

**In the National Company Law Tribunal
Kolkata Bench
Kolkata**

Before Shri Jinan K.R., Hon'ble Member (J)

C.P. No. 151 of 2014

In the matter of:

An application under Sections 58 and 59 of the Companies Act, 2013;

-And-

In the matter of:

An application under Sections 111 and 111A of the Companies Act, 1956;

-And-

In the matter of:

Mackintosh Burn Limited, a company incorporated under the provisions of the Companies Act, 1956, and a company within the meaning of the Companies Act, 2013, having its registered office at D-1/1, Gillander House, 8, Netaji Subhas Road, Kolkata 700001;

-And-

In the matter of:

Sarkar & Chowdhury Enterprises Private Limited, a company incorporated under the provisions of the Companies Act, 1956, and a company within the meaning of the Companies Act, 2013,

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having its registered office at "Business Tower", 7th Floor,
Room No.7C, 206, A.J.C. Bose Road, Kolkata 700017;

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Petitioner

-Versus-

Mackintosh Burn Limited, a company incorporated under the
provisions of the Companies Act, 1956, and a company within
the meaning of the Companies Act, 2013, having its registered
office at D-1/1, Gillander House, 8, Netaji Subhas Road,
Kolkata 700001.

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Respondent

Counsel appeared:

1. Mr. Abhrajit Mitra, Sr. Advocate] For Petitioner
2. Mr. Ratnanko Banerji, Sr. Advocate]
3. Mr. D. N. Sharma, Advocate]
4. Ms. Iram Hassan, Advocate]

1. Mr. P. C. Sen, Sr. Advocate]
2. Mr. Raj Ratna Sen, Advocate]
3. Mr. Arup Nath Bhattacharyya, Advocate] For Respondent
4. Mr. Anirban Ray, Advocate]
5. Ms. Sayani Das, Advocate]
6. Ms. Sreetama Biswas, Advocate]

Order pronounced on 18/09/2018

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O R D E R

1. This is a petition filed under Section 58 and 59 of Companies Act, 2013 read with Section 111 and 111A of the Companies Act 1956 praying for rectification of the register of membership of the Respondent Company, recording and transferring of 100 shares in the name of the Petitioner and recording the name of the Petitioner as the shareholder in respect of the 100 shares in the Respondent Company.

2. Briefly, stating the facts as follows:-

(a) The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 mostly into the business of architectural engineering and construction. The Respondent Company was originally incorporated under the Companies Act, 1913. It was converted into a public limited company in the year 1961. The Respondent Company is mostly into the business of architectural engineering and construction and is a government company where 51.01 % of the shares are held by the Government of West Bengal.

(b) The Petitioner was incorporated pursuant to a certificate of incorporation and is also a registered holder and absolute owner of 254 equity shares of Rs. 3500/- each, all fully paid up or 28.54% of the total issued, subscribed and paid up share capital of the Respondent Company. The

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Petitioner, who is a shareholder and/or member of the Company and a bonafide purchaser of 100 shares in the Company from one Mr. Sankar Naik, was entitled to be recorded as a member in the Register of Member of the Respondent Company. After the issuance of such shares, the Petitioner had lodged the original share certificates in relation to the said 100 shares with duly executed Transfer Deed along with all other relevant documents with the Company on April 2, 2014. However, the said letter was returned back undelivered with the postal endorsement refused. The Petitioner thereafter caused a legal notice vide letter dated June 9, 2014, to record the name of the Petitioner in the share register, failing which appropriate proceedings would be instituted. The said letter was replied by the Respondent Company vide reply dated June 16, 2014. Subsequent to which, a second attempt was made on July 2, 2014 by the petitioner company to forward the original share certificates representing 100 shares along with duly executed Transfer Deeds and all other relevant documents to the Respondent Company, which was duly received by the Respondent Company. Despite receipt of the aforesaid request to record the transfer and the name of the petitioner in the Register of Members of the company, the Respondent Company did not take any steps to record the name of the petitioner or give any intimation

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relating thereto to the Petitioner, which compelled the Petitioner to issue a reminder dated August 25, 2014 to the company by hand which was duly received and acknowledged by the Company on the same date.

(c) Thus, the Petitioner kept on reiterating that despite the receipt of the request for registration of the transfer of shares to be recorded in the name of the Petitioner, the Respondent Company didn't take any steps. Hence, the Petitioner was bound to apply before this Hon'ble Court against the wrongful refusal of registration of the shares in its name. In the above said facts and circumstances, the Petitioner to seek the following reliefs:

- ◆ Mandatory injunction directing the Respondent to rectify the Register of Members by recording and registering the transfer of 100 shares in the name of the Petitioner and by recording the name of the Petitioner as a shareholder in respect of the 100 shares in the Register of Members of the company.
- ◆ An injunction restraining the Respondent from permitting any person or entity, other than the Petitioner from exercising voting rights and/or to receive any benefits, including bonus and dividends in respect of the said 100

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shares of and in the Company which was previously standing in the name of Mr. Sankar Naik.

- ◆ An injunction restraining the Respondent from dealing with and/or disposing of and/or encumbering or transferring in any manner the said 100 shares of the Company to any person or entity, save and except for the purpose of recording and registering the name of the Petitioner.

3. It is understood from the facts that the Respondent Company had not been acknowledging the shares of the Petitioner Company. Hence the present application has been filed under Section 111 of the Companies Act, 1956; 58 and 59 of the 2013 Act seeking reliefs as against the acts of the Respondent.

4. Reply Affidavit filed by the petitioner to the Supplementary Affidavit filed by the Respondent contending in brief is the following:-

(a) The petitioner company has two shareholders, namely, (i) MKJ Enterprises Limited – 59.45% and (ii) Keventer Capital Limited- 40.55%.

(b) The petitioner contends that neither the petitioner nor the controlling shareholding companies of the petitioner are in any way connected or engaged in construction

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and/or development of infrastructure or other real estate projects. Hence, according to the petitioner the ground sought to be taken by the respondent to deny registration of additional shares is not tenable or valid.

(c) The petitioner further denies that neither the petitioner nor the controlling shareholding companies of the petitioner are in any way engaged in any business which is similar to the business carried on by the respondent. Therefore, the petitioner clears off its stand by denying the very recognition of the entity by the name of the "MKJ Group" being involved in the similar business to what the respondent is involved in. Thus, there is no question of conflict of interest with the reason being that neither in the past nor at present the petitioner company is in competing business with the respondent.

(d) The petitioner further submits that the respondent's only duty is to maintain the statutory register of members for the purpose of recording the names of the shareholders and not to ascertain whether the shareholders of the company are making profit or loss. The petitioner further states that due to his investment in the purchase of shares of 254 + 100 shares in the company, it is incumbent upon the petitioner to reflect the correct value of the investments made

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by the petitioner in its book and has disclosed the same in the books of account.

(e) However, the registration of additional 100 shares, which are yet to be registered in the name of the petitioner are not considered yet, the petitioner still holds 28.54% paid up capital of the respondent which is more than 25%. However, the respondent had tried to deny the petitioner its right as a shareholder in respect of the additional 100 shares by raising flimsy, untenable grounds which are also beyond the mandate of applicable law in this regard. The petitioner denies the fact that the alleged MKJ group has sought to acquire the shares of the respondent in guise as alleged but also at the same time denies and disputes any sort of competing for business with the respondent or that the alleged MKJ Group intends to control the respondent or runs business parallel to that of the petitioner. The petitioner thus clears off its stand that neither the company is owned and controlled by the purported MKJ group or that purported MKJ Group will attend to indirectly control the management of the company, which will affect the policy and decision making of the company as alleged or at all.

5. Rejoinder filed by the petitioner contending in brief, is the following:-

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(a) The petitioner denied and disputed the contention raised by the respondent in the reply affidavit other than the contention admitted in the rejoinder. The petitioner contends that there is no question of the acquisition being in violation of the SEBI Act or its Take Over Regulations since the said Act has no application to the Respondent Company as the shares of the company are not listed. In view of the matter, the said acquisition cannot and will not change the control of the respondent Company as in spite of such acquisition and even after registration of said transfer, it will continue to remain a Government Company. The contention that the Company is running at a loss is insignificant for the purpose of adjudication of the issue in the present proceeding. It is also irrelevant as to whether petitioner is controlled by MKJ Group or that the business of the Company and the business of MKJ Group are similar.

(b) It is incorrect to say that by purchase of 100 equity shares of the Company, the intention of the petitioner is to take over the control of the respondent or that the action of the petitioner is contrary to the corporate law or regulations framed there under as alleged. It is incorrect to say that the Respondent Company and/or its board of directors have the right to refuse registration of the transfer of shares

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in favour of the prospective transfer as alleged. The respondent Company being a public Company, the shares are freely transferable. The respondent has no lien on the concerned shares as they are all fully paid up.

(c) The respondent has not given any reason for refusing to register, the transfer of shares pursuant to the request made by the petitioner vide letter dated July 2, 2014, whereby the petitioner had forwarded the original share certificates for transfer of shares in the petitioner's name. The decision of the Board of Directors dated 4th July 2014 that the transfer would be considered only after the approval from the competent authorities of the Government of West Bengal is illegal and bad in law and cannot be a valid ground to deal with the petitioner's request dated July 2, 2014. The decision taken by the respondent Company is without any sufficient cause and cannot be relied upon.

(d) It is incorrect to say that petitioner is not entitled to receive any benefit/dividend in relation to 100 shares as alleged. It is incorrect to say that petitioner has already surrendered/intended to surrender its original shareholding of 254 equity shares (in the respondent company) to the respondent. No question arises for the petitioners transferring any shares without being paid the market value

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for such shares. No ground or cogent grounds have been made out by the respondent either to deny the registration of shares or to dispose of the petitioner's representation dated July 2, 2014. Upon the said contentions, the petitioner prays for allowing the petition as prayed for.

6. Sur-Rejoinder filed by the Petitioner, contending in brief, is the following:-

(a) The petitioner denies that it has purposely suppressed the fact about the original shareholding pattern of the petitioner company and contends that reference to the shareholding pattern of the petitioner is not relevant. It also denies that the entry of MKJ Enterprise Limited and Keventer Capital Ltd. immediately after the transfer in 2012 in favour of the petitioner was made in a calculated manner to make an entry into the respondent through the backdoor. It also contends that none of the shareholding companies of the petitioner have been involved in infrastructure and development. It is also denied that the shareholders of the petitioner are presently undertaking six major civil construction projects. It is denied and disputed that the petitioner is controlled by such shareholders who are in competing

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business or who shall through the petitioner interfere with the affairs of the respondent as alleged.

(b) Further, the respondent has not been able to make out any ground which can be urged to be a sufficient cause for refusing registration of shares and that the purported grounds urged by the respondent of "conflict of interest" is misleading, untenable, frivolous and it appears that the respondent company is refusing to transfer of shares because of racial bias which is impermissible in law.

7. The Respondent filed Reply Affidavit contending in brief, is the following:-

(a) The person, namely Supratim Ghosh in the Respondent Company working in the capacity of Manager (Accounts) makes the following averments:

(i) That, the petitioner company's action had been contrary to the SEBI Act and it's Regulations;

(ii) That, the petitioner is running at a loss as evident from the Balance Sheet for the year 2013-14.

(iii) It can be construed from the Balance Sheet that the petitioner company is controlled by MKJ group involved

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in the development and infrastructural as well as commercial property projects.

(iv) The Respondent is also involved in the development and construction projects and is a government company.

(v) On the submissions of the Respondent – By the alleged purchase of 100 equity shares, the only intent of the petitioner company is to take over the control of respondent company. Also, the respondent company does not approve the acquisition of further shares by the petitioner in view of the shareholding of the petitioner since such action of the petitioner is contrary to the corporate laws and regulations. It is incorrect to say that the petitioner is a bonafide purchaser of 100 equity shares or is entitled to any benefit/dividends in relation to the 100 shares.

(b) The Respondent further takes the stand that it has the power given by the Board vested to them under Articles of Association to refuse registration of transfer of shares in favour of prospective transferees if they are not approved by the BOD. In the meeting held on 4th July, 2014 it has been resolved that the transfer of such shares would be considered only after the receipt of approval from the Competent Authorities of Government of West Bengal and it is further

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stated that there were no valid transfer deeds for transferring 100 shares. Thus, the Respondent further states that since the petitioner company was acting in breach of obligation under the Companies Act, hence such transfer was denied to the petitioner company.

(c) However, it is pertinent to note that on 13th March, 2014 the petitioner had already made an application for sale of 254 equity shares to the Principal Secretary, the Government of West Bengal, Public Enterprises Department and also to the Managing Director, Mackintosh Burn Co. Ltd. and is in the process of accepting subject to proper valuation of the same. Accordingly, the petitioner has already intended to surrender its shares to the respondent company which the company is in the process of accepting subject to proper valuation of the same. Hence, the legal right to the petitioner wouldn't be affected if at all any order of injunction is passed/or has been prayed for.

8. According to the Respondents, the allegations made by the petitioner wherein they had alleged that their rights would be violated if no interim injunctions are passed, which according to the respondents are not required to be passed as there is no violation of the rights of the petitioner rather the promoters/shareholders of the petitioner shall be

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benefited since they would be in a position to prevent any resolution with regard to any development works being passed, in the event the same is contrary to the interest of such promoters who are also competent to run the business of the respondent. Based on such facts the application made by the petitioner needs to be dismissed.

9. Supplementary reply Affidavit filed by the Respondent contending in brief, is the following:-

(a) The Petitioner Company is owned and controlled by one "MKJ Group", a company which runs a competing business similar to that of the respondent. The petitioner already holds 254 shares. The petitioner furthermore had purchased 100 shares from Shankar Nayak with the advances made by the "MKJ group". Thus, once the 100 shares are registered transferring the shares in the Register of Members, it will give the petitioner a total 354 shares, while the government of Bengal holds 454 shares with the respondent company. By doing so, the petitioner will attempt to compel the company to sub-tender/assign the execution of work to "MKJ group", the controlling company of the petitioner, and will have the ability to disrupt the working of the company to benefit MKJ Group in competing tenders.

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(b) The advancement of a loan of Rs. 11,60,00,000 from MKJ Group to the petitioner company (with the backdrop of the petitioner company having paid-up share capital of Rs. 1,00,000/- with cash and cash equivalent in the form of assets of Rs. 5,81,343/- with no revenue generation and is running at a loss) is with the intention to acquire the shares of the Respondent Company and with an attempt to compel the Board of directors of respondent to take resolutions favouring the "MKJ Group" in cases of grant of contracts/sub-contracts for the business or tenders of the respondent Company.

(c) The petitioner company is not only a loss-making company, owned and controlled by "MKJ group", but that the "MKJ group" will attempt to indirectly control the management of the respondent company, and affect the policy/decision making of the respondent company. Moreover, such registration of shares and transfer of shares shall be in the violation of SEBI regulations and also, the MKJ Group in guise of the petitioner will then have the right to block resolutions of the company, which are in contravention to its private business interest.

10. Based on the aforesaid facts and circumstances it can be well apprehended by the Respondent that the petitioner,

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though acting alone but with the guise and guidance of another company named "MKJ group". Also, to note that prior to the registration of 100 shares, there were 254 shares held by the petitioner company. However, none of the shareholders of Petitioner Company were in competing business with respondent. With the advent of "MKJ group" including Keventer capital in 2014 (the sister companies) to the petitioner company, they were directly in competing for business with the respondent company. Howsoever, the question remains that whether the petitioner company acting in the guise of "MKJ group" company may in future try to acquire the management and control of the Respondent company once those 100 shares are registered.

11. Respondent filed Reply to the Rejoinder contending in brief, is the following:-

(a) The petitioner has purposely suppressed the facts about the shareholding pattern of the petitioner Company. The Company was incorporated by Indrajit Sarkar and Ashoka Das Chowdhury, the two original shareholders of the respondent Company on 7th December 2011. In January 2012 they applied for transfer of the shares in favour of the petitioner Company, which was allowed considering the fact neither the said two shareholders nor the said Company was in any business which

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may jeopardize the interest of the respondent Company. MKJ Enterprises Ltd. & Keventer Capital Ltd. (Formerly Priya Healthcare Private Ltd) immediately after the transfer of shares in 2012 in favour of the petitioner Company, was made to make an entry into the Company in a calculated manner through the back door. The entire episode of formation of the petitioner Company by the said Indrajit Sarkar and Ashoka Das Chowdhury, transfer of their shares into the petitioner Company, investment of Rs.11.66 crores by the present shareholders prior to March 2012 in a Company formed in December 2011, having a net share capital of Rs.1 lakh only, together with a negative income clearly demonstrate that the same has been done deceptively with an ulterior motive to acquire control of the respondent.

(b) The petitioner Company is also controlled by the aforesaid Companies which are involved in infrastructural development. The dividend declared by the respondent Company per share of Rs.3,400 face value is Rs.475 per share. Therefore, the total dividend income per year for 254 shares is Rs.1,20,650. Even if the additional 100 shares alleged to have been purchased from Shankar Naik is taken into account, the total dividend income would be Rs.1,68,150 per year against the investment of Rs.11.60 crores together by the MKJ

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Enterprises Private Ltd and Keventer Capital Ltd. Whereas even if the said money was kept in ordinary savings bank account, the revenue generation per year would have been Rs.34,00,000 per year calculated at 3% per annum simple interest. In such circumstances, there could have been no justification of a NBFC or business concern like MKJ Enterprises Pvt. Ltd. to invest such huge money for a return of 0.16% p.a. simple. In such circumstances, the purported allegation that Keventer Capital Ltd. being NBFC has invested in procuring share of respondent Company is unfounded.

(c) It is incorrect to say that petitioner Company is not connected or engaged in construction or development or infrastructural or real estate project. At present six major civil construction projects are being carried on by Keventer/MKJ Group, some of which are 88 East, in association with Tata Housing, Keventer Cross Winds, Keventer the North, Keventer Rishra, Keventer Westwind, Urbana. Further, as would appear from the balance sheet of Keventer capital and MKJ Enterprises as annexed by the petitioner themselves that the Keventer and MKJ Enterprises have invested in various real estate and infrastructure development business. Both the shareholder Companies of the petitioner are also controlling stakeholders of various associate Companies which are engaged

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in civil construction, civil engineering and infrastructural business. So also the petitioner Company is interested in several civil engineering and infrastructure Companies either indirectly or directly. Shareholders of the petitioner has also acquired shares of Government in Metro Dairy at a very meagre value and there was no better bidder. Immediately upon acquiring such shares they sold a very meagre portion to an entity abroad at a very high price and the same is now under enforcement probe.

(d) The respondent carries out various Government work as project management and consultant, wherein the entire cost of work is transferred to it. The respondent is privy to several information as a nodal agency for carrying out Government infrastructural tenders and preparing detailed project reports for Government to ascertain the cost of works, which information, if available to any prospective bidder would cost unjust and illegal advantage. In the event such advantage is allowed to be received, such basics of the Company as a nodal agency would be prejudicially affected other than affecting a fair tender process for the public at large. Upon the aforesaid contentions, the respondent prays for dismissal of the petition with cost.

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12. Heard Ld Sr. Counsels Mr. Abhraj Mitra, Mr. Ratanko Banerji and the Ld. Counsel Mr. D. N. Sharma for the petitioners and Ld Sr. Counsel Mr. P.C.Sen and the Ld. Counsel Mr. Raj Ratan Sen for the Respondent. Perused the records, notes of arguments and the citations referred to on both sides.

13. Upon hearing the arguments and considering the contentions on both sides the points that arise for determination are the following:-

(i) Whether the petition filed is premature as alleged by the respondent?

(ii) Whether the shareholders of the Petitioner Company is doing competent business with the respondent Company? If so whether the conflict of interest is sufficient cause in the facts and circumstances of the given case for refusal of registration?

(iii) Whether the transfer of shares in the name of the petitioner is deceptive and mala fide in the background of the respondent company?

(iv) Reliefs and cost.

14. Point No. (i)

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15. Before I come to the point for determination let me have an over view of the facts behind the order of remand by the Hon'ble Supreme Court.

16. The petitioner Company was incorporated in the year 2011 under the provisions of the Companies Act, 1956 mostly into the business of architectural engineering and construction. Petitioner company consists of shareholders namely MKJ Enterprises Limited having 59.45% and Keventer Capital Limited having 40.55%. The petitioner Company purchased additional 100 shares on or before 02.07.2014 from one Mr. Shankar Nayek in physical mode. After purchasing the above said shares in the respondent Company the petitioner applied for registering the transfer in the name of the petitioner company vide letter dated 02.04.2014 with original share certificates along with transfer deeds duly signed, stamped and executed to the respondent Company for registering the transfer of such 100 shares in the name of the petitioner Company but the said communication was returned with postal remark "**Refused**". Thereafter, the petitioner Company through its advocate issued notice dated 09.06.2014 calling upon the respondent Company to record the name of the petitioner Company in the share register which was replied by the respondent Company as per letter dated 16.06.2014. Upon receipt of the letter from the



respondent Company, the petitioner Company (in short the Petitioner) vide letter dated 02.07.2014 forwarded original share certificates representing 100 shares with all required documents to the respondent Company for effecting registration of the transfer in the name of the petitioner which was duly accepted by the respondent Company. However, despite receipt of the aforesaid request to record the transfer in the name of the said Company, no information was received by the petitioner Company nor any step has been taken by the respondent company to record the name of the said company as its shareholder of such 100 shares. A reminder letter was issued on 25.08.2014 to the respondent Company to re look into the matter which was duly acknowledged by the Respondent Company, but the Respondent Company did not respond. Despite repeated reminder, the Respondent Company did not register the transfer in the name of the petitioner nor refused the transfer and, therefore, a legal notice has been issued to the respondent Company on 11.09.2014 demanding to take immediate steps to register and record the name of the petitioner Company. Despite the receipt of the legal notice, the respondent Company did not effect the transfer as demanded nor refused, thereby the Petitioner filed this Company Petition before the erstwhile Company Law Board on 29.09.2014.

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17. Company Law Board, Kolkata Bench, vide order dated 16.09.2015 allowed the petition and directed the respondent Company to register the transfer of impugned 100 shares in the name of the petitioner Company within 10 days of the receipt of the order and to make suitable entries in the Register of Companies thereafter. Aggrieved by the direction issued by the Company Law Board, the respondent Company preferred an appeal before the Hon'ble High Court at Calcutta as ACO No. 199 of 2015 in APO No.448 of 2015. Vide order dated 15.10.2015 the Hon'ble High Court at Calcutta dismissed the appeal APO No.448 of 2015 finding that "*since the legal issue sought to be urged is devoid of merit, APO No.448 of 2015 and ACO 119/2015 are dismissed without going into the substance of the order*".

18. Aggrieved by the order of the Hon'ble High Court at Calcutta, the respondent Company preferred SLP before the Hon'ble Supreme Court as SLP No. 35029 of 2015. That SLP was disposed of by the Hon'ble Supreme Court as withdrawn with permission to approach the High Court. After withdrawal of the SLP the respondent Company filed an appeal as ACO No.73 of 2015 in APO No. 448 of 2015. The said appeal seems to be filed for review of the earlier order by the same Bench of the Hon'ble High Court at Calcutta. The Hon'ble High Court at Calcutta vide order dated 8th August 2016 dismissed the appeal. The

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respondent Company again approached the Hon'ble Supreme Court by filing SLP No. 29122 of 2016. That SLP seems to be allowed permitting the appellant respondent Company to file proper review petition before the Hon'ble High Court at Calcutta. Thereafter, the respondent Company filed review petition before the Hon'ble High Court at Calcutta as RW0 No. 59 of 2016 in AP0 No.448 of 2015. That review petition was dismissed by the Hon'ble High Court at Calcutta vide order dated 15.09.2017 ***holding that no ground for review are made out.*** Aggrieved by the order, an SLP was again preferred before the Hon'ble Supreme Court as Civil Appeal No.3322&3323 of 2018. Hon'ble Supreme Court allowed the appeal setting aside the order of the Company Law Board and the corresponding orders of Hon'ble High Court at Calcutta and remitted the matter to this Tribunal for consideration afresh of the appeal filed under Section 58 of the Companies Act 2013 (typed as "1956" in the copy of the judgement). The operative portion of the judgement reads as follows:

"We make it clear that the Tribunal shall pass order afresh, uninfluenced by any of the observations and findings in the order dated 16.09.2015 of the Company Law Board, orders of the High Court or this Court. We direct the Tribunal to pass orders expeditiously since the appeal is of the year of 2014. The appeals are disposed of accordingly."

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19. The respondent Company seriously contested this case. Respondent Company/ Mackintosh Burn Limited was originally incorporated under the Companies Act 1913. It was converted into a public limited company in the year 1961. According to the respondent, it is a profit making company engaged in the business of building and undertaking similar contracts. It is a state owned Company enjoying the benefit of direct allotment of civil work of the state of West Bengal without participating in tender, without security deposit. The respondent contends that the petitioner company was in competing business with respondent upon acquisition of shares of the petitioner company by MKJ Group. Though several grounds were raised in the reply affidavit, supplementary affidavit and in the reply to the rejoinder filed by the respondent, the Ld. Sr. Counsel for the respondent at the time of argument limited his arguments to the following grounds for the refusal of transfer of shares in the name of the petitioner:

- (a) Premature application by petitioner;
- (b) The petitioner is a loss making company;
- (c) Controlling shares to disrupt management of the respondent company;
- (d) Registration of shares not in interest of respondent;

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(e) Article 48 of Memorandum of Association and Articles of Association not complied with.

20. The above said are the brief background behind the remand and the grounds under challenge which I am liable to answer. Coming to the point the respondent company contends that the filing of the application is premature and as such is liable to be rejected on that ground alone. As per sub-section (4) of Section 58 of the Companies Act, 2013 an applicant whose application for transfer is refused by the respondent company, the transferee within a period of 60 days of such refusal can file an application before the Tribunal. Or else where no intimation is received by the applicant from the company, it can file appeal before the Tribunal within 90 days of the delivery of the instrument of transfer or intimation or transmission. It is good to read Sub-Section 4 of Section 58. Sub-Section 4 of Section 58 of the Companies Act, 2013 reads as follows:

"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

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transfer or intimation or transmission, appeal to the Tribunal."

21. In the case in hand the petitioner filed the application before the Company Law Board on 29/09/2014. The Board of Directors of the respondent company neither passed a resolution refusing the transfer nor issued any intimation in response to the application for transfer of shares in the name of the petitioner. Here in the instant case the petitioner applied for transfer along with required documents vide letter dated 02/04/2014. That application was since returned to the petitioner for the reason of refusal. No explanation forthcoming on the side of the respondent company as to why it refused to accept a letter addressed to it by the petitioner company. A deemed service of application for transfer of shares can be legitimately inferred. However, the petitioner on receipt of the application returned back to the petitioner, issued legal notice on 09/06/2014 and again sent application with original share certificates to the respondent on 02/07/2014 which has been received by the respondent. But the respondent did not pass a Resolution nor communicated order of refusal or acceptance and thereby the petitioner filed this petition on 29/09/2014. In the above said facts and circumstances an application for transfer of shares being evidently sent to the respondent along with the transfer

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application of shares on 02/07/2014 and that the respondent company did not refuse nor send any intimation as provided under sub-section (4) of Section 58 of the Companies Act, 2013, filing of present petition before the erstwhile Company Law Board is found in time and in compliance of sub-section (4) of Section 58 and therefore the preliminary objection raised by the respondent company is found not sustainable. This point is answered accordingly.

22. The Point No.(ii)

23. The next contention on the side of the respondent is that the purported purchase of 100 equity shares of the company is with an intention to take over the control of the Government Company and the attempt of the petitioner is contrary to the corporate laws and regulations framed thereunder. According to the Ld. Sr. Counsel for the respondent, the petitioner company is a loss making company, and the transfer of shares will disrupt the business and administration of the respondent, the petitioner being the 2nd largest shareholders having the 2nd largest controlling shares and that registration of shares in favour of the petitioner is not in the interest of the respondent company. It is submitted that the petitioner is a company owned and controlled by one MKJ Group, a company which

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runs competing business with the respondent and hence transfer of shares as prayed for cannot be allowed.

24. The Ld. Sr. Counsels for the petitioner on the other hand submits that neither the petitioner nor the controlling shareholding companies of the petitioner are in any way connected or engaged in construction or development of infrastructure or other real estate projects. According to them, the said ground sought to be taken on the side of the respondent for denying the registration of additional shares in the name of the petitioner's company is not tenable or valid. According to them, the transfer of shares requested by the petitioner is in accordance with the Articles of Association and Articles of Association do not restrict the Board of Directors of the respondent company in making such transfer and, therefore, refusal to transfer on the allegations that additional purchase of shares enable the petitioner to takeover the control and management of the respondent company is in violation of the Articles of Association.

25. Article 44 of the Articles of Association is relied upon by the Ld. Sr. Counsels for the Petitioner so as to strengthen his submission that the Board of Directors of the respondent company have no authority to decline the transfer of shares. They would further submit that the Board of Directors can

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decline the transfer of shares only in case where the respondent has a lien over such shares and when such shares are not fully paid up. According to him, none of the grounds above referred, is applicable in the instant case as there was no lien on any shares of the petitioner and further the shares are fully paid up. Therefore, Article 44 of Articles of Association cannot authorise the respondent to refuse registration of transfer of additional 100 shares purchased by the petitioner. They stressed to rely upon Article 44 of the Articles of Association, which reads as follows:-

"The directors may, without assigning any reason, decline to register any transfer of shares upon which the company has a lien, and in case of shares not fully paid up, may refuse to register transfer to a transferee of whom they do not approve."

26. Here in the instant case there was no Board Resolution refusing the transfer of shares. The reason highlighted by the respondent company in the reply affidavit as well as in the supplementary affidavit filed by the respondent is that one of the group companies of the petitioner company who is controlling the petitioner company may disrupt the management of the respondent company if the shares asked for transfer is transferred in favour of the petitioner. No argument was advanced as to the power of the Board of Directors in declining



the transfer referring to Article 44. What is argued is that the Tribunal is bound to consider the issues framed by the Hon'ble Supreme Court in the order of remand that whether the conflict of interest falls in the sufficient cause of sub section 4 of section 58 of the Companies Act, 2013.

27. According to the Ld. Sr. Counsels for the petitioner the Hon'ble Supreme Court directed the Tribunal not to be influenced by any of the observations and findings in the order of Company Law Board, orders of High Court or the order of Hon'ble Supreme Court and therefore to be determined independently. The Hon'ble Supreme Court vide judgement dated 27.03.2018 set aside the order of CLB mainly for the reasons highlighted in Para 17 of the said judgement. It is good to read para 17 of the said judgement. It read as follows:-

"Be that as it may, as we have been taken through the grounds before the Company Law Board, we propose to consider the matter from that stage. The Company Law Board, it appears, was of the view that the refusal to register the transfer of shares can be permitted only if the transfer is otherwise illegal or impermissible under any law. Going by the expression "without sufficient cause" used in Section 58(4), it is difficult to appreciate that view. Refusal can be on the ground of violation of law or any other sufficient cause. Conflict of interest in a given situation can also be a cause. Whether the same is sufficient in the facts and circumstances of a given case for refusal of

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registration, is for the Company Law Board to decide since the aggrieved party is given the right to appeal. The contention of the appellant before the Company Law Board that the whole transfer is deceptive and mala fide in the background of the respondent company, should have been considered".

28. A reading of the Para 17 above referred, it appears to me that although shares of Public unlisted Company are freely transferable, but with sufficient cause, the company, like the company in hand can refuse to register the transfer of shares. The Hon'ble Supreme Court has held that "***Conflict of interest in a given situation can also be a cause. Whether the same is sufficient in the facts and circumstances of a given case for refusal of registration, is for the Company Law Board to decide since the aggrieved party is given the right to appeal.***" So what I understood is that non-consideration of question of conflict of interest and as to whether the whole transfer is deceptive and mala fide in the background of the respondent company are the reasons to set-aside the orders of CLB. The above said findings indicates that this Tribunal is bound to answer those points which the CLB omitted to consider, of course untrammelled by the observations of the Hon'ble Supreme Court and orders of the High court and the CLB.

29. Since Hon'ble Supreme Court has held that conflict of interest can be a sufficient cause for refusal of transfer of



shares, the question is whether the shareholders of the petitioner company are doing competent business with the respondent? The respondent contends that MKJ Group, who has got majority shareholding of the petitioner's company, is doing the very same business of the respondent company, and that it is carrying on business like architect, surveyor and contractor and is doing competing business with the respondent and therefore transfer of shares, if allowed, it would enrich MKJ group to the detriment of interest of the respondent company and its shareholders. The petitioner has denied the allegations that its shareholders are doing the very same business of the respondent company. Reply to the rejoinder has been filed by the respondent denying the contentions of the petitioner that its shareholders are not carrying similar business run by the respondent. According to the Ld. Sr. Counsel for the respondent, the petitioner company is also interested in civil engineering and infrastructure construction either directly or indirectly and that shareholding company of the petitioner has undertaken various projects and from the website of the Ministry of Corporate Affairs, it is learnt that a Project that they are carrying out, named Urbana, has undergone CID enquiry.



30. According to the Ld. Sr. Counsels for the petitioner none of the projects highlighted by the respondent companies in their supplementary affidavit are relevant for the consideration of the interest of the company in civil and infrastructural development. According to them, the projects referred to in the Supplementary Affidavit would not make the petitioner's shareholders as architects or contractors and thus rivals of the respondent's company. According to them, architects and contractors of the development projects referred to in paragraph 7 of the supplementary affidavit are neither the petitioner nor any of its shareholder companies. So also it is submitted that the petitioner company have acquired any shares of the Government in Metro Dairy or there is any interference as alleged or at all.

31. The very case of the respondent is that MKJ Enterprises and Keventer Capital Ltd are the two shareholders of the petitioner's company and the original shareholders, namely, Indrajit Sarkar and Ashoka Das Chowdhury purchased the shares of the respondent company in the year 2012 at a time when MKJ Enterprise and Keventer Capital Ltd were not the shareholders of the company and thereby 254 shares of the respondent company was transferred in the name of the petitioner's company. The said fact was allegedly suppressed by the petitioner company

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while applying for transfer of 100 shares in their name which is in dispute in the case in hand. According to the Ld. Sr. Counsel appearing on the side of the respondent, the MKJ Enterprise Ltd., who is controlling the company as a whole is attempting to make an entry into the respondent company through the back door so as to capture the business of the respondent company. It would further submit that MKJ Enterprise Ltd. and Keventer Capital Ltd are in real estate business and engaged in the very same business activities of the respondent company and engaged in development and infrastructural activities and that it is not correct to say that the said Keventer Capital Ltd. is an NBFC company as alleged by the petitioner. To highlight the said contentions of the respondent, Ld. Sr. Counsel for the respondent relied upon the copies of documents in **Annexure 'X'** allegedly downloaded from the website of Joint Venture Companies allegedly belonging to the group companies of MKJ Enterprise and Keventer Capital Ltd.

32. Before coming to Annexure X, it is significant to note here that when the transfer of 254 shares of the respondent companies was effected in the name of the petitioner company, the petitioner company was engaged in the business of construction, building, design, erection and other related activities. Annexure P-2 annexed to the petition is the



Memorandum and Article of Association (In short MOA). As per the MOA, the very object of constitution of the petitioner company is for doing business referred to above. This fact is nowhere challenged by the respondent. On the other hand, MKJ Enterprises Ltd and Keventer Capitals Ltd. were constituted for not doing business similar to the business run by the respondent. As per the MOA of the MKJ Enterprises Ltd., the holding company is incorporated to carry on the business of stockists, agents, distributors, traders, and dealers, etc in all kinds of ferrous and non-ferrous metals, steels, alloy steels, copper., etc and all other kinds of metals and to undertake, transact and execute agency business, and to carry on all or any of the business of transport, cartage and haulage, storekeepers, and job masters, etc for the purpose of business of the Company, and to sell, lease and surrender, mortgage, dispose of or otherwise deal with all or any part of the property, assets rights or undertaking of the Company. While Keventer Capital Ltd. is incorporated to carry on the business of an Investment Company, and for that purpose to acquire shares, debenture stock, bonds and securities, etc issued or guaranteed by any State or Central Government, Public Body or Authority or any company constituted., and to carry on business of financing Industrial Enterprises by way of loans,

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etc and to give guarantee for payment of money or performance of any obligations or undertaking.., and also to carry on business as goldsmiths, silversmiths, jewelers, etc. These facts are also not challenged on the side of the respondent. According to the Ld. Sr. Counsel for the respondent, the petitioner company is a loss making company at the time of transfer of 254 shares but when the application for transfer of 100 shares in disputes comes for consideration, the shareholders of the petitioner company are found engaged in competing business hence it is a sufficient cause to deny transfer.

33. Whether a company is a loss making company or not is immaterial with regard to refusal or acceptance of transfer of shares and it is not a sufficient cause which comes within the purview of sub section 4 of section 58 of the Companies Act,2013. So it has come out in evidence that the respondent has transferred shares belonging to Indrajit Sarkar and Ashoka Das Chowdhury, in the name of the petitioner company while it was doing competing business with the respondent on the date of transfer. Truly now petitioner company is a joint venture company. MKJ Enterprises Ltd. is the holding Company of the petitioner. The attempt on the side of the respondent is that MKJ Enterprises Ltd. and Keventer Capital Ltd. group companies



who are controlling the petitioner company, are engaged in competing business and if the transfer is registered, a conflict of interest will occur and therefore the respondent has every right to refuse transfer.

34. The Ld. Sr. Counsel for the respondent stressed Annexure X to prove that both the shareholders of the petitioner company are engaged in construction or development of infrastructure or a real estate project and brought to my notice six major civil construction project allegedly being carried on by MKJ Group and Keventer Capital Ltd. Some of the projects allegedly being carried on by the group companies that he highlighted, are 88 East, in association with Tata Housing, Keventer Cross Winds, Keventer the North, Keventer Rishra, Keventer Westwind and Urbana. According to him, the aggregate sale value of the said projects are more than Rs.1,000 Crores and project Urbana is facing a CID enquiry. So, also referring to balance sheet of Keventer Capital Ltd. and MKJ Enterprise annexed with the petitioner's supplementary affidavit, it is submitted that MKJ Enterprise Ltd and Keventer Capital Ltd. had invested in various real estate and infrastructure company and according to the Ld. Sr. Counsel for the respondent, it is a proof that demonstrates that Keventer Capital Ltd. had also invested in MKJ Developers Ltd. and it is an indication that both

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shareholders of the petitioner company are also controlling stakeholders of the various associate companies, which are engaged in civil construction, civil engineering and infrastructure business.

35. **Annexure 'X'** being not copies of documents downloaded from the respective companies and some are copies of e-newspaper, its admissibility and reliability was seriously challenged on the side of the petitioner. According to the Ld. Sr. Counsels for the petitioner, even if it is relied upon, it does not prove that those companies are shareholder's companies or that those companies are engaged in construction, contract work or infrastructure development like the business activities of the respondent. Ld. Sr. Counsel for the respondent submitted that the companies referred to in Annexure X are associated companies of MKJ Enterprise and Keventer Capital Ltd. According to Ld. Sr. Counsels for the petitioner, even if the shareholders of the petitioner company have investments in real estate and infrastructure development company, that does not *ipso facto* signify that the said company will start operating business in similar line. They also reiterated that shareholding companies of the petitioner are not having controlling stake in companies which are engaged in civil construction or civil engineering business as alleged



or at all. So also it is submitted that in the project Urbana, Government of West Bengal is the largest shareholder and denied the contention that CID inquiry is pending against the project Urbana referred to in the reply to rejoinder filed by the petitioner. I do find some force in the argument advanced on the side of the petitioner. An investment in a company, even if it runs similar business as run by the respondent, is not at all a sufficient cause to deny transfer unless it is proved that such an investment would conflict the interest of the recipient company. Such a proof is lacking in the case in hand. So such an investment cannot be inferred as an investment to do business in the line of business object of the respondent company.

36. The Ld. Sr. Counsels for the petitioner further would submit that the petitioner's shareholders are not architects and contractors and thus are not rivals of the respondent company. The list of name of architects and contractors as shown in the reply to rejoinder is an attempt to prove that they are the architects or contractors for the projects of the associated companies of petitioner's shareholders. So also they have denied that the petitioner is in any way involved in the business of Metro Dairy so as to acquire shares of the Government in Metro Dairy. To disprove the said contention

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of the petitioner here in this case, there is no supporting proof other than the disputed **Annexure 'X'**.

37. Annexure X, if screened in detail, it also not helpful to prove the contention on the side of the respondent that the petitioner's shareholders have controlling stake in the companies referred to in the Annexure X. **Annexure X** refers to a company by name **MKJ Developers**. A reference to the details of the said company, it is understood that the MKJ Developers' directors are Pallab Kumar Ghatak, Mahendra Kumar Jalan and Shashi Prabha Jalan. However, the object of the company for which it has been incorporated was not found on the page 23 of **Annexure X**. Mahendra Kumar Jalan and Shashi Prabha Jalan are the controlling shareholders of MKJ Enterprises Ltd. The details of the MKJ Developers are insufficient to hold that the shareholders of the petitioner company have controlling stake in the MKJ Developers or that the said company was constituted for the business object similar to the object of the respondent company. On production of copy of MOA also the contention of the respondent not at all improved. The main object as provided in the MOA read as to carry on the business of imports and exports of all kinds of goods, merchandise and articles and to act as export-import agents in all types of

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goods and articles, and to invest, buy and sell shares, securities, properties, etc and to finance industrial enterprises by way of advances and loans, and to receive money deposits on interest or otherwise and to lend money on interest and to guarantee the performance of contracts by any person, companies, or firms, provided the company shall not carry on the business of banking subject to Section 58A of the Companies Act, 1956 and direction of the RBI.

38. A copy of e-news publication namely **Livemint** referred to on page 24, is relied upon to show that CID enquiry was initiated as against group companies of MKJ. A look on Page 24, it is understood that a probe has been initiated by the Criminal Investigation Department (CID), West Bengal as against the **Bengal NRI Complex Ltd.**, which is allegedly run by a joint sector companies belonging to MKJ Enterprise but there is no supporting evidence to prove that the Bengal NRI Complex Ltd. is a joint sector company belongs to the MKJ Enterprise and it is under its control. Moreover how is it related to the petitioner company's business objective, has no explanation forthcoming. Its MOA was produced on the last day of hearing . It read as follows:-

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"The main objects as per its MOA read as to acquire by purchase, lease or otherwise develop or operate land, buildings, including agricultural land, mines, farms, etc and in particular by preparing building sites, apartments, and to manage land, building or other properties whether belonging to the company or not, and to act as architects, builders, contractors, dealers in building requisites and materials, and to carry on the business of builder, developer, real estate agent and promoter, and to carry on the business of importers and exporters of all goods and services, and to acquire, invest, etc in any shares, etc guaranteed by companies, or securities guaranteed by government bodies, etc".

39. Truly the above said objects reveals that it is engaged in the similar business of the respondent. However as I stated above what is the controlling stake in it by the shareholders of petitioner company no proof produced. The list of shareholders produced at a later stage also not proves the contention on the side of the respondent that the shareholders of petitioner is having controlling stake in the said company.

40. Another company name referred to in **Annexure X** on page 25 is **Century Nirman Private Limited**. Its Directors are Kailash Chandra Joshi and Shyam Sunder Singhania. None of the directors of MKJ and Keventer are found in the name of the directors shown as the directors of Century Nirman Private Ltd. What is relied upon is the E-mail ID- mkjrsls@keventer.com, for strengthening that the said company is a joint venture company

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of MKJ Group. I am afraid, by simply relying upon the e-mail address of a company, can I hold a finding that it is a group company of MKJ Enterprises Ltd. I cannot. An e-mail ID cannot be taken as the proof to prove that MKJ and Keventer are group companies of Century Nirman Private Limited as shown in Annexure X. On the other hand, the names of the directors do not show that anyone of the directors of MKJ Enterprise and Keventer Capital Limited are the directors of the aforesaid company. The copy of MOA of this company also was produced. Its objects though reveals that one among the object is construction whether it is doing construction independently or not or that the shareholders of the petitioner company is having controlling stakes in it no proof.

41. Next company referred to is the **Ishan Housing Projects Ltd.** Its detail is given on page 26 and 29 of **Annexure X.** A look on the page 29, it is understood that Ishan Housing Projects Ltd.'s Directors are Ratan Lal Sethia, Shashi Prabha Jalan, Manoj Bose and Mohammad Faruk Mallick. Shashi Prabha Jalan is one of the directors of MKJ Developers and she is also a director of MKJ Enterprise. So, if the details shown in respect of Ishan Housing Projects Limited is true, it only shows that one of the directors of the MKJ Enterprises Ltd is a director of Ishan Housing Projects Limited. But nothing



shows that she has got controlling stake in Ishan Housing Projects Limited. So also the copy of Memorandum of Association not at all produced to prove that the said company was incorporated for the purpose of doing business in construction, infrastructure development and that they are engaged in architects or contracts.

42. The next company referred to is **DSK Real Estates Limited**. Its detail is given on pages 27 (35) and 28 of **Annexure X**. It shows DSK Real Estates Limited's activity. It shows that the said company is engaged in buying, selling, renting and operating of self-owned or leased real estate such as apartment building and dwellings, non-residential buildings, developing and sub-dividing real estate into lots etc. The activities referred to above is inadequate to hold that the said company is engaged in the field of construction, architect and infrastructural development. Otherwise buying, selling and renting apartments dwellings etc., do not come under the purview of the business objective of the respondent. Copy of MOA seen not produced to prove that its objects include construction and architecture. The directors of the said company as revealed on **page 27** of **Annexure X** are Vivek Khemka, Radhe Shyam Khetan, Gaurav Khaitan, Kailash Chandra Joshi and Shwetaank Nigam. None of the shareholders of MKJ have found

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a place in the list of directors of the said company. Whether they are the shareholders having controlling stakes in the said company here in this case, no proof.

43. Next company referred to is **Mantu Housing Projects Ltd.** The information regarding the directors and the company's activities is not at all revealed from the documents relied upon on page 30 of **Annexure X**. The copy of MOA seen produced to prove its objects. Truly its objects also shows it was incorporated for doing construction and architecture business in the same line of business of the respondent. So also the list of shareholders produced on the side of the respondent shows that MKJ Enterprises Ltd. is holding 24% of shares in the said company. So what I understood is that **Mantu Housing Projects Ltd** is an associated company of MKJ Enterprises Ltd. as defined under section 2(6) of the Companies Act, 2013.

44. Next company referred to is **Madanlal Limited**. Page 31 of the **Annexure X** indicates that Madanlal Limited is a member company of MKJ Group and Keventer Group of companies and that it is engaged in purchase and sale of securities and real estate, investment, etc. So even if it is relied upon, what it indicates is that Madanlal Limited is group company of MKJ Group and Keventer Group and the said company is engaged in purchase and sale of securities and real estate, etc. and

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nothing shows that the said company is engaged in the business of architecture, construction, infrastructure development and engaged in the business similar to the business of the respondent company. Moreover whether the shareholders have controlling stake in the company here in this case no proof.

45. The next company is **Right Address Ltd.** The document on page 33 of **Annexure X** does not reveal as to who are the directors of Right Address Ltd., though the said company's description includes activities like, housing and construction sector. Whether it is associated company of MKJ Group or the directors of MKJ are having controlling stake in the Right Address Ltd., here in this case, no supporting proof.

46. The next is **Trinity Developers Private Limited.** Its details is described on page 34 of **Annexure X** and its activity is shown as building of complete structure or parts thereof, civil engineering. To show that it is an associated company of MKJ Enterprise and Keventer Group what is relied upon is the E-mail mkjrls@keventer.com. As I observed above only because of the similarity of the name of MKJ and Keventer appears in the e-mail address given by the Trinity Developers Private Limited, it cannot be relied upon to strengthen the case of the respondent that it is an associate company of the petitioner's shareholders company. So even if its object as

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revealed from MOA includes business of construction it cannot be taken as a proof to prove that shareholders of petitioner is doing the said business.

47. **Keventer The North** is the next company referred to by the respondent. Page 36 of **Annexure X** does not provide the name of the directors or the activities of the company. What is revealed is that the company is related to residential project which is made by the Keventer Group, the North Real Estate. So even if it is a builder, whether the petitioner's shareholders have any controlling stake in the said company or it is a group company, no details can be revealed from its details available at the page referred to.

48. Next company referred to is **Keventer Rishra**. Its details are referred to on page 37 of **Annexure X**. However, no details are available in it so as to rely upon the contentions of the respondents. So it will not be helpful to the respondent.

49. Next company referred to is **Keventer Westwind**. The details as shown on Page no.38 read as follows:-

"Located in Garia, Kolkata. Westwind is a premium housing project launched by Keventer Group. The project offers Apartment in 2, 3 BHK configurations available from 1163 sqft. to 1211 sqft. The project is a completed project and possession in Dec. 11. Westwind has many amenities, such as, Swimming Pool, Landscaped Gardens, Maintenance Staff, Community Hall etc."

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Whether the said project was constructed and designed by the company itself or whether the company is selling a developed project by engaging contractors as contended by the respondent is not certain from the above said details. So also though it is named as group companies of Keventer, its connection with Keventer Capitals Ltd. cannot be inferred only because of similarity in the name of one of the petitioner's shareholder company.

50. The respondent also referred to **Keventer Westwind, Jadavpur**, Kolkata South on page 39 of **Annexure X**. No details seem to be available in it.

51. The next one is a project namely **TATA 88 East at Alipore**, Kolkata. It is detailed on page No. 40 of **Annexure X**. However, no details are available as to who is the builder and the project was launched by whom. Moreover, it is a copy of the webpage of telegraphindia.com. It shows that *Keventer is the partner of Tata House who is building the tallest tower in Alipore "88 East"*. If it is relied, what it indicates is that Tata is the builder of the said project and Keventer is the partner of Tata. Is it that Keventer referred to in it is Keventer Capital, it is not certain. It is impossible to rely upon an e-newspaper cutting to strengthen the said contention. As better evidence other than newspaper cutting and web pages

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downloaded from google are available at the MCA portal, relying upon Annexure X is not safe.

52. The last one company referred to is **Keventer Crosswinds at Alipore**, Kolkata. The details as revealed on page 45 of **Annexure X** are given below:-

“Keventer Group has launched its premium housing project, Crosswinds, in Alipore, Kolkata . The project offers 3, 4 BHK Apartment from 4537 sqft. To 5329 sqft. In Kolkata South. Starting at @Rs. 16,500/- sqft, Apartment are available for sale from Rs. 7.49 crore to Rs. 8.79 crore. Keventer Group Crosswinds is a completed project and possession in Apr.17”

53. To sum up the factors regarding competent business with the respondent company stand proved in the case in hand are the following:-

- The petitioner company itself was engaged in competent business with the respondent even at the time of transfer of 254 shares in the name of the petitioner. Its objects so far not altered. It is doing very same business in the line of business of the respondent company even at present.
- MKJ enterprises is the holding company of the petitioner. But it is not doing business competent with the respondent.

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- Keventer capitals Ltd. is the associated company of the petitioner. This company also not doing competent business with the respondent.
- Mantu Housing Projects Pvt. Ltd. is an associate company of MKJ Enterprises Ltd. having 24% shareholding in its shares.
- Mantu Housing Projects Ltd. is doing competent business with the respondent.
- The 6 projects referred to in the supplementary affidavit of the respondent not directly or indirectly belongs to the shareholders of the petitioner.
- 15 company names referred to in Annexure X are not at all an associate companies of the shareholders of petitioner except Mantu Housing Projects Pvt.Ltd.
- In Mantu Housing Projects Pvt. Ltd the shareholders of petitioner has no controlling stake as alleged.
- The list of shareholders [MGT-7, list of common directors and List of Shareholders of various holding and associate companies of MKJ Enterprises Limited and Keventer Capital Limited.] produced on the last day of hearing only proves one company referred to by the



respondent is an associated company of MKJ Enterprises Ltd.

54. At this juncture citing (1995) 1 SCC 478 (New Horizons Limited & Anr -vs- Union of India & Ors.) and (1988) 4 SCC 59 (State of U.P. & Ors. -vs- Renusagar Power Co. & Ors.) Ld. Sr. Counsel for the respondent submits that this Tribunal has to lift the corporate veil to hold that the companies referred to in Annexure 'X' annexed to the reply affidavit are the shareholder's companies of the petitioner and has to hold that the petitioner's shareholders are engaged in the very same kind of business as that of the business of the respondent company. According to him the proposition laid down in the above cited decisions permit this Tribunal to lift the corporate veil. In the State of U.P. & Ors. -vs- Renusagar Power Co. & Ors. cited above, it has been held that:-

"this Court lifted the veil to hold that Hindalco, the holding company, and Renusagar Power Co., its subsidiary, should be treated as one concern and the power plant of Renusagar must be treated as the own source of generation of Hindalco and Hindalco would be liable to payment of electricity duty on that basis. It was observed: (SCC p. 94, para 66)

"It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation.... The

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horizon of the doctrine of lifting of corporate veil is expanding."

55. Citing the decision of the Hon'ble Supreme Court in New Horizons Ltd., the Ld. Sr. Counsel for the respondent submits that this is a fit case to lift the veil to hold that the companies named in the Annexure X are the associated companies engaged in very same business activities of the respondent.

56. In New Horizons Ltd. & Anr., the Department of Telecommunications, Telecom District, Hyderabad invited sealed tenders from competent agencies for printing, binding and supply of specified number of telephone directories in English language for three annual issues commencing from 1993. New Horizons Ltd. (In short, NHL) and 4 other agencies submitted their tenders. Out of the 5 applicants, 4th respondent's tender was accepted though it quoted total amount of royalty at Rs. 95 Lakhs less than the amount quoted by the NHL. Whereas NHL has offered Rs. 459.90 Lakhs. The tender of NHL has been rejected for the reason that the said company does not have the experience in compiling, printing and supply telephone directories as prescribed conditions for qualification of the tenderer.

57. NHL challenged the rejection of tender before the Hon'ble Delhi High Court and the Hon'ble Delhi High Court

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dismissed the petition filed by the NHL. Against the dismissal order NHL preferred an appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court while setting aside the order of the Hon'ble Delhi High Court lifted the corporate veil for determining as to whether the shareholder companies of NHL have got experience as stipulated in the tender. NHL is a joint venture company who claimed in the tender that its shareholder companies, namely, TPI, LMI, and, WML as well as IIPL are experienced in compiling, printing, and in other work experiences to meet the requirements stipulated in the tender, and therefore, NHL is qualified as per the tender requirements. The Hon'ble Supreme Court has observed that experience of the shareholder companies of NHL had to be taken into consideration and found that experience of joint venture companies being not taken into consideration by the Department of Telecommunication, the order of acceptance of tender was set aside by lifting of the corporate veil.

58. In the given case the facts are entirely different. In Renusagar Power Co case, Hindalco is the holding company of Renusagar Power Co. In the said case holding company and subsidiary companies is considered as one concern for the purpose of lifting of the veil. In NHL case the group companies are found joint venture companies of NHL. Para 7 of the said

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judgement gives details about the nature of constitution of the joint venture companies relied upon by the Hon'ble Supreme Court. It read as follows:-

"NHL is a joint venture company established by Thomas Press (India) Ltd (TPL), Living Media Limited (LMI), World Media Limited (WML) and Integrated Information Pvt.Ltd. (IIPL), a wholly owned subsidiary of Singapore Telecom wherein 60% of shares are held by Mr.Aroon Purie, TPI, LML,WML and other companies in the same group and 40% of shares are held by IIPL".

59. So TPI,LML, WML, and IIPL are parent companies of NHL, and their experience has been considered by the Hon'ble Supreme Court for the approval of the tender in dispute by lifting of the veil. In the given case the companies referred to in Annexure X and referred to on the last day of hearing [On the last day of hearing 16 company names with its MOA were produced] are neither holding companies nor associated companies of petitioner company or not a holding company of MKJ Enterprises Ltd or Keventer Capital Ltd and not a shareholder's companies as laid down in the above referred decisions.

60. At this juncture Ld. Sr. Counsels for the petitioner has cited **(2005) 8 SCC 104 [P.C.Agarwala Vs. Payment of wages Inspector, M.P. And Others]** for strengthening his submission that lifting of corporate veil can be invoked only in exceptional cases and in which categories of cases it can apply.

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He stressed para 22 and 23 of the said judgement which read as follows:-

"22. The doctrine of lifting of the veil has been applied, in the words of Palmer, in five categories of cases: where companies are in relationship of holding the subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duty and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control, and in the law relating to trading with the enemy where the test of control is adopted (Palmer's Company Law, 20th Edn., p. 136, now p. 215, 24th Edn. 1987). In some of these cases judicial decisions have no doubt lifted the veil and considered the substance of the matter."

"23. Gower has similarly summarised this position with an observation that in a number of important respects, the legislature has rent the veil woven by Salomon case. Particularly this is so, says Gower, in the sphere of taxation and in the steps which have been taken towards the recognition of the enterprise entity rather than corporate entity. It is significant, however, that according to Gower the courts have only construed the statutes as "cracking open and corporate shell" when compelled to do so by the clear words of the



statute - indeed they have gone out of their way to avoid this construction whenever possible. Thus, at present the judicial approach in cracking open the corporate shell is somewhat cautious and circumspect. It is only when the legislative provision justifies the adoption of such a course that the veil has been lifted. In exceptional cases where the courts have felt "themselves able to ignore the corporate entity and to treat the individual shareholder as liable for its acts" the same course has been adopted. Summarising his conclusions, Gower has classified seven categories of cases where the veil of corporate body has been lifted. But it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly, where fraud is intended to be prevented, or trading with the enemy is sought to be defeated, the veil of the corporation is lifted by judicial decision and the shareholders are held to be "persons who actually work for the corporation".

61. The above said proposition is squarely applicable in the case in hand. The joint venture companies allegedly doing very same business of the respondent are not associate, subsidiary or holding companies of petitioner company. So it appears to me that the joint venture companies of shareholders of the petitioner does not fall in the categories of cases referred to in the above cited decisions. What is argued on the side of the respondent is to lift the veil of the corporation of



shareholder's companies with the petitioner and not lift the veil of the shareholder's companies of the shareholders of the petitioner.

62. Petitioner company on the other hand as I repeatedly stated earlier was doing very same business of the respondent and even at present it is doing very same business but is running in loss. Admittedly 254 shares were registered in the name of the petitioner company by transferring the shares from two individuals at a time the petitioner company was doing business competing with the respondent. However, till date the respondent has not raised a contention that the petitioner tried to block any one of its resolutions or interfered its freedom to do the business for which it was constituted. In the said background the contention that group companies of the shareholders of the petitioner are doing very same business and hence it would defeat the interest of the respondent is found devoid of any merit.

63. Upon the said reasons, it appears to me that the question of lifting of corporate veil doesn't arise in the peculiar nature and circumstances of the case in hand. In view of the above said discussions I come to a conclusion that the respondent failed in proving that petitioner's shareholder companies are doing competent business with the respondent



company. Being found that the petitioner's shareholders are not doing business in conflict with the interest of the respondent company, the business which is doing by the petitioner's shareholders not at all falls in the sufficient cause as laid down by the Hon'ble Supreme Court in the appeal preferred by the respondent company. This point is answered accordingly.

64. Point No (iii)

65. The next contention on the side of the respondent is that the transfer of shares is deceptive and mala fide in the background of the Respondent is also found not sustainable under law. In order to substantiate the respondent's contention that transfer of shares is deceptive and *mala fide*, the Ld. Sr Counsel for the respondent stressed two contentions. Firstly, it is contended that there is no *bona fide* interest in investing in the Respondent Company and that the intention of the Petitioner is to have back door entry. Secondly, it is contended that the Petitioner Company's shareholder, MKJ Enterprises holding 59.45% of its shares is carrying on business as trade in telecasting products and also doing some investments in real estate. However, its profit from real estate investment is less than 1 % of the total revenue generated by the said MKJ Enterprises which can be learnt from the Memorandum of Association of MKJ Enterprises and that the

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Keventer Capital Private Limited, who purchased 40.44% shares is a registered non-banking financial company as per its Memorandum of Association. On the other hand, the Respondent Company is carrying on business as Architect, Surveyor and Contractor which would be borne out from its Memorandum of Association and the Petitioner Company's shareholders are not expected to invest in the Respondent Company buying shares of the Respondent Company which has declared dividend @ Rs. 475/- per share having face value of Rs. 3400/- per share. The total dividend income per year, therefore, comes to Rs. 1,20,650/- for 254 shares and if the shares purchased from Sankar Nayek are taken into account the dividend would come to Rs. 1,68,160/- per year against the investment of Rs. 11.60 crores together by the shareholders, namely, MKJ Enterprises Pvt. Limited and Keventer Capital Pvt. Limited.

66. According to Ld. Senior Counsel for the Respondent, if that amount is deposited in a savings Bank, with interest @ 3%, it would come to Rs. 34,00,000/- per year and therefore, there is no justification of an NBFC Company like Keventer Capital Pvt. Limited investing the amount making them loss of income for a return of 0.16% per annum. According to him it is not an investment for the purpose of investment but for some

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hidden interest in taking over the respondent companies assets.

67. To this submission, the Ld. Sr. Counsels for the Petitioner submit that the valuation of the shares of the Respondent Company as shown as Rs. 3,400/- is not correct and that it is immaterial for the Respondent to ascertain the worth of the investment made by the Petitioner in purchasing the shares of the Respondent Company. According to Ld. Sr. Counsels appearing for the Petitioner, an investment by an investor whether to make profit or loss is not the concern of the Respondent Company in respect of transfer of shares. He would further submit that neither such profit nor loss is relevant for the purpose of considering the issue of registration of shares in the Register of Members of the Company. The Respondent Company cannot go into the issue of the Petitioner's chance to make profit out of the investment or not or whether the investment to generate a return of only 0.16% as contended by the Respondent. According to them, the said ground alleged is not the ground for refusing the transfer of shares.

68. One another contention also raised on the side of the Respondent that since the Petitioner Company's shareholders are doing the same business as the Respondent Company, the Petitioner Company acquiring shares beyond 254

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shares which they already held, open window for getting the control of the Respondent Company and it would affect the confidentiality of the decision to be taken in the Board of Directors. It is submitted on the side of the Respondent that the Respondent undertaking civil works of the Government and preparing detailed project reports of civil works of various Government work and providing project management and consultancy, the Board of Directors of the Respondent Company has to determine the cost of work which is to be transferred to the Respondent and in order to carry out direct Government work, it is to invite tenders from sub-contractors and in such a case, if any outsider is in the Board of Directors, the confidentiality in the preparation of cost and expense of the tender forms will loss. The Petitioner Company doing the very same kind of business, revealing of such data would cause prejudice in undertaking with the Government works by the Respondent Company as well as in accepting the tenders from sub-contractors. According to the Ld. Senior Counsel appearing for the Respondent, the respondent company is having provisioning of information as a nodal agency for carrying out Government infrastructural tenders and preparing detailed project reports for Government to enable the Government to ascertain the cost of works, which information if available

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to any prospective bidder would cause unjust and illegal advantage. He further would submit that in the event of such advantage being allowed to be received, such basics of the Company as a nodal agency would be prejudicially affected other than affecting the fair tender process for the public at large. Therefore, increasing the shares of the Petitioner Company other than which are already held, if permitted, would cause prejudice in maintaining the confidentiality of the decision taken by the Board of Directors of the Respondent Company and also if the transfer is allowed it would prejudicially affect the business interest of the Respondent Company as the Petitioner company has got conflicting interest in the nature of business carried out by the Respondent Company.

69. In answering point No.(ii), I come to a conclusion that the respondent failed in proving that the shareholders of the petitioner company are doing competing business with the respondent company. The contention that there is no *bonafide* intention in acquiring shares of the respondent by the petitioner company stands not proved by producing any reliable materials on the side of the respondent. The contention that the petitioner company is a loss making company and the respondent company is a profit making company and hence acquiring shares of respondent company is not *bonafide* is not

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sustainable under law. So also the contention that if, the money invested in the purchase of the shares would have been deposited in the bank, the company would have earned bank's interest higher than the dividend already issued, is also not at all a ground to deny transfer of shares.

70. It is significant to note here that the petitioner, in the alternative to register the transfer, applied for the sale of the shares to the respondent. At the time of argument, the Bench also enquired the possibilities of settlement by purchasing the shares by the respondent. It is submitted on the side of the respondent that the petitioner, if ready to negotiate sale, the respondent may agree for which the petitioner never agreed. According to the petitioner, they are entitled to get market value which would exceed 60 crores as on today. Respondent does admit that its market value is high and it is why it showed interest to negotiate. So investment of shares cannot be rated on the basis of its profitability by comparing the bank's simple interest on savings bank investment. Its value may go high or come down depending on the marketability of shares. So on investment point certainly it is a good investment especially in a government company.

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71. The contention that by increasing the shares from 254, the petitioner may try to interfere the decision making supremacy of the respondent and that if it is increased, the secrecy and confidentiality of tender process would badly be affected and that it may open the door to the petitioner to take control of the respondent company, also have no legal force. Those contentions are only unfounded imaginations of the respondent. Such a circumstance never would occur on increasing the shares from 254 to 354 shares (254+100) because Government of West Bengal is the majority shareholder of the respondent company having 51.01%. If the 100 shares is transferred in the name of the petitioner, then the total shareholding of petitioner will be 39.77% which would correspond to 354 shares in the respondent company. Therefore, chance of taking control of the respondent company by the petitioner by virtue of its additional purchase of 100 shares is too remote. In the said circumstances, the apprehension that increase in shares from 254 to 354, the petitioner may interfere with the free functioning of the board of directors of the respondent company and the petitioner may influence the decision of the board in accepting tenders of the contractors, is devoid of any merit. Having 28.54% paid up capital of the respondent which is more than 25% the petitioner do not



exercise any manner of control or interfered the respondent function so far. If it is increased to 39.77% not enable the petitioner to exercise significant control over the respondent companies action. A shareholder having 10% of a company's paid up capital can challenge a resolution of a company by alleging oppression and mismanagement under section 241 of the Companies Act, 2013. Admittedly the petitioner is now having more than 25% of the shareholding. In view of the above said reasons, I am coming to a conclusion that request for transfer of shares is not deceptive and mala fide in the background of the Respondent brought out in the case in hand. This point is answered accordingly.

72. Point No (iv)

73. In answering Point Nos (i) to (iii) I come to a finding that the application filed for transfer and registration of 100 shares which was lodged with the respondent is not premature as contended by the respondent, and that the respondent failed in proving that the shareholders of the petitioner company are doing competing business with the respondent or that the transfer of shares would disrupt the functioning of the Board of Directors of the respondent company and that the attempt of transfer was with *malafide* intention to take over the control of the respondent company.

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74. It has come out in evidence that the petitioner company which is doing very same business as the respondent was allowed to register transfer of 254 shares in the year 2012 from two individuals namely Indrajit Sarkar and Ashok Das Chowdury without any protest from the respondent. Though two shareholders namely MKJ Enterprises Ltd. and Keventer Capital Ltd. jointly acquired 100% of the shares of the petitioner company, the object of the company for which it was constituted was not changed. The MOA of the petitioner company and the shareholder's companies prove undoubtedly that the business object with which those companies were constituted are not similar to the objectives of the respondent company. The shareholder's company of the petitioner, as per the MOA, was neither engaged in appointing contractors for developing the alleged projects nor was doing infrastructure business like the business found engaged by the respondent company. The projects highlighted on the side of the respondent are in no way directly or indirectly engaged by the shareholders of the petitioner. Having minority stakes in one associated company and other companies by the shareholders of the petitioner referred to by the respondent is no ground to hold that shareholders company of the petitioner is doing competent business with the respondent. So also there is no question of



conflict of interest with the reason being that neither in the past or present the petitioner shareholders are in competing business with the respondent. Upon the above said discussions it appears to me that respondent failed in proving that petitioner shareholders are doing competing business with the respondent and that the investment in the respondent company is with malafide intention so as to take its control or that the transfer of shares is deceptive and malafide in the background of the respondent company.

75. As per Article 44 of the MOA of the respondent company, it is bound to transfer the shares provided the respondent has no lien over such shares and when such shares are not fully paid up. The respondent has no case that there is lien on any shares of the petitioner or that the shares are not fully paid. Therefore, borne in mind, the proposition laid down in *Laxmi Tea and Co. Ltd v. Pradip Kumar Sarkar* that [1989 Supp (2) SCC 636] that ***“Unless there is power in the Articles to refuse registration, the company has no power to refuse registration unless the transfer is in violation of any law.”*** I am of the view that the Respondent is bound to register the transfer as requested by the Petitioner.

76. Article 44 gives no power to refuse transfer upon the reasons advanced on the side of the respondent. The sufficient



cause as per sub section 4 of section 58 of the Companies Act, 2013 read with the Hon'ble Supreme Court's findings in this case, also does not stand established on the side of the respondent. In short, the respondent neither succeeds in showing any of the provisions in the Articles so as to refuse the transfer nor succeeds in proving that the petitioner's shareholders are doing any competing business which could be regarded as a sufficient cause as laid down in the Hon'ble Supreme Court's decisions in the case in hand. There is nothing forthcoming to prove that the transfer would violate any law as laid down in the *Laxmi Tea and Co* case. In view of the above said discussion I am of the view that the application of the petitioner is liable to be allowed however by directing the parties to bear their respective cost.


77. In the result, the petition is allowed upon the following directions:-

- (a) The respondent is directed to register the transfer of impugned 100 shares in the name of the petitioner company within one month of the date of the order and to make suitable entries in the register of members thereafter.
- (b) CP. No. 151 of 2014 is disposed of.



(c) Parties are directed to bear their respective cost.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(Jinan K.R.)
Member (J)

Signed on this, the 18th day of September, 2018.

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