BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
C.P. NO. 82/241,242,244/NCLT/MAH/2016

Coram: B.S.V. Prakash Kumar, Member (Judicial) &
V. Nallasenapathy, Member (Technical)

In the matter of **Sections 241, 242 & 244** of the Companies Act, 2013:
Between:

Cyrus Investments Pvt. Ltd. & Anr. ...Applicants/ Orig. Petitioners

vs.

M/s. Tata Sons Ltd. & Ors. ...Respondents/ Orig. Respondents

Applicants/ Petitioners:

1. Cyrus Investments Pvt. Ltd.
2. Sterling Investment Corporation Pvt. Ltd.

Respondents/ Respondents:

1. Tata Sons Ltd.
2. Ratan N. Tata
3. Amit Ranbir Chandra
4. Ishaat Hussain
5. Ajay GopikisanPairamal
6. Venu Srinivasan
7. Nitin Nohria
8. Ranendra Sen
9. Vijay Singh
10. Farida Dara Khambata
11. Cyrus Pallonji Mistry
12. Ralf Speth CEO of Jaguar Land Rover
13. N. Chandrasekaran
14. N.A. Soonawala
15. J. N. Tata
16. K. B. Dadiseth
17. R. K. Krishna
18. S. K. Bharucha
19. N. M.Munjee
20. R. Venkataramanan
21. Dr. Amrita Patel
22. V. R. Mehta
23. F. N. Subedar

Petitioners' Counsel:

Shri Aryama Sundaram, Shri Virender Ganda, Shri Milind Sathe, Sr. Counsel, Mr. Somasekhar Sundaresan, Mr. Manik Dogra, Ms. Rohini Musa, ApurvaDiwanji, Mr. Mahesh Agarwal, Mr. Ruzbeh Mistry, Mr. Anoj Menon, Mr. Mohit Arora, Mr. JayeshBakshi, Mr. Rohan Jaittey, Ms. SonaliJaittey, Mr. Parag Sawant, Ms.Gunjan Shah, Mr. Akshay Doctor, Mr. Dhaval Kothari, Mr. Abhishek Venkatraman, Mr. Ravi Tyagi, Mr. Shubhanshu Gupta, Sanya Kapoor ... Advocates for the Petitioners.

Respondents' Counsel:

Dr. Abhishek Manu Singhvi, Shri Ravi Kadam, Shri S. N. Mookharjee, Sr. Counsel, Mr. Nikhil Sakhardande, Mr. PrateekSekseria, Shuva Mandal,

Mr. Nitesh Jain, Mr. DhruvDewan, Ms. Ruby Sigh Ahuja, Mr. SayakMaity, Ms. TahiraKaranjawala, Mr. AvishkarSinghvai, Mr. Sidharth Sharma, Mr. Rohan Batra, Mr. Arjun Sharma, Ms. EeshaMohopatra, Ms. PayalChhabria, Mr. JeetKaria, Ms. JuhiMathur, ...Advocate for the Respondent Nos. 1, 2, 3 & 23.

Mr. Shailesh Poria ... Advocate for the Respondent Nos. 5 & 7.

Shri Sudipto Sarkar, Shri Mohan Parasaran, Sr. Counsel, Mr. D.L. Chidananda, Mr. Zal Andhyarujina, Mr. Ashwin Kumar D.S., Ms. Shurti Sardesai, Mr. Jahangir Mistry, Ms. Namrata Parikh. ... Advocates for the Respondent Nos. 6, 14, 16 to 22.

Shri Janak Dwarkadas, Sr. Counsel, Mr. Sharan Jagtiani, Mr. JehangirJejeebhoy, Ms. ShireenPochkhanawalla,
Mr. NiravBarot ... Advocates for the R-11.

ORDER
(Heard on 20.02.2017)
(Pronounced on 06.03.2017)

Nobody knows when problem comes, now problem has come upon TATA (Tata Sons Ltd. (R1)) which everybody knows in India, there can't be anyone who has not experienced the product of Tata. Many of rural folk may not know TATA as a company, but everybody, east to west and north to south, knows Tata salt, Tata tea, Tata car, Tata bus, likewise many, it is a household name in India. Salt to software, it has seasoned this country with all spheres and makes its presence felt all over the world. The time has now become excruciating to this Tata Sons (R1) owing to Board Room battle. Tata Sons is a driving force and funding machine to all its subsidiaries spread all over the World. These days, trying time has come for TATA, perhaps to hold out that it keeps journeying no matter how devastating the storm is – it waded through British India regime, and then has successfully hoisted in sovereign India. We believe that none of the persons in this story have any dislike or disrespect to this untiring provider.

2. Tata sons Ltd was incorporated on 3rd November 1917 and soon going to celebrate its platinum jubilee and is a conglomerate leading all its group companies to new heights. It is comprised of shareholding of Tata Trusts, Shapoorji Pallonji Group companies through the petitioners, some financial institutions and a few individuals. Finally, the board room fight has reached to NCLT, Mumbai for determination of the issues in between Shapoorji Pallonji Group and Tata Trusts.

3. The petitioners, namely Cyrus Investments Pvt. Ltd and Sterling Investment Corporation Pvt. Ltd (Shapoorji Pallonji Group companies owned by father of R11 and their family members) filed this CP82/2016 u/s 241,242 & 244 of the Companies Act 2013 on the footing that they together hold 18.37% equity shareholding in Tata Sons. The issue before this Bench today is when both the petitioner companies have filed this CP against the Respondents, principally the directors of R1 Company, Mr. Ratan Tata (R2), and persons running Tata Trusts and Mr. Cyrus Pallonji Mistry (R11), who was recently removed as Chairman of Tata Sons, assailing that the acts of the answering Respondents in relation to the affairs of R1 Company (Tata Sons) are prejudicial to the interest of not only the petitioners but also the company. The reliefs the petitioners sought in this CP are as follows:

- That in 2012, Tata Trusts altered Articles of Association in such a way that no policy decision could be taken without affirmative vote of Tata Trusts.

- That Tata Trusts Nominee Directors in R1 Company have virtually become postmen enabling Mr. Ratan Tata (R2) and Mr. Soonawala (R14) to take decisions and ensure them carried through these nominee directors (R3, R7 & R9).

- That Mr. Ratan Tata and Mr. Soonawala acting as Super Board to see their wishes carried out through Trustees nominee directors.

- That R2 in the year 2007, while he was Chairman of R1, led the purchase of Corus Group PLC (England Company) by Tata Steel Limited promoted by R1 for a sum in excess of USD 12 billion which was more than 33% of its original price, which eventually led Tata Steel go down by this purchase, when it was not doing well, Mr. Mistry initiated to merge this Tata Steel U.K with Thysseen Krupp so as to rid Tata Steel of the financial sufferance, but it is R2 who objected to restructuring of Tata Steel UK company causing loss to everybody including the petitioners.

- That sometime in 2007-2008, R2 came out with a proposal to manufacture a car that could be enjoyed by poor of this nation, with an installed capacity of 2,50,000 cars annually, but the demand for these cars is only 3,000 cars per year, by which Tata Motors consistently loosing ₹1000 crores causing once upon profit making company i.e., Tata Motors gone into losses, inspite of it, R2, for his emotional reasons, has prevented R11 from taking crucial decision to shut down Nano Car Project.

- That R2 caused issuance of 520 billion shares of TTSL at the rate of ₹17 to Sterling for a throw away price of ₹884 crores, and then issued TTSL shares to Singapore Company at the price of ₹26 per share immediately after transaction with Sterling owned by Shivsankaran (called as Shiva) who is close to R2. Thereafter, Shiva sold ₹20.74 million shares out of above shares in the year 2008 to DoCoMo at the rate of ₹117.81 per share making huge profit of above ₹200crores, all these facts were admitted by Shiva himself saying he is benefitted by his closeness with R2.

- That there being an arbitration dispute in between TTSL and DoCoMo, TTSL deposited entire ₹8,450crore, including the proportionate claim of ₹694crore to be paid by Sterling (owned by Shiva) in the Arbitration proceeding DoCoMo filed before Honourable High Court of Delhi, on seeing the above said Shivasankaran has not paid his share of amount in the deposited money, R11, being a chairman of R1 Company, on 15th September 2016, obtained Board approval to take action for recovery of ₹694crores payable by the Sterling. But by this, TTSL and DoCoMo, to the surprise of R11, received a notice back dated to 15th September 2016 from Shiva alleging oppression and mismanagement in the affairs of TTSL, by which, it is evident that decision taken in the Board meeting dated 15th September 2016 in all probability was leaked to Shiva through R2.

- That Shiva was benefited to ₹600crores from Tata Group companies through various contracts in between 2003 to 2008, at the cost of Tata Group companies.

- That R2 pocketed ₹3crores come from MPCPL towards surrendering tenancy rights of the residential apartment that R2 used to reside in a building called Bakhtawar at Colaba, otherwise that money should have come to the account of a company called FFC, which was at that time Tata Group Company.

- That R2 through Tata companies bestowed upon various contracts to one Mr. Mehli Mistry and his associates making Mr. Mehli rich because of the closeness he has with R2.

- That Air Asia Limited deal was forced upon R11 as a fait accompli as soon as he became Chairman of R1, it has later come out on

forensic examination of the Accounts of Air Asia that fraudulent transactions of about ₹22crore were carried out, involving non-existent parties in India and Singapore and all this happened at the behest of R2.

- That R11 was unfairly removed as Chairman of R1 on October 24, 2016 contrary to the express provisions of Articles of Association.

- That in pursuance of the allegations levied against the answering Respondents, the petitioners, having 18.37% shareholding in R1, sought various reliefs on the ground that the alleged actions of R2 and his men are oppressive and prejudicial to the interest of the petitioners and R1 Company and its group companies.

Arguments of the Respondents Counsel:

4. Looking at the petition the petitioners filed, Dr. Abhishek Manu Singhvi, Senior Counsel on the answering Respondents behalf, at the outset raised a threshold issue saying that the petitioners do not have qualification envisaged u/s 244 to file this CP u/s 241 for these two petitioners together have only 2.17% shareholding which is less than one – tenth of the issued share capital of the company, and by number also they being only two out of 51 total members of R1, the Respondents have taken out a detailed plea stating that the petitioners failed to meet the qualification as set out in section 244, therefore, this petition is liable to be dismissed in limine.

5. As to the issued share capital of R1, as on 21st December 2016, the total issued equity share capital of R1 is ₹40.41crores and the total issued preference shares is ₹294 crores, hence total issued share capital has become with an aggregate face value of ₹335 crores. Out of which the petitioners collectively hold with an aggregate face value of ₹7.44 crores amounting to 2.17% of the total issued share capital. The Respondents submit, if the equity alone is taken into count, they will have not less than

one-tenth of equity, but the requisite qualification u/s 244 being 1/10thin value of total issued share capital of R1, since **issued share capital** means and includes equity and preference, the qualification requirement has to be counted from the total issued share capital, on such counting, the petitioners shareholding being only 2.17%, the petitioners failed to qualify to maintain petition under section 241. Therefore, these petitioners, either way, are not qualified to appropriate cause of action to seek extraordinary remedy u/s 241 & 242 of the New Act.

6. The counsel on the Respondents behalf has also categorically mentioned that there are other issues on maintainability point dehors qualification issue, but for the time being, they have not taken up those issues that makes this petition otherwise also not maintainable.

7. When an appeal was filed by the petitioners on the orders passed by this Bench, Honourable Appellate Tribunal having directed this Bench first to decide maintainability point, this Bench heard it extensively from both sides and now passing this order.

8. The Respondent Counsel submits that the Petitioners have consciously not disclosed the fact that they do not have 10% of the Issued Share Capital by the time of filing this Petition, despite they ought to have mentioned the fact that they have only 2.17% of the total issued Share Capital of R1. For admittedly they are not qualified u/s 244 to maintain this CP, at the best, they would have sought for the waiver to the qualification clause u/s 244 (1) of the New Act.

9. For having the Petitioners raised a point that their Equity Share holding being more than 10%, and the Equity alone will have voting rights, the phrase "issued share capital" shall be construed as equity share holding to maintain the petition, the Respondent Counsel submits that since the statute in section 2 (50) says ***issued capital" means such capital as the company issues time to time for subscription,*** that since section 2 (84) says ***share means a share in the share capital of a company and includes stock*** and that since section 43 itself says share capital means

equity plus preference, it can't be even imagined issued share capital means only equity, not preference. As to variation of rights of different classes of shareholders u/s 48, if variation of rights of one class of shareholders affects of the interest of other class of shareholders, then certainly 3/4th of such other class is to be obtained, but one fact that should not be forgotten is this right of variation shall lie either in the Memorandum or Articles, if not in constitutional documents, then at least in the terms of the issue of shares it shall disclose these rights, this concept of different classes of shares run on the understanding of the persons opting for shares, but this oppression or prejudice remedy will never become a right either in constitutional documents or terms in between the parties, therefore the petitioners cannot derive an analogy from this section to say the same is applied to sections 241 and 244. The Respondents counsel therefore submits that the meaning of the phrase "issued Share Capital" will not and cannot change into "Issued Equity Share Capital" when it comes to decide maintainability u/s.244 of the New Act. In section 244, it has been mentioned that "any member or members holding not less than 1/10th of the Issued Share Capital of the company", the parties cannot employ the word "equity" to interpolate the phrase "Issued Share Capital" in section 244 as "issued equity share capital" so as to read the word "equity" into the phrase "issued Share Capital". The meaning has to be taken or understood as given by the statute; the meaning of the words will not change from man to man or case to case.

10. To say that issued Share Capital in Sec. 244 means "Equity and Preference", the Respondent Counsel relied upon ***Northern Projects Ltd. v/s. Blue Coast Hotels and Resorts Ltd. (2009) 148 Company Cases 279*** by referring to Para 24, 25, 29 which are as follows:

> *"**24**. ... Having regard to the provisions of sections 85, 86 and 87 of the Act, the expression "issued share capital" in section 399(1) of the Act can only refer to and refer only to the share capital which could be issued, i.e. both equity and preference share capital and* ***therefore, the expression***

"issued share capital" refers to both preference and equity share capital of the company. *In other words, these sections can be used as tools of interpretation of the said expression.*

25. *The expression "issued share capital" can have no doubt it when considered in relation to other provisions of the Act.* ***Inserting the word "equity" after the word "issued" and before the words "share capital" will be adding a word which the Legislature clearly did not intend and to interpret it further as "legally valid issued share capital" would be doing violence to the section.*** *The Court cannot read anything into a statutory provision which is plain and unambiguous. Interpreting the expression in a manner suggested on behalf of the appellant will amount to creating a mischief rather than preventing it and thereby leave out a class of shareholders who have subscribed to the capital of the company, i.e. by way of preference shares. It is to be noted that a statute is an edict of the Legislature and the language employed in a statute is the determinate factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself. The question is not what must be supposed and has been intended but what has been said. It is again to be noted that while interpreting a provision the court only interprets the law and cannot legislate it. Doing what is suggested on behalf of the appellant would not only be doing violence to the section but will amount to legislating a provision in a manner not at all intended by the Legislature.*

29. ***From the aforesaid discussion, and from whatever angle one looks at the expression "issued share capital" of the company, it is very clear that the expression can only refer to the preference share capital as well as equity share capital of the company and the appellant was required to hold one-tenth of the total of this issued share capital before he became eligible to maintain a petition under section 397/398 of the Act.*** *The appellant at no time held more than 2.01 per cent of issued share capital. It did not have it when it became a member*

or shareholder. It did not have requisite percentage on the date of filing of the petition. The appellant might be having 14.8 per cent of equity shares, but that is not the criterion to make an application. The petition was therefore rightly dismissed." ***[Emphasis supplied].***

11. He further submits that this decision is upheld by the Honourable Supreme Court dated **30.9.2013 in *SLP No.12753/2008 (M/s. Northern Projects Ltd. v. Blue Coast Hotels and Resorts Ltd. &Ors.)*** making it clear that issued share capital includes equity plus preference.

12. He further submits that there is no change in Section 244 from old Section 399 and the new Section being pari materia to the old Section, the ratio decided in Northern Projects Supra will remain relevant and binding upon this Bench to construe that Issued Share Capital means and includes Preference Share Capital as well. The binding effect of this precedent cannot be simply explained away by saying that the above ratio being decided on old section of law (sec. 399), it will not have binding effect on the new section of law, for new section of law (section: 244) has come into existence with many changes.

13. He further relies upon the citation in between ***J.P. Srivastava & Sons Pvt. Ltd. v. Gwalior Sugar Co. Ltd. (2005) 1 SCC pg.172.*** The brief story in this case is in respect to 399, it was contended that the calculation of 10% of the petitioner's shareholding in the Company was made only with regard to the equity share capital of the company, whereas Section 399 sub-section (1) requires the petitioner to have 10% of the ***total issued share capital*** which would include preference shares and that the shareholding claimed by the petitioners did not amount to 10% of such total. To which, of course other side replied that the consent of the Trust holding 1097 preference shares has been taken, therefore the total would be more than 10% to maintain petition u/s 397 & 398 of the old Act. Therefore, it is no more res integra that the phrase "issued share capital" means equity plus preference, by this calculation only, the petitioners

themselves relied upon consent of the other Shareholders to make up 10% shareholding to file the Company Petition. Though this issue is not a main issue in the case supra, there also, the Preference Share Capital is taken into consideration.

14. The Respondent Counsel relied upon ***Sakal Deep Sahai Srivastavv. Union of India (1974) 1SCC pg.338*** to say that if any of the sections of the repealed enactment is taken into new enactment without any change, it has to be presumed that the legislature has consciously not made any change to the old section of law by noticing that old section of law will remain relevant and contextual not only for now but also to the times to come. When legislature has taken old law into new enactment without any change, then obviously ratio decided under old section of law that is subsequently re-ordained as new section of law, is binding on the courts. In the case supra, the ratio has been decided in the context of repetition of Articles 102 and 120 of the Limitation Act, 1908 in identical terms without any modification in the Limitation Act, 1963. The same is the view held in ***Pradeep J. Mehta v/s. Commissioner of Income-tax, Ahmedabad (2008) 14 SCC pg.283 para No.20, 25 and Parvathy Amma&Ors. v. Krishnan &another 1962 KLJ 428 para No.8*** in respect to the applicability of case law decided on old section of law that has been re-ordained as new section of law without any change.

15. The Respondent Counsel submits that the attempt of the petitioners to read the term *"Class of Members"* into section 244 is wholly untenable, self-serving and would do violence to the language of this statute if at all equity shareholders, as is sought by the petitioners, are considered as separate class to say that since the petitioners have more than 10% equity shareholding, this petition is maintainable on class basis.

16. The Respondent Counsel retorts the arguments of the Petitioner Counsel saying that the phrase "class of members" finds no place in

section 244 of the Act, this has been used only in Section 241(1)(b) & Section 245 of the Act, the same phrase "class of members" has not been coined in Section 241(1)(a). He says that Section 241 is always subject to the mandate of section 244 for two reasons, one – section 244(1) says the member complaining shall be qualified to file complaint under section 241, two – section 241 itself says that the member eligible under section 244 alone can file complaint under section 241. Henceforth, the phrase of "class of members" appearing in section 241(1)(b) is inconsequential to the application of section 244. The Respondents counsel further submits that the petitioners' argument presupposes that the word "class of members" appearing in section 241 (1) (b) is in relation to an intra class threshold, which finds no mention in section 244. He also says wherever the legislature felt necessary to make intra classification, it would explicitly make clear that such and such class meeting is to be held and such and such class will have voting rights. In compromises and arrangements, class concept has been set out, because sometimes scheme has to be with creditors or any class of them or sometimes with members or with any class of them, there it all depends upon the kind of scheme they enter, that is not the case here, because separate, separate schemes are not required in section 241.

17. The Respondent Counsel relied upon the citation in between ***Naziruddin v/s. Sitaram Agarwal (2003) 2 SCC 577 para 35 & 37, to say that Court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislature or intention when the language of the provision is plain and unambiguous. It cannot have a subtract words to a statute or read something into it which is not there and it cannot re-write or recast legislation.*** It is also said from the text of the judgement that the real intention of the legislation must be gathered from the language used. When negative words are used, the court will presume that the intention of the legislature is that the provisions are mandatory in nature.

18. The Respondents Counsel submits that where the statute is clear and unambiguous then literal rule is applicable. The interpretation of statute arises only when literal interpretation defeats the purpose of the provision or results into manifest absurdity, for the language is being clear in section 244, there cannot be any scope to have more than literal interpretation to the section, therefore, the phrase *class of members* cannot be read into section 244 to say that issued equity share capital is to be taken into consideration for reckoning 10 percent shareholding qualification criteria mentioned section 244.

19. As to the argument of the Petitioners Counsel that section 244 has now become directory by introduction of waiver clause in the proviso to the section 244, the Respondents Counsel submits that argument of the Petitioners' case is surprising for two reasons, (1) – the Petitioners asking from one side that their Petition is maintainable on the ground that their equity is more than 10 percent, (2)–juxtaposition to the above argument, the Petitioners Counsel arguing that section 244 has become directory in the New Act for waiver clause has been introduced in the New Act forgetting the fact that prosecuting party cannot take inconsistent pleas. In fact, it is nothing but asking waiver before a waiver. The Respondents Counsel submits that introduction of the waiver clause into section itself makes it clear that qualification criterion set out in section 244(1) is mandatory, had the Legislature thought that this provision is directory, the legislature itself would have made it directory without incorporating waiver clause to it.

20. The Respondent Counsel relied upon ***Fairgrowth Investments Ltd. v. Custodian (2004) 11 SCC 472***, to say that prescribed time limit for filing petition is mandatory and is not extendable under any inherent jurisdiction of special court unless power is expressly conferred upon. Even under Limitation Act also, an expression provision is carved out to condone delay conferring sufficient cause jurisdiction to courts. He also submits that equity has no place in the determination of a jurisdictional

condition precedent. To fortify this point, he relied upon para 11 of the citation ***Rananjaya Singh v/s. Baijnath Singh (1955) 1 SCR pg.671,***to say that statutory provision has to be construed according to ordinary, grammatical and natural meaning of its language, not otherwise, ***if change is required, then Parliament to change, not courts.***

21. He relied upon another judgement of Hon'ble Supreme Court in the case of ***Ragunath Rai Barejav. Punjab National Bank, (2007) 2 SCC 230*** to say that where there is a conflict between law and equity, law prevails upon equity, the para relied upon is as follows:

*"**29.** Learned counsel for the Respondent Bank submitted that it will be very unfair if the appellant who is a guarantor of the loan, and Director of the company which took the loan, avoids paying the debt. While we fully agree with the learned counsel that equity is wholly in favour of the respondent Bank, since obviously a bank should be allowed to recover its debts, we must, however state that it is well settled that **when there is a conflict between law and equity, it is the law which has to prevail,** in accordance with the Latin maxim "dura lexsedlex", which means **"the law is hard, but it is the law".Equity can only supplement the law, but it cannot supplant or override it.*** **[Emphasis supplied].**

22. The Respondent counsel submits, if the law is what had been laid down in the case of Northern Projects supra, then the so-called "inequity" was being perpetuated for 57 years from 1956 to 2013. The determination of eligibility based on equity and preference share capital was present even under old regime and the same position never came to be contested in the period of 57 years. It is rather interesting that the same is allowed to continue without any change in the new enactment as section 244 believing the law that continued for more than half century as section 399 shall continue for the times to come as section 244. Now, it is not open to any body to say whether it is equitable or inequitable, that question is no more a question.

23. As to the argument the Petitioner counsel propounded that since Accounting Standard 32 referred to preference shares as debt, unless they are compulsorily convertible, as long as they are not converted or convertible into shares, the redeemable preference shares shall be treated as debt not as equity, henceforth the preference share capital that is not compulsorily convertible cannot be treated as share capital u/s.244 to calculate 10% shareholding for filing petition under section 241, the Respondent counsel argued that Accounting Standard cannot be used to override a statutory provision of Companies Act, 2013, that apart, the said Accounting Standard has no applicability to non-banking finance company such as R1, as NBFCs have been specifically exempted from application of Accounting Standards by Rule 5 of the Companies (Indian Accounting Standard) Rules 2015, the same is evident from the press release No.11 /10/2009 CL-V dated 18.1.2016 issued by the Ministry of Corporate Affairs that Indian Accounting Standards are applicable to NBFCs for Accounting periods beginning from 1st April, 2018 thereby this Accounting Standard has no applicability to present case, much less to govern the construction of section 244. At last the Respondent counsel submits that these Petitioners have come with frivolous proxy litigation to canvas the cause of R11, basing on these grounds, the Respondent Counsel submits that this Petition is not maintainable for not being in compliance of the qualification criterion set out u/s.244.

Arguments of the petitioner counsel and R11 Counsel:

24. The Senior Counsel Shri C.A. Sundaram appearing on behalf of Petitioners submits that different classes of members with conflicting interests cannot be put in one basket restricting certain class of members from complaining their grievances, this principle,in respective class of members, has to be founded on homogeneity and commonality of interest. For which, he has relied upon ***Infrastructure Leasing and Financial Services Ltd. v. BPL Ltd. (2015) 3SCC pg.363 384 para 30 to 32***

25. To show that Class of Members is recognized as a separate category under many of the sections of Company Law, the petitioner counsel referred to section 43 (share capital); section 48 (variation of rights of class of members); section 49 (call on shares of same class to be made on uniform basis; section 92 (Annual Returns); section 117 (Resolutions & Agreements to be filed) and Sections 230 to 234 (Power to compromise and arrangements).

26. The Petitioner counsel submits that Accounting Standard 32 refers to redeemable preference shares as liability to the company therefore, preference shares shall not be taken into account in computing 10% share capital for filing Company Petition u/s.244, if at all the word "issued share capital" is taken into consideration for computation of qualification u/s.244, it will become absurdity because even Tata Trusts, who are holding above 66% equity in R1 company cannot file petition u/s.241. If such is the case, then the very purpose of protecting the minority in the company will be become redundant. Here it is to be seen that the Petitioners' shareholding value will come to ₹1,00,000 crores in the company therefore, if the preference shareholding valuing to ₹294 crore makes the Petitioners incapable to maintain petition u/s 241, it will become nothing but mockery of justice.

27. The petitioners relied upon ***D. Saibaba v. Bar Council of India 2003 6 SCC pg.186; Indian Performing Rights of Society Ltd. v. Sanjay Dalia & Others (2015) 10 SCC pg. 161*** to say that a construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly has to be rejected and preference should be given to that construction which avoid such result.

28. The Petitioners submits that power under sec.241 to 244 being exercised by the Tribunal in its equitable jurisdiction, a hyper technical view ought not to be taken in order to deny the cause of equity and justice. For which he relied upon ***M/s. Worldwide Agencies Pvt. Ltd. and***

Another v. Margaratt Desor&Ors. (1990) 1 SCC 536, Baldev Krishna Sai v. Shipping Corporation of India &Ors. (1987) 4 SCC pg.361 @ 366

29. The Petitioners Counsel submits that section 241 & 244 will need to be read together and not mutually exclusive in as much as though conditions and parameters as contained in section 244 from the jurisdictional basis from section 241, in the same manner, the grievances mentioned in Section 241 can only be determined *"provided such member has a right to apply under Section 244"* has been stated in Section 241. This is more so, in light of Section 245, while dealing with a Class Action contains the very same parameters as contained in Section 244 and such Section also specifically deals with a "class of members". The petitioners counsel relied upon ***Krishan Kumar versus State of Rajasthan – 1991 (4) SCC 258 @ paras 11***to say that the provisions of one section of statute cannot be used to defeat those of another unless it is impossible to reconcile them.

30. The Petitioners counsel submits that courts will be more willing to hold that the statutory requirement is mainly directory if any breach of the requirement is necessarily followed by an opportunity to exercise from judicial or official discretion in a way which can adequately compensate for that breach.

31. As to ratio relied upon by the Respondents in Sakal Deep Sahai Srivastav (supra), the Petitioners counsel says it is no doubt true that when identical provision of old Act has come into existence in new Act, the ratio decided in the old sections is even applicable to the re-enacted sections but whereas here there being several changes to sections to 241 to 244 of Companies Act, 2013, such as introduction class of Members, covering past and concluded actions in oppression remedy and waiver clause in section 244, the ratio decided under the old Act is no more applicable to the new sections, therefore, the Petitioners says the ratio in Sakal (supra) is not applicable to them.

32. As to remaining cases Parvathy Amma supra, Pradeep J. Mehta supra, Fairgroup Investments Ltd. supra, Rananjaya Singh supra,

Ragunath Rai Bajeja, Naziruddin, the ratio decided in those cases is not applicable to this case for the facts in the present cases are dissimilar to the facts of those cases thereby the ratio decided before advent of 2013 Act is not applicable to the present case.

33. In view of these submissions, the Petitioners counsel submits that the Petitioners being more than 10% equity in the company, this Petition is maintainable.

34. The Sr. Counsel Shri Janak Dwarkadas appearing on behalf of R11 sailing with the Petitioners submits that the definitions to "issued Share Capital" "Member", have to be taken into consideration unless the context otherwise requires. Since the new concept of class of members have been introduced in section 241, the meaning of the "issued capital" has to be limited to the "issued equity share capital alone" not otherwise. When the phrase "class of members" are related back to qualification clause in section 244, the context demands that issued share capital means only equity share capital not the share capital along with preference share capital, therefore, the meaning given in definitions sections will remain inapplicable for it has been conditioned that its meaning is applicable, unless, in the Act, the context otherwise requires. Since the colour of section 244 is changed by relating it to the phrase 'class of members' used in section 241 (1) (b), the definitions and meanings given to issued capital, share and preference share capital and issued share capital are not applicable. With this submission, R11 counsel submits that this Petition is maintainable.

Discussion

35. On hearing the submissions of either side, it appears to us that the admitted case of the Petitioners is that they hold 18.37% equity shareholding in R1 Company, if the preference shareholding is included in the share capital, their shareholding would come down to 2.17% of the issued share capital, therefore, there is no dispute as to what is their percentage of equity shareholding and what is

their percentage in the issued share capital, if we go by this argument, it is no more *res integra* in respect to the Petitioners' percentage in the issued share capital of the Company i.e. 2.17%. If their issued share capital is less than 10%, the Petitioners, as the Respondents' Counsel stated, failed to meet the qualification set out under Section 244 for filing this Company Petition u/s 241.

36. As to factual aspect is concerned, since it is an admitted position that the Petitioners' shareholding in the total issued share capital is only 2.17%, the minimum shareholding set out u/s 244 not being there to the petitioners to file Petition u/s 241, now it is not the Respondents' turn to prove how this Petition is not maintainable, it has become the burden of the Petitioners to prove as to how this Petition is maintainable.

37. The basic argument of the Petitioners' Counsel is,

(1) that the Section of law under Section 241 and Section 244 of the new Act has been changed from the old Sections 397, 398 and 399 of the Act of 1956, therefore the ratio previously laid down u/s 399 is no more applicable to Section 244 because the concept of 'class of members' has for the first time been introduced in Section 241 to consider the grievance of the members on class basis, therefore, the phrase 'issued share capital' set out in Section 244 has to be understood and read as 'issued equity share capital',

(2) that this class concept has been recognised in Section 43 mentioning equity share capital separate from preferential share capital, in Section 49 to maintain equality among equals when call is made on shares of the same class, in Section 117, to pass a special resolution in respect to the interest of any class of members, in Sections 230 to 234 to consider the class of members when the interest of that class is affected, therefore, the Petitioners' Counsel argument is that the members mentioned in Section 244 has to be read as 'equity class' for it is relatable to the interest of equity shareholders,

(3) that since Accounting Standards-32 refers to preference shares especially redeemable preference shares, as 'debt to the company' thereby the preferential shareholding shall not be treated on par with equity,

(4) that Sections 241 to 244 will need to be read together and they are not mutually exclusive in as much as though conditions and parameters as contained in Section 244 from the jurisdictional basis for Section 241, in the same manner the grievances mentioned Section 241 can only be maintained *'provided such member has a right to apply under Section 244'* has been stated in Section 241. He argues primary rule of interpretation is that every part of a section should be given its full and natural meaning, it cannot be diluted by superimposing some other section on the footing one section is conditioned by another section,

(5) that by introduction of waiver jurisdiction to NCLT in Section 244, the qualification clause has become directory because whenever any person pleads waiver of Sub-section (1) of Section 244, the qualification has to be looked as directory not as mandatory.

38. Before going into the argument on both sides and merits on it, since the entire argument of either side has gone on sections 241 & 242 of new Act, it is essential to find out what these sections are sections saying and whether meaning of those sections could be understood by reading it or some tools of interpretation required to unravel the legislative wisdom conceived in the sections. First let us read the text of new sections and analogous sections from the Act 1956 to notice as to whether any changes have been brought in new sections, if so, what they mean.

Companies Act, 1956	Companies Act, 2013
397. Application to Company Law Boardfor relief in cases of oppression (1) **Any members** of a company ***who complain*** that the affairs of the company are being conducted in a manner prejudicial to public interest or in a	**241. Application to tribunal for relief in cases of oppression, etc.** (*1*) **Any member** of a company ***whocomplains*** that— (*a*) the affairs of the company have been or are being conducted

manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399. (2) If, on any application under sub-section (1), the Company Law Board is of opinion- (*a*) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and (*b*) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up; the Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.	in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or
398. Application to Company Law Board **for relief in cases of mismanagement -** (1) Any members of a company who complain - (*a*) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or (*b*) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the	(*b*) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, **it is likely that the affairs of the company will be**

company, whether by an alteration in its Board of directors or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, **it is likely that the affairs of the company will be conducted in a manner prejudicial to** public interest **or in a manner prejudicial to the interests of the company ;**	**conducted in a manner prejudicial to its interests or its members or *any class of members*,**
may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.	may apply to the Tribunal, provided such member has a right to apply under section 244, for an order **under this Chapter.**
(2) If, on any application under sub-section (1), the Company Law Board is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Company Law Board may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.	(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.
399. Right to apply under sections 397 and 398	**244. Right to apply under section 241**
(1) The ***following members*** of a company *shall* have the right to apply under section 397 or 398:	(1) The ***following members*** of a company ***shall*** have the right to apply under section 241, **namely:**
(*a*) in the case of a company having a share capital, not less than one hundred members of the company or, not less than	(*a*) in the case of a company having a share capital, not less than one hundred members of the company or not less than

one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, **provided** that the applicant or applicants have paid all calls and other sums due on their shares;	one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, **subject to** the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;
(*b*) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.	(*b*) in the case of a company not having a share capital, not less than one-fifth of the total number of its members:
(2) For the purposes of sub-section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.	
(3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.	
*(4) The **Central Government may**, if in its opinion circumstances exist which make it just and equitable so to do, **authorise any member or members** of the company to apply to the Company Law Board under section 397 or 398, **notwithstanding that the requirements of clause (a) or clause (b)**, as the case may be, of sub-section (1) are not fulfilled.*	***Provided** that the **Tribunal may, on an application** made to it in this behalf, **waive** all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.*
(5) The Central Government may, before authorising any member or members as aforesaid, require such member or	***Explanation.*** —For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one

members to give security for such amount as the Central Government may deem reasonable for the payment of any costs which the Company Law Board dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.	member. (2) Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

242. Powers of Tribunal

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

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

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

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

(This part (a) of subsection 1 of the above section is lifted from clause (a) of sub-section (2) of section 397 and from clause (a) of subsection 1 of section 398 and then abridged both into clause (a) of subsection (1) of section 242. As to part (b) of subsection (1) of section 242, it has been bodily lifted without any change from clause (b) of subsection (2) of section 397 – here in this sub section (1), it appears that enquiry and remedy has been set out under subsection (1) of section 242)

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

(From subsection (3) to subsection (8) are not relevant for today's discussion, hence not reproduced)

39. After going through the old Sections of law and the new Sections of law, it is true, as the Petitioners' Counsel stated, there are some changes in arranging Section 397 and 398 of 1956 Act into Section 241 and some part of Section 242 of 2013 Act. Likewise, there is a rearrangement to Section 399 of 1956 Act into Section 244 of 2013 Act.

40. Before going into the changes and arrangements, I must place the submissions of Senior Counsel Mr. Mohan Parasaran saying that Section 244 is a Section determining who can become a Complainant to raise cause of action under Section 241, Section 241 is a Section giving rise cause of action to the Complainant qualified u/s 244 and then u/s. 242 to see if the Tribunal is of the opinion that the oppression or prejudice is made out and such oppression and prejudice leads to winding up of the Company if so, by considering such winding up would unfairly prejudice the complaining member or members, pass any remedy which is just and equitable to end the litigation in between the parties or to pass any orders as set out Sub-section 2 of Section 242.

41. This Bench agrees with the submissions of the Senior Counsel Mr. Mohan Parasaran because in the Act, arrangement is made in such a way that the person complaining must be qualified u/s 244 to raise cause of action u/s 241 then if the Tribunal is of the opinion u/s. 242(1) that oppression or prejudice is made out which is likely to drive the Tribunal to pass an Order of winding up on just and equitable ground, since such winding up would unfairly prejudice the complaining member, then Tribunal will pass any alternative order to end the litigation complained of by passing any order or a relief that is set out under Sub-section (2) of Section 242.

42. Though Section 244 has been arranged subsequent to Section 241, since the Section saying who is the person qualified to raise the cause of action u/s 241, we are of the opinion that we have to make comparative

study in respect to old Section 399 and new Section 241 to arrive to a conclusion as to whether any change is there from old Act to new Act, if any such change is there, whether it is to narrow down the compass of the old Section or to widen the compass of the old Section in the new section. It is relevant to mention that Senior Counsel Shri Ravi Kadam appearing on behalf of the Respondents submitted that oppression and prejudice remedy is an exception to the Rule of Democracy.

43. Let us go back to these two Sections. In Sub-section (1) of 399 and Sub-section (1) of 244, they start saying that 'the following members' alone have right to apply under Section 397 and 398 or Section 241, as the case may be. So, in the beginning itself both, old and new, start saying ***"The following members shall have the right to apply u/s 397, 398 of the old Act/241, namely"***, in this clause one mandate in the beginning of the Section is **"the following members"**, then second mandate is ***"shall"***, third is a new introduction in new section is the word ***"namely"*** to be more exact about ***"the following members"*** in ensuing clause to specify and exclude the members other then members qualified u/s 244. Therefore, **"namely"** has been introduced to pinpoint the members qualified to file petition u/s 241. By reading up to Section 241(1)(a), it is clear in the statute that for maintaining a Petition u/s 241, the 'member or members' shall have 1/10th of number or not less than 10% of the issued share capital.

44. If we come to old Sub-section (4) of Section 399 of 1956 Act, it is evident that Central Government was authorised to authorise any member or members of the Company to apply to the Company Law Board u/s 397 or 398, *notwithstanding the requirements of Clause (a) or (b), as the case may be of Sub-section (1) are not fulfilled.* In the old Sub-section (4), three things are clear, one is authority was given to Central Government, two is the authority was given to the Central Government to ensure whether it is just and equitable to authorise a 'member' or 'members' to raise cause of action under either 397 or 398, three is an overriding clause

authorising Central Government to authorise 'member' or 'members', to raise cause of action u/s 397 or 398 notwithstanding as to whether they have been qualified under sub-section (1)(a) or (b) of Section 399 or not.

45. What has happened to this Sub-Section (4) in Section 244? When it comes to Section 244, instead of making it as sub-section and instead of giving authorisation to Central Government, it has been made a proviso to Sub-section (1) of Section 244, meaning thereby that this right of authorisation to the 'members' to raise cause of action u/s 397 and 398 has been restricted to a proviso to the main Section by which the unconditional right under subsection to section 399 has metamorphosed into restricted right in the proviso to section 244. The power to authorise has been conferred upon NCLT. When qualification issue has been decided by the statute under Sub-section (1) of section 244, the direction that is used there is 'shall' leaving it not open to the Tribunal to go beyond the minimum qualification mentioned therein, but where it has come to proviso, it has become 'may' in the proviso giving discretion to NCLT as to whether to waive or not to waive the qualification that is set out in main Section. Moreover, notwithstanding clause that was there in Sub-section (4) of Section 399 has gone off in the proviso to sub-section (1) of Section 244.

46. So by these perceptible changes, three things happened, one is the authority with the Central Government has been shifted to NCLT, perhaps, to bring the jurisdiction under Companies Act under one umbrella, two is the unconditional right given to Central Government has been restricted to a proviso by getting it tagged to subsection – 1 of section 244 of the new Act, three is non-obstante clause saying 'notwithstanding that the requirements of clause (a) or clause (b) of Sub-section (1) are not fulfilled' has been deleted when it has come to waiver clause in the proviso to Sub-section (1) of Section 244, therefore, the order of authorisation that could be passed by Central Government disregarding

qualification criterion mentioned in Sub-section (1) has been consciously deleted in the waiver clause of Section 244.

47. This proviso has started saying "provided". Normally 'provided' means, as we all know, 'on the condition that' or 'if' or 'only if', if this meaning is taken as meaning of word 'provided', the Tribunal is required to look into waiver only if an application has been made by the complaining 'member' or 'members', by which, it could be understood that the complaining member has to file an application for waiver along with the Main Company Petition itself. In subsection – 4 of section 399 of the old Act, it was not said that it has to be considered on application of the complaining party.

48. On seeing the facts of the case and on seeing the provisions of Section 244, prima facie it is clear that Petitioners having not met the 10% shareholding criterion to get qualification to file this Company Petition, therefore the Petitioners are not entitled to raise cause of action under section 241.

49. Now let us see whether the purposive interpretation canvassed by the Petitioners' Counsel saying that the issued share capital means 'equity share capital' is correct or not.

50. The Petitioners' Counsel laboured a lot to impress upon this Bench that the word 'class of members' added to Clause (b) of Sub-section (1) of Section 241 is relatable to Section 244 to read 'issued share capital' as 'issued equity share capital' for the reasons mentioned. One reason is that the legislature made so many changes in Section 397 and 398 of 1956 Act and abridged them into one Section i.e. 241 in 2013 Act.

51. Let us on this premise, again visit Sections 397, 398 and Sections 241, 244 to find out as to what are the changes made to them and whether such changes will have any bearing upon Section 244 of 2013 Act. Here, we should not forget that this Bench has already made an elaborate discussion on Section 244 and finally observed that no major changes have been done in respect to qualification, in fact, the compass of the

jurisdiction has been further restricted for compliance of qualification criterion stating that discretion for considering waiver clause will happen only on an application moved by the complaining member before the Tribunal.

52. On reading Sections 397 (1), 398 (1) of 1956 Act and Section 241(1) of 2013 Act, the commonality in three sections is that all three will start with saying ***any 'member' or 'members' of a Company who complains or complain...*** and ends with saying ***'may apply to the Company Law Board/Tribunal, provided such member/members have a right to apply under Section 399 of the old Act / 244 of the new Act for an Order under this chapter.*** (The only difference in the tail of these Sections is in Sections 397, 398 in the end it is said as **'in virtue of Section 399'**, whereas in Section 244 it ends saying ***'under section 244, for an order under this chapter')*** In all these three sections, old and new, there is no change as to who can complain, no ambiguity here. The word ***"provided"*** set out in the last clause of all these three sections is used as conditioner or modifier to sections 397, 398/241 so as to again reiterate that member or members qualified u/s 399/244 alone can ***complain,*** none other. Therefore, as to complaining party is concerned, no change has come. If we look for meaning of 'complaint', in legal parlance, "complaint" means pleading cause of action and the relief following the cause of action. So, according to all these three Sections, the member complaining must pass the test under the qualification Section, unless complaining member passes the test of qualification, such member cannot file a complaint/ petition under cause of action Section i.e. u/s 241 of the new Act. At least to this extent, there cannot be any confusion or any doubt or ambiguity to say that who can become a complaining party u/s 241 of the new Act. In the back drop of it, can it be said that by introduction of phrase 'the class of members' in (b) of Sub-section (1) of Section 241, the test for complaining party has been changed? To our belief and opinion, no. These words 'class of members' have been added to the mismanagement sub-section, therefore,

it could at best be said that if at all any grievance is there to a class of members in respect to the mismanagement of the affairs of the company, the complaining party may as well canvas for the cause of a class of members, that does not mean class of members can separately become a complaining party under Section 241 of the new Act.

53. Before going into further discussion, let us see the meaning of "cause of action'. If the dictionary meaning of "cause of action" is looked into, it says it is ***"a fact or facts that enable a person to bring an action against another"***. What is fact or facts in this case is the act or omission that falls within the ambit of oppression or prejudice stated in section 241. As to entitlement of cause of action, it is envisaged in section 244 that a member or members forming not less than one-tenth in number or one-tenth in value of the issued share capital alone are qualified for accrual of cause of action u/s 241, therefore cause of action u/s 241 is not a freehold cause of action, it is a qualified cause of action, the right to this cause of action comes upon qualification – **if no qualification, no cause of action**.

54. Here the cause of action is conceived in the Statute itself, so is the qualification. Both cause of action and qualification are not inalienable rights like fundamental rights to say that since the impugned action or omission is in violation of his fundamental rights, he is entitled to seek relief though right is not envisaged under any Statute. Of course, the right of remedy for violation of fundamental rights is also borne out of the Constitution of India. Therefore, when a cause of action and qualification are simultaneously designed by the Statute, both have to go together. Here the right u/s 241 and the qualification u/s 244 have been simultaneously given by the Statute, thereby one cannot dilute another. When "class of members" qua is not conferred with a right to complain, there is no occasion to assume that the qualification clauses u/s 244 diluted the intent of section 241. In section 241, the complainant can canvass the distress of himself, the company, other members and the class

of members, that does not mean all of them can become complaining party.

55. If you see the historical background of the doctrine of oppression and mismanagement; everybody knows it has been borrowed from English Law. When we read the fundamentals of Civil Law and Company Law, the cause of action will arise to the aggrieved alone, not to others. In Corporate jurisprudence, Company has been conceived as an independent person with rights and liabilities, thereby if we go by Civil jurisprudence, the aggrieved alone will have cause of action on wrong done against the aggrieved, since the Company has been conceived as independent person or independent entity if any wrongdoing has been done to the Company, the Company being an independent person it has to initiate action on its own against the person done/doing wrong. If the Directors themselves are wrongdoers in a Company and if such wrongdoing affects minority, then such minority neither can prevail over in the shareholders' meeting nor in the Board. Therefore, there will not be any occasion for the Company to take up the cause of the minority who are at sufferance. To get over this problem, common law has evolved a concept of derivative action to fight on behalf of the Company to fight for the cause which is not falling within the ambit of shareholders' rights. As we all know, if you fight for the cause of others or Company, it will become a representative action on behalf of others. The beauty in representative action or derivative action is that a person can fight not only for his grievances but also for the grievances of others. This is a new jurisdiction carved out from the basic concept of proper Plaintiff Rule. If this background is taken into consideration for reading Section 241, the bottom line for taking action under Section 241 is 1/10th of numbers by member or not less than 10% of the value of shareholding. The basic rule taken into consideration for qualification criterion is the economic interest of the members. After all, why the Company comes into existence? It comes into existence to make profits on the money invested by the

members. Therefore, the right given for the minorities is to protect economic interests of them. For this reason alone, class concept has not been introduced in Section 244 of the new Act thereby the phrase 'class of members' added to mismanagement clause will not have any bearing, not even remotely relatable to the qualification mentioned u/s 244 of the new Act.

56. The Petitioners' Counsel has vehemently argued that since 'class of members' concept has been introduced in cause of action Section (241), this has to be read into Section 244 of the new Act. We do not find any merit in this argument by looking at the phrase "class of members" mentioned in various sections of Company Law because shareholders - whether they are equity shareholders or preferential shareholders - they have to remain waiting for their turn when winding up is ordered in the Company. The only difference is the preference shareholders will come into priority before equity shareholders when the residue of the liquidated Company is distributed to the shareholders. They cannot have any security rights over the assets of the Company. If all of a sudden the Company goes into losses, the preference shareholders have also to suffer along with equity shareholders. The dividend rights will be exercised against the Company, only when Company is making profits. Therefore, it cannot be said that the investment of preference shareholders is safe and that the investment of equity shareholders is at risk.

57. The Petitioners' Counsel has brought in Accounting Standards into picture to say redeemable preference shares have been shown as debt in the Accounting Treatment, therefore, the preference shareholding cannot be considered as shareholding in the Company. This argument is not even remotely sound, for two reasons – one, Accounting Treatment or Accounting Standards is to show the transparency and to avoid mixing up figures, therefore, the facility that has been recognised in the Accounting Treatment cannot be considered as overreaching effect on the statutory provisions. When the Statute defines preference shareholding as

part of the issued share capital, can it be said that since Accounting Standard saying that redeemable shareholding shown as debt in the Company, therefore, the definitions given under Companies Act and the rights created under Companies Act are redundant? It cannot be like that. Preference shareholding will never become a debt and a shareholder can never wear the hat of creditors. The Petitioners have been arguing redeemable preference shares as debt, if so, any right has been conceived to the preference shareholders at least to make a demand for recovery of their investment before the period envisaged while issuing redeemable preference shares. If Company has gone into losses, can it be possible to preference shareholder to ask for recovery on par with creditors? So this limited argument of the Petitioners highlighting the practice in Accounting Standards will not make any case to obfuscate the mandate of the Statute. Therefore, we have not found any merit in the argument of the Petitioners' Counsel saying that the phrase 'issued share capital' used in Section 244 of the new Act is contrary to the purpose of legislation. It has been again and again reiterated by the Hon'ble Supreme Court, the purposive interpretation is to find out the purpose of legislation, but not to invent a purpose for the gain of any individual. The purpose of legislation is to initiate proceedings u/s 241 of the new Act only when the criteria of fulfilling one-tenth in number or not less than one-tenth of shareholding, i.e., 10% economic interest in the Company. Voting rights of the equity shareholders in the Company is only limited to the management of the Company. In fact, there is every possibility by virtue of this voting right to cause economic loss to the preference shareholders who do not have voting right to the decisions in the Company. Then what will happen to the economic interest of the preference shareholders who have invested their money in as much as the equity shareholders invested. Considering all these implications, 10% of the issued share capital is taken as qualification. The Petitioners have raised a point saying that today these Petitioners shareholding will become net value of ₹1 lakh crores,

therefore, this investment being miniscule in the net worth of the Company, it cannot be considered for determination of qualification u/s 244 of the new Act. If that is the case, how much these Petitioners invested as equity in this Company? It was only ₹7 crores and odd. When economic interest is taken into consideration, the benchmark is how much investment has gone from the shareholders. It is not how much the net worth of the Company is at the time of filing the Company Petition. Moreover, the Respondents' Counsel has stated that R1 Company is a NBFC; therefore, these Accounting Standards are not applicable to R1 Company till date. Hence, whatever being said under Accounting Standards will have no bearing on R1 Company.

58. If we see the objective of such Accounting Standards, they have come into existence to provide a standard set of accounting policies, valuation norms, disclosure requirements on the basis of which financial statements should be prepared to make financial statements more meaningful and comparable, to harmonise the diverse accounting policies and practices in order to ensure standardisation in the preparation of financial statements and to enable the comparability of financial statements and thereby improve reliability and usefulness of financial statements.

59. By reading these objectives, it is ascertainable that this Accounting Treatment has come into existence to easily understand the financial statements of the Company, nothing more nothing less.

60. When section is in clear and clean language understandable, no interpretation is required. Of course, the necessity will arise for interpretation to those who are bent upon to run down the purpose of legislation. What is the purpose of legislation? The answer is qualified cause of action.

61. Let us take one illustration to know how cause of action is relatable and personal. What will happen if a person is murdered – it being an offence against State, it will take action, though State is not directly

aggrieved, since such action is prohibited under law, penal action will follow so as to maintain social order in a State. But when it comes to sue for damages, (of course this cause of action is not prevalent in our country) only the persons depending on the deceased alone are entitled to; because they being dependents on the deceased and his death will have bearing on the lives of dependants, they are implicitly qualified to seek damages. Though, State takes action for the wrong done on criminal front, but when it comes to seeking damages, cause of action will accrue to kith and kin only. Therefore, for every wrongful action, cause of action on civil side is open only to those persons who are entitled to have entitlement, so entitlement criterion is the testing ground to accrual of cause of action.

62. Normally, when an act is illegal, the person against whom such illegality has been committed will get cause of action, for which a special jurisdiction need not be conferred upon a civil court, because Civil Procedure Code developed on the background of common law on the premise that inherent powers have been endowed upon a civil court to remedy the wrong unless it is expressly or impliedly barred by law. But over a period of time, special courts have come into existence. Wherever it has been mentioned that jurisdiction is conferred upon tribunal, it has to work within the frame work that has been assigned by the Statute, even the equity that is canvassed as given to NCLT under section 242 is also a jurisdiction given by the statute, therefore, it can't be said that it is an equity jurisdiction, so Tribunal can do anything by applying its discretion, here we must make it clear that Tribunals or for that matter courts are to exercise the discretion judicially to the extent permitted, not beyond.

63. When it has been said that jurisdiction is conferred upon a particular Tribunal with overriding effect, then cause of action obviously will not arise before civil court, because remedy is not available before civil court, therefore it has to be understood that accrual of cause of action is always dependable on or relatable to the person entitled to and remedy

is also available at where jurisdiction is conferred upon. What all we say is cause of action is specific and personal, not in rem.

64. Who can become a complainant? Normally, the person giving complaint is complainant. It will be generally found in cause of action section, the person aggrieved can complain over the cause considered as grievance in the section. For a minute, let us clarify what is meant by grievance also, so there will not be any confusion. The word "grievance" denotes a cause of distress (injury, injustice, or wrong, etc.,) felt to afford reason for complaint or resistance. As we already said in the illustration that cause of action in civil cases is limited to the persons entitled, so unless entitlement of a person complaining is fulfilled, it cannot be construed as cause of action arose to the person propose to complain.

65. If we carefully read section 241, it is not discernible as to whether wrongful action is repugnant to any mandate of the statute or prohibition made by any statute. It says that if the act or omission of a wrong doer is prejudicial or oppressive to the categories mentioned in this section, it does not matter whether such action is legal or illegal. By going through origin of this concept, it will be clear that it has developed on fairness principle, probity principle and on equality principle, therefore, it is a remedy developed over and above repugnancy doctrine, so this relief is ordinarily not available before civil court. This is a unique doctrine not available under any other provision of the very same Act or, to our remembrance, under any other law.

66. We all know that an act or omission will have remedy only when such act or omission passes the test of repugnancy, if the act or omission does not pass that test, there cannot be any remedy, whichever Act we take, for example Contract Act, Transfer of property Act or Negotiable Instruments Act, for that matter any Act, repugnancy test has to be passed before laying hands on remedy. When remedy is not available in the cases where action is not hit by repugnancy, can civil court entertain a case

where repugnancy of law is not present, certainly not possible for want of repugnancy. If such is the case, oppression remedy and unfair prejudice remedy do not fall within the ambit of civil court. This is the precise reason that drove the English Court to hold in Foss v. Harbottle that the action of the minority shareholders on company's behalf is hit by Proper Plaintiff Rule and Majority Rule. This case has become precursor to carve out a unique, exceptional and extraordinary jurisdiction to minority shareholders to pursue on company's behalf when the treatment against the minority is unfair and devoid of probity laced with bias, these words unfair prejudice and oppression are defined nowhere. If this case is dealt with as much as any other civil case, nothing is per se apparent to say that action of majority is hit by repugnancy. If the case law over this doctrine is gone into, it must be clear that treatment to minority or any member or members shall not only be differential to minority, but also discriminatory qua minority or complaining members to defeat the economic interest of them. Since this special jurisdiction is carved out beyond repugnancy, will it require higher standard of proof to pass this remedy than to pass a remedy in ordinary civil case? Obviously it must be more, because this relief is not based on ordinary civil law; it is all built on ethical foundations highlighting on good faith (trust), fairness and probity. Precisely for this reason alone, this relief is consciously not made available to below 10%, for two reasons, one – if no qualification is there, it will become a night mare to the management, two – majority is a rule, this relief to minority is an exception, after all the decisions in a company are democratically taken, owing to this reason alone, courts normally not interfere with the decisions of the company. **Exception shall remain exception, Rule remains Rule, and these two are not interchangeable.** Courts, before passing any relief, have to see whether cause propounded by the minority is really an exception to Rule of democracy, here strict proof test is to be applied, because this remedy in ordinary parlance is not available. If the case falls within the groove of oppression and

mismanagement, equity could obviously be applied to pass any relief that is able to end the litigation, but by throwing all this cautious exercise and judicial discretion to winds, and assume that case u/s 241 & 242 is not bound by any principle and can pass any order ignoring the screening tests set out by the statute, then the corporate democracy, which is conceived as hallmark of governance, will become otiose. It will not only make corporate democracy otiose, it indeed makes our rule of democracy otiose if we act contrary to the mandate of statute.

67. A Section of law cannot be grafted with anything & everything to one's convenience and take out a hybrid saying hybrid is the purpose of the section without realizing or perhaps knowing well that hybrid will never become original. One must be cognitive of the fact that statutes are not let loose to mutations. Purposive interpretation is not a regular phenomenon; it is a rare phenomenon. It is not the view of this Bench, it is the view laid by Honourable Supreme Court of India in **Raghunath RajBareja v. Punjab National Bank, (2007) 2 SCC 230** is ***"law is hard, but it is law."***

68. The petitioners are under misnomer that the word member used in section 244 is in relation to members holding equity only, had it been so, the legislature would have clarified in the section itself that members means and includes equity shareholders alone. Then, can it be presumed that the legislature taken every care to mention class of shares in other sections has remained incognito when it has come to drafting and approval of section of 244. Moreover, had the legislature felt that the oppression or prejudice remedy is to be limited or intended to be on class basis, why a separate provision has been brought under section 245 of the Act 2013. When the legislature consciously has not introduced this class concept in section 244 or even in section 241, instead of digging deep down why it has not been legislated in the way we felt right, if we start looking for the objective of the section, then our doubts will disappear and we get an answer to the legislative intent the petitioners doubting.

69. If at all it is felt necessary to find out the purpose of the section, first of all that section or part of the section has to be read and try to elicit meaning out of it, if really it does not give meaning, then we must see the heading of the section, then it must be related to the sections proximate to it. We must take the meaning what section is giving, if you want to get some other meaning for which section is not meant, or section is not giving, then howsoever hard we try, we can't get the meaning other than what it gives. On seeing the petitioners trying to make out qualification criterion out of section 241 knowing well nothing is available in section 244, Mr. S.N. Mukherjee, senior counsel on the Respondents behalf has put forward a commonsensical argument, by saying it is like searching for something lost in darkness at some other place where light is there, this is to say that the petitioners trying to hang out at the phrase "class of members" present in section 241, instead of looking into section 244 where qualification criterion has been set out.

70. The senior counsel Shri Sarkar appearing on behalf of the Respondents argued that when computation is made u/s 244, it is the investment made by the members will be taken into consideration, not the net value of the company or net value of the petitioners' shares as on the date.

71. Finally, our answers to the Petitioners' Counsel's arguments are

(1) That no change or new concept was brought in Section 244 of the 2013 Act. Indeed, the old Section of law is in toto bodily lifted from Section 399 to Section 244, change is there to the extent of sub-section (4) in Section 399 to a proviso to sub-section (1) of Section 244, as to the phrase 'issued share capital' or as to its rigors no change has come, indeed, the word 'namely' has been introduced. For further confirmation that qualification is limited to the 'members' mentioned in the Section, not to others, thereby the ratio decided in Northern Projects (supra) is still relevant and makes it not open to the

Petitioners to say that 'issued share capital' means 'issued equity share capital'.

(2) That the phrase 'class of members' mentioned in the mismanagement clause in Section 241 cannot be said as percentage of shareholding for qualification is to be counted within the 'class of members', over this aspect, we have elaborately discussed and said that the member complaining can as well fight for the cause of 'class of members' if mismanagement is *qua* against a 'class of members'. But, it cannot be read that a 'class of members' themselves have to be treated separately attaining qualification u/s 244. It is only an additional relief that a member qualified u/s 244 can ask for relief. We already said that the addition of 'class of members' is inconsequential to the qualification mentioned u/s 244. When the legislature has taken every care in creating rights on class basis, had the legislature intended to introduce class concept, they would have introduced the same in Section 244 as well. But that has not been done. Therefore, there is no point in the argument of Petitioners saying that 'members' mentioned in Section 244 has to be read as 'class of members'.

(3) That we do not find any merit in the argument of the Petitioners' Counsel saying that since the redeemable preference shareholding be shown as debt in the Accounting Treatment, preference shareholding cannot be equated with the equity shareholding to invoke Section 244, because showing in Accounting Treatment for the convenience of Accounting Treatment will neither change the concepts of Company Law nor have any bearing on the mandate of the Statute.

(4) That we do not find any merit in the argument of the Petitioners' Counsel saying that by introduction of waiver clause, Section 244(1)(a) has become directory, because by making waiver clause as an exception to 244(1)(a), the qualification clause has become further strong for two reasons – one, by introduction of word 'namely', it has become a third reiteration in respect to qualification and (2) by

introduction of waiver clause as proviso, that unconditional authorisation available the old Act to the Central Government has been made as a discretionary relief u/s 241(1)(a).

72. In respect to the argument of Senior Counsel Shri Janak Dwarkadas, appearing on behalf of R11, saying that the definitions given u/s 2 will be taken into consideration unless the context otherwise requires, he advanced this argument to say that issued capital does not mean equity plus preference in lieu of the additional phrase 'class of members' introduced in Section 241(1)(b). We differ with the argument of the Senior Counsel because there is neither a context in Section 244 in respect to 'class of members' nor in complaint/application/cause of action Section 241, it is only inclusion of *class of members* giving a window to the complainant to canvass for the grievance of class of members as well, not more than that. Therefore, the meaning of the definitions enumerated in Section-2 will remain applicable; the meanings cannot be taken otherwise unless an explicit or implicit context comes into play saying that particular word's meaning is very much different from the meaning given in the definition. Therefore, we do not find any merit in the argument of R11's Counsel.

Both sides have filed catena of decisions showing precedents that purposive interpretation could be given where the Section of law is unable to give the meaning legislature intended to and if the purpose is not derivable from the language available, then definitely Courts will apply the doctrine of Casus Omissus or harmonise the meaning by taking the help of external tools and the Sections proximate to that Section. When meaning is plain, language is plain; there cannot be any occasion to apply doctrine of purposive interpretation to any Section of Law. For there being no precedent saying that the meaning Section 244 is absurd and un-meaningful, this bench has to go by the language of the Section, when language is clear to this Bench to arrive to a conclusion to what has been said in the Section, we do not believe that there is any need to interpret to

inflect the Section envisaged in plain language. Thereby, when language of the Section is plain and simple, we are of the view that there is no point to discuss every decision and to arrive to a conclusion to say that they are not applicable to the present case. The only precedent that is applicable to the present case is Northern Projects Ltd. (supra) to say that issued share capital means equity plus preference. Therefore, this Bench is of the opinion that the Petitioners' side has failed to satisfy this Bench that this Petition is maintainable.

For there being a direction from Hon'ble NCLAT to decide waiver point soon after determination of maintainability point, this Bench, instead of dismissing this Company Petition as not maintainable, listed this matter for hearing on the point of 'waiver' on **7th March, 2017.**

Sd/-

B.S.V. Prakash Kumar
Member (Judicial)

Sd/-

V. Nallasenapathy
Member (Technical)