REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2481 OF 2014

Darius Rutton Kavasmaneck ...Appellant

Versus

Gharda Chemicals Limited & Others ...Respondents

J U D G M E N T

Chelameswar, J.

1. The first respondent is a company under the Companies Act, 1956 (hereinafter referred to as "the Act"). Two appellants herein who are mother (since deceased) and son respectively are minority shareholders holding or otherwise controlling 17 per cent of the equity in the first respondent company.

HISTORY OF THE COMPANY

2. First respondent company is carrying on the business of "selling chemical process, knowhow and of manufacturing dyes, chemicals and textile auxiliaries" etc. It all started as a family firm in the year 1962 known as M/s. Gardha Chemicals Industries. The above-mentioned partnership was created by (1) the mother of the first appellant, (2) the husband of the first appellant, (3) a sister of the first appellant and the second respondent - the brother of the first appellant. The partnership deed contained a clause that none of the partners could sell his/her respective share in the firm without offering it first to the other partners.

3. On 6th March, 1967, a private limited company was incorporated with the principal object of taking over the assets and liabilities of the above-mentioned partnership as a going concern. Article 57 of the Articles of Association contained restrictions on the rights of all the shareholders to transfer their shares. Any shareholder desiring to sell his shares must offer his shares to the other shareholders of the company pro

rata to the holding of each of such other members respectively at a fair value.[1]

4. With effect from 17th August, 1988, the first respondent company became a public company (under Section 43A (1A) of

[1] 57. Save as aforesaid the following provisions shall apply to the transfer of shares –

(a) A member of the company may transfer a share to his lineal descendent, but save as aforesaid no share shall be transferred to a person who is not a member of the company so long as any member is willing to purchase the same at the fair value as hereinafter provided.

(b) The member proposing to transfer any shares (hereinafter called the proposing transferor) shall give notice in writing (hereinafter called a transfer notice) to the Company that he desires to transfer the same;

(c) Within the period of seven days from the receipt of a transfer notice as aforesaid the Company shall offer to each of the existing members of the company respectively such number of the shares included in the transfer notice as a pro rata or as nearly as may be to the holding of each member respectively on the footing that if he desires to purchase any or all of such members of the said shares at the fair value he shall within fifteen days of the offer be entitled to apply for the purchase and transfer of the same and the company shall be bound, upon payment to the transferor of the fair value of such shares, to transfer the shares of member applying;

(d) In case any member or members shall not have applied for the purchase and transfer of any or all of the shares to which he is entitled, the company shall within seven days of the date at which the offer closed, offer the untaken shares to such of the members as have applied for the purchase and transfer of all the shares to which they were entitled by the terms of the original offer in proportion as the holding of each of such members bears to the total number of shares held by them and they shall be entitled within fifteen days of the offer to apply for the purchase and transfer of a pro rata number of the said untaken shares and the company shall be bound, upon payment to the transfer of the fair value of such shares, to transfer the shares to the member applying;

(e) The promising transferor shall be bound to execute a transfer in respect of any shares so sold and in default thereof be deemed to have executed such a transfer. The company shall thereupon cause the names of the members who have purchased the shares to be entered in the Register as the holders of such shares and thereafter the validity of the proceedings shall not be questioned by any person;

(f) In case no member shall apply for any of the shares included in the transfer notice or in case any are untaken after the compliance with the foregoing provisions of this Article the intending transferor shall have the right (which right shall endure for the period of one year from the date of transfer notice) to sell and dispose of hi shares to any person and at any price and to apply for registration of the transfer of the same and the company shall be bound to give effect to the transfer of such shares accordingly.

(g) For the purpose of this clause the fair value of the share shall be such sum, if any, as the auditors for the time being of the Company shall certify as the fair value thereof provided that it expressly declared that the fair value shall be (1) the amount of capital paid upon thereon plus (2) a sum bearing the same proportion to the value as appearing in the company's last balance sheet of any reserve fund or other fund of the company as the capital paid up on all the shares of the company for the time being issued plus or minus as the case may be, (3) a sum bearing the same proportion to the value as appearing in the profit and loss account consisting of or representing undivided

the Act) as its turnover exceeded the limit prescribed thereunder:

> "43A. ****** ****** ******
> ****** ****** ******
>
> (1A) Without prejudice to the provisions of sub-section (1), where the average annual turnover of a private company, whether in existence at the commencement of the Companies (Amendment) Act, 1974, or incorporated thereafter, is not, during the relevant period, less than rupees one crore, the private company shall, irrespective of its paid-up share capital, become, on and from the expiry of a period of three months from the last day of the relevant period during which the private company had the said average annual turnover, a public company by virtue of this sub-section;
>
> Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of Section 3 and the number of its members may be, or may at any time be reduced, below seven."

5. One important development in the history of the first respondent company relevant for the decision of the instant appeal is that on 2nd April, 2001 a notice was issued calling for extraordinary general meeting of the first respondent company scheduled to be held on 5th May, 2001. The purpose of the said meeting was to adopt a resolution for amending the Articles of Association of the first respondent by inserting clause (d) to Article 3 thereof. The substance of the said clause is to prohibit any invitation or acceptance of deposits from persons other than the members, directors or the

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profits or losses as the capital paid up on such share bears to the total capital paid up on all the shares of the company for the time being issued."

relatives of the members or the directors of the company. According to the respondents, such a proposal for amendment was necessitated to comply with the requirements of the newly inserted sub-section (d) of Section 3(1)(iii)[2] which came to be inserted by Act 53 of 2000 w.e.f. 13.12.2000. The appellant opposed the amendment of the Articles of Association and the amendment could not be carried as the proposal failed to muster the requisite majority.

HISTORY OF THE LITIGATION:

6. In the month of May, 2009, certain reports appeared in the media that the second respondent was proposing to sell his shares in the first respondent company which were at that time valued at approximately 1600 crores. The appellant, therefore, filed a Company Petition No. 132/397-98/CLB/MB/2009 (hereinafter referred to as the Company Petition 132 of 2009) before the Company Law Board, *inter alia*, seeking prohibitory orders[3] against the 2nd and 3rd respondents from committing breach of the pre-emption

[2] **3.(1)(iii)** - 'private company' means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by its articles,-- ……

(d) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

[3] That this Hon'ble Bench be pleased to grant a permanent order and injunction restraining the 2nd/3rd respondents by themselves or through their servants and or agents, directly or indirectly, from selling, transferring, alienating, dealing or disposing the shares held, directly or indirectly, by the 2nd/3rd Respondents in the 1st Respondent to any person without first offering the same to the Petitioners at the fair value quantified in accordance with Article 57(g) of the Articles of Association of the 1st Respondent.

agreement contained in Article 57 of the Articles of Association referred to supra. On 11th December, 2009, ad-interim injunction order was passed by the Company Law Board restraining the second respondent from alienating his share without permission of the Company Law Board. However, the Company Petition No. 132 of 2009 was heard finally and dismissed by an order dated 14th May, 2010.

7. Aggrieved by the same, the appellants preferred Company Appeal No.24/2010 before the High Court of Bombay on 26th June, 2010. The High Court summarized the decision of the Company Law Board as under:

> "75. It is on this material that the company petition was placed before CLB and heard accordingly. The CLB firstly held that the first respondent is a public company. Once it is held to be a public company, then, its shares are freely transferable and the issue was to whether any preemption clause/article restraining transferability of shares in public company is valid. The Board held that the Article 57 does contain such restriction but, the Board relying upon a judgment of this Court in the case of Western Maharashtra Development Corporation Ltd. Vs. Bajaj reported in (2010) 154 Company Cases 593 (Bom) held that such an clause in the Articles of Association will not be applicable to 1st respondent company. Once it is held to be a public company, its shares are freely transferable and the Articles would not hold good as they are contrary to the statute. Holding that violation of such an clause in the Articles is not an act of oppression, the petition came to be dismissed."

The said appeal was finally heard and dismissed by the impugned judgment dated 14th June, 2011.

According to the appellants, the High Court held that –

> "an agreement between shareholders of an unlisted public company conferring a right of preemption which is embodied in its Articles is invalid and unenforceable." - SLP

8. Elaborate submissions were made on either side dealing with the various provisions of the Companies Act as amended from time to time. The learned counsel appearing on either side also submitted written briefs.

9. According to the written brief submitted by the appellant the question that arises for consideration of this Court is summarized as follows: -

> Whether on and after the bringing into force of the Companies (Amendment) Act, 2000, the status and character of Gharda Chemicals Ltd. (R-1) continued to be as that of a "hybrid company" (Section 43A company) and whether this company and its members are bound by the terms of a preemption clause contained in Article 57 of the Articles of Association?

In our opinion, the REAL QUESTION is not whether after the Amendment Act 53 of 2000, the first respondent continued to be a private company or became a public company, But whether the amendment made by the Act 53 of 2000 to Sections 3 and 43A destroys the rights and obligations created by Article 57 of the Articles of Association of the first respondent company.

10. The case of the appellants all through has been that notwithstanding the amendment of the Act by the Amendment

Act 53 of 2000, Article 57 of the Articles of Association still governs the rights of the members of the first respondent Company.

11. On the other hand, the case of the respondents has always been and is that the first respondent company is a public company having had become so by the operation of law i.e., Section 43A(1) and it cannot now become a private company. There is nothing in the Amendment Act 53 of 2000 which automatically renders a public company created under Section 43A to become a private company. It is also the case of the respondents that the failure to amend the Articles of Association to give effect to Section 3(1)(iii)(d) *ipso facto* make the first respondent a public company thereby rendering Article 57 inoperable.

12. We shall deal with those arguments later in the judgment. Before dealing with these various arguments, we deem it appropriate to examine the relevant provisions of the Companies Act, and the various amendments made to the Act from time to time.

SCHEME OF THE RELEVANT PROVISIONS OF THE COMPANIES ACT:

13. The Companies Act, 1956, (hereinafter referred to as 'the Act') as it was originally enacted, contained only the definition of a 'private company' under Section 3(1)(iii)[4] to mean a company[5] [a defined expression under Section 3(1)(i)] which, by its articles **(a)** restricts the right to transfer its shares, if any[6], **(b)** limits the number of its members to fifty and **(c)** prohibits any invitation to public to subscribe for any shares or debentures for the company.

14. Section 27(3) of the Act stipulates:

> "In the case of a private company having a share capital, the articles shall contain provisions relating to the matters specified in sub-clauses (a), (b) and (c) of clause (iii) of sub-section (1) of section 3; and in the case of any other private company, the articles shall contain provisions relating to the matters specified in the said sub-clauses (b) and (c)."

This sub-section makes it clear that to be a private company either with or without share capital the Articles of Association of such company must necessarily provide for the matters

[4] **3.(1)(iii)** - 'private company' means a company which, by its articles, -
(a) restricts the right to transfer its shares, **if any;**
(b) limits the number of its members to fifty not including –
xxx xxx xxx xxx

[5] **3. Definition of 'company', 'existing company', 'private company' and 'public company' – (**1) In this Act, unless the context otherwise requires, the expressions 'company', 'existing company', 'private company' and 'public company' shall, subject to the provisions of sub-section (2), have the meanings specified below –
(i) 'company' means a company formed and registered under this Act or an existing company as defined in clause (ii);

[6] Section 12 of the Companies Act recognizes the possibility of the formation of two clauses of Companies, companies "limited by shares" and companies " limited by guarantee".

specified in Section 3(1)(iii) of the Act. In the case of a private company limited by share capital all the three requirements specified in clauses (a), (b) and (c) of clause (iii) of sub-section (1) are to be provided. In the case of a private company other than a company having share capital only matters specified in clauses (b) and (c) of the above sub-section are to be stipulated.

15. Part-II of the Act deals with incorporation of company and matters incidental thereto. A brief survey of the said Part insofar as it is relevant for the purpose of this case is necessary.

16. Section 12 deals with the mode of forming incorporated companies, either public or private. It stipulates that an incorporated company may be formed by two or more persons in the case of a private company and seven or more persons in the case of a public company by subscribing their names to a memorandum of association and complying with other requirements of the Act in respect of registration.

17. Section 26 of the Act mandates *inter alia* that in the case of a private company limited by shares, there shall be

registered (along with the memorandum), Articles of Association signed by the subscribers of the memorandum. Such Articles of Association must prescribe the regulations for the company.

> "Section 26. Articles prescribing regulations.—There may in the case of a public company limited by shares, and there shall in the case of an unlimited company or a company limited by guarantee or a private company limited by shares, be registered with the memorandum, articles of association signed by the subscribers of the memorandum, prescribing regulations for the company."

18. The Act came to be amended by Act 65 of 1960. By the said amendment, Section 43A came to be inserted in the said Act. It originally contained eight sub-sections. Sub-Section (1) declared that any private company which has a share capital, of which twenty-five per cent of the paid-up share capital is held by "one or more bodies corporate"[7] become a public company.

19. The relevant part of sub-Section (1) reads as under:

> "**43A. Private company to become public company in certain cases** - (1) Save as otherwise provided in this section, where not less than twenty-five per cent of the paid-up share capital of a private company having a share capital

[7] "Explanation – For the purposes of this sub-section, "bodies corporate" means public companies, or private companies which had become public companies by virtue of this section."
but such an explanation was not there originally, but added by Act 31 of 1988.

is held by one or more bodies corporate, the private company shall,-

***** ***** *****
***** ***** *****

become by virtue of this section a public company."

20. Such companies popularly came to be called DEEMED PUBLIC COMPANIES (they are referred to by the learned counsel for the appellant as "HYBRID Companies") though Section 43A does not use that expression. In our opinion, Section 43A only creates a new class of PUBLIC companies -answering the description contained therein though they have and can retain all the attributes of a PRIVATE COMPANY as defined under Section 3(i)(iii). These companies are hereinafter referred to as "HYBRID Companies" for the sake of convenience.

21. Obviously, the question of private companies without share capital becoming public companies does not arise. Bodies corporate cannot hold non-existent shares in such private companies. Sub-Section (1) has two provisos. An examination of the contents of the first proviso is relevant and necessary for the purpose of this case. We shall deal with the same separately.

22. Sub-section (2) mandates that within three months from the date on which a private company becomes a public company by virtue of Section 43A(1), the company shall inform the Registrar that it has become a public company. It also mandates that the Registrar shall make necessary consequential alterations of the records.

23. The language and implication of sub-section (2) will be examined later in the judgment.

24. We are not concerned with sub-Section (3). Sub-Section (4) contemplates the possibility of a private company which becomes public company by virtue of the operation of Section 43A once again becoming a private company. It stipulates that any private company which becomes a public company by virtue of Section 43A(1) shall continue to be a public company, until such time it becomes a public company in accordance with the provisions of the Act. Such a re-conversion requires the approval of the Central Government.

> "(4) A private company which has become a public company by virtue of this section shall continue to be a public company until it has, with the approval of the Central Government and in accordance with the provisions of this Act, again become a private company."

25. Sub-section (5) provides for penalties for defaults in complying with the mandate of sub-Section (2). Sub-Sections (6) and (7) were omitted by the Amending Act 31 of 1988. Sub-Section (8) prescribes certain obligations attached to such public companies, the details of which may not be necessary.

26. By the Amendment Act 41 of 1974, sub-Sections (1A) and (1B) came to be inserted in Section 43A. By the newly inserted sub-sections, the legislature declared that two more classes of private companies become public companies on the happening of the events specified in each of the newly introduced sub-sections.

27. Sub-section (1A) declares that a private company whose "average annual turnover" "during the relevant period" is not less than Rs.1 crore becomes public company.

> "(1A) Without prejudice to the provisions of sub-section (1), where the average annual turnover of a private company, whether in existence at the commencement of the Companies (Amendment) Act, 1974, or incorporated thereafter, is not, during the relevant period, less than such amount as may be provided, the private company shall, irrespective of its paid-up share capital, become, on and from the expiry of a period of three months from the last day of the relevant period during which the private company had the said average annual turnover, a public company by virtue of this sub-section :
>
> Provided that even after the private company has so become a public company, its articles of association may include

provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be reduced, below seven."

28. The amount of Rs.1 crore mentioned originally in the sub-section (1) is substituted by the Act 31 of 1988 with the words "such amount as may be provided".

29. Sub-section (1B) declares that any private company holding not less than 25 per cent of the paid up share capital of a public company shall become a public company. Both the sub-sections contain a proviso each, which are *ipsissima verba*. The implications of such provisos along with the implication of the proviso to sub-Section (1) shall be examined later.

"(1B) Where not less than twenty-five per cent of the paid-up share capital of a public company, having share capital, is held by a private company, the private company shall,-

(a) on and from the date on which the aforesaid percentage is first held by it after the commencement of the Companies (Amendment) Act, 1974, or

(b) where the aforesaid percentage has been first so held before the commencement of the Companies (Amendment) Act, 1974 on and from the expiry of the period of three months from the date of such commencement, unless within that period the aforesaid percentage is reduced below twenty-five per cent of the paid-up share capital of the public company,

become, by virtue of this sub-section, a public company, and thereupon all other provisions of this section shall apply thereto :

> Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be reduced, below seven."

30. Sub-sections (9) to (11) of Section 43A came to be inserted by various amending acts. The complete details of the contents of all these sections and their legislative history is not necessary for us except to note that in the explanation appended to sub-section (9), the expressions "relevant period" and "turnover" occurring in sub-Section (1) and (1A) are defined as follows:-

> Explanation – For the purposes of this section, -
>
> (i) "relevant period" means the period of three consecutive financial years, -
> (ii) Immediately preceding the commencement of the Companies (Amendment) Act, 1974 ,or
> (iii) A part of which immediately preceded such commencement and the other part of which immediately, followed such commencement, or
> (iv) Immediately following such commencement or at any time thereafter;
>
> (b) "turnover", of a company, means the aggregate value of the realization made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year;

31. Act 31 of 1988 inserted sub-section (1C) which declares that any private company accepting deposits from "the public other than its members, directors or their relatives"

(hereinafter referred to as "PUBLIC" for the sake of convenience) pursuant to such invitation made by an advertisement after the commencement of the Amendment Act i.e. 15.6.1988 or renews an existing deposit becomes a public company. Even sub-section (1C) has a proviso in terms which are identical with the provisos to Section (1A) and (1B).

> "(1C) Where, after the commencement of the Companies (Amendment) Act, 1988 a private company accepts, after an invitation is made by an advertisement, or renews, deposits from the public, other than its members, directors or their relatives, such private company shall, on and from the date on which such acceptance or renewal as the case may be, is first made after such commencement, become a public company and thereupon all the provisions of this section shall apply thereto:
>
> Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be, reduced below seven."

32. Thus, it can be seen that by the date of amendment of Section 43A by the Act 53 of 2000 under Section 43A, there are four classes of private companies which are declared by the said section to become public companies on the happening of an event mentioned in each of the sub-sections.

33. It is also necessary to note that each of the above-mentioned four sub-sections contained a proviso. The tenor of all the four provisos is identical.

> "Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be reduced, below seven."

34. Each one of these provisos declare that even after a private company becomes a public company by virtue of the operation of any one of the four sub-Sections i.e. (1), (1A), (1B) and (1C) of Section 43A; the Articles of Association of such company may include provisions relating to the matters specified in Section 3(1)(iii). The provisos further declare that the number of members of such company "may be or may at any time be reduced, below seven". The implications of the provisos require an examination.

35. The provisos permit the continuance of stipulations in the Articles of Association of such public companies which relate to the matters specified in Section 3(1)(iii). In other words, though the companies whose Articles of Association provide for matters specified in Section 3(1)(iii) are private companies, and under the scheme of the Companies Act a

public company cannot have such stipulations, Section 43A expressly permit the four classes of public companies to retain such Articles of Association.

36. Secondly, the relaxation under the proviso regarding the membership of such companies getting reduced below seven is meant to obviate the conflict with the requirement of Section 12 which requires a minimum of such seven persons to constitute a public company.

37. The employment of the expression "may" in the clause, "its Articles of Association may include provisions relating to the matters" only indicates that a private company which becomes a public company by virtue of the operation of any one of the four sub-sections of Section 43A has choice either to retain those stipulations in its Articles of Association relating to the matters specified under Section 3(1)(iii) or to amend its Articles of Association either deleting all or some of the stipulations relating to matters specified in Section 3(1)(iii) from its Articles of Association. The reason is that a private company has certain privileges and exemptions under the Companies Act in the sense that a private company is subject

to a lesser degree of regulation under the provisions of the Companies Act, than a public company. The moment private company becomes a public company, either by operation of law or the volition of its member, such company becomes subject to a more rigorous regulation of its activities by the various provisions of the Companies Act. At the same time, a public company has certain advantages under law. Therefore, it is for the company and its members to decide whether the restrictions and limitations contained in the Articles of Association referable to matters specified in Section 3(1)(iii) should still continue even after the company lost the exemptions and privileges attached to a private company.

38. Section 43 of the Companies Act recognizes the existence of such privileges and exemptions by declaring that a private company which defaults in complying with any one of the stipulations made in its Articles of Association relating to the matters specified under Section 3(1)(iii), such Company "shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Act and this Act shall apply to the Company as if it were not a private company.[8]

[8] **43. Consequences of default in complying with conditions constituting a company a private company** - Where the articles of a company include the provisions which, under clause (iii) of sub-section (1) of section 3, are required to be included in the articles of a company in order to constitute it a

39. Therefore, these four provisos give an option to the company either to retain the original Articles of Association or alter them, but there is no statutory compulsion to alter the Articles of Association. Our view is fortified by the language of sub-Section (2) of Section 43A.

> "(2) Within three months from the date on which a private company becomes a public company by virtue of this section, the company shall inform the Registrar that it has become a public company as aforesaid, and thereupon the Registrar shall delete the word "Private" become the word "Limited" in the name of the company upon the register and shall also make the necessary alterations in the certificate of incorporation issued to the company and in its memorandum of association."

40. It only obligates a private company which becomes a public company by virtue of the operation of Section 43A to inform the Registrar within three months from the date on which the private company becomes a public company, regarding the change in its status from 'private' to 'public'.

41. On receipt of such intimation, the Registrar is required to make a change in the name of the company in his register and

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private company, but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Act, and this Act shall apply to the company as if it were not a private company :

Provided that the Central Government, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Central Government just and expedient, order that the company be relieved from such consequences as aforesaid.

is also required to make necessary alterations in the 'certificate of incorporation' issued to the company and its 'Memorandum of Association'.

42. Sub-section (2) does not obligate either the company or the Registrar to make any changes in the Articles of Association. No other provision of the Companies Act is brought to my notice which creates such an obligation.

43. Sub-section (11) was inserted by Act 53 of 2000 which is the bone of contention in the instant appeal and reads as follows:-

> "(11) Nothing contained in this section, except sub-section (2A), shall apply on and after the commencement of the Companies (Amendment) Act, 2000."

The implication of the same requires a detailed examination at a later stage of this judgment.

DECISION OF THE HIGH COURT:

44. The High Court noted the history of Sections 3(1)(iii) and 43A of the Act and recorded a finding that in view of the

insertion of sub-section (2A) in Section 43A by the Companies Amendment Act (Act 53 of 2000)–

> "..... the concept of deemed public company under section 43A and introduced by the Companies (Amendment) Act has now been abolished based on the recommendation of the working group of Companies Act, 1956."

45. The High Court also recorded a finding that the first respondent company is a public company[9]. The High Court then went on to examine whether there can be any restriction on the shareholder's right to transfer shares in a public company. The High Court reached a conclusion that in view of the subsequent statutory amendments made in 1988 and 2000 to the Companies Act, Article 57 of the Articles of Association of the first respondent company would no longer govern the rights of its shareholders to transfer their shares.

> "After 17th August 1988 and in any event after dated 13th December 2000, the position has undergone a change and Article 57 appearing in the Articles of Association would no longer be the governing article. It is not necessary to then consider the argument as to whether the said article is void or not. That article must give way to the statutory provision. If the shares of public company are freely transferable, then, the statutory provisions in that behalf will take such effect notwithstanding anything to the contrary contained in the Articles of Association of such company. The over-riding effect given to the Act by section 9 cannot be ignored and brushed aside as desired by the appellants."

[9] 117. Therefore, in my view, once the first respondent is a public company as evidenced by the certificate referred to above, with effect from 17th August 1988, then, the amendment made in 2000 would be applicable and section 43A ceases to apply to it. That the words "On and After", are used makes no difference as far as present case4 is concerned. In the present case, the status of the first respondent as a public company remains and it is now academic to find out whether it was a deemed public company earlier as contended. Once the law makes only a broad categorization as noticed above, then, it is not necessary to deal with this contention any more.

46. An alternative argument of the appellants that in view of the fact the shares of the first respondent company are not listed shares, there can be a right of preemption, is rejected by the High Court.

> "Their alternate argument that assuming that GCL is public company, its shares being nonlisted, there can be a right of preemption, is equally unsound and not tenable. There is no distinction made in the Act of this nature. That argument is canvassed only by relying on the definition of the term 'listed public companies' appearing in section 2(23A). The definition itself clarifies that a public company which has any of its securities listed in any of the recognized stock exchange will be termed as listed public company. Nonetheless it remains a public company and merely because its shares are not listed in any recognized stock exchange does not mean that there is any restriction on their transfer. They are and continue to be freely transferable as they are shares of a public company. The broad distinction as noticed above, between the term 'Private' and "Public" company, is enough to turn down this alternate argument."

47. The High Court also rejected the other submission of oppression and mismanagement pleaded by the appellants as the basis of the plea of oppression and mismanagement is the existence of legally valid preemption clause. The High Court held–

> "127. Once all these arguments and contentions are dealt with, then, other part of submissions of Mr. Samdani on oppression of minority also fail. They are raised on the basis that the preemptive right is defeated by respondent Nos.2 to 5 by their several acts of omission and commission. Once the preemptive right itself is not in existence by virtue of the statutory provisions in the field, then, there is no act of

> oppression. As held above, the plea of mis-management has been given up and has not been pursued."

48. The reasons which led to the above extracted conclusions of the High Court are as follows:

A) Section 43A prior to its amendment by Amendment Act 53 of 2000 only provided for various situations in which a private company becomes a public company by operation of law but not vice-versa.

> "112. ... In other words, this section permitted a private company to become a public company in certain cases and once the word private is deleted it becomes a public company. However, there was nothing which permitted such public company to again become private company and that is achieved by insertion of section 43(2A).

B) The High Court also opined that in view of the declaration contained under sub-section (11) of section 43A, which was inserted by the Amendment Act 53 of 2000, the entire Section 43A becomes inoperative w.e.f. 13.12.2000 (the day on which the Amendment Act came into force) except for sub-section (2A). Thereby "the concept of deemed public company under Section 43A" has "been abolished".

> "112. ..... Sub-section 43A(11) which also was inserted by Act 53 of 2000 from 13th December 2000, clarified that nothing contained in section 43A, save and except sub-section 2A shall apply on and after the commencement of

> Companies (Amendment) Act 2000. In other words, whole of section 43A except for one sub-section viz., sub-section 2A ceases to apply after the commencement of Companies (Amendment) Act, 2000. ..... Thus, section 43A itself became inapplicable by virtue of sub-section 11. The effect of all this is that the concept of deemed public company under section 43A and introduced by the Companies (Amendment) Act has now been abolished based on the recommendation of the working group the Companies Act, 1956."

C) The High Court held that though the first respondent company was initially incorporated as a private company, it became a public company (in the language of the High Court 'a DEEMED public company') by virtue of the operation of Section 43A (1A) but ceased to be a private company. Since its Articles of Association could not be amended to give effect to the newly inserted clause (d) of Section 3(1)(iii) (introduced by Act 53 of 2000 w.e.f. 13.12.2000), therefore, its status as 'DEEMED public company' itself lapsed w.e.f. 13.12.2000 and thereafter the first respondent company would only be a public company but not either a private company or a DEEMED public company whose Articles of Association could contain restrictions on the transfer of shares of its members.

> "115. It is clear from the factual position that the attempt to amend the Memorandum and Articles of Association of the first respondent was unsuccessful. The said resolution

proposed in the meeting held on 5th May 2001 was not carried but in fact defeated. Once it was defeated, then, the first respondent which had become a public company on 17th August 1988 continued with that status. It would be of relevance to note that the resolution was moved in the meeting held on 5th May 2001. That resolution was defeated on that day. However, the Companies Amendment Act 2000 had come into effect already and to be precise from 13th December 2000. On 13th December 2000, GCL was not a deemed public company but a public company. Once it was a public company, then, the argument of the appellants that it continued to retain its fundamental and basic character as a private company cannot be accepted. The status is conferred by law. The status was sought to be changed or amended by moving an amendment to insert an additional clause (d) was defeated, then, there is no scope to alter the status of the respondent No.1 company by either terming it as a deemed public company or a public company retaining the fundamental and basic character of a private company. Both these concepts are unknown to law."

49. **SUBMISSIONS BY THE APPELLANTS:**

(i) On a plain reading of sub-Section (11), it is clear that Section 43A is retained on the statute book and not deleted by the Companies (Amendment) Act, 2000. Had the Parliament intended to completely efface all Section 43A companies, the surest manner would have been to delete Section 43A from the statute. The retention of Section 43A is an extremely strong indicator of the legislative intention to continue recognition of *existing* "hybrid companies" even after 13.12.2001.

(ii) This legislative intention is made clear by the insertion of clause (11) in Section 43A by the Companies (Amendment) Act, 2000 which reads:

> "(11). Nothing contained in this section, except sub-section (2A), shall apply on and after the commencement of the Companies (Amendment) Act, 2000."

The expression "nothing contained in this section .. shall apply *on and after*", coupled with the retention of Section 43A on the statute book, clearly indicates that the legislature did not want the regime of hybrid companies to lapse w.e.f. 13.12.2000.

(iii) Apart from retaining Section 43A on the statute book, Section 111(14) of the companies Act, 1956 also remained in the statute after the Companies (Amendment) Act, 2000. Section 111(14) reads:

> "In this section "company" means a private company and includes a private company which had become a public company by virtue of Section 43A of this Act."

The justification for retaining a specific reference to Section 43A in Section 111 is that the status of deemed public companies continued to be recognized even after the 2000 amendment. Had the Parliament's intention been otherwise, Section 43A itself and all references in the Companies Act, 1956 to Section 43A would have been deleted by the legislature.

(iv) The insertion of sub-section (2A) into Section 43A was required to provide an exit route on and after 13.12.2000 for

an existing hybrid company which ceased to attract the operation of Section 43A(1) - (1C). Prior to the 2000 amendment, where a hybrid company ceased to attract the operation of the relevant sub-section of Section 43A which had rendered it a hybrid company with approval of the Central Government was mandatory in terms of sub-section 43A(4). The 2000 amendment removed the requirement for Central Government approval.

(v) Each of the sub-sections of Section 43A contained a specific clarificatory proviso which preserved the essential character and status of a private company. Therefore, to construe Section 43A subsequent to 13.12.2000 to destroy the essential character and status of the companies covered by Section 43A would be illogical.

(vi) A "Company" is a legal vehicle for more than one person/collection of persons to come together and form an enterprise. The basic terms on which such persons would join together would be contained in the Memorandum & Articles of Association of such a company, creating rights and obligations including the conditions subject to which shares are to be held. When a person becomes a member of a company he

agrees to be bound by the covenants in the Articles of Association (Section 36[10]). The Articles are the foundation on the basis of which shareholders of the company deal with each other. In the case of a company such as the Respondent No.1, the application of Section 43A did not in any manner disturb the existing arrangements among the shareholders but added on certain regulatory requirements. Assuming (whilst denying) that Section 43A stood effectively "repealed" on and after 13.12.2000, there is nothing to suggest that the intention of the legislature was to completely disrupt the foundational arrangement amongst shareholders across the country in tens of thousands of private limited companies. In other words, assuming there was a repeal, the status of every deemed public company reverts back to a private company and not a public company. Should the status of every hybrid company subsequent to the 2000 amendment be regarded as "public" that would mean a destruction of various Articles which thought permissible in a private company are illegal with regard to a public company.

[10] Section 36. Effect of memorandum and articles.—(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

(vii) It is settled position that unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation. The amendment to the definition of a "private company" affects its status and would affect substantive vested rights acquired over decades. An amendment which affects alteration in status/substantive vested rights is always presumed to be prospective in operation.

(viii) By the Amendment Act of 2000, two prospective changes were introduced in the definition of a "private company" – *first* regarding such a company having a minimum paid up capital of one Lakh and *second* that such a company in its Articles must also include a fourth prohibition (d) regarding invitation or acceptance of deposits from persons other than its members, directors or their relatives. Consequently, whilst no fresh private company could be incorporated after the Amendment Act of 2000, unless it met with the new amended definition, for existing private companies, the 2000 Amendment made a provision by introducing sub-sections (3) and (5)[11] thereby pre-existing private companies were required

[11] "(3) Every private company, existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than one lakh rupees, shall within a period of two years from such

to increase their paid up capital within a period of two years to meet with the minimum threshold of Rupees One Lakh now introduced by the Amendment Act of 2000, no provision was contained for pre-existing private companies to amend their Articles of Association to introduce the new sub-clause (d) in its Articles. Thus, the existing private companies were not required to amend their articles by introducing the fourth clause (d) in its Articles to retain their character of a private company.

50. **SUBMISSIONS BY THE RESPONDENTS:**

(i) With the introduction of the Amendment Act of 2000 on 13th December 2000, an existing private company that does not have clause (d) in its articles becomes a public company. Any other construction of the amendment would result in the creation of two classes of private companies leading to discriminatory results.

(ii) Neither the definition in Section 3(1) nor the other sub-sections of Section 3 carve out an exception from the operation

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commencement, enhance its paid-up capital to one lakh rupees.

(5) Where a private company … fails to enhance its paid up capital in the manner specified in sub-section (3) ….., such company shall be deemed to be a defunct company within the meaning of section 560 and its name shall be struck off from the register by the Registrar."

of clause (d) to companies existing on 13.12.2000; and do not prescribe a time limit for insertion of the provisions to give effect to clause (d) in the Articles of Association. Therefore, such non-inclusion necessarily led to the result (by operation of law) that all such private companies become full-fledged public companies on 13.12.2000 until they amended their articles to include the provisions of clause (d).

(iii) Section 43A (1C) was introduced to regulate the unhealthy practice of accepting deposits from the public by private companies. The only legal consequence of Section 43A(1C) was to treat such private companies to be public companies but that did not stop them from being 'private companies' who accepted deposits from the public. Parliament wanted to remedy the malpractice or 'mischief' of collecting deposits by private companies and it did so by the addition of clause (d) to Section 3(1)(iii) on 13.12.2000 so as to mandatorily prohibit acceptance of deposits from the public. If they did not incorporate the provisions of clause (d) in their articles and stop accepting deposits from the public they were to become 'public companies'.

(iv) The appellant voted against the resolution to introduce (d) on 5th May 2001 and issued his letter dated 6th June 2001. Therefore, estopped from arguing that the first respondent is a private company.

(v) The fact that the first respondent is a public company and Article 57 is invalid has been conclusively held by the Bombay High Court vide an earlier Order dated 14th November 2008 – which is a judgment in rem and has attained finality.

(vi) The appellant applied for transfer of 5 shares – which resulted in the total members exceeding 50. The fact that the total members have exceeded 50 is *admitted*. Thus, the first respondent cannot claim to be a private company.

(vii) After the Amendment Act of 2000, S. 43A stands abolished; Sub-section 2A is merely ministerial and a surplus; As first respondent is not a private company after 13th December 2000,it cannot be a deemed public company.

(viii) Article 57 offends the principle of free transferability under S. 111A(2) which was recognized under S. 22A of the SCRA and is recognized by this Hon'ble Court in the case of

Vodafone International Holdings B.V. v. Union of India, (2012) 6 SCC 613.

EXAMINATION OF THE CORRECTNESS OF THE CONCLUSIONS OF THE HIGH COURT:

(A)

51. When the High Court recorded that "there was nothing which permitted such public company (companies covered under Section 43A, emphasis supplied) to again become private company', obviously, Section 43A, sub-section (4) escaped the attention of the High Court. Sub-section (4) is on the statute book since the inception of Section 43A. At the cost of repetition, I reproduce it.

> "(4) A private company which has become a public company by virtue of this section shall continue to be a public company until it has, with the approval of the Central Government and in accordance with the provisions of this Act, again become a private company."

52. Parliament always recognized the possibility of a private company (which becomes a public company by virtue of operation of Section 43A) once again reverting back to its status of a private company.

53. The reasons are obvious. Each one of the events stipulated under Section 43A sub-sections (1), (1A), (1B) and

(1C) which have the effect of converting a public company into a private company is transient. For example, if we take a case falling under sub-section (1) of Section 43A, i.e. a private company becoming a public company by virtue of the fact that 25% of its shares are held by one or more bodies corporate; it is always possible that at some point of time such bodies corporate decide to disinvest either completely or partially (thereby reducing their holding to less than 25%) their shares of such private company. In such a case, the event or the condition which is essential to convert a private company into a public company under Section 43A (1) ceases to exist. Similarly, take the case falling under Section 43A(1B), i.e. a private company becoming a public company by virtue of the fact that such a private company holds not less than 25% of paid-up shares of a public company; If the private company (becoming a public company, by virtue of operation of Section 43A sub-section (1B), disinvest its shares either entirely or partially (thereby reducing the holding to less than 25%) in the share capital of that public company, once again the condition/event which converted the private company into a public company ceases to exist. Such company can always

revert back to its original status of a private company. However, sub-section (4) stipulates that such a reversion to the original status is subject to the prior approval of the Central Government.

(B)

54. The High Court recorded a finding that after the amendment to the Companies Act by Act 53 of 2000, only two classes of companies remained, i.e. private and public companies and the third class of public companies under Section 43A (HYBRID companies) ceased to exist. The correctness of this conclusion is required to be examined.

55. Obviously, from 1960 to 2000, innumerable private companies would have become public companies (HYBRID) by virtue of the operation of the various sub-sections of Section 43A. If the Parliament really wanted to do away with HYBRID companies, the best way would have been to repeal Section 43A. Because it is a settled principle of statutory interpretation that the repeal of an enactment effaces the repealed statute from the statute book *ab initio* thereby creating a fiction in law that such a statute never existed, and

never created in any legal consequences except for rights and obligations which emanated from various acts and omissions covered by the statute and are saved by the express provisions under the repealed act or by virtue of the provisions of the General Clauses Act. Therefore, by repealing Section 43A, Parliament could have put an end to the existence of all HYBRID companies. We are aware that there can be other technics by which the same result can be achieved. Therefore, it is required to be examined whether the Act 53 of 2000 refers to achieve the same result. It does not repeal Section 43A. Sub-section (11) which came to be inserted by the said amendment in Section 43A only declares:-

> "(11). Nothing contained in this section, except sub-section (2A), shall apply on and after the commencement of the Companies (Amendment) Act, 2000."

56. What exactly is the meaning of sub-section (11) is to be examined?

57. There must be innumerable private companies in this country. For the purpose of our analysis, they can be classified into two categories, (i) private companies which came into existence prior to the Amendment Act 53 of 2000 (w.e.f.

31.12.2000); and (ii) private companies which came into existence after the abovementioned date.

58. Insofar as the first of the abovementioned two categories is concerned they can further be categorized into (i) private companies which remained as such, and (ii) private companies which became public companies by virtue of operation of Section 43A.

59. Insofar as private companies which came into existence prior to 13.12.2000 and remained as such without falling into the net of Section 43A and private companies which came into existence after 13.12.2000, sub-section (11) of Section 43A would have no application.

60. The legal consequences emanating from insertion of sub-section (11) in Section 43A only visit the second category mentioned above i.e. private companies which came into existence prior to 13.12.2000 but became public companies by virtue of operation of Section 43A.

61. Of them, we are only concerned with those private companies which became public companies by virtue of

operation of Section 43A(1C), that is, those private companies which had accepted deposits from PUBLIC. Mere acceptance of the deposits from PUBLIC prior to 13.12.2000 did not contravene any law. Such acceptance was only regulated by virtue of Section 58A. Though such private companies were treated as public companies by virtue of Section 43A(1C) they were entitled to continue those stipulations dealing with the matters specified under Section 3(1)(iii)(a)(b)&(c). It is only w.e.f. 13.12.2000, Section 3(1)(iii) of the Act came to be amended by inserting sub-clause (d) which obligates a private company to contain a prohibition against any invitation or acceptance of deposits from PUBLIC in such company's Articles of Association.

62. What happens to those private companies (obviously there must be innumerable) which existed prior to 13.12.2000 and had also invited and collected deposits from PUBLIC as they were legitimately entitled to do so prior to the amendment? If the conclusion of the High Court that the concept of DEEMED public company is abolished is correct, all those private companies should become public companies (not HYBRID/DEEMED public companies) overnight until

their Articles of Association are amended. As a consequence thereof, their respective shareholders lose a vested right flowing out of the Articles of Association (created by a contract) which they collectively enjoyed till 13.12.2000 to restrict the right of individual shareholders to freely transfer their shares. Such a collective right by definition inheres in the shareholders of a private company and protected by virtue of proviso to Section 43A(1C) notwithstanding the fact that such companies were treated as public companies prior to 13.12.2000. To deprive the shareholders of HYBRID companies such a collective right would be too drastic a change overnight without giving any option or time to the HYBRID company and its members to retain the basic character of the company as a private company.

63. Though, in theory, it is open to the legislature to create such a situation, whether the Parliament intended such a drastic course of action is the question. It must be remembered that in the ultimate analysis a company is a voluntary association of its members who have a fundamental right to form associations under Article 19(1)(c) of the Constitution of India, the inference which is obvious from the

text of the Constitution and also on cumulative reading of the decisions of this Court in ***Damyanti Naranga*** *v.* ***The Union of India & Others,*** (1971) 1 SCC 678, ***Rustom Cavasjee Cooper*** *v.* ***Union of India,*** (1970) 1 SCC 248, ***Bennett Coleman & Co. & Others*** *v.* ***Union of India & Others,*** (1972) 2 SCC 788. The fundamental right to form an association implies the right to form the association on such terms and conditions agreed upon by its members, so long as such terms and conditions are not in conflict with any law or public policy. No doubt, the State can, by law, impose restrictions on such rights on the basis of the considerations mentioned in Article 19(4), but such restrictions must be reasonable.

64. The destruction of the collective rights of the members of the companies mentioned in para 62, in our view, would require, at the least, an express provision of law and such a provision must be a 'reasonable restriction' within the meaning of that expression occurring in Article 19(4). In the absence of any express provision which takes away the fundamental right of the shareholders of a private company, we are inclined to read a restriction on the collective right of

the shareholders of a private company to restrict the right of the individual shareholders to freely transfer their shares.

65. Our view is supported by the parliamentary practice and history of the amendments made to the Companies Act itself.

66. Under the Act 53 of 2000 when the definition of private company is amended by inserting a clause by which requirement of having a "minimum paid up share capital of one lakh rupees or such higher paid up capital as may be prescribed by its articles" is introduced for the first time, Parliament also gave a window of 2 years for the private companies existing on the date of the commencement of the Amendment Act i.e. 13.12.2000. By Section 3(5)[12] it is declared that companies failing to comply with the newly introduced obligation "shall be deemed to be defunct" companies and their names "shall be struck off from the register". Parliament not only gave a window period to the existing companies to take steps to comply with the amended law but also provided expressly for the consequences to follow on the failure to comply with the law.

[12] Section 3(5) – Where a private company or a public company fails to enhance its paid-up capital in the manner specified in sub-section (3) or sub-section (4), such company shall be deemed to be a defunct company within the meaning of section 560 and its name shall be struck off from the register by the Registrar.

67. One more reason for our inability to accept the theory of abolition of HYBRID companies is that – if accepted, the Amendment Act 53 of 2000 would have the effect of retrospectively taking away the rights collectively enjoyed by the shareholders (of private companies which became HYBRID companies) from 1956 onwards. In this context, it is worth remembering the words of this Court in ***K.C. Arora & Another*** *v.* ***State of Haryana & Others,*** (1984) 3 SCC 281 at 294:

> "The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature-made law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history. ... Today's equals cannot be made unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made

> retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws."

68. Apart from that, it is rightly pointed out by the appellant – if Parliament really wanted to put an end to the existence of all the HYBRID Companies, Parliament should have deleted all reference to the HYBRID (Section 43A) companies in the Act. But Section 111(14) still continues to make reference to Section 43A.

69. Therefore, we are of the opinion that the concept of HYBRID (Section 43A) companies is not altogether abolished. At least insofar as the Companies falling under Section 43A(1C) are concerned which were in existence on 13.12.2000 would continue as HYBRID Companies.

(C)

70. The other conclusion of the High Court that the failure of the first respondent company to amend its Articles of Association to give effect to clause (d) of Section 3(1)(iii) rendered the first respondent company to cease to be a private company, in our opinion, is irrelevant for the decision on the REAL question in this case.

71. The REAL question is not whether the failure to amend the Articles of Association by the first respondent company rendered the first respondent company (which is otherwise a private company) a public company, but whether such a failure destroyed the collective right of the members of the first respondent company to have shares whose transferability is subject to limitations and restrictions contained in Article 57 of its Articles of Association.

72. Originally, Section 3(1)(iii) stipulated - to be a private company a company's Articles of Association are required to contain certain stipulations with regard to the matters specified in clause (a), (b) and (c). By virtue of the Act 53 of 2000 w.e.f. 13.12.2000 a private company's Articles of Association are required to contain additional stipulations relating to the matter contained in clause (d) also. The question is whether the newly introduced requirement is applicable to existing private companies also or only to those which come into existence subsequent to the commencement of the Act 53 of 2000?

73. Section 27(3) mandates that the articles of a private company having share capital (such as the one on hand) shall only contain provisions relating to matters specified in clauses (a), (b) and (c) of Section 3(1)(iii) but not matters relating to clause (d). In other words, though the Parliament chose to introduce clause (d) in Section 3(1)(iii) (by an amendment in the year 2000), did not think it necessary to make a corresponding amendment to Section 27(3). Whether such an omission is accidental or by a design is required to be examined? If it is by a design what is the purpose sought to be achieved of such a design requires an examination?

74. The Companies Act never prohibited the acceptance of deposits. Prior to the Amendment Act of 2000, there has never been a provision in the Companies Act which altogether prohibited companies either **public** or **private** from inviting or accepting deposits. Section 58A(1)[13] of the Act, (which was introduced by Act 41 of 1974) for the first time made a provision enabling the Central Government to prescribe "the limits up to which, the manner in which and the conditions

[13] Section 58A. Deposits not to be invited without issuing an advertisement.—(1) The Central Government may, in consultation with the Reserve Bank of India, prescribe the limits up to which, the manner in which and the conditions subject to which deposits may be invited or accepted by a company either from the public or from its members.

subject to which deposits may be invited or accepted by a company either from the public or from its members". The remaining sub-sections of Section 58A make various stipulations regarding the method and manner of inviting and accepting (after the insertion of the Section) deposits or the renewal of deposits taken prior to introduction of the Section and the penalties for the failure to comply with the stipulations contained in the said Section - the details of which are not necessary for the present purpose. But even Section 58A did not prohibit the acceptance of deposits. Irrespective of the fact whether a company accepting deposits is a private company or a public company, the invitation or acceptance of such deposits is only made to strict regime of regulations under Section 58A.

75. Then came, in 1988, Section 43A(1C), which only declared that **a private company** either accepting deposits from or renewing existing deposits (made either after or prior to 15.6.1988 respectively) collected from "persons other than its members, directors or their relatives" (hereinafter for the sake of convenience referred to as "PUBLIC") shall become a public company. But under the proviso to sub-section (1C),

even after becoming a public company, such a Company can retain either restrictions or limitations contemplated under Section 3(1)(iii).

76. Therefore, the question is-what is the effect of the insertion of clause (d) in Section 3(1)(iii)?

Prior to 1988:

77. Whether a **Company** should accept deposits from PUBLIC or not is a policy choice only of the company and its members. Even prior to the introduction of Section 3(1)(iii)(d) & Section 43A (1C), the members of a private company could have either permitted or prohibited the company from accepting deposits from PUBLIC or stipulated conditions subject to which deposits could be taken. If a company's internal policy prohibited the acceptance of deposits from PUBLIC and contrary to such internal policy deposits are collected from PUBLIC it was always open to the members of the company to deal with the situation and the persons violating the company's policy.

78. In 1988, the Parliament thought it necessary to provide for a more rigorous control and scrutiny of the activities of

accepting deposits from PUBLIC by private companies and introduced sub-section (1C) of Section 43A, thereby enabling the State to have a greater control over such activity of such private companies by treating them as public companies. The regulations, control and supervision to which the management of public companies is subjected to under the Act is higher in degree compared to the regulations, control and supervision to which the management of a private companies is subjected to under the Act. The control contemplated under Section 43A(1C) is in addition to the regulations and supervision brought in by virtue of Section 58A.

Before the amendment Act 53 of 2000:

79. If a **private company** chose to incorporate a stipulation not to accept deposits from PUBLIC, it is a matter of its internal policy. But if it incorporated such a stipulation and defaulted in compliance with such stipulation, the Company only ceased "to be entitled to the privileges and exemptions conferred on a private company by or under the Act" and the "Act shall apply to the company as if it were not a private company" – by virtue of the operation of Section 43[14] which

[14] Section 43. Consequences of default in complying with conditions constituting a company a private company.—Where the articles of a company include the provisions which, under clause (iii) of sub-section (1) of section 3, are required to be included in the articles of a company in order to constitute if a private company, but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Act, and this Act

only creates a legal fiction. Section 43 does not declare that such companies do become public companies unlike Section 43A. On the other hand, the proviso to Section 43 enables the Central Government to condone the lapse of such private companies.

> **"Proviso to Section 43:**
>
> Provided that the Central Government on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Central Government just and expedient, order that the company be relieved from such consequences as aforesaid."

80. Notwithstanding the fact that the Parliament thought it necessary for the State to impose a higher degree of control over the affairs of the management of such private companies inviting and accepting deposits from PUBLIC, Parliament did not think it necessary to restrict the collective right of the members of a private company to impose restrictions on the right of individual shareholders to freely transfer their respective shares. Therefore, the proviso to sub-section (1C) of Section 43A. For that matter, in none of the four contingencies contemplated under Section 43A(1), (1A), (1B) and (1C), Parliament thought it necessary to restrict such

shall apply to the company as if it were not a private company.

collective right of the shareholders of a private company. Such private companies are to be treated as public companies for certain purposes.

81. If a private company chooses not to incorporate the prohibition, such as the one contemplated under Section 3(1)(iii)(d), and accepts deposits from the public then such collection of deposits is regulated by Section 58A. If it chooses to incorporate a stipulation but fails to comply with the same, it would attract the consequences mentioned in Section 43 which consequences are also avoidable under the proviso to Section 43.

82. It must be remembered that the kind of control which the Parliament sought to impose on private companies which earlier attracted sub-sections (1) to (1B) of Section 43A is now thought clearly not necessary by the Parliament. An inference obvious from Section 43A(11) whatever be the other implications of those sub-sections.

83. Even during the period when Section 43A operated, the Parliament never thought of curtailing the collective right of the members of the private companies to have restriction on

the rights of individual shareholder to freely transfer shares. Therefore, to believe that such restriction is now sought to be imposed only in the case of those private companies in existence on 13.12.2000, which had earlier attracted Section 43A(1C), but not in the case of private companies, which earlier attracted sub-sections (1), (1A) and (1B), would be illogical.

84. The insertion of clause (d) in Section 3(1)(iii) is admittedly only prospective. Therefore, on and after 13.12.2000, if any body proposes to create a private company, the Articles of Association of such company must contain a clause prohibiting the invitation and acceptance of deposits from PUBLIC.

85. For all the abovementioned reasons, we are unable to agree with the submission of the respondents that by the Amendment Act 53 of 2000 and more particularly sub-section (11) of Section 43A, the Parliament intended to curtail or destroy the collective right of the shareholders of a HYBRID company to impose restrictions on the rights of the individual shareholders to have unfettered right of transfer of their

shares. Such a restriction which, in our view, constitutes a restriction on the fundamental rights under Article 19(1)(c), requires a more express legal authority and cannot be brought in by inference.

86. The effect of the amendment to Section 3(1)(iii) is: insofar as the private companies in existence on 13.12.2000, if they choose to make provisions in their Articles of Association to give effect to the mandate of Section 3(1)(iii)(d), they become private companies w.e.f. such date they make such provision by virtue of Section 43(2A) of the Act. If they do not make such an amendment, they would still continue to be public companies governed by Section 43A(1C) [HYBRID Companies] and can continue to have provisions in their Articles of Association referable to Section 3(1)(iii)(a), (b) & (c).

87. Here, an argument of the respondent that such an interpretation of sub-section (11) creates "two classes of private companies and would have discriminatory results" is required to be answered. In our view, the argument is based on a wrong premise. It proceeds on the basis that HYBRID companies created prior to 13.12.2000 are private companies.

We have already held that HYBRID companies are public companies which in law are entitled to retain some features of the private companies if the shareholders choose to retain them. Therefore, the question of discrimination does not arise.

88. Therefore, in our opinion, the failure of the first respondent company to amend its Articles of Association to give effect to clause (d) of Section 3(1)(iii) does not effect the operation of its Article 57.

89. That leaves us with two more questions raised by the respondents herein. They are contained in submissions (iv), (v) and (vi) noted earlier in the judgment. In fact, submissions (iv) and (v) are interconnected. The substance is that in view of the fact that the appellants herein opposed the resolution to amend the articles of association of the first respondent company to bring them in tune with the newly inserted clause (d) of Section 3(1)(iii), they are estopped from arguing that the first respondent company is not a public company and secondly in view of the judgment of the Bombay High Court dated 14.11.2008 in Company Petition No.77 of 1990 "to which the appellants herein were originally the parties but

withdrew from the said company petition later" where the Bombay High Court held as follows:

> "Insofar as the present Petitioners are concerned as a matter of fact they are free to deal with the shares held by them. In that, the shares are now freely transferable. Indeed, when the Petition was presented at the relevant time, the Respondent No.1 Company was a Private Limited Company. As a result, there was restriction in the transfer of shares. However, it is common ground that now the Respondent No.1 Company has become a Public Limited Company as a result of Special Resolution moved in the Extra Ordinary General Meeting dated 5th May 2001 having been defeated. Having acquired the status of a Public Limited Company, the restriction on the right to transfer the shares which was applicable to Private Limited Company, would naturally get diluted.

The appellants are precluded to argue that the first respondent Company is not a public company.

90. Both the submissions are required to be rejected. The submission based on the principle of estoppel is required to be rejected in view of my conclusion that the HYBRID companies contemplated under Section 43A(1C), which were in existence on 13.12.2000 would continue to be in existence.

91. It is already concluded earlier in this judgment that the requirement of amending the Articles of Association pursuant to the Amendment Act 53 of 2000, insofar as such companies are concerned, is only optional on the part of the shareholders.

The fact that the shareholders of a HYBRID company exercised option not to amend the Articles of Association thereby converting a HYBRID company into a private company does not prevent such shareholders from advancing an argument that the first respondent company is not a public company but still a HBRID company.

92. The second submission is that the judgment in Company Petition No.77 of 1990 is binding upon the appellants on the ground that they were parties to the said company petition earlier and withdrew from the same unconditionally and, therefore, they are precluded from arguing anything contrary to the conclusion recorded therein.

93. The principles of law which preclude a party to a civil litigation from agitating certain issues are contained in Section 11 and Order II Rule 2 of the Code of Civil Procedure, 1908. Section 11 deals with the principle of *res judicata* and it prohibits a Court from trying any suit or issue in which the matter directly and substantially in issue in a former suit has been heard and finally decided.

94. The question whether the first respondent Company is a public company or a HYBRID company or a private company was never directly and substantially in issue in Company Petition No.77 of 1990. The parties to the said company petition proceeded on the basis that in view of the fact that an amendment to the Articles of Association to give effect to the newly inserted clause (d) of Section 3(1)(iii) could not be carried on, the first respondent company became a public company. Therefore, the Court never examined that question of law. Hence, it cannot be said that the appellants are precluded from raising such a question of law in the instant appeal.

95. We therefore, do not propose to examine the question as to what is the effect of the appellant's withdrawal from the abovementioned company petition.

96. The only other submission of the respondent which requires to be dealt with is regarding the transfer of five shares of the appellant which, according to the respondents, resulted in the membership of the first respondent company exceeding fifty thereby rendering the first respondent a public company.

Unfortunately, though the High Court noted the submission at para 9, it did not record any finding in this regard. We, therefore, decline to examine this question. This Court cannot be converted into a Court which enquires into the questions of fact for the first time.

97. In view of the fact the High Court, though noted the contentions of the respondent herein, failed to record any conclusion thereon, we deem it appropriate to remit the matter to the High Court only for the purpose of considering the abovementioned submissions of the respondent and take appropriate decision. We order accordingly.

98. This appeal stands allowed.

.....**J**.
(J. Chelameswar)

.....**J**.
(A.K. Sikri)

New Delhi;
October 28, 2014

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2481 OF 2014

Darius Rutton Kavasmaneck ...Appellant

Versus

Gharda Chemicals Limited & Others ...Respondents

O R D E R

In view of the order remitting the matter to the High Court, we deem it appropriate that the interim order passed

earlier on 22.7.2011 by this Court will continue till the disposal of the matter by the High Court.

The High Court is requested to dispose of the matter expeditiously in view of the long pendency of the matter.

.....J.
(J. CHELAMESWAR)

.....J.
(A.K. SIKRI)

NEW DELHI
OCTOBER 28, 2014.