IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-II

Company Appeal No.221/58(4)/MB/2017

In the matter of
Section 58(4) of the Companies Act, 2013

And

In the matter of
Kirloskar Ebara Pumps Limited
[CIN: U29120MH1988PLC045865]

Riverdale Infrastructures Private Limited
[CIN: U45200DL2006PTC156549]
Having its registered office at –
Unit No.981, 9th Floor
Aggarwal Cyber Plaza-II
Netaji Subhash Place, Pitampura
Delhi 110 034

Earlier at –
A-1/83, Sector 8, Rohini
New Delhi
Represented by its authorised signatory,
Mr Umesh Gupta

… Appellant

Versus

1. **Kirloskar Ebara Pumps Limited**
   [CIN: U29120MH1988PLC045865]
   Having its registered office at –
   Pride Kumar Senate Buildings
   Senapati Bapat Road
   Pune 411 016

2. Ebara Corporation
A company registered under the laws of Japan, and having its head office at –
11-1, Haneda Asahi-cho
Ota-ku, Tokyo 144-8510, Japan
(proforma respondent)

3. Kirloskar Brothers Limited
[CIN: L29113PN1920PLC000670]
Having its registered office at –
Yamuna, Survey No.98/3 to 7
Plot No.3, Baner, Pune 411 045

(added as Respondent No.3 pursuant to order dated 27.07.2017 in MA No.273/2017)

… Respondents

Order pronounced on 26th May 2020

Coram:

Mr Rajasekhar VK	:	Hon'ble Member (Judicial)
Mr Ravikumar Duraisamy	:	Hon'ble Member (Technical)

Appearances:

For the Appellant	:	Mr Somasekhar Sundaresan, a/w Mr Shanay Shah, i/b Mr Nishant S Vyas, Advocates
For Respondent No.1	:	Mr Ravi Kadam, Senior Advocate Mr Ashish Kamat, a/w Ms Gitanjali Sharma, i/b Atul Dayal Associates, Advocates

For Respondent No.2	:	Mr Vijay Nair, a/w Mr Mahesh Londhe Mr Prashant Jain Mr Darshan Ashar Mr Parth Chowdhary, i/b Sanjay Udeshi & Co, Advocates
For Respondent No.3	:	Mr Janak Dwarkadas, Senior Advocate Mr Ankit Lohia, a/w Ms Ipshita Sen Mr Jesse Cornelius Mr Partha Nansukhani i/b Gagrats, Advocates

ORDER

Per: Rajasekhar VK, Member (Judicial)

1. Introductory

1.1. This is a Company Appeal under section 58(4) of the Companies Act, 2013 ***("the Act")***, filed by Riverdale Infrastructures Private Limited [CIN: U45200DL2006PTC156549], a private company limited by shares registered under the Companies Act, 1956, with the Registrar of Companies, Delhi, *inter alia* seeking the following reliefs:

(a) To strike down clause 6.01 of the Joint Venture Agreement dated 27.01.1988 and Article 51(b) of the Articles of

Association of the Respondent No.1 to the extent that they are *ultra vires* section 58 of the Act;

(b) To direct Respondent No.1 company to register the transfer of shares in favour of the Appellant, and to further direct compliance with such order within ten days; and

(c) To award costs.

2. Facts

2.1. The factual matrix under which the present Application has been preferred, is as follows:

(a) Ebara Corporation, the second respondent herein (**"Ebara"** or **"R2"**) and Kirloskar Brothers Limited, the third respondent herein (**"KBL"** or **"R3"**) entered into Joint Venture Agreement dated 27.01.1988 **(JVA)** for promoting, manufacturing and selling industrial process pumps and other products. The JVA has been placed on record at pp.82-119 of the Appeal.

(b) Accordingly, Kirloskar Ebara Pumps Limited (**"KEPL"** or **"R1")** was incorporated as a joint venture company by R2 and R3 on 13.01.1988,

(c) The issued, subscribed and paid-up share capital of R1 at present is ₹50,00,000/- (Rupees fifty lakh only), consisting of 5,00,000 shares of ₹10/- each. There is a total of sixty-eight shareholders. The list of shareholders is placed on record at pp.121-125 of the Appeal. For the purposes of this Appeal,

we are concerned with the shareholding of R2 and R3 which are as follows:

Sl No	Shareholder	No. of shares	Percentage
1.	Ebara Corporation	2,25,000	45.00
2.	Kirloskar Brothers Limited	2,25,000	45.00
	Total	**4,50,000**	**90.00**

(d) R2 had offered to sell the shares for ₹50 lakh, *vide* its letter dated 09.12.2016.[1] R3 was requested to convey acceptance or otherwise of the offer. In case R3 was willing to accept the offer, then a Share Purchase Agreement (SPA)[2] was to be executed within three months. Alternatively, there was a refusal on the part of R2 or any request for amendment of the SPA, which was enclosed to the letter, or if, after execution of the SPA there was default in payment of consideration within a period of one month, then it would be deemed to be a refusal on the part of R3. In such a case, R2 stated that it would be left with no option but to sell the shares to a third party pursuant to clause 11.02 of the JVA.

(e) R3, *vide* its letter dated 30.12.2016, noted that R2 had included certain unilateral conditions in the SPA. It indicated that while it is willing to purchase R2's shares at a mutually agreed price, the terms and conditions of R2's exit

[1] p.134 of the Appeal.

[2] Draft SPA at pp.136-153 of the Appeal.

from R1 were still being discussed. R3 also reminded R2 that in terms of Article 51(b) of the Articles of Association (AoA),[3] any sale of R2's shares would require R3's prior written consent.

(f) On 11.01.2017,[4] R2 through its lawyers wrote to R3 replying to its letter of 30.12.2016, stating that the terms suggested by KBL (R3) for purchase of R2's shares are unreasonable and not acceptable to Ebara. Therefore, R3 was called upon to decide whether it intends to exercise the right of first offer under the JVA to acquire R2's shares, in terms of the draft SPA, which constituted Ebara's final and definitive offer on the matter.

(g) KBL (R3) responded on 10.02.2017,[5] *inter alia* requesting that both parties sit together in order to arrive at an amicable resolution.

(h) In terms of the JVA, R2 and R3 had several rounds of discussions, wherein R3 offered to purchase R2's shares for a total consideration of ₹20.75 lakh, equivalent to R2's investment in the said shares. Apparently, it was a conditional offer, with additional stipulations attached, which R2 found unacceptable.

[3] pp.48-49 of the Appeal.

[4] pp.167-168 of the Appeal

[5] pp.169-170 of the Appeal

(i) Thereafter, even though a meeting was held between the representatives of R3 and R2, the same did not yield any result.

(j) On 17.03.2017, R2 entered into a Share Sale and Purchase Agreement (SSPA)[6] with the Appellant, for sale of 2,25,000 shares held by R2 in KEPL (R1) for a consideration of ₹50 lakh.

(k) Following this, the Appellant wrote to R1 on 24.03.2017,[7] asking that the transfer of shares be recorded.

(l) R1 wrote to R3 on 27.03.2017,[8] asking whether prior written consent for sale of shares by R2 to the Appellant was accorded for the said transfer. R3 replied on 30.03.2017,[9] stating that it had not granted any consent to R2 for transfer of shares and requested R1 not to give effect to the transfer. A copy of the letter dated 30.03.2017 was also sent to the Appellant. The Appellant wrote to R1 on 06.04.2017,[10] *inter alia* stating that there cannot be an absolute embargo on the transferability of shares, particularly in the case of a public limited company.

(m) On 21.04.2017,[11] R1 wrote to the Appellant, stating that R1 had been put on notice by KBL (R3) refusing the record the

[6] pp.177-206 of the Appeal. Consideration clause is at para 2.4 at p.180 of the Appeal.

[7] pp.207-208 of the Appeal.

[8] p.217 of the Appeal.

[9] p.218 of the Appeal.

[10] pp.220-221 of the Appeal.

[11] pp.225-226 of the Appeal.

transfer of shares by R2 in favour of the Appellant, stating that by virtue of clause 6.01[12] of the JVA and also Article 51(b) of the AoA [para 2 (e) *supra*], R1 cannot recognise a transfer where the transferor had failed to meet with the requirement of obtaining the prior written consent of KBL (R3) before the transfer of shares. Additionally, R1 also pointed out certain procedural compliances that had not been met.

(n) On 10.05.2017,[13] the Appellant's legal advisors wrote to R1 on compliance with the procedural aspects. Further, on 11.05.2017,[14] the Appellant wrote to R1, stating that the refusal to register the transfer of shares is unsustainable and *mala fide.* The Appellant called upon R1 to disregard R3's objections and register the transfer of shares.

2.2. The Appellant has contended that R1 is a public limited company and in terms of section 58 of the Act, shares of a public limited company are freely transferable. Even if it is assumed that section 58(2) of the Act permits such a restriction, it can only apply to the parties to the JVA and not to others.

2.3. The Appellant, therefore, seeks that the transfer be registered by R1 company overriding the objection raised.

[12] p.84 of the Appeal.

[13] pp.230-231 of the Appeal.

[14] pp.243-245 of the Appeal.

3. The issue requiring determination

3.1. The sole issue requiring determination in the present proceedings is framed as follows:

"Whether the refusal by R1 to give effect to the registration of shares acquired by the Appellant from R2 is permissible within the framework of the law, given that R1 is a public company, and public companies, by definition, cannot restrict transfer of shares as is permissible in a private company?"

4. Arguments advanced by Mr Somasekhar Sundaresan, learned Counsel for the Appellant

4.1. Mr Somasekhar Sundaresan, learned Counsel appearing for the Appellant, took us through section 58[15] of the Act at the outset.

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[15] ***58. Refusal of registration and appeal against refusal.*** —

(1) * * *.

(2) Without prejudice to sub-section (1), the securities or other interest of any member in a public company shall be freely transferable:

Provided that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

(3) * * *.

(4) If a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company, within ninety days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

He also took us through the definition of private company in section 2(68)[16] and public company in section 2(71)[17] of the Act.

4.2. The thrust of Mr Somasekhar's argument was that if a public company could indeed restrict transferability of shares by virtue of the proviso to section 58(2), then it would in effect render nugatory the basic difference between a private and public company. Therefore, he invited the court to read section 58(2) keeping in view the definition of private company under section 2(68). A purposive reading of the scheme and provisions of the Act was necessary, he said.

4.3. Mr Somasekhar, learned Counsel, submitted that Article 51(b) of the AoA of R1 comprised of two "inextricably interwoven facets" – (1) consent of a non-exiting shareholder for a proposed exit by another shareholder, and (2) a pre-emptive right to acquire the shares proposed to be sold by the exiting shareholder. Therefore, the right of first refusal and the right to approve an exit are two sides of the same coin. If Article 51(b) could be read in a manner whereby these two facets are not interlinked, then this Tribunal would have to rule that a public company may

[16] 2(68): "private company" means a company having a minimum paid-up share capital as may be prescribed, and which by its articles,—

(i) restricts the right to transfer its shares;

[17] 2(71): "public company" means a company which—

(a) is not a private company

place an unconditional restriction on the right of a shareholder to transfer its shares, which would have the effect of converting R1 into a private limited company. Therefore, he submitted, the only logical manner of interpreting Article 51(b) of the AoA is that the right of either shareholder to consent (or to reject consent, as the case may be) is a right in aid of first refusal, intrinsically embedded in the very same provisions.

4.4. Mr Somasekhar urged that if two views are possible, the view that is in consonance with the vires of the scheme of the legislation is the view to be adopted. In the present case, the competing point of view that may be canvassed by R1 and supported by R3 would be repugnant to the Companies Act, 2013.

4.5. Continuing further with his arguments, Mr Somasekhar submitted that a contract which erodes the very substratum of the character of a public company cannot become enforceable by reason of the proviso to section 58(2) of the Act. He further stated that the proviso to section 58(2) of the Act is not a proviso to section 2(68) and 2(71) of the Act. Therefore, he insisted that the only logical, reasonable and harmonious construction of the proviso to section 58(2) would be that an agreement which does not amount to a blanket restriction on transfer of shares shall be recognised as a valid contract.

4.6. Mr Somasekhar further submitted that the cause shown by R1 for refusal is not "sufficient cause." He would urge that once an offer is made and rejected, the offeror would have a right to sell the shares to a third party. He took us through the correspondence of 09.12.2016, 30.12.2016, 11.01.2017, 10.02.2017, 21.02.2017, 01.03.2017 and 11.03.2017 [all discussed in para 2 *supra*], to advance the proposition that R3 has been consistently attempting to hold R2 hostage to clauses 6.01 and 11.02 of the JVA as well as Article 51(b) of the AoA.

4.7. R3 had consistently evaded responding to the offer made by R2. Therefore, the non-reply constitutes deemed refusal of the offer after completion of the period of three months. The consent to proceed with transfer of shares to a third party in line with clause 11 of the JVA and Article 51(b) of the AoA is implicit in such rejection.

4.8. Mr Somasekhar also impugned R1's action in not accepting the request for transfer. He submitted that R1 was acting under the influence and control of R3 even after all the requisite clarifications were provided to it.

5. Arguments of Mr Ravi Kadam, learned Senior Counsel for R1

5.1. Mr Ravi Kadam, learned Senior Counsel for R1, submitted that R1 is bound by the terms of the JVA and the AoA. He submitted

that R1 cannot be expected to go beyond the terms of the JVA and the AoA. As soon as the request for transfer of shares was received, R1 addressed a letter dated 27.03.2017 to R3 seeking their consent for registration of the transfer. R3 objected to the same, which was duly intimated to the Appellant.

5.2. Mr Ravi Kadam, learned Senior Counsel, further submitted that the restrictions embodied in Article 51(b) of the AoA and clause 6.01 of the JVA are both valid and enforceable. He then took us through the provisions of section 58(2) and its proviso and submitted that even in the case of a public company, any contract or arrangement between two or more persons in respect of transfer of shares is enforceable and constitutes a valid contract. A mere restriction in a contract as between two or more shareholders in respect of transfer of shares cannot in any manner change the character of a company from public to private. Hence, such a contract cannot be held to be contrary to section 2(71) of the Act which defines "public company."

5.3. Mr Ravi Kadam submitted that in ***Western Maharashtra Development Corporation Limited v Bajaj Auto Limited,*** the Hon'ble Supreme Court had affirmed the judgment of the Hon'ble Bombay High Court dated 08.05.2015 in the case of ***Bajaj Auto Limited v Western Maharashtra Development***

Corporation Limited,[18] that contractual restrictions contained in an agreement between shareholders of a public company are valid and enforceable.

5.4. With regard to the contentions of the Appellant that certain clauses in the JVA and the AoA are bad in law, Mr Ravi Kadam submitted that this Tribunal, while exercising summary jurisdiction under section 58 of the Act, cannot go into disputed questions of facts or adjudicated upon. The remedy for the Appellant lies before a civil court. On this ground, the present Appeal is not maintainable.

5.5. In written submissions, R1 has submitted that the mere fact that the Appellant has chosen to give up the prayer clause (i) does not in any manner cure the defects in the petition.

6. Arguments of Mr Vijay Nair, learned Counsel for R2

6.1. Mr Vijay Nair, learned Counsel for R2, pointed out that one of the features of the JVA was the right of first refusal set out in clause 6.01[19] thereof, the provisions of which are also contained in Article 51(b)[20] of the AoA.

[18] 2015 (4) Bom CR 299 : 2015 SCC OnLine Bom 2111, decided on 08.05.2015

[19] p.84 of the Appeal

[20] p.48 of the Appeal

6.2. Mr Vijay Nair submitted that *vide* letter dated 09.12.2016,[21] R2 had offered to sell its entire shareholding to R3. However, R3, instead of accepting the offer, chose to abuse the terms of the AoA to compel R2 to accept unilateral, onerous and unacceptable terms relating to Mutual Termination and Release Agreement (MTRA), such as continued usage of R2's name[22] and the technical knowhow[23] even after R2's exit from the company. R3 even imposed a long-term non-competition clause in violation of section 27[24] of the Indian Contract Act, 1872. The onerous conditions proposed by R3 was not acceptable to R2. R3 found a way to refuse to buy the shares, thereby refusing the offer made by R2 *sub silentio.*

6.3. Therefore, R2 was left with no option but to sell its shares to a third party on conditions similar to those offered to R3. After negotiations, the Appellant was identified as the purchaser for the shares. On 17.03.2017,[25] the SSPA was executed between the

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[21] p.134 of the Appeal

[22] Section 5 of the MTRA, at p.47 of R2's reply paper book

[23] Section 3 & 4 of the MTRA, at p.45 of R2's reply paper book

[24] ***27. Agreement in restraint of trade, void.***— Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1.—Saving of agreement not to carry on business of which goodwill is sold.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

[25] pp.177-206 of the Appeal. Consideration clause is at para 2.4 at p.180 of the Appeal.

Appellant and R2, in terms of which the Appellant purchased R2's shares in R1. Therefore, the position is that R2 sold its shares to the Appellant only after R3 refused to purchase the shares at the price and terms offered by R2.

6.4. Mr Vijay Nair, learned Counsel, also submitted that on a plain reading of clause 6.01 of the JVA, it is clear that none of the parties can sell, assign, transfer or otherwise dispose of any of the shares of the company respectively held by them. Such requirement of prior consent is in aid of the right of first refusal in the same clause, whose last sentence provides that *"the other party shall have the right of first refusal of such offer."* Therefore, it is clear that the intention of the parties is to have a clause for Right of First Offer (RoFR), Mr Vijay Nair submits. At the time of entering into the JVA, the parties certainly did not intend to include the provision of *"prior written consent"* to act as an absolute embargo at the instance of one party, which would permit such party to impose harsh conditions whereby the other party would not be able to sell its shares.

6.5. Mr Vijay Nair further submitted that a harmonious reading of the clauses will clarify that the intendment between the parties was only RoFR and not anything more. A party wanting an exit must be given an exit, subject to the RoFR condition. If, in the present case, *"prior written consent"* is considered as a condition precedent

in addition to RoFR, then it would amount to an absolute prohibition, which is impermissible in law. What constitutes a restriction cannot transmogrify into a prohibition. Such a contract would become illegal and therefore unenforceable even under the proviso to section 58(2). Therefore, Mr Vijay Nair would submit that once R2's offer is rejected by R3, then no additional consent from R3 would be required. R3 cannot be permitted to withhold the exit of R2 unreasonably on the pretext that prior written consent was not taken.

6.6. Winding up his arguments, Mr Vijay Nair submitted that it would be reasonable to grant the prayer at para 32(ii) of the Appeal in favour of the Appellant, which is a *bona fide* acquirer of the shares of a public limited company, and is a protectee of the law guaranteeing free transferability of such shares in accordance with law under section 58(5)[26] of the Act.

7. Arguments of Mr Janak Dwarkadas, learned Senior Counsel for R3

7.1. Mr Janak Dwarkadas, learned Senior Counsel for R3, submitted with reference to the contention of Mr Somasekhar that no

[26] (5) The Tribunal, while dealing with an appeal made under sub-section (3) or subsection (4), may, after hearing the parties, either dismiss the appeal, or by order—

(a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of ten days of the receipt of the order; or

(b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.

restriction could be placed on transferability of shares of a public company, opened his arguments by referring us to the proviso to section 58(2)[15] of the Act. He emphasised that by the proviso, any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract. This proviso was meant to be an exception not the rule laid down. He drew our attention to para 43 of the judgment of the Hon'ble Supreme Court in ***S Sundaram Pillai & others v R Pattabiraman / & others,***[27] which is extracted below: -

"43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

(i) qualifying or excepting certain provisions from the main enactment;

(ii) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(iii) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

[27] (1985) 1 SCC 591

(iv) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

7.2. Mr Janak Dwarkadas also highlighted that the Hon'ble Supreme Court, in ***Ali M.K. v State of Kerala,***[28] had held that as a general rule, a proviso is added to an enactment to quality or create an impression to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule.

7.3. Mr Janak Dwarkadas further expounded on the definition of the term **'contract'** under section 2(h) of the Indian Contract Act, 1872, which defines that a contract as an agreement enforceable by law. Further, section 10 of the Indian Contract Act, 1872 also explains what agreements are contracts: all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Viewed in this context, the JVA executed between R2 and R3 is a valid contract and therefore enforceable as one. Mr Janak Dwarkadas also pointed out that Article 51(b)[3] binds only two out of the sixty-eight shareholders of R1 and thus, this would not be violative or contrary to section 58(2) of the Act.

[28] (2003) 11 SCC 632

7.4. In interpreting the expression, **"in respect of transfer of securities,"** Mr Janak Dwarkadas submitted that this has to be given the widest meaning in view of the judgment of the Hon'ble Supreme Court in ***Renu Sagar Power Company Limited v General Electric Company & others,***[29] where, after analysing the previous judicial pronouncements on the subject, the Hon'ble Supreme Court laid down as follows:

"Expression such as 'arising out of' or 'in respect of' or 'in connection with' or 'in relation to' or 'in consequence of' or 'concerning' or 'relating to' the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement."

7.5. Specifically with regard to restrictions on transferability of shares, Mr Janak Dwarkadas referred to the judgment of the Hon'ble Bombay High Court in ***Bajaj Auto Limited v Western Maharashtra Development Corporation Limited,***[18] which deals squarely with this aspect, and which has also been affirmed by the Hon'ble Supreme Court on 09.01.2019 by dismissing the appeal filed by Western Maharashtra Development Corporation Limited. Paras 39 and 40 of the Hon'ble Bombay High Court's judgment, which is singularly relevant, reads as follows: -

[29] (1984) 4 SCC 679, at p.704, para 25(2).

"39. Sub-section (2) of section 58 specifically provides that without prejudice to sub-section (1), the securities or other interest of any member in a public company shall be freely transferable. However, the proviso to the said section stipulates that any contract or arrangement between two or more persons in respect of transfer of contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract. Before the Companies Act, 2013 came into force, the 57th Report of the Parliamentary Standing Committee on the Companies Bill 2011, at pg.86 thereof, noted that the proviso to section 58 "simply seeks to codify the pronouncements made by various Courts holding that contracts relating to transferability of shares of a company entered into by one or more shareholders of a company (which may include promoter or promoter group as a shareholder) shall be enforceable under law." *Keeping in line with the proviso to section 58(2) of the Companies Act, 2013, the Securities and Exchange Board of India had also issued a notification dated 3 October 2013 being Notification No.LAD-NRO/GN/2013-14/26/6667 which declares that no person in the territory to which the Securities Contracts (Regulation) Act, 1956 extends, shall save with the permission of the Board, enter into any contract for sale or purchase of securities other than a contract falling under any one or more of the following namely:*

*(a) ****

*(b) ****

(c) Contracts for pre-emption including right of first refusal, or tag-along or drag-along rights contained in shareholders agreements or articles of association of companies or other body corporate;

*(d) ****

"40. On reading section 58 and the above Notification issued by the Securities and Exchange Board of India, we are of the view that section 58 merely clarifies and codifies the existing legal position regarding such pre-emption agreements. In other words, what was implicit in the provisions of section 111A of the Companies Act, 1956 has now been made explicit in section 58 of the Companies Act, 2013."

7.6. That apart, Mr Janak Dwarkadas also pointed out that the JVA was entered into on 27.01.1988. R2 and R3 have been JV partners since then. R2 has acknowledged and acted upon the JVA. In fact, in the SSPA dated 17.03.2017 entered into between R2 and the Appellant, it was specifically acknowledged as follows: -

*"**7.6. Treatment of JVA:** Upon delivery of the share certificates and duly executed transfer deeds to the Purchaser, the Seller shall be deemed to have duly complied with its obligation under this Agreement and shall automatically be released from its obligations under the JVA and the Purchaser undertakes to be bound by and to comply with the terms of the JVA, unless KBL agrees otherwise. Upon instruction of the Seller after the Closing, the Purchaser shall sign and deliver to KBL a letter agreeing to comply with and be bound by the terms of the JVA as though the Purchaser is a signatory to the JVA."*

7.7. Mr Janak Dwarkadas further submitted that the Appellant and R2 were both aware of the existence, execution, validity and enforceability of the JVA. *Inter se*, they have also agreed to abide by all the terms of the JVA without exception. Having acted

upon, acknowledged and acquiesced in the terms contained in the JVA, it is not open to the Appellant or to R2 now to challenge or dispute any of the terms of the JVA. That apart, the entire object and purpose of incorporation of R1 was pursuant to the JVA. Mr Janak Dwarkadas alleges that whole purpose of the present Appeal is an attempt to resile from the non-compete obligation cast upon R2 under the JVA, in respect of which Suit No.56/2018 is pending before the learned District Court, Pune.

7.8. Mr Janak Dwarkadas further stated that it is not the case of the Appellant that the JVA is not a valid contract that may fall foul of section 14 to 19[30] of the Indian Contract Act, 1872. In any case, even if the Appellant wanted to challenge to the terms of the JVA, such a challenge would lie only before a civil court. Even if it is the contention of the Appellant that the JVA does not express the real intention of the parties, then the appropriate relief would lie under section 26[31] of the Specific Relief Act, 1963, for rectification of the contract, or under section 27[32] of the

[30] Section 14: "Free consent" defined.
Section 15: "Coercion" defined.
Section 16: "Undue influence" defined.
Section 17: "Fraud" defined.
Section 18: "Misrepresentation" defined.
Section 19: "Voidability of agreements without free consent.

[31] Section 26: When instrument may be rectified.

[32] Section 27: When rescission may be adjudged or refused.

Specific Relief Act, 1963, for rescission of the contract. The Appellant has not done any of these things. The question of unreasonableness in withholding consent cannot be gone into in the present Appeal.

7.9. Going on to the facts of the matter, Mr Janak Dwarkadas has stated that it was the highhanded manner of R2 in contending that the offer made by it, including the terms and condition thereof, were non-negotiable, that resulted in failure of the negotiations. Having contributed to the collapse of negotiations, it is not open at this stage for the Appellant to question the JVA and request the Tribunal to read down the provisions thereof in these proceedings.

8. Analysis and findings

8.1. We have heard the very compelling submissions made by Mr Somasekhar, learned Counsel for the Appellant, Mr Ravi Kadam, learned Senior Counsel for R1, Mr Vijay Nair, learned Counsel for R2 and Mr Janak Dwarkadas, learned Senior Counsel for R3. We have also perused the pleadings, and the Brief Note of the Appellant along with the Brief Rejoinder Note, and the Written Submissions of R1, R2 and R3.

8.2. The controversy revolves around whether the JVA impacts the free transferability of shares that is the hallmark of a public

company. In this regard, Mr Somasekhar submitted that clause 6.01 and 11.02 of the JVA, cannot coexist with the notion of free transferability of shares in a public company. Both clauses are extracted below since the entire Appeal turns on these:

"6.01. In order to foster and promote the attainment of the mutual aims and objectives of the parties hereto with respect to the joint venture contemplated by this Agreement, the parties hereto covenant and agree that, notwithstanding anything to the contrary contained in the Memorandum of Association or the Articles of Association of the Company, they shall not sell, assign, transfer or otherwise dispose of (whether by way of pledge, encumbrance or otherwise) any of the shares of the Company respectively held by them or any interest therein or enter into a commitment to do any of the foregoing unless prior written consent is obtained from the other party. In case either party offers to sell, assign or transfer any such shares with the consent of the other party, such other party shall have the right of first refusal of such offer."

"11.02. In the event of refusal, if no reply is communicated within three (3) months to the party offering the shares under firm terms and conditions and/or in the event of non-payment of the price within one (1) month from the date of acceptance, the party offering the same may, subject to such approvals or consents as may be required by mandatory provisions of law or ordinance of the Republic of India, sell the shares so offered to any third party within three (3) months thereafter. The price per share and the terms and conditions of the sale to any such third party shall not be less favourable for the party offering such shares than offered to other party to this Agreement. The refusal or deemed refusal (either by way of non-reply or non-payment of the price within one (1) month) by one party shall not,

however, be operative for more than (3) months, after which a fresh offer will have to be made in case of any proposed sale."

8.3. Mr Somasekhar contended that these two clauses infract section 58(2) when read in the context of the definitions of a private company under section 2(68) and of a public company under section 2(71) of the Act. He said that this warrants interference in this Appeal to set aside these two clauses which negates the free transferability of shares. He submitted that there cannot exist a blanket ban on transfer of shares without the consent of the other party in a public company. For this reason, he urged us to read down the clauses as also Article 51(b) which embodies these restrictions into the AoA of R1.

8.4. While this argument seems compelling at first blush, we find ourselves unable to agree with Mr Somasekhar's proposition on many counts.

8.5. First, the principle of law embodied in the proviso to section 2(68) is, in our view not in conflict with the definitions of a public company in section 2(71). R2 was founded in 1912 while R3 was incorporated in 1920. Both are, therefore, companies of some standing which have entered into the JVA with some objective in mind and who knew fully well the consequences of what they were contracting. There is nothing unusual, unequal or extraordinary in the contractual relationship between them.

While the principle in general is that the shares of a public company are freely transferable, there is nothing in law that stops two or more shareholders from entering into a covenant containing clauses for pre-emption, such as right of first refusal embodied in clause 11.02 of the JVA under consideration in the present Appeal. While this has been recognised through judicial pronouncements under the earlier Companies Act, 1956, the same has now been embodied in the proviso to section 58(2) of the Act.

8.6. Secondly, if we do go along with Mr Somasekhar's line of reasoning, then what we would in effect be doing is to take upon ourselves the role of a civil court in deciding whether the contract itself contains clauses that are too onerous or incapable of performance. We feel that we are not empowered by legislation to do so. Unlike a court's powers under section 9 of the Code of Civil Procedure (CPC), a tribunal's powers are ring-fenced by the legislation under which it is constituted and functions. A tribunal must be ever watchful in ensuring that it does not transgress its powers in the guise of doing complete justice.

8.7. Thirdly, Mr Somasekhar's contentions that a contract which erodes the very substratum of the character of a public company and therefore unenforceable, cannot become enforceable by reasons of the said proviso, is not very well founded. If there is

any problem with the way the contract has been worded, even if such problem come to the fore later on, then there are effective remedies under the Indian Contract Act, 1872, for novation, rescission or alteration of the contract under sections 26[31] and 27[32] of the Specific Relief Act, 1963, as Mr Janak Dwarkadas, learned Senior Counsel appearing for R3, has pointed out. The fact that no such suit has been instituted so far in any civil court, means that R2 itself did not think that the contract was unfair and required alteration or rescission in any manner.

8.8. As Mr Ravi Kadam, learned Senior Counsel for R1 rightly pointed out, R1 has no option but to go by the AoA of the company. So long as consent of R3 was not obtained, R1 had no option but to refuse the request of the Appellant. Further, we are also convinced with Mr Ravi Kadam's argument that the JVA binds only two of the shareholders. The AoA incorporates the provisions of the JVA. While the fact remains that what two independent shareholders contract amongst themselves is a matter concerning those two shareholders alone, R1 is bound to be run in accordance with the AoA. R1 cannot be expected to be run in violation of the provisions of the AoA without inviting trouble for itself.

8.9. In so far as R2 was concerned, it simply shifted its own responsibility under the JVA to the Appellant *vide* clause 7.6 of

the SSPA, requiring the Appellant to sign and deliver to KBL (R3) a letter agreeing to comply with and be bound by the terms of the JVA. Thus, contrary to the position that R2 has adopted here, R2 completely accepted its responsibilities under the JVA, but for reason only that it has now sold its shares, it wants the Appellant to step into its own shoes *qua* R3. Therefore, we must come to the conclusion that even now, neither R2 nor the Appellant find the terms of the JVA to be onerous or contrary to the law.

8.10. We find merit in the contention of Mr Janak Dwarkadas, learned Senior Counsel appearing for R3, in case the Appellant found the terms of the JVA to be unfair, the choice was always open to it to approach a civil court for alteration of the contract. The Appellant has not chosen to do so.

8.11. Further, let us consider a continuum with private company at one end and public company at the other. The proviso to section 58(2) enables a company to exist anywhere in the continuum subject to agreement between the parties. To read it otherwise, as Mr Somasekhar would like us to do, would be to render the proviso to section 58(2) a nullity. It is not for this Tribunal to go into the *vires* of the legislation itself, that is something that only the constitutional courts can go into.

8.12. Now turning to the judgments relied upon by Mr Somasekhar in support of his contentions, our observations are as under: -

Sl No	Judgment relied upon	Proposition	Our observations
1.	*RBI v Peerless General Finance & Investment Co Ltd (1987) 1 SCC 424*	Interpretation must depend on the text and context.	The law permits two shareholders to enter into a pre-emptive contract of the kind that we have seen in the present case.
2.	*VB Rangaraj v VB Gopalakrishnan & ors (1992) 1 SCC 160*	Shares are freely transferable and restrictions on their transfer are construed strictly. When a restriction is capable of two meanings, the less restrictive interpretation will be adopted by the court. These restrictions have to be embodied in the AoA.	The restrictions in the JVA are incorporated into the AoA of R1. Therefore, this judgment does not apply to the facts of the present case.
3.	*Innoventive Industries Ltd v ICICI Bank Ltd & others*	Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes.	Does not apply to the present facts, since what the Tribunal has been called upon to do in the present Appeal is effectively to re-frame the JVA between R2 and

Sl No	Judgment relied upon	Proposition	Our observations
			R3, which we cannot do.
4.	*Raghuvanshi Mills Ltd v CIT Bombay (1970) Comp LJ 113*	The correct meaning of the expression "freely transferable" is that the share in the first place must be freely transferable, in the sense that there must not be any restriction contained in the AoA restricting the general transferability of the share by a shareholder to another person.	This judgment may be applicable to the facts of that case. There are many judgments more directly dealing with the issue of transferability of shares and restrictions that may be placed thereon by contract between the parties. See para *Bajaj Auto Ltd v Western Maharashtra Dev Corp Ltd,* quoted in paras 5.3 and 7.5 *supra,* which has not been interfered with by the Hon'ble Supreme Court.
5.	*Ontario Jockey Club Ltd v Samuel McBride AIR 1928 PC 291*	Restrictions placed upon a shareholder's right of transfer of his shares cannot be questioned. The cases are numerous in which such	Far from supporting the case of the Appellant, it does the opposite. It supports the proposition that

Sl No	Judgment relied upon	Proposition	Our observations
		restrictions have been upheld … there is no law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to. It may be for the benefit of the company that, for instance, shares shall not be transferred to rivals in the company's trade. A restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid.	there is nothing which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to.
6.	*Estate Investment Company Pvt Ltd & anr v Siltap Chemicals Ltd (1999) 96 Comp Cas 217 (CLB)*	Even though the term "Sufficient cause" has been interpreted in various manners with reference to section 111, now in view of this term having been used in section 111A, the same to be	This position no longer holds the field after the enactment of the new Companies Act 2013, and the judgment of the Hon'ble Bombay High Court

Sl No	Judgment relied upon	Proposition	Our observations
		examined with reference to the provisions of this section. … refusal on any other round in respect of a public company cannot be considered to be a sufficient cause for such refusal.	referred to in paras 5.3 and 7.5 *supra.*
7.	*Bajaj Auto Ltd v CLB & others (1998) 6 SCC 218*	This Court (Hon'ble SC) while examining the action of the Board of Directors is not expected to exercise original jurisdiction and sit in appeal on question of fact. The judicial review while hearing in appeal from the decision of the CLB would be limited to see whether there was a *bona fide* exercise of power by the Board of Directors while refusing to register the transfer of shares.	We have kept in mind the latest judgment of the Hon'ble Bombay High Court dated 27.01.2015, in which the position arising out of section 58(2) proviso has been duly considered and upheld. This judgment has not been interfered with in appeal before the Hon'ble Supreme Court, which dismissed the SLP filed by Western Maharashtra Dev

Sl No	Judgment relied upon	Proposition	Our observations
			Corp Ltd on 09.01.2019.

9. Order

9.1. For all the above reasons, the present **Company Appeal No.221/58(4)/MB/2017,** therefore, fails and is, accordingly, dismissed. No order as to costs.

9.2. We may hasten to add that nothing stated herein shall prejudice any other proceedings that the Appellant may be entitled to pursue under the law before other judicial fora, either *in praesenti* or *in futuro.*

9.3. Ordered accordingly. Any connected interlocutory application shall stand disposed of.

Sd/- Sd/-

Ravikumar Duraisamy **Rajasekhar VK**
Member (Technical) Member (Judicial)
26.05.2020