NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT) NO.121 OF 2022

In the matter of:

The Peerless General Finance Investment Co Ltd Appellant

Vs

Bhagwati Developers Pvt Ltd & Ors Respondent

For Appellant: Mr. Harish Salve, Sr Advocate with Mr. Ratnanko Banerji and Mr. Abhijeet Sinha, Sr Advocates with Ms Arunabha Deb, Ms Ashika Daga, Ms Pallavi Mishra, Mr Soumya Roy Chowdhury, Mr. Sanket Sarawgi, Mr S. Sukumaran, Mr Anand Sukumar, Mr. Harsh Agarwal, Advocates
Mr Bhikram Sarka, Ms Ruchi Anand, Advocates.

For Respondent: Mr Jishnu Saha, Sr Advocate, Mr Farandees, Mr Divesh, Ms Neha Nagori, Advocates.

With

Company Appeal (AT) No.123 of 2022

In the matter of:

Shikha Holdings Pvt Ltd & Anr Appellant

Vs

Peerless General Finance and Investment Co Ltd Respondent

For Appellant: Mr. Arun Kathpalia, Sr Advocate, Mr. Debanjan Mandal, Mr Sanjiv Kumar Trivedi, Mr Kunal Vajani, Mr. Kunal Mimani, Mr Subhang Tandon, Ms Mahima Cholera, Mr Deepayghya Datta, Mr Dev Karan Singh, Mr Debayan Sen, Advocates.
Mr Samar Bansal, Mr Manoranjan Sharma, Mr Deeptanshu Jain, Mr Vijay Nair, Mr. Raghav Dembla, Ms Shambhavi Singh, Mr Vedant Kapur, Ms Anshika Saxena, Advocates.

For Respondent: Mr. Jishnu Saha, Sr Advocate, Mr. Farazanees, Mr Divesh, Ms Neha Nagori, Advocates.

With

Company Appeal (At) No.124 of 2022

In the matter of:

Jayanta Roy & Ors Appellant

Vs

The Peerless General Finance & Investment Co Ltd Respondent

For Appellant: Mr. Krishnendu Datta, Sr Advocatge, Mr. Abhishek Naik, Ms Gulaesha Kureshi, Mr Rehman Ghalib Kha, Advocates.

For Respondent: Mr Jishnu Saha, Sr Advocate, Mr Farazanees, Mr Divesh, Ms Neha Nagori, Advocates.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

Company Appeal (AT) No's *121*, *123* and *124* of *2022* have been filed against common impugned order dated *18.07.2022* passed in C.P. No. 222 of *1991* by Ld. NCLT, Kolkata. Vide the impugned order, the petition under Section *397-398* of the Companies Act, 1956 was allowed after more than *31* years of its institution by passing various directions.

2. Before coming to the contentions raised it would be appropriate to state about the issues involved and the findings given in the impugned order *qua* such issues

3. The issues for consideration before the Ld. NCLT were as follows:-

> ***a)*** *whether the issuance of 30,000 equity shares by private placement was wrongful and illegal;*
> ***b)*** *whether purchase made by Respondent Nos. 26 and other Respondents of 15,626 shares of Respondent No.1 company was bad in law and could not have been done*;
>
> ***c)*** limitation.

4. *Qua (c) viz.* limitation the Ld. NCLT had stated the Original Petitioners had no knowledge of the purported issue/allotment of shares till October, 1990 and the notice dated 25.11.1987 of the AGM of PGFI/appellant was not

received by the original petitioners and they relied upon the Director's Report dated 1988 to say they never knew the names of the allottees; and it was not shown the petitioners were aware of these fact, at any time prior to three years from date of the filing of the petition and the acts of oppression and mismanagement, if are continuing, then the company petition cannot be brushed set aside.

5. For *(a)* and *(b)* above, we need to look to certain dates before we proceed further with the matter.

6. On 30th October, 1987 a Board Meeting of the appellant company was held wherein a Resolution was passed to issue *30000* shares @ Rs.*100/-* each in a private sale. Mr. P. Lodha participated in the Meeting and was a party to such resolution. Admittedly a notice dated 25.11.1987 was then issued for holding of AGM on 30th December, 1987. In the said AGM dated 30.12.1987, the participants, including Mr. P. Lodha and M/s Bhagwati Developers Pvt Ltd., (earlier known as M/s Lodha Services Pvt. Ltd.) voted in favour of resolution for issuance of *30000* shares @ Rs.*100/-* each, in private sale.

7. On 02.02.1988 another Meeting was held and the Share Transfer Committee was given an authority to allot such *30000* shares; and to receive applications by private negotiations, as the Committee may deem fit in terms of the Resolution passed on 30th December, 1987. It allotted these shares on 26.04.1988 to various person. Admittedly, Mr. P. Lodha was present in the said Meeting dated 02.02.1988 and the Resolution was passed with his consent as he never raised any objection to such allotment. Reference was also made to the Minutes of Meeting dated 30th December, 1987 wherein Mr.

Sunil Jain appeared on behalf of M/s Lodha Service Pvt Ltd *viz* Respondent No. 1 herein and one Mr. P.K. Jain appeared on behalf of Mr. P. Lodha wherein resolution was passed to issue *30000* equity shares @ Rs.*100/-* each, *for an aggregate value of Rs.30 lakh for cash at par,* payable in full on application by private placement to such person and in such manner as the Board may deem fit. The proxy form of appointment of Mr. P.K. Jain for Mr. P. Lodha to vote in the AGM of dt. 30th December, 1987 is annexed at Page *631* of the Paper Book and Board Resolution dated 28.02.1987 of M/s Lodha Services Pvt Ltd, now Respondent No. 1, authorising Mr. Sunil Jain to represent such company is filed at Page *632* of the Paper Book. Thus the Lodha group who had a majority shareholding of *46.07%* in M/s Peerless General Finance Investment comprising of Mr. P. Lodha, the Respondent No. 1 company, M/s Multiplex Business Ltd., Mr. R.L. Gaggar, T.K. Ghosh, etc. (emphasis supplied), had participated in the Meeting, either personally or through proxies, who all voted in favour of such Resolution(s). However, on 13th March, 1988 Mr. Parasmal Lodha resigned from the Board of the appellant company and on 16th March, 1988 Respondent no.1 company and Mr. P Lodha, both sold their shares in appellant company in favour of M/s Debashree Investment and Services (P) Ltd. (Respondent No.20 herein). In all *15626* shares were purchased by Respondent No. 20 herein and thereafter the Company Petition was filed challenging the issue of *30000* shares and sale of *15626* shares of Lodha's. On 19.04.1988 the sale of *10115* shares by Respondent No. 1 company and *800* shares by Mr P. Lodha were recorded in register of PGFI/the appellant. It was argued these shares were transferred for valuable consideration, hence Lodha's could not have challenged their voluntary sale of shares. It was

argued though the sale of their shares were held to be void but there is no finding *qua* sale of their remaining *4711* shares to others. Further on 26.04.1988, the Share Transfer Committee resolved to allot *30000* shares of appellant company to Respondents No.*8*, *9* and *10* and thus were allotted.

8. It was the submission of learned senior counsel for the appellant *initially* on 30.05.1991 the Company Petition i.e. CP No.*222/1991* was filed by Mr. Anil Chatterjee and Mr. Kusum Chatterjee on an allegation that no notice of the Board Meeting held on 30th December, 1987 was ever issued to Chatterjee's and they did not attend the same. Further Chatterjee's alleged the whole purpose of issuing *30000* shares in a private sale was to convert *Roy-Sen* group (i.e. Respondents No. 2 and 3) and their associates, into majority shareholders and Chatterjee's had no knowledge or opportunity to object to the issuance of such *30000* shares. It was argued the special resolution or the notice(s) etc. did not mention the manner of allotment and to whom such shares would be offered; and whether such purchaser(s) belong to a particular group or not. It was alleged the allotment of *30000* shares tilted the balance of shareholding towards *Roy-Sen* Group (i.e. Respondents No. 2 and 3).

9. The learned senior counsel for the appellant argued Mr. P. Lodha sat in the Board Meetings which decided to increase the share capital of the company by Rs. *30,00,000/-* (Rs. Thirty Lakhs) and later he unilaterally sold his *10915* shares, and also of his company, M/s Bhagwati Developers (P) Ltd./Respondent No. 1 herein and became a minority shareholder and it seems after the sale of their shares was complete, Lodha's probably changed

their mind. Now Chatterjee's Company Petition filed under Section *397* of the Companies Act, 1956 was dismissed by the Ld. Single Judge on the ground Chatterjee's did not hold *10%* of the shares. Chatterjee's, then filed an appeal against an order of dismissal of Company Petition. However, later they moved an application for withdrawal of appeal and *vide* an order dated 16.11.1993, the appeal of Mr. Anil Chatterjee was dismissed as withdrawn. The appeal of his brother Mr. Kusum Chatterjee was also directed to be withdrawn *vide* order dated 18.11.1993.

10. In December, 1993 a recall application was filed by M/s Bhagwati Developers Pvt. Ltd. i.e. the Respondent No. 1 herein, but it was dismissed by the Division Bench of Calcutta High Court. Thereafter SLP No. *19193 of 1995* was filed before the Hon'ble Supreme Court which was decided on 24.07.1996 wherein leave was granted to file an appeal against the order of the Ld. Single Judge dated 13.01.1992 holding *if such appeals were filed, those were not to be dismissed on ground of limitation or on the grounds the appellant has no locus standi to file such appeal, however* ***the question was kept open for Respondents to contend by virtue of withdrawal of Chattejee, the original petition under Section 397-398 was not maintainable****.* The right to appeal was granted by Hon'ble Supreme Court not only against the order dismissing the main petition under Section *397-398* but also against *IA's* which led to be dismissal/withdrawal of appeals.

11. Those appeals were thus filed within four weeks of the order of the Hon'ble Supreme Court, but were dismissed on 24.11.2003 by the Division Bench of Calcutta High Court and it held as follows:-

55. Another significant observation of the previous Division Bench was that if the company petition was found valid and legally effective at the time of presentation, notwithstanding withdrawal by the Chatterjee brothers, the question of continuance of the same by the present appellant could have been considered in a favourable way, but, that is not the case in the present appeals. According to the observation of the learned single judge the company petition was invalid and ineffective at the time of its institution, because, one of the Chatterjee brothers was not a "member" within the meaning of the Companies Act and at the same time one of the consenting parties, namely, R. L. Gaggar, had withdrawn his consent soon after filing of the original application and on both these counts, even if the Chatterjee brothers had not withdrawn, the company petition could not be accepted as a valid petition in the eye of law and we have already recorded that these findings of the learned single judge were upheld by the Division Bench while disposing of the petitions filed by BDPL and even taking the risk of repetition it can be stated that the hon'ble Supreme Court did not interfere with the findings of the Division Bench in this regard while recording its order dated April 26, 1996.

56. Thus, after considering the oral submissions of learned counsel of both the sides and the written notes of arguments submitted by them and on proper examination of the order of the Hon'ble Supreme Court dated April 26, 1996, we are of the view that the order of the previous Division Bench dated November 16 and 18, 1993 and February 2, 1995, were not touched by the Hon'ble Supreme Court regarding recognition of the withdrawal of Chatterjee brothers both from the appeals as well as from the original company petition and in that background the present appellant being a consenting party, and that consent too not being above legal scrutiny, has no legal right to proceed with the present appeals without the original application out of which the appeals arose and which is non-existent in the eye of law.

12. The matter again went to the Hon'ble Supreme Court in Civil Appeals No. *361-362* of *2005,* decided on 04.04.2013, but those were yet remanded to Hon'ble Division Bench of Calcutta High Court. Para *30* of the order is as under:

"30.In view of the above we are of the considered opinion that the Division Bench erred in holding that after the judgement of

this Court dated 26.04.1996, it was permissible for the High Court to hold that the Company Petition under section 397/398 of the Act, 1956, was non-existence in the eyes of law while placing reliance on the earlier judgments of the division Bench of the High Court dated 16.11.1993 and 18.11.1993.

Thus the appeals are allowed, the impugned judgment and order of the High Court dated 24.11.2003 is hereby set aside and the matters are remanded to be decided by the High Court of Calcutta afresh giving strict adherence to judgment of this court dated 26.04.1996. While deciding the case afresh, the Division Bench shall not take note of the earlier judgments of the High Court dated 16.11.1993 and 18.11.1993."

13. Once again the matter came up before the Hon'ble Division Bench of the Calcutta High Court and *vide* its order dated 10.06.2013 it held: -

OUR VIEW LAW ON THE SUBJECT:
Considering the cases cited at the bar, our understanding of the law is:
i) Section 399 would make a petition maintainable even if the petitioners do not have the requisite share ratio provided they would get support from others to make good the short fall.

ii) The Section would only require express consent being given to he made part of the petition in Form No. 43 and 44 of the Company (Court) Rules 1959. It would not be necessary for the supporter either to file petition and/or pleadings expressing their support or read and confirm the petition that would be filed by the petitioner. A letter of consent would be enough that should be annexed with the petition.

iii) The shares held as on the date of filing of the petition should only be considered while filing and/or supporting a petition under Section 397 and 398. Subsequent change in ratio, is immaterial.

iv) Once the Chatterjee's were already in the roll of the shareholders having distinctive number of shares that would be enough to extend support on the basis of the shares held by them. There would be no FERA violation as alleged.

v) The share percentage of the petitioners as on the date of filing of the petition coupled with the share percentage of the supporter as on that date, taken together, would be sufficient to maintain a petition for oppression and mismanagement. The rigid compliance as suggested in the old law would not be mandatory.

CONCLUSION

We are of the considered view; the learned Judge did not apply His Lordship's mind on the issue. His Lordship did not assign any reason why it would be unsafe to rely on the support of Gaggar when it was in consonance with the wishes of the beneficial owners. Mr. Gaggar never raised his finger towards the transactions. He denied having read the petition. Even if we give full credence to what he had said, such positive averment on behalf of Chatterjees in their petition would be superfluous as it was not the legal necessity. We hold, the petition filed by Chatterjees maintainable.

We have already observed, we should ignore subsequent crossing of the floor. Hence, BDPL would be entitled to be transposed and/or substituted in place of Chatterjees in the proceeding.

14. The appellant went to the Hon'ble Supreme Court against the above order but the leave was denied.

15. Thus the question whether the company petition is maintainable was held in favour of Lodha's *but the effect of withdrawal applications etc. could be considered.* An opportunity was granted to Lodha's to amend the Company Petition and to bring subsequent events on record but the amendment was carried out only in the *title* of the company petition, where in Chatterjee's were removed and were replaced by Respondent No.1 namely M/s Bhagwati Developers Pvt Ltd. However, no change was made in the body/contents of the company petition.

16. Now the learned senior counsel for the appellant submitted if this is a situation then we have to find out whether Respondent no. 1 - M/s Bhagwati Developers Pvt. Ltd. could continue with such a petition under Section *397-398* of Act (now u/s *241-242* of the Act). It was argued Respondent No.1 need

to *prove the conduct of Respondents was prejudicial and oppressive to them or to any other member/members.*

17. It is argued *admittedly* in Board Resolution dated 30th October, 1987; the AGM Meeting dated 30th December, 1987 and also the Board Meeting of dated 02.02.1988, Lodha's who were holding *46.07%* shares in appellant company, had never objected to the agenda for increase in the paid up capital and it was only with their consent *30000* shares were sold/issued. As is apparent from the facts, during such period Lodha's were in exit mode and Mr. P. Lodha even sold his shares of PGFI/appellant herein. Now understandably Chatterjee's had a cause to file company petition *alleging* collusion between *Roys-Sens and Lodha's* but now since Lodha's have been substituted in place of Chatterjee's, then moot question would arise *if Lodha's can take benefit of allegations made by Chatterjee's against Roys-Sen and Lodha's themselves?*

18. It was argued the Chatterjee' made allegations against Lodha's and Roy-Sen group that they have been oppressing the minority and had allotted/issued *30000* shares in private sale *in collusion with each other*. Thus it was a voluntary act of Lodha's to increase share capital and Mr. P. Lodha and his proxies, including his company, M/s BDPL/Respondent No. 1, all had participated in such meeting(s). Admittedly soon thereafter Mr. P. Lodha resigned and even sold his shares, but later got transposed in place of Chatterjee's. Thus, now the question is if Respondent No. 1 *without pledging* on *oath to the allegations in the Petition, can rely on such allegations,* moreso when the sale of their shares was a *voluntary* act.

19. It was argued the allotment and voluntary sale of shares was cancelled by the Ld. NCLT, as was found to be in alleged contravention of Section *77* of the Companies Act. Paras *55, 56,59* of the impugned order are as under: -

> *55. There is one more aspect to be seen here. We have held in the latter part of this Order that the money of the Company itself was used for purchase of its shares by the Respondent allottees in violation of the law as applicable then. Thus, there are serious infirmities in the allotment which could not have been noticed in absence of material facts being disclosed in the explanatory statement.*
>
> *56. On the issue of nexus between the allottees of these 30,000 shares for benefit for Respondent No. 2 and 3 and the relationship between them, we are inclined to accept the Petitioner's contentions for the following reasons:- ·*
>
> > *The authorized share capital and paid up share capital of all Respondents no. 14 to 16 Companies – allottees are same. These facts have not contested by the Respondents.*
> >
> > *· With respect to the contention of the Petitioner on nexus between Respondents no. 2 & 3 and the Respondent allottees, a perusal of paragraph 48 of the reply affidavit filed by the Respondents would show that the Respondents have vaguely denied the relationship, without any explanation for the same. It is a trite law that a bare denial is no denial. The aforementioned facts clearly shows that there is a direct nexus between Respondent no.2 and other Respondents who have been allotted majority of the shares of Respondent no.1.*
> >
> > *· The Key Management Personnel of Respondent no. 14 to 16 Companies appear to be the same. For example, the auditors of Respondents no. 14-16 are same.*
> >
> > *· The Petitioner's contend that Respondent no.2 and his wife are the directors in Respondent no.14 to which there is mere denial by the Respondents without adducing any proof.*

· Respondents no. 17 and 18 allottees are the children of Respondent no.2.

> *· In/around September 1988, Respondent no.1 company sanctioned a clean unsecured advance of Rs. 3 crores to Respondent no. 30 company, which is owned by Respondent no.31 company. The relationship between Respondent no.31 and Respondent no.2 dates back to several years. Pertinently, at the time of sanctioning the loan, the paid up capital of Respondent no. 30 was merely Rs. 200/-. In para 79 of the reply, Respondent no.2 contends that Rs. 30 lacs was advanced by Respondent no.1 to Respondent no. 30 on 30.04.1989 and another sum of Rs. 2.70 crores on 21.4.1989 and that both loans were for 3 years carrying interest at 20% and that the loans had been advanced without touching certificate holders monies. But the fact remains that loans were advanced by Respondent no. 1 to Respondent no. 30 for which there is no explanation.*
>
> *· It is the settled principle that the corporate veil of the company can be lifted for the advantage of the Company. A This is a fit case where the corporate veil of the other Respondent Companies should be lifted.*

59. The Petitioner has also raised several serious allegations to support its plea of financial mismanagement of Respondent no.1 Company by Respondent nos.2 and 3. It is Petitioner's contention, that monies of Respondent no.1 Company have been used by the other Respondents to subscribe to the shares of Respondent no.1 Company. We feel that it is important to look into these allegations as well as Respondent's reply to the same for proper adjudication of the present matter.

> *▪ According to the Petitioner, Respondent nos. 2 to 9 used to make Respondent no.1 Company grant loans to Respondent nos.25 to 32 and that money was used by Respondents no. 25 to 32 in turn give loans to Respondent nos.14, 15 and 16 for the purpose of subscribing shares of Respondent no.1 Company. Therefore, the argument of the Petitioner is that the funds of Respondent no.1 Company which were lent as advances and loans were*

actually ploughed back into the Company in form of subscription of shares by other Respondents.

- *To buttress the aforementioned argument, the Petitioner, in paragraph 37A of the Petition has stated that Respondent no. 16 had obtained an unsecured loan of Rs. 6 lacs from Respondent no.31 and further sum of Rs. 2.5 lacs from one Vanshree Holdings Pvt. Ltd (Petitioner has relied on extracts from the financial statement of Respondent no.16 which contains the shareholding statement, abridged balance sheet etc.). It is Petitioner's contention that both Respondent no.31 as well as Vanshree Holding Pvt. Ltd. had taken inter corporate loans from Respondent no.1 Company and therefore, in essence, Respondent no.16 had used the funds of Respondent no.1 Company to subscribe to 8,350 equity shares of Respondent no.1.*

- *The Petitioner contends that similar modus operandi was followed by Respondent nos. 14 and 15. According to Petitioner, Respondent no. 14's balance sheet as on 31st March 1989 shows that Respondent no.14 had obtained unsecured loan of Rs. 9,50,000/- from Respondent no.26 to 32. The said Respondents no. 26 to 32 had in fact taken a loan from Respondent no.1 Company and therefore, the monies used by Respondent no.14 to subscribe to Respondent no.1 Company's shares were in fact of Respondent no.1 itself. With respect to Respondent no.15, the Petitioner has relied on the shareholding statement of Respondent no.15 to show that Respondent no.2 was a Director in Respondent no.15 as well.*

- *The Respondents have vehemently denied the aforementioned allegations. Respondent no.2 in its Counter Affidavit in paragraph 55 has stated that it had no knowledge of the funds obtained by Respondent no.15 from Respondent no. 31 and Vanshree Holdings Pvt. Ltd. Respondent no.2 has further admitted that an inter corporate loan of Rs. 1 crore was given by Respondent no.1 to Respondent no.31 on 03.03.1987, however, the said loan carried interest at the rate of 18% p.a. and the same was granted against the hypothecation of computer micro filing equipment. Furthermore, Respondent no.2 has also stated*

> *that out of Rs. 1 crore, a sum of Rs. 22,855/- was refunded on 04.05.1989. On the allegation of giving loan to Vanshree Holdings Pvt. Ltd., the Respondents have denied that any such loan was advanced to the said Company. With respect to allegations qua other use of Respondent no.1's monies by Respondent nos.14 and 16, Respondent no.2 has merely denied the same, without any elaboration.*

20 It was argued Lodha's cannot seek benefit of the averments made by the Chatterjee's without amending the company petition or without filing separate affidavits alleging facts oppressive to them, more specifically, when they were *present*, having *impliedly consented* at *each stage* to the allotment of *30000* shares and sale of their own shares. The question is if a party had consented to an act, can it turn around to say it/he has been oppressed by the same act.

21. It was argued though the impugned order had cancelled the allotment of *30000* shares but consequently no order was passed for refund of the consideration paid for such shares. It also cancelled the allotment of *15626* shares to *Respondent No. 20* despite it being a pure sale and not an allotment, and also did not give finding on balance of *4711* shares, sold at same price to others. Further the directions given in impugned order qua return of bonus; accrued dividends for *37* years and qua appointment of a Special Officer to look into financial mismanagement was never a *cause* before the Ld. Tribunal.

22. It was argued the Ld. NCLT was obliged to look into the issue of shares and not to financial mismanagement as it was never an issue before it and it was not proper to appoint a Scrutiniser or an auditor when financial issues were never agitated before the Ld. NCLT. Further for the need to increase the

paid up share capital, the appellants relied upon a Residuary Non- Banking Companies (Reserve Bank) Directions, 1987, which come up with certain restrictions being imposed upon the NBFC in the matter of investments.

23. The learned senior counsel for the Respondent no.1 argued otherwise to say if one peruse the minutes of the Board Meeting dated 30.10.1987 as well as minutes of the Meeting dated 30th December, 1987 of the AGM one could find there was no explanation *as to why the money viz. Rs.30 lakh were required* by the company and why such allotment of shares were essential, especially when one could find from minutes dated *30.10.1987,* the company was issuing Bonus shares. Now if the company had so much capital that it was issuing bonus shares then obviously there could be no reason to issue fresh shares to private person and that too @ Rs.*100/-* per share, when the value of share was much more and thus it shows malafide of the appellants here.

24. Learned counsel for the Respondent relied upon Section *81*, Section *81(1)(a)* and Section *81(1A)* of the Companies Act,1956 and Section *62 (1)(a)* of Companies Act, 2013 as under:

> ***81**. FURTHER ISSUE OF CAPITAL*
>
> *(1) Where at any time after the expiry of two years from the formation of a company or at any time after the expiry of one year from the allotment of shares in that company made for the first time after its formation, whichever is earlier, it is proposed to increase the subscribed capital of the company by allotment of further shares, then, -*
>
> *(a) such further shares shall be offered to the persons who, at the date of the offer, are holders of the equity shares of the company, in proportion, as nearly as circumstances admit, to the capital paid-up on those shares at that date;*

(b) the offer aforesaid shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days from the date of the offer within which the offer, if not accepted, will be deemed to have been declined;

(c) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person ; and the notice referred to in clause (b) shall contain a statement of this right ;

(d) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of directors may dispose of them in such manner as they think most beneficial to the company. Explanation. - In this sub-section, "equity share capital" and "equity shares" have the same meaning as in section 85.

(1A) *Notwithstanding anything contained in sub-section (1), the further shares aforesaid may be offered to any persons [whether or not those persons include the persons referred to in clause (a) of sub-section (1)] in any manner whatsoever –*

(a) if a special resolution to that effect is passed by the company in general meeting, or

(b) *where no such special resolution is passed, if the votes cast (whether on a show of hands, or on a poll, as the case may be) in favour of the proposal contained in the resolution moved in that general meeting (including the casting vote, if any, of the chairman) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, exceed the votes, if any, cast against the proposal by members so entitled and voting and the Central Government is satisfied, on an application made by the Board of directors in this behalf, that the proposal is most beneficial to the company.*

62*. Further issue of share capital.—(1) Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered—*

(a) to persons who, at the date of the offer, are holders of equity shares of the company in proportion, as nearly as circumstances admit, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions, namely:—

> (i) *the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days 1 [or such lesser number of days as may be prescribed] and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;*
>
> (ii) *unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (i) shall contain a statement of this right;*
>
> (iii) *after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of Directors may dispose of them in such manner which is not disadvantageous to the share holders and the company;*

25. It is the submission of the learned senior counsel for Respondent No. 1 where the shares are being offered/sold to private person, the idea is to get maximum value and for this reason in Companies Act-2013, valuation is made compulsory and the valuation report is required to be obtained for shares prior to those being offered in private sale. The learned senior counsel referred to the minutes of Board Meeting of dated 30th October, 1987 to say though Mr. P. Lodha was present but minutes do say such sale to private person shall be subject to the approval of shareholders, however this condition was later modified in the notice of *54th* AGM on 25.11.1987 and was removed. He then referred to explanatory statement to show paid up capital of the company at relevant time was *73,61,200;* bonus shares were already issued; hence there was no reason to increase the capital base of the company and to sell the shares to private person and that too *at par*. The need was never clarified in the explanatory statement.

26. He then referred to the minutes of the AGM held on 30.12.1987 to say even in these Minutes there was no disclosure *qua* the person to whom such shares were to be sold. Mr. P. Lodha then resigned from the Board on 12.03.1988 and in April 1988 the shares were allotted to Respondents No.8*, 9,* and *10* whereas these companies were incorporated only on 11.04.1988 with a paid up capital of Rs.*50000/-* each. Such companies were related to Roy-Sen Group *viz* Respondents No.*2* and *3* as is noted in paras *31, 37* and *37A* of the Company Petition wherein it is alleged Respondent No. 8*, 9,* and *10* had purchased *20850* shares @ *Rs.100/-* each, in violation of Section *77* of the Companies Act. Reference was made to reply filed by the Roy-Sen Group (Respondents No.*2* and *3*) wherein they never gave any explanation as to why these three companies *viz* Respondent No. 8*, 9,* and *10* were incorporated on the same day and why their accounting offices were same as that of Respondent No.1. The learned senior counsel for respondent then referred to various annexures *viz* Annexure *E* at *Page 329* of the appeal paper book to show *20850* shares were purchased by these three companies from loans procured from Respondent No. *25* or other sister companies, who in turn had procured loan from Respondent No. *25.* It was argued Respondent No.*25* and Respondents No. 8*, 9,* and *10,* all belong to Roy-Sen group *viz* Respondents No.*2* and *3* and the loans taken from Respondent No.*25* by these companies were used to purchase shares of the appellant company. It was argued in March, *1987,* the appellant company had given a loan of Rs.*1* crore to Respondent No.*25* and such loan was not repaid till *1988-89* and such amount was transferred in one way or the other through corporate loans to Respondents No. 8*, 9,* and *10* companies which purchased the shares of

Respondent No.1 company, hence all these three companies used the monies of appellant company to purchase the shares in appellant and thus violated Section *77* of the Companies Act.

27. Further the Learned Senior Counsel for the Respondent No. 1 referred to the part of the reply filed by the appellants to the company petition where it noted, in the year *1991* the value of a share was about Rs. *2000/-* per share and the company has been distributing dividends @ *35%* for the last four proceeding years. Now, if the price was near about Rs. *2000/-* per share, then why those shares were sold @ of Rs. *100/-* in private sale. Reference was also made to para *60* of the reply of the appellants herein to reveal the companies were creating FDRs and had issued bonus shares.

28. Thus it was an argument of the Learned Senior Counsel for Respondent No. 1 the private sale being not an ordinary sale is an *exception* to the normal rule and generally the shares are sold in private where either there is an urgent need for money or when promoters are not coming forward to purchase the right issue. It was argued Section *81* and *81(1A)* of the Companies Act, 1956 pertain to the right issue and also to the sale to private person by special resolution. Reference was made to Sahara India Real State Corporate Ltd. and others Vs. Security and Exchange Board of India and another (2013) 1 SCC 1, wherein the court held *Section 81(1A) is an exception to the normal rule of Section 81(1)(a) of the Companies Act 1956.*

29. The learned counsel for Respondent further argued though the Company Act, *1956* did not speak of valuation of shares *prior* to its sale to private parties *yet* the Court have held the sale of shares must be in the

interest of the company. It was argued in *2013* Act, a specific provision *viz* Section *52(1)(c)* has been incorporated *qua* sale of shares to private person. Admittedly this provision never existed under the 1956 Act *yet* there exists an obligation upon the directors to act in the best interest of the company. Reference was made to para *35* of the Company Petition which notes *inter-alia* the book value of shares in *April 1988* was Rs.*1300* per share and the market value was about Rs. *2000/-* per share and further in its reply to the Company Petition the appellants herein in paras *35* and *52* never denied the value of shares was *less* than the amounts stated in the appeal. Reference was also made to the purchase of shares in March, 1988 by M/s Debashree Investment Services Pvt Ltd (Respondent No. 20) owned by Roy's, wherein they purchased *10915* equity shares of Lodha's @ Rs.*550*/- per share but whereas the subject shares were sold in April, 1988 a month after, at *par* i.e. @ Rs.*100/-* per share. Thus it was argued the sale of shares was wholly detrimental to the interest of the company and there was no justification to sell the shares when the company itself had issued bonus shares. It was argued the valuation was not got done deliberately as it would have disclosed the real value of shares. Learned counsel for the Respondent further addressed his argument to refer to an Annexure *1* of the C.P. No.*222/1991* filed by A.K. Chatterjee wherein Respondent No. 20 - Debashree Investment and Services Ltd, was shown to be owned by the Roy family. Reference was made to Nana Lal Zaver and Anr Vs Bombay Life Ass Company *1950 SCC 137,* wherein the Hon'ble Supreme Court held:

> ***44***. *It is not disputed that the company's need for the funds standing by itself will afford a good motive to the directors to*

> *issue further shares. The contention, however, is that if that motive was not the sole motive but was mixed up with any other motive, it was an abuse of the powers of the directors to issue further shares.*
> ***54**. It is well established that directors of a company are in a fiduciary position vis-à-vis the company and must exercise their power for the benefit of the company.*

30. Further in Dale & Carrington Invt (P) LTd Vs P.K. Prathapan (2005) 1 SCC 212 also upholds the same principle. Further in Sangramsinh P Gaekwad and others Vs Shantadevi P Gaekwad (Dead) through LRS and others *(2005) 11 SCC 314* the Hon'ble Supreme Court held -

> ***69**. This Court therein also applied the bona fide test of the Director and for the benefit of the company as a whole. In that case, the directors assigned reasons which were tested from three angles view, viz., (i) whether the directors acted in the interest of the company; (ii), whether they acted on a wrong principle; and, (iii) whether they acted with an oblique motive or for a collateral purpose. It was observed in M/s. Harinagar Sugar Mills Ltd. Vs. Shyam Sunder Jhunjhunwala & Others [(1962) 2 SCR 339] that the action of the directors must be set aside if the same was done oppressively, capriciously, corruptly or in some other way malafide. In this case, this Court is not faced with such a situation.*

31. Thus it was argued by allotting new shares by the directors to three entities *viz* Respondent No. *8 -10*, which companies were incorporated only on 11.04.1988 itself; and further failure to disclose their connections with these three companies viz Respondent No.*8, 9 and 10* was fatal, though in pleadings before the Ld. NCLT it was admitted wife of Mr. Roy was a director in Respondent No.9, incorporated only for maintenance of accounts and administrative office at P-78 Lake Club of Respondent No.1 and *qua* Respondents No.8 and 10, a clear statement was made in the Company Petition that Roy's did not have any connection with these two companies, but Annexure *A-11,* annexed with the appeal, would show these three

companies i.e. Respondents No. *8 -10* viz Go Ahead Holding (Pvt) Ltd, Shikha Holding (P) Ltd. and Bichitra Holding (Pvt) Ltd and to whom *9350* shares, *3150* shares and *8350* shares respectively were allotted, were part of Roy family. Reference was made to the minutes of the Meeting dated 26th April, 1988 of the appellant company wherein all these shares were allotted at par @ Rs 100/- per share. Some shares were allotted to sympathisers and relatives of Roy's. Thus, violation of Section *77(2)* of the Companies Act, 1956 was alleged:

> ***Section 77***
> *(1) xxx*
> *(2) No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for* ***the purpose of or in connection with a purchase or subscription*** *made or to be made* ***by any person of*** *or* ***for any shares in the company or in its holding company****:*
> *Provided that nothing in this sub-section shall be taken to prohibit –*
>
> > *(a) the lending of money by a banking company* ***in the ordinary course of its business; or***
> > *(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried office or employment in the company; or*
> > *(c) the making by a company of loans, within the limit laid down in sub-section (3), to persons (other than directors 1 [***] or managers) bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.*

32. It is argued the company cannot give loan to any of its subsidiary company *only* for the purpose of purchase of shares of its holding company

or vice versa. It was argued the paid-up share capital of these three companies *viz*. Respondents No. *8 -10* was Rs. *50,000/-* each and the balance amount came from unsecured loans, either from directors or subsidiary/sister/holding companies. It was the submission Rs.*1* crore was given as loan on *03.03.1987* by appellant company to Respondent No.*25* and then it was routed by Respondent No.25 to other companies and lastly to Respondent No. *8 -10* and *20* and such monies were used to purchase shares of appellant company. Thus it was argued the appellant company had *indirectly* financed to Respondent No. *8 -10* and Respondent No.*20* to purchase it shares and thus violated Section 77 of the Act and hence such sales were void.

33. Reference was made to Manna Lal Khetan Vs Kedar Nath Khetan *1977 (Vol II) SCC 424* wherein it was held: -

> ***20****. It is well established that a contract which involves in its ful-filment the doing of an act prohibited by statute is void. The legal maxim A pactis privatorum publico juri non derogatur means that private agreements cannot alter the general law. Where a contract express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See Mellis v. Shirley L.B.) What is done in contravention of the provisions of an Act of the legislature cannot be made the subject of an action.*
> ***21****. If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that statute would inflict a penalty for a lawful act.*

34. It was also argued by the learned senior counsel for the Respondent No. 1 that in the Board Meeting dated 30.10.1987 Mr. P. Lodha was though present, but all other directors were of Roy-Sen group, hence Mr. P. Lodha

with one vote in the Meeting was in minority and could not have turned the table. Similarly, in AGM dated 30.12.1987 wherein Respondent no. 1 - M/s Bhagwati Developers Pvt Ltd was represented through Mr. Sunil Jain and Mr. P. Lodha was represented by Mr. P.K Jain, were still in minority. It was also argued Lodha group never had *46%* shares during that period and were having only *31.2%* shares.

35. The learned senior counsel for the Respondent rather referred to the shareholding pattern *viz* Annexure *F* as on *30.12.1987* wherein Roy & Sen were holding *37%* shares in the company and Chatterjee group, including of Respondent no. 1 - M/s Bhagwati Developers Pvt. Ltd. were having *17.13%* shares. Later on 28th April, 1988 Mr. P. Lodha of Respondent no. 1 sold *10915* shares to Roy's. It was argued as on 30.12.1987 Mr. P. Lodha's representation was about *14530* shares which comes to approximately *19.60%* and as such Lodha could not have stopped the resolution for private sale of shares but if one presumes he had the support of Chatterjee's and Mr. Gaggar then he would have only *26%* shares. Reference was also made to the reply filed by the appellants herein to the Company Petition wherein they never mentioned Lodha's had *46%* of the shares. It is not clear from the pleadings of the appellants herein before the Ld. NCLT how they had calculated the shares percentage of Lodha group to be *46%*. Though a chart was filed of the shareholding as of 30.10.1987 by the appellants herein, annexed in the reply to this appeal wherein the Roy Group was shown to be holding *31.45%* and Lodha Group to be holding *46%* shares and after private sale, Mr. P. Lodha group fell to *31.24%* shares and whereas Roy-Sen went up *46.27%* but there

is no pleading to this effect as to how Lodha Group had *46%* shares and what constituted Lodha's Group and in the absence of these pleadings one can only say Lodha Group had only *19%* shareholding as on 30.12.1987. Reference was made to AN Reddy Vs VRR Reddygari and others *2014(5 SCC) 312* wherein the Hon'ble Supreme Court *held pleadings without evidence cannot be looked into.*

36. On the question of estoppel, the learned counsel for the Respondent referred to Beni Parsad Vs Durga Devi *2023(6 SCC) 708* wherein the Hon'ble Supreme Court held: -

> *29. In the situation and circumstances expatiated above it is only apposite to refer to the decision in Abdul Kader Chaudhury v. Upendra Lal Barua15. It was held therein that in the case of acquiescence the representations are to be inferred from silence, but mere silence, mere inaction could not be construed to be a representation and in order to be a representation it must be inaction or silence in circumstances which require a duty to speak and therefore, amounting to fraud or deception.*

37. Further *qua* sale *15950* shares, it was argued even if Mr. P Lodha and Respondent No. 1 - Bhagwati Developers (P) Ltd had consented to the sale of these shares to Respondent No.*20* but then these shares were purchased by Respondent No.*20* through the loans indirectly obtained from the appellant company thus was hit by Section *77* of the Companies Act, 1956.

38. Learned senior counsel for Respondent in this context referred to para No.*43* of the Company Petition filed before the Ld. NCLT and it read: --

> ***43****. The respondent Nos, 2 and 3 schemed to obtain further shares in the company held by one Mr. P. Lodha and other shareholders in the company. For the purpose of purchasing and/or acquiring such shares, the respondent nos. 2 and 3 in the year 1988 caused the company to make a fixed deposit of Rs.1 crore with the Standard Chartered Bank Ltd, N.S. Road,*

> *Calcutta. Thereafter the respondent Nos. 2 and 3 pledged the said Fixed Deposit with the Standard Chartered Bank Ltd. and caused the said Bank to advance loans to the respondent Nos. 26 and other associates. The said Standard Chartered Bank granted loan of Rs.60 lacs against pledge of the said fixed deposit out of which about Rs.37 lacs was advanced to respondent no. 26 and loan of Rs.23 lacs to the other investment companies and/or respondent No. 2,3 and their relatives, such pledge is still continuing. By obtaining such loans and also inter corporate loans, the respondents Nos. 2 and 3 purchased* ***10915*** *shares from Mr. P. Lodha and - 4711 shares from other shareholders of the company. In all 15626 shares were purchased and/or acquired in this way. Such acquisition of shares is wholly is violation of provisions contained in Section 77 of the Companies Net,1956.*

39. Now the said assertion was replied by the appellant company (PGFI) in para *60* of Reply to the Company Petition as under:-

> ***60****. With reference to paragraph 43 of the said petition, I deny and dispute that myself or the respondent No,2 schemed to obtain any shares of the respondent No, 1 held by Mr. Parasmal Lodha or any other shareholder as alleged or at all. I deny and dispute that myself or the respondent No.3 caused the company to make a fixed deposit with Rs.1,00,00,000/- with the Standard & Chartered Bank, Nataji Subhas Road, Calcutta, for the purpose of purchasing or acquiring any shares of the respondent No. 1 as alleged or at all. I say that the respondent No.1 made Fixed Deposits' for a total sum of Rs.50,33,003/- in May,* ***1988*** *(2,50,000 + 15,00,000 + 10,00,000 = 50,00,000/- and another fixed deposit of Rs.50,00,000/- on 8.2.89, such fixed deposits* ***were made in usual course of business****. Copies of the relevant fixed deposit receipts are annexed herewith and collectively marked on or about 7.3.89 the' Board of Directors of the respondent No.1 decided at a meeting that an accommodation upto a maximum amount 75,00,000/- by way of overdraft against deposit of Rs.10,00,00,000/-in the name of company be taken from the Standard Chartered Bank, Netaji Subhas Road, Calcutta and Mr. P. C. Sen, Chairman and Managing Director and Mr. A, F. Mukherjee, then Director of the company were authorised to sign and execute necessary documents and papers and to take all such action as may be required from time to time to avail such overdraft facilities of Rs.75,00,000/- from the Standard Chartered Bank. A copy of the relevant extract of the minutes of the Board meeting of the respondent No. 1 held on 7.3.81 is annexed herewith and marked 'o'.*

40. Further para 33(a) of the rejoinder to the Company Petition read the following: -

(a) At the outset I, however, say that in Annexure 'F' to the petition through bona fide mistake and/or inadvertence it was stated that Roy-Sen combine purchase 10,915 shares from Parasmal Lodha. I have been informed by Bhagwati Developers Private Limited that the said statement is not correct inasmuch as Bhagwati Developers Private Limited was wrongfully and illegally induced to sell 10,115 shares and Parasmal Lodha had sold only 800 shares. However, the said shares were purportedly purchased by the respondent No. 26. Bhagwati Developers Private Limited has sold 10,115 shares for an aggregate consideration of Rs.55,63,250/-. The purported sale was concluded according to the own admission of the deponent on 19th April, 1988. I however, say that 50 per cent of the value of the said shares being a sum of Rs.27,81,625/- was not paid by respondent No. 26 until ***6th May, 1988*** *although the respondent No. 26 obtained delivery of the said 10,115 Share Certificates by 19th April, 1988. The payment of Rs.27,81,625/- was allegedly made by the respondent No. 26 on 6th May, 1988 by an Account Payee Cheque dated 2nd May, 1988. In view of the aforesaid admitted position I say that the purported transaction of purchase of 10,115 shares by the respondent No. 26. from Bhagwati Developers Private Limited as ex facie illegal being in violation of the mandatory provisions of the Securities Contracts (Regulation) Act, 1956 and null and void. The respondent No. 26 is bound and obliged to return the said 10,115 shores to the Bhagwati Developers Private Limited. Further the alleged transfer of shares being illegal, null and void the respondent no. 1 is obliged to rectify its Register of Members in respect of the said 10,115 shares by deleting the name of the respondent no. 26 in its record and restoring the name of Bhagwati Developers Private Limited in respect of 10,115 shares.*

41. Further the reply of the Respondent No.1 - Bhagwati Developers Pvt Ltd in para *70, 73* read as under: -

70. That as regards the purchase of 15,626 shares of Appellant Company from the answering Respondent (BDPL), Mr.Parasmal Lodha and others is concerned, it may be noted that the Respondent No. 20 (Debashree) purchased 10,115 shares of answering Respondent (BDPL) on March 16, 1988 and answering Respondent BDPL, vide its letter dated 16.03.1988, forwarded to the Respondent No. 20 (Debashree), the sale bill

of Rs 55,63,250/- along with the original share scripts and blank transfer forms duly signed by the Petitioner. Payment for the shares was, however, made later as follows:

08.04.1988	*R-20 (Debashree) paid to Lodha Services Pvt Ltd (now Bhagwati Developers Pvt Ltd) a cheque bearing no 398376 drawn on Canara Bank, Kolkata being part payment of sale proceeds of shares*	*Rs 3,80,000/*
15.04.1988	*R-20 (Debashree) forwarded 3 cheques bearing no 398379, 398380 and 398391 all dated 15.04.1988 drawn on Canara Bank for Rs 24.01,625/- towards 50% of sale bill dated 16.03.1988.*	*Rs 24,01,628/-*
02.05.1988	*R-20 (Debashree) forwarded a cheque bearing no 398382 for Rs 27,81,625/- dated 02.05.1988 drawn on Canara Bank towards balance 50% of sale bill dated 16.03.1988*	*Rs 27,81,625/-*
31.08.1988	*R-20 (Debashree) forwarded a pay Order no 029416 dated 31.08.1988 for Rs 18,291/- issued by American Express Bank towards agreed interest @15% on the delayed payment*	*Rs 18,291/-*

***73**. That in this context it is once again relevant to note the following events. Mr. Parasmal Lodha resigned from the Board of the company on 12th March 1988. Thereafter he and the answering Respondent BDPL sold 10,915 out of said 15,626 shares on 19th April 1988. On 23rd April 1988 the Respondent No. 2 obtained a loan ofRs.40 lakhs from the Standard Chartered Bank, against the guarantee of the Respondent No. 20 and pledge of 4,000 shares of the Appellant. This 4000*

> *shares are the part of total shares 10,915 purchased from the answering Respondent and Parasmal Lodha. This apart, there was a promise by the said Respondent that it would further secure the loan by a pledge of 1,000 shares of Appellant. Following the same, allotment of the said 30,000 shares was made on 28th April 1988. In May, 1988 the Appellant Company made a fixed deposit of Rs.50 Lacs with the Standard Chartered Bank. On 2 May, 1988, the Respondent No. 2 advanced Rs. 25 lakhs to the Respondent No. 20 and on 6th May, 1988 the said Respondent No. 20 made payment of sum of Rs. 27,81,625/-towards part payment of the price of 10,915 shares from the said block of 15,626 shares acquired by it.*

42. Learned senior counsel for the Respondent No.1 also referred to Bhagwati Developers Vs Peerless *2013 (9) SCC 584* to say in case the amount of consideration *for the sale of shares is not paid on the spot at delivery or by next date*, such sale shall be *considered as illegal and violative* of Section 16(1) of the Securities Contract (Regulation) Act, 1956. Reference was made to IFB Agro Industries Ltd Vs SICGIL India Limited and others Civil Appeal No.2030 of 2019 decided by the Hon'ble Supreme Court wherein the Hon'ble Supreme Court held the appellant in the *said case was not justified in invoking the jurisdiction of CLB under Section 111A of the Act for violation of the SEBI Regulations* but the facts in the said case were entirely different. As the matter was regarding *allotment of shares and voting rights etc.* and if there *is proof of an inside trading*, in violation of the Securities Contract Regulations Act, then, of course, Ld. NCLT may not have jurisdiction. Further it was the submission the transfer of shares being made in violation of the Securities Act, such transfer was void and if there was a change in ownership in the company's shares because of such violation, it would constitute an oppression and mismanagement. Heard.

43. Thus the crux of the argument of the Respondent No. 1 is ***(a)*** no active participation by Mr. P. Lodha or Respondent no. 1 -M/s BDPL in the meetings for sale of 30000 shares of PGFI; ***(b)*** Misleading explanatory statement and absence of valuation; ***(c)*** incurring substantial losses of Rs.1.35 crore in 1988; ***(d)*** round tripping allegations in issuance in allotment of 30000 shares; ***(e)*** three group companies created solely to receive 30000 issued shares; ***(f)*** BDPL Respondent no. 1 had no knowledge that Respondent No.20, a buyer of their shares was linked to S.K. Roy or the funds of appellant company were used to purchase these shares, thus violation of Section 77 is alleged; ***(g)*** the acts of appellant company being in violation of Security Contract (Regulations) Act, 1988; and lastly ***(h)*** there was no requirement of amending the pleadings by BDPL.

44. Qua ***(a)*** we need to note both the Mr. P. Lodha and Respondent No. 1 - M/s BDPL were aware of the allotments to be made from 1987 and there is no dispute Mr. P Lodha was a founder director of the appellant company and was present at the board meetings dated 30.10.1987 as well as of dated 02.02.1988 and never got recorded his dissent. Under Section *193(4)(b)* of the Companies Act, 1956, if a director disagrees with a resolution he is required to record his dissent in the minutes. Silence amounts to *assent*. Admittedly the aforesaid resolution were passed unanimously and thereafter was placed before the shareholders. Since no such dissent was ever recorded, hence Respondent No. 1 – M/s BDPL is now estopped from alleging the facts contrary of the official minutes. Admittedly both Mr. P. Lodha as well as Respondent No. 1 – M/s BDPL were duly represented in such meetings and if

they had dissented, it could have been recorded in minutes, but now they can't take silence as their defence.

45. Moreso under *1956* Act there was no statutory provision prohibiting the issuance of shares *at par*; though Section *79* of the *1956* Act regulated issuance of shares at a discount *i.e.* below face value, which was never the case here. More so Mr. P. Lodha and Respondent No. 1 -M/s BDPL had sold their *15626* shares soon after private sale and thus both were already in an exit mode. Now if they were of the view the issuance of *30000* shares were improper or oppressive, they could have demanded pro- rata allotment; recorded their dissent; opposed the resolutions or challenged the allotment, which they never did and rather participated in the meetings and thus cannot complain of *lack of probity.*

46. Qua ***(b)*** it was argued by the Respondent *per* Section *62(1)(c)* of the Companies Act, 2013 the valuation is now mandatory and further the explanatory statement violated Section *173(2)* of the *1956* Act as it did not give enough details to the shareholders to make an informed decision and further the three entities i.e. Respondents No.*8* to *10* which received most of the shares were incorporated only *17* days prior to the allotment and it had Rs.*50000/-* each as capital, yet subscribed to the shares worth Rs.*20* lakh without any explanation or funds.

47. Now admittedly the Board under the *1956* Act had the power to issue capital *which was not contingent upon existence of any need.* Now where the issue of shares result in change in the percentage of shareholding (as in right issue), a person whose holding is reduced may raise an issue of probity but

here both Mr. P. Lodha and Respondent No. 1 - M/s BDPL never challenged such issue and further the person who challenged this issue viz Chatterjee's already withdrew their allegations. In any event, the explanatory statement gave reasons of issuance of shares i.e. *for expansion of the capital base*. This reasoning has not been challenged by any of the shareholder, hence it cannot be now challenged by the Respondent no. 1 more specifically for the reason, it being instrumental in approving such allotment. Section *62(1)(c)* of the Companies Act, 2013 cannot be made *retrospectively* applicable in the present case. Further it is the case of the appellants on 15.05.1987 RBI introduced Residuary Non-Banking Companies (Reserve Bank) Directions, 1987 i.e. RNBC Directions which required all *deposits and accrued interest* to be invested in prescribed investments, most of which were low interest bearing. The only area of freedom of investment was linked to net owned fund of PGFI which was again linked to share capital base and hence there was a need for the appellant company to broaden its capital base for investment in high interest bearing investment so as to give assured returns to the certificate holders and defray working capital expenses. The reply of appellant company to the Company Petition and in its appeal, it has alleged the need for more capital in view of such directions.

48. Regarding ***(c)*** i.e. the appellant company ought not to have raised more money by issuing shares at *par,* cannot be appreciated as the relevant enquiry is not whether alternative commercial decisions were possible, but is *whether the decision actually taken lacked probity or otherwise was vitiated in a manner that attract Section 397-398 of the 1956 Act*. The fallacy of this

argument is it confuses the loss to PGFI with dilution of the shareholders *inter se* holdings. Where shares are issued by company, it receives a sum (in this case Rs.30 lakh) and issuance of a definite number of shares (in this case 30000). If appellant had valued the shares at Rs.500 each, it would still have received Rs.*30* lakhs but had issued *6000* shares. This would have made no difference to appellant as the number of shares would only affect the distribution of dividend between the shareholders or voting rights, but it did not affect the appellant company. The use of the private placement route inherently means the shares would be offered to a person known to the company or its management. If it were a public invitation or offers to all shareholders, it would have been a rights issue.

49. Admittedly Mr P Lodha and Respondent No. 1 - M/s BDPL sold their shares in March, 1988 at a value of Rs.*550*/- each, therefore, it cannot be said in December, 1987 or in February, 1988 they were not aware of the value of the shares which they were holding and which were sold the very next month *yet* they did not vote against the allotment of *30000* shares *at par*. Therefore, it was a *conscious* and *informed decision* on the part of Mr. P. Lodha and Respondent No. 1 - M/s BDPL not to vote in dissent and rather *favoured* the allotment of shares *at par*, hence later they cannot raise objections. The allegation the appellant suffered financial loss of Rs.*1.35* crores is misconceived.

50. Qua ***(d)*** *viz* the allegation of round tripping in issuance and allotment of 30000 shares; it was argued *9350* shares purchased by Respondent No.*8* was through a loan of Rs.950000/- taken from Respondents No.*20-26* herein

which in turn it borrowed money from appellant company; Further Respondent No.*9* has purchase 3150 shares from loan taken from Respondents No.*25-26* and appellant had advanced substantial loan to Respondent No.*25*. Lastly it was argued that *8350* shares were purchased by Respondent No.*10* on the basis of loan granted by Respondent No.*25* which took unsecured loan of Rs.1 crore on 03.03.1987 from appellant. The Respondent No.*25* had granted a loan of Rs.6 lacs to Respondent No.*10*. Moreso, the appellant had granted an inter corporate loan to Vanshree Holding Pvt Ltd who then granted loan of Rs.2,50,000/- to Respondent No.10, thus it enabled Respondent No.*1* to subscribe to 8350 shares of PGFI.

51. Admittedly Respondents No.*8-10* were issued 9350, 3150 and 8350 shares respectively and the balance shares out of 30000 were purchased by the family members and other shareholders *qua* whom there was no allegation of Section *77* breach.

52. Now Section 77 of the 1956 Act on the face of it requires the loan itself *has to be for the purpose of purchase of the shares* but there is *no finding the loan of Rs.1 crore was given by appellant to Respondent No.25 to eventually give a loan of Rs.6 lakh to Respondent No.10*. There is also no finding as to how Respondents No.*8* and *9* obtained loan from appellant to purchase the shares.

53. Regarding Respondent No.*8* the documents itself show no loan amount was advanced by appellant to Respondents No.*20*, *21* and *23* and whereas some loan was granted to Respondents No.*22*, *24* and *26* only in *1989-90* i.e. much after the allotment of 30000 shares. Further Respondent No.*9* also did

not receive any fund from Respondent No.*25* or from appellant at the relevant time and the purchase of *3150* shares was sourced from its promoters *viz* Mrs. Shikha, who loaned an amount of Rs.*7* lakhs to Respondent No.*9* for this purpose. Respondent No.*9* thus did not receive any money from Respondent No.*25* at any point of time.

54. Now for Respondent No.*10*, it was a case of the appellants the loan of Rs. *1* crore was granted by the appellant to Respondent No.25 way back on 03.03.1987 and on this day the issue of 30000 shares was never in contemplation of the Board of Directors of the company. Such decision for issuance of shares was taken by the Board about seven months later i.e. on 30.10.1987, necessitated by reasons of RBL Directions coming into force on 15.05.1987 *i.e.* two months after the loan was granted by appellant to Respondent No. 25. Now the loan by Respondent no. *25* to Respondent no. *10* was on 22.04.1988. Both these transactions are ex-facie separated by a substantial gap of time. Further as regards Vanshree Holding Pvt Ltd no evidence has been filed *qua* loan obtained by it. Respondent no. 1 rather required the appellant to produce material to demonstrate the source of funds of each of the allottees of *30000* shares to dispel the allegation of Respondent no. 1 the purchase did not emanate from the appellant. However, it is a well settled principle of law the *party asserting a fact must prove that fact*, but here the Respondent no.1 required the appellant to disprove the allegations made in the company petition. Further as per Respondent No. 1 - M/s BDPL, the alleged *taint* pertain only to *specific tranches of shares* yet the Ld. NCLT set aside the entire allotment of *30000* shares, including those of the individuals.

In any event Section *77* is penal in nature and requires strict establishment of statutory ingredients, namely the financial assistance was given directly or indirectly by the company *for the purpose of* or *in connection with the purchase of its own shares*. The Respondent no.1 did not prove the same with *definite evidence* and sought to prove these facts only *through presumptions*.

55. The allegation ***(d)*** i.e. the three companies i.e. Respondents No.*8*, *9* and *10* were incorporated on 11.4.1988 and had the same place of business at that of the appellant and such companies belong to Roy-Sen combine (i.e. Respondent No.2 and 3) and had Rs.*50000/-* as share capital, hence were not having financial standing; we only need to say the question if these companies were in control or management of Roy-Sen group (R2-3) is wholly irrelevant to the validity of the allotment, as the Companies Act, 1956 did not prohibit the allotment of shares to companies having commercial, personal or even familial connections with the existing shareholders or directors so far as the allotment was duly authorised in accordance with law. Further the allotment was *unanimously approved* and Respondent No. 1 - M/s BDPL rather actively participated in the process and had consented to the Transfer Share Committee allotting the shares as per its discretion. The use of the private placement route inherently means the shares were to be offered to the person known to the company or its management and neither Mr. P. Lodha nor Respondent no. 1 - M/s BDPL can deny such knowledge.

56. The argument ***(f)*** is Respondent No. 1 - M/s BDPL had no knowledge that Respondent No.20 - Debashree Investment and Services Pvt Ltd was linked to Roy's (Respondent No. 2) and the fund of the appellant was used to

purchase the shares by Respondent No. 20 in violation of the Companies Act, 1956. It was rather claimed by Respondent No. 1 - M/s BDPL that Standard Chartered Bank (SCB) granted loan of Rs.*60* lakhs against the Fixed Deposit, out of which Rs.37 lakhs were advanced to Respondent No. *20* and Rs.*23* lakhs were advanced to other investment companies as well as to *Roy-Sen* or their relatives, hence there was some *secret understanding* between the SCB and Respondent No.2.

57. However, we first need to note Respondent No. 20 cannot be said to be an unrelated third party as the name of the company include the name '*Debashree'*. It is stated Debashree is Respondent No. 2's daughter and it cannot be said Respondent no. 1 - M/s BDPL or Mr. P. Lodha were not aware of this fact. Even otherwise, Respondent No. 1 - M/s BDPL at the time of allotment, never raised any objection or cause any enquiry, hence in these circumstances, the belated assertion of ignorance is contrary to record and is inconsistent with Respondent no. 1's own conduct.

58. Further Respondent No. 1 was duly aware of the allotment to be made from 1987. Mr. P. Lodha, an alter ego of Respondent No. 1 - M/s BDPL, also agreed to the allotment by the Share Transfer Committee at the Board Meeting, the appellant held on 02.02.1988. Further Mr. P. Lodha and Respondent No. 1 - M/s BDPL themselves sold their *15626* shares on 19.04.1988. The FD of Rs.*1* crore by appellant with SCB was admittedly made on 04.05.1988 and no connection is shown as to how on the basis of FD by appellant with SCB, any loan was given to Respondent No.2 in 1988. Further giving of loan to Respondent No.20 by Respondent No. 2 is wholly irrelevant

and cannot attract Section *77* (supra) *unless* there is proof of fact said money was directly or indirectly obtained from appellant. Here one may refer to the findings of Ld. NCLT that *there are several such transactions which seem to be closely linked and Respondent seem to be falling foul of the provisions of Section 77 of the Companies Act, 1956*. Hence, there is *no definite finding*. Admittedly Respondent No.2 secured a personal loan of Rs.*40* lakhs from SCB against securities, MTNL bonds and guarantee from Respondent No.20 as well as pledge of *1000* PGFI shares and on 02.05.1988 Respondent No. 2 advanced Rs.*25* lakhs to Respondent No. 20. Thus Respondent No. 20 did not receive any loan from appellant and the personal loan obtained by Respondent No. 2 from SCB did not include Fixed Deposit maintained by the appellant in Standard Chartered Bank. Thus, there seems to be no connection between the Fixed Deposit of the appellant company with Standard Chartered Bank and the loan was taken by Respondent No.2 from SCB in his personal capacity and by pledging his 1000 shares. Hence Section *77* (supra) is not attracted.

59. Even otherwise, Respondent No. 1 had itself sold *10115* shares of Respondent No.*20* and received consideration in *1988*. Further Mr. P. Lodha also sold *800* shares to Respondent No.20 in *1988* and received the entire consideration. If they had received the full consideration, they cannot challenge these transactions. Though the Respondent's case was the loan was pursuant to a secret understanding, but such secret understanding ought to have been established conclusively and cannot be inferred from events *like* raising of funds against securities, etc.

60. Qua ***(g)*** *viz* the acts of M/s PGFI are in violation of Securities Contracts (Regulation) Act of 1988; we only need to say such violation can only be considered by the relevant regulatory authority and Ld. NCLT does not have the jurisdiction and it cannot be decided in a proceeding under Section *397-398* of the Companies Act, 1956. Respondent No. 1 had failed to establish how such a contract had caused the affairs of the appellant to be conducted in a manner prejudicial to the public interest or oppressive to its members. The judgement of Hon'ble Supreme Court in Bhagwati Developers Pvt Ltd Vs PGFI *(2013) 9 SCC 584* is inapplicable to the facts before us as the said judgement arose in the context of proceedings initiated under Section *111 (A)* of the Companies Act, 1956, i.e. rectification of register of members to ineffectuate a sale contrary to the Securities Contracts (Regulation) Act of 1988. The question of legality of the transfer of shares arose in the context of M/s PGFI refusing to register the transfer, but here no proceedings have been brought by the transferor to challenge the transfer. More so the alleged violation of the Securities Contract (Regulation) Act, 1998 cannot be a ground for passing an order under Section *397-398* of the Companies Act, 1956. To our mind Respondent no. 1 and its controlling shareholders, *admittedly*, were active participants and beneficiaries of the very transactions, now impugned. Thus, having voluntarily sold shares, receiving full consideration, the Respondent No. 1 cannot now approbate and reprobate. Same is our reply to the arguments *qua* alleged violation of MRTP Act, 1959.

61. Lastly though it was the submission of Respondent No. 1 that no amendment was ever required in the body of the company petition, but

admittedly Respondent No. 1 did not file any affidavit to support the original averments in the petition, particularly when Chatterjee's have on oath *withdrawn all allegations referring them as incorrect*. Even Respondent No. 1 did not file fresh affidavit and rather sought to proceed on allegations which the original petitioners have themselves *disowned*. The original company petition alleged the alliance between Respondent No. 2 and 3 i.e. Roy-Sen Group as well as Lodha's alleging they have mismanaged the company for their personal gains *yet* the pleadings were not amended. Now there exist the pleadings *alleging* collusive dishonest conduct on the part of Lodha's *yet* on the other hand Lodha's are seeking relief under Section *397-398* by projecting them as an aggrieved party. Now if the allegation in the original petition are true *vis a vis* Lodha's being *collusive* then can any relief be granted to Mr P Lodha or its alter ego i.e. M/s BDPL - Respondent No. 1 herein. A person accused in the very pleadings cannot take advantage of it, hence no case of oppression against Respondent No. 1 is said to be made out on the basis of petition filed by Chatterjee's. In any case Mr P. Lodha and Respondent No. 1 company had full knowledge of the transactions impugned and actively participated therein; attended the AGM; voted in favour of special resolutions for allotment of *30000* shares and voluntarily sold *10915* shares and *800* shares respectively for valuable consideration; received entire consideration without protest and thus having jointly altered the shareholding structure through their own commercial decision and having benefited from it, are estopped from invoking equitable jurisdiction of the Tribunal to impugn the transactions, which rather facilitated and profited them. Even otherwise, if such transactions are treated as void, it shall cause serious consequences to

the company on the issues of resolutions of a general meeting for the past *33* years; dividends paid on shares and related taxes with dividend distribution etc. which shall *ex-facie* be inequitable and against the interest of M/s PGFI, the appellant herein.

62. Thus we find force in the arguments of the appellant and set aside the impugned order for the reasons enumerated above. All the three appeals *121 of 2022, 123 of 2022, 124 of 2022* are allowed. All pending I.A.'s, if any, are disposed of. No order as to cost.

63. During the course of the proceedings the record of the Ld. NCLT of Kolkata was also called and now since the appeals have been disposed of, the record be returned.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated: 16-04-2026

BM