitted, or in the case of a first return, since the date of the incorporation of the private company, no body or bodies corporate has or have held twenty-five per cent. or more of its paid-up share capital, . . .

(c) that the private company, irrespective of its paid-up share capital, did not have, during the relevant period, an average annual turnover of such amount as is referred to in sub-section (1A) or more,

(d) that the private company did not accept or renew deposits from the public.

(9) Every private company, having share capital, shall file with the Registrar along with the annual return a certificate signed by both the signatories of the return, stating that since the date of the annual general meeting with reference to which the last return was submitted, or in the case of a first return, since the date of the incorporation of the private company, it did not hold twenty-five per cent. or more of the paid-up share capital of one or more public companies.

Explanation.—For the purposes of this section,—

(a) 'relevant period' means the period of three consecutive financial years,—

(i) immediately preceding the commencement of the Companies (Amendment) Act, 1974, or

(ii) a part of which immediately preceded such commencement and the other part of which immediately, followed such commencement, or

(iii) immediately following such commencement or at any time thereafter ;

(b) 'turnover' of a company, means the aggregate value of the realisation made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year ;

(c) 'deposit' has the same meaning as in section 58A.

(10) Subject to the other provisions of this Act, any reference in this section to accepting, after an invitation is made by an advertisement, or renewing deposits from the public shall be construed as including a reference to accepting, after an invitation is made by an advertisement, or renewing deposits from any section of the public and the provisions of section 67 shall, so far as may be, apply, as if the reference to invitation to the public to subscribe for shares or debentures

occurring in that section, includes a reference to invitation from the public for acceptance of deposits.

(11) Nothing contained in this section, except sub-section (2A), shall apply on and after the commencement of the Companies (Amendment) Act, 2000."

167 As per sub-section (2) of section 43A, within three months from the date on which a "private company" becomes a "public company", the company informed the Registrar that it has become a public company and thereupon the Registrar deleted the word "private" before the word "limited" in the name of the company upon the register and made the necessary alteration in the certificate of incorporation issued to the company and its "memorandum of association".

As per sub-section (4) of section 43A, a "private company" which became a "public company" by virtue of the aforesaid provisions, is to continue to be a public company until it has, with the approval of the Central Government and in accordance with the provisions of the Act, again becomes a "private company".

168 Pursuant to section 43A(1A), the company ("Tata Sons Ltd.") which was a "private company", due to its annual turnover, irrespective of its paid-up share capital became "public company".

169 Part of the Companies Act, 1956 was repealed by the Companies Act, 2013, from the date of its notification, except those covered in Part IXA of the Companies Act, 1956. Though the Companies Act, 1956 has not been repealed in totality in absence of any Notification issued by the Central Government under section 465 giving it effect, but section 31 of the Companies Act, 1956 which relates to "Alteration of articles by special resolution" has been repealed and substituted by section 14 of the Companies Act, 2013 which relates to "Alteration of articles" and reads as follows :

"14. *Alteration of articles.*—(1) Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of—

(a) a private company into a public company ; or

(b) a public company into a private company :

Provided that where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as from the date of such alteration, cease to be a private company :

Provided further that any alteration having the effect of conversion of a public company into a private company shall not take effect except with the approval of the Tribunal which shall make such order as it may deem fit.

(2) Every alteration of the articles under this section and a copy of the order of the Tribunal approving the alteration as per sub-section (1) shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

(3) Any alteration of the articles registered under sub-section (2) shall, subject to the provisions of this Act, be valid as if it were originally in the articles."

170 As per section 14 of the Companies Act, 2013, if any company decides to alter its articles having the effect of conversion of a "private company" into a "public company" or a "public company" into a "private company" ; it is required to pass a special resolution and as per sub-section (2) of section 14, it requires approval by the Tribunal. Only after order of approval by the Tribunal, the company can request the Registrar together with a printed copy of the altered articles, to register the company as "private company" or "public company" as the case may be.

171 "Private company" is defined under section 2(68) of the Companies Act, 2013, as follows :

2. *Definitions*.—. . . (68) 'private company' means a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and which by its articles,—

(i) restricts the right to transfer its shares ;

(ii) except in case of one person company, limits the number of its members to two hundred :

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member :

Provided further that—

(A) persons who are in the employment of the company ; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,

shall not be included in the number of members ; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company."

On the other hand, "public company" is defined under section 2(71) of **172** the Companies Act, 2013, as follows :

"2. *Definition.*—. . . (71) 'public company' means a company which—

(a) is not a private company ;

(b) has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital, as may be prescribed :

Provided that a company which is subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles."

Like section 43A(1A) of the Companies (Amendment) Act, 2000, there is **173** no provision under the Companies Act, 2013 for automatic conversion of "public company" to "private company" or a "private company" to "public company". Therefore, on the basis of definition of "private company" as defined under section 2(68) of the Companies Act, 2013, there cannot be automatic conversion of a "public company" to "private company". Similarly, on the basis of definition of "public company" as defined under section 2(71) of the Companies Act, 2013, there cannot be automatic conversion of "private company" to "public company".

For alteration of articles including alteration of the company from a "pri- **174** vate company" to a "public company" or "public company" to "private company", steps are contemplated to be taken under section 14 of the Companies Act, 2013.

The company ("Tata Sons Ltd.") having become "public company" since **175** long, for altering its articles as a "public company" into a "private company", it is required to follow section 14(1)(b) read with section 14(2) and (3) of the Companies Act, 2013.

Learned counsel for the contesting respondents relied on General **176** Circular No. 15 of 2013, dated September 13, 2013 and Notification dated September 12, 2013 issued by the Central Government to submit that a company comes within the meaning of "private company" under section 2(68) and can take direct permission from the Registrar of Companies to change the articles of association and to record it as "private company".

However, aforesaid General Circular No. 15 of 2013, dated September **177** 13, 2013 and Notification dated September 12, 2013 cannot override the

substantive provisions of section 14 of the Companies Act, 2013 which is mandatory for conversion of a "public company" to a "private company".

178 Curiously, the "Tata Sons Ltd." remained silent for more than 13 years and never took any step for conversion in terms of section 43A(4) of the Companies Act, 1956. Even after enactment of the Companies Act, 2013 which came into force since April 1, 2014 for more than three years, it had not taken any step under section 14. Till date, no application has been filed before the Tribunal under section 14(2) of the Companies Act, 2013 for its conversion from "public company" to "private company".

In absence of any such approval by the Tribunal under section 14, we hold that "Tata Sons Ltd." cannot be treated or converted as a "private company" on the basis of definition under section 2(68) of the Companies Act, 2013.

179 At the stage of hearing of the appeals, it was brought to our notice that the Registrar of Companies in the certificate has struck down the word "public" and shown "Tata Sons Ltd." as "private" company even in absence of any order passed by the Tribunal under section 14 of the Companies Act, 2013.

180 The aforesaid fact show that even after the removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) on October 24, 2016 from the post of executive chairman of the company ("Tata Sons Ltd.") and the post of directors of "Tata Companies", during the pendency of the cases, in a hurried manner, the company ("Tata Sons Ltd.") and its board moved before the Registrar of Companies for conversion of company from "public company" to "private company" to give it colour of "deemed conversion" which is against the law and unsustainable.

181 The aforesaid action on the part of the company, its board of directors to take action to hurriedly change the company ("Tata Sons Ltd.") from "public company" to a "private company" without following the procedure under law (section 14), with the help of the Registrar of Companies just before filing of the appeal, suggests that the nominated members of "Tata Trusts" who have affirmative voting right over the majority decision of the board of directors and other directors/members, acted in a manner "prejudicial" to the members, including minority members ("Shapoorji Pallonji group") and others as also "prejudicial" to the company ("Tata Sons Ltd.").

182 In this background, the appellants have raised no confidence on the majority shareholders particularly the "Tata Trusts" which have nominated directors having affirmative right over the majority decision of the Board and have raised doubt on the respondents that they may now act in a manner "prejudicial" and "oppressive" against the minority shareholders by

exercising powers conferred under article 75 and without any notice or reason, may take over their shares.

183 The facts, as noticed above, including the affirmative voting power of the nominated directors of the "Tata Trusts" over majority decision of the Board ; actions taken by Mr. Ratan N. Tata (second respondent), Mr. Nitin Nohria (seventh respondent) and Mr. N. A. Soonawala (fourteenth respondent) and others as discussed above ; the fact that the company ("Tata Sons Ltd.") has suffered loss because of "prejudicial" decisions taken by board of directors ; the fact that a number of "Tata Companies" have incurred loss ; in spite of decision making power vested with the board of directors with affirmative power of nominated directors of the "Tata Trusts" ; the action in making change from "public company" to "private company" ; the manner in which Mr. Cyrus Pallonji Mistry (eleventh respondent) was suddenly and hastily removed without any reason and in absence of any discussion in the meeting shown in the board of directors held on October 24, 2016 and his subsequent removal as director(s) of different "Tata Companies", coupled with global effect of such removal, as accepted by the company in its "Press Statement" form a consecutive chain of events with cumulative effect justifying us to hold that the appellants have made out a clear case of "prejudicial" and "oppressive" action by the contesting respondents, including Mr. Ratan N. Tata (second respondent), Mr. Nitin Nohria (seventh respondent) and Mr. N. A. Soonawala (fourteenth respondent) and other, the nominee directors.

We further hold that the company's affairs have been or are being conducted in a manner "prejudicial" and "oppressive" to members including appellants, Mr. Cyrus Pallonji Mistry (eleventh respondent) as also "prejudicial" to the interests of the company and its group companies, i. e., "Tata Companies" and winding up of the company would unfairly prejudice the members, but otherwise the facts, as narrated above, would justify a winding up order on the ground that it was just and equitable that the company should be wound up and thereby, it is a fit case to pass order under section 242 of the Companies Act, 2013.

184 In the facts and circumstances of the case, we declare the resolution dated October 24, 2016 passed by the board of directors of company removing Mr. Cyrus Pallonji Mistry (eleventh respondent) as the executive chairman of the company ("Tata Sons") illegal ; all consequential decisions taken by "Tata Companies" for removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) as directors of such companies are also declared illegal.

185 We are of the view that for better protection of interest of all stakeholders as also safeguarding the interest of minority group, in future at the

time of appointment of the executive chairman, independent director and directors, the "Tata group" which is the majority group should consult the minority group, i. e., "Shapoorji Pallonji group" and any person on whom both the groups have trust, be appointed as executive chairman or director as the case may be which will be in the interest of the company and create healthy atmosphere removing the mistrust between the two groups, already developed and has caused global effect as admitted in the "Press Statement" of the company.

186 As regards the conversion of the company from "public company" to "private company", as action taken by the Registrar of Companies is against the provisions of section 14 of the Companies Act, 2013 and "prejudicial" and "oppressive" to the minority members and depositors, etc., conversion of the "Tata Sons Ltd." from "public company" to "private company" by Registrar of Companies, is declared illegal.

187 In view of the findings aforesaid, we pass the following orders and directions :

(i) The proceedings of the sixth meeting of the board of directors of "Tata Sons Ltd." held on Monday, October 24, 2016 so far as it relates to removal and other actions taken against Mr. Cyrus Pallonji Mistry (eleventh respondent) is declared illegal and is set aside. In the result, Mr. Cyrus Pallonji Mistry (eleventh respondent) is restored to his original position as executive chairman of "Tata Sons Ltd." and consequently as director of the "Tata Companies" for rest of the tenure.

As a sequel thereto, the person who has been appointed as "executive chairman" in place of Mr. Cyrus Pallonji Mistry (eleventh respondent), his consequential appointment is declared illegal.

(ii) Mr. Ratan N. Tata (second respondent) and the nominee of the "Tata Trusts" shall desist from taking any decision in advance which requires majority decision of the board of directors or in the annual general meeting.

(iii) In view of "prejudicial" and "oppressive" decision taken during last few years, the company, its board of directors and shareholders which has not exercised its power under article 75 since inception, will not exercise its power under article 75 against appellants and other minority member. Such power can be exercised only in exceptional circumstances and in the interest of the company, but before exercising such power, reasons should be recorded in writing and intimated to the concerned shareholders whose right will be affected.

(iv) The decision of the Registrar of Companies changing the company ("Tata Sons Ltd.") from "public company" to "private company" is declared illegal and set aside. The company ("Tata Sons Ltd.") shall be recorded as "public company". The "Registrar of Companies" will make correction in its record showing the company ("Tata Sons Ltd.") as "public company".

At this stage, it is apt to notice some observations in the Judgment dated July 9, 2018 passed by the Tribunal are inappropriate and avoidable. **188**

The Tribunal in its opening paragraphs was not required to highlight the products of "Tata Sons Ltd." nor was required to appreciate its activities before deciding the case on merit. Sometimes, such observations or appreciation in favour of one or other party creates a wrong impression in the mind of the other party. The Tribunal is required to appreciate the merits and demerits of the case and should desist from highlighting the merits of a product or virtues of a party or appreciating any action taken by a party to a case. **189**

We find certain observations made by the Tribunal against Mr. Cyrus Pallonji Mistry and other appellants are undesirable and based on extraneously sourced material not on record. It casts impact on the reputation of the appellants and Mr. Cyrus Pallonji Mistry which may affect them in pending proceedings, if any, and their business. These remarks are not only disparaging but also wholly unsubstantiated by any document on record. An illustrative list of such remarks which the appellant sought to expunge, is as under : **190**

Sl. No.	*Disparaging remarks against the appellant*	*Paragraph of the impugned order*
1.	It appears that the petitioners and Mr. Cyrus, because of the heart burn they had for Cyrus being removed as executive chairman of the company, they tried to steamroller all these business decisions upon Mr. Tata as mismanagement of the affairs causing prejudice to the company, so as to bully the answering respondents by using section 241 as a device.	Paragraph 237
2.	As against this story present on record, could it be conceivable to say that AirAsia decision is fait accompli upon him ; all investment to AirAsia has been done by the company in his tenure without being known to Mr. Cyrus. It is fundamental in law that the person privy to a transaction estopped from denying it, but unfortunately today the petitioners and Mr. Cyrus have made all kinds of allegations with impunity flouting all legal principles. They stated as if they did not take active part in AirAsia incorporation, as if Mr. Cyrus did not preside over	Paragraph 245

	meeting on September 15, 2016 in further funding it, they went ahead to make a scurrilous statement, without a shred of paper, that Mr. Tata funded one Terrorist through hawala with diversion of AirAsia India funds.	
3.	These petitioner as well as Mr. Cyrus have come out with unfounded allegations against Mr. Tata so as to settle their score for Mr. Cyrus was removed as executive chairman of the company	Paragraph 304
4.	Whose action in this episode is prejudicial ? Is it Mr. Cyrus's action or the action of Mr. Tata saying to go ahead with the resolution is prejudicial ? For the petitioners have filed this company petition, we have not gone any further over this issue leaving it to the wisdom of the petitioners to realize that the action of Mr. Cyrus is prejudicial to the interest of the company or Mr. Tata.	386
5.	Is it that Mr. Cyrus will remain whole and sole and call the shots in the company by virtue of he being appointed by the majority as executive chairman, and keep Mr. Tata representing majority and the trust nominee directors remain as credit cards in his wallet to use them whenever board meetings and shareholder meetings take place ?	Paragraph 396
6.	His removal, who is taken as employee will not make any difference to the shareholders or the company. Therefore, unless an action is vitiated by fraud, it will not become a fraud or unfairness. This clause of prejudice will be only in respect to either the economic interest of the petitioners or the economic interest of the company. Here, personal emotions or personal egos will not have any place to attribute it as a grievance under section 241	Paragraph 457
7.	If you see the correspondence and transactions happened under the stewardship of Mr. Cyrus it is evident on record that Mr. Cyrus created a situation that since he being the executive chairman, he is not accountable either to majority shareholders or to the trusts nominee directors . . . Any executive chairman, for that matter, to all big companies will act, as a face of the company, but that does not mean he is whole and sole and the majority will remain at the beck and call of him.	Paragraph 542
8.	The best example to prove that Mr. Cyrus tried to convey his way is highway is Welspun issue, where Mr. Cyrus on behalf of Tata Power entered into acquisition of an asset costing around Rs. 9,000 crores even before Tata Sons passing a resolution as mentioned under article 121A of the articles of association,	Paragraph 543

	which is nothing but bypassing the approval that was to be taken from the board of Tata Sons before entering into any understanding with other parties, the reason behind it is, Tata Sons is an investment company, ultimately money has to go from Tata Sons, that means, acquisition in Tata Power is intrinsically connected to the economic interest of Tata Sons . . .	
9.	The problem is Mr. Cyrus was taken as executive chairman to preside over the board of directors, he could not become a sovereign authority over this company . . .	Paragraph 561
10.	For Mr. Cyrus started his journey as an executive chairman under the impression that he was given free hand or would be given free hand to run the affairs of the company, perhaps caused all these problems because he was obsessed with an idea that he alone would lead the company and others to remain assisting him in running the company. Perhaps since he saw Mr. Tata working as executive chairman, he might gone into the mind that he would exercise the powers as Mr. Tata exercised forgetting the fact that Mr. Tata at that point of time had two hats . . .	Paragraph 564
11.	There is no befitting reply to any of these allegations except saying that they gave information to DCIT so that Mr. Cyrus would not be penalized for non-compliance of filings with income-tax authorities for he was continuing as one of the directors of the company. As to leakage of his confidential letter dated October 25, 2015 sent by e-mail, the reply is so irrational that he could not explain away leaking e-mail correspondentce to outsiders except the person who has been using such e-mail id.	Paragraph 576

For the reasons aforesaid, the impugned judgment dated July 9, 2018 **191**
passed by the National Company Law Tribunal, Mumbai, is set aside. Remarks made against the appellants, Mr. Cyrus Pallonji Mistry and others stand expunged. Both the appeals are allowed with aforesaid observations and directions. No costs.

[2020] 221 Comp Cas 364 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

1. CYRUS INVESTMENTS P. LTD.

(I. A. No. 4331 of 2019 in Company Appeal (AT) No. 254 of 2018)

2. CYRUS PALLONJI MISTRY

(I. A. No. 4336 of 2019 in Company Appeal (AT) No. 268 of 2018)

v.

TATA SONS LTD. AND OTHERS

SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)*** and **BANSI LAL BHAT** J. ***(Judicial Member)***

January 6, 2020.

HF ▸ Respondent

APPEAL TO APPELLATE TRIBUNAL—INTERLOCUTORY APPLICATION—REGISTRAR OF COMPANIES SEEKING AMENDMENT IN FINAL DECISION REGARDING OBSERVATIONS MADE IN CERTAIN PARAGRAPHS—CONTENTIONS THAT SUCH OBSERVATIONS CAST ASPIRATIONS ON REGISTRAR—NO SPECIFIC MALA FIDE ACTION ALLEGED AGAINST REGISTRAR—NO FACTUAL OR LEGAL ERROR APPARENT ON BODY OF ORDER—NO GROUNDS MADE OUT TO AMEND ORDER—APPLICATION DISMISSED—COMPANIES ACT, 2013, S. 424.

In an appeal against an order on a petition under sections 241 and 242 of the Companies Act, 2013, the Appellate Tribunal observed that the company had to comply with section 14(2) of the Act after altering its articles of association for 13 years. It held that in absence of an order from the Tribunal, the company could be treated as a private company. The certificate issued by the Registrar of Companies in this regard was struck down. (See Cyrus Investments P. Ltd. *v.* Tata Sons Ltd. [2020] 221 Comp Cas 272 (NCLAT)*). Aggrieved by the observation of the Appellate Tribunal in this order, the Registrar of Companies filed interlocutory applications seeking amendment in the order :*

Held, *dismissing the applications, (i) that it was not the case of the Registrar of Companies that in terms of section 14 of the Act, the company by a special resolution altered its articles having the effect of its conversion as a public company into a private company. It was also not the case of the*

Registrar that such resolution was produced before it. No approval had been taken from the Tribunal. There being a specific provision for conversion of companies already registered in terms of section 18 of the Act and alteration of articles in terms of section 14, the Registrar of Companies could not rely on section 43A(2A) of the Companies Act, 1956 that too without relying on clause (4) therein which related to requirement of approval of the Central Government. The contention that in the absence of any prescription by the Central Government under any rule in terms of section 2(66) of the 2013 Act, for the purpose of section 2(68) (private company), the paid-up share capital should be read as zero was not acceptable. Therefore, the prayer for amendment was not to be granted.

(ii) That no observation or allegations were made against the Registrar of Companies in the order. The directions of the Appellate Tribunal did not cast any aspersions on the Registrar. No ground was made out to amend the order dated December 18, 2019 in the absence of any factual or legal error apparent on the body of the order.

[The Appellate Tribunal took note of the typographical error in paragraph 171 of the order where the unamended definition of "private company" had been quoted. It directed that the definition of "private company" as defined under amended section 2(68) of the Companies Act, 2013 be read as quoted in paragraph 171].

CYRUS INVESTMENTS P. LTD. *v.* TATA SONS LTD. [2020] 221 Comp Cas 272 (NCLAT) (para 1) *referred to*.

I. A. Nos. 4331 and 4336 of 2019 in Company Appeal (AT) Nos. 254 and 268 of 2018.

Sanjay Shorey, Director (L&P), Ministry of Corporate Affairs for Registrar of Companies, for the appellant.

Akshay Makhija and *Ms. Kriti Awasthi*, for respondent No. 1.

C. A. Sundaram and *Arun Kathpalia*, Senior Advocates, with *Mrs. Sonali Jaitley Bakhshi*, *Manik Dogra*, *Ravi Tyagi*, *Shubhanshu Gupta*, *Ms. Rini Badoni*, *Pragalbh Bhardwaj*, *Akshay Doctor* and *Gunjan Shah*, for respondents Nos. 24 and 25.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)***.—Interlocutory 1
applications have been preferred by the Registrar of Companies, Mumbai for seeking amendment in judgment dated December 18, 2019—(*Cyrus*

Investments P. Ltd. v. *Tata Sons Ltd.* [2020] 221 Comp Cas 272 (NCLAT)) passed by this Appellate Tribunal in so far as it relates to observations made at paragraphs 181, 186 and 187 of the judgment.

2 In the aforesaid judgment, this Appellate Tribunal while dealing with conversion of "Tata Sons Ltd." from "public company" to "private company" noticed that the "Tata Sons Ltd." was initially a "private company" but after insertion of section 43A(1A) in the Companies Act, 1956 on the basis of average annual turnover, it assumed the character of a deemed "public company" with effect from February 1, 1975.

3 The aforesaid provision was amended and section 43A(2A) was substituted after the commencement of the Companies (Amendment) Act, 2000. As per sub-section (4) of section 43A, a "private company" which has become a "public company" by virtue of the aforesaid provisions, is to continue to be a "public company" until it has, with the approval of the Central Government and in accordance with the provisions of the Act, again becomes a "private company".

4 It was noticed that part of the Companies Act, 1956 was repealed by the Companies Act, 2013, from the date of its notification, except those covered in Part IX-A of the Companies Act, 1956.

5 Section 31 of the Companies Act, 1956 which relates to "Alteration of Articles by Special Resolution" was repealed and substituted by section 14 of the Companies Act, 2013 which relates to "Alteration of Articles", as referred in the judgment.

6 Taking into consideration the definition of "private company" as defined under section 2(68) of the Companies Act, 2013 and the definition of "public company" as defined under section 2(71) of the Companies Act, 2013, following observations were made by this Appellate Tribunal at paragraphs 181, 186 and 187 of the judgment dated December 18, 2019 (pages 358 and 360 of 221 Comp Cas) :

> "The aforesaid action on the part of the company, its board of directors to take action to hurriedly change the company ('Tata Sons Ltd.') from 'public company' to a 'private company' without following the procedure under law (section 14), with the help of the Registrar of Companies just before filing of the appeal, suggests that the nominated members of 'Tata Trusts' who have affirmative voting right over the majority decision of the board of directors and other directors/ members, acted in a manner 'prejudicial' to the members, including minority members ('Shapoorji Pallonji group') and others as also 'prejudicial' to the company ('Tata Sons Ltd.') . . .

As regards the conversion of the company from 'public company' to 'private company', as action taken by the Registrar of Companies is against the provisions of section 14 of the Companies Act, 2013 and 'prejudicial' and 'oppressive' to the minority members and depositors, etc., conversion of the 'Tata Sons Ltd.' from 'public company' to 'private company' by the Registrar of Companies, is declared illegal.

In view of the findings aforesaid, we pass the following orders and directions :

(i) The proceedings of the sixth meeting of the board of directors of 'Tata Sons Ltd.' held on Monday, October 24, 2016 so far as it relates to removal and other actions taken against Mr. Cyrus Pallonji Mistry (eleventh respondent) is declared illegal and is set aside. In the result, Mr. Cyrus Pallonji Mistry (eleventh respondent) is restored to his original position as executive chairman of 'Tata Sons Ltd.' and consequently as director of the 'Tata Companies' for rest of the tenure.

As a sequel thereto, the person who has been appointed as 'executive chairman' in place of Mr. Cyrus Pallonji Mistry (eleventh respondent), his consequential appointment is declared illegal.

(ii) Mr. Ratan N. Tata (second respondent) and the nominee of the 'Tata Trusts' shall desist from taking any decision in advance which requires majority decision of the board of directors or in the annual general meeting.

(iii) In view of 'prejudicial' and 'oppressive' decision taken during last few years, the company, its board of directors and shareholders which has not exercised its power under article 75 since inception, will not exercise its power under article 75 against appellants and other minority member. Such power can be exercised only in exceptional circumstances and in the interest of the company, but before exercising such power, reasons should be recorded in writing and intimated to the concerned shareholders whose right will be affected.

(iv) The decision of the Registrar of Companies changing the company ('Tata Sons Ltd.') from 'public company' to 'private company' is declared illegal and set aside. The company ('Tata Sons Ltd.') shall be recorded as 'public company'. The 'Registrar of Companies' will make correction in its record showing the company ('Tata Sons Ltd.') as 'public company'."

Mr. Sanjay Shorey, Director Prosecution, Ministry of Corporate Affairs, **7**
who appeared on behalf of the Registrar of Companies, Mumbai was asked

to clarify the date from which the definition of "private company" as defined under section 2(68) of the Companies Act, 2013 was amended and whether the Central Government has come out of the rule prescribing minimum paid-up share capital so as to ascertain whether a "company" comes within the meaning of "private company" as defined under section 2(68) read with section 2(66) of the Companies Act, 2013.

8 Mr. Sanjay Shorey, Director Prosecution, Ministry of Corporate Affairs, appearing on behalf of the Registrar of Companies, Mumbai specifically informed that the Central Government has not framed any rule under section 2(66) of the Companies Act, 2013 prescribing minimum paid-up share capital of a "private company".

9 It was submitted that till such date, section 43A(2A) had not been repealed and there is no corresponding provision enacted under the Companies Act, 2013, therefore, section 43A(2A) of the Companies Act, 1956 is still in operation. Reliance has been placed on Ministry of Corporate Affairs' Notification S. O. No. 560(E), dated January 30, 2019[1] in support of such submission.

10 It was submitted that in view of the aforesaid position of law as section 43A(2A) has not been repealed, after judgment of the National Company Law Tribunal, "Tata Sons Ltd." by its letter dated July 19, 2018 intimated the Registrar of Companies of its exercise of the option under section 43A(2A) for reversion back to the status of a private company, therefore, the Registrar of Companies was statutorily obligated to carry out the necessary changes in the "Register of Companies", the "Certificate of Incorporation" of "Tata Sons Ltd." and the "memorandum of association" of "Tata Sons Ltd.".

11 This Appellate Tribunal specifically asked Mr. Sanjay Shorey, Director Prosecution, Ministry of Corporate Affairs, who appeared on behalf of the Registrar of Companies, Mumbai that in the year 1975 when the company was converted to be a deemed "public limited company", necessary correction was made in the articles of association with regard to the nature of the company as "public limited company". On behalf of the Registrar of Companies, it is specifically stated that in the year 1975 when "Tata Sons Ltd." (company) was converted to a deemed "public company", necessary corrections were also made in the articles of association of the company as "public limited company". Apart from this, necessary changes were made in "the Register of Companies" and "the Certificate of Incorporation" of "Tata Sons Ltd.". This will be also evident from the specific pleading made at paragraph 20 of the interlocutory application, as follows :

1. See [2019] 212 Comp Cas (St.) 150.

". . . the applicant was statutorily obligated to carry out the necessary changes in the Register of Companies, the certificate of incorporation of TSL and the memorandum of association of TSL."

12 It is accepted that prior to the letter dated July 19, 2018 the definition of "private company" as defined under section 2(68) was amended and the words "of one lakh rupees or such higher paid-up share capital" omitted by Act 21 of 2015 with effect from May 29, 2015. After such amendment, the definition of "private company" as defined under section 2(68) reads as follows :

"2. *Definitions.*—. . . (68) 'private company' means a company having a minimum paid-up share capital as may be prescribed, and which by its articles,—

(i) restricts the right to transfer its shares ;

(ii) except in case of one person company, limits the number of its members to two hundred :

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member :

Provided further that—

(A) persons who are in the employment of the company ; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members ; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company."

13 The word "prescribed" is defined under section 2(66) of the Companies Act, 2013, as follows :

"2. *Definitions.*—. . . (66) 'prescribed' means prescribed by rules made under this Act ;"

14 It is accepted that the Central Government has not framed any rule under the Companies Act, 2013 under section 2(66) prescribing minimum paid-up share capital of a "private company".

15 Therefore, it is clear that on the basis of definition of "private company" as amended by section 2(68) and was applicable on the date of correction of certificate of incorporation, in absence of any prescription of minimum paid-up share capital, the Registrar of Companies has no power or jurisdiction to carry out any changes in the Register of Companies or certificate

of incorporation of "Tata Sons Ltd." and the "memorandum of association" of the "Tata Sons Ltd.".

16 The Registrar of Companies cannot take advantage of section 43A(2A) on the ground that it has not been repealed for the following reasons.

17 Section 43A(2A) while empowers a "public company" to become a "private company" on or after commencement of the Companies (Amendment) Act, 2000 by informing the matter to the Registrar for substitution of the word "private company" with the word "public company" in the name of the company upon the register and certificate of incorporation issued to the company and its memorandum of association but under section 43A(4) such "private company" which has been made public company by virtue of the said provision, will continue to be a "public company" until it has, with the approval of the Central Government and in accordance with the provisions of the said Act, again become a "private company". This we have noticed in our judgment at paragraph 166 wherein section 43A(2A) has been quoted along with sub-section (4) therein, relevant of which reads as follows :

> "43A. *Private company to become public company in certain cases.*—(2A) Where a public company referred to in sub-section (2) becomes a private company on or after the commencement of the Companies (Amendment) Act, 2000, such company shall inform the Registrar that it has become a private company and thereupon the Registrar shall substitute the word 'private company' for the word 'public company' in the name of the company upon the register and shall also make the necessary alterations in the certificate of incorporation issued to the company and in its memorandum of association within four weeks from the date of application made by the company."

This provision has been referred to by the Registrar of Companies.

> "43A. *Private company to become public company in certain cases.*—. . . (4) A private company which has become a public company by virtue of this section shall continue to be a public company until it has, with the approval of the Central Government and in accordance with the provisions of this Act, again become a private company."

However, the aforesaid provision has not been noticed or referred to by the Registrar of Companies.

18 For the purpose of appreciation, in terms of section 43A(4), as referred to by the Registrar of Companies, the "Tata Sons Ltd." which was a

"private company" has becomes a "public company" by virtue of the provision aforesaid shall continue to be a public company, having not taken any approval from the Central Government and in accordance with the provisions of the said Companies (Amendment) Act, 2000 to become a "private company".

We have already referred section 14 of the Companies Act, 2013 which relates to "Alteration of articles". It is not the case of the Registrar of Companies that as per section 14, "Tata Sons Ltd." (company) by a special resolution altered its article having the effect of its conversion as a "public company" into a "private company". It is also not the case of the Registrar of Companies that such resolution was produced before it. No approval has been taken from the Tribunal (NCLT). **19**

Section 18 of the Companies Act, 2013 specifically refers to "Conversion of companies already registered", as follows : **20**

> "18. *Conversion of companies already registered.*—(1) A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.
>
> (2) Where the conversion is required to be done under this section, the Registrar shall on an application made by the company, after satisfying himself that the provisions of this Chapter applicable for registration of companies have been complied with, close the former registration of the company and after registering the documents referred to in sub-section (1), issue a certificate of incorporation in the same manner as its first registration.
>
> (3) The registration of a company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done."

There being a specific provision of conversions of companies already registered in terms of section 18 of the Companies Act, 2013 and "alteration of articles" in terms of section 14, the Registrar of Companies cannot rely on section 43A(2A) that too without relying on clause (4) therein which relates to requirement of approval of the Central Government. **21**

Section 465 of the Companies Act, 2013 relates to "repeal of certain enactments and savings" and sub-section (1) therein reads as follows : **22**

"465. *Repeal of certain enactments and savings.*—(1) The Companies Act, 1956 (1 of 1956) and the Registration of Companies (Sikkim) Act, 1961 (Sikkim Act 8 of 1961) (hereafter in this section referred to as the repealed enactments) shall stand repealed :

Provided that the provisions of Part IX-A of the Companies Act, 1956 (1 of 1956) shall be applicable mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies :

Provided further that until a date is notified by the Central Government under sub-section (1) of section 434 for transfer of all matters, proceedings or cases to the Tribunal, the provisions of the Companies Act, 1956 (1 of 1956) in regard to the jurisdiction, powers, authority and functions of the Board of Company Law Administration and Court shall continue to apply as if the Companies Act, 1956 (1 of 1956) has not been repealed :

Provided also that provisions of the Companies Act, 1956 (1 of 1956) referred in the notification issued under section 67 of the Limited Liability Partnership Act, 2008 (6 of 2009) shall, until the relevant notification under such section applying relevant corresponding provisions of this Act to limited liability partnerships is issued, continue to apply as if the Companies Act, 1956 (1 of 1956) has not been repealed."

23 In terms of section 465 of the Companies Act, 2013, all provisions of the Companies Act, 1956 stand repealed except provisions of Part IX-A of the Companies Act, 1956 which applies mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies.

24 Section 43A(2A) was inserted in the year 1975 in the Companies Act, 1956 as amended in the year 2000 stood repealed by enactment of the Companies Act, 2013. In place of the old provision of section 43A for "conversion of the company" and "conversion of articles of association", now section 18 and section 14 of the Companies Act, 2013 are applicable.

25 The stand taken by Mr. Sanjay Shorey, Director Prosecution, Ministry of Corporate Affairs, who appeared on behalf of the Registrar of Companies, Mumbai that in absence of any prescription by the Central Government under any rule in terms of section 2(66), for the purpose of section 2(68) ("private company"), the paid-up share capital should be read as "zero". However, such submission cannot be accepted as there cannot be a "private company" or "public company". For the said reason, in amended

section 2(68), it is specifically mentioned that "as may be prescribed by the Central Government" (i. e., under the Rules in terms of section 2(66)).

In view of the aforesaid position of law, the prayer for amendment in the judgment dated December 18, 2019 is rejected. **26**

However, in paragraph 171 of the judgment dated December 18, 2019 we find that wrongly unamended definition of "private company" has been quoted which stood amended with effect from May 29, 2015, i. e., much prior to filing of the petition under sections 241 and 242 of the Companies Act, 2013 and the application for change of company from "public company" to "private company", which was filed in July, 2017. It is accordingly ordered to read the definition of "private company" as defined under amended section 2(68) of the Companies Act, 2013 as quoted in paragraph 171, as follows : **27**

> "2. *Definitions*.—. . . (68) 'private company' means a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and which by its articles,—
>
> (i) restricts the right to transfer its shares ;
>
> (ii) except in case of one person company, limits the number of its members to two hundred :
>
> Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member :
>
> Provided further that—
>
> (A) persons who are in the employment of the company ; and
>
> (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,
>
> shall not be included in the number of members ; and
>
> (iii) prohibits any invitation to the public to subscribe for any securities of the company."

One of the grievances of the Registrar of Companies is that the observations made in paragraphs 181, 186 and 187 of the judgment cast aspersions on the Registrar of Companies who was not party before this Appellate Tribunal. **28**

However, we find that there is a wrong perception of the Registrar of Companies as no observation has been made against the Registrar of Companies, Mumbai, nor anything alleged against him.

29 In paragraph 181 of the judgment, the action on the part of the company, its board of directors has been referred which was taken hurriedly to change the company from "public company" to a "private company" and nothing has been alleged against the Registrar of Companies, Mumbai.

30 Paragraph 186 of the judgment is the finding of this Appellate Tribunal that the action taken by the Registrar of Companies is against the provisions of section 14 of the Companies Act, 2013 which is "prejudicial" and "oppressive" to the minority members and depositors. No specific mala fide action has been alleged against it.

31 Similarly, paragraph 187 is the directions of this Appellate Tribunal which does not cast any aspersions on the Registrar of Companies.

32 Therefore, no ground is made out to amend the judgment dated December 18, 2019 in absence of any factual or legal error apparent on the body of the aforesaid judgment. There is a typographical error at paragraph 171 wherein unamended section 2(68) has wrongly been typed which has been ordered to be corrected.

In absence of any merit, both the interlocutory applications are dismissed. No costs.

[2020] 221 Comp Cas 374 (SC)

[IN THE SUPREME COURT OF INDIA]

ARUNA OSWAL

v.

PANKAJ OSWAL AND OTHERS

ARUN MISHRA and **S. ABDUL NAZEER** JJ.

July 6, 2020.

HF ▸ Appellant

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—MAINTAINABILITY—PETITION BY LEGAL HEIR OF DECEASED SHAREHOLDER—CIVIL DISPUTE PENDING REGARDING EFFECT OF NOMINATION—FINDING BY CIVIL COURT IN RESPECT OF TITLE TO BE FINAL AND CONCLUSIVE—NOT APPROPRIATE TO GRANT WAIVER TO LEGAL HEIR OF REQUIREMENT UNDER PROVISO TO SECTION 244 OF ACT—NO PRIMA FACIE CASE OF OPPRESSION AND MISMANAGEMENT MADE OUT—PROCEEDINGS NOT TO BE ENTERTAINED DURING PENDENCY OF CIVIL DISPUTE—PROCEEDINGS BEFORE NATIONAL COMPANY LAW TRIBUNAL DROPPED WITH LIBERTY TO FILE AFRESH ON ALL QUESTIONS, IF SUIT DECREED IN FAVOUR OF LEGAL

HEIR AND HIS SHAREHOLDING INCREASED TO 10 PER CENT. AS REQUIRED UNDER SECTION 244—COMPANIES ACT, 2013, SS. 241, 242, 244.

The first respondent, son of a deceased shareholder, filed a petition under sections 241, 242 and 244 of the Companies Act, 2013, alleging certain acts of oppression and mismanagement in the affairs of respondent No. 16-company. The appellant, wife of the deceased shareholder, challenged the maintainability of the petition on the ground that the first respondent was not a shareholder. She relied on the nomination filed by the deceased shareholder in her favour in respect of the company's share. The Tribunal held that the first respondent was eligible in terms of section 244 of the Act. The Appellate Tribunal affirmed the order. It, inter alia, observed that on the death of the holder of the instrument, the amount or share vested with the legal heirs, and the nominee merely held the amount or share till the matter of vesting was decided in favour of the legal heirs. The fact that the first respondent's claim relating to the shares of the deceased was pending in a suit before the court of competent jurisdiction was taken note of to hold that this was a fit case for waiver under sub-section (4) of section 244 of the Act. On further appeal by the appellant :

Held, *allowing the appeal, (i) that the question concerning the effect of nomination being a civil dispute, could not be decided in these proceedings and the decision might jeopardise parties' rights and interest in the civil suit. With regard to the dispute as to right, title, and interest in the securities, the finding of the civil court would be final and conclusive and binding on parties. The decision of such a question had to be eschewed in these proceedings. It would not be appropriate, in the facts and circumstances of the case, to grant a waiver to the respondent of the requirement under the proviso to section 244 of the Act, as ordered by the National Company Law Appellate Tribunal.*

(ii) That, prima facie, this did not appear to be a case of oppression and mismanagement. Transactions simpliciter could not be inferred as a case of oppression and mismanagement. The proceedings before the National Company Law Tribunal filed under sections 241 and 242 of the Act should not be entertained because of the pending civil dispute and considering the minuscule extent of holding of 0.03 per cent., that too, acquired after filing a civil suit in company securities, of respondent No. 1. In order to maintain the proceedings, the respondent should have waited for the decision of the right, title and interest, in the civil suit concerning shares in question. The proceedings filed before the National Company Law Tribunal regarding oppression and mismanagement under sections 241 and 242 of the Act were to be dropped

with liberty to file them afresh, on all the questions, in case of necessity, if the suit was decreed in favour of respondent No. 1 and the shareholding of respondent No. 1 increased to the extent of 10 per cent. required under section 244. [The court reiterated that all the questions was to be decided in the pending civil suit with a request to the civil court to decide as expeditiously as possible.]

Order of the National Company Law Appellate Tribunal in OSWAL GREENTECH LTD. *v.* PANKAJ OSWAL [2019] 217 Comp Cas 520 (NCLAT) *reversed*.

Cases referred to :

Dale and Carrington Invt. P. Ltd. *v.* Prathapan (P. K.) [2004] 122 Comp Cas 161 (SC) (para 23)

Dwarka Prasad Agarwal *v.* Ramesh Chandra Agarwala [2003] 117 Comp Cas 206 (SC) (para 22)

J. P. Srivastava and Sons P. Ltd. *v.* Gwalior Sugar Co. Ltd. [2004] 122 Comp Cas 696 (SC) (para 24)

Kedar Nath Agarwal *v.* Jay Engineering Works Ltd. [1963] 33 Comp Cas 102 (Cal) (para 16)

Life Insurance Corporation of India *v.* Escorts Ltd. [1986] 59 Comp Cas 548 (SC) (para 16)

Oswal Greentech Ltd. *v.* Pankaj Oswal [2019] 217 Comp Cas 520 (NCLAT) (para 1)

Pratap Singh *v.* Shri Krishna Gupta [1956] AIR 1956 SC 140 (para 24)

Rajahmundry Electric Supply Corporation Ltd. *v.* Nageswara Rao (A.) [1956] 26 Comp Cas 91 (SC) (para 16)

Ram Chander Talwar *v.* Devender Kumar Talwar [2010] 159 Comp Cas 646 (SC) (paras 13, 19)

Sangramsinh P. Gaekwad *v.* Shantadevi P. Gaekwad [2005] 123 Comp Cas 566 (SC) (para 22)

Sarbati Devi *v.* Usha Devi [1984] 55 Comp Cas 214 (SC) (paras 13, 17)

Vishin N. Khanchandani *v.* Vidya Lachmandas Khanchandan [2000] 102 Comp Cas 340 (SC) (paras 13, 18)

World Wide Agencies P. Ltd. *v.* Margaret T. Desor (Mrs.) [1990] 67 Comp Cas 607 (SC) (paras 11, 13, 16)

Civil Appeal Nos. 9340 of 2019 with 9399 and 9401 of 2019.

Appeal from the judgment and order dated November 14, 2019 of the National Company Law Appellate Tribunal in Company Appeal

(A. T.) No. 411 of 2018. The judgment of the National Company Law Appellate Tribunal is reported as *Oswal Greentech Ltd.* v. *Pankaj Oswal* [2019] 217 Comp Cas 520 (NCLAT).

Bhakti Vardhan Singh, *Aman Jha*, *R. C. Kohli* and *Mrs. Swarupama Chaturvedi* for the appellant.

Sidharth Sethi for the respondents.

JUDGMENT

The judgment of the court was delivered by

ARUN MISHRA J.—These appeals have been preferred against the judgment and order dated November 14, 2019[1] passed by the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) No. 411 of 2018, thereby affirming the order passed by the National Company Law Tribunal concerning maintainability of the applications filed under sections 241 and 242 of the Companies Act, 2013 (hereinafter referred to as "the Act"). 1

The case is the outcome of a family tussle. Late Mr. Abhey Kumar Oswal, during his lifetime, held as many as 53,53,960 shares in M/s. Oswal Agro Mills Ltd., a listed company. He breathed his last on March 29, 2016 in Russia. On or about June 18, 2015 Mr. Abhey Kumar Oswal filed a nomination according to section 72 of the Act in favour of Mrs. Aruna Oswal, his wife. Two witnesses duly attested the nomination in the prescribed manner. As per the appellant, it was explicitly provided therein that : "This nomination shall supersede any prior nomination made by me/us and any testamentary document executed by me/us". The name of Mrs. Aruna Oswal, the appellant, was registered as a holder on April 16, 2016 as against the shares held by her deceased husband. 2

Mr. Pankaj Oswal, respondent No. 1, filed a partition suit being C. S. No. 53 of 2017 claiming entitlement to one-fourth of the estate of Mr. Abhey Kumar Oswal. He claimed one-fourth of the deceased's shareholdings who was holding shares to the extent of 39.88 per cent. in Oswal Agro Mills. Ltd., respondent No. 2. The deceased also held 11.11 per cent. shares in M/s. Oswal Greentech Ltd., respondent No. 16. The partition suit was filed on February 3, 2017 by respondent No. 1 for one-fourth each of 39.88 per cent. shareholding in respondent No. 2-company and 11.11 per cent. shareholding in respondent No. 16-company. Prayer was made for an interim injunction in the civil suit. The High Court vide order dated February 8, 2017 directed the parties to maintain the status quo concerning shares and other immovable property. As on February 8, 2017 the shares 3

1. See *Oswal Greentech Ltd.* v. *Pankaj Oswal* [2019] 217 Comp Cas 520 (NCLAT).

stood registered in the ownership of Mrs. Aruna Oswal, who continues to be the owner of the shares.

4 After the demise of Mr. Abhey Kumar Oswal, respondent No. 1 entered into the corporate offices of respondents Nos. 2 and 16 along with his wife for which a criminal complaint was lodged. F. I. R. No. 54 of 2016 was registered at Police Station Barakhamba Road, New Delhi. As a counterblast, respondent No. 1 also filed a criminal complaint against the appellant as well as the officials of respondent No. 2 and respondent No. 16 companies, alleging illegal transmission of shares. The application filed by respondent No. 1 for registration of the FIR was dismissed vide order dated August 13, 2018 and the revision petition filed against the said dismissal is pending.

5 Mr. Pankaj Oswal, respondent No. 1 filed Company Petition No. 56/CHD/PB/2018 *Pankaj Oswal* v. *Oswal Agro Mills Ltd.*, alleging oppression and mismanagement in the affairs of respondent No. 2-company. A prayer was also made against M/s. Oswal Greentech Ltd. Respondent No. 1 claimed eligibility to maintain the petition on the ground of being a holder of 0.03 per cent. shareholding and claiming entitlement and legitimate expectation to 9.97 per cent. shareholding of M/s. Oswal Agro Mills Ltd., by virtue of his being the son of deceased Abhey Kumar Oswal.

6 An application was filed before the National Company Law Tribunal in May, 2018 by the appellant challenging maintainability of the petition, inter alia, on the following grounds :

(i) That respondent No. 1 only holds 42,900 shares to the extent of 0.03 per cent. shares of the total paid-up capital of M/s. Oswal Agro Mills Ltd., which were acquired in June, 2017. The claim made by Pankaj Oswal to 9.97 per cent. out of 39.88 per cent. shareholding held by late Abhey Kumar Oswal could not be made basis to maintain a petition under sections 241 and 242 read with section 244 of the Act. It was pointed out that the entire shareholding of deceased stood transmitted in ownership of Mrs. Aruna Oswal with effect from April 16, 2016. She is the absolute owner of shares that rest in her under the provisions contained in section 72 of the Act and rules framed thereunder.

(ii) Respondent No. 1 failed to indicate the violation of any provisions of the Act. The averments made as to oppression and mismanagement were bald and vague.

(iii) Respondent No. 1 indulged in forum shopping, which could not be allowed in view of the availing remedy of filing of the partition suit due to which company petition could not be said to be maintainable.

(iv) The High Court ordered status quo on February 8, 2017 according to which, as the shareholding had been transferred in the name of Mrs. Aruna Oswal, she would continue to be the owner during the pendency of the suit.

(v) Similar prayer has been made in the suit as well as in the company petition concerning the shareholding. The prayer regarding the determination of the ownership of shares in the company petition was the subject-matter of the civil suit, as such the application under sections 241 and 242 of the Act could not be said to be maintainable. The appropriate remedy was to apply under section 59 of the Act.

(vi) The main dispute raised as to the inheritance of the estate of the deceased is a civil dispute and could not be said to be an act of oppression and mismanagement. Such a dispute could not be adjudicated in a company petition filed during the civil suit's pendency. Thus, the company petition deserves to be dismissed.

(vii) Respondent No. 1 was not having the requisite shareholding as mandated under section 244(1) to invoke the provisions of section 241 of the Act.

(viii) The parallel proceedings on the same issue could not be termed to be appropriate, and thus, the application could not be said to be maintainable.

7 The National Company Law Tribunal, Chandigarh, directed the appellants and other respondents to file a reply to the company petition sans deciding the question of maintainability, an appeal was preferred before the National Company Law Appellate Tribunal, and the same was disposed of on May 29, 2018 and National Company Law Tribunal was directed to decide the issue of maintainability before proceeding to decide the company petition on merits.

8 The National Company Law Tribunal vide order dated November 13, 2018 dismissed the application, including C. A. No. 146 of 2018 challenging the company petition's maintainability. The National Company Law Tribunal held respondent No. 1 as legal heir was entitled to one-fourth share of the property/shares. Aggrieved thereby, three appeals were filed before the National Company Law Appellate Tribunal, which have been dismissed vide judgment and order dated November 14, 2019. Aggrieved thereby, the appellants are before this court.

9 Time was granted on February 17, 2020 to the parties to reach an amicable settlement that could not be arrived. Hence, the matter was heard on merits.

10 Dr. A. M. Singhvi, learned senior counsel appearing on behalf of Mrs. Aruna Oswal, wife of the deceased, vehemently argued that the appellant was the sole nominee of shares of the erstwhile shareholder late Abhey Kumar Oswal. In view of the provisions contained in section 71 of the Act, respondent No. 1 could not claim any interest in the said shares because of the nomination. After excluding shares in the name of mother Mrs. Aruna Oswal, respondent No. 1-Pankaj Oswal would have only 0.03 per cent. of the shareholding in M/s. Oswal Agro Industries Ltd. Given the provisions in section 244 of the Act, as respondent No. 1 lacked requisite shareholding of 10 per cent., as such, the application was not maintainable under sections 241 and 242 of the Act. Mr. Abhey Kumar Oswal died intestate. Because of the provisions of section 72 of the Act, all the rights vested in Mrs. Aruna Oswal, the appellant. Thus, the shareholding purchased by respondent No. 1 to the extent of 0.03 per cent. in May, 2017 after filing of civil suit, did not bestow any right upon him to maintain the company petition. Respondent No. 1 indisputably has settled in Australia and had nothing to do with the management of the company. He has tried to interfere in the management of M/s. Oswal Agro Mills Ltd., illegally. The National Company Law Tribunal and National Company Law Appellate Tribunal ignored and overlooked the rights of the deceased shareholder that would vest in the nominee. The application could not be said to be maintainable. The matter of inheritance is pending adjudication before this court in another C. A. No. 7107 of 2017—*Shakti Yezdani* v. *Jayanand Jayant*. It would not be appropriate for the National Company Law Tribunal to decide a civil dispute. Respondent No. 1 did not claim waiver on the rigors of section 244 of the Act and also did not file an application seeking a waiver under the proviso to section 244 of the Act.

11 Mr. Neeraj Kishan Kaul, learned senior counsel appearing for M/s. Oswal Agro Mills Ltd., fervently argued that in the wake of the civil suit's pendency, it was not appropriate for the National Company Law Tribunal to entertain the application. Reliance placed on the decision of this court in *World Wide Agencies P. Ltd.* v. *Mrs. Margaret T. Desor* [1990] 1 SCC 536[1] could not be said to be appropriate as the question of nomination was not involved in the said matter. There was no nomination made in the said case. That was a case of inheritance of shares. Thus, the legal representatives were given the right to maintain the application regarding oppression and mismanagement. Given the provisions of section 72 of the Act, and particularly in the absence of requisite shareholding, it was not permissible to Pankaj Oswal, respondent No. 1, to maintain the company

1. See [1990] 67 Comp Cas 607 (SC).

petition. As a civil suit had been filed earlier in point of time and similar issue as to ownership of shares is also raised therein, further proceedings in the company petition deserve to be stayed, even assuming that the company petition is maintainable.

12 Mr. P. S. Narasimhan, learned senior counsel representing M/s. Oswal Green Tech Ltd., respondent No. 16, strenuously argued that the deceased was having 11.11 per cent. of the shareholding out of which respondent No. 1 claimed only one-fourth interest. Thus, given the total shareholding which would be available, even if respondent No. 1 is deemed to be the owner to the extent of 2.78 per cent., it would be much less than what is required to maintain an application under sections 241 and 242 in view of the provisions contained in section 244 of the Act. It is a case of a civil dispute. As such, it would not be appropriate to maintain a company petition. It amounts to sheer abuse of the process of law to file successive petitions concerning the same relief. Respondent No. 1 has no locus standi to maintain the application, and the principle of estoppel comes in the way of maintaining the application.

13 Mr. Siddhartha Dave, learned senior counsel appearing on behalf of respondent No. 1, strenuously argued that the application filed under sections 241 and 242 of the Act was maintainable. The nomination was made only to hold the shares for the benefit of legal representatives. It is permissible for a legal representative to maintain the proceedings for oppression and mismanagement in the affairs of the company, though his/her name is not entered as a registered owner of the shares. He has relied upon *World Wide Agencies P. Ltd.* v. *Mrs. Margaret T. Desor* [1990] 1 SCC 536[1], *Sarbati Devi* v. *Usha Devi* [1984] 1 SCC 424[2], *Vishin N. Khanchandani* v. *Vidya Lachmandas Khanchandan* [2000] 6 SCC 724[3] and *Ram Chander Talwar* v. *Devender Kumar Talwar* [2010] 10 SCC 671[4]. He further argued that the waiver requirement to hold 10 per cent. shares, had been pleaded in the company petition filed by respondent No. 1. The National Company Law Tribunal, as well as the National Company Law Appellate Tribunal rightly held the petition to be maintainable. The civil suit's pendency could not have come in the way of maintaining the application concerning oppression and mismanagement, as only civil rights have to be determined in the civil suit. The company petition is prima facie maintainable because

1. See [1990] 67 Comp Cas 607 (SC).
2. See [1984] 55 Comp Cas 214 (SC).
3. See [2000] 102 Comp Cas 340 (SC).
4. See [2010] 159 Comp Cas 646 (SC).

of the verdicts mentioned above of this court. Hence, no case for interference in the appeals is made out.

14 The first argument advanced by learned counsel for the parties concerns the effect of nomination under section 72 of the Act, the same is extracted hereunder :

> "72. *Power to nominate.*—(1) Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person *to whom his securities shall vest in the event of his death*.
>
> (2) Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, *any person to whom all the rights in the securities shall vest in the event of death of all the joint holders*.
>
> (3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a *nomination made in the prescribed manner* purports to confer on any person the right to vest the securities of the company, *the nominee shall*, on the death of the holder of securities or, as the case may be, on the death of the joint holders, *become entitled to all the rights in the securities, of the holder or, as the case may be*, of all the joint holders, in relation to such securities, *to the exclusion of all other persons*, unless the nomination is varied or cancelled in the prescribed manner.
>
> (4) Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority." (emphasis[1] supplied)

15 It is quite apparent from a bare reading of the aforesaid provisions of section 72(1), every holder of securities has a right to nominate any person to whom his securities shall "vest" in the event of his death. In the case of joint holders also, they have a right to nominate any person to whom "all the rights in the securities shall vest" in the event of death of all joint holders. Sub-section (3) of section 72 contains a non obstante clause in respect of anything contained in any other law for the time being in force or any disposition, whether testamentary or otherwise, where a nomination is validly made in the prescribed manner, it purports to confer on any person "the right to vest" the securities of the company, all the rights in the securities shall vest in the nominee unless a nomination is varied or cancelled

1. Here printed in italics.

in the prescribed manner. It is prima facie apparent that vesting is absolute, and the provisions supersede by virtue of a non obstante clause any other law for the time being in force. Prima facie shares vest in a nominee, and he becomes absolute owner of the securities on the strength of nomination. Rule 19(2) of the Companies (Share Capital and Debentures) Rules, 2014 framed under the Act, also indicates to the same effect. Under rule 19(8), a nominee becomes entitled to receive the dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities ; and after becoming a registered holder, he can participate in the meetings of the company. Rule 19(8) is extracted hereunder :

> "19. (8) A person, being a nominee, becoming entitled to any securities by reason of the death of the holder shall be entitled to the same dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities except that he shall not, before being registered as a holder in respect of such securities, be entitled in respect of these securities to exercise any right conferred by the membership in relation to meetings of the company :
>
> Provided that the Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the securities and if the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends or interests, bonuses or other moneys payable in respect of the securities, as the case may be, until the requirements of the notice have been complied with."

In *World Wide Agencies P. Ltd.* v. *Mrs. Margaret T. Desor* [1990] 1 SCC 536[1], this court held that a legal representative has a right to maintain an application regarding oppression and mismanagement without being registered as a member against the securities of a company. However, the question of nomination was not involved in the said decision, as such, court was not required to decide the question of the effect of nomination whether it vests all the rights in the securities in nominee to the exclusion of legal representatives. The court concerning the right of a legal representative to maintain the petition held thus[2] : **16**

> "On behalf of the appellants it was contended that the right which is a specific statutory right, is given only to a member of the company and until and unless one is a member of the company, there is no

1. See [1990] 67 Comp Cas 607 (SC).
2. See page 612 of 67 Comp Cas.

right to maintain application under section 397 of the Act. Mr. Nariman contended that there was no automatic transmission of shares in the case of death of a shareholder to his legal heir and representatives, and the Board has a discretion and can refuse to register the shares. Hence, the legal representatives had no locus standi to maintain an application under sections 397 and 398 of the Act. Mr. Nariman submitted that the rights under sections 397 and 398 of the Act are statutory rights and must be strictly construed in the terms of the statute. The right, it was submitted, was given to 'any member' of a company and it should not be enlarged to include 'any one who may be entitled to become a member'.

In order to decide the question involved, it would be necessary to examine certain provisions of the Act. Section 2(27) of the Act states that 'member' in relation to company does not include a bearer of a share warrant of the company issued in pursuance of section 114 of the Act. Section 41 of the Act provides as follows :

'41. (1) The subscribers of the memorandum of a 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.

(2) Every other person who agreed in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.'

Section 26 of the English Companies Act, 1948 is substantially the same.

Section 109 of the Act states as follows :

'A transfer of the share or other interest in a company of a deceased member thereof made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.'

In this connection, it would be relevant to refer to articles 25 to 28 of Table A of the Act, which deal with the transmission of shares and which are in the following terms :

'25. (1) On the death of a member the survivor where the member was a joint holder, and his legal representatives where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares.

(2) Nothing in clause (1) shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons.

26. (1) Any person becoming entitled to a share in consequence of the death or insolvency of a member may, upon such evidence being produced as may from time to time properly be required by the Board and subject as hereinafter provided, elect, either—

(a) to be registered himself as holder of the share ; or

(b) to make such transfer of the share as the deceased or insolvent member could have made.

(2) The Board shall, in either case, have the same right to decline or suspend registration as it would have had, if the deceased or insolvent member had transferred the share before his death or insolvency.

27. (1) If the person so becoming entitled shall elect to be registered as holder of the share himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects.

(2) If the person aforesaid shall elect to transfer the share, he shall testify his election by executing a transfer of the share.

(3) All the limitations, restrictions and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice or transfer as aforesaid as if the death or insolvency of the member had not occurred and the notice or transfer were a transfer signed by that member.

28. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends or other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company :

Provided that the Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the share, and if the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share, until the requirements of the notice have been complied with.'

Article 28 is more or less in pari materia to article 32 of Table A to the English Companies Act. It may also be mentioned, as it has been mentioned by the High Court, that section 210 of the English Companies Act, before its amendment in 1980, was substantially the same as section 397 of the Act . . .

We do not agree with the reason mentioned earlier. It further appears to us the Australian judgment does not reconcile itself to logic in accepting that a legal representative can petition for winding up, which is called the 'sledge-hammer remedy', but that he would be refuse the lesser and alternative remedy of seeking relief against oppression and mismanagement though the latter remedy requires establishment of winding up on just and equitable ground as a pre-condition for its invocation. It would be rather incongruous to hold that the case for winding up on just and equitable ground can be made out by the legal representatives under section 439(4)(b) of the Act but not the other. This does not appear to be logical. It appears to us that to hold that the legal representatives of a deceased share-holder could not be given the same right of a member under sections 397 and 398 of the Act would be taking a hyper-technical view which does not advance the cause of equity or justice. The High Court in its judgment under appeal proceeded on the basis that legal representatives of a deceased member represent the estate of that member whose name is on the register of members. When the member dies, his estate is entrusted in the legal representatives. When, therefore, these vestings are illegally or wrongfully affected, the estate through the legal representatives must be enabled to petition in respect of oppression and mismanagement and it is as if the estate stands in the shoes of the deceased member. We are of the opinion that this view is a correct view. It may be mentioned in this connection that succession is not kept in abeyance and the property of the deceased member vests in the legal representatives on the death of the deceased and they should be permitted to act for the deceased member for the purpose of transfer of shares under section 109 of the Act.

In some situations and contingencies, the 'member' may be different from a 'holder'. A 'member' may be a 'holder' of shares but a 'holder' may not be a 'member'. In that view of the matter, it is not necessary for the present purpose to examine this question from the angle in which the learned single judge of the Calcutta High Court analysed the position in the case of *Kedar Nath Agarwal* v. *Jay*

Engineering Works Ltd. [1963] 33 Comp Cas 102 (Cal) to which our attention was drawn.

Admittedly in the present case, the legal representatives have been more than anxious to get their names put on the register of members in place of deceased member, who was the managing director and chairman of the company and had the controlling interest. It would, therefore, be wrong to insist their names must be first put on the register before they can move an application under sections 397 and 398 of the Act. This would frustrate the very purpose of the necessity of action. It was contended on behalf of the appellant before the High Court that if legal representatives who were only potential members or persons likely to come on the register of members, are permitted to file an application under sections 397 and 398 of the Act, it would create havoc, as then persons having blank transfer forms signed by members, and as such having a financial interest, could also claim to move an application under sections 397 and 398 of the Act. The High Court held that this is a fallacy, that in the case of persons having blank transfer forms, signed by members, it is the members themselves who are shown on the register of members and they are different from the persons with the blank transfer forms whereas in the case of legal representatives it is the deceased member who is shown on the register and the legal representatives are in effect exercising his right. A right has devolved on them through the death of the member whose name is still on the register. In our opinion, therefore, the High Court was pre-eminently right in holding that the legal representatives of deceased member whose name is still on the register of members are entitled to petition under sections 397 and 398 of the Act. In the view we have taken, it is not necessary to consider the contention whether as on the date of petition, they were not members. In that view of the matter, it is not necessary for us to consider the decision of this court in *Rajahmundry Electric Supply Corporation Ltd.* v. *A. Nageswara Rao,* AIR 1956 SC 213[1]. In view of the observations of this court in *Life Insurance Corporation of India* v. *Escorts Ltd.* [1986] 1 SCC 264[2], it is not necessary, in our opinion, to consider the contention as made on behalf of the appellant before the High Court that the permission of the Reserve Bank of India had been erroneously obtained and consequently amounts to no permission. In

1. See [1956] 26 Comp Cas 91 (SC).
2. See [1986] 59 Comp Cas 548 (SC).

the present context, we are of the opinion that the High Court was right in the view it took on the first aspect of the matter."

The effect of nomination did not fall for consideration before this court in *World Wide Agencies P. Ltd.* v. *Mrs. Margaret T. Desor* [1990] 1 SCC 536[1]. There is no doubt that in the absence of nomination, a legal representative cannot be denied the right to maintain a petition regarding oppression and mismanagement. In the instant case, the nomination had been made, and the nominee is registered as the holder of shares. What is the effect of the same is required to be decided to determine the extent of shareholding of respondent No. 1, concerning which civil suit filed earlier in point of time is pending consideration.

17 Learned senior counsel has also placed reliance on *Sarbati Devi* v. *Usha Devi* [1984] 1 SCC 424[2] in which question came up for consideration regarding section 39 of the Life Insurance Act, 1938 concerning rights of a nominee in the amount covered under policy when the assured died intestate. It was held that nomination was subject to a claim of the heirs of the assured under the law of succession. The provisions of section 39 of the Life Insurance Act, 1938, are quite different from the provisions contained in section 72 of the Act. The rights of the nominee would depend upon what is provided statutorily. There was no vesting of interest provided in the nominee under section 39 of the Act of 1938. Hence, the decision does not espouse the cause of the appellant.

18 Learned senior counsel also referred to the decision in *Vishin N. Khanchandani* v. *Vidya Lachmandas Khanchandan* [2000] 6 SCC 724[3], wherein the provisions of sections 6 to 8 of the Government Savings Certificates Act, 1959 came up for consideration. It was held that the nominee was entitled to receive the sum due on the savings certificates, yet he retained the same for the persons entitled to it under the relevant law of succession. The argument that the non obstante clause in section 6 entitled the nominee to utilise the sum so received by him, in the manner he likes, was rejected. In the sections mentioned above of the Act of 1959, vesting was not provided ; thus, the provisions being quite different, the decision is distinguishable.

19 Learned senior counsel representing respondent No. 1, lastly referred to *Ram Chander Talwar* v. *Devender Kumar Talwar* [2010] 10 SCC 671[4], wherein section 45ZA(2) of the Banking Regulation Act, 1949 was

1. See [1990] 67 Comp Cas 607 (SC).
2. See [1984] 55 Comp Cas 214 (SC).
3. See [2000] 102 Comp Cas 340 (SC).
4. See [2010] 159 Comp Cas 646 (SC).

considered by this court as well as the provisions of the Hindu Succession Act, 1925 and that of 1956. Nomination made under the provisions of section 45ZA of the said Act was to receive the amount of deposit from the banking company on the death of the sole depositor. There was no similar provision regarding the vesting of rights in nominee in section 45ZA(2). Hence, the decision is to no avail.

Admittedly, respondent No. 1 is not holding the shares to the extent of **20** eligibility threshold of 10 per cent. as stipulated under section 244 in order to maintain an application under sections 241 and 242. He has purchased the holding of 0.03 per cent. in M/s. Oswal Agro Mills Ltd., in June, 2017 after filing civil suit and remaining 9.97 per cent. is in dispute, he is claiming on the strength of his being a legal representative. In M/s. Oswal Greentech Ltd., the shareholding of the deceased was 11.11 per cent., out of which one-fourth share is claimed by respondent No. 1. Admittedly, in a civil suit for partition, he is also claiming a right in the shares held by the deceased to the extent of one-fourth. The question as to the right of respondent No. 1 is required to be adjudicated finally in the civil suit, including what is the effect of nomination in favour of his mother Mrs. Aruna Oswal, whether absolute right, title, and interest vested in the nominee or not, is to be finally determined in the said suit. The decision in a civil suit would be binding between the parties on the question of right, title, or interest. It is the domain of a civil court to determine the right, title, and interest in an estate in a suit for partition.

Respondent No. 1 had pleaded in paragraph 23 of the petition filed **21** under section 241 of the Companies Act, 2013, as under :

> "23. Late 1990s and early 2000s saw increased liberalization in Indian economic policies. Foreign investors and MNCs had a positive outlook towards doing business in India. Similarly, Indian business houses were looking to increase their exposure in the international arena. In these circumstances, petitioner father, on or about 2000, desired that the petitioner gain some international exposure to doing business outside India and encouraged him towards that end. On or about 2001, the petitioner started exploring opportunities in Australia and ultimately moved there to set up his own business Gradually, he increasingly got involved in setting up his business in Australia. Therefore, the petitioner was not involved in the day-to-day affairs of the company after making."

It is admitted by respondent No. 1 that he was not involved in day-to-day affairs of the company and had shifted to Australia to set up his independent business with effect from 2001. His grievance is that the family

had not recognised him as holder of the one-fourth shares. They were registered in the ownership of his mother Mrs. Aruna Oswal ; that also he had submitted to be an act of oppression. He acquired 0.03 per cent. share capital after filing of the civil suit, otherwise he was not having any shareholding in M/s. Oswal Agro Mills Ltd.

22 In *Sangramsinh P. Gaekwad* v. *Shantadevi P. Gaekwad* [2005] 11 SCC 314[1], it was held that the dispute as to inheritance of shares is eminently a civil dispute and cannot be said to be a dispute as regards oppression and/or mismanagement so as to attract company court's jurisdiction under sections 397 and 398. Adjudication of the question of ownership of shares is not contemplated under section 397. The relevant portion is extracted hereunder[2] :

> *"It is also not in dispute that the matter relating to her claim to succeed FRG as his Class I heir is pending adjudication in Civil Suit No. 725 of 1991 in the Baroda Civil Court. She claimed title in respect of 8,000 shares by inheritance in terms of the Hindu Succession Act*. Indisputably, in terms of section 15 of the said Act she is a Class I heir but the appellants herein contend that the said provision has no application having regard to section 5(2) thereof as inheritance in the family is governed by the rule of primogeniture. *A pure question of title is alien to an application under section 397 of the Companies Act wherefor the lack of probity is the only test*. Furthermore, it is now well-settled that the jurisdiction of the civil court is not completely ousted by the provisions of the Companies Act, 1956 (see *Dwarka Prasad Agarwal* v. *Ramesh Chandra Agarwala* [2003] 6 SCC 220[3]).
>
> *A dispute as regards right of inheritance between the parties is eminently a civil dispute and cannot be said to be a dispute as regards oppression of minority shareholders by the majority shareholders and/or mismanagement*." (emphasis[4] supplied)

In view of the aforesaid decision, we are of the opinion that the basis of the petition is the claim by way of inheritance of one-fourth shareholding so as to constitute 10 per cent. of the holding, which right cannot be decided in proceedings under section 241/242 of the Act. Thus, filing of the petition under sections 241 and 242 seeking waiver is a misconceived exercise, firstly, respondent No. 1 has to firmly establish his right of inheritance before a civil court to the extent of the shares he is claiming ; more so, in

1. See [2005] 123 Comp Cas 566 (SC).
2. See page 622 of 123 Comp Cas.
3. See [2003] 117 Comp Cas 206 (SC).
4. Here printed in italics.

view of the nomination made as per the provisions contained in section 71 of the Companies Act, 2013.

In *Dale and Carrington Invt. P. Ltd.* v. *P. K. Prathapan*, AIR 2005 SC 1624[1], the question of locus standi to entertain the petition under sections 397 and 398 of the Companies Act, 1956, which are pari materia to sections 241 and 242 of the Companies Act, 2013, was considered. This court held that in order to maintain the petition, one should have requisite number of shares in the company on the date of filing of the petition. It was observed[2] : **23**

> "It is to be further noted that the entire scheme regarding purchase of shares in the name of the 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 section 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 section 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.*" (emphasis[3] supplied)

In *J. P. Srivastava and Sons P. Ltd.* v. *Gwalior Sugar Co. Ltd.*, AIR 2005 SC 83[4], this court considered the object of prescribing a qualifying percentage of shares to entertain petition under sections 397 and 398. It was held that the object is to ensure that frivolous litigation is not indulged in by persons, who have no legal stake in the company. If the court is satisfied that the petitioners represents the body of shareholders holding the requisite percentage, the court may proceed with the matter. This court held thus[5] : **24**

1. See [2004] 122 Comp Cas 161 (SC).
2. See page 183 of 122 Comp Cas.
3. Here printed in italics.
4. See [2004] 122 Comp Cas 696 (SC).
5. See page 716 of 122 Comp Cas.

> *"The object of prescribing a qualifying percentage of shares in petitioners and their supporters to file petitions under sections 397 and 398 is clearly to ensure that frivolous litigation is not indulged in by persons who have no real stake in the company*. However, it is of interest that the English Companies Act contains no such limitation. What is required in these matters is a broad commonsense approach. *If the court is satisfied that the petitioners represent a body of shareholders holding the requisite percentage, it can assume that the involvement of the company in litigation is not lightly done* and that it should pass orders to bring to an end the matters complained of and not reject it on a technical requirement. Substance must take precedence over form. Of course, there are some rules which are vital and go to the root of the matter which cannot be broken. There are others where non-compliance may be condoned or dispensed with. In the latter case, the rule is merely directory provided there is substantial compliance with the rules read as a whole and no prejudice is caused (see *Pratap Singh* v. *Shri Krishna Gupta*, AIR 1956 SC 140). In our judgment, section 399(3) and regulation 18 have been substantially complied with in this case." (emphasis[1] supplied)

In the instant case, considering on the anvil of aforesaid decisions, we are satisfied that respondent No. 1, as pleaded by him, had nothing to do with the affairs of the company and he is not a registered owner. The rights in estate/shares, if any, of respondent No. 1 are protected in the civil suit. Thus, we are satisfied that respondent No. 1 does not represent the body of shareholders holding requisite percentage of shares in the company, necessary in order to maintain such a petition.

25 It is also not disputed that the High Court in the pending civil suit passed an order maintaining the status quo concerning shareholding and other properties. Because of the status quo order, shares have to be held in the name of Mrs. Aruna Oswal until the suit is finally decided. It would not be appropriate given the order passed by the civil court to treat the shareholding in the name of respondent No. 1 by the National Company Law Tribunal before ownership rights are finally decided in the civil suit, and propriety also demands it. The question of right, title, and interest is essentially adjudication of civil rights between the parties, as to the effect of the nomination decision in a civil suit is going to govern the parties' rights. It would not be appropriate to entertain these parallel proceedings and give waiver as claimed under section 244 before the civil suit's decision. Respondent No. 1 had himself chosen to avail the remedy of civil suit, as

1. Here printed in italics.

such filing of an application under sections 241 and 242 after that is nothing but an afterthought.

Learned senior counsel for the appellants argued that respondent No. 1, **26**
a disgruntled son disowned by family, settled in Australia for the last 25-30 years. He admittedly did not have anything to do with the affairs of the company. On the other hand, it was vigorously argued by Mr. Siddhartha Dave, learned senior counsel appearing for the respondent, that owing to the rampant COVID-19 pandemic, respondent No. 1 is in Dubai. Be that as it may. Merely disowning a son by late father or by the family, is not going to deprive him of any right in the property to which he may be otherwise entitled in accordance with the law. The pertinent question needs to be tried in a civil suit and adjudicated finally, it cannot be decided by the National Company Law Tribunal in proceedings in question. Hence, we refrain from deciding the aforesaid question raised on behalf of the appellants in the present proceedings. In the facts and circumstances, it would not be appropriate to permit respondent No. 1 to continue the proceedings for mismanagement initiated under sections 241 and 242, that too in the absence of having 10 per cent. shareholding and firmly establishing his rights in civil proceedings to the extent he is claiming in the shareholding of the companies.

We refrain to decide the question finally in these proceedings concern- **27**
ing the effect of nomination, as it being a civil dispute, cannot be decided in these proceedings and the decision may jeopardise parties' rights and interest in the civil suit. With regard to the dispute as to right, title, and interest in the securities, the finding of the civil court is going to be final and conclusive and binding on parties. The decision of such a question has to be eschewed in instant proceedings. It would not be appropriate, in the facts and circumstances of the case, to grant a waiver to the respondent of the requirement under the proviso to section 244 of the Act, as ordered by the National Company Law Appellate Tribunal.

It prima facie does not appear to be a case of oppression and mismanagement. Our attention was drawn by learned senior counsel appearing for respondent No. 1 to certain company transactions. From transactions simpliciter, it cannot be inferred that it is a case of oppression and mismanagement. **28**

We are of the opinion that the proceedings before the National Com- **29**
pany Law Tribunal filed under sections 241 and 242 of the Act should not be entertained because of the pending civil dispute and considering the minuscule extent of holding of 0.03 per cent., that too, acquired after filing a civil suit in company securities, of respondent No. 1. In the facts and

circumstances of the instant case, in order to maintain the proceedings, the respondent should have waited for the decision of the right, title and interest, in the civil suit concerning shares in question. The entitlement of respondent No. 1 is under a cloud of pending civil dispute. We deem it appropriate to direct the dropping of the proceedings filed before the National Company Law Tribunal regarding oppression and mismanagement under sections 241 and 242 of the Act with the liberty to file afresh, on all the questions, in case of necessity, if the suit is decreed in favour of respondent No. 1 and shareholding of respondent No. 1 increases to the extent of 10 per cent. required under section 244. We reiterate that we have left all the questions to be decided in the pending civil suit. Impugned orders passed by the National Company Law Tribunal as well as the National Company Law Appellate Tribunal are set aside, and the appeals are allowed to the aforesaid extent. We request that the civil suit be decided as expeditiously as possible, subject to co-operation by respondent No. 1. Parties to bear their costs as incurred.

[2020] 221 Comp Cas 394 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — PRINCIPAL BENCH]

ANURAG GUPTA[1]

v.

B. K. EDUCATIONAL SERVICES P. LTD.

M. M. KUMAR C. J. (RETD.) ***(President)*** and
S. K. MOHAPATRA ***(Technical Member)***

October 10, 2019.

HF ▸ Petitioner

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—FINANCIAL CREDITOR—DEFINITION—PROMOTER WHO PAID DUES OF COMPANY UNDER A RESOLUTION PASSED BY ITS BROAD OF DIRECTOR—CAN FILE PETITION AS FINANCIAL CREDITOR ON FAILURE BY COMPANY REPAY AMOUNT SO PAID—VIOLATION OF PROVISIONS OF COMPANIES ACT, 1956 OR COMPANIES ACT, 2013 IN CAPACITY AS DIRECTOR NOT MAKE ANY DIFFERENCE—INSOLVENCY RESOLUTION PROCEEDINGS DIFFERENT FROM PROCEEDINGS UNDER THESE ENACTMENTS—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 5(8), 7.

1. This order has been affirmed by the National Company Law Appellate Tribunal : see [2020] 221 Comp Cas 402 (NCLAT) *infra*.—Ed.

The petitioner filed a petition under section 7 of the Insolvency and Bankruptcy Code, 2016, with a prayer to initiate the corporate insolvency resolution process in respect of the corporate debtor on the ground that it had failed to repay its debt. It was contended that the petitioner had disbursed a total amount of Rs. 20,46,500 to the corporate debtor in his capacity as the director of the company in pursuance of the resolution passed by the company in the meeting of board of directors. The corporate debtor filed an application contending that the petitioner and his family had abused the process of newly enacted Code by wearing a cloak of a "financial creditor" after he and his family members were forced to resign as directors and shareholders of the company on June 27, 2016 and that the proceedings had been initiated with mala fide and malicious intent and the application filed under sections 65 and 75 of the Code warranted to be accepted by imposing maximum penalty on the petitioner :

Held, *admitting the petition, (i) that a promoter or shareholder or director of the company could also be its creditor. The petitioner as a director had a status different than that of the creditor and he had invoked his status as creditor of the corporate debtor. Therefore the amount claimed by the creditor was a "financial debt" within the meaning of the Code. He had also placed on record the bank statements that showed that the transactions had been made by him in favour of the Greater Noida Industrial Development Authority on behalf of the corporate debtor in terms of the resolution passed by the board of directors in its meeting dated September 1, 2015. The balance-sheets for the years ending 2015, 2016 and 2017 depicted borrowings from the directors, shareholders and related parties under the heading "short-term borrowings" to the tune of more than Rs. 9 crores. Even otherwise there was overwhelming evidence placed on record to show that the amount as claimed "due and payable" was disbursed by the petitioner to the Authority on behalf of the corporate debtor. The financial creditor had disbursed money to the corporate debtor and the corporate debtor had committed default in repayment of the outstanding financial debt which exceeded the statutory limit of rupees one lakh. Thus, the petition warranted admission as it was complete in all respects.*

Shailesh Sangani *v.* Joel Cardoso [2019] 7 Comp Cas-OL 207 (NCLAT) *relied on.*

(ii) That the Regional Director in his report dated March 18, 2019 had stated that the petitioner was guilty of certain acts of indiscretion and recorded preliminary findings on the basis of inspection of books of account and other records. He had concluded that there were certain violations under the

Companies Act, 1956 and the Companies Act, 2013. Any violation of the provisions of these enactments and various violations by the petitioner in his capacity as director would not make any difference. The admission of the petition was not to prejudice those proceedings. Therefore, there was no substance in the argument that the petition had been filed with oblique motive particularly when the amount deposited by the petitioner had not been disputed as it was fully supported by the resolution passed by the company.

SHAILESH SANGANI *v.* JOEL CARDOSO [2019] 7 Comp Cas-OL 207 (NCLAT) (para 10) *referred to.*

C. P. No. IB-422(PB) of 2018.

Ashish Dholakia, Rohan Chawla with *Anurag Gupta* for the petitioner.

ORDER

The order of the Bench was delivered by

1 M. M. KUMAR C. J. (RETD.) ***(President)***.—The petitioner claiming to be financial creditor has filed the instant petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity "the Code") read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity "the Rules") with a prayer to trigger corporate insolvency resolution process in respect of the respondent-M/s. B. K. Educational Services P. Ltd. (for brevity the "corporate debtor").

2 The corporate debtor-M/s. B. K. Educational Services P. Ltd., was incorporated on April 1, 2005 under the provisions of the Companies Act, 1956. The identification number of the corporate debtor given is CIN U80301DL2005PTC134622.

3 It is submitted by the petitioner that it had disbursed a total amount of Rs. 20,46,500 to the respondent-company in its capacity as the director of the said company in pursuance of the resolution passed by the company in the meeting of board of directors dated September 1, 2015. The said resolution reads as under :

> "Resolved that, as the company is in deep financial trouble, because of non-availability of funds for payments to GNIDA and for continuing construction, hence the directors of the company be and are hereby authorized to take/introduce necessary unsecured loans from shareholders, directors as well as relatives/related parties.
>
> Resolved further that, the said loan shall be used to clear the overdue amount of Greater Noida Industrial Development Authority and to continuing construction of school building. That the amounts

introduced/taken will be returned along with interest at 12 per cent., which is lower than the rate of interest being charged by Greater Noida Industrial Development Authority.

Resolved further that, any such amount of loans obtained by the company shall be returned back soon after obtaining loans from financial institutions or by June 30, 2016.

Resolved further, Smt. Kumkum Varshney, director of the company is authorised to give or sign any acknowledgment, confirmation, promise, letter of authority, or guarantee in relation to any payment/ repayment and it will be binding on company."

4 The precise case of the petitioners is that the total amount in default due and payable by the corporate debtor is Rs. 20,46,500. The petitioner has also attached a computation of the amount disbursed along with the dates of default when the amount became due and payable.

5 The financial creditor has proposed the name of Mr. Debashis Nanda as the insolvency professional with the address C-304, Paradise Apartments, 40, I. P. Extension, Delhi-110 092. His registration number is IBBI/IPA-003/ IP-N00040/2017-18/10316. He has filed his written communication as per the requirement of rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration (pages 34-36).

6 In Part IV of the petition, the financial creditor has given the details of the total amount of the financial debt along with the dates of disbursement. In column 2 of Part IV of the petition the financial creditor has given the details of the amount claimed in default and the date of the default.

7 In Part V of the petition the financial creditor has mentioned the particulars of the documents and records that substantiate that the amount claimed was disbursed which includes the statement of account maintained with the financial creditors, photocopies of the bank statements of both the financial creditor and the corporate debtor, photocopies of the payments made to GNIDA and the statement of account maintained with the corporate debtor.

8 A reply to the petition has been filed by one Mr. Mukesh Aggarwal, being the director of the respondent-corporate debtor, who has been given authority vide board resolution dated August 6, 2018 and also a rejoinder to the reply has been filed by the petitioner-financial creditor.

9 In the reply the respondent-corporate debtor has raised a preliminary objection to the maintainability of the petition and has questioned the material facts based on which the petition is filed. On that basis it is sought

to be argued that the amount claimed to be in default is not a "financial debt" within the meaning of section 5(8) of the Code.

10 The petitioners have out rightly denied the assertion of the corporate debtor and have placed reliance on the judgment of the hon'ble Appellate Tribunal in the case of *Shailesh Sangani* v. *Joel Cardoso* [2019] 7 Comp Cas-OL 207 (NCLAT) ; [2019] SCC Online NCLAT 52 where it held as under (page 212 of 7 Comp Cas-OL) :

> "A plain look at the definition of 'financial debt' brings it to fore that the debt along with interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of 'financial debt'. The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of section 5(8) embody the nature of transactions which are included in the definition of 'financial debt'. It includes money borrowed against the payment of interest. Clause (f) of section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement It is manifestly dear that money advanced by a promoter, director or a shareholder of the corporate debtor as a stakeholder to improve financial health of the company and boost its economic prospects, would have the commercial effect of borrowing on the part of corporate debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a company may at times feel the heat of resource crunch and the stakeholders like promoter, director or a shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long-term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the company. Enhancement of assets, increase in production and the growth in profits, share value or equity ensures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with

obligation on the part of company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the company is in the nature of a 'financial debt'."

A perusal of the aforesaid paragraph from the judgment of the Appellate Tribunal shows that a promoter/shareholder/director of the company can also be its creditor. It is therefore evident that the petitioner as a director has a status different than that of the creditor. In the present proceedings the petitioner has invoked his status as one of the creditor of the respondent-company.

Therefore the amount claimed by the petitioner is a "financial debt" within the meaning of the Code. The petitioner has also placed on record the bank statements that show that the transactions have been made by him in favour of the Greater Noida Industrial Development Authority (GNIDA) on behalf of the company as per the resolution passed by the board of directors in its meeting dated September 1, 2015. The copies of the balance-sheets filed for the years ending 2015, 2016 and 2017 depict borrowings from the directors, shareholders and related parties under the heading "short-term borrowings" to the tune of more than Rs. 9 crores. Even otherwise there is overwhelming evidence placed on record to show that the amount as claimed "due and payable" was disbursed by the petitioner to the GNIDA on behalf of the respondent-company. **11**

As a sequel to the aforesaid discussion and the material placed on record it is confirmed that the petitioner-financial creditor had disbursed money to the respondent-corporate debtor. It is accordingly held that the respondent-corporate debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of rupees one lakh. Thus, the petition warrants admission as it is complete in all respects. **12**

Learned counsel for the petitioner has argued that all requirements of section 7 of the Code for initiation of corporate insolvency resolution process stand fulfilled and accordingly the present petition is admitted. **13**

Having heard learned counsels for the financial creditor and corporate debtor and having perused the paper book with their able assistance we find that the provisions of section 7(2) and (5) of the IBC have been complied as discussed in detail in our order dated November 27, 2018 rendered in the of *ECL Finance Ltd.* v. *Digamber Buildcon P. Ltd.* (I. B. No. 1039(PB) of 2018). **14**

After a conjoint reading of the aforesaid provision along with rule 4(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application **15**

under sub-section (2) of section 7 is complete. The name of the IRP has been proposed and there are no disciplinary proceedings pending against the proposed interim resolution professional.

16 As a sequel to the above discussion, this petition is admitted and Mr. Debashis Nanda is appointed as the interim resolution professional.

17 In pursuance of section 13(2) of the Code, we direct that interim insolvency resolution professional shall immediately (3 days) make public announcement with regard to admission of this application under section 7 of the Code.

18 We also declare a moratorium in terms of section 14 of the Code. It is made clear that the provisions of the moratorium are not to apply to transactions which might be notified by the Central Government and a surety in a contract of guarantee to a corporate debtor. Additionally, the supply of essential goods or services to the corporate debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

19 We direct the financial creditor to deposit a sum of Rs. 2 lakhs with the interim resolution professional to meet out the expenses to perform the functions assigned to him in accordance with regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the financial creditor. The amount however be subject to adjustment by the committee of creditors as accounted for by interim resolution professional and shall be paid back to the financial creditor.

20 Directions are also issued to the ex-management to provide all documents in their possession and furnish every information in their knowledge within a period of one week from the admission of the petition to the IRP, otherwise coercive steps to follow.

21 There is a general complaint received against the financial creditors, banks, NBFCs and asset reconstruction companies that the amount claimed by them is far more than what is owed by the corporate debtor to them. Many a times the rate of interest is alleged to be exorbitant and allegations are levelled that a penal interest compounded monthly has been charged. We have no mechanism of rectification of claims made. However, the RPs ordinarily have professionals and experts at their disposal and in

case the ex-management raises any such issue then the RP must get it settled in order to avoid any injustice to the corporate debtor.

22 The office is directed to communicate a copy of the order to the financial creditor, the corporate debtor and the interim resolution professional at the earliest but not later than seven days from today. The petitioner is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the Registrar of Companies for updating the master data. The Registrar of Companies shall send compliance report to the Registrar, National Company Law Tribunal.

23 Before parting we may notice C. A. Nos. 1139(PB) of 2019 and 662(PB) of 2019 filed by the respondent-company by alleging that the petitioner along with his family has abused the process of newly enacted Insolvency and Bankruptcy Code, 2016 by wearing a cloak of a "financial creditor" after he and his family members were forced to resign as the directors/ shareholders of the company on June 27, 2016. The allegation is that the present proceedings have been initiated with mala fide and malicious intent and the application filed under sections 65 and 75 of the Code warrants to be accepted by imposing maximum penalty on the petitioner.

24 The respondent has asserted that the corporate debtor was incorporated in 2005 and has given the details of the shares and shareholding pattern from April 1, 2005 till date. It is also averred that the mother of the petitioner was the sole shareholder holding 100 per cent. equity of the corporate debtor from September 28, 2012 to June 30, 2016 which is dubbed as illegal as minimum 2 shareholders are required to form a private company under the Companies Act. The petitioner transferred these 100 per cent. shares to his mother with mala fide intention to keep the control of the company in his hands. As a matter of fact shares were purchased by Mr. Mukesh Aggarwal and Mrs. Sunita Aggarwal from Ms. Pradeep Kaur and Mr. Gurinder Singh. The transfer deeds have been placed on record. It however remains undisputed that during May 19, 2005 to June 27, 2016 e-form were filed by the petitioner himself as every e-form contained his e-mail id or the company's e-mail id. There are many other allegations made in the application.

25 It is true that the Regional Director in its report dated March 18, 2019 has held that the petitioner is guilty of certain acts of indiscretion by recording the preliminary findings on the basis of inspection of books of account and other records. It has been concluded that there are certain violations in respect of sections 220 and 159 of the Companies Act, 1956 and section 253/152(3) of the Companies Act, 1956/2013 and further.

26 The issue before this Tribunal is whether the petitioner has advanced loan to the respondent-company (in his capacity as a creditor) which has remained unpaid. If the loan advanced has not been paid then default has occurred. Therefore, any violation of the provisions of the Companies Act, 1956/2013 would not make any difference and in his capacity as a director the consequences of various violations would be faced by the petitioner. The admission of the present petition is not to prejudice those proceedings and the same shall remain intact. Therefore we are unable to find any substance in the argument that petition has been filed with oblique motive particularly when the amount deposited by the petitioner has not been disputed as it is fully supported by the resolution passed by the company. The objection raised is therefore rejected.

[2020] 221 Comp Cas 402 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

MUKESH KUMAR AGARWAL

v.

ANURAG GUPTA AND ANOTHER

VENUGOPAL (M.) J. *(Judicial Member),* **V. P. SINGH** and **SHREESHA MERLA** *(Technical Members)*

June 8, 2020.

HF ▸ Respondent

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—FINANCIAL DEBT—DEFINITION—AMOUNT DISBURSED ON BEHALF OF CORPORATE DEBTOR BY ITS DIRECTOR TO EASE ITS LIQUIDITY CRUNCH, IMPROVE ITS ECONOMIC PROSPECTS AND TO SAVE ALLOTMENT OF PLOT—FELL WITHIN DEFINITION OF "FINANCIAL DEBT"—DISBURSEMENT OF AMOUNT NOT DISPUTED—AMOUNT NOT REPAID—ADMISSION ORDER AFFIRMED—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 5(8), 7.

The respondent disbursed a total amount of Rs. 20,46,500 on account of the company in his capacity as its director in pursuance of a resolution passed by the company in the meeting of the board of directors. The Adjudicating Authority admitted the petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016, filed by the respondent. On appeal from the order the company contended that the amount claimed in default was not a "financial debt" within the meaning of section 5(8) of the Code :

Held, *dismissing the appeal, that the creditor had advanced various sums to the corporate debtor to ease its liquidity crunch, thereby improving its economic prospects and to save the allotments by making direct payment to the Greater Noida Industrial Development Authority for the plot allotted in the name of corporate debtor. The amount deposited by the creditor fell within the ambit of "financial debt". Admittedly, the amount had not been paid back, and there was a default. Consequently, the Adjudicating Authority had admitted the petition filed under section 7 of the Code.*

LAKSHMI (B. V. S.) (DR.) *v.* GEOMETRIX LASER SOLUTIONS P. LTD. [2018] 3 Comp Cas-OL 61 (NCLAT) *distinguished*.

SHAILESH SANGANI *v.* JOEL CARDOSO [2019] 7 Comp Cas-OL 207 (NCLAT) *relied on*.

Order of the National Company Law Tribunal in ANURAG GUPTA *v.* B. K. EDUCATIONAL SERVICES P. LTD. [2020] 221 Comp Cas 394 (NCLT) *affirmed*.

Cases referred to :

Anurag Gupta *v.* B. K. Educational Services P. Ltd. [2020] 221 Comp Cas 394 (NCLT) (para 1)

Innoventive Industries Ltd. *v.* ICICI Bank [2017] 205 Comp Cas 57 (SC) (para 9)

Lakshmi (B. V. S.) (Dr.) *v.* Geometrix Laser Solutions P. Ltd. [2018] 3 Comp Cas-OL 61 (NCLAT) (para 8)

Shailesh Sangani *v.* Joel Cardoso [2019] 7 Comp Cas-OL 207 (NCLAT) (paras 7, 11)

Company Appeal (AT) (Insolvency) No. 1264 of 2019.

Swapnil Gupta and *Rudrajit Ghosh* for the appellant.

Rohan Chawla for respondent No. 1.

Syed Sarfaraz Karim for respondent No. 2.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

V. P. SINGH ***(Technical Member)***.—This appeal emanates from the order passed by the Adjudicating Authority/National Company Law Tribunal, Principal Bench, New Delhi, in C. P. No. IB-422(PB) of 2018, dated October 10, 2019—(*Anurag Gupta* v. *B. K. Educational Services P. Ltd.* [2020] 221 Comp Cas 394 (NCLT)) whereby the Adjudicating Authority has admitted the application filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short "I and B Code"), against the "corporate 1

debtor" M/s. B. K. Educational Services P. Ltd. The parties are represented by their status in the company petition for the sake of convenience.

2 Brief facts of the case are as follows :

The appellant contends that respondent No. 1 has filed the present insolvency petition only to wriggle out of the repayment obligations to the appellant under the memorandum of understanding dated January 27, 2016. The abovementioned memorandum of understanding was entered into between the appellant and his wife on one side, and respondent No. 1/his mother on the other. The memorandum of understanding provides that respondent No. 1/his mother are jointly liable to repay the aggregate amount of Rs. 20.5 crores to the appellant and his wife. It further provides that the appellant and his wife were to hold 90 per cent. shares of respondent No. 2 as security for repayment of the amount above.

It is submitted that the petitioner had disbursed a total amount of Rs. 20,46,500 to the respondent-company in its capacity as the director of the said company in pursuance of the resolution passed by the company in the meeting of board of directors dated September 1, 2015. The said resolution provides that since the company is in deep financial trouble, because of non-availability of funds for payments to Greater Noida Industrial Development Authority (in short "GNIDA") and continuing construction, hence the directors of the company are authorised to take necessary unsecured loans from shareholders, directors as well as relatives/related parties. It was further resolved that the said loan shall be used to clear the overdue amount of GNIDA and to continue construction of school building. The amounts taken will be returned along with interest at 12 per cent., which is lower than the rate of interest being charged by GNIDA. It was further resolved that any amount of loans obtained by the company shall be returned soon after receiving loans from the financial institutions or by June 30, 2016.

3 In reply filed by one Mr. Mukesh Aggarwal, the director of the respondent-corporate debtor it contends that the amount claimed in default is not a "financial debt" within the meaning of section 5(8) of the Code. The Adjudicating Authority erred in treating the amount claimed by the petitioner as a "financial debt", within the meaning of the Code. The Adjudicating Authority has further observed that the petitioner has also placed on record the bank statements which show that the transactions have been done by him in favour of GNIDA, on behalf of the company, in terms of the resolution passed by the board of directors in its meeting dated September 1, 2015.

There is other reliable evidence placed on record to show that amount as claimed "due and payable", was disbursed by the petitioner to the GNIDA on behalf of the respondent-company. It is further observed by the learned Adjudicating Authority that the petitioner-financial creditor had paid money to the respondent-corporate debtor and the corporate debtor has committed default in repayment of the outstanding "financial debt" which exceeds the statutory limit of rupees one lakh. The Adjudicating Authority further observed that since the application under section 7 is complete and all the requirements of section 7 of the Code for initiation of corporate insolvency resolution process stands fulfilled accordingly, the petition got admitted. 4

The appeal is filed mainly on the ground that the Adjudicating Authority erred in holding that the amount claimed from respondent No. 2 to respondent No. 1 is in the nature of loan ; the Adjudicating Authority has failed to consider that these amounts were conveniently paid at a time when respondent No. 1/his family was in complete control of the affairs of respondent No. 2 ; the Adjudicating Authority has further failed to consider that the purported board resolution dated September 1, 2015, which allegedly authorised the board of the appellant to secure loans from respondent No. 1 is a forged and fabricated document ; the Adjudicating Authority has failed to consider that respondent No. 1 has been unable to disclose any default whatsoever ; the Adjudicating Authority has further failed to find that respondent No. 1 had entered into a binding memorandum of understanding dated January 27, 2016 whereunder the shares of respondent No. 2 were transferred to the present shareholders as security for the repayment of Rs. 20.5 crores by the respondent No.1 to the current shareholders ; the memorandum of understanding is a conclusive record of all the repayment obligations inter se the parties, the said Rs. 20.5 crores is payable by respondent No. 1 and no amounts are due and payable to respondent No. 1 ; the Adjudicating Authority has failed to consider that respondent No. 1 has preferred the present petition for evidence of repayment obligations under the memorandum of understanding ; respondent No. 2 neither owes any amount to respondent No. 1 nor has defaulted in any manner in any repayment obligations. 5

Heard the arguments of learned counsel for the parties and perused the records. 6

The Adjudicating Authority has admitted the petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 by treating the alleged debt as financial debt based on the judgment of this Tribunal in case of *Shailesh Sangani* v. *Joel Cardoso* [2019] 7 Comp Cas-OL 207 (NCLAT) ; [2019] SCC 7

Online NCLAT 52 and noted that the promoter/shareholder/director of the company could also be its creditor. The petitioner, as director has a status different than that of the creditor. In the instant case, the petitioner has invoked the provision of the Code as one of the creditors of the respondent company, and the amount claimed by the petitioner is a "financial debt" within the meaning of the Code. The petitioner contends that the bank statements reveal that the transactions have been made by him in favour of GNIDA on behalf of the company, given the resolution plan passed by the board of directors in its meeting dated September 1, 2015. The copies of the balance-sheets filed for the years ending 2015, 2016 and 2017 depict the borrowings from directors, shareholders and related parties under the heading "short-term borrowings" to the tune of Rs. 9 crores. The record is sufficient to show that the amount as claimed by the applicant is "due and payable", which was disbursed by the petitioner to GNIDA on behalf of the respondent company and based on the above the Adjudicating Authority has admitted the petition.

8 The appellant has assailed the impugned order passed by the Adjudicating Authority on the basis that the alleged debt does not fall under the definition of "financial debt" as defined under section 5(8)(f) of the Code. The appellant has placed reliance on the order passed by this Appellate Tribunal passed in Company Appeal No. 38 of 2017 *Dr. B. V. S. Lakshmi* v. *Geometrix Laser Solutions P. Ltd.* [2018] 3 Comp Cas-OL 61 (NCLAT).

9 In the case mentioned above, the three Member's Bench of this Tribunal has noted that (page 66 of 3 Comp Cas-OL) :

> "The amount as reflected in the earlier balance-sheet of the company merely describes certain 'unsecured loan' being payable to the appellant as on March 31, 2014. The respondent-company has already placed on record the auditor certificate, which categorically states that no amount is due and payable to the appellant. Further, the auditor balance-sheet of the respondent company as on March 31, 2017 also nowhere reflects any amount being due and payable to the appellant either as a 'financial debt' or as an unsecured loan. The qualification of the auditor in the balance-sheet of the respondent company as on March 31, 2016 also categorically states that in absence of any document pertaining to approval of any loan taken, interest erroneously paid on account of an alleged loan given by the appellant herein is not to be provided and accounted for.
>
> Learned counsel for the respondent relied on decision of the hon'ble Supreme Court in *Innoventive Industries Ltd.* v. *ICICI Ban*k [2017] 205 Comp Cas 57 (SC) ; [2017] SCC Online SC 102, and

submitted that the Adjudicating Authority has to be satisfied as to existence of a default. The term 'default' has been defined in section 3(12) of the 'I and B Code'. For the purpose of ascertainment of default, it is imperative to point out the date and time when the alleged debt has become due and payable. A debt may not be due, if it is not payable in law or in fact. In the instant case, no debt is due as nothing is payable to the appellant in law or in fact. Admittedly, the appellant has not stated any date on which the alleged debt became due and payable."

10 In the case mentioned above, this Tribunal has noticed that the appellant has failed to establish that there has been disbursement against consideration of time value and money. The amount, as reflected in the balance-sheet of the company merely describes certain 'unsecured loans' being payable to the appellant whereas the auditor certificate states that no amount is due and payable to the appellants. In the circumstances, this Tribunal has rejected the contention of the appellant and held that the appellant has failed to show that the amount has been raised by the respondent under any other transaction, such as sale or purchase agreement, having the commercial effect of borrowing.

11 Thus, the above case law does not apply to the facts of the present case. In the instant case, respondent No. 1 has advanced various sums to the corporate debtor-B. K. Educational Services to ease its liquidity crunch, thereby improving its economic prospects and to save the allotments by making direct payment to the GNIDA for the plot allotted in the name of the corporate debtor. The paragraph 6 of the judgment in *Shailesh Sangani* v. *Joel Cardoso* [2019] 7 Comp Cas-OL 207 (NCLAT) ; [2019] SCC Online NCLAT 52 of this Tribunal it is held that the monies advanced by a director to improve the financial health of the company would have the commercial effect of borrowing even if no interest is claimed on the same.

12 Thus the amount deposited by respondent No. 1 in the account of GNIDA to save the corporate debtor on account of financial crunch to save the allotment made in the name of corporate debtor falls within the ambit of "financial debt". Admittedly, the amount has not been paid back, and there is a default. Consequently, the Adjudicating Authority had admitted the petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016. In the circumstance, as stated above, we do not find any justification for interfering with the impugned order. Therefore the appeal is dismissed. No order as to costs.

[2020] 221 Comp Cas 408 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — CHENNAI BENCH]

S. P. VELUMANI AND ANOTHER[1]

v.

MAGNUM SPINNING MILLS INDIA P. LTD. AND OTHERS

CH. MOHD. SHARIEF TARIQ ***(Judicial Member)***

July 11, 2019.

HF ▶ Respondent

OPPRESSION AND MISMANAGEMENT—MISMANAGEMENT—DECISION OF BOARD TO AUTHORISE ANY TWO DIRECTORS TO OPERATE BANK ACCOUNT—NOT A CASE OF MISMANAGEMENT CALLING FOR INTERFERENCE—COMPANIES ACT, 2013, SS. 241, 242.

OPPRESSION AND MISMANAGEMENT—OPPRESSION—ARTICLES OF ASSOCIATION—ARTICLES OF COMPANY PROVIDING THAT ANY PERSON WHETHER A MEMBER OR NOT MAY BE APPOINTED AS DIRECTOR AND NO QUALIFICATION BY WAY OF SHAREHOLDING REQUIRED—TRIBUNAL CANNOT COMPEL COMPANY TO IMPLEMENT PROPORTIONATE REPRESENTATION TO SHAREHOLDERS ON BOARD OF DIRECTORS—COMPANIES ACT, 2013, SS. 241, 242.

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—CONSTRUCTION ON GOVERNMENT LAND WITHOUT APPROVAL OF COMPETENT AUTHORITY—ISOLATED ACT NEED NOT BE INQUIRED INTO—COMPANIES ACT, 2013, SS. 241, 242.

OPPRESSION AND MISMANAGEMENT—MISMANAGEMENT—BAD DEBTS WRITTEN OFF—COMMERCIAL DECISION—NEED NOT BE INTERFERED WITH—COMPANIES ACT, 2013, SS. 241, 242.

On a petition filed under sections 241 and 242 of the Companies Act, 2013 :

Held, *on the facts, (i) that the Tribunal would not interfere with the decision of the board by which any two of the directors had been authorised to operate the bank accounts of the company.*

SUDHA M. SINGH (SMT.) *v.* EAGLE CONES P. LTD. [2000] 1 Comp LJ 289 (CLB) *and* UPPER INDIA STEEL MANUFACTURING AND ENGINEERING CO. LTD. *v.* GURLAL SINGH GREWAL MANU/NL/0164/2017 *relied on.*

1. This order has been affirmed by the National Company Law Appellate Tribunal : see [2020] 221 Comp Cas 424 (NCLAT) *infra*.—Ed.

(ii) That the articles of the company provided that any person whether a member of the company or not, might be appointed as director of the company and no qualification by way of shareholding should be required from any director. In the absence of any provision in the articles of association or shareholders agreement, the company could not be forced to have a proportionate representation of the shareholders or their nominees on the board.

(iii) That the petitioners had not placed any evidence on record to prove the construction of buildings or superstructures on Government land was without any approval of the board of directors and the competent authorities. Moreover, the act complained of was an isolated act, which need not be inquired into.

(iv) That the decision of the board of directors to write off the bad debt was a commercial decision, which did not warrant any judicial interference. Moreover, a single act of financial mismanagement did not have continuous effect, which was necessary for relief under these provisions, though it could cause a short-term diminution in share value.

RAVISHANKAR PRASAD (A.) *v.* PRASAD PRODUCTIONS P. LTD. [2007] 135 Comp Cas 416 (CLB) *and* RUTHERFORD, *In re* [1994] BCC 876 *relied on*.

Cases referred to :

Francis Cleetus (Dr.) *v.* Rashtra Deepika Ltd. [2013] 178 Comp Cas 206 (CLB) (para 47)

Mani (K. R. S.) *v.* Anugraha Jewellers Ltd. [2005] 126 Comp Cas 878 (Mad) (para 46)

Ravishankar Prasad (A.) *v.* Prasad Productions P. Ltd. [2007] 135 Comp Cas 416 (CLB) (para 49)

Sudha M. Singh (Smt.) *v.* Eagle Cones P. Ltd. [2000] 1 Comp LJ 289 (CLB) (para 46)

Upper India Steel Manufacturing and Engineering Co. Ltd. *v.* Gurlal Singh Grewal MANU/NL/0164/2017 (para 46)

Rao (V. M.) *v.* Rajeswari Ramakrishnan [1987] 61 Comp Cas 20 (Mad) (para 46)

Rutherford, *In re* [1994] BCC 876 (para 49)

C. P. No. 17 of 2017.

Mrs. Manjula Devi, M. K. Preetha and *Dr. K. S. Ravichandaran*, Practising Company Secretary for the petitioners.

R. Vidayashankar and *R. Ashok Kumar* for the respondents.

ORDER

1 CH. MOHD SHARIEF TARIQ ***(Judicial Member)***.—Company Petition No. 17 of 2017 has been filed under sections 241 and 242 and other applicable provisions of the Companies Act, 2013, there are two petitioners and eight respondents including the first respondent-company, viz., M/s. Magnum Spinning Mills India P. Ltd. The first respondent-company was incorporated on October 29, 2010, under the Companies Act, 1956 having its registered office at SF No. 355, Varuthampatti Chinna Goundanoor Sankari, Salem-637 303, Tamil Nadu. Respondents Nos. 2 to 6 are the first directors of the first respondent-company and respondents Nos. 7 and 8 are also the directors of the first respondent-company.

2 The authorised share capital of the first respondent-company is Rs. 15,00,00,000 (rupees fifteen crores only) consisting of 15,00,000 (fifteen lakhs only) equity shares of Rs. 100 each. Petitioner No. 1 is a founder promoter and one of the first directors of the company and holds 2,53,730 equity shares aggregating to 19.55 per cent. shares in the capital of the first respondent-company. Petitioner No. 2 is the wife of petitioner No. 1 and holds 30,000 equity shares aggregating to 2.31 per cent. shares in the capital of the first respondent-company. Therefore, the petitioners are satisfying the requirements as prescribed under section 244 of the Companies Act, 2013 for maintaining the present petition.

3 The facts of the case are that the first respondent-company was formed and promoted by petitioner No. 1 and the respondents in the nature of a partnership firm, with specific shares for each group. Ever since the incorporation of the company, petitioner No. 1 has been part of the management of the day-to-day affairs of the company. All the forms and returns filed with the Registrar of Companies were signed and filed by petitioner No. 1.

4 The petitioners have submitted that respondent No. 3 had carried out certain fabricated transactions for making personal gains in wrongful manner. Petitioner No. 1 objected to making payments against such fabricated invoices. The petitioners have also submitted that respondents Nos. 2 to 8 are close relatives. They persuaded the first petitioner not to rake up the issues and allow the payment to the vendors and commission payments thereof. The petitioners have submitted that petitioner No. 1 had released the cheques keeping in mind the paramount interests of the company so that the operations of the company would not suffer.

5 The petitioners have submitted that the statutory auditor of the company informed petitioner No. 1 that the respondents would want a change in the mandate for operating the bank accounts of the company. Petitioner

No. 1 was given a draft of the resolution in which it was pre-typed as if it is a certified copy of a resolution passed on August 22, 2016. The petitioners have submitted that it seems the respondents have allegedly conducted board meeting without giving any notice to the petitioner. Petitioner No. 1 has submitted that he has never received any notice of this board meeting dated August 22, 2016. Such a meeting is per se invalid and it is liable to be set aside.

6 The petitioners have submitted that upon further enquiry with the bank, petitioner No. 1 happened to learn that the directors have submitted to the bank by which any two directors can operate the bank account. Petitioner No. 1 has submitted that by letter dated August 30, 2016, he had conveyed to State Bank of India his objections to any change and he had categorically stated that he was not a party to any resolution. He requested the bank not to honour any instruments and instructions until further notice.

7 The petitioners have submitted that by a letter dated September 9, 2016, the bank has replied to petitioner No. 1 refusing to accede to his request enclosing thereto a copy of what was purportedly a board resolution duly signed by respondents Nos. 2 to 7 and on the top of which paper it is mentioned "Date : August 29, 2016". There was no explanation to any of those pertinent queries. What had transpired between the bank and the respondents is a mystery.

8 The petitioners have submitted that it appears that the respondents had submitted the resolution dated August 22, 2016 to the bank only on August 29, 2016. It is also submitted by the petitioners that the respondents have fabricated the records as though on August 22, 2016 as if the mandate for operating the bank accounts of the company has been changed under the authority of the board.

9 It is further submitted by the petitioners that prior to the alleged board meeting, the power and authorisation to operate the bank accounts was with petitioner No. 1 along with any one of the directors of the first respondent-company. But in the alleged board meeting the mandate for signing the cheques/operating the bank account was modified that any two of the directors can operate the said bank account of the company.

10 The petitioners have submitted that the respondents have not only sidelined petitioner No. 1 from managing the affairs of the company but have played a fraud on him and have also oppressed him. In a closely held company, doing such things behind the back of the petitioner who is a founder promoter and who has been managing the affairs of the company to the best of his ability, constitutes a grave act of oppression and its effect is serious and overwhelming. It is further submitted that without proper notice

to the petitioner the resolution is per se invalid. Any notice of any such meeting would have certainly enabled the petitioner to seek remedies in a manner known to law.

11 The petitioners have alleged that the respondents have cooked up records to show as if there were board meetings and annual general meeting in the year 2016 and have created records to show as if accounts were approved by the board and adopted by the annual general meeting. These acts constitute severe acts of oppression against the rights of the petitioners. It is submitted that the petitioners never received any notice of the annual general meeting allegedly conducted on September 30, 2016 and the petitioners have not received the financial statements also.

12 It is further submitted that though petitioner No. 1 is one of the directors of the company, he has not received any notice of board meeting for approving the financial statements of the company for the financial year 2015-16. As per the financial statements filed with the Registrar of Companies the board meeting was allegedly held on August 22, 2016 in which the financial statement was approved by the board of directors. Therefore, it is submitted that the board meeting allegedly held on August 22, 2016 is illegal, null and void and thus liable to be set aside.

13 The petitioners have submitted that exclusion of petitioner No. 1 in this manner and paving way for indiscriminate use of funds and properties of the company, holding meetings of the board of director and general meetings, passing of accounts and taking major decisions on material matters are series acts of oppression and a reflection of high handedness and arrogance on the part of the respondents. Further, such acts are also acts of mismanagement and continuing such acts will be prejudicial to the interest of the shareholders, creditors and other stakeholders of the company and will also deteriorate the finances' viability and solvencies' of the company in the long run.

14 The petitioners have submitted that in the light of the facts and being a company in the nature of the partnership, concomitant with the stake of the petitioners a proportional representation should be introduced in the composition of board of directors of the company. Presently with 77.5 per cent. stake the respondents have 6 directors, on an average representing 12.90 per cent. Therefore, there are not less than 3 directors who hold 10 per cent. or less and still enjoy a directorship. The petitioners have further submitted that in this situation a proportional representative is an appropriate remedy to operate as a check when the majority control showing tendencies to run the management of the affairs of the company according

to their whims and fancies excluding the petitioners from the management though they are rightfully entitled to the same.

15 The petitioners have submitted that on August 21, 2017, the petitioners have received the notice and agenda of the board meeting dated August 31, 2017 to which petitioner No. 1 sent a letter on August 25, 2017 to the board of directors of the company raising various objections with regard to the meeting.

16 The petitioners have submitted that on August 29, 2017 petitioner No. 1 received a letter from the State Bank of India stating that with reference to the credit facilities sanctioned to the company for which petitioner No. 1 has extended his personal guarantee and properties as collateral, petitioner No. 1 has to sign the recent arrangement letter and other documents. Petitioner No. 1 in his reply to the letter sent by the State Bank of India dated August 29, 2017 objected that the board resolution dated August 22, 2016 is not valid and a case is pending before the National Company Law Tribunal, Chennai Bench challenging the validity of the board meeting held on August 22, 2016 and other allegations against the other directors of the company, therefore, petitioner No. 1 is not inclined to sign the documents until the disposal of the same.

17 The petitioners have submitted that on August 31, 2017 petitioner No. 1 received the seventh annual report of the company along with the notice of the annual general meeting proposed to be held on September 30, 2017. To the shock of petitioner No. 1 the board's report attached with the annual return showed that the board of directors of the company has met 5 times in the financial year April 1, 2016 to March 31, 2017, viz., on June 4, 2016, August 8, 2016, August 22, 2016, December 9, 2016 and January 9, 2017 for which no notices of any of the board meetings was given to petitioner No. 1.

18 The petitioners have submitted that petitioner No. 1 has through e-mail sent his objections to the proposed annual general meeting to be held on September 30, 2017.

19 It is submitted by the petitioners that without considering the objections raised by the petitioners, the respondents conducted the alleged annual general meeting on September 30, 2017 and also filed Form-AOC-4(XBRL) with the Registrar of Companies on October 26, 2017. The respondents have also filed the annual return in Form MGT-7 with the Registrar of Companies on October 21, 2017.

20 The petitioners have submitted that every board meetings and annual general meeting allegedly held during the pendency of the company petition before this hon'ble Bench and every decisions allegedly taken on such

BMs and annual general meetings are liable to be set aside and declared as invalid for the above stated reasons. The petitioners have submitted that the affairs of the company are being conducted not only in a manner oppressive to the petitioners but also prejudicial to the interests of the company and its shareholders.

21 Having stated as above, the petitioners have prayed as follows :

(a) To declare that the respondents have acted in an oppressive manner and have mismanaged the affairs of the company.

(b) To declare that the board meeting allegedly held on August 22, 2016 and resolutions passed threat as invalid, illegal and consequently set aside the proceedings thereof.

(c) To declare the annual general meeting 2016 allegedly held on September 30, 2016 and resolutions passed thereat as invalid and illegal and consequently set aside the proceedings thereof.

(d) To direct signature of petitioner No. 1 as mandatory to operate the bank account of the company.

(e) To direct respondent No. 1 company and respondents to alter the composition of the board of directors giving a proportional representation to the shareholders groups so that each group has a proportional representation ; for instance, if 6 directors represent 77.5 per cent., the petitioners' side would have 2 directors.

(f) To direct the company and the respondents to follow the applicable regulations and secretarial standards with reference to board meetings and general meetings so that the management of the affairs of the company is regulated and conducted in a transparent manner without putting into jeopardy the interest of any shareholders or other stake holders.

(g) To direct the respondents to frame necessary regulations for the purpose of opening and operating the bank accounts of the company in a manner conducive for the day-to-day business needs with due and advance and timely disclosure to all the directors.

(h) To issue such other regulations as may be necessary for the purpose of smooth operations of the company.

(i) To declare that the board meetings alleged to be held for the financial year April 1, 2016 to March 31, 2017, viz., on June 4, 2016, August 8, 2016, August 22, 2016, December 9, 2016 and January 9, 2017 as illegal, invalid, null and void.

(j) To declare that the board meeting of the first respondent-company allegedly held on August 31, 2017 as oppressive, invalid and null and void.

(k) To declare that the annual general meeting of the first respondent-company allegedly held on September 30, 2017 as oppressive, invalid and null and void.

(l) To set aside the forms, statements and returns filed with the Registrar of Companies anything done at the said board and general meeting.

(m) To grant such other relief(s) that this Tribunal may deem fit and proper in the circumstances of this case.

22 Respondent No. 3 has filed counter stating therein that while the petitioners have claimed alleged irregularity in respect of certain payments, the petitioners are estopped from challenging the transaction ex facie, owing to their own admission that they are consenting parties to such transactions. It is submitted that the first petitioner authorized the payments, after perusing and approving the underlying documents.

23 The respondent has further submitted that the mere change in mandate concerning operation of the bank account, that too when any two directors including the petitioner have been authorized to operate the bank account, cannot be categorized as an act of oppression by any stretch of imagination. The grievance complained does not affect the petitioner's character as a member of the company or in other words is not qua shareholder. There is also apparently no lack of probity or fair play and the single isolated act cannot enable maintenance of a company petition.

24 The respondent has also submitted that it is settled law that court will not interfere in affairs relating to internal management of the company. What is impugned in the company petition is merely a change in mandate concerning operation of the bank account of the company. The other allegations are apparently contrived, superfluous, and without any substance. The respondent has further submitted that the hon'ble Tribunal cannot be expected to intervene on a grievance related to the said issue. Legitimate expectation of shareholder cannot be stretched even in the absence of any agreement to stake a claim that all bank account operations should pass only with his signature. A single shareholder cannot override the will of the majority on the issue as to who will operate a bank account of the company. Such legitimate expectation or a right in minority to overrule the majority on such a subject is unknown to law.

25 The respondent has contended that the first petitioner appears to make grievance only because the cotton appears to have been supplied from a station different from the one contracted. The fact remains that the type of cotton contracted and supplied was Shankar 6. It is not even the case of the petitioner that any inferior quality cotton was purchased or that the company suffered any quality claim against the yarn manufactured there from.

In the circumstance, it is apparent that the allegation in this regard is contrived allegation.

26 The respondent has submitted that it is the first petitioner who acted detrimental to the interest of the company by making oral communication to the regular and only main supplier, viz., Grasim Industries Limited, which was supplying the main raw material, viz., viscose fibre and asking them to stop supplying the raw material based on PDC's which was the actual practice of transaction at that point of time. The other six directors of the company had collectively addressed communication dated March 26, 2013 to the said supplier and extended personal and also official commitment to honour the payments based on PDC's issued for supply made and the amounts that may become due to be paid by the company. It is only thereafter the supplies were restored by Grasim Industries Ltd.

27 The respondent has submitted that there is no contractual arrangement or promoters agreement or any article in the articles of association mandating that the petitioner should remain a mandatory signatory to the operation of the bank account of the company. The respondent has further submitted that in the past, such authorization has been given by the board to other directors, excluding the petitioner.

28 It is submitted by the respondent that all the directors, other than the petitioner, felt that the power to operate the bank account cannot be concentrated only in the hands of the petitioner, and that the petitioner as a single shareholder cannot retain a practical veto right in operation of the bank account, but that it should be democratically operated considering the fact that the other shareholders also hold significant stake in the company and that the petitioner was not a majority shareholder. Consequently, the respondents had prepared a written representation seeking a change in such mandate to enable any two directors to operate the bank account. Such representation was prepared in the form of a letter dated August 11, 2016 addressed to the statutory auditor of the company, who was the common professional assisting the company in compliance related issues.

29 It is submitted by respondent No. 3 that a meeting was called on August 22, 2016 to consider the subject and an e-mail was also sent in this regard on August 19, 2016 and received by the petitioner(s). It is further submitted by the respondent that the first petitioner attended such meeting and decision was taken thereat to change the mandate. At such meeting, the mandate for operating the bank account of the company was changed to enable any two directors to operate the accounts, including the first petitioner.

30 The respondent has submitted that the first petitioner is also authorized to sign cheques, etc., and it is the first petitioner, who on his own accord is