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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs.440-441 0F 2020

TATA CONSULTANCY SERVICES LIMITED ... APPELLANT(S)

VERSUS

CYRUS INVESTMENTS PVT. LTD. AND ORS. ... RESPONDENT(S)

WITH

CIVIL APPEAL NOs.13-14 0F 2020
CIVIL APPEAL NOs.442-443 0F 2020
CIVIL APPEAL NOs.19-20 0F 2020
CIVIL APPEAL NOs.444-445 0F 2020
CIVIL APPEAL NOs.448-449 0F 2020
CIVIL APPEAL NOs.263-264 0F 2020
CIVIL APPEAL NO.1802 0F 2020

J U D G M E N T

1. *Lis* in the Appeals

1.1 Tata Sons (Private) Limited has come up with two appeals in Civil Appeal Nos.13-14 of 2020, challenging a final order dated 18-12-2019 passed by the National Company Law Appellate Tribunal ("NCLAT" for short) **(i)** holding as illegal, the proceedings of

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the sixth meeting of the Board of Directors of TATA Sons Limited held on 24.10.2016 in so far as it relates to the removal of Shri Cyrus Pallonji Mistry ("CPM" for short); **(ii)** restoring the position of CPM as the Executive Chairman of Tata Sons Limited and consequently as a Director of the Tata Companies for the rest of the tenure; **(iii)** declaring as illegal the appointment of someone else in the place of CPM as Executive Chairman; **(iv)** restraining Shri Ratan N. Tata ("RNT" for short) and the nominees of Tata Trust from taking any decision in advance; **(v)** restraining the Company, its Board of Directors and Shareholders from exercising the power under Article 75 of the Articles of Association against the minority members except in exceptional circumstances and in the interest of the Company; and **(vi)** declaring as illegal, the decision of the Registrar of Companies for changing the status of Tata Sons Limited from being a public company into a private company.

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1.2 RNT has come up with two independent appeals in Civil Appeal Nos.19-20 of 2020 against the same Order of the NCLAT, on similar grounds.

1.3 The trustees of two Trusts namely Sir Ratan Tata Trust and Sir Dorabji Tata Trust have come up with two independent appeals in Civil Appeal Nos.444-445 of 2020, challenging the impugned order of the Appellate Tribunal. A few companies of the Tata Group, which were referred to in the course of arguments, as the operating companies or downstream companies, such as the Tata Consultancy Services Limited, the Tata Teleservices Limited and Tata Industries Limited have come up with separate appeals in Civil Appeal Nos.440-441 of 2020, 442-443 of 2020 and 448-449 of 2020. The grievance of RNT as well as the Trustees of the two Trusts, is as regards the injunctive order of the Appellate Tribunal restraining them from taking any decision. The grievance of the three operating companies which have filed 6 Civil Appeals is that

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CPM has been directed to be reinstated as Director of these companies by the impugned Order, for the rest of the tenure.

1.4 The original complainants before the National Company Law Tribunal ("NCLT"for short), who initiated the proceedings under Sections 241 and 242 of the Companies Act, 2013 namely **(i)** Cyrus Investments Private Limited **(ii)** Sterling Investment Corporation Private Limited, have come up with a cross appeal in Civil Appeal No.1802 of 2020. Their grievance is that in addition to the reliefs already granted, the NCLAT ought to have also granted a direction to provide them proportionate representation on the Board of Directors of Tata Sons Limited and in all Committees formed by the Board of Directors. They have one more grievance namely that the Appellate Tribunal ought to have deleted the requirement of an affirmative Vote in the hands of select Directors under Article 121 or at least ought to have restricted the affirmative vote to matters covered by Article 121A.

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1.5 In addition to C.A.Nos. 13 and 14 of 2020, Tata Sons have also come up with 2 more appeals in C.A.Nos. 263 and 264 of 2020. These appeals arise out of an order passed by NCLAT on 06-01-2020 in two interlocutory applications filed by the Registrar of Companies, Mumbai, seeking amendment of the final order passed by NCLAT in the main appeals. The reason why the Registrar of Companies was constrained to file 2 interlocutory applications in the disposed of appeals, was that in the final order passed on 18-12-2019 by NCLAT in the 2 company appeals, there were some remarks against the Registrar of Companies for having issued an amended certificate of incorporation to Tata Sons by striking off the word "Public" and inserting the word "Private". NCLAT dismissed these 2 applications by an order dated 06-01-2020, not merely holding that there were no adverse remarks against the Registrar of Companies but also giving additional reasons to justify its findings in the disposed of appeals, in the purported exercise of the power available under section 420 of the Companies Act, 2013. Therefore,

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Tata Sons have come up with these 2 appeals in C.A.Nos. 263 and 264 of 2020.

1.6 Thus we have on hand, 15 Civil Appeals, 14 of which are on one side, assailing the Order of NCLAT in entirety. The remaining appeal is filed by the opposite group, seeking more reliefs than what had been granted by the Tribunal.

1.7 For the purpose of easy appreciation, we shall refer to the appellants in the set of 14 Civil Appeals as "the Tata Group" or "the Appellants". We shall refer to the other group as "SP Group" (Shapoorji Pallonji Group) or "the respondents". Similarly we shall refer to Tata Sons Limited (or Tata Sons Private Limited) merely as 'Tata Sons', as there is a controversy regarding the usage of the word "Private" before the word "Limited".

2. Background of the Litigation

2.1 On 08.11.1917, Tata Sons was incorporated as a Private Limited Company under the Companies Act, 1913.

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2.2 Two companies by name Cyrus Investments Private Limited and Sterling Investment Corporation Private Limited, forming part of the SP Group respectively acquired 48 preference shares and 40 equity shares of the paid-up share capital of Tata Sons, from an existing member by name Mrs. Rodabeh Sawhney. Over the years, the share-holding of SP Group in Tata Sons has grown to 18.37% of the total paid-up share capital.

2.3 The shareholding pattern of Tata Sons Limited is as follows:

(i)	Shares held by two Tata Trusts	65.89%
(ii)	Shares held by SP Group	18.37%
(iii)	Shares held by operating Companies	12.87%
	Total	97.13%

The balance is held by RNT and a few others.

2.4 From 25.06.1980 to 15.12.2004 Shri Pallonji S. Mistry, the father of CPM was a Non-Executive Director on the Board of Tata Sons. On 10.08.2006 CPM was appointed as a Non-Executive Director on the Board.

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2.5 By a Resolution of the Board of Directors of Tata Sons dated 16.03.2012, CPM was appointed as Executive Deputy Chairman for a period of five years from 01.04.2012 to 31.03.2017, subject however to the approval of the shareholders at a General Meeting. The General Meeting gave its approval on 01.08.2012.

2.6 By a Resolution dated 18.12.2012, the Board of Directors of Tata Sons redesignated CPM as its Executive Chairman with effect from 29.12.2012, even while designating RNT as Chairman Emeritus.

2.7 By a Resolution passed on 24.10.2016, the Board of Directors of Tata Sons replaced CPM with RNT as the interim Non-Executive Chairman. It is relevant to note that CPM was replaced only from the post of Executive Chairman and it was left to his choice to continue or not, as Non-Executive Director of Tata Sons.

2.8 As a follow up, certain things happened and by separate Resolutions passed at the meetings of the shareholders of Tata Industries Limited, Tata Consultancy Services Limited and Tata

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Teleservices Limited, CPM was removed from Directorship of those companies. CPM then resigned from the Directorship of a few other operating companies such as the Indian Hotels Company Limited, Tata Steel Limited, Tata Motors Limited, Tata Chemicals Limited and Tata Power Company Limited, after coming to know of the impending resolutions to remove him from Directorship.

2.9 Thereafter, 2 companies by name, Cyrus Investments Private Limited and Sterling Investment Corporation Private Limited, belonging to the SP Group, in which CPM holds a controlling interest, filed a company petition in C.P No.82 of 2016 before the National Company Law Tribunal under Sections 241 and 242 read with 244 of the Companies Act, 2013, on the grounds of unfair prejudice, oppression and mismanagement.

2.10 But these two companies, hereinafter referred to as 'the complainant-companies', together had only around 2% of the total issued share capital of Tata Sons. This is far below the *de-minimus* qualification prescribed under Section 244(1)(a) to invoke sections

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241 and 242. Therefore, the complainant companies filed a miscellaneous application under the proviso to Sub-section (1) of Section 244 seeking waiver of the requirement of Section 244(1)(a), which requires atleast one hundred members of the company having a share capital or one-tenth of the total number of fixed members or any member or members holding not less than one-tenth of the issued share capital of the company alone to be entitled to be the applicant/applicants.

2.11 Along with the application for waiver of the requirement of Section 244(1)(a), the complainant companies also moved an application for stay of an Extra-ordinary General Meeting ("EGM" for short) of Tata Sons, in which a proposal for removing CPM as a Director of Tata Sons had been moved. The NCLT refused stay, as a consequence of which the EGM proceeded as scheduled and CPM was removed from the Directorship of Tata Sons, by a Resolution dated 16.02.2017.

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2.12 Subsequently, by an Order dated 06.03.2017, NCLT held the main company petition to be not maintainable at the instance of persons holding just around 2% of the issued share capital. This was followed by another order dated 17.4.2017, by which NCLT dismissed the application for waiver.

2.13 The complainant companies filed appeals before NCLAT against both the Orders dated 06.03.2017 and 17.04.2017. These appeals were allowed on 21.09.2017, granting waiver of the requirement of Section 244(1)(a) and remanding the matter back to NCLT for disposal on merits. Tata Group did not challenge this order.

2.14 Thereafter, NCLT heard the company petition on merits and dismissed the same by an Order dated 09.07.2018.

2.15 Challenging the order of the NCLT, the two complainant companies filed one appeal. CPM filed another appeal. Both these appeals were allowed by the Appellate Tribunal by a final Order dated 18.12.2019 granting the following reliefs:

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(i) The proceedings of the sixth meeting of the Board of Directors of 'Tata Sons Limited' held on Monday, 24th October, 2016 so far as it relates to removal and other actions taken against Mr. Cyrus Pallonji Mistry (11th Respondent) is declared illegal and is set aside. In the result, Mr. Cyrus Pallonji Mistry (11th Respondent) is restored to his original position as Executive Chairman of 'Tata Sons Limited' 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 (11th Respondent), his consequential appointment is declared illegal.

(ii) Mr. Ratan N. Tata (2nd 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 Limited') from 'Public Company' to 'Private Company' is declared illegal and set aside. The Company ('Tata Sons Limited') shall be recorded as 'Public Company'. The 'Registrar of Companies' will make correction in its record showing the Company ('Tata Sons Limited') as 'Public Company'."

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2.16 After NCLAT disposed of the appeals by its order dated 18-12-2019, the Registrar of Companies moved 2 interlocutory applications seeking the deletion of certain remarks made by NCLAT against them. These applications were dismissed by NCLAT by order dated 06-01-2020. Therefore, as against the final Order of NCLAT dated 18-12-2019, **(i)** Tata Sons Private Limited **(ii)** RNT **(iii)** the Trustees of the two Tata Trusts and **(iv)** three operating companies of Tata Group have come up with 2 Civil Appeals each (totalling to 12 appeals) and the complainant companies have come up with one Civil Appeal. In addition, Tata Sons have also come up with 2 more appeals against the order dated 06-01-2020 passed by NCLAT on the applications of the Registrar of Companies.

3. Case set up by the complainants in their petition under sections 241 and 242, Companies Act, 2013 and Reliefs sought

3.1 In the company petition as it was originally filed by S.P. Group in December, 2016 before the NCLT, the complainant-companies claimed that the affairs of Tata Sons, are carried out as

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though it was a proprietary concern of RNT and that the oppressive conduct of the respondents was such that it would be just and equitable to wind up Tata Sons, but such winding up would unfairly prejudice the interest of the petitioners and that therefore the Tribunal should pass such orders so as to bring to an end, the acts of oppression and mismanagement.

3.2 The acts of oppression and mismanagement complained against Tata Sons revolved around **(i)** alleged abuse of the Articles of Association, particularly Articles 121, 121A, 86, 104B and 118, to enable the trusts and its nominee Directors to exercise control over the Board of Directors; **(ii)** alleged illegal removal of CPM as Executive Chairman without any notice and an all out attempt to remove him from the Directorship of all the operating companies of the Tata group; **(iii)** alleged dubious transactions in relation to Tata Teleservices Limited, alongwith one Mr. C. Sivasankaran; **(iv)** RNT allegedly treating Tata Sons as a proprietorship concern with all others acting as puppets, resulting in the Board of Directors failing

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the test of fairness and probity **(v)** acquisition of Corus Group PLC of UK at an inflated price and then jeopardising the talks for its merger with Thyssen Krupp **(vi)** Nano car project becoming a disaster with losses accumulating year after year and the conflict of interest that RNT had in the supply of Nano gliders to a company where he had stakes; **(vii)** providing corporate guarantee to IL & FS Trust Company for the loan sanctioned by Standard Chartered Bank to Sterling **(viii)** making Kalimati Investments Ltd, a subsidiary of Tata Steel to provide an inter corporate bridge loan to Sterling; **(ix)** the dealings with NTT DoCoMo and Sterling resulting in an arbitration award for a staggering amount; **(x)** leaking information to Siva of Sterling that resulted in Siva issuing legal notices to Tata Teleservices and Tata Sons **(xi)** RNT making a personal gain for himself through the sale of a flat owned by a Tata group company to Mehli Mistry; **(xii)** companies controlled by Mehli Mistry receiving favours due to the personal relationship that RNT

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had with him; and **(xiii)** fraudulent transactions in the deal with Air Asia which led to financing of terrorism.

3.3 On the foundation of the above, the complainant-companies contended before NCLT:- **(i)** that the directors of Tata Sons are not carrying out their fiduciary responsibilities for and on behalf of the shareholders, but have become mere puppets controlled by RNT and the Trustees of the two Trusts; **(ii)** that the powers contained in the Articles of Association are being exercised in a *malafide* manner prejudicial to the interest of the petitioners and to public interest; **(iii)** that various operating decisions are taken either for emotional reasons or for pampering the ego of RNT; **(iv)** that attempts are made to shield persons responsible for fraudulent transactions at Air Asia; **(v)** that attempts are made to ensure that no legal action is initiated against Siva who owes Rs. 694 crores; **(vi)** that Ratan Tata enabled his associates to unjustly enrich themselves at the cost of Tata Sons; and **(vii)** that the present directors of Tata Sons are not promoting the interests of

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shareholders of Tata Sons and the interests of the shareholders of various operating companies of the Tata group.

3.4 In the light of the above pleadings and contentions, the petitioners before the NCLT sought a set of about 21 reliefs, whose abridged version is as follows:

> *"(A) Supersede the existing Board of Directors of Respondent No. 1 and appoint an administrator;*
> *(B) In the alternative to prayer (A) above, appoint a retired Supreme Court Judge as the non-executive Chairman of the Board of Directors of Respondent No. 1 and appoint such number of new independent directors;*
> *(C) restrain the so-called "Interim Chairman" i.e Respondent No. 2 from attending any meeting of the Board of Directors;*
> *(D) restrain Respondent No. 14 from interfering in the affairs of Respondent No. 1;*
> *(E) direct Respondent No. 1 not to issue any securities which results in dilution of the present paid-up equity capital;*
> *(F) direct the Respondents not to remove Respondent No. 11 as a director from the Board of Respondent No. 1;*
> *(G) restrain the Respondents from making any changes to the Articles of Association of Respondent No. 1;*
> *(H) order an investigation into the role of the Trustees of the Tata Trusts in the operations of Respondent No. 1 and/or Tata Group companies and prohibit the Trustees from interfering in the affairs of Respondent No. 1 and/or Tata Group companies;*
> *(I) appoint an independent auditor to conduct a forensic audit into transactions and dealings of Respondent No. 1 with particular regard to all transactions with C.Sivasankaran and his business entities and all transactions involving Mr. Mehli Mistry and his associated entities and such findings of the*

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audit and investigation should be referred to the Serious Fraud Investigation Office;

(J) Appoint an inspector (under applicable law) to investigate into the breach of the SEBI (Prohibition of Insider Trading) Regulations, 2015 and/or refer the findings of such investigation to the Serious Fraud Investigation Office of the Ministry of Corporate Affairs, Government of India.

(K) direct Respondent No.2 to pay Respondent No. 1 the amount of unjust enrichment that has accrued to Respondent No. 2 on account of surrender of the sub-tenancy of the Bakhtawar flat;

(L) appoint a forensic auditor to re-investigate the transactions executed by AirAsia with entities in India and Singapore and such findings of the audit should be referred by the Hon'ble Tribunal to the Serious Fraud Investigation Office of the Ministry of Corporate Affairs, Government of India;

(M) strike of Articles numbered 86, 104(B), 118, 121 and 121A in their entirety and in so far as Article 124 of the Articles of Association of Respondent No. 1 is concerned, the following portion of the said Article, which is offending and/or repugnant, should be deleted: "… Any committee empowered to decide on matters which otherwise the Board is authorised to decide shall have as its member at least one director appointment pursuant to Article 104B. The Provisions relating to quorum and the manner in which matters will be decided contained in Articles 115 and 121 respectively shall apply mutatis mutandis to the proceedings of the committee. "from the Articles of Association of Respondent No. 1; and substitute these articles with such articles as the nature and circumstances of this case may require;

(N) direct the Respondents (excluding Respondent Nos. 4, 10 &11) to bring back into Respondent No. 1, the funds used by Respondent No. 1 for acquiring shares of Tata Motors;

(O) restrain Respondent No. 1 from initiating any new line of business or acquiring any new business;

(P) restrain the trustees of the Trusts from interfering in the affairs of Respondent No. 1 and in the various companies;

(Q) restrain the existing Selection Committee from acting any further.

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(R) direct that no candidate selected by the Selection Committee constituted pursuant to Article 118 of the Articles of Association of Respondent No. 1 to be appointed without leave of this Hon'ble Tribunal;

(S) direct Respondent No. 1 not to demand and/or procure any unpublished price sensitive information from any listed operating companies within the Tata Group;

(T) grant interim and ad-interim reliefs in terms of Prayers (A) to (S) above; and

(U) pass such further orders that this Hon'ble Tribunal may, deem necessary for bringing an end to the acts of oppression and mismanagement in the running of Respondent No. 1."

4. <u>Amendment of pleadings, addition and deletion of reliefs</u>

4.1 The contents of Chapter-3 above, are the pleadings made and the reliefs sought in the company petition, as it was originally filed on 20.12.2016. But the pleadings and the prayers underwent certain changes in the course of the proceedings, partly due to subsequent developments and partly due to change of strategy/better counsel.

4.2 What is important to note here is that some of the changes to the pleadings and the reliefs sought, were by way of proper applications for amendment and some others were just by way of additional affidavits. We shall advert to them in this part.

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4.3 The company petition filed on 20.12.2016 was taken up on 22.12.2016 and the NCLT passed an order to the following effect:-

> *"It has also been further agreed by all the parties more specially by the petitioner counsel, or R-11 counsel and the counsel on behalf of the answering respondents that they will not file any interim application or initiate any action or proceedings over this subject matter pending disposal of this company petition."*

4.4 Soon, the matter got precipitated. Claiming that CPM sent four box-files containing several documents relating to Tata Education Trust, to the Deputy Commissioner of Income Tax with a view to create trouble, a special notice was issued for convening the EGM of Tata Sons on 06.02.2017 for considering the proposal for the removal of CPM as a Director of Tata Sons.

4.5 Therefore, the complainant-companies moved a contempt application. The said application was disposed of by NCLT by an order dated 18.01.2017, permitting the complainant-companies and CPM to file an additional affidavit limiting to the proposal for the removal of Cyrus Pallonji Mistry from the Board.

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4.6 Accordingly, an additional affidavit was filed on 21.01.2017. However, the NCLT, by an order dated 31.01.2017 rejected the prayer of S.P. Group for stay of EGM scheduled to be held on 06.02.2017.

4.7 S.P. Group filed an appeal against the order refusing the stay of EGM. The appeal was disposed of on 03.02.2017, merely permitting the S.P. Group to file a petition for amendment, in the event of CPM being removed in the EGM. In the EGM held on 06.02.2017, CPM was removed.

4.8 Therefore, the complainant-companies filed an amendment application dated 10.02.2017 seeking addition of two more prayers namely:- **(i)** to direct the respondents to reinstate the representative of the complainant-companies on the Board of Tata Sons; and **(ii)** to direct the amendment of Articles of Association of Tata Sons to provide for proportional representation of shareholders on the Board of Directors of Tata Sons.

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4.9 But the petition for contempt, the petition for interim stay of EGM and the application for amendment to include additional prayers, all turned out to be exercises in futility, with the NCLT passing two orders, one on 06.03.2017 and another on 17.04.2017. By the first order dated 06.03.2017, NCLT held the company petition to be not maintainable, on the ground that the two complainant companies did not hold at least 10% of the issued share capital of Tata Sons. By the second order dated 17.04.2017, NCLT rejected the application for grant of waiver filed under the proviso to Sub-section (1) of Section 244.

4.10 But the aforesaid orders of NCLT dated 06.03.2017 and 17.04.2017 were reversed by NCLAT by an order dated 21.09.2017 and the matter was remanded back to NCLT.

4.11 Thereafter, the complainant-companies filed one additional affidavit, one application for amendment, one application for stay and one memo giving up some of the reliefs already sought.

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The facts relating to these, can be compressed into a tabular column as follows:-

Sl.No.	What was filed	Reliefs sought
1.	Additional affidavit dated 31.10.2017	This additional affidavit sought to challenge the conversion of Tata Sons from being a Public Limited Company into a Private Limited Company.
2.	Application for amendment dated 31.10.2017	By this application, the complainants sought the following prayers: (M-1): Set aside the resolution passed by the shareholders of respondent No.1 on September 21, 2017 insofar as it seeks to amend the Articles of Associations and Memorandum of Association of Respondent No.1 for conversion of Respondent No.1 into a private company. (M-2): Strike off/Delete Article 75 as the same is a tool in the hands of the majority shareholders to oppress the minority; and; (M-3): Pending the final hearing disposal of the Company Petition, the effect and operation of the resolution dated September 21, 2017 be stayed. (F-1): Direct Respondent No.1 and/or Respondent No. 2 to 10 and 12 to 22 to reinstate a representative of the Petitioners on the Board of Respondent No.1 (G-1): Direct that the Articles of

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		Association of Respondent No.1 be amended to provide for proportionate representation of shareholders on the Board of Directors of Respondent No.1
3.	Application for stay dated 31.10.2017	Through this application, the complainants sought Stay of conversion of Tata Sons into a Private Limited Company.
4.	Memo dated 12.01.2018	By this memo, certain reliefs originally sought, were given up, certain reliefs originally prayed for, were not pressed and one particular relief was sought to be restricted. The prayer in the Memo was as follows:- a. Prayer M, which sought the striking of Articles 86, 104(B), 118, 121 and 121A, and striking of a portion of Article 124, is restricted as under: i. The necessity of an affirmative vote of the majority of directors nominated by the Trusts, which are majority of shareholders, be deleted; ii. The Petitioners be entitled to proportionate representation on Board of Directors of Respondent No.1; iii. The Petitioners be entitled to representation on all committees formed by the

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		Board of Directors of Respondent No.1; and iv. The Articles of Association be amended accordingly. b. Prayers A, B and C were not pressed. c. Prayers F, Q and R, being infructuous were not pressed.

5. Response of Tata Sons to the allegations made in the Company Petition

5.1 Tata Sons filed a reply to the company petition contending *inter-alia* : **(i)** that CPM, who was removed from the post of Executive Chairman, after having lost the confidence of 7 out of 9 Directors, has sought to use the complainant companies to besmirch the reputation of Tata Group; **(ii)** that even the decisions to which CPM was a party have been questioned in the petition; **(iii)** that Tata Group founded in 1868 is a global enterprise, headquartered in India, comprising over a hundred operating companies, having presence in more than 100 countries across six continents, collectively employing over 6,60,000 people; **(iv)** that the

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revenue of Tata Group in 2015-16, was $103.51 billion; **(v)** that there are 29 publicly listed companies in the Tata Group with a combined market capitalisation of about $116.41 billion; **(vi)** that 65.3% of the issued ordinary share capital of Tata Sons is held by philanthropic trusts which support education, health, livelihood generation and art and culture; **(vii)** that it was at the instance of CPM that RNT was designated as Chairman Emeritus and he was requested to attend Board Meetings as a special and permanent invitee and continue to guide the Board; **(viii)** that Articles 104B and 121 were introduced through a new version of Articles of Association at the Annual General Meeting of Tata Sons held on 13.09.2000 and Article 121 was subsequently amended by Resolution dated 09.04.2014; **(ix)** that Shri Pallonji Shapoorji Mistry, who represented the complainant companies, was present at the General meeting held on 13.09.2000; **(x)** that CPM himself was a party to the Resolution passed by the shareholders on 09.04.2014, introducing Articles 121A and 121B; **(xi)** that CPM's

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leadership gave rise to certain issues such as insufficient detail and discipline on capital allocation decisions, slow execution on identified problems, lack of specificity and follow through in strategic plan and business plan, failure to take meaningful steps to enter new growth businesses, weak top management team and reluctance to embrace the Articles of Association that spelt out the governance structure of the company and the rights of Tata Trusts; **(xii)** that there was a growing trust deficit between the Board of Directors of Tata Sons and CPM due to several reasons, such as the conflict of interest in the matter of award of contracts to S.P. Group of companies and his systematic and planned reduction of the representation of Tata Sons Directors on the Boards of other major Tata Companies; **(xiii)** that even when the Directors of Tata Sons resolved on 24.10.2016 to replace CPM as Executive Chairman, the Board agreed to his continuance as a Director of Tata Sons; **(xiv)** that however CPM addressed a vitriolic mail on 25.10.2016 to the Directors making false allegations; **(xv)** that though the mail

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was marked confidential, it was simultaneously leaked to the press; **(xvi)** that CPM also breached his fiduciary and contractual duties by disclosing confidential information and documents pertaining to Tata Sons to third parties; **(xvii)** that CPM made representations to the shareholders of all operating companies, with unsubstantiated and false allegations, thereby attempting to make the operating companies vulnerable to make confidential data available for public inspection; **(xviii)** that the shareholders of Tata Industries Limited, Tata Consultancy Services and Tata Teleservices Limited passed Resolutions respectively on 12.12.2016, 13.12.2016 and 14.12.2016 to remove CPM from Directorship; **(xix)** that, therefore, CPM resigned from the Directorship of the other companies also on 19.12.2016, when he faced the prospect of being removed in the impending meetings; **(xx)** that the actions and conduct of CPM after 24.10.2016 compelled Tata Sons to issue a special notice and requisition for his removal from the Directorship of Tata Sons; **(xxi)** that the company petition was not about espousing the cause of

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corporate governance or seeking remedies for oppression and mismanagement of Tata Sons; **(xxii)** that prior to his removal as Executive Chairman, CPM never raised any concerns regarding any oppression or mismanagement; **(xxiii)** that many of the acts of oppression complained of by the complainant companies, have happened long before the date of filing of the company petition, showing thereby that the company petition was hopelessly barred by delay and laches.

5.2 On the allegations of oppression and mismanagement, the response of Tata Sons was as follows: **(i)** that the complainant companies have cherry picked certain business decisions to launch a vitriolic attack on the Tata Trusts; **(ii)** that while the complainant companies have talked about bad business deals, such as Corus acquisition and Nano Project, they have deliberately omitted to talk about Tetley acquisition by Tata Global Beverages Limited, the immensely successful Jaguar Land Rover acquisition by Tata Motors and the phenomenal success of Tata Consultancy Services;

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(iii) that Corus acquisition, the Nano Project, contracts awarded to the business concerns of Mr. Mehli Mistry and the investment by Mr.C. Sivasankaran have surfaced only after the replacement of Mr. Cyrus Mistry as the Executive Chairman; **(iv)** that CPM has been the Director of Tata Sons since the year 2006 and was also the Executive Chairman from December, 2012 to October, 2016 and was fully aware of how the decisions relating to these projects were taken when they were taken; **(v)** that courts cannot be called upon to sit in judgment over the commercial decisions of the Board of Directors of companies; and **(vi)** that even commercial mis-judgments of the Board of Directors cannot be branded as instances of oppression and mis-management.

5.3 On specific acts of oppression and mismanagement, raised in the company petition, such as **(i)** over priced and bleeding acquisition of Corus PLC of UK; **(ii)** doomed Nano car project; **(iii)** loan advanced by Kalimati Investments to Siva; **(iv)** sale of the

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residential flat to Mehli Mistry; **(v)** unjust enrichment of Mehli Mistry and the companies controlled by him, due to the personal equation of RNT with him; **(vi)** aviation industry misadventures; and **(vii)** a huge loss due to purchase of shares of Tata Motors, the reply filed by Tata Sons contained an elaborate and graphic rebuttal. We shall take note of them later, while dealing with the question whether or not the allegations constitute the ingredients of sections 241 and 242 of the Act.

6. The approach of NCLT

6.1 The NCLT, in its order dated 9.7.2018, went into each of the allegations of oppression, mismanagement and prejudice and recorded categorical findings. In brief, these findings, allegation-wise, were as follows:

On the allegations revolving around Siva and Sterling group of companies

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(i) Tata Teleservices shares were acquired in the year 2006 with the approval of the Board and hence almost after 10 years, it cannot be raised as an issue. It is also a fact that the very complainant companies had acquired same TTSL shares two months before, for Rs.15 per share.

(ii) The loan taken from Kalimati Investments was already paid back by Siva Group of Companies and the company was relieved of its undertaking by Siva himself who provided personal guarantee for the loan taken from Standard Chartered Bank.

(iii) As to the allegation that Siva made a big profit by selling shares to NTT DoCoMo @ Rs.117 per share, it is evident from the record that these shares were sold in the year 2008 to NTT DoCoMo, while NTT DoCoMo was acquiring shares in bulk from TTSL as well as from some of the shareholders of TTSL including the brother and father of CPM and also from Siva. They also equally gained benefit just as Siva group gained from selling shares of TTSL to NTT

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DoCoMo. But this was not disclosed by the complainant companies either in their petition or in their rejoinder. The rate at which the petitioners acquired shares of TTSL is less than the rate at which Siva Group acquired and the gain that the petitioners made by selling shares to NTT DoCoMo was more than the gain Siva group got from selling shares to NTT DoCoMo.

(iv) No material has been placed either by the petitioner or by CPM to show that any information was leaked to Siva Group either by RNT or by anyone else.

(v) DoCoMo issue cropped up in 2016, when the award was passed for payment of Rs.8450 crores. The letter around which a controversy is raised, was written by RNT in the year 2013. Hence that letter cannot be linked to DoCoMo issue to show as if RNT was encouraging Mr. Siva not to pay money to the company.

<u>On the allegations relating to Air Asia</u>

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(i) Air Asia India Pvt. Ltd. is a joint venture between Air Asia Berhad (Malaysian Company) and Tata Sons, incorporated on 28.03.2013. The allegations relating to this, are mostly based on the emails sent by one Mr. Bharat Vasani, who is not a party to this proceeding and hence these allegations could not be put to test.

(ii) In the meeting held on 06.12.2012, CPM did not raise any objection to the approval of the joint venture or for infusing funds in Air Asia India, until he was removed as Chairman of the company.

(iii) In their desperate attempt to make a case out of nothing, the complainant companies claim on the one hand that CPM had no say in the Air Asia transaction, but on the other hand, they claim that CPM protected the interest of the company by limiting its exposure to 30% equity of USD 30 million and by ensuring that no fall back liability came on the company.

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(iv) A person privy to a transaction is estopped from questioning it, but the complainant companies and CPM have made all kinds of allegations with impunity flouting all legal principles. They have proceeded as though they did not take active part in the Air Asia incorporation and as though CPM did not preside over the meeting on 15.09.2016 for further funding it. In addition, they have made a scurrilous statement, without a shred of paper, that RNT funded one Terrorist through hawala with diversion of Air Asia India funds.

<u>On the Transactions with Mehli Mistry, including the sale of the flat (Bhakthawar) and a land (Alibaug)</u>

(i) There is nothing to indicate that RNT got enriched at the cost of the company. Forbes Golak was not made a Party

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and the transaction happened somewhere in the year 2002, but the allegation is raised in the year 2016.

(ii) As to these allegations relating to Mehli deriving huge benefits, the only document that the Petitioners and CPM filed and relied on, is an email Mr. Mehli addressed to Mr. Padmanabhan of TPC among others.

(iii) In respect of the 1993 contract for dredging at Trombay, it was awarded by Tata Power to MpCL for 9 years after choosing them from amongst three vendors. Thereafter it was renewed 5 times for various tenures from October 2002 to September, 2014 after obtaining requisite approvals. When these approvals were given, CPM was a Director of Tata Power. He held directorship from 1996 to 2006 and again from 2011 to 2016, but never raised any objection.

Nano car project and the losses suffered by Tata Motors

(i) RNT has not been the director of Tata Motors at any point of time during which the actions complained of happened.

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(ii) Tata Motors and Jayem incorporated a joint venture company by name J.T. Special Vehicle Pvt. Ltd. with 50:50 shareholdings, in July 2016. This joint venture was incorporated under the stewardship of CPM himself. It is therefore entirely incorrect to say that Jayem has benefited unduly from any patronage extended by RNT.

Acquisition of Corus

(i) The acquisition of Corus was a collective decision of Tata Steel and it was approved by CPM as a director of the board of Tata Steel. This entire acquisition was undertaken following the due governance process under the supervision of the board of directors of Tata Steel without any dissent from any of the shareholders of Tata Steel.

(ii) Tata Steel did not buy it for an inflated price, but it so happened that Tata Steel took a unanimous decision to quote a price of GBP 608 pence per share while their competitor CSN's final bid was GBP 603 pence per share.

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CPM or the complainant companies have not placed any letter or email, seeking divesting or restructuring of Corus.

Private company vs Public company

(i) On the impact of Section 43A (2A) of the Companies Act, 1956 and the issue of the amended certificate of incorporation to Tata Sons, it has to be seen that Tata Sons had not altered any of the Articles of Association so as to bring any new entrenchment to the Articles and that the management had not done anything so as to cause prejudice to the rights of the minority shareholders.

On the contention that a few Articles were oppressive or that they were abused

(i) The contention that Articles 104B, 121, 121A and 75 of the Articles of Association were *per se* oppressive and that they have been used as tools of oppression and mismanagement, is unacceptable since CPM's father was party to the amendments made to the Articles of Association on 13.09.2000. The amendment of Article 118 was passed on

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06.12.2012 when CPM was the Executive Deputy Chairman. CPM was also party to the Resolutions passed on 09.04.2014, in which the Articles were amended so as to confer affirmative rights in favour of the Directors of the Trusts. In so far as Article 75 is concerned, it was in existence throughout and hence the question whether persons who acquired shares of such a company consciously despite the presence of Article 75, can turn around later and project them as oppressive, looms large.

(ii) The fact that the nominee Directors stepped out of the meeting of the Board held on 29.06.2016 to take instructions from RNT on the issue of acquisition of Welspun by Tata power, cannot be projected as an incident where Article 121 was abused, since the issue of acquisition of Welspun should have come up before the Board of Tata Sons even prior to Tata Power taking a decision, in view of Article 121A-(h). Since Tata Power had already signed the papers for the acquisition of Welspun on 12.06.2016 itself,

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CPM really made the Directors of Tata Sons as *fait accompli*. Therefore, it was the action of CPM that was prejudicial to the interests of Tata Sons and not the other way around.

(iii) None of the Articles have ever been opposed either by the complainant companies or by CPM at any point of time in the past. And Article 75 has been in place even before the complainant companies acquired shares.

Allegation of Breach of fiduciary duties by the Directors

(i) In support of their allegation that there was breach of fiduciary duties by the Trust nominee Directors and to prove that the Directors of the Company were guilty of dereliction of duties in the teeth of Sections 149 and 166 of the Companies Act, 2013 read with schedule IV (Code for Independent Directors), the complainant companies had not placed any material other than the Minutes of the meeting held on 24.10.2016 (in which CPM was removed from Chairmanship). Also the removal of CPM as Executive

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Chairman was not in deprivation of any of the rights of the complainant companies as shareholders and his removal had nothing to do with his association with the complainant companies. The removal of CPM as Executive Chairman cannot be projected as oppression of minority shareholders merely because he also happens to have controlling interest in companies that hold around 18.40% shareholding in the company.

(ii) The provision in the Articles of Association entitling the two Trusts to have 1/3rd of the Directors on the Board of Tata Sons with an affirmative vote, was actually a curtailment of their right to appoint majority of the Directors to the Board and hence it cannot be construed as oppressive of the minority.

<u>On the removal of CPM</u>

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(i) The removal of CPM as Executive Chairman of Tata Sons on 24.10.2016 and his removal as Director on 06.02.2017, were on account of trust deficit and there was no question of a Selection Committee going into the issue of his removal.

(ii) There was no material to hold that CPM was removed on account of purported legacy issues. CPM created a situation where he is not accountable either to the majority shareholders or to the Trust nominee Directors and hence his removal.

(iii) The letter dated 25.10.2016 issued by CPM could not have been leaked to the media by anyone other than CPM and hence his removal from Directorship on 06.02.2017 became inevitable.

6.2 What we have provided in the preceding paragraph, is an abridged version of the findings recorded by NCLT on every one of the allegations contained in the main company petition. Apart from those findings recorded in the body of the judgment, NCLT itself

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gave a summary of findings in paragraph 581 of its decision. It is extracted verbatim as follows:

> *"a) Removal of Mr. Cyrus Mistry as Executive Chairman on 24.10.2016 is because the Board of Directors and Majority of Shareholders, i.e., Tata Trusts lost confidence in Mr. Cyrus as Chairman, not because by contemplating that Mr. Cyrus would cause discomfort to Mr. Tata, Mr. Soonawala and other answering Respondents over purported legacy issues. Board of Directors are competent to remove Executive Chairman; no selection committee recommendation is required before removing him as Executive Chairman.*
>
> *b) Removal of Mr. Cyrus Mistry from the position of Director is because he admittedly sent the company information to Income Tax Authorities; leaked the company information to Media and openly come out against the Board and the Trusts, which hardly augurs well for smooth functioning of the company, and we have not found any merit to believe that his removal as director falls within the ambit of section 241 of Companies Act 2013.*

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c) We have not found any merit to hold that proportional representation on Board proportionate to the shareholding of the petitioners is possible so long as Articles do not have such mandate as envisaged under section 163 of Companies Act, 2013.

d) We have not found any merit in purported legacy issues, such as Siva issue, TTSL issue, Nano car issue, Corus issue, Mr. Mehli issue and Air Asia issue to state that those issues fall within the ambit of section 247 and 242 of Companies Act 2013.

e) We also have not found any merit to say that the company filing application under section 14 of Companies Act 2013 asking this Tribunal to make it from Public to Private falls for consideration under the jurisdiction of section 247 & 242 of Companies Act 2013.

f) We have also found no merit in saying that Mr. Tata & Mr. Soonawala giving advices and suggestions amounted to interference in administering the affairs of the company, so that to consider their conduct as prejudicial to the interest of the company under section 241 of Companies Act 2013.

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g) We have found no merit in the argument that Mr. Tata and Mr. Soonawala acted as shadow directors superimposing their wish upon the company so that action to be taken under section 241 & 242 of Companies Act 2013.

h) We have not found any merit in the argument that Articles 75, 104B, 118, 121 of the Articles of Association per se oppressive against the petitioners.

i) We have not found any merit in the argument that Majority Rule has taken back seat by introduction of corporate governance in Companies Act, 2013, it is like corporate democracy is genesis, and corporate governance is species. They are never in conflict with each other; the management is rather more accountable to the shareholders under the present regime. Corporate governance is collective responsibility, not based on assumed free-hand rule which is alien to the concept of collective responsibility endowed upon the Board.

j) We have observed that prejudice remedy has been included in 2013 Act in addition to oppressive remedy already there and also included application of "just and equitable" ground as precondition to pass any relief in

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mismanagement issues, which was not the case under old Act."

7. The Approach of NCLAT

7.1 While NCLT dealt with every one of the allegations contained in the main company petition and recorded its findings, NCLAT, curiously, focused attention only on (i) the removal of CPM (ii) the affirmative voting rights of the Directors nominated by the 2 Trusts in the decision making process and (iii) the amended certificate of incorporation issued by the RoC, deleting the word "Public" and making it a private company once again.

7.2 The findings recorded by NCLAT are presented, to a great extent, in the language of NCLAT itself, as follows:

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(i) The word 'unfairly prejudicial' has not been used in Section 241. The Indian Law (Sections 241 & 242 of the Companies Act, 2013) does not recognize the term 'legitimate expectation' to hold any act prejudicial or oppressive. (paragraphs 101 and 102 of the impugned order)

(ii) In the general meeting of the shareholders of 'Tata Sons Limited' or the Board of Directors, the majority decision is fully dependent upon the affirmative votes of nominated Directors of 'Tata Trusts'. The affirmative vote of the Directors nominated by 'Tata Trusts' has an overriding effect and renders the majority decision subservient to it. (paragraph 115 of the impugned order)

(iii) The Tribunal/Appellate Tribunal has no jurisdiction to hold any of the Articles as 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

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'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, it may pass appropriate orders in terms of Section 242. (paragraph 119 of the impugned order)

(iv) The email correspondence dated 18.07.2013, 28.02.2014, 11.03.2015, 28.05.2015, 03.11.2015 etc. would show that CPM was unaware and not in a position to understand how decisions are taken by the Tata Trusts before the decision of the Board of Directors of Tata Sons and that CPM felt the need for development of a governance framework. (paragraph 126 of the impugned order)

(v) Emails dated 13th March, 2016; 30th April, 2016 and 10th May, 2016 between CPM and Mr. Nitin Nohria show that CPM formulated a governance framework after obtaining the

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feedback from Mr. Nitin Nohria to clarify the role of the Trustees of 'Tata Trusts' in the decision making process of 'Tata Sons Limited'. It was followed by e-mail dated 15th May, 2016 sent by CPM to RNT forwarding a draft of the governance framework. (paragraph 127 of the impugned order)

(vi) The 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 RNT for 'Tata Trusts', in which Mr. Nitin Nohria and Mr. N.A. Soonawala, were taking active part. (paragraph 129 of the impugned order)

(vii) Prior to the Board's meeting held on 24th October, 2016 before removing CPM, on the same date decision had already been taken by RNT in presence of Mr. Nitin Nohria

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to remove CPM, who asked him to step down from the post of the 'Executive Chairman' of the Company ('Tata Sons Limited'). (paragraph 130 of the impugned order)

(viii) RNT was determined to remove CPM even prior to the meeting of the board and the majority shareholders of Tata Trust knew that there was a requirement of advance notice before the removal of CPM. Therefore, they had taken opinion from eminent lawyers and a former Judge of the Supreme Court. (paragraph 133 of the impugned order)

(ix) 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 CPM. (paragraph 134 of the impugned order)

(x) From the opening sentence of 'Press Statement' dated 10th November, 2016, issued by Tata Sons it is clear that sudden

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and hasty removal of CPM as Executive Chairman of 'Tata Sons Limited' raised concerns in the industrial group. (paragraph 137 of the impugned order)

(xi) The allegations as made in the 'Press Statement' dated 10th November, 2016 appears to be an afterthought as the aforesaid matter was not discussed in any of the meetings of the Board of Directors. The allegations in the 'Press Statement' as not supported by record cannot be accepted. (paragraph 139 of the impugned order)

(xii) Correspondence between CPM, RNT, Mr. Nitin Nohria and Mr. N.A. Soonawala show that all the time CPM had been pointing out that some of the 'Tata Companies' were suffering losses and if appropriate steps were not taken, it may aggravate in future. In spite of such communications no decision for the revival or restructuring of Tata Companies was taken. (paragraph 140 of the impugned order)

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(xiii) If there was a failure and loss caused to one or other Tata Company which also affected the 'Tata Sons Limited', 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. (paragraph 141 of the impugned order)

(xiv) 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', the independence of the Board of Directors of the Company becomes irrelevant. (paragraph 143 of the impugned order)

(xv) The suggestions made by CPM 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 RNT or 'Tata Trusts' which resulted in no confidence on CPM. (paragraph 144 of the impugned order)

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(xvi) The record suggests that the removal of CPM 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 CPM performed well which was praised by the 'Nomination and Remuneration Committee' a Statutory Committee under Section 178, on 28th June, 2016 i.e. just few months before he was removed. (paragraph 146 of the impugned order)

(xvii) Nominee Director Mr. Vijay Singh on behalf of 'Tata Trusts' was well aware that performance of CPM was satisfactory and there was need for a framework for operationalizing the Articles. (paragraph 149 of the impugned order)

(xviii) 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 29th June, 2016. (paragraph 150 of the impugned order)

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(xix) Three Directors who also voted for removal of CPM, including Mr. Amit Chandra, who spearheaded the removal proceedings and Mr. Ajay Piramal and Mr. Venu Srinivasan, had been inducted into the Board of 'Tata Sons Ltd.' only on 8th August, 2016 i.e. after the appraisal report of 'Nomination and Remuneration Committee'. They attended just one Board meeting prior to the meeting held on 24th October, 2016. (paragraph 151 of the impugned order)

(xx) Two of the Directors, Mr. Ranendra Sen and Mr. Vijay Singh, a Trust Nominee Director, who voted for the removal of CPM, were members of the 'Nomination and Remuneration Committee' which just four months' prior to his removal on 28th June, 2016 praised the performance of CPM as Executive Chairman. These two Directors also voted against CPM just four months thereafter which has not been explained by Mr. Ranendra Sen and Mr. Vijay Singh. Further, what is accepted is that prior to the meeting held

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on 24th October, 2016 between 2.00 p.m. to 3.00 p.m., in the forenoon, the 'Tata Trusts' in a separate meeting decided to remove CPM. Even before decision of 'Tata Trusts', RNT in presence of Mr. Nitin Nohria called CPM and asked him to resign. (paragraph 152 of the impugned order)

(xxi) In view of what transpired, it is not open to the Respondents to state or allege that loss in different 'Tata Companies' was due to mismanagement of CPM. 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 10th November, 2016. The consecutive chain of events coming to fore from the correspondence amply demonstrates that impairment of confidence with reference to conduct of affairs of company was not attributable to probity qua CPM but to unfair abuse

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of powers on the part of other Respondents. (paragraph 155 of the impugned order)

(xxii) Even in the absence of a right of minority members ('Shapoorji Pallonji Group'), because of the healthy atmosphere and clear understanding between two groups i.e. 'Tata Group' and 'Shapoorji Pallonji Group' for the 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 CPM and his father Mr. Pallonji Shapoorji Mistry. (paragraph 160 of the impugned order)

(xxiii) 'Shapoorji Pallonji Group', minority shareholders, 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. (paragraph 161 of the impugned order)

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(xxiv) Because of recent actions of 'Tata Trusts', its nominee Directors, and RNT and Mr. Nitin Nohria, taken since the year 2013, as noticed and discussed and sudden and hasty removal of CPM on 24th October, 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. (paragraph 162 of impugned order)

(xxv) The prejudicial action, did not come to an end, after 24th October, 2016, when CPM was removed as Executive Chairman and Director of the Company ('Tata Sons Limited'). It continued even thereafter with the removal of CPM from the Directorship of other group companies and the conversion of Tata Sons Limited from being a public limited company into a private company, after the decision of NCLT. (paragraph 165 of the impugned order)

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(xxvi)Tata Sons Limited became a public company by virtue of Section 43(1A) of the Companies Act, 1956 on the basis of average annual turnover, w.e.f. 01.02.1975. (para 165) In terms of Sub-section (2) of Section 43A Tata Sons informed the Registrar and the Registrar deleted the word "private" in the name of the Company upon the Register. By virtue of Sub-section (4), such a company is to continue to be a public company until it becomes a private company with the approval of the Central Government and in accordance with the Act. (para 167) The Companies Act, 2013 repealed part of the 1956 Act. The new Act defines a "Private Company" and a "Public Company" under Clauses (68) and (71) of Section 2. (para 169 to 172). Under the 2013 Act, there is no provision similar to Section 43A(1A), for automatic conversion of a company. Since there is no automatic conversion, Tata Sons, having become a public company long ago was required to alter its articles of

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Association by following the procedure prescribed by Section 14(1)(b) read with Section 14(2) and 14(3), for converting the company as a private company.(paras 173 to 175). The General Circular No.15 of 2013 dated 13.09.2013 and Notification dated 12.09.2013 issued by the central Government cannot override Section 14 of the Act (para 177) and hence the action taken by Tata Sons hurriedly to get the word "public" struck off in the certificate of incorporation, after the order of NCLT is absolutely illegal.

(xxvii) The aforesaid action on the part of the company and its Board of Directors to take action to hurriedly change the Company ('Tata sons Limited') 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 the filing the appeal, suggests that the nominated members of 'Tata Trusts' who have

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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 Limited') (paragraph 181 of the impugned order)

(xxviii) The affirmative voting power of the nominated Directors of the 'Tata Trust' over majority decision of the Board; actions taken by Mr. Rata N. Tata (2nd Respondent), Mr. Nitin Nohria (7th Respondent) and Mr. N.A. Soonawala (14th Respondent) and others as discussed above; the fact that the Company ('Tata Sons Limited') 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 powers vested with the Board of Directors with affirmative power of nominated Directors of the 'Tata Trust'; the manner in which Mr. Cyrus

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Pallonji Mistry (11th Respondent) was suddenly and hastily removed without any reason and in absence of any discussion in the meeting of the Board of Directors held on 24th October, 2016 and his subsequent removal as Director 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 the Tribunal 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 (2nd Respondent), Mr. Nitin Nohria (7th Respondent) and Mr. N.A. Soonawala (14th Respondent) and other nominee Directors. (paragraph 183 of the impugned order)

(xxix) The company's affairs have been or are being conducted in a manner 'prejudicial' and 'oppressive' to members including Appellants, Mr. Cyrus Pallonji Mistry (11th

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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.

(xxx) The Resolution dated 24th October, 2016 passed by the Board of Directors of Company removing Mr. Cyrus Pallonji Mistry (11th Respondent) as the Executive Chairman of the Company ('Tata Sons') is illegal; all consequential decisions taken by 'Tata Companies' for removal of Mr. Cyrus Pallonji Mistry (11th Respondent) as Director of such Companies are also illegal. (paragraph 184 of the impugned order)

(xxxi) For better protection of interest of all stake holders as also safeguarding the interest of minority group, in future at

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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 parties 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. (paragraph 185 of the impugned order)

8. <u>Important difference between the approach of NCLT and the approach of NCLAT</u>

8.1 As pointed out at the beginning of chapter 7, NCLT dealt with every one of the allegations of oppression and mismanagement and recorded reasoned findings. But NCLAT, despite being a final court of facts, did not deal with the allegations one by one nor did the NCLAT render any opinion on the correctness or otherwise of

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the findings recorded by NCLT. Instead, the NCLAT summarised in one paragraph, namely paragraph 183, its conclusion on some of the allegations, without any kind of reasoning. This Paragraph 183 reads as follows:

> *"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 (2nd Respondent), Mr. Nitin Nohria (7th Respondent) and Mr. N.A.Soonawala (14th Respondent) and others as discussed above; the fact that the Company ('Tata Sons Limited') 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 (11th 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 24th October, 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 contesting Respondents, including Mr. Ratan N. Tata (2nd Respondent), Mr. Nitin Nohria (7th Respondent) and Mr. N.A.Soonawala (14th Respondent) and other, the nominee Directors.*

8.2 The allegations relating to (i) over priced and bleeding Corus acquisition (ii) doomed Nano car project (iii) undue favours to

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Siva and Sterling (iv) loan by Kalimati to Siva (v) sale of flat to Mehli Mistry (vi) the unjust enrichment of the companies controlled by Mehli Mistry (vii) the Aviation industry misadventures (viii) losses due to purchase of the shares of Tata Motors etc., were not individually dealt with by NCLAT, though NCLT had addressed each one of these issues and recorded findings in favour of Tata Sons. Therefore, ***there is no escape from the conclusion that NCLAT did not expressly overturn the findings of facts recorded by NCLT, on these allegations.*** We are constrained to take note of this, even at the outset, in view of a contention raised by Shri Shyam Divan, learned Senior Counsel for the SP group, that in an appeal under Section 423 of the Companies Act, 2013, this court will not normally interfere with a finding of fact reached by NCLAT, unless it is found to be wholly perverse.

9. Contentions on behalf of Tata Sons, group companies and Trustees

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9.1 Assailing the judgment of NCLAT, Shri Harish Salve and Dr. Abhishek Manu Singhvi, learned Senior counsel for Tata Sons contended as follows:

(i) The entire focus of NCLAT was only on the justification for the removal of CPM from the post of Executive Chairman of Tata Sons, despite the fact that the positive case of the complainant companies as well as CPM was that they were not seeking the reinstatement of CPM;

(ii) In focusing entirely upon the removal of CPM from Executive Chairmanship of Tata Sons, NCLAT lost track of the law that such a removal cannot be termed as oppression or mismanagement;

(iii) NCLAT went completely overboard by directing the reinstatement of CPM as the Executive Chairman of Tata Sons and also annulling the appointment of the new Chairman N. Chandrasekaran;

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(iv) NCLAT went completely out of the way in directing the reinstatement of CPM as a Director of even the operating companies, the management of affairs of which, were not even the subject matter. The subject matter concerned only the management of the affairs of Tata Sons and not its Group Companies;

(v) NCLAT failed to see that the "*just and equitable clause*" is triggered only in two situations namely: *(a)* wherever there was a functional deadlock; and *(b)* wherever there was a corporate quasi partnership in which there was a breakdown of trust and confidence. In the case on hand there was no pre-existing partnership between Tata Group and the S.P. Group. S.P. Group became shareholders only after 48 years of the incorporation of Tata Sons and they did not even hold any directorial position until June-1980. Therefore S.P. Group never had any right of management nor a right that could

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emanate from a pre-existing relationship of trust and confidence, before the incorporation of the company;

(vi) Tata sons was not a "Two Group" company with one of them being a majority and the other, a minority. S.P. Group became shareholders long after the incorporation of the company and they did not acquire any privilege, prerogative or right. S.P. Group became shareholders, accepting the rights and obligations *inter se* among shareholders, as spelt out by the Articles of Association. S.P. Group also accepted without any demur, all the amendments made to the Articles of Association, when Pallonji Mistry was on the Board and also when CPM was on the Board;

(vii) The removal of CPM was on account of the loss of confidence in CPM and the complete breakdown of trust between the other members of the Board and CPM. To say that his removal required the stamp of approval of the Selection Committee, is completely amiss;

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(viii) NCLAT failed to appreciate in the right perspective, the effects of the Amendment Act 53 of 2000 on a 'deemed to be a public company' under Section 43A and the provisions of the 2013 Act, while dealing with the question whether Tata Sons would be a private Company or a public Company. NCLAT, without any justification, made uncharitable remarks against the Registrar of Companies for issuing an amended certificate of incorporation after the judgment of NCLT, though RoC was not a party. When RoC sought the expunction of those remarks by filing an application, NCLAT entertained the same, only for the purpose of improving upon the reasons already provided, showing thereby the mindset with which NCLAT approached the case;

(ix) NCLAT committed a serious error in whittling down Article 75 of the Articles of Association, though the said Article was not found to be illegal;

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(x) Curiously NCLAT did not find any actual misuse of the Articles of Association, which envisaged a crucial role for the nominee Directors of the two Trusts. CPM himself had proposed a Governance framework which recognised pre-consultation with the Trusts. Therefore, the findings of NCLAT as though the pre-consultation as well as the affirmative voting right conferred upon the Directors nominated by the Trust, undermined the role of the Board of Directors of Tata Sons, are completely perverse;

(xi) The direction issued by NCLAT to the majority (Tata Group) to consult the S.P. Group, for all future appointments of Executive Chairman or Director, is wholly unsustainable in law. This direction tantamount to striking down Articles 104B and 118, even though the challenge to these Articles had already been given up.

10. <u>Contentions on behalf of S.P. Group:</u>

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10.1 Shri C. Aryama Sundaram, learned Senior counsel, appearing on behalf of the S.P. Group raised the following contentions, both in defense of that portion of the judgment of NCLAT which had gone in their favour and also for attacking NCLAT for not going further:

(i) Tata Sons could very well be treated as a two group company where the relationship between the groups was in the nature of a quasi partnership, which created equitable obligations. The relationship between the family of CPM and the Tata family, spans over seven decades and was one of trust and mutual confidence. S.P. Group had acted as the guardian of Tata Group's interest when the Trust had no affirmative voting rights;

(ii) The existence of a quasi partnership can be presumed whenever it is found *(a)* that an Association was formed or continued on the basis of a relationship involving mutual trust and confidence; *(b)* that there was an understanding that some

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of the members would participate in the management of the company; or *(c)* that there was a restriction upon the transfer of the member's interest in the company. One or more of these elements were found to exist in the relationship between Tata Group and S.P. Group and hence it was in the nature of quasi partnership;

(iii) The Trustees misused the Articles of Association to undermine the Board of Directors of Tata Sons and also caused erosion of their ability to exercise independent judgment and to act in the interest of the Company. RNT as well as Soonawala demanded pre-consultation and prior clearance of the agenda items to be placed before the Board. There were instances (a) when the Trust-Nominee Directors objected to matters being placed before the Board without the approval of the Trust, (b) when RNT edited the minutes of the Board meetings that he did not attend, (c) when RNT questioned certain operational and business decisions of Tata Motors, (d) when the Trustees

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overruled the views of the Tata Group legal counsel in the DoCoMo disputes and (e) when the Trustees interfered in business decisions such as Welspun acquisition and rights issue of Tata Motors;

(iv) Tata sons was a public company in form and conduct, as they accepted public deposits even after 13.12.2000 till September-2002 and hence the conversion of the company into a private company by a hand written order of the ROC, effected at night just before NCLAT was to hear the appeals, was completely shocking. The conversion of the company into a private company was aimed at avoiding a higher standard of scrutiny statutorily required for public companies. The conversion also adversely affected the ability of Tata Sons to raise funds, thereby increasing borrowing costs. Due to this conversion, Tata Sons became obliged to refund money to insurance companies which held substantial investments in the instruments issued by the company. Therefore the conversion

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of the company into a private company lacked probity and prejudiced the proprietary rights of minority shareholders;

(v) The removal of CPM was contrary to the provisions of Article 118, which required the setting up of a Selection Committee both for appointment as well as removal. In fact Article 121B contemplates a 15 days' notice, but the same was also not complied. Therefore, the removal of CPM, carried out without there being any agenda for the same and without there being any deliberation or discussion, was wholly illegal. The manner in which three Directors were inducted into the Board without being vetted by the Nomination and Remuneration Committee and the manner in which the resolution for removal was passed would show that it was pre-planned. It was quite strange that CPM's performance came to be appreciated by the Nomination and Remuneration Committee in June-2016 and this Committee had two members, who later became parties to the resolution removing him from Executive Chairmanship;

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(vi) The removal of CPM from the Directorship of Tata Sons as well as the Directorship of the other Group Companies showed complete lack of probity, since veiled threats were sent to the Board of Directors of the other group companies for the withdrawal of the Tata brand, if they failed to fall in line.

10.2 Carrying the baton from Shri Aryama Sundaram, it was contended by Shri Shyam Divan, learned Senior counsel, as follows:

(i) With the coming into force of the Companies Act, 2013, law has moved from 'corporate majority' or 'Corporate democracy' to 'corporate governance', which includes the principles of fairness. This is seen from sections 135, 148, 151, 166 and 177.

(ii) Law now enjoins companies to be operated and managed within a statutory framework i.e. by a Board of Directors and no one else, as per s.149 of the 2013 Act.

(iii) Directors of companies have a fiduciary role vis-à-vis the company with the highest level of duty, which cannot be

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outsourced or delegated and their allegiance should only be to the company alone.

(iv) Once a director is appointed, his duty is only to the company and none else, irrespective of how he is appointed.

(v) There was a series of acts of oppression, including the breach of Articles, misuse of Articles and also a violation of the essential understanding between the two groups. This was found by the NCLAT.

(vi) There was a clear lack of probity and honesty in the dealings of the majority. The concept of probity is much broader and wider than integrity.

(vii) There was a long good faith relationship between the Tata group and SP group, developed over several decades and this has to be viewed in the context of a specific statutory framework that existed from 1964 upto 2000.

(viii) In matters of this nature, the Court is obliged, in its equitable jurisdiction, to take note of the status of the

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company in question, which is at the top (apex) of the pyramid, with several stakeholders including the minority shareholders of the company itself, the employees and shareholders of the operating companies controlled by the company etc.

(ix) NCLAT has recorded detailed findings on facts and there is no perversity in those findings. Therefore there is actually no scope for interference by this court.

(x) The reliefs sought in the company petition, are consistent with the provisions of the Companies Act, 2013 including Section 163 (proportionate representation) and sub-Sections (1), (5), (7) and (8) of Section 242 of the Act.

10.3 Mr. Janak Dwarakadas, learned counsel appearing on behalf of CPM, the original composer of this musical ensemble, raised the following contentions:

(i) Lack of financial probity is not the only ground on which the 'just and equitable' clause for winding up can be

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invoked. Infraction of a legal and/or proprietary right is also a ground for invoking it.

(ii) Proprietary right includes the right to be governed in accordance with the Articles of Association and the provisions of the Act. Independence and autonomy of Board is guaranteed by law. Interference by majority shareholders that encroaches upon the Board's autonomy and independence, is an infraction upon the proprietary rights of minority shareholders.

(iii) Art. 104B, 121 and 121A have been misinterpreted, misconstrued and misapplied to mean that majority shareholders have a right to seek pre-consultation or pre-clearance before matters can be placed before the Board of Tata Sons or Tata Operating Companies. The right to nominate 1/3rd directors by Tata Trusts (A.104B), the requirement of affirmative vote of a majority of nominee directors (A.121) and Article 121A, do not alter the fact that

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nominee directors have a fiduciary duty in exercising these powers to act in the interests of the company alone. Article 122(b) provided that Tata Sons shall be board-managed. But the true legal scope and meaning of these Articles were never understood.

(iv) The role and duties of nominee Directors should have been well defined and kept within the confines of law.

(v) The Nomination and remuneration Committee, in its meeting held on June 28, 2016, expressed the need for clarity on the functioning of the Board of Tata Sons in relation to Tata Trusts as well as its role vis-a-vis the group companies.

(vi) NCLAT has recorded a finding that 3 attempts were made by CPM to place before the Board of Tata Sons, a governance structure and that this became the principal cause for his removal. This finding of fact cannot be set at naught by this court.

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11 Contentions on behalf of the Tata Trusts

Assailing the judgment of NCLAT, Shri Mohan Parasaran, learned Senior counsel appearing for the Trusts, contended as follows:

(i) Impugned judgment did not deal with the detailed findings of fact rendered by NCLT, nor the arguments advanced on behalf of the Trustees of the Tata Trust.

(ii) Impugned judgment employed erroneous tests to determine oppression under section 241 of the 2013 Act

(iii) Mere unwise or loss making business decisions etc. cannot be construed as acts of mismanagement so as to justify winding up on just and equitable grounds. For holding the majority guilty (a) there must be a sequential chain of events leading up to the date of filing the petition; (b) the conduct must be burdensome, harsh and wrongful qua the minority; and (c) there must be an element of lack of probity depriving the proprietary rights of the SP group as

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shareholders.

(iv) This is not a case of quasi-partnership

(v) Impugned judgment is replete with erroneous findings of fact that influenced the conclusions drawn and reliefs granted

(vi) Impugned judgment misattributes the replacement of CPM to RNT and grants reliefs that were not prayed for.

(vii) Though the Trust-Nominee Director introduced the resolution for CPM's removal, it was ultimately the majority of the Board that voted in favor of the resolution.

(viii) Impugned judgment goes against the fundamentals of corporate democracy by taking away basic rights of shareholders

(ix) By directing that all future appointments to directorial positions in Tata Sons can be made only through mutual "consultation" with the SP Group and that only a person "on whom both the groups have trust" can be appointed,

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NCLAT has undermined the role of majority. This could create a stalemate and an impasse by giving minority shareholders a veto power.

(x) This direction also renders mute, the right of the Tata Trusts to nominate directors under Art.104B even though its validity was not under challenge before NCLAT.

(xi) Impugned judgment's interpretation of affirmative voting rights u/ Art 121 is conceptually and legally wrong.

(xii) NCLAT took the affirmative right to mean unilateral power to implement decisions (referencing para 155 of the judgment).

12. <u>Contentions of Tata Consultancy Services (TCS)</u>

Attacking one portion of the judgment of NCLAT which issued a direction to TCS to reinstate CPM as a Director, Ms. Fereshte D. Sethna, learned counsel appearing for TCS argued as follows:-

(i) NCLAT lacked jurisdiction to direct CPM's reinstatement, as TCS was not party to the original proceedings or appellate

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proceedings. Neither the SP Group, nor CPM had prayed for reinstatement of CPM to the board of directors of TCS

(ii) Due process was followed in the removal of CPM from the board of TCS. CPM was granted opportunity to make a representation against the proposed resolution for his removal in compliance with section 169 of the Companies Act. Unanimous approval was granted by the board of directors of TCS at their meeting dated 17.11.2016 for convening an EGM for removal of CPM from the board of directors. Circulation of representation against his proposed removal on 05.12.2016 was made by CPM to members. Requisite majority of shareholders (93.11%) passed resolution at EGM dated 13.12.2016, for the removal of CPM**.** 57.46% of public institutional shareholders were in favor of the resolution for his removal. Further, 71.88% of public shareholders were in favor of resolution for his removal.

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(iii) Action against TCS not maintainable by the SP Group as they did not meet the requisite threshold under section 244 of the Companies Act, 2013. The SP Group held only 0.24% in direct equity interests in TCS which stood at 0.55% on 13.12.2016, and has since been diluted to 0.05% on 18.12.2019 – the date of the impugned order.

(iv) There was no allegation of oppression and mismanagement made out against TCS.

(v) TCS was denied the opportunity of hearing which was contrary to the principles of natural justice.

(vi) NCLAT lacked jurisdiction to grant reinstatement as CPM's tenure of office came to an end on 16.06.2017.

13. Contentions of others

13.1 Shri Tushar Mehta, learned Solicitor General, appearing on behalf of the Registrar of Companies, made submissions to the limited extent of justifying the action of the RoC in issuing an

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amended certificate of incorporation. According to him, the Articles of Association of Tata Sons contained provisions which come within the parameters of the definition of a 'private company' under section 2(68) of the Act. The amendment merely recognized a pre-existing reality and the RoC followed the extant provisions of the Act. But unfortunately, the NCLAT passed remarks, though it claimed it did not, without even hearing the RoC beforehand.

13.2 Shri Zal Andhyarjuna, learned counsel appearing for Shri Noshir A. Soonawala, submitted that Soonawala has never been accused of wrongdoing in his 44 years of association with the Tata Group and even during CPM's tenure as Director. He has not attended a single meeting of the Board of Directors of Tata Sons since his retirement. He was requested to act as advisor to Tata Sons which received unanimous approval of the Board in 2010. CPM would therefore, approach him from time to time for advice on financial matters of Tata Sons. Soonawala has, on his own initiative, sent only two notes to CPM and RNT which were purely

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advisory in nature and cannot be construed as being "directions" or "instructions" from him. The Note dated 04.12.2015 was an analysis of Tata Sons' past financial results pointing out areas of concern and the Memo dated 09.07.2015 concerned Tata Tele Services Limited, an unlisted company having financial problems. Therefore, he argued that NCLAT was wrong in attributing to him, interference with the affairs of Tata Sons.

14. <u>Questions of law arising for consideration</u>

14.1 Though the learned counsel for the parties have raised innumerable contentions touching upon every aspect, micro or macro, and which we have faithfully recorded in paragraphs 9 to 13 above, the jurisdiction of this Court under Section 423 of the Companies Act, 2013, is primarily to answer questions of law arising out of the proceedings before the Tribunal and Appellate Tribunal.

14.2 Therefore, from the rival contentions, the questions of law that arise are formulated as follows:-

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(i) Whether the formation of opinion by the Appellate Tribunal that the company's affairs have been or are being conducted in a manner prejudicial and oppressive to some members and that the facts otherwise justify the winding up of the company on just and equitable ground, is in tune with the well settled principles and parameters, especially in the light of the fact that the findings of NCLT on facts were not individually and specifically overturned by the Appellate Tribunal ?

(ii) Whether the reliefs granted and the directions issued by the Appellate Tribunal, including the reinstatement of CPM into the Board of Tata Sons and other Tata companies, are in consonance with the pleadings made, the reliefs sought and the powers available under Sub-section (2) of Section 242 ?

(iii) Whether the Appellate Tribunal could have, in law, muted the power of the Company under Article 75 of the Articles of Association, to demand any member to transfer his ordinary shares, by simply injuncting the company from exercising such a right without setting aside the Article ?

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(iv) Whether the characterisation by the Tribunal, of the affirmative voting rights available under Article 121 to the Directors nominated by the Trusts in terms of Article 104B, as oppressive and prejudicial, is justified especially after the challenge to these Articles have been given up expressly and whether the Tribunal could have granted a direction to RNT and the Nominee Directors virtually nullifying the effect of these Articles ?

(iv) whether the re-conversion of Tata Sons from a public company into a private company, required the necessary approval under section 14 of the Companies Act, 2013 or at least an action under section 43A(4) of the Companies Act, 1956 during the period from 2000 (when Act 53 of 2000 came into force) to 2013 (when the 2013 Act was enacted) as held by NCLAT ?

15. Legislative History of Oppression, Mismanagement and Unfair Prejudice

15.1 Before we take up the questions of law formulated above for consideration, we think it would be useful to look at the legislative history of oppression, mismanagement and prejudice/ unfair prejudice, both in England and India, as colonial vintage

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continues to haunt us (fortunately or unfortunately), both in legislative drafting and in judicial decision making even till date.

In England

15.2 The history of legislative action to regulate incorporated companies, in England, is just 176 years old. It begins with the Joint Stock Companies Act, 1844. Until then, the government created corporations under a Royal Charter or an Act of Parliament with the grant of a monopoly over a specified territory. The best known example is the British East India Company, to which Queen Elizabeth I granted the exclusive right to trade with all countries to the east of the Cape of Good Hope. During this period, Corporations essentially used to act on the government's behalf, bringing in revenue from their exploits abroad.

15.3 A chartered company (similar to East India Company), known as the South Sea Company, was established in 1711 to trade in the Spanish South American colonies. The South Sea Company's monopoly rights were supposedly backed by the Treaty of Utrecht, signed in 1713 as a settlement following the War of

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Spanish Succession. Investors in the UK were promised high returns of unimaginable proportions, which led to the shares of the company being traded by avaricious investors at high premium. By 1717, the South Sea Company became so wealthy despite having done no real business that it assumed the public debt of the UK government. This was the first speculative bubble that the country (or perhaps the world) saw, but by the end of 1720, the bubble had "burst", leading to bankruptcies and the passage of The Bubble Act, 1720.

15.4 The UK Bubble Act, 1720 prohibited the establishment of companies without a Royal Charter and it remained in force until its repeal in 1825. By 1825, Industrial Revolution had gathered pace, necessitating a legal change. The Bubble Companies Act 1825 lifted the restrictions, but it did not resolve the problem fully.

15.5 Therefore in 1843, the Parliamentary Committee on Joint Stock Companies, chaired by William Gladstone made a report, which led to the enactment of the Joint Stock Companies Act 1844.

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This Act made it possible for ordinary people to incorporate companies through a simple registration procedure. However, it did not permit limited liability.

15.6 Then came the Limited Liability Act, 1855, which allowed investors to limit their liability in the event of business failure, to the amount they invested in the company. These two features - a simple registration procedure and limited liability - were subsequently codified in the first modern company law enactment, namely the Joint Stock Companies Act 1856. The Joint Stock companies Act, 1856 made it possible for any 7 individuals, subscribing to shares individually, to form a limited liability company. This was subsequently consolidated with a number of other statutes in the Companies Act 1862, which was described by Francis Palmer as the Magna Carta of Co-operative enterprises.

15.7 The Companies Act, 1862 consolidated the laws relating to the incorporation, regulation and winding up of trading companies and other associations. Though this Act did not provide

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for any remedies to the minority shareholders in respect of oppression and mismanagement, Section 79 empowered the Court to wind up a company whenever the Court was of the opinion that it is just and equitable to wind up the company. This Act also contained a provision conferring a limited right upon a dissentient member, whenever a sale or transfer of the business or property of the company took place in the course of winding up proceedings.

15.8 However, when fraudulent practices in relation to the formation and management of companies came to the fore, an investigation was ordered by a Committee chaired by Lord Davey. The Committee submitted a report along with a draft Bill in June, 1895. This Bill became the Companies Act, 1900. This Act also did not contain any provision relating to oppression and mismanagement. So was the case with the Companies (Consolidation) Act, 1908. The Act of 1908 was examined by a committee presided over by Lord Wrenbury in 1918 and again by a committee headed by Greene, K.G. in 1926, which led to the Companies Act, 1929.

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15.9 During the second world war, a Company Law Reforms Committee chaired by Lord Cohen was appointed (in 1943) by the President of the Board of Trade to consider and report what major amendments are needed to the 1929 Act, particularly "*to review the requirements prescribed in regard to the formation and affairs of companies and the safeguards afforded for investors and for the public interest*". This Committee's report dealt specifically with 2 problems, namely (i) the hardship caused to the legal heirs of a deceased shareholder of a private company in the matter of disposal of the shares, due to the restriction on the transferability of shares and (ii) the abuse of office by the Directors in siphoning off huge profits in the form of remuneration, to the detriment of the small shareholders. After analyzing these 2 issues in paragraphs 58 and 59 as illustrative cases, the Cohen Committee, recommended that "*a step in the right direction would be to enlarge the power of the Court to make a winding-up order by providing that the power shall*

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be exercisable notwithstanding the existence of an alternative remedy".

Paragraphs 58 to 60 of the Report reads as follows:

> *58.* ***Restrictions on transfer of shares****. - It has been represented to us that the provisions which are inserted in the articles of a private company for the restriction of the transfer of the shares have caused hardship especially where the legal representatives of minority shareholders have to raise money to pay estate duties. The directors of the company, who are usually the principal shareholders, sometimes exercise their power to refuse to register transfers to outsiders, with the result that executors, who must realise their testators' shares in order to pay estate duty, have to sell to the directors or persons approved by them at prices much lower than the values at which the shares are assessed by the Board of Inland Revenue in valuing the estate of the deceased for purpose of estate duty. This difficulty is not in law peculiar to private companies since there is no legal impediment to a public company having in its articles a provision subjecting transfer of shares to the approval of the directors though Stock Exchanges do not accept it where leave to deal is required. This restriction is valued as a means of keeping a family business under the control of the family and we see no sufficient reason for its removal, particularly if our suggestion in paragraph 6o is adopted.*
>
> *59.* ***Excessive remuneration of directors****. - Another abuse which has been found to occur is that the directors absorb an undue proportion of the profits of the company in remuneration for their services so that little or nothing is left for distribution among the shareholders by way of dividend. This may happen where, for example, two persons trading in partnership form their business into a limited company and one partner dies-, leaving his shares to his widow who takes*

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no active part in the business. At present the only remedy open to the minority shareholder is to commence an action to restrain the company from paying the remuneration on the ground that such payment is a fraud on the minority, since the Court would not make a winding-up, order in view of the alternative remedy.

60. Oppression of minorities.-We have carefully examined suggestions intended to strengthen the minority shareholders of a private company in resisting oppression by the majority. The difficulties to which we have referred in the two preceding paragraphs are, in fact, only illustrations of a general problem. It is impossible to frame a recommendation to cover every case. We consider that a step in the right direction would be to enlarge the power of the Court to make a winding-up order by providing that the power shall be exercisable notwithstanding the existence of an alternative remedy. In many cases, however, the winding-up of the company will not benefit the minority shareholders, since the break-up value of the assets may be small, or the only available purchaser may be that very majority whose-oppression has driven the minority to seek redress. We, therefore, suggest that the Court should have, in addition, the power to impose upon the parties to a dispute whatever settlement the Court considers just and equitable. This discretion must be unfettered, for it is impossible to lay down a general guide to the solution of what are essentially individual cases. We do not think that the Court can be expected in every case to find and impose a solution; but our proposal will give the Court a jurisdiction which it at present lacks, and thereby at least empower it to impose a solution in those cases where one exists.

15.10 Ultimately, in para 153 of the report, a recommendation was made to amend the provision relating to winding up, by adding the following:

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> *There be a new section under which, on a shareholder's petition, the Court, if satisfied that a minority of the shareholders is being oppressed and that a winding-up order would not do justice to the minority, should be empowered, instead of making a winding-up order, to make such other order, including an order for the purchase by the majority of the shares of the minority at a price to be fixed by the Court, as to the Court may seem just*

15.11 Lord Cohen committee report led to the enactment of the Companies Act, 1948, in which a provision was incorporated in section 210. The heading given to the Section was, "*Alternative Remedy to Winding up in Cases of Oppression*". This provision reads as follows:-

> ***"210. Alternative remedy to winding up in cases of oppression***
>
> *(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (3) of section one hundred and sixty-nine of this Act, the Board of Trade, may make an application to the court by petition for an order under this section.*
>
> *(2) If on any such petition the court is of opinion—*
>
> *(a) that the company's affairs are being conducted as aforesaid; and*
>
> *(b) that to wind up the company would unfairly prejudice that part of the members, but 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, whether for*

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regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(3) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly.

(4) An office copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within fourteen days after the making thereof, be delivered by the company to the registrar of companies for registration; and if a company makes default in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(5) In relation to a petition under this section, section three hundred and sixty-five of this Act shall apply as it applies in relation to a winding-up petition, and proceedings under this section shall, for the purposes of Part V of the Economy (Miscellaneous Provisions) Act, 1926, be deemed to be proceedings under this Act in relation to the winding up of companies.

15.12 But the word “oppressive” appearing in section 210 of the 1948 Act, was construed by the House of Lords in ***Scottish***

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Cooperative Wholesale Society vs. ***Meyer***[1] to mean "***burdensome, harsh and wrongful***". The expression "wrongful" gave rise to some uncertainty as to whether it required actual illegality or invasion of legal rights. Moreover, the provision invited 2 criticisms namely (i) that the requirement to establish grounds which justified winding up under the just and equitable clause was itself harsh and (ii) that section 210 would not apply to an isolated act, but applied only to a course of conduct.

15.13 Therefore, the Jenkins Committee of 1962 recommended use of the term "unfairly prejudicial". Parliament adopted it in Section 75 of the Companies Act, 1980. Later, this section 75 of the 1980 Act became, with an amendment, Section 459 of the Companies Act, 1985. Sections 459 to 461 of the Companies Act, 1985 were included in Part XVII, under the caption "***Protection of Company's Members against Unfair Prejudice".*** Sections 459 to 461 read as follows:-

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1 1959 A.C.324

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459. Order on application of company member.

(1) A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is ***unfairly prejudicial to the interests of some part of the members*** *(including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member or members are to be construed accordingly.

460 Order on application of Secretary of State

(1) If in the case of any company—

(a) the Secretary of State has received a report under section 437, or exercised his powers under section 447 or 448 of this Act or section 44(2) to (6) of the [1982 c. 50.] Insurance Companies Act 1982 (inspection of company's books and papers), and

(b) it appears to him that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members, or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. he may himself (in addition to or instead of presenting a petition under section 440 for the winding up of the company) apply to the court by petition for an order under this Part.

(2) In this section (and, so far as applicable for its purposes, in the section next following) "company" means any body corporate which is liable to be wound up under this Act.

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461 Provisions as to petitions and orders under this Part

(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court's order may—

(a) regulate the conduct of the company's affairs in the future,

(b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do,

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct,

(d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

(3) If an order under this Part requires the company not to make any, or any specified, alteration in the memorandum or articles, the company does not then have power without leave of the court to make any such alteration in breach of that requirement.

(4) Any alteration in the company's memorandum or articles made by virtue of an order under this Part is of the same effect as if duly made by resolution of the company, and the provisions of this Act apply to the memorandum or articles as so altered accordingly.

(5) An office copy of an order under this Part altering, or giving leave to alter, a company's memorandum or articles shall, within 14 days from the making of the order or such longer period as the court may allow, be delivered by the company to the registrar of companies for registration ; and if a company makes default in complying with this subsection, the company and every officer of it who is in default is liable to a fine and, for continued contravention, to a daily default fine.

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(6) Section 663 (winding-up rules) applies in relation to a petition under this Part as in relation to a winding-up petition.

The words in bold letters in the above extract in section 459, were later substituted by the words "***unfairly prejudicial to the interests of its members generally or of some part of its members"*** by a 1989 amendment which came into effect in 1991.

15.14 The Companies Act, 1985 was repealed by the Companies Act, 2006, which had the dubious distinction of being the longest Act in British parliamentary history, with 1300 sections and 16 schedules. (until it was overtaken by the Corporation Tax Act, 2009). Part 30 of the Act contains 3 provisions in sections 994 to 996 (apart from others), grouped under the heading "Protection of Members against Unfair Prejudice". Paragraph 1265 of the Explanatory Notes to the 2006 Act, confirms that Sections 994-998 restate sections 459, 460 and 461 of the 1985 Act.

15.15 Sections 994 to 996 of the Companies Act, 2006 read as follows:-

"994 Petition by company member

(1) A member of a company may apply to the court by petition for an order under this Part on the ground—

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(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, "company" means—

(a) a company within the meaning of this Act, or

(b) a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991 (c. 58).

995 Petition by Secretary of State

(1) This section applies to a company in respect of which—

(a) the Secretary of State has received a report under section 437 of the Companies Act 1985 (c. 6) (inspector's report);

(b) the Secretary of State has exercised his powers under section 447 or 448 of that Act (powers to require documents and information or to enter and search premises);

(c) the Secretary of State or the Financial Services Authority has exercised his or its powers under Part 11 of the Financial Services and Markets Act 2000 (c. 8) (information gathering and investigations); or

(d) the Secretary of State has received a report from an investigator appointed by him or the Financial Services Authority under that Part.

(2) If it appears to the Secretary of State that in the case of such a company—

(a) the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members, or

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(b) an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, he may apply to the court by petition for an order under this Part.

(3) The Secretary of State may do this in addition to, or instead of, presenting a petition for the winding up of the company.

(4) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, "company" means any body corporate that is liable to be wound up under the Insolvency Act 1986 (c. 45) or the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)).

996 Powers of the court under this Part

(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court's order may—

(a) regulate the conduct of the company's affairs in the future;

(b) require the company— (i) to refrain from doing or continuing an act complained of, or (ii) to do an act that the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

Legislative history in India

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15.16 In India, the earliest legislation made for the 'Regulation of Registered Joint Stock Companies' was Act No. XLIII of 1850. This Act provided for the registration of every un-incorporated company of partners, associated under a deed containing a provision that the shares in the stock or business of the said company, are transferable without the consent of all the partners. It will be fascinating for those interested in history, to know that under this 1850 Act, ***the Supreme Courts of Judicature at Calcutta, Madras and Bombay*** were conferred not only with the power of registration of such companies but also with a power to enforce the performance by the directors of any of their duties under the Act or the deed of partnership. These courts also had a consequential power to punish a person for contempt, if there was any disobedience of the order of the court. The concepts such as minority, majority, oppression, mismanagement etc., were alien to this Act of 1850.

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15.17 Then came Act No.XIX of 1857 which provided for the incorporation and regulation of joint stock companies and other associations either with or without limited liability of the members thereof. The primary object of the Act was to enable the members of the joint stock companies and other associations to limit their liability for the debts and engagements relating to those companies and associations. It was under this Act that for the first time the prescription that 7 or more persons associated for any lawful purpose may form themselves into an incorporated company with or without limited liability by subscribing their names to a Memorandum of Association, was introduced. By this very same Act the prohibition for 20 or more persons to carry on any partnership in trade or business having gain as its object, unless they are registered as a company, was also introduced. But even in this Act the concepts such as oppression and mismanagement etc., were not dealt with (perhaps due to the fact that East India Company alone was granted such a privilege).

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15.18 Thereafter, a full-fledged enactment known as The Indian Companies' Act, 1866 was passed with a view to consolidate and amend the laws relating to the incorporation, regulation and winding up of trading companies and other associations. Even this Act, did not provide for any remedy in the case of oppression and mismanagement, though provisions were made for winding up including voluntary winding up.

15.19 The above Act No. X of 1866 was repealed by The Indian Companies Act No. VI of 1882. This Act also did not contain provisions for an individual or group of shareholders/members to seek redressal against oppression, mismanagement or any unfair prejudicial treatment.

15.20 Then came The Indian Companies Act, 1913 (Act No.VII of 1913) which repealed the 1882 Act and the amendments made thereof. Interestingly, this 1913 Act also repealed one particular provision in the Indian Arbitration Act, 1899. Though in the original enactment of 1913, there was no provision relating to oppression

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and mismanagement, the Amendment Act 52 of 1951 inserted Section 153C to The Indian Companies Act, 1913. This Section 153C reads as follows :-

> *"**153C. Power of court to act when company acts in a prejudicial manner or oppresses any part of its members**.-(1) Without prejudice to any other action that may be taken, whether in pursuance of this Act or any other law for the time being in force, any member of a company who complains that the affairs of the company are being conducted-*
>
> *(a) In a manner prejudicial to the interest of the company, or*
>
> *(b) In a manner oppressive to some part of the members (including himself) may make an application to the court for an order under the section.*
>
> *(2) An application under sub-section (I) may also be made by the Central Government if it is satisfied that the affairs of the company are being conducted as aforesaid.*
>
> *(3) No application under sub-section (I) shall be made by any member, unless-*
>
> *(a) In the case of a company having a share capital, the member complaining-*
>
> *(i) has obtained the consent in writing of not less than one hundred in number of the members of the company or not less than*

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one-tenth in number of the members, whichever is less or

(ii) holds not less than one-tenth of the issued share capital of the company upon which all calls and other sums due have been paid; and

(b) In the case of a company not having a share capital the member complaining has obtained the consent in writing of not less than one-fifth in number of the members, and where there are several persons having the same interest in any such application and the condition specified in clause (a) or clause (b) of this sub-section is satisfied with reference to one or more of such persons, any one or more of them may, with the permission of the court, make the application on behalf of, or for the benefit of, all persons so interested, and the provisions of rule 8 of Order I of the First Schedule to the Code of Civil Procedure, 1908 (Act V of 1908), shall apply to any such application as it applies to any suit within the meaning of that rule.

(4) If on any such application the court is of opinion-

(a) that the company's affairs are being conducted as aforesaid, and

(b) that to wind up the company would unfairly and materially prejudice the interests of the company or any part of its members, but otherwise the facts would justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up,

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

(5) Without prejudice to the generality of the powers vested in a court under sub-section (4), any order made under that sub-section may provide for-

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

(b) the purchase of the 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 shares or interest by the company being a company having a share capital, for the reduction accordingly of the company's capital or otherwise;

(d) the termination of any agreement, howsoever, arrived at, between the company and its manager, managing agent, managing director or any of its other directors;

(e) the termination or revision of any agreement entered into between the company and any person other than any of the persons referred to in clause(d), provided that no such agreement shall be termination or revised except after due notice to the party concerned and in the case of revision of any such

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agreement, after obtaining the consent of the party concerned thereto;

(f) 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 sub-section (I), which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference.

(6) Where an order under this section makes any alteration in, or addition to, the memorandum or articles of any company, then notwithstanding anything contained in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in, or addition to, the memorandum or articles inconsistent with the provisions of the order, but subject to the foregoing provisions of this sub-section the alterations or additions made by the order shall have the same effect as is duly made by a resolution of the company, and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly.

(7) A certified copy of every order under this section altering or adding to, or giving leave to alter or add to, the memorandum or articles of any company shall, within fifteen days after the making thereof, be delivered by the company to the registrar for registration, and if a company makes default in complying with the provisions of this sub-section, the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees.

(8) It shall be lawful for the court upon the application of any petitioner or of any respondent to a petition under this

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section and upon such terms as to the court appears just and equitable, to make an such interim order as it thinks fit for regulating the conduct of the affairs of the company pending the making of a final order in relation to the application.

(9) Where any manager, managing agent, managing director or any other director or any other person who has not been impleaded as a respondent to any application under this section applies to be made a party thereto, the court shall, if it is satisfied that his presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the application, direct that the name of any such person be added to the application.

(10) In any case in which the court makes an order terminating any agreement between the company and its manager, managing agent or managing director or any of its other directors, as the case may be, the court may, if it appears to it that the manager, managing agent, managing director or other director, as the case may be, has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company, compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sums to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just, and the provisions of sections 235 and 236 of this Act shall apply as they apply to a company in the course of being wound up.

***Explanation**.- For the purposes of this section, any material change after the 21st day of July, 1951, in the control of a company, or in the case of a company having a managing agent in the composition of the managing agent which is a firm or in the control of the managing agent which is a company, may be deemed by the court to be a fact which*

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would justify the making of a winding-up order on the ground that it would be just and equitable that the company should be wound up:

Provided that the court is satisfied that by reason of the change the interests of the company or any part of its members are or are likely to be unfairly and materially prejudiced"

15.21 After the country attained independence, a Company Law Committee was appointed by the Government of India for the revision of the Companies Act with particular reference to Indian trade and industry. The Committee submitted its report in March-1952. After circulating the Report to all State Governments, Chambers of Commerce, Trade Associations and other bodies and after examining the inputs received, the Companies Act, 1956 (Act no.1 of 1956) was passed. This Act included a full Chapter in Chapter VI of Part VI, containing elaborate provisions for the prevention of oppression and mismanagement. This Chapter was divided into two parts, with Part A dealing with the powers of the Court/Tribunal and Part B dealing with the powers of the Central

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Government. Sections 397, 398 and 402 of the Act are of significance and, hence, they are extracted as follows:

> *"**397. 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 manner oppressive to any member or members (including any one or more of themselves) may apply to the Court for an order under this section, provided such members have a right so to apply in virtue of section 399.*
> *(2) If, on any application under sub-section (1), the Court is of opinion -*
>
> > *(a) that the company's affairs are being conducted in a manner oppressive to any member or members; and*
> >
> > *(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;*
>
> *the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.*
>
> ***398. Application to Court for relief in cases of mismanagement**.-(1) Any members of a company who complain-*
>
> > *(a) that the affairs of the company are being conducted in a manner prejudicial to the interests of the company; or*
> >
> > *(b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its board of Directors, or of its managing agent or secretaries and treasurers, or in the*

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constitution or control of the firm or body corporate acting as its managing agent or secretaries and treasurers, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other 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 the interests of the company;

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 that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Court may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

***402 - Powers of Court on application under section 397 or 398**. - Without prejudice to the generality of the powers of the Court under section 397 or 398, any order under either section may provide for-*

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

(b) the purchase of the 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) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely:-

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(i) the managing director,
(ii) any other director,
(iii) the managing agent,
(iv) the secretaries and treasurers, and
(v) the manager.

upon such terms and conditions as may, in the opinion of the Court, be just and equitable in all the circumstances of the case.

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) 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 section 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(g) any other matter for which in the opinion of the Court it is just and equitable that provision should be made."

15.22 After the economy of the country opened up and the national and international economic environment changed, the Government decided to replace the 1956 Act with a new one. Accordingly, the Companies Bill, 2009 was introduced in the Lok

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Sabha. But this bill was withdrawn and the Companies Bill, 2011 was introduced. This eventually became the Companies Act 2013. Among the many changes brought about by this Companies Act 2013, those relating to protection of minority shareholders is what is relevant for our purpose. In fact, paragraph 5(ix) of the Statement of Objects and Reasons for the Companies Act, 2013 deals with the issue of protection of minority shareholders. It reads as follows:

> *"5. (ix)* ***Protection for Minority Shareholders:***
>
> *(a) Exit option to shareholders in case of dissent to change in object for which public issue was made.*
>
> *(b) Specific disclosure regarding effect of merger on creditors, key managerial personnel, promoters and non-promoter shareholders is being provided. The Tribunal is being empowered to provide for exit offer to dissenting shareholders in case of compromise or arrangement.*
>
> *(c) The Board may have a director representing small shareholders who may be elected in such manner as may be prescribed by rules."*

15.23 Chapter XVI of the 2013 Act containing Sections 241 to 246 deals exclusively with "*Prevention of Oppression and*

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Mismanagement." Sections 241 and 242 are of relevance for our purpose and hence it is extracted as follows:

> *"**241. Application to Tribunal for relief in cases of oppression, etc. —** (1) Any member of a company who complains that—*
>
> *(a) 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 in a manner prejudicial to the interests of the company; or*
>
> *(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other 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*

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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 subsection 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

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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.

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(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 marking 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."

15.24 Thus the ***English legislative history of the provisions relating to oppression, mismanagement and prejudice, show 3 milestones, namely (i) the introduction in the year 1862, of***

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the 'just and equitable clause' for winding up and the conferment of a limited right on the dissentient member, whenever a transfer or sale took place in the course of winding up proceedings, (ii) the provision of an alternative remedy to winding up, in case of oppression of minority, in the year 1948 and (iii) the shift from oppression to the 'unfair prejudice' quotient in 1980/1985. The journey, in other words, was from "winding up on just and equitable cause" to "oppression" to "unfair prejudice".

15.25 But in so far as India is concerned, what was incorporated in section 210 of the English Companies Act, 1948, inspired the insertion of section 153-C of the Indian Companies Act, 1913, by way of an amendment in 1951. Then came sections 397 and 398 of the 1956 Act, with certain modifications. An overhaul of these provisions resulted in Sections 241 and 242 of the 2013 Indian Act, on the model of (and not exact reproduction of) sections

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459 to 461 of the English Companies Act, 1985 and sections 994 to 996 of the English Act of 2006.

15.26 The change of language and the consequential change of parameters for an inquiry relating to oppression and mismanagement from 1951 to 1956 and from 1956 to 2013 and thereafter can be best understood, if the anatomy of the statutory provisions are dissected and presented in a table :-

1913 Act (After the Amendment Act 52 of 1951)	**1956 Act (with the amendment made under Act 53 of 1963)**	**2013 Act**
(1) Company's affairs **are being conducted** in a manner - (a) Prejudicial to the company' interest; or (b) Oppressive to some part of the members; and (2) Winding up will unfairly **and materially** prejudice **the interests of the company's or any part of its members**	(1) Company's affairs **are being conducted** in a manner- (a) Prejudicial to public interest; or (b) Oppressive to any member or members; or (c) Prejudicial to the interests of the company; and (2) Winding up will unfairly prejudice **such**	(1) Company's affairs **have been or are being** conducted in a manner– (a) Prejudicial to any member or members; (b) Prejudicial to public interest; or (c) Prejudicial to the interests of the company; or (d) Oppressive to

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(3) The object should be to bring to an end, the matters complained of.	**member or members**.	any member or members. (2) Winding up will unfairly prejudice **such member or members.**

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

(i) While the conduct of the company's affairs in a manner that warrant interference, should be ***"present and continuing",*** under the 1913 Act and 1956 Act, as seen from the usage of the words *"are being"*, the conduct could even be ***"past or present and continuous"*** under the 2013 Act as seen from the usage of the words *"have been or are being" (But the conduct cannot be of a distant past*);

(ii) Prejudice to public interest and prejudice to the interests of any member or members were not among the parameters prescribed in the 1913 Act, but under the 1956 Act prejudice to public interest

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was included both under the provision relating to oppression and also under the provision relating to mismanagement. Prejudice to the interest of the company was included only in the provision relating to mismanagement. But under the 2013 Act conduct prejudicial to any member or prejudicial to public interest or prejudicial to the interest of the company are all added along with oppression;

(iii) Under the 1913 Act, the Court should be satisfied that winding up under the just and equitable clause will not only unfairly prejudice but ***"also materially prejudice"*** the interests of the company or any part of its members. But in the 1956 Act and 2013 Act, the words *"and materially"* do not follow the word *"unfairly"*. Moreover, under the 1956 Act and 2013 Act all that is required to be seen is whether the winding up will unfairly prejudice *"such member or members"* indicating thereby that the focus was on complaining/affected members.

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15.28 Having thus seen the shift in the Indian legislative policy under Act 52 of 1951 (amending the 1913 Act) and then under the 1956 Act as amended by Act 53 of 1963 and thereafter under the 2013 Act, let us also see how the shift in the legislative policy happened in the United Kingdom. A table similar to the one given in para 15.26, is presented below insofar as the English Law is concerned:

1948 English Act	***1985 English Act with Amendment in 1991***	***2006 Act***
(i) the company's affairs ***are being conducted*** *in a manner oppressive to some part of the members* *(ii) to wind up the company would unfairly prejudice that part of the members, though winding up on just and equitable ground may be justified.* *(iii) the order of the Court should be*	*(i) the company's affairs* ***are being or have been conducted*** *in a manner unfairly prejudicial to the interests of some part of its members or:* *(ii) that any actual or proposed act would be so prejudicial* *then the Court may pass such order as it thinks fit for giving relief in respect of the matters complained of.*	*(i) the company's affairs* ***are being or have been conducted*** *in a manner unfairly prejudicial to the interests of the members generally or of some part of its members and:* *(ii) that any actual or proposed act would be so prejudicial* *then the Court may pass such order as it thinks fit for giving relief in respect of the matters complained of.*

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passed with a view to bringing to an end the matters complained of.		

15.29 There are a few notable features of the shift that happened in England. They are **(i)** from a *"conduct oppressive to some part of the members*" the focus has shifted to "*conduct unfairly prejudicial to the interests of the members generally or of some part of its members*": **(ii)** conduct prejudicial to public interest or prejudicial to the company's interest, does not form part of the scheme of English Law; **(iii)** any actual or proposed act or omission, can also be challenged under English Law on the ground that it would turn out to be prejudicial; **(iv)** the question of the Court forming an opinion that the facts would otherwise require an order for winding up on just and equitable ground but that the same will unfairly prejudice the complaining members, does not arise under the English Law any more.

15.30 But despite the huge shift in England, there appears to be a common thread running in all the enactments, both in India

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and England. In all the 3 Indian enactments, namely the 1913 Act, 1956 Act and the 2013 Act, the Court is ordained, generally to pass such orders ***"with a view to bringing to an end the matters complained of"***. This sentence is found in Section 153C(4) of the 1913 Act. It is found in Section 397(2) as well as 398(2) of the 1956 Act and it is also found in Section 242 (1) of the 2013 Act. This is also the common thread that runs through the statutory prescriptions contained in the English Acts of 1948, 1985 and 2006. Therefore, at the stage of granting relief in an application under these provisions, the final question that the Court should ask itself is as to whether the order to be passed will bring to an end the matters complained of. Having thus seen the development of law, let us now take up the questions of law one after another.

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16. Question No. 1

16.1 The first question of law arising for consideration is whether the formation of opinion by the Appellate Tribunal that the company's affairs have been or are being conducted in a manner prejudicial and oppressive to some members and that the facts otherwise justify the winding up of the company on just and equitable ground, is in tune with the well settled principles and parameters, especially in the light of the fact that the findings of NCLT on facts were not individually and specifically overturned by the Appellate Tribunal ?

16.2 An analysis of the provisions of Section 241(1)(a) read with clauses (a) and (b) of Sub-section (1) of Section 242 shows that a relief under these provisions can be granted only if the Tribunal is of the opinion –

> "(1) that the company's affairs have been or are being conducted in a manner –
>
> (a) Prejudicial to any member or members *or*

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(b) Prejudicial to public interest *or*

(c) Prejudicial to the interests of the company *or*

(d) Oppressive to any member or members

and

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

16.3 Keeping in mind the above statutory prescription, if we go back to the pleadings, it will be seen that the complainant companies forming part of the S.P. Group pitched their claim in their original petition on the ground:

(i) that the affairs of Tata Sons are being carried as though it was the proprietary concern of RNT; and

(ii) that though the oppressive conduct of the respondents was such that it would be just and equitable to wind up Tata Sons under Section 241, but such winding up would unfairly prejudice the interests of the complainants.

16.4 The specific allegations on which the complainant companies (of the S.P. Group) sought relief are as follows:-

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(i) The abuse of a few Articles of Association and the control exercised by the Tata Trust and its nominee Directors over the Board of Directors of Tata Sons;

(ii) The removal of CPM as Executive Chairman;

(iii) Transactions with Mr. C. Sivasankaran of Sterling Infotech and the transactions in which Tata Teleservices got entangled;

(iv) Acquisition of Corus Group Inc of U.K.;

(v) Doomed Nano Car project;

(vi) The grant of inter-corporate bridge loan to sterling computers;

(vii) The dealings with NTT DoCoMo which eventually led to an arbitration award for a huge sum of money;

(viii) The sale of a flat to Mehli Mistry and the grant of huge personal favours to the companies owned and controlled by Mehli Mistry.

16.5 Each and every one of the allegations forming the basis of the complaint, was dealt with by NCLT and categorical findings

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based on evidence was recorded by NCLT. The findings recorded by NCLT allegation-wise, are indicated in paragraph 6.1 above.

16.6 None of the above findings, except the one relating to the removal of CPM was specifically and individually overturned by NCLAT. In addition NCLAT focused on the conversion of Tata Sons from a public company to a private company.

16.7 For easy appreciation, we present in the following table, the allegations made in the complaint, the findings recorded by NCLT with an indication whether NCLAT dealt with the same or not:

Allegation	***Findings of NCLT***	***Whether NCLAT dealt with it specifically***
Siva Group Co. – 1. Non-payment of due amount by Siva Group (Sterling) as per arbitral award in TTSL-NTT DoCoMo deal (para 218-234) 2. Acquisition of shares in TTSL by Siva and Temasek 3. Info leak pertaining to	1. On 03.10.2013, Siva wrote a letter to CPM seeking an exit from TTSL in lieu of the financial strain it was facing. On 08.10.2013, RNT wrote to CPM requesting him to meet Siva to discuss the predicament, in lieu of latter's previous contributions in the history of TTSL. However, this was three years before the Docomo issue, which cropped up in 2016. **(Para 222, 233)** 2. The loan given by one of	No specific finding.

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initiation of action against Siva 4. Acquisition of Dishnet DSL (DDSL) from Siva Group	the Tata Group Companies (Kalimati) to Siva Company was paid back and undertaking given by the company was released. Siva himself provided personal guarantee for the loan taken from Standard Chartered Bank. Moreover, no Tata Group company paid any money for acquisition of TTSL shares by Siva Group. **(Para 228)** 3. Ultimately, Siva had to pay its group pro-rata share of the Docomo award. Siva, on 19.09.2016, then sought damages from Tata Sons for the alleged mismanagement of TTSL, for the ensuing losses incurred by it. However, this did not prove any special relationship with RNT.**(Para 221, 230, 233,234)** 4. Acquisition price of TTSL by both Siva and Temasek had unanimous approval of the shareholders. **(Para 230)** 5. Transaction was not done not behind the back of CPM and connected parties. **(Para 230)** 6. The reason for the difference in the acquisition prices between Temasek	

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	(Rs.26/ share) and Siva Group (Rs.17/share) was owing to more shareholding rights with Temasek. **(Para 230)** 7. CPM made more profits from the acquisition of shares of TTSL than Siva Group. (the latter had sold its shares to NTT-Docomo in 2008). Complainant companies also acquired shares of Tata Teleservices Ltd. at Rs. 15/ per share. **(Para 230)** 8. NTT-DoCoMo also acquired shares from brother and father of CPM. CPM was also a beneficiary like Siva but this was not disclosed by the complainant companies. The rate at which the petitioners acquired the shares of TTSL is less than the rate at which Siva acquired them and the gain made by the petitioners by selling shares of NTT DoCoMo was more than the gain made by the Siva Group. **(Para 230)** 9. The acquisition happened in 2006 and it is sought to raise after 10 years, during which period CPM was part of that board and also the	

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	Executive Chairman for a period. 10. No proof on record to show leakage of info 11. It was Mr. Nitin Nohria (Trust Nominee director) and not CPM, who proposed to initiate legal action against Siva. **(Para 231)** 12. With respect to Tata Capital giving a loan to Mr. Siva, due diligence carried out on the same, and no role in the grant of this loan can be attributed to RNT. **(Para 234)** 13. The acquisition of Dishnet DSL (DDSL) from Siva group took place in 2004. CPM has not argued that he was unaware of this acquisition. Nor has it been argued that RNT made any illicit gain out of it. In fact, it was commercial decision of TTSL. This issue was brought to the notice of CPM way back in October, 2013, but he never complained earlier. **(Para 235)** Neither TTSL nor Kalimati nor Tata Capital were arrayed as party to the proceeding.	
Air Asia India Ltd. &Vistara:-	Air Asia not made a party. At the time when resolution	No specific finding.

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Diversion of funds through a Global terrorist.	for Joint Venture was placed on 06.12.2012, CPM was active in discussions and was a consenting party to the same. The said Joint Venture was incorporated on 28.03.2013 and CPM did not raise any issue till his removal in 2016. **(Para 242-244)** CPM contends that the deal was struck with Mr. Hamid Reza Malakotipour who was classified as a Global terrorist by the United Nations. However, the allegation of indirectly financing terrorism through the involvement of such third parties, is serious and demeaning. **(Para 241)** After claiming that he has no say in the AirAsia transactions, CPM claims to have protected the interest of the company by limiting its exposure and ensuring no fallback liability. These two claims conflict with each other. **(Para 242)** With respect to the Joint Venture with Singapore Airlines to set up Vistara, all Air Asia decision are fait accompli upon him, and thus, he is estopped from denying	

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	knowledge regarding these transactions. **(Para 244)** It would be preposterous to allege that RNT funded a terrorist through hawala with diversion of AirAsia India funds. **(Para 245)**	
Mehli Mistry:- 1. Awarding of dredging and Shipping contracts (without tenders) to Mehli's Companies by Tata Power. 2. Purchase of agricultural land by RNT at Alibaug in 1993 where Aqua Farms (in which Mr. Mehli was a partner) was a confirming party to the sale deed. 3. Sale of Bakhtawar Apartment at Colaba to MPCPL (which belongs to	The contract for dredging at Trombay was awarded in 1993 and renewed for various tenures (5 times) from 2002 – 2014. CPM held directorship of Tata Power from 1996-2006 & 2011-2016, but never raised any objection. **(Para 258)** 2004 barging cum dredging contract – with regard to the award of contract by Tata Power to MPCL, there is nothing on material to prove that this caused loss to TPC. **(Para 259)** 2006 Shipping Contract awarded by Tata Power to a consortium (comprising of MPSPL and Mercator Lines Ltd.) – Letter written by Mr. Mehli to Tata Power dated 04.05.2013 pertained to issue of coal storage, which does not prove any expropriation or bullying by him. Since, the company of Mr. Mehli was the contractor, he only wrote	No specific finding.

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Forbes Gokak Ltd.)	to Tata Power to ensure proper coordination and joint decision making to sustain a smooth supply chain to Trombay Power house. **(Para 263)** This (Alibaug) was a regular transfer that took place in 1993. Previously, Aqua Farms had made payments to the original landowner for purchase, but the sale deed did not fructify. Aqua Farms was made a confirming party, as RNT reimbursed Aqua Farms for the original payment that it had made to the original land owners. Simply put, the moment RNT reimbursed Aqua Farms, the vendors of the land would execute the sale deed in favour of RNT. This was a mere sale transaction between two parties, which cannot be used to argue that contracts were bestowed to Mr. Mehli**(Para 253)** No unjust enrichment of RNT at the cost of Company – Forbes Gokak Ltd. not arrayed as a party –	

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	Allegation raised in 2016 of the events which can be traced back to 2002 – This was not a company related affair, as RNT retired from the company and has not been in management since 2012 – Not a case falling under 241. **(Para 252)**	
Corus acquisition	The allegation that Tata Steel acquired Corus at an inflated price is without basis. **(Para 301)** The price quoted by Tata Steel was GBP 608 Pence per share, while their competitors' final bid was GBP 603 Pence per share. **(Para 301)** Acquisition of Corus was a collective decision by Tata Steel. CPM (Director at Tata Steel) approved every resolution of Tata Steel, for entering into auction and for confirming the final acquisition share price. Acquisition was undertaken following due governance process under the supervision of the Board, without any dissent of shareholders of Tata Steel. **(Para 300)**	No specific finding.

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	To salvage the company from the losses incurred from the Corus acquisition, TSL entered into a merger with ThyssenKrupp. There is no material to prove that RNT had any role in preventing the same. **(Para 303)** Moreover, CPM never raised this issue before the board when he was chairman. **(Para 305)** **TSL** has not been made a party.	
Tata Motors – Nano Project:-	It is well established that RNT was not in the management of either Tata Motors or the company after retirement. There is not a single instance where the advice of RNT was directly implemented without consideration by the respective Board. **(Para 267)** Tata Motors and Jayem Auto incorporated a Joint Venture. This happened under the stewardship of CPM. **(Para 275)** CPM never objected over any visit, correspondence or investment by RNT in Jayem Auto. **(Para 272)** Merely because Tata Motors Finance (TMF) had a loss of	No specific finding.

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	Rs. 392 Crores (towards Nano out of Rs.2000 Crores) for financing Nano, it cannot be used to make a case of mismanagement against RNT. **(Para 280)** With regard to personal visits of RNT to the Jayem Auto factory and about the enquiries sought apropos to the projects, no personal benefit to RNT or harm to Tata Motors has been proved. **(Para 281-282)** No evidence of the UPSI causing prejudice to the interest of Tata Motors has been placed by CPM, upon whom the burden of proof was. **(Para 284)** Seeking information does not amount to conducting affairs of the company. **(Para 285)** The correspondences of RNT to CPM regarding the supply of cars to Ola/ Uber, were done to try to get into business with either of the two. **(Para 290-293)**	
Wellspun Acquisition by Tata Power	Since the acquisition of Welspun was not put up to the Board of Tata Sons for prior approval and it came up only after Tata Power had signed the papers for	No specific finding.

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	acquisition, making Tata Sons a *fait accompli*, the nominee directors had to indulge in consultations and the same did not tantamount to interference by the Trusts. **(Para 384, 385, 543)**	
The oppressive nature of Articles 104B, 121, 121A and 75	CPM's father was a director at the time when amendments were made to the Articles of Association on 13/09/2000. **(Para 371)** Article 118 was amended on 06/12/2012 when CPM was chairman. **(Para 372)** CPM was also a party to the resolution passed on 09/04/2014, amending the articles so as to confer affirmative rights in favour of the Trust-Nominated directors. **(Para 373)** Article 75 was always in existence and neither CPM nor his father nor the complainant companies ever made a complaint. **(Para 393)**	No specific finding.
The provision in the Articles of Association entitling the two trusts to have 1/3 of the	The two Trusts, if they really wished, could have had the Board of Directors entirely with their nominees. But they allowed the Articles of Association only to have the	No specific finding.

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directors with affirmative vote, is prejudicial to the interests of the members and the interests of the company	minimum requirement and hence the same cannot be termed as oppressive of the minority. **(Para 419)**	

16.8 NCLAT, being an Appellate Tribunal, conferred with the power under sub-Section (4) of Section 421 to confirm, modify or set aside the order of NCLT, can be taken to be a final court of fact. An appeal from the Order of the NCLAT to this Court under Section 423 is only on a question of law. Considering the nature of the jurisdiction conferred upon NCLAT, it is clear that the findings of the NCLT, not specifically modified or set aside by NCLAT should be taken to have reached finality, unless the parties aggrieved by such non-interference by NCLAT have approached this Court, raising this as an issue. Though SP group has also filed an appeal in C.A. No. 1802 of 2020, the grievance aired therein, as seen from para 3 of the memorandum of appeal, is limited to the failure of NCLAT to grant certain reliefs. The failure of NCLAT to specifically overturn

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the findings of fact recorded by NCLT, is not assailed in the SP group's appeal. Therefore, we have no hesitation in holding that the allegations relating to

(i) transactions with Siva and Sterling Group of Companies;

(ii) Air Asia;

(iii) Transactions with Mehli Mistry;

(iv) the losses suffered by Tata Motors in Nano car project; and

(v) the acquisition of Corus

reached finality.

16.9 The findings recorded by NCLAT for the grant of reliefs, revolved primarily around the removal of CPM, the affirmative voting rights, interference by nominee Directors and the conversion of Tata Sons into a private company. In other words, these are the 4 areas in which NCLAT can be taken to have undertaken a scrutiny and reversed the findings of NCLT. Therefore, for answering the first question of law, we need to focus mainly on these issues on which NCLAT expressly overruled NCLT.

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16.10 Out of these 4 specific issues on which NCLAT overruled NCLT, 3 issues will also be covered in our discussion on questions of law 4 and 5.. Therefore, we shall take up in this chapter, the question (i) whether the removal of CPM could have been the basis for the allegation that the company's affairs have been or are being conducted in a manner oppressive or prejudicial to the interests of some of the members and (ii) whether the findings recorded by NCLAT about the existence of just and equitable clause is in accordance with the well established principles of law.

Removal of CPM

16.11 CPM was first removed only from the post of Executive Chairman of Tata Sons, but not from the Directorship, by the resolution of the Board dated 24.10.2016. This acted as the trigger point for CPM, to launch an offensive. On the very next day namely 25.10.2016, CPM wrote a mail alleging total lack of corporate governance and failure on the part of the directors to discharge their fiduciary duties. He also called all the Trust nominee directors

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as postmen. Though the mail was labelled as 'confidential', a copy of the mail landed up with the media creating a "sensation". NCLT recorded a finding that CPM who owes a duty to explain this leakage of confidential mail, could not provide a satisfactory answer and that therefore, by virtue of section 106 of the Evidence Act, the leakage has to be traced to CPM. NCLAT did not overrule this finding.

16.12 The mail compelled Tata sons to issue a Press Statement on 10.11.2016. This was followed by the removal of CPM from the Directorship of Tata Industries Limited, Tata Consultancy Services Limited and Tata Teleservices Limited, all of which happened during the period from December 12 to December 14, 2016. Seeing clearly the course of destiny (which was actually set in motion by none other than himself), CPM resigned from other operating companies of Tatas such as The Indian Hotels Company Limited, Tata Steel Limited, Tata Motors Limited, Tata Chemicals Limited and Tata Power Limited, on 19.12.2016, on the eve of the Extraordinary

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General Meetings of those companies, convened for considering resolutions for his removal. On the very next day namely, 20.12.2016 the complainant companies, of which CPM is the pivot, filed a petition C.P.No.82 of 2016 before NCLT, Mumbai, under Sections 241 and 242 read with Section 244 of the Companies Act, 2013.

16.13 Around this time, as if by coincidence, the Principal Officer of Tata Sons received a letter dated 29.11.2016 from the Deputy Commissioner of Income Tax (Exemptions) seeking certain information under Section 133(6) of the Income Tax Act, 1961 in the case of Tata Education Trust. Tata Sons, through a reply dated 09.12.2016 furnished necessary information along with the requested documents. The Deputy Commissioner of Income Tax also called for some additional information by subsequent letters, and the information so called for, was also furnished.

16.14 Claiming that a mail dated 20.12.2016 issued by the Deputy Commissioner of Income Tax seeking further information

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under Section 133(6) was copy-marked to him, CPM sent a reply to the Income Tax department confirming ***(i)*** that the Directors appointed by Tata Trust controlled the decision making processes by virtue of the affirmative voting rights; ***(ii)*** that RNT and Soonawala have on many occasions sought prior information and consultation; ***(iii)*** that the conduct of the Trustees posed several regulatory risks; and ***(iv)*** that the office of RNT, in his capacity as Chairman Emeritus was funded by Tata Sons, including the cost of his overseas travel by private jet. To this letter to the Deputy Commissioner of Income Tax was enclosed certain files purportedly containing the information sought.

16.15 Upon coming to know of CPM's letter to the Deputy Commissioner of Income Tax, Tata Sons lodged a protest through a letter dated 26.12.2016. It was followed by a legal notice issued by Tata Sons to CPM on 27.12.2016 pointing out that he was guilty of breach of confidentiality and that he had passed on confidential and sensitive information contained in 4 box files, without any

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authority. CPM sent a legal reply dated 05.01.2017 claiming that he had a statutory obligation to cooperate with Income Tax authorities. As if to display his courage of conviction, CPM sent another letter dated 12.01.2017 to the Deputy Commissioner of Income Tax sending one more file and assuring the authorities that he would continue to check the records and submit any additional data/information as and when available.

16.16 In the light of whatever transpired as narrated above, a "Special Notice and Requisition" was moved on 03.01.2017 convening an EGM of Tata Sons for considering the removal of CPM as Director of Tata sons. It must be remembered at this stage that by the Resolution of the Board of Tata Sons dated 24.10.2016, CPM was merely removed from the post of Executive Chairman, but he continued to be a member of the Board as a Non Executive Director even after 24.10.2016. It must also be remembered that it was during his continuance as the member of the Board that CPM exchanged correspondence/legal notice with Tata Sons and also

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passed on information along with certain files, to the Income Tax authorities claiming to be a very “law abiding citizen”.

16.17 Since the EGM of Tata sons was scheduled to be held on 06.02.2017, for considering the resolution for CPM’s removal from the Directorship, the Companies (S.P. Group) which filed the complaint before the NCLT moved an interim application before NCLT for a stay of the EGM. NCLT declined stay and the appeal against the refusal to grant stay was also dismissed by NCLAT. Therefore, the EGM proceeded as scheduled on 06.02.2017 and CPM was removed from the Directorship of Tata Sons. In his place Mr. N. Chandrasekharan, was appointed as Executive Chairman.

16.18 In the Company Petition as it was originally filed on 20.12.2016, the complainant companies had sought a set of 21 reliefs, one of which was for a direction to the respondents (the company and its directors) not to remove CPM (who was cited as R-11 in the original petition) from the directorship of Tata Sons. This was in prayer clause (F) of Paragraph 153 of the main company

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petition. This prayer was in direct contrast to the reliefs sought in prayer clauses (A) and (B). Prayer clause (A) was for superseding the existing Board of Directors and appointment of an Administrator. Prayer in clause (B) was for appointment of a retired Supreme Court Judge as Non Executive Chairman and for appointment of a new set of independent Directors.

16.19 After the dismissal of the interim application moved for stalling the EGM scheduled to be held on 06.02.2017 and after the passing of the resolution for the removal of CPM in the EGM held on 06.02.2017, the complainant companies moved an application for amendment of the original petition so as to include two additional prayers namely ***(i)*** reinstatement of the representative of the complainant companies on the Board of Tata Sons; and ***(ii)*** amendment of the Articles of Association to provide for proportional representation.

16.20. However, eventually the prayers made in clauses (A), (B) and (C) were not pressed. Prayers in clauses (F), (Q) & (R) were also

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not pressed on the ground that they had become infructuous. In Paragraph 3.4 above we have extracted the reliefs as originally sought in the main company petition and in the table in Paragraph 4.11 we have indicated the prayers additionally made and the reliefs either given up or sought to be modified.

16.21 In fact the real reason why the complainant companies thought fit, quite tactfully, not to press for the reinstatement of CPM is that the mere termination of Directorship cannot be projected as something that would trigger the just and equitable clause for winding up or to grant relief under Sections 241 and 242. A useful reference can be made in this regard to the decision of this Court in ***Hanuman Prasad Bagri & Ors***. vs. ***Bagress Cereals Pvt. Ltd***.[2].

16.22 It must be remembered : ***(i)*** that a provision for inclusion of a representative of small shareholders in the Board of Directors, is of a recent origin under Section 151 of the Companies Act, 2013

2 (2001) 4 SCC 420

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and it is applicable only to a listed company; ***(ii)*** that Tata sons is not a listed Company; ***(iii)*** that the Articles of Association of Tata sons, to which the complainant companies, CPM and his father had subscribed, do not provide for any representation; ***(iv)*** that despite there being no statutory or contractual obligation, Tata Sons inducted CPM's father as a director on the board in the year 1980 and continued him for a period of almost 25 years; ***(v)*** that CPM himself was inducted, again without reference to any statutory or contractual obligation, as a Director on the Board in August, 2006; and ***(vi)*** that within 6 years of such induction, CPM was identified as a successor to RNT and was appointed as Executive Deputy Chairman and elevated to the position of Executive Chairman.

16.23 It is an irony that the very same person who represents shareholders owning just 18.37% of the total paid up share capital and yet identified as the successor to the empire, has chosen to accuse the very same Board, of conduct, oppressive and unfairly prejudicial to the interests of the minorities. In support of such

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allegation, the complainant companies have pointed out certain business decisions taken during the period of more than 10 years immediately preceding the date of removal of CPM. That failed business decisions and the removal of a person from Directorship can never be projected as acts oppressive or prejudicial to the interests of the minorities, is too well settled. In fact it may be concede today by Tata sons that one important decision that the Board took on 16.03.2012 certainly turned out to be a wrong decision of a life time.

16.24 Therefore, the fact that the removal of CPM was only from the Executive Chairmanship and not the Directorship of the company as on the date of filing of the petition and the fact that in law, even the removal from Directorship can never be held to be an oppressive or prejudicial conduct, was sufficient to throw the petition under section 241 out, especially since NCLAT chose not to interfere with the findings of fact on certain business decisions.

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16.25 The subsequent conduct on the part of CPM in leaking his mail dated 25-10-2016 to the Press and sending replies to the Income Tax Authorities enclosing 4 box files, even while continuing as a Director, justified his removal even from the Directorship of Tata Sons and other group companies. A person who tries to set his own house on fire for not getting what he perceives as legitimately due to him, does not deserve to continue as part of any decision making body (not just the Board of a company). It is perhaps this realisation that made the complainant companies give up their original prayer for restraining the company from removing CPM and singing a different tune seeking proportionate representation on the Board.

16.26 For assailing the decision to remove CPM from the Chairmanship of Tata Sons, it is contended ***(i)*** that Tata Group performed exceedingly well under his stewardship; ***(ii)*** that the Nomination and Remuneration Committee for the Financial Year 2015-16 endorsed his performance and even recommended a pay

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hike and performance linked bonus; and ***(iii)*** that the Board unanimously approved these recommendations on 29.6.2016 just four months before his unceremonious removal.

16.27 First of all, the above contention is in direct conflict with the entire foundation on which the whole case of the complainant companies was erected. If CPM and the members of the Nomination and Remuneration Committee as well as the entire Board were on the same page till 29.6.2016 that the company was doing well under the stewardship of CPM, then there can be no allegation that the company's affairs were conducted in a manner oppressive or prejudicial to the interest of anyone, namely the company or the minority, at least until 29.6.2016. On the contrary if the company's affairs have been conducted in a manner oppressive or prejudicial, even before 29.6.2016, the other members of the Board and CPM could not have formed themselves into a mutual admiration society to laud CPM's performance and CPM acknowledging that the company was doing well when he was in the driver's seat.

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16.28 An important aspect to be noticed is that in a petition under Section 241, the Tribunal cannot ask the question whether the removal of a Director was legally valid and/or justified or not. The question to be asked is whether such a removal tantamount to a conduct oppressive or prejudicial to some members. Even in cases where the Tribunal finds that the removal of a Director was not in accordance with law or was not justified on facts, the Tribunal cannot grant a relief under Section 242 unless the removal was oppressive or prejudicial.

16.29 There may be cases where the removal of a Director might have been carried out perfectly in accordance with law and yet may be part of a larger design to oppress or prejudice the interests of some members. It is only in such cases that the Tribunal can grant a relief under Section 242. The Company Tribunal is not a labour Court or an administrative Tribunal to focus entirely on the manner of removal of a person from Directorship. Therefore, the accolades received by CPM from the

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Nomination and Remuneration Committee or the Board of Directors on 29.6.2016, cannot advance his case.

16.30 A contention was raised that CPM's removal was a pre-meditated act, carried out at the behest of Tata Trusts and RNT and that the removal was not only contrary to Article 118, but also contrary to Article 105(a) read with the second proviso to Section 179(1) and Article 122(b).

16.31 As we have pointed out above, the validity of and justification for the removal of a person can never be the primary focus of a Tribunal under Section 242 unless the same is in furtherance of a conduct oppressive or prejudicial to some of the members. In fact the post of Executive Chairman is not statutorily recognised or regulated, though the post of a Director is. At the cost of repetition it should be pointed out that CPM was removed only from the post of (or designation as) Executive Chairman and not from the post of Director till the Company Petition was filed. But

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CPM himself invited trouble, by declaring an all out war, which led to his removal from Directorship.

16.32 It is true that as per the evidence available on record he was requested before the Board meeting, to step down from the post of Executive Chairman. That does not tantamount to the act being pre-meditated. The induction of new members on 8.8.2016 into the Board and the Board securing a legal opinion prior to the Board meeting, cannot make the act a pre-meditated one. There is a thin line of demarcation between a well-conceived plan and a pre-meditated one and the line can many times be blurred.

16.33 Article 118 around which arguments were advanced reads as follows:

> *"118. APPOINTMENT OF CHAIRMAN*
>
> *For the purpose of selecting a new Chairman of the Board of Directors and so long as the Tata Trusts own and hold in the aggregate at least 40% of the paid up Ordinary Share Capital of the Company for the time being, a Selection Committee shall be constituted in accordance with the provisions of this Article to recommend the appointment of a person as the*

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Chairman of the Board of Directors and the Board may appoint the person so recommended as the Chairman of the Board of Directors, subject to Article 121 which requires the affirmative vote of all Directors appointed pursuant to Article 104B.

The same process shall be followed for the removal of the incumbent Chairman.

The Selection Committee shall comprise – (a) Three (3) persons nominated jointly by the Sir Dorabji Tata Trust and the Sir Ratan Tata Trust who may or may not be Directors of the Company, (b) one (1) person nominated by and from amongst the Board of Directors of the Company and (c) one (1) independent outside person selected by the Board for this purpose.

The Chairman of the Committee will be selected by the Sir Dorabji Tata Trust and the Sir Ratan Tata Trust from amongst the nominees nominated by the Trusts.

The quorum for a meeting of the Selection Committee shall be the presence of a majority of members nominated jointly by the Sir Dorabji Tata Trust and the Sir Ratan Tata Trust.

Explanation: The words "nominated jointly' used in this Article shall mean that the Sir Dorabji Tata Trust and the Sir Ratan Tata Trust shall together decide the nominees. 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."

16.34 The sentence in Article 118 reading *"the same process shall be followed for the removal of incumbent Chairman"* actually goes along with the last limb of the portion immediately preceding this line. It deals with the appointment of a person as Chairman,

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pursuant to the recommendation of a Selection Committee, *subject to Article 121 which requires the affirmative vote of the Directors appointed in terms of Article 104B.*

16.35 It is absurd to interpret Article 118 to mean that Selection Committee is to be constituted for the removal of an incumbent Chairman. The necessity for taking recourse to the affirmative voting right under Article 121 is what is meant by the expression *"the same process"* appearing in the second part of Article 118.

16.36 The argument pitched upon Article 105(a) is also completely unfounded. Article 105(a) deals with the power of the Board to appoint a Managing Director, Joint/Deputy Managing Director or Whole Time Director. The provision relating to Executive Chairman is not to be found in Article 105(a) but in Article 105(b) which reads as follows:

> *"The Board shall have the power to designate the Chairman of the Board as the Executive Chairman and pay him such remuneration as, in their opinion, they deem fit".*

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Therefore, the argument on the basis of Article 105(a) is ill-founded.

16.37 The contention that the removal was in violation of the second proviso to Section 179(1) read with Article 122(b) is also ill-conceived. The second proviso to Section 179(1) prohibits the Board from exercising any power that could be exercised by the company only in a General Meeting. Article 122(a) is only a reiteration of the principle behind the second proviso to Section 179(1). Article 122(b) says that the Board may exercise all such powers as are not required to be exercised by the company in General Meeting. The ***designation of a person as Executive Chairman***, is not one of the functions to be performed in a general meeting, either under the Act or under the Articles of association.

16.38 It is also contended that no advance notice of his removal was given to CPM and no agenda item was placed in advance in terms of Article 121B, which reads as follows:

> "*121B. Any Director of the Company will be entitled to give at least fifteen days notice to the Company or to the Board that any matter or resolution be placed for deliberation by the Board and if such notice is received it shall be mandatory for the Board to take up such matter or resolution for*

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consideration and vote, at the Board meeting next held after the period of such notice, before considering any other matter or resolution."

16.39 We do not know how Article 121B is sought to be invoked. It deals with a situation where a Director wants to bring up any matter or resolution before the Board. It has no relevance to the agenda that the Board wants to take up. Even according to the complainant companies, the Directors of a Company have a fiduciary relationship. It is a relationship in which one party places special trust, confidence and reliance on another. It is claimed by the appellants (Tata Group) that the removal of CPM was as a result of lack of confidence and trust in him. By his own subsequent conduct, CPM unfortunately enhanced the firepower of the management of Tata Sons, with regard to their claim relating to lack of confidence and trust.

16.40 The decision in **Central Bank of India Ltd.** vs**. Hartford Fire Insurance Co. Ltd.**[3] is relied upon by the S.P. Group to

3 AIR 1965 SC 1288

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contend that the power of removal of a Director is subservient to the agreed duration of office. But the decision in **Central Bank of India** arose out of the termination of a fire insurance policy. It had nothing to do with the removal of a Director. But a decision of the King's Bench in **Nelson vs. James Nelson**[4] was relied upon in the said case to assail the termination of the insurance policy. After pointing out that ***Nelson*** was a case where the termination assailed was that of the services of the Managing Director and that the contract of his appointment did not provide for his termination except on the condition of his ceasing to be a Director, this Court rejected the citation in **Central Bank of India** on the ground that it had no relevance to the termination of a policy of insurance.

16.41 The decision in **M.I. Builders Pvt. Limited vs. Radhey Shyam Sahu & Others**[5], to the effect that an important issue cannot be decided under the residuary agenda item *"any other item"*, will not also go to the rescue of the complainant companies,

4 1914-2K.B. 770
5 (1999) 6 SCC 464

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since the matter in **M.I. Builders** concerned the permission granted by the Municipal Corporation to a builder to construct an underground shopping complex in a park. The Court found the decision taken by the Mahapalika to be in clear breach of Sections 91 and 119 of the U.P. Municipal Corporation Act, 1959. Therefore, the said decision has no application.

16.42 In any event the removal of a person from the post of Executive Chairman cannot be termed as oppressive or prejudicial. The original cause of action for the complainant companies to approach NCLT was the removal of CPM from the post of Executive Chairman. Though the complainant companies padded up their actual grievance with various historical facts to make a deceptive appearance, the *causa proxima* for the complaint was the removal of CPM from the office of Executive Chairman. His removal from Directorship happened subsequent to the filing of the original complaint and that too for valid and justifiable reasons and hence

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NCLAT could not have laboured so much on the removal of CPM, for granting relief under Sections 241 and 242.

Invocation of just and equitable clause

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

6 [1924] AC 783

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16.44 A passage from the opinion of Lord President of the Court of Session (Lord Clyde) in ***Baird v. Lees*** [7], quoted in ***Loch*** (supra), reads as follows:-

> "*A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company.*"

16.45 If the above tests are applied, the case on hand will not fall anywhere near the just and equitable standard, for the simple reason that it was the very same complaining minority whose representative was not merely given a berth on the Board but was also projected as the successor to the Office of Chairman.

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7 (1924) SC 83 Scottish Supreme Court

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16.46 In ***Ebrahimi*** v. ***Westbourne Galleries Ltd.***[8], decided by House of Lords, one of the Directors who was voted out of office by the other two Directors (father-son duo) petitioned for an order under Section 210 of the English Companies Act, 1948. The very relief sought by the ousted director was for a direction to the other two persons to purchase his shares in the Company or to sell their shares to him on such terms as the Court should think fit. Alternatively, he prayed for winding up. The Court of the first instance held that a case for winding up had been made out, as the majority was guilty of abuse of power and a breach of good faith which the partners owed to each other not to exclude one of them from all participation in the business. The court of Appeal reversed it by applying the tests of ***(i)*** bonafide exercise of power in the interest of the company; and ***(ii)*** whether a reasonable man could think that the removal was in the interest of the Company. While reversing the decision of the Court of Appeal, the House of Lords

8 [1972] 2 WLR 1289

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held, that "***the formula 'bonafide interest of the company' should not become little more than an alibi for a refusal to consider the merits of the case.***" Holding that, "***equity always does enable the Court to subject the exercise of legal rights to equitable considerations namely considerations that is of a personal character"***, the House of Lords added some caution in the following words:-

> *"The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."*

16.47 But it must be remembered that the origin of just and equitable clause is to be traced to the Law of Partnership which has developed, according to the House of Lords, "the conceptions of

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probity, good faith and mutual confidence". Having said that, ***Ebrahimi*** pointed out that the reference to quasi partnerships or "in-substance partnerships" is also confusing for the reason that though the parties may have been partners in their '*Purvashrama*', they had become co-members of a company accepting new obligations in law. Therefore, "***a company, however small, however domestic, is a company and not a partnership or even a quasi partnership***".

16.48 That, "for superimposing an equitable fetter on the exercise of the rights conferred by the Articles of Association, there must be something in the history of the company or the relationship between the shareholders", is fairly well settled[9].

16.49 In ***Lau*** v. ***Chu[10],*** the House of Lords indicated, "that a just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap". The first of these is labelled as,

9 Re Saul D. Harrison and Sons Plc. 1994 BCC 475
10 [2020] 1 WLR 4656

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

16.50 Therefore, for invoking the just and equitable standard, the underlying principle is that the Court should be satisfied either

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11 [1897] WN 58

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that the partners cannot carry on together or that one of them cannot certainly carry on with the other[12].

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

16.52 Coming to the Indian cases, this court held in ***Rajahmundry Electric Supply Corpn. Ltd.*** v. ***Nageshwara Rao***[13] that for the invocation of just and equitable clause, there must be a justifiable lack of confidence on the conduct of the directors, as held**.** A mere lack of confidence between the majority shareholders and minority shareholders would not be sufficient, as pointed out in ***S.P. Jain*** v. ***Kalinga Tubes Ltd***.[14]

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12 The advantage that the English courts have is that irretrievable breakdown of relationship is recognised as a ground for separation both in a matrimonial relationship and in commercial relationship, while it is not so in India.

13 (1955) 2 SCR 1066

14 AIR 1965 SC 1535

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16.53 It was contended repeatedly that lack of probity in the conduct of the directors is a sufficient cause to invoke just and equitable clause. Drawing our attention to the landmark decision in ***Needle Industries (India) Ltd. and Ors.*** v. ***Needle Industries Newey (India) Ltd. and ors***.[15], it was contended that even the profitability of the company has no bearing if just and equitable standard is fulfilled and that the test is not whether an act is lawful or not but whether it is oppressive or not.

16.54 But ***all these arguments lose sight of the nature of the company that Tata Sons is.*** As we have indicated elsewhere, Tata Sons is a principal investment holding Company, of which the majority shareholding is with philanthropic Trusts. The majority shareholders are not individuals or corporate entities having deep pockets into which the dividends find their way if the Company does well and declares dividends. The dividends that the Trusts get are to find their way eventually to the fulfilment of charitable

15 (1981) 3 SCC 333

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purposes. Therefore, NCLAT should have raised the most fundamental question whether it would be equitable to wind up the Company and thereby starve to death those charitable Trusts, especially on the basis of un-charitable allegations of oppressive and prejudicial conduct. Therefore, the finding of NCLAT that the facts otherwise justify the winding up of the Company under the just and equitable clause, is completely flawed.

17. Question of Law No.2

17.1 The second question of law arising for consideration is as to whether the reliefs granted and directions issued by NCLAT including the reinstatement of CPM into the Board of Tata Sons and other Tata Companies are in consonance with (i) the pleadings made, (ii) the reliefs sought and (iii) the powers available under Sub-Section (2) of Section 242.

17.2 As we have indicated in Para 3.4 above, the complainant companies originally sought a set of 21 reliefs listed in para 153 (A) to (U). Subsequently, the complainant companies sought the

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addition of two more prayers, through an application for amendment filed on 10.2.2017. The additional reliefs sought to be included were for: (i) reinstatement of a representative of the complainant companies on the Board of Tata Sons and (ii) Amendment of the Articles of Association so as to provide for proportional representation on the Board.

17.3 Thereafter the complainant companies sought a few more prayers through an application for amendment dated 31.10.2017. However, by a Memo dated 12.01.2018 the complainant companies gave up certain prayers, sought a modification of some other prayers and recorded that they were not pressing certain reliefs. At the cost of repetition, we have to present in a tabular form, the reliefs originally sought and the metamorphosis that they underwent through applications for amendment or Memo. It is as follows:

Reliefs as originally sought in the main Company Petition	**Reliefs that are added, given up or restricted through Additional affidavit dated 31-10-2017, Application for amendment dated**

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	31-10-2017 and Memo dated 12.1.2018
(A) Supersede the existing Board of Directors of Respondent No. 1 and appoint an administrator to look after the day-to-day affairs of Respondent No. 1 with such powers as may be necessary to take such decisions and actions, in the facts and circumstances of the present case, till such time as a new Board of Directors of Respondent No. 1 is constituted; (B) In the alternative to prayer (A) above, appoint a retired Supreme Court Judge as the non-executive Chairman of the Board of Directors of Respondent No. 1 and appoint such number of new independent directors of professional competence, reputation and standing to the Board of Directors of Respondent No. 1 such that these newly appointed directors constitute the majority of the Board of Directors of Respondent No. 1; (C) restrain the so-called "Interim Chairman" i.e Respondent No. 2 from attending any meeting of the Board of Directors of Respondent No. 1, or sub-committee thereof and/or interfering in the affairs of Respondent No. 1; (D) restrain Respondent No. 14 from interfering in the affairs of Respondent No. 1; (E) direct Respondent No. 1 not to issue any securities which results in dilution of the present paid-up equity capital held by the Petitioners in Respondent No. 1; (F) direct Respondent No. 1 and/or Respondent Nos. 2 to 10 and 12 to 22 not to remove Respondent No. 11 as a director from the Board of Respondent No.1;	**<u>Under Affidavit (31-10-2017)</u>** conversion of Tata Sons from being a Public Limited Company into a Private Limited Company is bad **<u>Under Application (31-10-2017)</u>** (M-1): Set aside the resolution passed by the shareholders of respondent No.1 on September 21, 2017 insofar as it seeks to amend the Articles of Associations and Memorandum of Association of Respondent No.1 for conversion of Respondent No.1 into a private company. (M-2): Strike off/Delete Article 75 as the same is a tool in the hands of the majority shareholders to oppress the minority; and; (M-3): Pending the final hearing disposal of the Company Petition, the effect and operation of the resolution dated September 21, 2017 be stayed. (F-1): Direct Respondent No.1 and/or Respondent No. 2 to 10 and 12 to 22 to reinstate a representative of the Petitioners on the Board of Respondent No.1 (G-1): Direct that the Articles of Association of Respondent No.1 be amended to provide for proportionate representation of shareholders on the Board of Directors of Respondent No.1

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(G) restrain Respondent No. 1 and/or Respondent Nos. 2 to 10 and 12 to 22 from making any changes to the Articles of Association of Respondent No. 1 unless such changes have been made with the leave of this Hon'ble Tribunal; (H) order and investigation into the role of the Trustees of the Tata Trusts in the operations of Respondent No. 1 and/or Tata Group companies as also in the functioning of the Board of Directors of Respondent No. 1 and /or Tata Group companies, and prohibit the Trustees from interfering in the affairs of Respondent No. 1 and/or Tata Group companies; (I) appoint an independent auditor to conduct a forensic audit and independent investigation into transactions and dealings of Respondent No. 1 with particular regard to: (i) all transactions between Mr. C. Sivasankaran and his business entities on the one hand, and the Respondent No. 1 and various Tata Group companies under the control of Respondent No. 1 or of which Respondent No. 1 is the promoter on the other hand, to determine and crystallize the breach of trust, violation of fiduciary duties and failure to discharge the duty of care, and fix accountability therefor; and (ii) all transactions involving Mr. Mehli Mistry and his associated entities with Respondent No. 1 and/or Tata Group companies whereby any unjust enrichment has been generated in favour of any these parties; and submit a report to this Hon'ble Tribunal such that this Hon'ble Tribunal can pass such further orders as may be necessary	**<u>Under Memo (12-01-2018)</u>** Prayer M, which sought the striking of Articles 86, 104(B), 118, 121 and 121A, and striking of a portion of Article 124, is restricted as under: i. The necessity of an affirmative vote of the majority of directors nominated by the Trusts, which are majority of shareholders, be deleted; ii. The Petitioners be entitled to proportionate representation on Board of Directors of Respondent No.1; iii. The Petitioners be entitled to representation on all committees formed by the Board of Directors of Respondent No.1; and iv The Articles of Association be amended accordingly. Prayers A, B and C were not pressed. Prayers F, Q and R, being infructuous were not pressed

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so as to recover from concerned persons the loss that has been caused inter alia to the Petitioners and such findings of the audit and investigation should be referred by the Hon'ble Tribunal to the Serious Fraud Investigation Office of the Ministry of Corporate Affairs, Government of India; (J) Appoint an inspector (under applicable law) to investigate into the breach of the SEBI (Prohibition of Insider Trading) Regulations, 2015, with particular regard to the breach by Respondent No. 2 and Respondent No. 14, of the obligation not to procure, demand or acquire unpublished price sensitive information and submit a report to this Hon'ble Tribunal such that this Hon'ble Tribunal can pass such further orders as may be necessary and/or refer the findings of such investigation to the Serious Fraud Investigation Office of the Ministry of Corporate Affairs, Government of India. (K) direct Respondent No.2 to pay Respondent No. 1 the amount of unjust enrichment that has accrued to Respondent No. 2 on account of surrender of the sub-tenancy of the Bakhtawar flat, along with interest at such rate as this Hon'ble Tribunal may deem fit, from the date on which the Respondent No. 2 was unjustly enriched; (L) appoint a forensic auditor to re-investigate the transactions executed by AirAsia India with entities in India and Singapore to ascertain whether any proceeds have been diverted to any secret bank account of Mr. Venkatraman and to submit a report to this Hon'ble Tribunal; such that this Hon'ble Tribunal can pass such further orders as may be necessary so as to recover from Mr. Venkatraman the loss that has been caused inter alia to	

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the Petitioners; and such findings of the audit should be referred by the Hon'ble Tribunal to the Serious Fraud Investigation Office of the Ministry of Corporate Affairs, Government of India; (M) strike of Articles numbered 86, 104(B), 118, 121 and 121A in their entirety and in so far as Article 124 of the Articles of Association of Respondent No. 1 is concerned, the following portion of the said Article, which is offending and/or repugnant, should be deleted: "… Any committee empowered to decide on matters which otherwise the Board is authorised to decide shall have as its member at least one director appointment pursuant to Article 104B. The Provisions relating to quorum and the manner in which matters will be decided contained I Articles 115 and 121 respectively shall apply mutatis mutandis to the proceedings of the committee. " from the Articles of Association of Respondent No. 1; and substitute these articles with such articles as the nature and circumstances of this case may require; (N) direct the Respondents (excluding Respondent Nos. 4, 10 &11) to bring back into Respondent No. 1, the funds used by Respondent No. 1 for acquiring shares of Tata Motors; (O) restrain Respondent No. 1 from initiating any new line of business or acquiring any new business in existing lines of business without leave of this Hon'ble Tribunal and that too only after the matter is discussed and decided upon by the Board of Directors of Respondent No. 1 without applying Article 121 of the Articles of Association; (P) restrain the trustees of the Trusts from interfering in the affairs of Respondent No. 1 and in the various companies that form part of the Tata	

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Group; (Q) restrain the existing Selection Committee from acting any further and/or discharging any functions and a new Selection Committee be appointed. (R) direct that no candidate selected by the Selection Committee constituted pursuant to Article 118 of the Articles of Association of Respondent No. 1 to be appointed without leave of this Hon'ble Tribunal; (S) direct Respondent No. 1 not to demand and/or procure any unpublished price sensitive information from any listed operating companies within the Tata Group; (T) grant interim and ad-interim reliefs in terms of Prayers (A) to (S) above; and (U) pass such further orders that this Hon'ble Tribunal may, in the interest of justice, deem necessary for bringing an end to the acts of oppression and mismanagement in the running of Respondent No. 1.	

17.4 Therefore, after all the confusion created by affidavits, application for amendment and the memo mentioned above, the reliefs that remained to be considered by NCLT were as follows:

(1) restrain Respondent No. 14 (N.A. Soonawala) from interfering in the affairs of Respondent No. 1; (Relief clause D)

(2) direct Respondent No. 1 (Tata Sons) not to issue any securities which will result in dilution of the paid-up equity capital; (Relief clause E)

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(3) restrain the Respondents from making any changes to the Articles of Association of Respondent No. 1 without the leave of the Tribunal; (Relief clause G)

(4) order an investigation into the role of the Trustees of the Tata Trusts in the operations of Respondent No. 1, the Tata Group companies as also in the functioning of the Board of Directors of Respondent No. 1 and Tata Group companies, and prohibit the Trustees from interfering in the affairs of Respondent No. 1 and Tata Group companies; (Relief clause H)

(5) appoint an independent auditor to conduct a forensic audit and independent investigation into transactions and dealings of Respondent No. 1 with particular regard to:

(i) Mr. C. Sivasankaran and his business entities; and

(ii) Mr. Mehli Mistry and his associated entities;

and submit a report to this Hon'ble Tribunal and investigation should be referred by the Hon'ble Tribunal to the Serious Fraud Investigation Office of the Ministry of Corporate Affairs, Government of India; (Relief clause I)

(6) Appoint an inspector (under applicable law) to investigate into the breach of the SEBI (Prohibition of Insider Trading) Regulations, 2015. (Relief clause J)

(7) direct Respondent No.2 to pay Respondent No. 1 the amount of unjust enrichment that has accrued to Respondent No. 2 on account of surrender of the sub-tenancy of the Bakhtawar flat; (Relief clause K)

(8) appoint a forensic auditor to re-investigate the transactions executed by Air Asia India with entities in India and Singapore; (Relief clause L)

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(9) Read down and amend Articles 86, 104B, 118, 121 and 121A as well as Article 124 so that:

i. The necessity of an affirmative vote of the majority of directors nominated by the Trusts, which are majority of shareholders, be deleted;

ii. The Petitioners be entitled to proportionate representation on Board of Directors of Respondent No.1;

iii. The Petitioners be entitled to representation on all committees formed by the Board of Directors of Respondent No.1; ((Relief clause M restricted through memo dated 12-01-2018)

(10) Set aside the resolution passed on 31-09-2017 for amendment of the Articles and declare the conversion of Tata Sons into a private company as illegal (Additional Relief sought to be included as clause M-1 through Application for amendment)

(11) To delete Article 75 (Additional Relief sought to be included as clause M-2 through Application for amendment)

(12) To reinstate a representative of the petitioners on the Board (Additional Relief sought to be included as clause F-1 through Application for amendment)

17.5 Out of the aforesaid reliefs that came to stay till the end, NCLAT granted only certain reliefs, which in simple terms, were as follows:-

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(i) Setting aside the removal of CPM and directing his reinstatement both as Executive Chairman of Tata Sons and as Director of other Tata Companies for the rest of the tenure.

(ii) Restraining RNT and the nominees of Tata Trust from taking any advance decision.

(iii) Restraining Tata Sons from exercising its power under Article 75 against the complainant companies and other minority members, except in exceptional circumstances and in the interest of the Company and that too after recording reasons and informing the affected parties.

(iv) Setting aside the decision of the Registrar of Companies recognising Tata Sons conversion into a Private Company.

17.6 Thus NCLAT granted to the complainant companies (and indirectly to CPM) four reliefs *namely:*

(i) reinstatement of CPM;
(ii) declaring Tata Sons as a Public Limited Company;
(iii) restraining the nominee Directors and RNT from taking any decision in advance and

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(iv) restraining the invocation of Article 75 except in exceptional circumstances.

We shall now see whether NCLAT could have granted any of these reliefs.

Reinstatement of CPM

17.7 Removal and reinstatement are two different things. We have dealt with the issue of removal of CPM, while answering question of law No.1, in the context of whether it was part of a scheme of oppressive and prejudicial conduct. Now we shall deal with the issue of reinstatement in the context of the contours of section 242(2) and the nature of the orders that could be passed.

17.8 As we have seen already, the original motive of the complainant companies, was to restrain Tata Sons from removing CPM as Director. Subsequently, there was a climb down and the complainant companies sought what they termed as "reinstatement" of a representative of the complainant companies.

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Thereafter, it was modulated into a cry for proportionate representation on the Board.

17.9 In this background it was repeatedly argued both before the NCLAT and before this Court that the objective of the litigation was not to have CPM reinstated, but only to set things right in the State of Denmark (of which CPM himself was the Premier for 4 years). But interestingly, NCLAT understood what the complainant companies and CPM actually wanted, though they attempted to camouflage their intentions with legal niceties. Therefore, despite there being no prayer for reinstatement of CPM either as a Director or as an Executive Chairman of Tata Sons, NCLAT directed the restoration of CPM as Executive Chairman of Tata Sons and as Director of Tata Companies for the rest of the tenure.

17.10 While granting much more than what the complainant companies and CPM themselves thought as legally feasible, NCLAT failed to notice one important thing. The appointment of CPM as Executive Deputy Chairman of Tata Sons, was to be for a period of

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5 years from 01.04.2012 to 31.03.2017, subject to the approval of the shareholders. In the Meeting of the shareholders held on 01.08.2012, the appointment of CPM as Executive Deputy Chairman was approved and the General Body left it to the Board to re-designate CPM as Chairman. Accordingly, the Board re-designated CPM as Executive Chairman, with effect from 29.12.2012, by a resolution passed on 18.12.2012.

17.11 The judgment of the NCLAT was passed on 18.12.2019, by which time, a period of nearly 7 years had passed from the date of CPM's appointment as Executive Chairman. Therefore, we fail to understand : ***(i)*** as to how NCLAT could have granted a relief not apparently sought for (though wished for); and ***(ii)*** what NCLAT meant by reinstatement "*for the rest of the tenure*". That the question of reinstatement will not arise after the tenure of office had run its course, is a settled position. In this regard, we may refer to the decisions in ***Raj Kumar Dey*** vs. ***Tarapada Dey***[16] and ***Mohd.***

16 (1987) 4 SCC 398

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Gazi vs. ***State of Madhya Pradesh***[17]***.*** While so, it is incomprehensible that the NCLAT directed reinstatement, and that too, of a Director of a company, after the expiry of his term of office. Needless to say that such a remedy would not have been granted even by a labour court/service Tribunal in matters coming within their jurisdiction.

17.12 In fact NCLAT has gone to the extent of reinstating CPM not only on the Board of Tata Sons, but also on the Board of Tata group companies, without they being parties, without there being any complaint against those companies under section 241 and without there being any prayer against them. These companies have followed the procedure prescribed by Statute and the Articles and they have validly passed resolutions for his removal. For instance, TCS granted an opportunity to CPM and held a general meeting in which 93.11% of the shareholders, including public institutions who hold 57.46% of shares supported the resolution. In any case CPM's tenure itself was to come to an end on 16.06.2017 but

17 (2000) 4 SCC 342

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NCLAT passed the impugned order reinstating him "for the rest of the tenure". In respect of other companies which had convened the EGM for considering the resolution for his removal, CPM submitted resignations. But now by virtue of the impugned order, CPM will have to be reinstated even on the Board of companies from which he has resigned. This is why even the complainant companies have found it extremely difficult to support the order.

17.13 As an aside, we should record here, the words of gratitude (if any) expressed by CPM himself in the meeting of the Board of Tata Sons on 18.12.2012, immediately after the resolution appointing him as Executive Chairman was carried through unanimously. This is what CPM said in the Board Meeting dated 18.12.2012:-

> *"Mr. Mistry responded by saying that – "the past one year has been a great learning experience under the direct guidance of Mr. Ratan Tata.* ***The TATA Group is founded on strict values.*** *We will face all the ups and down, whatever may lie in our path. We are ready to face all the challenges that will come our way. The Board recognises the stellar contribution of Mr. Ratan Tata and wishes, to designate him Chairman Emeritus.*

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We shall continue to seek his guidance on significant matters."

17.14 It is interesting to note that at the time of his appointment in December 2012, what CPM saw and acknowledged, was a "***great learning experience he had under the direct guidance of RNT***", but at the time of departure in October 2016, what he saw was only a conduct for over 10 years, that was oppressive and prejudicial to the interests of the company and of the minority. NCLAT failed to take note of this, while granting reliefs neither sought for nor feasible in law.

17.15 NCLAT appears to have granted the relief of reinstatement gratis without any foundation in pleadings, without any prayer and without any basis in law. By doing so, the NCLAT has forced upon the appellant an Executive Chairman, who now is unable to support his own reinstatement.

17.16 The NCLAT has found the dismissal to be illegal and not a nullity. In law, a dismissal even if found to be wrongful and

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malafide is an effective dismissal and may give rise to a claim in damages. In ***Dr. S.B. Dutt*** vs. ***University of Delhi***[18] this Court held: -

> *"The award held that the appellant had been dismissed wrongfully and malafide. Now, it is not consequential to such a finding that the dismissal was of no effect, for a wrongful and malafide dismissal is nonetheless an effective dismissal though it may give rise to a claim in damages. The award, no doubt, also said that the dismissal of the appellant was ultravires but as will be seen later, it did not thereby hold the act of dismissal to be a nullity and, therefore, of no effect."*

17.17 It is significant that Sections 241 and 242 of the Companies Act, 2013 do not specifically confer the power of reinstatement, nor we would add that there is any scope for holding that such a power to reinstate can be implied or inferred from any of the powers specifically conferred.

17.18 The following words at the end of sub-section (1) of 242 "the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit" cannot be interpreted as conferring on the Tribunal any implied power of

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18 1959 SCR 1236

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directing reinstatement of a director or other officer of the company who has been removed from such office. These words can only be interpreted to mean as conferring the power to make such order as the Tribunal thinks fit, where the power to make such an order is not specifically conferred but is found necessary to remove any doubts and give effect to an order for which the power is specifically conferred. For instance, sub-section (2) of Section 242 confers the power to make an order directing several actions. The words by which sub-section (1) of Section 242 ends, supra can be held to mean the power to make such orders to bring an end, matters for which directions are given under sub-section (2) of Section 242.

17.19 The architecture of Sections 241 and 242 does not permit the Tribunal to read into the Sections, a power to make an order (for reinstatement) which is barred by law vide Section 14 of the Specific Relief Act, 1963 with or without the amendment in 2018. Tribunal cannot make an order enforcing a contract which is dependent on personal qualifications such as those mentioned in

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Section 149(6) of the Companies Act, 2013. Moreover, it has been held in the case of ***Vaish Degree College*** (supra) that the general rule is that a contract of personal services is not specifically enforceable unless a person who is removed from service is ***(a)*** a public servant who has been dismissed from service in contravention of provisions of Article 311 of the Constitution of India; ***(b)*** dismissed under Industrial Law seeking reinstatement by Labour or Industrial Tribunal; and ***(c)*** terminated in breach of a mandatory obligation imposed by statute by a statutory body. The Court observed:-

> ***"17.*** *On a consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. This rule, however, is subject to three well recognised exceptions — (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute."*

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17.20 The position in law that a contract of personal services cannot be enforced by Court is a long standing principle of law and cannot be displaced by the existence of any implied power, though none is shown in the present case. This is described as the Principle of Legality[19]:-

> *"As statutes are not enacted in a vacuum, it is assumed that long standing principles of constitutional law and administrative law are not displaced by use of merely general words. This is styled as the principle of legality. In the words of SIR JOHN ROMILLY: "The general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the previous policy untouched." Since every new law involves some change the above statement of LORD ROMILLY must be applied with caution and should be normally confined to cases where 'the abrogation of a long standing rule of law is in question'. There are many presumptions which an interpreter is entitled to raise which are not readily displaced merely by use of general words, e.g., an intention to bind the Crown or an intention to exclude the supervisory jurisdiction of superior courts will not be inferred merely by use of general words. It is an application of the same principle that unless there be clearest provision to the contrary, Parliament is presumed not to legislate contrary to rule of law which enforces 'minimum standard of fairness both substantive and procedural'. Thus a statutory power though conferred in wide terms has certain implied limitations; provisions excluding*

19Principles of Statutory Interpretation 14th Edition by Justice G.P. Singh at Page 541

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> *challenge to an order have no application when the order is a nullity and a provision excluding an appeal against an order of a criminal court does not bar an appeal against an order which the court had no power to make. For the same reason, unless the statute expressly or by necessary implication provides otherwise an administrative decision does not take effect before it is communicated to the person concerned."*

17.21 It is interesting to note that one of the grounds of challenge to the order of NCLAT, raised by SP group in their appeal C.A.No. 1802 of 2020 is that the Tribunal ought not to have granted the relief of reinstatement. In paragraph 4 of the Memorandum of Grounds of Civil Appeal C.A. No. 1802 of 2020, the complainant companies (SP group) have given a tabulation of the reliefs granted by the Tribunal and the reliefs that the Tribunal ought to have given instead. Para 4 of the memo of grounds of appeal along with a portion of the Table there under reads as follows:

> *"4. Having correctly arrived at these findings, it is submitted that the Ld. NCLAT ought to have granted the reliefs sought. For ease of reference, the reliefs granted by the Ld. NCLAT under the various heads of oppression as against certain key reliefs sought by the Appellants, which the Ld. NCLAT has not granted and which the appellants are aggrieved by, are summarized in the tabular form below:-*

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Reliefs granted by the Ld. NCLAT	***Reliefs that ought to have been granted by the Ld. NCLAT in light of the findings rendered and the reliefs sought for***
Ousting of nominee of the SP Group as Director of Tata Sons	
R-11 should be reinstated as Executive Chairman and Director, for the rest of his tenure of Tata Sons and as Director of three Tata Group Companies from whose board he was removed.	*R-11 has himself stated clearly that he had no intent to once again taken charge of Executive Chairman and Director of the Tata Group companies. Given the nature of Tata Sons being that of a two group company and the huge stake that the appellants have in Tata Sons, the relief that ought to have been granted was that the appellants be granted proportionate representation on the Board of Directors of Tata Sons and representation on all committees formed by the Board of Directors of Tata Sons."*

17.22 Thus the relief of reinstatement granted by the Tribunal, was too big a pill even for the complainant companies (and perhaps CPM) to swallow.

Relief relating to Article 75

17.23 The larger questions revolving around the attack to Article 75, particularly the question whether the very presence of such an article could be construed as oppressive and prejudicial to

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some members, will be dealt with in the next chapter concerning question of law No.3. But we shall consider here, the limited question whether the Tribunal could have granted a relief, that has the effect of sending Article 75 into comatose.

17.24 Actually, the relief in respect of Article 75, technically speaking, could not have been granted by NCLAT. The reason is that in the Company Petition as it was originally filed, there was no prayer challenging Article 75. It was only through an application for amendment dated 31.10.2017 that the complainant companies sought to incorporate a prayer as Clause M-2 for striking off/ deleting Article 75 on the ground that it is a tool in the hands of majority shareholders to oppress the minority. In the said application for amendment filed on 31.10.2017, the complainant companies sought to include five additional prayers, three of them as Clauses M-1, M-2 and M-3, one of them as Clause F-1 and the last as Clause G-1. The prayer for striking off/deleting Article 75

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was sought to be included in Clause M-2 of Para 153 of the main petition.

17.25 But what happened thereafter is quite interesting. Through a Memo dated 12.1.2018, the complainant companies sought to *"not press"* the prayers in Clauses (A), (B), (C), (F), (Q) and (R). In addition they sought to restrict the prayer in Clause M, as we have indicated in the table above. There was no indication in the Memo filed on 12.1.2018 as to whether the prayers included as M-1, M-2 and M-3 inserted under the application for Amendment dated 31.10.2017 are to be retained, despite their prayer for restricting the claim made in Clause M.

17.26 It is true that the rigors of CPC and the Evidence Act are not be applicable to Tribunals/Quasi-Judicial Authorities. These rigours do not even apply to Courts dealing with constitutional matters (*refer the Explanation under Section 141 CPC).*

17.27 Such a concession was incorporated in all Statutes by which quasi judicial Tribunals are created, solely with a view to

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avoid delay in the dispensation of justice. ***But instead of eliminating delay, it has eliminated discipline in pleadings and procedure***.

17.28 If it is a Civil Court, the Memo dated 12.1.2018 will be taken to have superseded whatever had been done till then. In such a case, there would have been complete lack of clarity whether the prayer included in Clause M-2 survived despite the Memo restricting prayer made in the Clause-M.

17.29 Even if we take it that the memo dated 12-01-2018 restricted the prayer in clause M alone and not clause M-2, NCLAT could not have muted Article 75 by holding that it cannot be invoked except in exceptional circumstances. This is for the reason that after all, Article 75 just provides for an exit option to the unwilling partner. Even traditionally, the law in England and in India is to pave the way for a safe and honourable exit, when 2 persons in commercial relationship cannot co-exist.

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17.30 In this context, it will be useful to take note of the nature of the directions that could be issued by a Tribunal, in matters of this nature, as indicated in Clauses (a) to (m) of Sub-section (2) of Section 242. Sub-section (2) of Section 242 has been extracted by us elsewhere and it shows that what is listed in Clauses (a), (b), (c), (e), (f) and (g) of Sub-section (2) of Section 242 are just the same as or similar to Clauses (a) to (f) of Section 402 of the 1956 Act. Clauses (d), (h), (i), (j), (k) and (l) of Sub-section (2) of Section 242 are new additions under the 2013 Act.

17.31 Fundamentally, the object for the achievement of which, the Tribunal is entitled to pass an Order under Section 242(1) of the 2013 Act, remains just the same, as in the 1956 Act. The words *"the Tribunal may,* ***with a view to bringing to an end the matters complained of,*** *make such order as it thinks fit"*, found in the last limb of Sub-section (2) of Section 397 of the 1956 Act, is also repeated in the last limb of Sub-section (1) of Section 242 of

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the 2013 Act. These words also found a place in the last limb of Sub-section (4) of Section 153C of the 1913 Act.

17.32 Even Section 210 of the English Companies Act of 1948 used the very same words namely *"the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit"*. Though the English Law made a paradigm shift from 'oppressive conduct' to 'unfairly prejudicial conduct' under the Companies Act, 1985, the object to be kept in mind by the Court while passing an order under Section 461 of the English Companies Act, 1985 continued to be almost similar. Section 461(1) enabled the Court to make *"such order as it thinks fit for giving relief in respect of the matters complained of"*. Section 996 of the English Companies Act, 2006 retained the very same wordings.

17.33 Therefore, despite the law relating to oppression and mismanagement undergoing several changes, the object that a Tribunal should keep in mind while passing an order in an application complaining of oppression and mismanagement, has

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remained the same for decades. This object is that the Tribunal, by its order, should bring to an end the matters complained of.

17.34 In other words the purpose of an order both under the English Law and under the Indian Law, irrespective of whether the regime is one of *"oppressive conduct"* or *"unfairly prejudicial conduct"* or *a* mere *"prejudicial conduct"*, is to bring to an end the matters complained of by providing a solution. The object cannot be to provide a remedy worse than the disease. The object should be to put an end to the matters complained of and not to put an end to the company itself, forsaking the interests of other stakeholders. It is relevant to point out that once upon a time, the provisions for relief against oppression and mismanagement were construed as weapons in the armoury of the shareholders, which when brandished in terrorem, were more potent than when actually used to strike with. While such a position is certainly not desirable, they cannot today be taken to the other extreme where the tail can wag the dog.

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17.35 The Tribunal should always keep in mind the purpose for which remedies are made available under these provisions, before granting relief or issuing directions. It is on the touchstone of the objective behind these provisions that the correctness of the four reliefs granted by the Tribunal should be tested. If so done, it will be clear that NCLAT could not have granted the reliefs of (i) reinstatement of CPM (ii) restriction on the right to invoke Article 75 (iii) restraining RNT and the Nominee Directors from taking decisions in advance and (iv) setting aside the conversion of Tata Sons into a private company.

18. Question 3

18.1 The third question of law to be considered is as to whether NCLAT could have, in law, muted the power of the company under Article 75 of the Articles of Association, to demand any member to transfer his shares, by injuncting the company from exercising the rights under the Article, even while refusing to set aside the Article.

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18.2 Article 75 of the Articles of Association reads as follows:-

> ***" 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."*

18.3 At the outset it should be pointed out that the complainant companies did not make a grievance out of Article 75 on the ground that it had been misused in the past and that such misuse tantamount to conduct oppressive or prejudicial to the interests of some of the members. The *sine qua non* for invoking Section 241 is that the affairs of the Company should have been conducted or are being conducted in a manner oppressive or prejudicial to some of the members. No single instance even of invocation of Article 75, leave alone misuse, is averred in the main company petition or in the application for amendment. Therefore,

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NCLAT could not have and should not have made Article 75 completely ineffective by passing an order of restraint.

18.4 As a matter of fact, NCLAT has agreed, on first principles, that it has no jurisdiction to declare any of the Articles of Association illegal. After having set a benchmark correctly, NCLAT neutralised Article 75 merely on the basis of likelihood of misuse. Section 241(1)(a) provides for a remedy, only in respect of past and present conduct or past and present continuous conduct. NCLAT has stretched Section 241(1)(a) to cover the likelihood of a future bad conduct, which is impermissible in law.

18.5 That Articles of Association of a company constitute a contract among shareholders, is the bedrock of Company Law. In fact, Article 75 was not an invention of the recent origin in Tata Sons. It has been there for nearly a century in one form or the other. As we have pointed out elsewhere, the Company was incorporated in the year 1917 and S.P. Group acquired shares nearly after 50 years in the year 1965. Even at that time Article 75

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was in existence in a different form. After 1965, Article 75 underwent several rounds of amendments, to which the S.P. Group, CPM's father and CPM were parties. CPM himself was a party to an amendment made to Article 75 on 13.09.2000. The Article in its present form was made only on 13.09.2000 and the amendment was unanimously carried through in the presence of and with the consent of CPM.

18.6 A person who willingly became a shareholder and thereby subscribed to the Articles of Association and who was a willing and consenting party to the amendments carried out to those Articles, cannot later on turn around and challenge those Articles. The same would tantamount to requesting the Court to rewrite a contract to which he became a party with eyes wide open.

18.7 It is not as though CPM or his father who was also a Director for nearly 25 years, were not aware of or blind to the existence of Article 75. In fact, in the application for amendment filed by the complainant companies on 31.10.2017, seeking to

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incorporate a challenge to Article 75, the complainant companies stated as follows:-

> *"...**In as much as no occasion had arisen in exercise of the said Article, the petitioners i.e., Respondent Nos. 1 and 2 had taken a conscious decision not to challenge the same**. Respondent Nos. 1 and 2 now foresee a real and immediate threat of this Article being misused"*

The above pleading on the part of the complainant companies was sufficient to throw the challenge to Article 75 out, as it did not correlate to an actual conduct but the possibility of a future conduct. Section 241 is not intended to discipline a Management in respect of a possible future conduct.

18.8 It is no doubt true that the Tribunal has the power under Section 242 to set aside any amendment to the Articles that takes away recognised proprietary rights of shareholders. But this is on the premise that the bringing up of amendment itself was a conduct that was oppressive or prejudicial.

18.9 It was contended that Article 75 was repugnant to Sections 235 and 236 of the Companies Act, 2013. We do not know

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how these provisions would apply. Section 235 deals with a scheme or contract involving transfer of shares in a Company called the transferor company, to another called the transferee company. Similarly, Section 236 deals with a case where an acquirer acquired or a person acting in concert with such acquirer becomes the registered holder of 90% of the equity share capital of the Company, by virtue of amalgamation, share exchange, conversion of securities etc. These provisions have no relevance to the case on hand.

18.10 Even the contention revolving around Section 58(2) is wholly unsustainable, as Section 58(2) deals with securities or other interests of any member of a Public Company.

18.11 Therefore, the order of NCLAT tinkering with the power available under Article 75 of the Articles of Association is wholly unsustainable. It is needless to point out that if the relief granted by NCLAT itself is contrary to law, the prayer of the S.P. Group in their Appeal C.A. No.1802 of 2020 asking for more, is nothing but a request for aggravating the illegality.

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19. Question 4

19.1 The fourth question of law to be considered is whether the characterisation by the Tribunal, of the affirmative voting rights available under Article 121 to the Directors nominated by the Trusts in terms of Article 104B, as oppressive and prejudicial, is justified especially after the challenge to these Articles have been given up expressly and whether the Tribunal could have granted a direction to RNT and the Nominee directors virtually nullifying the effect of these Articles.

19.2 In the Company Petition as it was originally filed, the complainant companies sought a prayer in Paragraph 153(M) to strike down Articles 86, 104B, 118, 121 and 121A in entirety and to strike off one portion of Article 124. These Articles (other than Article 118, which is extracted elsewhere) read 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***

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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% 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."

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% 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

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and Sir Ratan Tata Trust shall together nominate such Directos. 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.

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."*

*****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*

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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.*

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Explanation: the term "Tata Company" used in this article shall, as the context requires, mean each or any of the 4 following companies"

Tata Consultancy Services ltd., Tata Steel Limited, Tata Motors Limited, Tata Capital Ltd., Tata Chemicals Ltd., Tata Power Company Ltd., Tata Global Beverages Ltd., The Indian Hotels Company Ltd., Trent Limited, Tata Teleservices (Maharashtra) Limited, Tata Industries Limited, Tata Teleservices Limited, Tata Communications Limited, Titan Company Limited and Infiniti Retail Limited and any other Company in which the Company (or its subsidiaries) holds twenty percent 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".

19.3 But through a Memo dated 12.01.2018, the complainant companies restricted the relief prayed in Paragraph 153(M) to the extent as follows:-

(i) the necessity of affirmative voting of the majority of the Directors nominated by the Trusts, which are majority of shareholders be deleted;

(ii) the petitioners be entitled to proportionate representation on the Board of Directors of Respondent No.1;

(iii) the petitioners be entitled to a representation on all committees formed by the Board of Directors of Respondent No.1; and

(iv) the Articles of Association be amended accordingly.

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19.4 Therefore, what was actually sought by the complainant companies was the deletion of the Article that necessitated the affirmative voting right of the majority of the Directors nominated by the two Trusts. There was no prayer for restraining RNT and the nominee Directors of the Trusts from taking any decision in advance.

19.5 In fact, even the complainant companies are not happy about the relief so granted by NCLAT. In the Table given in Paragraph 4 of their Memorandum of Appeal in C.A.No.1802 of 2020, the complainant companies themselves seek a modification of the relief so granted. This Table found below Paragraph 4 of the Memorandum of Grounds of appeal in C.A.No.1802 of 2020 reads as follows:-

Reliefs granted by the Ld. NCLAT	***Reliefs that ought to have been granted by the Ld. NCLAT in light of the findings rendered and the reliefs sought for***
Abuse of Articles culminating in the removal of R-11	
R-2 and nominee of the Tata Trusts should desist from taking decisions in advance of Board meetings and	*i. The direction ought not to have been only against the nominee of Tata Trusts and R-2 but*

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shareholder meetings of Tata Sons.		*against the Trustees of the majority shareholders who even though not on the Board of Tata Sons, were interfering with the decision making processes of the Board of Directors, and therefore, the reliefs ought to have been granted against all the Trustees of the Tata Trusts.*
	ii.	*Further in view of the fact that such interference was being based on the existence of an affirmative vote under Article 121, it would totally be anomalous to a Board managed Company if every decision required an affirmative vote of the Trust Nominee Directors and Tata Sons would virtually become a majority shareholder managed company rather than a Board managed company as contemplated under Article 122(b). Article 121A of the Articles specifies certain areas where consent of the majority shareholder was necessary and therefore, the relief that ought to have been granted was to restrict the applicability of the affirmative vote to the nominee of the Tata Trusts on the matters covered under Article 121A and a a similar right ought to have been conferred on the nominee directors of the minority*

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	shareholder – the SP Group.

19.6 But for the fact that the complainant companies have also come up with an appeal, we would have simply set aside the order of restraint passed by NCLAT against RNT and nominee Directors, on the ground that there was no such prayer. Now that S.P. Group has come up with an appeal seeking an amplification or modulation of the relief so granted, we shall deal with the challenge to the affirmative voting rights.

Affirmative voting rights

19.7 Under Article 104B, Sir Dorabjee Tata Trust and Sir Ratan Tata Trust, acting jointly, shall have a right to nominate 1/3rd of the prevailing number of Directors on the Board, so long as the Trusts own and hold, in the aggregate, at least 40% of the paid up share capital. Article 121 provides that the matters which require to be decided by a majority of the Directors, shall require the affirmative vote of the majority of Directors appointed under Article 104B.

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19.8 Article 121A contains the list of matters to be resolved by the Board of Directors. One of the items included therein is **"any matter affecting the share holding of the Tata Trusts in the Company..."**

19.9 As seen from the Table under Paragraph 4 of the Memorandum of appeal filed by the S.P. Group in C.A.No.1802 of 2020, they are not seeking, even now, the scrapping of the affirmative voting rights. Interestingly, S.P. Group, through their Memo dated 12.01.2018 wanted the deletion of the Article providing for affirmative voting right. But as per the Table under Paragraph 4 of the Memo of their appeal in C.A.No.1802 of 2020, the complainant companies have now reconciled themselves to the unavoidability of affirmative voting rights but all that they want is that the applicability of affirmative voting right should be restricted to the matters covered by Article 121A. In addition, the complainant companies want a similar affirmative right to be conferred on the nominee Directors of the S.P. Group.

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19.10 The swing that the S.P. Group has taken in their position relating to affirmative voting rights is quite funny. To begin with, they sought a prayer for striking off Article 121 in its entirety. Later they restricted their relief, by the Memo dated 12.01.2018, to the deletion of "the necessity of affirmative voting rights". But now they are fine with the existence of affirmative voting rights for the majority in respect of matters covered by Article 121A, but want a similar right in favour of the nominee directors of the S.P. Group.

19.11 The frequent change of position that S.P. Group has taken and the relief that they now seek, raises a doubt whether it is actually a fight on principles. If affirmative voting rights are bad in principle, we do not know how they may become good, if conferred on S.P. Group also.

19.12 Drawing our attention to Sections 135, 149, 151, 161 166 and 177 of the Companies Act, 2013, it was argued on behalf of SP group that there is a sea change in the law, after the advent of the 2013 Act and that today a paradigm shift has taken place from

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'corporate majority/democracy' to 'corporate governance' and that every action of the Board has to pass the test of fairness. It is further contended that Directors have a fiduciary responsibility with the highest level of duty and that the same cannot be outsourced. According to the SP group, the Directors, once appointed, owe their allegiance only to the company and not to their nominators.

19.13 At first blush, these arguments, almost bordering on romantic idealism, appear very attractive. But on a deeper scrutiny, they are bound to get grounded. If we have a look at the history of evolution of corporate enterprises, it can be seen that there are 3 time periods through which development of corporate entities have passed. In the first period, large corporate houses were established by individuals with their own funds and those individuals and their families controlled both ownership and management of these enterprises. In the second time period, when professionalism became the '*Taraka mantra*', families which promoted enterprises, retained ownership, but appointed professional managers to run

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the show. Thus ownership got divested from management. In the third time period, social participation increased by leaps and bounds through public issues and listing. This increased the social accountability and social responsibility of corporate entities. Every time a historical shift/change took place, the legal regime had to undergo a change, albeit at snail's pace.

19.14 As a matter of fact, the Companies Act, 1956 suffered 24 amendments. Major amendments were made first in 1988 and then in 2002, respectively on the basis of the recommendations of the Sachar Committee and the Report of the Eradi Committee. On August 4, 2004, the Ministry of Company Affairs, published a Concept Paper on Company Law on its website, after which, the Government constituted an Expert Committee under the Chairmanship of Dr. J.J. Irani[20]. The mandate of the Committee was to make recommendations on certain issues, one of which was *"protecting the interests of stakeholders and investors, including small investors"*. This committee's report crystallised into

20 Incidentally J.J. Irani was the Chairman of Tata Sons for sometime

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Companies Bill, 2009, which later became Companies Bill, 2011 and then Companies Act, 2013.

19.14 It is true that the 2013 Act brought a lot of drastic changes. Some of the salient features of the 2013 Act are:

(i) Every company is required to have at least one Director who has stayed in India for a total period of not less than 182 days in the previous calendar year.

(ii) Every listed Public Company is required to have at least one-third of the total number of Directors as independent Directors.

(iii) Some Public Companies are required to have at least two independent Directors.

(iv) Every independent Director should give a declaration at the first Board meeting that he meets the criteria of independence.

(v) Certain types of Public Companies are required to appoint at least one woman Director.

(vi) Every listed company may appoint a small shareholders' Director, to be elected by the small shareholders.

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(vii) The report of the Board of Directors should include a Director's Responsibility Statement, covering certain aspects relating to accounting standards, accounting policies and maintenance of accounting records.

(viii) Directors of a company are obliged to perform certain duties, such as duty to act in good faith, duty to exercise reasonable care, skill diligence and independent Judgment etc.

(ix) A detailed Code of conduct for independent Directors is stipulated in Schedule IV. This includes guidelines for professional conduct, roles and functions and duties.

(x) The resignation or removal of independent Directors should be in accordance with the procedure prescribed.

(xi) Independent Directors are required to hold at least one meeting in a year without the attendance of non-independent Directors and members of management and they are entitled in this meeting to review the performance of non-independent Directors and the Board as a whole. They can even review the performance of the Chairperson of the Company and assess the quality,

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quantity and timeliness of flow of information between the management and the Board.

(xii) The Board of Directors of certain companies are required to have certain Committees such as (1) Audit Committee; (2) Nomination and Remuneration Committee and (3) Stakeholders Relationship Committee.

(xiii) A separate section on Corporate Governance is to be included in the Annual Reports of certain companies, with a detailed compliance Report on Corporate Governance.

(xiv) After the advent of the Companies Act, 2013, SEBI Regulations were also amended, inserting Clause 49 in the Listing Agreement, to enforce compliance with Corporate Governance standards.

19.15 But it must be remembered that the shift under the Companies Act, 2013 is focused on listed and unlisted public companies. The requirement under Section 149(4) to have at least one-third of the total number of Directors as independent Directors applies only to every listed public company. The requirement under Section 151 to have one Director elected by small shareholders is

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also applicable only to listed companies. The requirement to constitute an Audit Committee in terms of Section 177(1), a Nomination and Remuneration Committee and the Stakeholders Relationship Committee in terms of Section 178(1) are also only on listed public companies.

19.16 Insofar as Tata Sons is concerned, the Articles of Association of the Company continue to contain the prescribed restrictions which make it a private company within the definition of the expression under Section 2(68). Therefore, the provisions discussed above do not apply to Tata Sons. Yet Tata Sons has a Board packed with many people who are ranked outsiders. If the idea was to run Tata Sons purely as a family business, RNT need not have stepped down from the Chairmanship. Today nobody wants to step down from any office, except if afflicted by brain stroke or sun stroke. As we have seen from the pleadings, the Tata Group was founded by Jamsetji Nusserwanji Tata (1839-1904). It was first established as a private trading firm in 1868 and was later

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incorporated as a private company on 8.11.1917 under Section 2(13) of the Companies Act, 1913. Later two Trusts were created, one in the year 1919 under the name Sir Ratan Tata Trust and another in 1952 under the name Sir Dorabji Tata Trust. It was only in 1965 that S.P. Group acquired 48 preference shares and 40 equity shares, from a member of Tata Sons named Mrs. Rodabeh Sawhney. Shri Pallonji Mistry, the father of CPM was inducted as a Non-Executive Director on 25.06.1980, though the Articles of Association did not confer any right of Directorship upon the S.P Group. He stepped down from this position in December, 2004. Thereafter, CPM was appointed as Non-Executive Director on 10.08.2006. Ever since the establishment of the Tata Group in 1868, there have only been six persons who became the Chairmen of the Group. While five of them namely Jamshedji Tata, Sir Dorab Tata, Nowroji Saklatwala, JRD Tata and Ratan Tata belonged to the same family, the sixth person namely CPM was inducted as Executive Chairman by Resolution dated 18.12.2012 with effect

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from 29.12.2012. Before the said appointment, CPM was identified by a Selection Committee which comprised of the nominees of the two Tata Trusts. This Selection Committee identified CPM as a successor to RNT as Chairman and appointed him first as Executive Deputy Chairman for a period of five years form 1.04.2012 till 31.03.2017, subject to the approval of the General Body. The General meeting of the shareholders, held on 1.8.2012 approved the appointment of CPM as Executive Deputy Chairman and also left it to the Board to re-designate him as Chairman. This is how the Board, in its meeting dated 18.12.2012 re-designated CPM as Executive Chairman.

19.17 If the argument relating to corporate governance is carefully scrutinized in the context of the fact: (i) that a large industrial house whose origin and creation was familial, was willing to handover the mantle of heading the entire empire to a person like CPM (a rank outsider to the family); *and* (ii) that the identification of CPM as the successor to RNT was done by the very same nominees

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of the two Tata Trusts (who is now accused of interference), then it will be clear that Tata Group was guided by the principle of Corporate Governance (even without a statutory compulsion) and not by tight-fisted control of the management of the affairs of the Group.

19.18 The provisions of sections 135, 149, 151, 166 and 177 around which the argument relating to corporate governance is fantasised, cannot advance the case of the SP group. Section 135 deals with corporate social responsibility, which in any case is more pronounced in this company due to the fact that charitable trusts hold majority of the shares. Section 149 deals with the requirement to have Directors, section 151 provides for appointment of a Director elected by small shareholders, section 166 enumerates the duties of directors and section 177 and 178 speak of some committees. Some of these provisions such as sections 151, 177 and 178 apply only to listed public companies. Yet, Tata Sons have

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complied with sections 177 and 178 by constituting necessary committees.

19.19 It was contended that a Director of a Company is to act in good faith in order to promote the objects of the Company for the benefit of all the stakeholders and that he is in a fiduciary capacity *vis-a-vis* the company. The affirmative voting rights, according to S.P.Group, disabled the nominee Directors from acting independently in the best interests of the company and its stakeholders and that once appointed, the loyalty of the nominee Directors should be to the Company and not solely to the Trusts which nominated him. It was further contended that under Articles 121, 121A and 122, Tata Sons was to be a Board managed Company and that the protective rights conferred under Article 121 were intended to take care of the interests of the Tata Trust, in case they became a minority.

19.20 According to the S.P. Group, the pre-consultation/pre-clearance requirement disabled the Directors from effectively

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discharging their fiduciary duties under Section 166, violated the Secretarial Standards required to be adhered to under Section 118(10) and rendered nugatory, the scheme of Section 149 which requires 1/3rd of the members of the Board to be independent Directors.

19.21 But all the above contentions are completely devoid of any substance, for they tend to overlook one basic fact namely that Tata Sons is not a company engaged either in any manufacturing activity or in any trading activity. As per the pleadings, on which there is no dispute, Tata Sons is a Principal Investment Holding Company and is a promoter of Tata Companies. Tata Sons holds a controlling interest in all the operating companies of the Tata Group. Other than being the Principal Investment Holding Company, Tata Sons, by itself is not engaged in any direct business activity.

19.22 As we have indicated in the beginning, around 66% of the equity share capital of Tata Sons is held by philanthropic Trusts,

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including Sir Dorabji Tata Trust and Sir Rata Tata Trust. It is claimed that these charitable Trusts support education, health, livelihood generation and Art & Culture.

19.23 If we take these two important factors into consideration namely: ***(i)*** that Tata Sons is only a Principal Investment Holding Company; and ***(ii)*** that the majority shareholders of Tata Sons are only philanthropic charitable Trusts, it will be clear that the Directors nominated by the Trusts are not like any other Directors who get appointed in a General Meeting of the Company in terms of Section 152(2) of the Act. In fact it is a paradox to claim that by virtue of Sub-sections (2) and (3) of Section 166, every Director of a Company is duty bound to act in good faith in order to promote the objects of the company for the benefits of its members and in the best interests of all the stakeholders as well as environment and a duty to exercise independent judgment, and yet mandate the appointment of independent Directors under Section 149(4). If all Directors are required under Section 166(3) to exercise independent

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Judgment, we do not know why there is a separate provision in Section 149(4) for every listed Public Company to have at least 1/3rd of the total number of Directors as independent Directors. We do not also know whether the prescription in Section 149(4) is a tacit acknowledgment that all the Directors appointed in a General meeting under Section 152(2) may not be independent in practice, though they may be required to be so in theory.

19.24 A person nominated by a charitable Trust, to be a Director in a company in which the Trust holds shares, also holds a fiduciary relationship with the Trust and fiduciary duty towards the nameless, faceless beneficiaries of those Trusts. As we have pointed out elsewhere, the history of evolution of the corporate world shows that it has moved from the (i) familial to (ii) contractual and managerial to (iii) a regime of social accountability and responsibility. This is why Section 166(2) also talks about the duty of a Director to protect environment, in addition to his duties to ***(i)*** promote the objects of the company for the benefit of its members

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as a whole; and ***(ii)*** act in the best interests of the company, its employees, the shareholders and the community. It is common knowledge that some of the industries which take good care of its shareholders and employees also run polluting industries. Therefore there is always a conflict, a tug of war between competing interests and statutes cannot resolve these conflicts effectively.

19.25 Affirmative voting rights for the nominees of institutions which hold majority of shares in companies have always been accepted as a global norm. As a matter of fact the affirmative voting rights conferred by Article 121 of the Articles of Association, confers only a limited right upon the Directors appointed by the Trusts under Article 104B. Article 121 speaks only about the manner in which matters before any meeting of the Board shall be decided. If it is a General Meeting of Tata Sons, the representatives of the two Trusts will actually have a greater say as the Trusts have 66% of shares in Tata Sons. Therefore, if we apply Section 152(2) strictly, the Trusts which own 66% of the paid up capital of Tata Sons will

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be entitled to pack the Board with their own men as Directors. But under Article 104B, only a minimum guarantee is provided to the two Trusts, by ensuring that the Trusts will have at least 1/3rd of the Directors, as nominated by them so long as they hold 40% in the aggregate of the paid up share capital.

19.26 Section 43 of the Companies Act (which is equivalent of Section 86 of the 1956 Act), recognises two types of share capital of a company limited by shares. They are ***(i)*** equity share capital; and ***(ii)*** preference share capital. Again equity share capital can be of two kinds namely, ***(i)*** those with voting rights; and ***(ii)*** those with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed.

19.27 Section 47(1)(b) of the 2013 Act (equivalent to Section 87(1)(b) of the 1956 Act), declares that the rights of a member of a company limited by shares, shall be in proportion to his share in the paid up equity share capital of the company. This right is subject to the provisions of Section 43, Section 50(2) and Section

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188(1) of the 2013 Act. The restrictions under Sections 43, 50(2) and 188(1) respectively are, ***(i)*** shares with differential voting rights; **(ii)** disentitlement to voting rights, of a member who has not paid the unpaid share capital; and ***(iii)*** the disentitlement of a member to vote on a resolution for the approval of any contract entered into by the company with a related party.

19.28 Under Section 10(1) of the Companies Act, 2013, the Articles of Association bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member. However, this is subject to the provisions of the Act.

19.29 Article 94 of the Articles of Association of Tata Sons is in tune with Section 47(1)(b), as it says that upon a poll, the voting rights of every member, whether present in person or by proxy shall be in proportion to his share of the paid up capital of the company. Therefore, a shareholder or a group of shareholders who constitute majority, can always seek to be in the driving seat by

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reserving affirmative voting rights. So long as these special rights are incorporated in the Articles of Association and so long as they are not in contravention of any of the provisions of the Act, the same cannot be attacked on these grounds.

19.30 Coming to the argument revolving around the duty of a Director, it is necessary that we balance the duty of a Director, under Section 166(2) to act in the best interests of the company, its employees, the shareholders, the community and the protection of environment, with the duties of a Director nominated by an Institution including a public charitable trust. They have fiduciary duty towards 2 companies, one of which is the shareholder which nominated them and the other, is the company to whose Board they are nominated. If this is understood, there will be no confusion about the validity of the affirmative voting rights. What is ordained under Section 166(2) is a combination of private interest and public interest. But what is required of a Director nominated by a charitable Trust is pure, unadulterated public interest. Therefore,

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there is nothing abhorring about the validity of the affirmative voting rights.

19.31 Relying upon the decision of this Court in ***Vodafone International Holdings BV*** vs. ***Union Of India***[21], it was contended that a minority investor has what is called "participative rights, which is a sub-sect of protective rights" and that these participative rights enable the minority to overcome the presumption of consolidation of operations or assets by the controlling shareholder.

19.32 But the decision in ***Vodafone*** (supra) arose under a completely different context. It was a tax dispute in relation to capital gains arising from the sale of share capital of a company resident for tax purposes in Cayman Islands, on the basis that it held underlying Indian assets. It was in that context that this Court analysed the independent legal existence of a subsidiary and held that even if directors are appointed at the behest of the parent company or removable by the parent company, such directors of the subsidiary company will owe their duty to those companies and are

21 (2012) 6 SCC 613

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not to be dictated by the parent company if it is not in the interest of the subsidiaries.

19.33 The decisions ***Re: Neath Rugby Limited***[22] and ***Central Bank of Ecuador and others*** vs. ***Conticorp SA and others (Bahamas)***[23], are relied upon to show that while a nominee director is entitled to take care of the interests of the nominator, he is duty bound to act in the best interests of the company and not fetter his discretion.

19.34 The question as to (i) what is in the interest of the company, (ii) what is in the best interest of the members of the company as a whole and (iii) what is in the interest of a nominator, all lie in locations whose borders and dividing lines are always blurred. If philosophical rhetoric is kept aside for a moment, it will be clear that success and profit making are at the core of business enterprises. Therefore, the best interest of the majority shareholders need not necessarily be in conflict with the interest of the minority

22 (2010) B.C.C. 597
23 (2015) UKPC 11 Judicial Committee of the Privy council (UK)

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or best interest of the members of the company as a whole, unless there is siphoning of or diversion. Such a question does not arise when the majority shareholders happen to be charitable Trusts engaged in philanthropic activities. ***It is good to wish that the creation gets liberated from the creator, so long as the creator does not have any control or ability to manipulate***. In the corporate world, democracy cannot be seen as an ugly expression, after using the very same democratic process for the appointment of directors.

19.35 Much ado was made about pre-consultation and pre-clearance by the Trustees, even before the Board took a call. But it was actually about nothing. Whenever an institution happens to be a shareholder and a notice of a meeting either of the Board or of the General body is issued, it is but normal for the institution to have an idea about the stand to be taken by them in the forthcoming meeting.

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19.36 Objections were raised about RNT vetting the minutes of the meetings of the Board post facto and his participation as a shadow Director. But as we have pointed out elsewhere, CPM himself sought, while accepting the office of Executive Chairmanship, the continued guidance of RNT. When the Board, of which CPM was a Chairman, nominated RNT as Chairman Emeritus and recorded their desire to look forward to his support and guidance, it is not open to the complainant companies to call RNT a shadow Director. If someone, aggrieved after his removal from office can engage in shadow-boxing through the companies controlled by him, he cannot accuse the very same person who chose him as successor to be a shadow director. Someone who gained entry through the very same door, cannot condemn it when asked to exit.

19.37 Therefore, the challenge to the affirmative voting rights and the allegations revolving around pre consultation and pre clearance by the Trusts of all items in the agenda and RNT's

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indirect or direct influence or grip over the Board are all liable to be rejected. That leaves us with one more related issue, under this question of law and the same relates to the claim of SP group for proportionate representation on the Board. We shall now go to the same.

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Claim for proportionate representation

19.38 As we have pointed out elsewhere, the Statute confers upon the members of a company limited by shares, a right to vote in a general meeting. And this right is proportionate to his shareholding as per Section 47(1)(b). Section 152 which contains provisions for the appointment of Directors, does not confer any right of proportionate representation on the Board of any company, be it public or private.

19.39 The maximum extent, to which the Parliament has gone under the 2013 Act, is to make a provision under Section 151, enabling ***"a listed company"*** to have one Director elected by such small shareholders in such manner and on such terms and conditions as may be prescribed. Though a similar prescription was incorporated in Section 252(1) of the Companies Act, 1956, under Act 53 of 2000, it was not exactly the same. For the purpose of easy appreciation, the proviso to Sub-section (1) of Section 252 of

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the 1956 Act and Section 151 of the 2013 Act are presented in a tabular column as follows:

1956 Act	2013 Act
Section 252. Minimum number of directors. – (1) Every public company other than a public company which has become such by virtue of section 43A shall have at least three directors: (Provided that a public company having, - (a) a paid-up capital of five crore rupees or more; (b) one thousand or more small shareholders, may have a director elected by such small shareholders in the manner as may be prescribed. *Explanation.* – For the purpose of this sub-section "small shareholders" means a shareholder holding shares of nominal value of twenty thousand rupees or less in a public company to which this section applies.	**Section 151. Appointment of director elected by small shareholders.** - A listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed. *Explanation.*—For the purposes of this section "small shareholders" means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

19.40 The important features to be noticed in the 1956 Act and the 2013 Act are : ***(i)*** that Section 252 of the 1956 Act was

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applicable to every public company but not to a public company which has become such by virtue of Section 43A, indicating thereby that it would not have had any application to Tata Sons; **(ii)** that in contrast, Section 151 of the 2013 Act applies only to listed companies; **(iii)** that for the application of the proviso to Section 252(1) of the 1956 Act, the public company should have a paid-up capital of Rs.5 crores or more and 1000 or more small shareholders; **(iv)** that in contrast the applicability of Section 151 of the 2013 Act does not depend upon either the paid-up capital or the number of small shareholders; and **(v)** that the definition of the expression ***"small shareholders"*** is just the same under both the enactments.

19.41 It is interesting to note that the smallness conceived by the 1956 Act is virtually minuscule. One would qualify to be a small shareholder only if he holds shares of a nominal value of Rs.20,000/- or less, in a public company having a paid-up capital of Rs.5 crores or more. This proportion works out to 1/2500 or 0.04%.

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19.42 One must be careful to note that both under Section 252(1) of the 1956 Act and under Section 151 of the 2013 Act, the spotlight was only on ***"small shareholders"*** and not on ***"minority shareholders"*** like the S.P. Group which holds around 18.37%. In fact, admittedly the value of this 18.37% of shareholding of the S.P. Group, as of March-2016 was around Rs.58,441 crores. It is claimed that the purchase consideration of these shares at the relevant point of time was Rs.69 crores and that during the period from 1991 to 2016, SP group had received aggregate dividends to the tune of Rs.872 crores. We do not know whether this kind of a huge return on investment and the skyrocketing of the appreciation of the value of investment, is also due to oppressive conduct or despite oppressive conduct.

19.43 Whatever it be, the right to claim proportionate representation is not available even to a minority shareholder statutorily, both under the 1956 Act and under the 2013 Act. It is

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available only to a small shareholder, which S.P. Group is certainly not.

19.44 The right to claim proportionate representation is not available for the S.P. group even contractually, in terms of the Articles of Association. Neither S.P. Group nor CPM can request the Tribunal to rewrite the contract, by seeking an amendment of the Articles of Association. The Articles of Association, as they exist today, are binding upon S.P. Group and CPM by virtue of Section 10(1) of the Act.

19.45 Realising the fact that they have no right, statutorily or contractually or otherwise to demand proportionate representation on the Board, S.P. Group has come up with a very novel idea, namely the claim of existence of a quasi-partnership between the Tata group and SP group. It is contended by S.P. Group that there existed a personal relationship between those in management of the S.P. Group and those in management of Tata Sons for over several decades and that the relationship was one of trust and mutual

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confidence. According to S.P. Group, they acted as the guardian of the Tata Group when the Tata Trust had no voting rights. Therefore, it is claimed that there is a right and a legitimate expectation to have a representation on the Board of Tata Sons.

19.46 But we do not think that there ever existed a relationship in the nature of quasi partnership. As we have pointed out elsewhere, the company was incorporated in the year 1917 and S.P. Group became a shareholder in 1965, namely after 50 years. A berth on the Board of Tata Sons was granted only in the year 1980 to CPM's father. Therefore, there is nothing on record in the form of pleadings or proof, to show that there was either ***(i)*** a pre-existing relationship before the incorporation of the company or ***(ii)*** a living in relationship picked up half way through, by entering into an agreement in the nature of a partnership.

19.47 In fact, CPM's father was inducted into the Board in 1980, after 15 years of acquisition of shares and such induction was not in recognition of any statutory or contractual right. After

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his father's exit in 2004, CPM was inducted in 2006, neither in recognition of a contractual right nor in recognition of a hereditary or statutory right.

19.48 The claim for proportionate representation can also be looked at from another angle. RNT who was holding the mantle as the Chairman of Tata Sons for a period of 21 years from 1991 to 2012, actually conceded a more than proportionate share to the S.P. Group by nominating CPM as his successor. Accordingly CPM was also crowned as Executive Deputy Chairman on 16.3.2012 and as Chairman later. CPM continued as Executive Chairman till he set his own house on fire in 2016. If the company's affairs have been or are being conducted in a manner oppressive or prejudicial to the interests of the S.P. group, we wonder how a representative of the S.P. Group holding a little over 18% of the share capital could have moved upto the top most position within a period of six years of his induction. Therefore, we are of the considered view that the

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claim for proportionate representation on the Board is neither statutorily or contractually sustainable nor factually justified.

19.49 Placing reliance upon section 163 of the Companies Act, 2013, it was contended that proportionate representation is statutorily recognised. But this argument is completely misconceived. Section 163 of the 2013 Act corresponds to section 265 of the 1956 Act. It enables a company to provide in their Articles of Association, for the appointment of not less than two-thirds of the total number of Directors in accordance with the ***principle of proportionate representation by means of a single transferable vote***. First of all, proportionate representation by means of a single transferable vote, is not the same as representation on the Board for a group of minority shareholders, in proportion to the percentage of shareholding they have. It is a system where the voters exercise their franchise by ranking several candidates of their choice, with first preference, second preference etc. Moreover, it is only an enabling provision and it is upto the

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company to make a provision for the same in their Articles, if they so choose. There is no statutory compulsion to incorporate such a provision.

19.50 Therefore, the fourth question of law is also to be answered in favour of the Tata group and the claim in the cross appeal relating to affirmative voting rights and proportionate representation are liable to be rejected.

20. <u>Question No.5</u>

20.1 The 5th question of law formulated for consideration is as to whether the re-conversion of Tata Sons from a public company into a private company, required the necessary approval under section 14 of the Companies Act, 2013 or at least an action under section 43-A(4) of the Companies Act, 1956 during the period from 2000 (when Act 53 of 2000 came into force) to 2013 (when the 2013 Act was enacted) as held by NCLAT ?

20.2 As we have pointed out elsewhere, Tata Sons was actually incorporated as a Private Limited Company, but was

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deemed to have become a Public Limited Company, with effect from 01.02.1975, by virtue of Section 43-A (1A) of the Companies Act, 1956. However, by virtue of the proviso to Sub-section (1A), the Articles of Association of the Company, continued to retain the provisions relating to the matters specified in sub-clauses (a), (b) and (c) of Clause (iii) of Sub-section (1) of Section 3 of the 1956 Act.

20.3 By Act 53 of 2000, the deeming fiction in section 43A was removed and the whole concept of private companies becoming public companies disappeared from the date of coming into force of this Act 53 of 2000.

20.4 The Companies Act, 2013 did not include any provision similar to section 43A. Therefore, Tata Sons passed a resolution in its 99th Annual General meeting held on 21-09-2017 to alter the Memorandum and Articles so as to insert the word “private” in between the words “Sons” and “Limited” in its name.

20.5 On 09.07.2018, the complaint under sections 241 and 242 was dismissed by NCLT and hence Tata Sons approached the

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Registrar of Companies on 19.07.2018 seeking an amendment to the Certificate of Incorporation. It appears that S.P. Group filed objections with the Registrar of Companies on the ground that they were filing appeals against the order of the NCLT. But the Registrar of Companies issued an amended certificate on 06.08.2018.

20.6 Upon coming to know of the issue of amended Certificate of Incorporation, S.P. Group filed an additional affidavit before NCLAT on 10.08.2018 in the appeals that came up for hearing.

20.7 While allowing the appeals of S.P. Group by a judgment dated 18.12.2019, NCLAT declared the action of the Registrar of Companies in issuing the amended Certificate of Incorporation as illegal with a further direction to the Registrar of Companies to make necessary corrections in the records showing the Company as a Public Company.

20.8 The Registrar of Companies moved an application under Sections 420(2) and 424(1) of the Companies Act, 2013 read with Rule 11 of the NCLAT Rules, 2016, seeking removal of the

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observations made in Paragraphs 181, 186 and 187(iv) of the judgment. This application was dismissed by the NCLAT by an order dated 06.01.2020, not only holding that no aspersions were cast in the judgment of the NCLAT on the Registrar of Companies warranting any review/clarification, but also providing certain additional reasons. It is under these circumstances that the 5th question of law revolving around Section 43A of the 1956 Act as amended by Act 53 of 2000, and the Companies Act, 2013 has arisen for consideration.

20.9 A look at Section 43A would show that it was actually inserted under Companies (Amendment) Act 65 of 1960 with effect from 28.12.1960. This Section underwent two amendments, one under Act 41 of 1974 with effect from 01.02.1975 and another under Act 31 of 1988 with effect from 15.06.1988. Finally, by Act 53 of 2000, Section 43A was made inapplicable with effect from 13.12.2000.

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20.10 Section 43A, as inserted by Act 65 of 1960, together with the amendments made under Act 41 of 1974, Act 31 of 1988 and Act 53 of 2000, is reproduced as follows:-

> ***"43A. Private Company to become a 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*

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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.

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(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 2 [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,

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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

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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.

(6) & (7) omitted by Act 31 of 1988

(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

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have held twenty-five per cent or more of its paid-up share capital,

(b) …

(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 is 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;

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> *(b) "turnover", of a company, means the aggregate value of the realization 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."*

20.11 In its inception, Section 43A contained only one stipulation namely that a private company in which not less than 25% of the paid up share capital was held by one or more bodies corporate, shall become a public company. But by Act 41 of 1974, two additional stipulations were included. They are ***(i)*** that a private

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company whose average turnover during the relevant period is not less than an amount prescribed, shall become a public company, irrespective of its paid up share capital; and ***(ii)*** that a private company which holds not less than 25% of the paid up share capital of a public company, shall become a public company.

20.12 By Act 31 of 1988, the benchmark of the average annual turnover that would determine the applicability of Section 43A was prescribed as not less than Rs. 1 crore. In addition, Act 31 of 1988 also made a private company which accepts deposits from the public, other than its members or directors, to be a public company.

20.13 Two important prescriptions, which continued without any change, from the date of insertion of Section 43A, namely 28.12.1960, till the coming into force of Act 53 of 2000 namely 13.12.2000, were Sub-sections (2) and (4) of Section 43A. Sub-section (2) imposed an obligation upon a private company which became a public company by virtue of section 43A, to inform the

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Registrar. Upon receipt of such information, the Registrar was ordained to delete the word "private" in the name of the company upon the register and also to make necessary alterations in the Certificate of Incorporation and its Memorandum of Association.

20.14 Sub-section (4) declared that the status of such a company as a public company would continue until such time it becomes a private company ***(i)*** with the approval of the Central Government; and ***(ii)*** in accordance with the provisions of the Act.

20.15 In ***Needle Industries (India) Ltd vs Needle Industries Newey (India) Ltd***[24], this court pointed out (A) that there are 3 distinct types of companies, namely Private companies, Public Companies and deemed to be public companies which occupy a distinct place in the scheme of the Act (B) that private companies, which become public companies, but which continue to retain in their articles those matters mentioned in section 3(1)(iii) of the Act are also broadly and generally subjected to the rigorous discipline of

24 (1981) 3 SCC 333

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the Act and (C) that though section 43A companies cannot claim the same privileges to which private companies are entitled, there are certain provisions of the Act which would apply to public companies, but not to Section 43A companies. An important observation found in *Needle Industries*, is that "*the policy of the Act if anything, points in the direction that the integrity and structure of section 43A proviso companies should, as far as possible, not be broken up*".

20.16 Keeping the above stipulations in mind, let us now come to the amendments made to Section 43A under Act 53 of 2000, with effect from 13.12.2000. By this Act, two sub-sections namely Sub-section (2A) and Sub-section (11) were inserted in Section 43A.

20.17 By virtue of sub-section (11), all the provisions of Section 43A except sub-section (2A) were made inapplicable on and after the commencement of Act 53 of 2000. This meant that with effect from 13.12.2000, the whole of Section 43A except Sub-section (2A) got washed out.

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20.18 Sub-section (2A) prescribes the procedure to be followed by a company, which has earlier become a public company by virtue of Section 43A, but which has later become a private company after the commencement of Act 53 of 2000, to have necessary changes effected. The procedure prescribed by sub-section (2A) for such re-conversion (or *Ghar Wapsi*) is as follows:-

> *(i) The company shall inform the Registrar that the company has again become a private company; and*
>
> *(ii) The Registrar shall thereupon substitute the word "Private Company" for the word "Public Company" upon the register and also make necessary alterations in the Certificate of Incorporation and its Memorandum of Association."*

20.19 But Act 53 of 2000 did not stop with section 43A. It also amended section 3(1)(iii) by inserting an additional sub-clause, namely ***"(d)"*** along with sub-clauses (a), (b) and (c). Under this sub-clause (d) of clause (iii) of sub-section (1) of section 3, the articles of association of a private company should also contain a prohibition on any invitation or acceptance of deposits from persons other than its members, directors or their relatives. Section 3(1)(iii) after amendment under Act 53 of 2000 read as follows:

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> "3 (1) *In this Act, unless the context otherwise requires, the expressions "company", "existing company", "private company" and "public company", shall, subject to the provisions of sub-section (2), have the meanings specified below:-*
>
> *(iii) "private company" means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by is articles, -*
>
> *(a) restricts the right to transfer its shares, if any ;*
>
> *(b) limits the number of its members to fifty not including - (i) persons who are in the employment of the company ; and (ii) 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 ; and*
>
> *(c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company ;*
>
> ***(d) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives:***
>
> *Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition, be treated as a single member;"*

20.20 Sub-clause (d) was what was added to section 3(1)(iii) by Act 53 of 2000, even while scrapping the concept of a deemed public company. But this sub-clause (d) is nothing but sub-section (1C) of section 43A. Though section 43A was being scrapped in effect, the Parliament wanted to retain the prescription contained in sub-section (1C) of section 43A and which is why sub-clause (d) was inserted under section 3(1) (iii).

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20.21 But while doing so under Act 53 of 2000, a major omission happened. The omission related to section 27 (3) of the 1956 Act. Section 27 of the 1956 Act contained stipulations as to what the Articles of Association of (i) an unlimited company (ii) a company limited by guarantee and (iii) a private company limited by shares, should contain. It reads as follows:

> *"27. REGULATIONS REQUIRED IN CASE OF UNLIMITED COMPANY, COMPANY LIMITED BY GUARANTEE OR PRIVATE COMPANY LIMITED BY SHARES*
>
> *(1) In the case of an unlimited company, the articles shall state the number of members with which the company is to be registered and, if the company has a share capital, the amount of share capital with which the company is to be registered.*
>
> *(2) In the case of a company limited by guarantee, the articles shall state the number of members with which the company is to be registered.*
>
> *(3) In the case of a private company having a share capital, the articles shall contain provisions relating to the matters specified in sub-clauses (a), (b) and (c) of clause (iii) of sub-section (1) of section 3; and in the case of any other private company, the articles shall contain provisions relating to the matters specified in the said sub-clauses (b) and (c)."*

20.22 No corresponding amendment was made to Section 27 (3), by Act 53 of 2000, so as to make it in tune with the amended section 3(1)(iii). The result was that on and from 13-12-2000 (the date of coming into force of Act 53 of 2000), section 3(1)(iii)

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contained 4 requirements for a private company, but section 27(3) referred only to 3 requirements. The incongruity can be stated thus. To fall within the definition of a private company, 4 stipulations contained in section 3(1)(iii) were to be satisfied. But under section 27(3), it is enough if the Articles of Association of a private company contained only 3 prescriptions.

20.23 Be that as it may, the consequence of the amendment to section 3(1)(iii), under Act 53 of 2000, was that a company which wanted to take the route of sub-section (2A) of section 43A, after the coming into force of Act 53 of 2000 and reconvert itself into a private company, was required to satisfy the rigours of sub-clauses (a), (b) and (c) as well as (d) of clause (iii) of sub-section(1) of section 3. In other words, the Articles of Association of such a company should contain all the 4 prescriptions namely (i) restriction on the right to transfer shares (ii) limitation on the number of members (iii) prohibition of any invitation to the public to subscribe for shares/debentures and (iv) prohibition of any invitation or

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acceptance of deposits from persons other than members/Directors or their relatives.

20.24 The Articles of Association of Tata Sons had the prescriptions contained in sub-clauses (a), (b) and (c), but not sub-clause (d). Therefore, they did not take any steps in terms of sub-section (2A) of section 43A after the advent of Act 53 of 2000.

20.25 But Companies Act, 2013 changed the complexion of the game. It not merely put an end to the concept of deemed public companies, but also restored the definition of the expression 'private company" to the position that prevailed before Act 53 of 2000. Section 2(68) of the 2013 Act which defines a "private company" incorporated only the original 3 prescriptions contained in sub-clauses (a), (b) and (c) of clause (iii) of sub-section (1) of section 3. The stipulation inserted as sub-clause (d) by Act 53 of 2000, is omitted in section 2(68). Section 2(68) of the 2013 Act reads as follows:-

> *Sec 2 (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*

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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;

20.26 But Companies Act, 2013, created one confusion. Different provisions of the Companies Act, 2013, came into force on

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different dates (driving people crazy). Section 2(68) which defines a private company, came into force on 12-09-2013 vide S.O. 2754 (E) dated 12-09-2013. This notification issued under section 1(3) of the 2013 Act, fixed 12-09-2013 as the appointed date for the coming into force of section 2(68).

20.27 But on 12-09-2013, the date appointed for the coming into force of section 2(68) of the Companies Act, 2013, the old Act, namely the Companies Act, 1956 had not been repealed. The provisions for repeal are contained in Section 465 of The Companies Act, 2013. Section 465(1) repeals the 1956 Act, subject to certain stipulations mentioned in the provisos there under. Sub-section (2) of Section 465 of the Companies Act, 2013 provides a list of matters which will stand saved despite the repeal of the 1956 Act. Sub-section (3) of Section 465 makes it clear that the mention of particular matters in Sub-section (2) shall not be held to prejudice the general application of Section 6 of the General Clauses Act, 1897.

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20.28 The provisions of Section 465, in so far as they relate to the repeal of the 1956 Act are concerned, came into force on 30-01-2019, vide S.O. 560 (E) dated 30-01-2019. In other words, the provisions of the 1956 Act continued to be in force till repealed on 30-01-2019. It means that the criteria for a "private company" under sub-clauses (a), (b), (c) and (d) of clause (iii) of sub-section (1) of section 3 of the 1956 Act, did not stand repealed until 30-01-2019. But the new definition of a "private company" under section 2(68) of the 2013 Act had already come into effect on and from 12-09-2013.

20.29 As a result, we had 2 definitions of the expression "private company" from 12-09-2013 [the date appointed for the coming into force of section 2(68) of the 2013 Act] to 30-01-2019 (the date on which section 3(1) of the 1956 Act became a dead letter consequent upon the repeal of the 1956 Act through the notification of the repeal provision under section 465).

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20.30 Therefore, we have to fall back upon section 465(3) of the 2013 Act to conclude that section 2(68) of the 2013 Act will prevail over section 3(1)(iii) of the 1956 Act. In other words, on and from 12-09-2013, the question whether a company is a private company or not, will be determined only by the definition of the expression "private company" found in section 2(68) of the 2013 Act.

20.31 The articles of association of Tata sons contain the restrictions prescribed in sub-clauses (a), (b) and (c) of Section 3(1)(iii) of the 1956 Act, but they do not satisfy the requirement of sub-clause (d) incorporated in the year 2000. However, on and from 12-09-2013, which is the date appointed for the coming into force of section 2(68) of the 2013 Act, the articles of association of Tata Sons satisfy the requirements of Section 2(68) of the 2013 Act. Therefore, it was and it continues to be a private company.

20.32 In other words, the status of Tata Sons-

(i) was that of a private company till 31-01-1975;

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(ii) was that of a deemed public company under section 43A from 01-02-1975 till 12-12-2000;

(iii) was that of a company that continued to be a deemed to be public company from 13-12-2000 till 11-09-2013 by virtue of section 3(1)(iii) of the 1956 Act as amended by Act 53 of 2000 with effect from 13-12-2000; and

(iv) was that of a private company with effect from 12-09-2013 within the meaning of section 2(68) of the 2013 Act.

20.33 Interestingly, it is not disputed by anyone that today Tata Sons satisfy the parameters of section 2(68) of the 2013 Act. The dispute raised by the S.P. Group and accepted by NCLAT is only with regard to the procedure followed for reconversion. NCLAT was of the opinion that Tata Sons ought to have followed the procedure prescribed in Section 14(1)(b) read with Sub-sections (2) and (3) of Section 14 of the Companies Act, 2013 for getting an amended certificate of incorporation. NCLAT was surprised (quite surprisingly) that Tata Sons remained silent for more than 13 years from 2000 to 2013 without taking steps for reconversion in terms of Section 43A(4) of the 1956 Act. While on the one hand, NCLAT took

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note of the "lethargy" on the part of Tata Sons in taking action for reconversion, NCLAT, on the other hand also took adverse notice of the speed with which they swung into action after the dismissal of the complaint by NCLT.

20.34 But what NCLAT failed to see was that Tata sons did not become a public company by choice, but became one by operation of law. Therefore, we do not know how such a company should also be asked to follow the rigors of Section 14(1)(b) of the 2013 Act. As a matter of fact, Section 14(1) does not *ipso facto* deal with the issue of conversion of private company into a public company or vice versa. Primarily, Section 14(1) deals with the issue of alteration of Articles of Association of the company. Incidentally, Section 14(1) also deals with the alteration of Articles "having the effect of such conversion".

20.35 By virtue of the proviso to sub-section(1A) of Section 43A of the 1956 Act, Tata Sons continued to have articles that covered the matters specified in sub-clauses (a), (b) and (c) of Clause(iii) of Sub-section(1) of Section 3 of the 1956 Act. Though it did not have

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the additional stipulation introduced by Act 53 of 2000, namely the stipulation relating to acceptance of deposits from public, this additional requirement disappeared in the 2013 Act. Therefore, Tata Sons wanted a mere amendment of the Certificate of Incorporation, which is not something that is covered by Section 14 of the 2013 Act. NCLAT mixed up the attempt of Tata Sons to have the Certificate of Incorporation amended, with an attempt to have the Articles of Association amended. Since Tata Sons satisfied the criteria prescribed in Section 2(68) of the 2013 Act, they applied to the Registrar of companies for amendment of the certificate. The certificate is a mere recognition of the status of the company and it does not by itself create one.

20.36 As pointed out by this court in ***Ram Parshotam Mittal Vs. Hillcrest Realty***[25], "*it is not the records of the Registrar of Companies which determines the status of the company*". The status of the company is determined by the Articles of association and the statutory provisions.

25 (2009) 8 SCC 709

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20.37 NCLAT was wrong in thinking that Tata Sons ought to have taken action during the period 2000-2013 and obtained approval of the Central Government to become a private company under Sub-section (4) of Section 43A of the 1956 Act. Sub-section (11) of section 43A, inserted under Act 53 of 2000 made all sub-sections of Section 43A except sub-section (2A), inapplicable on and after the commencement of the Act. Therefore, it is clear that Sub-section (4) ceased to exist on and from 13.12.2000 and hence the question of Tata Sons seeking the approval of the Central Government under Sub-section (4) during the period 2000-2013 did not arise.

20.38 The only provision that survived after 13.12.2000 was Sub-section (2A) of Section 43A. It survived till 30-01-2019 until the whole of the 1956 Act was repealed. There are two aspects to Sub-section (2A). The first is that the very concept of "deemed to be public company" was washed out under Act 53 of 2000. The second aspect is the prescription of certain formalities to remove the remnants of the past. What was omitted to be done by Tata Sons

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from 2000 to 2013 was only the second aspect of Sub-section (2A), for which Section 465 of the 2013 Act did not stand as an impediment. Section 43A(2A) continued to be in force till 30-01-2019 and hence the procedure adopted by Tata Sons and the RoC in July/August 2018 when section 43A(2A) was still available, was perfectly in order.

20.39 As rightly held by this court in ***Darius Rutton Kavasmaneck vs. Gharda Chemicals Ltd***[26], Parliament always recognised the *possibility of a deemed public company again reverting back to the status of a private company.* Though this court took note of the conflict between section 27(3) and section 3(1)(iii)(d), after the amendment by Act 53 of 2000, this court nevertheless held in *Gharda Chemicals* that by incorporating the requirement of sub-clause (d) of section 3(1)(iii) in the Articles of Association, a deemed public company can revert back to its status as a private company, in view of sub-section (2A) of section 43A, by incorporating necessary provisions in the Articles. In simple terms,

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26 (2015) 14 SCC 277 [see the editor's note in the SCC report regarding the conflict between sec.27(3) and sec.3(1)(iii)(d)]

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a company which becomes a deemed public company by operation of law, cannot be taken to have undergone a process of fermentation or coagulation like milk to become curd or yogurt, having an irreversible effect.

20.40 Therefore, NCLAT was completely wrong in holding as though Tata Sons, in connivance with the Registrar of companies did something clandestinely, contrary to the procedure established by law. The request made by Tata Sons and the action taken by the Registrar of Companies to amend the Certificate of Incorporation were perfectly in order.

20.41 It was argued on behalf of SP group (i) that in 1995 Tata Sons allowed renunciation of entitlement to rights issue, in favour of rank outsiders, throwing the restriction contained in section 3(1)(iii) to the wind (ii) that till September 2002, Tata Sons accepted deposits from public and hence sub-clause (d) of section 3(1)(iii) was not satisfied (iii) that as per the circular of the Department of Company Affairs, a company which does not approach the RoC for

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reconversion would be deemed to have chosen to remain as a public company (iv) that as per RBI circular dated 1-1-2002 private companies accepting deposits would become public companies (v) that till the year 2009, Tata Sons chose to describe itself only as a public company in the forms filed under Rule 10 of the Companies (Acceptance of Deposits) Rules, 1975 (vi) that the conversion adversely affected the ability of Tata Sons to raise funds increasing borrowing costs (vii) that Tata Sons will be required to refund the investments made by insurance companies on account of the conversion and (viii) that the act of conversion lacked probity and was also prejudicial to the interests of the minority shareholders and the company as well as independent directors.

20.42 But we are not impressed with the above contentions. Once the company had become a deemed public company with effect from 1-2-1975, the privileges of a private company stood withdrawn and the company was entitled in law to allow renunciation of shares under rights issue. In any case, the validity

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of what was done in 1995 was not in question. That they accepted deposits from public till September 2002, is the reason why they were not reconverted as a private company at that time. Once a new definition of the expression “private company” came into force with effect from 12-09-2013 under section 2(68) of the 2013 Act, the only test to be applied is to find out if the company fits into the scheme under the new Act or not. We need not go to the circulars issued by the department or the RBI when statutory provisions show the path with clarity. The description of the company in the forms filed under Rule 10, reflected the true position that prevailed then and they would not act as estoppel when the company was entitled to take advantage of the law. That the ability of the company to raise funds has now gone and that the company will have to repay the investments made by insurance companies, are all matters which the shareholders and the Directors are to take care. The question before the court is whether the reconversion is in accordance with

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law or not. The question is not whether it is good for the company or not.

20.43 The real reason why SP group and CPM are aggrieved by the conversion is, that most of their arguments are traceable to provisions which apply only to public and listed public companies. If re-conversion goes, they may perhaps stand on a better footing. But that would tantamount to putting the cart before the horse. One may be entitled to a collateral benefit arising out of a substantial argument. But one cannot seek to succeed on a collateral issue so as to make the substantial argument sustainable.

20.44 Therefore, question of law No. 5 is accordingly answered in favour of Tata Sons and as a consequence, all the observations made against the appellants and the Registrar of companies in Paragraphs 181, 186 and 187 (iv) of the impugned judgment are set aside.

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21. Conclusion

21.1 Thus in fine, all the questions of law are liable to be answered in favour of the appellants-Tata group and the appeals filed by the Tata Group are liable to be allowed and the appeal filed by S.P. Group is liable to be dismissed. But before we do that we should also deal with the application moved by S.P. Group before us during the pendency of these proceedings, praying for the alternative relief of directing Tata Sons and others to cause a separation of ownership interests of the S.P. Group in Tata sons through a scheme of reduction of capital by extinguishing the shares held by the S.P. Group in lieu of fair compensation effected through a transfer of proportionate shares of the underlying listed companies, with the balance value of unlisted companies and intangibles including brand value being settled in cash.

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21.2 Interestingly, such an application was filed after Tata Group moved an application for restraining S.P. Group from raising money by pledging shares and this court passed an order of *status quo* on 22.09.2020. For the first time S.P. Group seems to have realized the futility of the litigation and the nature of the order that the Tribunal can pass under Section 242. This is reflected in Paragraph 62 of the application, where S.P. Group has stated that they are seeking such an alternative remedy ***as a means to put an end to the matters complained of***.

21.3 As a matter of fact, S.P. Group should have sought such a relief from the Tribunal even at the beginning. As we have pointed out elsewhere a divorce without acrimony is what is encouraged both in England and in India under the statutory regime.

21.4 But in an appeal under Section 423 of the Companies

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Act, 2013, this Court is concerned with questions of law arising out of the order of NCLAT. Therefore, we will not decide this prayer. It should be pointed out at this stage that Article 75 of the Articles of Association is nothing but a provision for an exit option (though one may think of it as an expulsion option). After attacking Article 75 before NCLT, the S.P. Group cannot ask this Court to go into the question of fixation of fair value compensation for exercising an exit option. What is pleaded in Paragraph 72 of the application for separation of ownership interests, require an adjudication on facts, of various items. The valuation of the shares of S.P. Group depends upon the value of the stake of Tata Sons in listed equities, unlisted equities, immovable assets etc., and also perhaps the funds raised by SP group on the security/pledge of these shares. Therefore, at this stage and in this Court, we cannot adjudicate on the fair compensation. We will leave it to the parties to take the Article 75 route or any other legally available route in this regard.

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21.5 In the result, all the appeals except C.A. No.1802 of 2020 are allowed and the order of NCLAT dated 18.12.2019 is set aside. The Company Petition C.P. No. 82 of 2016 filed before NCLT by the two Companies belonging to the S.P. Group shall stand dismissed. The appeal C.A. No.1802 of 2020 filed by Cyrus Investments Pvt. Ltd., and Sterling Investments Corporation Pvt. Ltd. is dismissed. There will be no order as to costs.

All IAs including the one for causing separation of ownership interests of the S.P. Group in Tata Sons namely IA No.111387 of 2020, are dismissed.

.....CJI
(S.A. BOBDE)

.....J.
(A.S. BOPANNA)

.....J.
(V. RAMASUBRAMANIAN)

New Delhi
March 26, 2021