

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****COMPANY APPEAL NO. 24 OF 2010****IN****COMPANY PETITION NO. 132/397-398/CLB/MB/2009**

**Darius Rutton Kavasmaneck)
residing at 626, Parsi Colony, Dadar,)
Mumbai 400 014)**

**..... Appellant
(Orig.Petitioner)**

Versus

**1. Gharda Chemicals Limited,)
a company incorporated under the)
Companies Act, 1956 and having its)
registered address at 5/6, Jer Mansion,)
10, W.P.Warde Marg, Bandra (West),)
Mumbai 400 050)**

**2. Keki Hormusji Gharda,)
of Mumbai, Indian Inhabitant, having)
its address at 5/6, Jer Mansion,)
10, W.P.Warde Marg, Bandra (West),)
Mumbai 400 050)**

**3. Aban Keki Gharda,)
of Mumbai, Indian Inhabitant, having)
its address at 5/6, Jer Mansion,)
10, W.P.Warde Marg, Bandra (West),)
Mumbai 400 050)**

**4. A. K. Luke ,)
of Mumbai, Indian Inhabitant, having)
its address at 5/6, Jer Mansion,)
10, W.P.Warde Marg, Bandra (West),)
Mumbai 400 050)**

5. Almitra H. Patel,)
 of Mumbai, Indian Inhabitant, having)
 its address at 5/6, Jer Mansion,)
 10, W.P.Warde Marg, Bandra (West),)
 Mumbai 400 050)

6. D. T. Desai,)
 of Mumbai, Indian Inhabitant, having)
 its address at 5/6, Jer Mansion,)
 10, W.P.Warde Marg, Bandra (West),)
 Mumbai 400 050)

..... Respondents
 (Orig. Respondents)

Mr.Praveen Samdhani, Senior Advocate, a/w. Mr.Mayur Khandeparkar, Mr.Shriraj Dhruve, Mr.Mitesh Naik, Ms.Heena Desai, i/b. Dhru & Co. for the Appellant.

Mr.V.R.Dhond, Senior Advocate, a/w. Mr.Rohan Kadam, Mr.Amol Baware, Mr.Abhishek Adke, i/b. Legasis Partners for the Respondents.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 4th MAY, 2017

PRONOUNCED ON : 4th AUGUST, 2017

JUDGMENT :

This appeal is placed on board in view of the Order dated 28th October,2014 passed by the Supreme Court of India in Civil Appeal No.2481 of 2014 allowing the said civil appeal and remanding the company Petition No.24 of 2010 to this court for deciding the factual enquiry 'whether the transfer of five shares from the appellant (singly) to the appellant jointly with his children and wife resulted in the total members of the respondent no.1 i.e. Gharda Chemicals Limited exceeding 50. Both the parties have accordingly addressed this court at length.

2. Some of the relevant facts for the purpose of deciding the issue

remanded to this court by the Supreme Court of India are as under :-

3. Mrs. Jer Kavasmaneck was the mother of the appellant and the respondent no.2 i.e. Dr. Keki Hormusji Gharda. The appellant is the son of Mrs. Jer Kavasmaneck and nephew of Dr. Keki Hormusji Gharda. The respondent no.3 is wife of respondent no.2.

4. On 28th April, 1962, Kavasmaneck and Gharda family constituted a firm called M/s. Gharda Chemicals Industries. On 6th March, 1967, M/s. Gharda Chemicals Industries is incorporated as a private company by taking over the erstwhile family firm of M/s. Gharda Chemicals Industries. It is the case of the appellant that the understanding was enshrined in the Articles of Association of the respondent no.1 whereby the promoters and the shareholders agreed not to transfer their shares to any outsider without first offering the same to the existing members. Article 57 recognized and grants this preemptive right.

5. On 17th August, 1988, M/s. Gharda Chemicals Limited became a deemed public company on account of turnover criteria under section 43A of the Companies Act, 1956. On 16th January, 1990, the respondent no.1 proposed to pass a resolution so as to amend Article 57 of the Articles of respondent no.1. By an order dated 14th February, 1990 passed in Company Petition No.77 of 1990, the implementation of the said resolution came to be stayed. In the year 1990, the appellant herein filed a Company Petition No. 77 of 1990 in this court under sections 397 and 398 of the Companies Act, 1956 against the respondent no.1 and others *inter alia* praying for winding up of respondent no.1, for appointment of a liquidator and for various declarations.

6. It is the case of the appellant that the appellant and other minority shareholders withdrew the said company petition on 8th September, 2005 in view of the assurance given by Dr. Keki Hormusji Gharda regarding increase in dividend, compliance with Article 57 and involving the appellant in the work of respondent no.1 company. The said Company Petition No.77 of 1990 however was continued by Percy R. Kavasmaneck and Aban Percy Kavasmaneck who were also the petitioners in the said company petition along with the petitioner.

7. On 13th December,2000, some of the provisions of the Companies Act, 1956 came to be amended. It is the case of the petitioner that the definition of the private company under section 3(1)(iii) was prospectively amended so as to amend sub-clause (d) of the fourth condition that a private company must include in its articles and that section 43A is stated to be inapplicable after 13th December,2000.

8. It is the case of the petitioner that on 5th May, 2001 a resolution was proposed to amend the articles of respondent no.1 by introducing sub clause (d) of section (3)(iii). The said amendment was however defeated. It is the case of the petitioner that sometime in the year 2009 as Dr.K.H.Gharda was attempting to violate the right of pre-emption by transferring his shareholding to an outsider, the petitioner filed a company petition bearing no. 132 of 2009 for enforcing the right of pre-emption and for preventing Dr.K.H.Gharda from transferring the shares, directly or indirectly held or controlled by him. The Company Law Board granted an ad-interim injunction on 11th December,2009 and restrained Dr.K.H.Gharda from transferring the shares directly or indirectly held by him.

9. On 14th May, 2010, the Company Law Board dismissed the said Company Petition No.132 of 2009 and held that after the amendment to the Companies Act, 1956 in the year 2000, section 43A was inapplicable, the respondent no.1 did not amend its articles in line with the new definition of private company, the respondent no.1 had become a full-fledged public company and thus Article 57 was consequently invalid.

10. On 21st May, 2010, the appellant herein filed a company appeal bearing no. 24 of 2010 and impugned the said order dated 14th May, 2010 passed by the Company Law Board before this court. The appeal was admitted on 28th June, 2010 and the injunction which was granted by the Company Law Board was continued by this court. It is the case of the appellant that the question of validity of Article 57 was thus alive and was pending in this court in the said company appeal filed by the appellant.

11. On 1st September, 2010, this court in case of Messer Holding held that the pre-emption agreement was valid even in the case of a public listed company and overruled the judgment delivered by the learned Single Judge of this court in case of **Bajaj Auto vs. WMDC**.

12. On 16th October, 2010, the respondent no.1 company issued a notice for convening for said Extra Ordinary General Meeting on 12th November, 2010 for deleting Article 57 on the ground that it had been held by the Company Law Board to be invalid. It is the case of the appellant that the respondent no.1 issued the said notice and convened the said Extra Ordinary General Meeting though the question of validity of Article 57 was subjudice in Appeal No. 24 of 2010.

13. On 29th October, 2010, the appellant herein filed a Company Petition No.87 of 2010 *inter alia* praying for restraining the respondent no.1 from convening the proposed Extra Ordinary General Meeting for deleting Article 57 or any other similar meeting in future.

14. On 9th December, 2010, the respondent no.1 issued a letter withdrawing a notice dated 16th October, 2010 as the question of the legality of Article 57 was pending in this court in Company Appeal No.24 of 2010. On 14th June, 2011, this court dismissed the said Company Appeal No.24 of 2010 and held that the respondent no.1 had become full-fledged public company after amendment of the Companies Act 1956 in the year 2000 and Article 57 was consequently invalid being violative of the concept of free transferability.

15. In the month of July 2011, the appellant herein filed Special Leave Petition No.16994 of 2011 before Supreme Court of India. The Supreme Court of India continued the injunction which was initially granted by the Company Law Board and continued by this court restraining Dr.K.H.Gharda from selling or transferring the shares directly or indirectly held by him. By an order dated 14th February, 2014 the Supreme Court of India granted leave in the said Special Leave Petition and thus the said Special Leave Petition came to be converted into Civil Appeal No.2481 of 2014.

16. On 25th April, 2012 the respondent no.1 issued another notice convening Extra Ordinary General Meeting on 22nd May, 2012 for deleting Article 57 on the ground that it had been held invalid/dead wood by the Company Law Board and this court. On 9th May, 2012, the appellant filed a company application bearing no. 73 of 2012 in Company Petition No.87 of 2010 *inter alia* praying for

amendment in Company Petition No.87 of 2010 to bring on record the challenge to the notice dated 25th April, 2012 and convening of the Extra Ordinary General Meeting and for seeking an injunction against the respondent no.1 for holding the said Extra Ordinary General Meeting.

17. On 19th May, 2012, Ms. Maharukh who was also one of the original petitioner and who had held approximately 6% share capital of the respondent no.1 and who was one of the requisitionists to the Extra Ordinary General Meeting informed the Company Law Board that she did not propose to move or support the proposed resolution for deletion of Article 57.

18. On 21st May, 2012, the Company Law Board passed an order in the said Company Application No.73 of 2012 permitting the respondent no.1 to hold the Extra Ordinary General Meeting but made it clear that if any resolution is passed by the respondent no.1 in the Extra Ordinary General Meeting, the same shall be kept in abeyance. Insofar as the relief for amendment to the company petition is concerned, the said question was deferred.

19. On 22nd May, 2012, the respondent no.1 held the said Extra Ordinary General Meeting. It is the case of the appellant that even with 25% shareholders being opposed to the said resolution, the said resolution was shown to have been passed by the respondent no.1. Sometime in the month of June 2012, the respondent no.1 filed company application bearing no.85 of 2012 in the said Company Petition No.87 of 2010 inter alia praying for vacating ad-interim order dated 21st May, 2012. At the same time, the appellant filed company application bearing no. 91 of 2012 inter alia praying for further amendment of Company Petition No.87 of 2010 and to bring on record the challenge to a meeting held on

22nd May, 2012 and for injunction against the respondent no.1 from implementing the purported resolution passed on 22nd May, 2012.

20. On 10th August, 2012, the Company Law Board heard Company Application No.73 of 2012 which was for amendment and Company Application No.85 of 2012 which was for vacating the order dated 21st May, 2012. The Company Law Board however deferred the hearing of the Company Application No.91 of 2012 which was for seeking amendment to the petition.

21. By an order dated 13th August, 2012, the Company Law Board allowed Company Application No.73 of 2012 and permitted the amendment to challenge the notice and convening the Extra Ordinary General Meeting dated 22nd May, 2012. The Company Law Board also allowed Company Application No.85 of 2012 and vacated the ad-interim order dated 21st May, 2012.

22. On 27th August, 2012, the appellant filed an appeal bearing (L) No.41 of 2012 *inter alia* challenging the order dated 13th August, 2012 to the extent that it vacated the injunction restraining the respondent no.1 for implementing the resolution dated 22nd May, 2012. By an order dated 30th August, 2012, this court in Appeal (L) No.41 of 2012 restrained the respondent no.1 from taking any steps pursuant to its resolution dated 22nd May, 2012.

23. In the month of September, 2012, Gharda Chemicals Limited filed an appeal bearing (L) No.45 of 2012 challenging the order dated 13th August, 2012 allowing the amendment to the challenge and convening of Extra Ordinary General Meeting dated 22nd May, 2012. On 20th December, 2012, this court dismissed the Appeal (L) No.45 of 2012 filed by the respondent no.1 and held that

Company Petition No.87 of 2010 had raised several issues which were required to be gone into and the amendment challenging the convening of the meeting was rightly allowed. This court dismissed the Appeal (L) No. 45 of 2012 with regard to the implementation of the resolution passed on 22nd May, 2012. This court adverted to the conduct of the Extra Ordinary General Meeting and *prima facie* found the same to be satisfactory and accordingly upheld the order of the Company Law Board which had vacated the injunction restraining the respondent no.1 from implementing the resolution dated 22nd May, 2012.

24. On 21st January,2013, the Company Application No.91 of 2012 came up before the Company Law Board. It is the case of the appellant that this court had dealt with prayer clause (b) of the Company Application No. 91 of 2012 inasmuch as it did not grant injunction implementing the resolution. Prayer clause (a) of the Company Application No. 91 of 2012 survived to be allowed by the Company Law Board. The Company Law Board however held that this court had considered and disposed of the Company Application No. 91 of 2012 in its entirety and held accordingly.

25. In the month of February/March 2013, the appellant herein filed Special Leave Petition No.13640 of 2013 challenging the order dated 20th December,2012 passed by this court. The Supreme Court has granted leave in the said Special Leave Petition. The said Special Leave Petition has been accordingly converted into Civil Appeal No.2488 of 2014.

26. In the month of 2013, the appellant filed Company Appeal No. 31 of 2013 against the order dated 21st January,2013 by which the application filed by the appellant to amend the company petition and to bring on record the challenge

to conduct Extra Ordinary General Meeting dated 22nd May, 2012 was rejected by the Company Law Board.

27. On 28th October, 2014, the Supreme Court allowed Civil Appeal No. 2481 of 2014 and held that the respondent no. 1 could validly retain Article 57 in its Articles of Association. By the said order, the Supreme Court remanded the matter for deciding the factum query as to whether the transfer of five shares of the appellant (singly) to the appellant jointly with his children and wife registered in the total members of respondent no. 1 exceeding 50 and the effect thereof on Article 57. The Supreme Court held that though the High Court had noted the submission at paragraph (90), it did not record any finding in this regard.

28. Mr. Samdhani, learned senior counsel for the appellant invited my attention to various statutory provisions of Companies Act, 1956 such as section 3(1)(iii), section 12, section 41, section 43, section 43A and section 45 of the Companies Act, 1956 and also to various Articles of Association of respondent no. 1 such as Article 3, Articles 15 and 20, 52, 57, 59(a) and (b), Articles 101 and 193. He also invited my attention to the judgment delivered by this court on 14th June, 2011 in Company Appeal No. 24 of 2010, the averments made by the appellant in Special Leave Petition No. 13640 of 2013 converted into Civil Appeal No. 2488 of 2014 and also to various paragraphs of the order passed by the Supreme Court on 28th October, 2014 in Civil Appeal No. 2488 of 2014 disposing of the said Civil Appeal No. 2488 of 2014.

29. It is submitted by the learned senior counsel that under section 41 of the Companies Act, 1956, any person who agreed to become a member of the company and whose name is entered into the register of the members, shall be a

member of the company. He submits that for the purpose of counting 50 members under section 3(1)(iii) of the Companies Act, 1956, the employee shareholders are to be excluded and joint shareholders are to be treated as single. Learned senior counsel gave an illustration that if shares are jointly held by A, A1 and A2, all three of them will be the members of the company. However, the same is inapplicable for counting 50 members for the purposes of section 3(1)(iii). In support of this submission, learned senior counsel placed reliance on the judgment of this court in case of ***Dinesh Vrajlal Lakhani vs. Parke Davis (India) Limited, 2004(1) Bom.C.R.120*** and in particular paragraphs 28, 29 and 32.

30. It is submitted that for the purpose of counting 50 members under section 3(1)(iii), A, A1 and A2 will not be counted as three members but only A will be counted as a member. He submits that if the shares of the company are held in the name of (A, A1) (B,B1), (C, C1) and (E employee category), there would be seven members under section 71. However, for the purpose of section 3(1)(iii) there would be only three members i.e. A, B and C as joint holding is treated as a single i.e. A, B and C respectively and E being under employee category has to be excluded.

31. It is submitted by the learned senior counsel that the respondent no.1 had in its article provided categorically that in respect of the joint shareholding, it would recognize only the first shareholder in as much as, share certificates will be given to him, notices will be issued to him, dividend will be paid to him and if there be any conflict, decision of the first named shareholder will prevail over the rest. He submits that by Article 3, the number of members of the respondent no.1 is restricted to 50. By Article 52, the company is prevented from registering any transfer if the number of shareholders exceed by the reason of such transfer 50

and the company is under obligation to maintain the number below 50. It is submitted that respondent no.1 had refused to transfer shares in past on a plea that in its opinion the proposed transfer will result in the member exceeding 50. He invited my attention to the relevant paragraph on page 127 on the affidavit in reply dated 28th February, 2015.

32. It is submitted that the proposed transfer by the appellant by including the names of his wife and children respectively in twenty five shares which were held by the appellant in the respondent no.1 were rightly transferred in favour of the appellant jointly with his wife and children in view of the correct decision of the respondent no.1 that such transfer did not exceed the membership above 50. He submits that the respondent no.1 thus cannot be allowed to contend now anything contrary to such transfer effected by respondent no.1 in favour of the appellant and his family members and cannot be allowed to take advantage of its own wrong even if such decision was wrong.

33. Learned senior counsel for the appellant placed reliance on Article 59 (a) and (b) and would submit that under the said Article, the employees of the respondent no.1 who are allotted shares of the said company under the employee quota were under an obligation to re-transfer those shares to the other regular members on cessation of such employee shareholders. He submits that even those shares are endorsed with EMP category in the records of the company. He submits that thus 60 employees holding 60 shares are to be excluded in the counting of 50 members under section 3(1)(iii). He submits that if any such employee has gifted his shares to the family members, the shares will still remain under the employee quota and such family members must be excluded while counting 50 members of the respondent no.1. He submits that the number of 50 members has thus not

crossed through the appellant had transferred twenty five shares each in the joint names of himself respectively with his wife and three children as in each case he was the only member.

34. It is submitted that the number of members shall not be confused with the creation of folios which are merely the book keeping entries for the sake of convenience. Learned senior counsel tendered a coloured chart showing the shares held by various members of the respondent no.1 company including the employees and ex-employees with their old and new folio numbers, various dates of their shareholding in support of the submission that the number of members of respondent no.1 would not exceed 50 but would be only about 42.

35. It is submitted that till 18th May, 2001, the appellant had 7,555 shares of the respondent no.1. As on 31st December,2001, the appellant was shown as members in respect of 7,535 shares and other 20 shares were shown in the name of other family members of the appellant. He submits that some of the employees have transferred some shares to their family members illegally and in violation of Articles of Association of respondent no.1. Even if those members are considered as members, it would not exceed 50. He also invited my attention to the averments made by the appellant to the additional affidavit filed by the respondent no.1.

36. It is submitted that twenty five shares held by the appellant were transferred by the respondent no.1 on 31st December,2001. He invited my attention to the additional affidavit filed by the respondent no.1 on 12th February, 2015 placing on record the material of transfer of twenty five shares. He submits that even if names of the family members are added along with the name of the

original member, the membership of the respondent no.1 does not exceed 50.

37. It is submitted by the learned senior counsel that the Articles of Association of the respondent no.1 which have to be considered as agreement between the parties clearly provides as to whether the employees' shareholders are to be considered as members of respondent no.1 or not. It is submitted that under Article 101 of the Articles of Association of the respondent no.1, the dividend is paid by the respondent no.1 only to the first holder. There is a separate provision for transfer of shares by the employees. The employees have to issue notice of transfer. He submits that under proviso to section 3 of the Companies Act, 1956 a special or an artificial method is created for counting members of the shareholders in case of a private limited company. The purpose of the said proviso is to carve out an exception. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Kedarnath Jute Manufacturing Co. vs. Commercial Tax Officer, Calcutta & Ors., AIR 1966 SC 12*** and in particular paragraph 8, judgment of Supreme Court in case of ***Haryana State Cooperative Land Development Bank Ltd. vs. Haryana State Cooperative Land Development Banks Employees Union & Anr., (2004) 1 SCC 574*** and in particular paragraphs 9 and 10 in support of his submission on the effect of a proviso to the main provision. He submits that the joint shareholding has to be treated as one. It is submitted that if the names of the employees are excluded from the list of the shareholders and the members, the members would be not more than 33.

38. Without prejudice to the aforesaid submissions made by the learned senior counsel for the appellant, in his alternate submission it is submitted that even if the membership of the respondent no.1 crosses 50, it would have very limited consequence as provided in section 43 of the Companies Act, 1956. It

does not affect or bring about any change in the status of the company but it only deprive the company from certain privileges and exemptions which can be enjoyed by a private company. He submits that under section 43 of the Companies Act, 1956 it is not provided that the private limited company shall be ceased to be a private limited or would become public limited company if the membership exceeds 50.

39. It is submitted that fiction is created to deprive a private limited company of certain privileges and exemption without any change in status of the company from private limited company to the public limited company. He submits that several such privileges and exemptions of a private limited company are conferred under the provisions of Companies Act, 1956. He submits that the pre-emption right is a vested right of a shareholder and is not a privilege or exemption of a private limited. He submits that section 43 creates a limited legal fiction for the purpose of making a private company and to comply with the privileges and exemption which otherwise it was not under the obligation to do so but for the limited legal fiction. He submits that such fiction has to be construed strictly and cannot be extended by importing another fiction. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of **Maruti Udyog Ltd. vs. Ram Lal & Ors., (2005) 2 SCC 638** and in particular paragraph 38, the judgment of Supreme Court in case of **Mancheri Puthusseri Ahmed & Ors. vs. Kuthiravattam Estate Receiver, (1996) 6 SCC 185** and in particular at page 195, the judgment of Supreme Court in case of **Sri Baru Ram vs. Prasanni & Ors., AIR 1959 SC 93** and in particular at page 100 and the judgment of Supreme Court in case of **Sharif-ud-din vs. Abdul Gani Lone, (1980) 1 SCC 403** and in particular paragraphs 9 and 18.

40. In his alternate submission, learned senior counsel for the appellant submits that assuming whilst denying that the status of the company had undergone a change and it had become a full-fledged public company, the right of pre-emption can still be maintained between the promoters and the shareholders. The Articles of Association constitutes an agreement between the shareholders *inter se* and as such the right of pre-emption can be continued. He submits that when a fiction is created, the purpose is limited and thus second fiction cannot be created beyond such purpose. He submits that if a particular consequence is provided in the provision for default, no other consequence can be considered.

41. Mr.Samdhani, learned senior counsel for the appellant invited my attention to the prayers in Company Application No.91 of 2012 which was filed by the appellant before the Company Law Board including the schedule of amendment read by the appellant. He also invited my attention to the various paragraphs of the judgment delivered by this court in Company Appeal (L) No.45 of 2012 and in particular paragraphs 38 to 40, 49, 51, 70, 82, 83, 113, 117, 119, 121, 127, 152 and 154. He submits that by the said order passed by this court in the Company Appeal (L) No.45 of 2012, this court had dismissed the appeal filed by the respondents impugning the amendment allowed by the Company Law Board. No Special Leave Petition came to be filed by the respondents against the said order. He submits that the entire efforts while arguing Company Application No.91 of 2012 was in context of injunction and not relating to the challenge to the resolution passed by the respondent no.1. He submits that no final order came to be passed by this court in Company Application No.91 of 2012 in the said order passed in the Company Appeal (L) No.45 of 2012 and thus the appellant did not challenge that part of the order in Supreme Court. He submits that even if the injunction was not granted by the Company Law Board, validity of resolution

could be still gone into by the Company Law Board in under sections 397 and 398 of the Companies Act, 1956 by the appellant. Learned senior counsel invited my attention to the grounds of appeal filed by the appellant in this court against the said order passed by the Company Law Board.

42. It is submitted by the learned senior counsel that the leave is granted by the Supreme Court against the order passed by this court in Company Appeal (L) No.45 of 2012. Various observations thus made by this court in the said judgment cannot be relied upon by the respondents against the appellant.

43. Mr.Dhond, learned senior counsel for the respondent nos.1 to 3 on the other hand invited my attention to the notice dated 25th April, 2012 issued by the respondent no.1 for deletion of Article 57. He submits that the said notice was issued by the respondent no.1 on the basis of a notice for convening the Extra Ordinary General Meeting issued by the shareholding 12.58% simplicitor for deletion of Article 57. He placed reliance on the explanatory statement issued by the respondent no.1 along with notice dated 12th November,2010 issued by the respondent no.1 for convening earlier Extra Ordinary General Meeting and the resolution proposed by the board of the respondent no.1. He submits that the said meeting was convened so as to give effect to the amendment of the provisions of the Companies Act, 1956. He placed reliance on section 169 of the Companies Act, 1956.

44. Learned senior counsel for the respondent nos. 1 to 5 invited my attention to the order dated 13th August,2012 passed by the Company Law Board and in particular paragraphs 19 and 20 thereof to show as to why the deletion was sought by some of the shareholders of the respondent no.1 in respect of Article 57.

He also placed reliance upon the company application filed by the appellant before the Company Law Board. He submits that on 10th August, 2012, the appellant had sought adjournment before the Company Law Board to argue the Company Application No.91 of 2012. The said application was accordingly adjourned by the Company Law Board to 6th September, 2012. The appellant had argued about the conduct of the meeting by Dr.K.H.Gharda before the Company Law Board. The Company Law Board had allowed the first amendment sought by the appellant however adjourned the application for second amendment at the request of the appellant. He submits that the appellant had argued the application for amendment to the impugned resolution before the Company Law Board and then took adjournment. Company Law Board had recorded that the argument in Company Application No.73 of 2012 and in Company Application No.85 of 2012 were concluded and adjourned the Company Application No.91 of 2012 to 6th September, 2012.

45. Learned senior counsel invited my attention to various paragraphs of the order passed by this court in Company Appeal (L) No.45 of 2012. The question of law formulated by this court in the said judgment and in particular paragraphs 32, 37, 48, 67, 70, 71, 72, 82, 127, 128, 133, 141, 153 and 155. He also invited my attention to the grounds raised by the appellant herein before the Supreme Court in the Special Leave Petition arising out of the said order and judgment delivered by this court and in particular grounds raised in paragraph (s) to (u).

46. Learned senior counsel for the respondent nos. 1 to 5 also invited my attention to various paragraphs of the impugned order passed by the Company Law Aboard in which various orders passed by this court were quoted. It was held

by the Company Law Board that the Company Application No.91 of 2012 has been considered and disposed of. It is submitted by the learned senior counsel that the Company Law Board rightly took a view that this court had already disposed of Company Application No.91 of 2012 which was filed before the Company Law Board in view of the submissions made by the appellant. He submits that the Company Law Board has thus rightly held that the said application for amendment was considered by the High Court itself and has been disposed of. He invited my attention to the grounds of appeal in Company Appeal (L) No.45 of 2012 and would submit that no such ground is raised in the appeal memo that the arguments were advanced by the appellant only in respect of injunction and not the amendment.

47. Mr.Dhond, learned senior counsel for the respondent nos. 1 to 3 submits that Supreme Court while remanding the matter to this court has made it clear that this court has to decide only the question of fact of the membership having exceeded 50. He submits that the Supreme Court has already allowed the civil appeal filed by the appellant. As on today, the company appeal filed under section 10F of the Companies Act, 1956 i.e. Company Appeal No.24 of 2010 is not pending on the file. This Court thus does not have to decide the entire appeal afresh. It is submitted that it was not the intention of the Supreme Court that this court on remand shall decide the consequences or implications of the finding directed to be rendered by this court on the issue of membership has exceeded 50.

48. It is submitted that some of the proceedings between the parties are also pending before the Company Law Board and thus this court cannot go beyond the mandate of the remand of the Supreme Court. In support of this submission, learned senior counsel invited my attention to some of the paragraphs of the order

passed by the Supreme Court and more particularly paragraphs 96, 97 and 98. It is submitted that since the learned Single Judge of this Court in the company appeal had not rendered a finding of fact whether the membership of the respondent no.1 exceeded 50 or not though had referred to the submissions made by the parties, the Supreme Court has remanded the matter only for the said limited issue.

49. It is submitted by the learned senior counsel that the Supreme Court has finally decided that even if one of the requirements of section 3(1)(iii) is not met, the company cannot be a private company. He submits that once this court renders a finding that the membership has exceeded 50, the same will automatically render the consequence of the company ceasing to be private and would become public and/or the appellant being estopped from contending to the contrary. He submits that the consequence of such finding once rendered by this court will automatically follow, as a matter of law. The findings that has to be rendered by this court would be primarily based on question of fact. If this court renders any further finding on the consequence, it would partake of a question of law which is not a subject matter of remand by the Supreme Court to this court.

50. Learned senior counsel for the respondent nos. 1 to 5 invited my attention to various paragraphs of the judgment delivered by this court in Company Appeal (L) No.45 of 2012 and more particularly paragraphs 33, 84 and 85 and would submit that this court has already rendered a finding in various paragraphs of the said judgment that there was no dispute between the parties that the members of the respondent no.1 company had exceeded 50. He submits that this court as well as Company Law Board has independently rendered a finding that the members had exceeded 50 and the respondent no.1 has become public limited company. He placed reliance on paragraphs 17 and 21 of the order passed

by the Company Law Board. It is submitted that the findings rendered by this court in the said judgment are not set aside nor the said judgment of this court is stayed by the Supreme Court while admitting the Special Leave Petition filed by the appellant and converting the said Special Leave Petition into a civil appeal. He submits that the said finding rendered by this court are thus binding on parties and also on this Court and cannot be overlooked. Learned senior counsel submits that the appellant thus cannot be allowed to argue that the members of the respondent no.1 had not exceeded 50 or that the respondent no.1 company has not become a public limited company.

51. It is submitted that the appellant did not challenge the finding of the Company Law Board per-se. It was also not the case of the appellant that the Company Law Board had failed to record their submissions on this point. He invited my attention to the grounds raised in memo of appeal filed before this court and more particularly grounds raised in paragraphs (S) and (DD). It is submitted that even at the time of arguments before the Company Law Board or in the memo of appeal filed before this court, the question whether the membership of the respondent no.1 had exceeded 50 or not was not seriously disputed by the appellant. The appellant had only challenged the legal consequences and interpretation of the section and not the underlying fact of exceeding 50 members.

52. Learned senior counsel for the respondent nos. 1 to 3 placed reliance on the judgment of Supreme Court in case of ***Mohd.Akram Ansari vs. Chief Election Officer & Ors. (2008) 2 SCC 95*** in support of this submission that if a point is not mentioned in the judgment of a court, the presumption is that that point was never pressed before the learned Judge and it was given up. He submits that the appellant did not make any application before this court alleging that the

submissions advanced by the appellant on the question whether the membership of the respondent no.1 had exceeded 50 or not was though raised but was not dealt with by this court in the judgment.

53. It is submitted by the learned senior counsel that if according to the appellant, the alleged concession was not made by the appellant and was wrongly recorded by the Company Law Board or by this Court, the remedy of the appellant was to apply to the Company Law Board or this court as the case may be for clarification and rectification which the appellant had failed.

54. Learned senior counsel for the respondent nos. 1 to 3 invited my attention to the observations made by this court in paragraphs 83 to 85 of the judgment rendered in Company Appeal (L) No. 41 of 2012 holding that the membership of the respondent no.1 had exceeded 50. He submits that this court thus cannot take a different view in the matter. He submits that though the ground is raised in the Special Leave Petition filed by the appellant that the finding had been given by this court was without any pleadings or evidence and that the said issue had not raised before the Company Law Board, the same could not have found place in the appeal before this court, the said finding of the High Court is not set aside by the Supreme Court. The Special Leave Petition filed by the appellant against the judgment delivered by this court in Company Appeal (L) No.41 of 2012 is still pending.

55. In his alternate submissions, it is submitted by the learned senior counsel that it is clear from the record that the membership of the respondent no.1 had clearly exceeded 50. He placed reliance on section 3(1)(iii) of the Companies Act, 1956 which defines a “private company” and also placed reliance on section

3(1)(iii)(b) and would submit that the said provisions makes it clear that a private company must limit the number of its members to 50. He submits that under section 3(1)(iii)(b) it is clearly provided that whilst counting towards those numbers, the two distinct classes specified in section 3(iii)(b) (i) and (b)(ii) must be excluded, i.e. (a) persons who are in the employment of the company i.e. employees, (b) persons who having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, i.e. ex-employees.

56. It is submitted by the learned senior counsel that the subject of the distinct classes under section 3(1)(iii) (b) (i) and (ii) are 'persons' and not "a class of shares". He submits that the words of section and its intent is unequivocal. He submits that the said provision clearly indicates that it is personality-centric or pre-centric i.e. on the holder of the share and not "share centric". He placed reliance on the Commentary of Pennington on Company Law. Reliance is placed on section 28(1) of the UK Companies Act, 1948 which defines a "private company" and would submit that the said definition under the said Act is in *parimateria* with section 3(iii) of the Companies Act, 1956. He submits that only an actual employee or ex-employee is to be excluded, is implicitly recognized in the said passage of Pennington on Company Law. He submits that the said provision under the Companies Act, 1956 makes it clear that what the section/law requires is identity of the shareholder i.e. person to be considered and not the alleged identity or character of the share.

57. It is submitted that if the Parliament would have intended the exclusions under section 3(iii)(b) operate qua a particular class/quota of shares, it would have provided that a particular class of shares were to be excluded from

counting towards 50 members which has not been done. He submits that the case of the appellant that the employee quota shares has to be excluded is not supported by the said provision under the Companies Act, 1956. There is no such quota in law. He submits that there is no permanent law i.e. an employee quota share remains an employee quota share even when it gets into the hands of someone other than an employee. To convert a share into something akin to “a covenant running with the land” will be to turn the law on its head.

58. It is submitted by the learned senior counsel that the factum of their predecessors in interest whether by way of sale, transfer, transmission or whatsoever by the employee or ex-employee is irrelevant for the purpose of counting the members of the respondent no.1 but only status of the present holder is relevant whether he is an employee or ex-employee. He submits that there are only two tests i.e. (i) is the holder an employee / ex-employee and (ii) if so, was he an employee when he acquired the shares. He submits that article 59 of the Articles of Association of the respondent no.1 would not assist the case of the appellant. There is no bar thereunder to transfer the shares. At most, the company is given an option to give notice if it so chooses, it may choose not to. There is no such things as an employee quota shares.

59. Insofar as the issue of joint membership raised by the appellant is concerned, learned senior counsel for the respondent nos.1 to 3 placed reliance on the proviso to definition of “private company” under section 3(1)(iii) and would submit that the said proviso recognizes that a share held jointly by more than one person is to be counted as one single entity / unit. It is submitted that the said proviso explicitly states that it's expression is limited to the purposes of this definition i.e. section 3(1)(iii) alone. The reference to other provisions of the Act

is irrelevant for construing the said provision. He submits that the said proviso itself contemplates and recognizes joint holding as a concept.

60. Learned senior counsel led emphasis on the word “they” and would submit that the same would mean an aggregation of two or more persons. By recognizing the ownership / holding, the proviso draws a distinction between the individual members and joint members viz. members who together hold one common share. He submits that whether the members hold shares in common / jointly they are treated as separate unit which is distinct, separate and independent from, of their constituents i.e. the sums treated as different from its constituent parts. Learned senior counsel gave an illustration i.e. if shares are held jointly by “A” and “B”, the same are to be construed for the purpose of section 3(1)(iii) as being one unit or held by one member i.e. “AB”, and in such a case member is “AB”. In support of this submission, reliance is placed on the passages from the commentary of Pennington. Reliance is also placed on the judgment of this Court in case of ***Narandas Munmohandas Ramji vs. Indian Manufacturing Co. Ltd. (1953) 23 Company Cases 335*** at page 340. He also placed reliance on the judgment of the Punjab & Haryana High Court in case of ***Jarnail Singh & Anr. vs. Bakshi Singh & Anr. (1959) 30 Company Cases 192.***

61. It is submitted by the learned senior counsel that the object of the proviso to the section 3(1)(iii) is only to treat the shares held jointly by two persons as one single member entity / unit, for the sole and exclusive purpose of the definition of a private company. He submits that the contention of the appellant that only the first holder must be considered and the second and other shareholders are to be ignored is *ex-facie* contrary to the plain reading of section 3(1)(iii) read with proviso. It is submitted that the suggestion of the appellant that only the first

holder is to be counted and other holders are to be ignored or treated as tails or driftwood is not expressed by the proviso and is clearly beyond its intent. No such intention is borne out by the language of the proviso. There is no primacy given to the first holder under the said provision. Learned senior counsel gave an illustration that if the shares are held by four partnerships, who have as their partners A & B, A & C, A & D and A & E, then by reason of the proviso there will be four members, AB, AC, AD and AE and not five members i.e. A, B, C, D and E and even more certainly not one member viz. A.

62. It is submitted by the learned senior counsel that the said fiction is only created for this definition of the private company under section 3(1)(iii) and cannot be extended further. He submits that showing as to how joint members are otherwise treated under the provisions of the Companies Act, 1956 is irrelevant and misleading in view of the fiction created by the proviso to definition of the private company. He submits that for the purpose of definition and proviso, the joint holders are one distinct unit different from constituent and the second holder of shares held jointly with another is a member in all respects since his name even otherwise appears in the register of members. He submits that once both principles are applied, there can be no dispute that the membership of the respondent no.1 had consequently exceeded 50.

63. It is submitted that on 30th October, 2001, the appellant had applied to transfer twenty five shares held by him to five shares held jointly each with his wife, his son and two daughters. The said transfer was effected by the respondent no.1 on 31st December, 2001. On 14th January, 2002, the respondent no.1 company informed the appellant of such transfer effected in the records of the respondent no.1. It is submitted that as a result of such transfer effected by the appellant

himself, the numbers of the members of the respondent no.1 increased to 54. The respondent no.1 has recognized that separate port folio had been created in new joint shareholding units / entities.

64. It is submitted that as a result of such transfers, applied for by the appellant and carried out by the respondent no.1, four new joint holders entities / units were added to the membership i.e. the appellant and his wife, the appellant and his son, the appellant and his daughter and the appellant and his daughter. He submits that as required by section 3(1)(iii)(b), the current employee and the ex-employee have not been counted towards the membership.

65. It is submitted by the learned senior counsel that the appellant has been aware of the fact that the membership of the respondent no.1 had exceeded 50 all through out and he had inspected the records of the respondent no.1 through his constituted attorney on 17th January, 2002. Reliance is placed on the letter issued by the appellant on 18th January, 2002 annexed at Exhibit-K of the paper book. It is submitted that the issue involved is not one of counting but really how counting is to be done i.e. “who is to be considered whilst counting” or “who is to be included and who is not”.

66. Learned senior counsel thereafter made his comment on the colour chart submitted by Mr.Samdhani, learned senior counsel for the appellant and more particularly the entry of Mr.Bhanushali who is having Folio No.135 and would submit that the said Mr.Bhanushali was a employee of respondent no.1. He submits that a person who is claiming through an employee is not required to be excluded for the purpose of calculation of membership. The sons of the employee have to be included as member.

67. Insofar as observation made by Supreme Court on interpretation of section 43A is concerned, it is submitted by the learned senior counsel that the said observation is only an obiter and cannot be considered as a ratio and is not binding. Article 57 was existing earlier which is no more in existence and thus no reliance thereof can be placed. He submits that under section 43A of the Companies Act, 1956, an option is given to the parties which is discretionary. Sub-section (d) inserted in section 3(1) cannot be compared with the provisions of section 3(1), (a), (b) and (c). He submits that insertion of clause (d) in section 3(1) is prospective in nature and not retrospective. He submits that paragraphs 96 and 97 of the Supreme Court judgment delivered in Civil Appeal No.2481 of 2014 has to be read with paragraph (90) of the judgment of this court in Civil Appeal No.2481 of 2014. He also invited my attention to various findings recorded at pages 23, 28, 40, 41 and 42 of the impugned order passed by the Company Law Board. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Ram Parshotam Mittal and another vs. Hillcrest Realty SDN.BHD. and others, (2009) 8 SCC 709*** and in particular paragraphs 71 to 74. He also placed reliance on the judgment of Supreme Court in case of ***Needle Industries (India) Ltd. and others vs. Needle Industries Newey, (India) Holding Ltd. & others, (1981) 3 SCC 333*** and in particular paragraphs 146 to 150 thereof.

68. Insofar as name of R.N.Sethna and M.M.Sharma in the chart of members is concerned, learned senior counsel for the respondent nos. 1 to 5 fairly admitted that the same was a mistake on the part of the respondent no.1.

69. Learned senior counsel then placed reliance on paragraph 14 of the judgment of the Supreme Court in the Special Leave petition filed by the appellant

and would submit that it is already held by the Supreme Court that all requirements of section 3(1)(iii) have to be fulfilled for a company to retain its private character. He submits that the said issue is already concluded finally by the Supreme Court in the said judgment and cannot be re-opened by this Court. He submits that Article 57 of the respondent no.1 has stood deleted admittedly. The respondent no.1 had passed a resolution for deleting the said article. The said resolution was challenged by the appellant herein and was negatived and held to be valid by this Court. He submits that admittedly the said judgment delivered by this Court in Company Appeal (Lodging) No.41 of 2012 has not been stayed by the Supreme Court. He submits that there is no final adjudication on the issue of deletion of Article 57 by the Supreme Court. The said Special Leave Petition filed by the appellant, which is now converted into Civil Appeal is still pending. He submits that the fact remains that as on date the condition under section 3(1)(iii)(a) viz. to provide for a restriction on a right to transfer shares, no longer exists. A determination of status must take into account concluded questions of fact between parties.

70. In his alternate submission, it is submitted that the consequence of default under section 43 of the Companies Act, 1956 is that the company loses its privilege and exemptions and has to be treated as if it would no longer a private company and thus the company in default if any must be treated as a public company. He submits that there is a mandate that the Court treat it as a public company. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in case of ***Needle Industries (India) Ltd. & Ors.*** (supra) that the effect of sections 43 and 44 of the Companies Act, 1956 were the same viz. that a company within the scope of either section lost all characteristics of a private company and was a public company.

71. Learned senior counsel for the respondent nos.1 to 3 distinguished the judgment of the Supreme Court in case of ***Union of India & Ors. vs. West Coast Paper Mills & Anr.***(supra) on the ground that there was no finding rendered in the said judgment which was appealed against but not stayed, loses all binding effect upon a simplicitor appeal being preferred. It is submitted that in the said matter, the Supreme Court was concerned with a question of limitation. He submits that the said judgment is clearly distinguishable on the facts of this case and would not assist the case of the appellant.

72. Learned senior counsel for the respondent nos.1 to 3 distinguished the decision of the Company Law Board in case of ***Jyotirmoy Ghosh & Anr. vs. A. Tosh & Sons (India) Ltd. & Ors.*** (supra) on the ground that the findings rendered by the Company Law Board in that matter were given on a limited point of maintainability of a petition under section 399 of the Companies Act. He relied upon paragraphs 8.1 of the said decision in support of his submission.

73. Learned senior counsel distinguished the judgment of this Court in case of ***Dinesh Lakhani vs. Parke Davis*** (supra) and would submit that the said judgment does not lay down any law nor does it suggest that whilst computing joint membership for the purpose of determining the number of members, the second holder must be excluded and has no effect exists. He submits that the said judgment merely notes that in the context of voting, the first holder of jointly held shares is entitled to vote under the Articles of Association if both holders are present. He submits that the same is merely for convenience and does not in any way confer a inferior status to the second holder since the law recognizes that the right of voting belongs collectively to all the holders of that particular share.

74. Learned senior counsel for the respondent nos.1 to 3 distinguished the judgment of the Supreme Court in case of ***Reserve Bank of India vs. Peerless General Finance & Investment Co. Ltd.*** (supra) on the ground that the same is not relevant. He submits that there is no dispute about the general proposition of law with regard to contextual interpretation. He submits that however in this case, section 3(1)(iii)(b) and the proviso thereof are clear in their statutory import which clearly states that its applicability is limited for the purposes of definition under section 3(1)(iii) alone.

75. Learned senior counsel for the respondent nos.1 to 3 distinguished the judgment of the Supreme Court reported in ***AIR 1967 SC 12*** and ***(2004) 1 SCC 574***. He submits that there is no dispute about the general proposition of law laid down therein in relation to the interpretation of provisos. He submits that however, the said judgment does not bolster the case of the appellant that shares held jointly by one person in four separate and independent sets is to be counted as one single member.

76. Insofar as the submission of the learned senior counsel for the appellant that section 43 of the Companies Act, 1956 only entails a limited legal fiction that a company loses its privilege and exemptions and that it does not lose its fundamental character of being a private company is concerned, it is submitted that the consequences of default under section 43 is beyond the scope of remand under the order passed by the Supreme Court. He submits that without prejudice to the said submission already made by him, the default under section 43 has been equated by the Supreme Court to mean the loss of private character of the company in all respects. He submits that in the judgment in case of ***Needle***

Industries (India) Ltd. & Ors. (supra), the Supreme Court has held that the company loses its private character when its membership exceeds 50.

77. It is submitted by the learned senior counsel that in the decision of the Supreme Court in the civil appeal filed by the appellant by which the Supreme Court has remanded the matter to this Court for limited enquiry has held that where the private company limited becomes a deemed public company under section 43-A, the mere fact that it has become deemed public by reason of section 43-A does not *ipso facto* and automatically make it a public company and does not by itself invalidate provisions in its Articles against free transferability. He submits that the Supreme Court has accepted that the deemed public company under section 43-A can have restrictions against free transfer of shares in its Articles. He submits that the said judgment is not an authority for the proposition that where a private limited company fails to answer the statutory description of a private limited because (i) its members exceed 50 and/or (ii) the restriction against free transferability in its Articles (Article 57) is consciously deleted.

78. It is submitted that the argument of the appellant is self-defeating. He submits that if the Supreme Court would have held that the respondent no.1 was a private company, the Supreme Court would not have directed this Court to carry out an empty formality or an exercise of finding out the number of members. He submits that the outcome of this enquiry is obviously irrelevant. He submits that the Supreme Court's judgment does not deal with the cases where companies have become public under sections 43 and 44. There is a marked difference in the language of sections 43, 43-A and 44 which have been recognized in the case of ***Needle Industries (India) Ltd. & Ors.*** (supra).

79. Mr.Samdhani, learned senior counsel for the appellant in rejoinder submits that the Supreme Court has already granted leave in the Special Leave Petition arising out of the order and judgment of this court in Company Appeal (L) No.45 of 2012. He submits that after introduction of section 44A of the Companies Act, 1956 there are only two types of companies i.e. private company or public limited company. The deemed fiction which was provided in the Companies Act, 1956 has been deleted. He submits that the finding of the Company Law Board that the members of respondent no.1 exceeded 50 is totally perverse. The pleadings filed by the appellant before the Company Law Board were not seen by the Company Law Board while rendering the impugned order and judgment. He submits that the affidavit in reply filed by the respondent no.1 before the Company Law Board was without any documents. He submits that there was no admission on the part of the appellant at any stage in any proceedings that the membership had exceeded 50.

80. In support of this submission, learned senior counsel for the appellant invited my attention to various averments made in the company petition filed by the appellant and also in the appeal memo filed by the appellant before this court in Appeal (L) No.45 of 2012. He submits that whenever the number of members exceeded 50, respondent no.1 was declining transfer of shares. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. & Others (1987) 1 SCC 424*** and in particular paragraph 33 and would submit that the first shareholder has to be considered as a member and not the entire unit. He submits that Article 59(b) of the Articles of Association deals with the shares of employees.

81. Insofar as various shares held by Bhanushali A.L. is concerned, he

submits that the said employee has transferred his shares to his family members which was not permissible under the Articles of Association of the respondent no.1.

82. It is submitted by the learned senior counsel that the issue regarding the number of members crossing 50 was not argued before the learned Single Judge of this court and accordingly no discussion is found in the judgment and order dated 14th June, 2011. He submits that this question was once again raised by the respondent nos.1 to 5 before the Supreme Court and it was effectively denied by the appellant. He invited my attention to pages 509 and 523 of the counter affidavit dated 23rd August, 2011 filed by the respondents and pages 553, 554, 555 and 569 of the rejoinder dated 23rd September, 2011 filed by the appellant before the Supreme Court.

83. It is submitted by the learned senior counsel that as the parties were in dispute with regard to the number of members having crossed 50, the Supreme Court thought it fit to remand the said issue. He submits that the respondents thus cannot be allowed to urge that the said issue is already decided by the Company Law Board and also by the learned Single Judge of this court. It is submitted that since there was no material on this issue, the respondents for the first time placed the material vide their affidavit dated 12th February, 2015 which was responded by the appellant by filing his reply dated 28th February, 2015.

84. Insofar as submission of the learned senior counsel that the issue as to whether members exceeded 50 or not has been already dealt with by this court in the judgment dated 20th December, 2012 in Company Appeal (L) No.45 of 2012 is concerned, it is submitted by Mr.Samdhani, learned senior counsel for the

appellant that the said judgment dated 20th December,2012 has been challenged by the appellant in the Supreme Court in Special Leave Petition No.13640 of 2013 in which the Supreme Court has granted leave by an order dated 14th February,2014 and the said Special Leave Petition is converted into a Civil Appeal No.2481 of 2014. He submits that the findings thus contained in the said decision dated 20th December,2012 cannot be looked into. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Kunhayammed vs. State of Kerala, (2000) 6 SCC 359*** and in case of ***Union of India vs. West Coast Paper Mills, (2004) 2 SCC 747***.

85. Learned senior counsel for the appellant invited my attention to the grounds 5(AA)(ii),(iii) and (v) in the Special Leave Petition and would submit that the findings in the judgment and order dated 20th December,2012 is specifically challenged by the appellant before the Supreme Court not only on the ground that it was not factually incorrect but also on the ground that it did not arise at all in the matter in Appeal (L) No.45 of 2012. He submits that the Supreme Court has granted leave in both these special leave petitions. By a common order dated 14th February, 2014, both the matters were to be heard together. He submits that inspite of the alleged finding in the order dated 20th December,2012, Supreme Court has remanded the matter to this court to decide the issue whether the number of members has crossed 50 and to pass appropriate order thereof. He submits that if the arguments of the respondents are accepted, there was no reason for the Supreme Court to remand the matter to decide the issue of number of the members of respondent no.1.

86. Insofar as submission of Mr.Dhond, learned senior counsel for the respondent nos. 1 to 5 that for the purpose of section 3(1)(iii), joint shareholders

are to be treated as one unit and consequently AB, AC and AD are to be treated as three members is concerned, it is submitted that though the respondents are admitting that for the purpose of counting the members under section 3(1)(iii), joint members must be counted as one member, however they are not answering the necessary corollary of that who that one member is. He submits that for the purpose of counting 50 members, it is necessary to identify who constitute the 50 members. He submits that the plain reading of Articles of Association of respondent no.1 and more particularly Article 3, 15, 20, 52, 59(a) and (b), 101 and 193 clearly suggests that in case of joint members, the company will recognize only the first member. He submits that when “AB” is to be treated as one member that one member is 'A'. Similarly in case of “AC”, the one member is 'A' and so also the “AD”, the one member will be 'A'. consequently for the purposes of section 3(1)(iii), each of the alleged three units are actually 'A' and they must be counted as one member.

87. It is submitted that if the interpretation of the respondents is accepted, it would result in absurd, impractical and impermissible consequences. Learned senior counsel once again placed reliance on the judgment of this court in case of ***Reserve Bank of India*** (supra) on the issue of interpretation of statute and would submit that statute should be construed after ascertaining legislative intent and in the context and scheme of the Act and must depend on the text and the context. No part of statute and no word of a statute can be construed in isolation. Learned senior counsel gave an illustration i.e. if Mr.'A' is a shareholder in Tata Motors Ltd. and holds 100 shares, he is ineligible to file a petition under section 397 as he would not constitute 10% of the paid up capital. However, if Mr.'A' splits from his single holding to joint holding with 100 individuals, so that his 100 shares are splits into 100 units, i.e. Mr.'A' jointly with B1, B2, B3, B100. 'A' has

created 100 units means AB1, AB2, AB3, AB100 where the first shareholder is “A” but the second name of shareholders in each case is different. He submits that if the interpretation of the respondents is accepted in this case, then AB1 to AB100 together are eligible to file a petition under section 397 as if they are 100 members.

88. Learned senior counsel placed reliance on the judgment of Company Law Board in case of *Jyotirmoy Ghosh vs. A.Tosh & Sons (India) Ltd., (2016) 198 Comp. Cas 510* holding in support of the submission that such joint membership cannot be counted as different members and must be counted as one. He submits that twenty five shares in each were transferred individually by the appellant jointly with his wife and three children. The number of members for the purpose of section 3(1)(iii) will not exceed 50 as the appellant continues to remain first name member. He submits that in any event if the joint members are not to be considered as separate members but are considered as one member, total number of members do not exceed 50.

89. Learned senior counsel for the appellant distinguished the judgment of Punjab High Court in case of *Jarnail Singh and another* (supra) on the ground that that court did not have the occasion to consider whether the number of members in that case had exceeded 50 and whether two joint holders with the first common name should be treated as one member or two members. He submits that the issue before the Punjab High Court was totally different.

90. Insofar as judgment of this court in case of *Narandas Munmohandas Ramji* (supra) relied upon by the respondents is concerned, learned senior counsel for the appellant distinguished the said judgment on the ground that the issue

before this court in the said judgment was totally different. There was no issue regarding the manner of counting 50 members but on the contrary the issue was whether the joint shareholder could be held liable on the death of the co-holder. This court held that the joint shareholder can be treated as one only for the purpose of section 3(1)(iii) of the Companies Act, 1956. He submits that in any event, the judgment of this court in case of ***Narandas Munmohandas Ramji*** (supra) has already been referred by the Division Bench of this court in case of ***Dinesh Vrajlal Lakhani vs. Parke Davis (India) Limited, 2004(1) Bom.C.R.120.***

91. Insofar as submission of the learned senior counsel for the respondent nos. 1 to 5 that employee shares are “persons specific” and could not be considered in a generic sense and that the reference to Article 59(b) was of no consequence is concerned, it is submitted that the submission of the appellant was that on a fair and purposeful reading of section 3(1)(iii) for the purpose of counting 50 members, the shares held by the employees of the company both past and present are to be excluded. In this case, the respondent no.1 has specifically created an employee quota where the employee share certificates were separately identified as employee shares. He submits that under Article 59(b) these shares always carry the obligation of being transferred to existing members. He submits that if the employee transfers some shares to his wife and children, they will continue to hold these shares under the employee category subject to the restriction of Article 59(b). He submits that if the employee is excluded from the counting of 50, his wife and children who hold the nominal shares also are subject to the obligation of Article 59(b) and must necessarily be excluded from the counting of 50 members. He submits that the Commentary of Penningon's on Company Law is not relevant and would not assist the case of the respondents.

92. Insofar as submission of the learned senior counsel for the respondents that the consequence of exceeding 50 members is beyond the scope of remand is concerned, learned senior counsel for the appellant submits that the Supreme Court has remanded this matter to this court for examining the question whether the transfer of twenty five shares of the appellant resulted in the membership of the respondent no.1 exceeding 50 and if so, to take an appropriate decision. He submits that in order to take an appropriate decision, it is necessary for this court to consider the consequences of the number of members exceeding 50. He submits that if this court comes to the conclusion that the number of members exceed 50, this court will have to consider the effect thereof i.e. whether the respondent no.1 can only lose its privilege and exemption or the right of pre-emption will not be rendered illegal or invalid. He submits that the Supreme Court has already disposed of the civil appeal filed by the appellant and thus the consequence and effect of the number of exceeding 50 or not will have to be considered by this court.

93. Insofar as submission of the learned senior counsel for the respondent nos. 1 to 5 that section 43 of the Companies Act, 1956 is inapplicable as Article 57 has been factually deleted or that the consequence of deletion Article 57 makes the 1st respondent public company under section 44 and therefore section 43 is inapplicable is concerned, it is submitted by the learned senior counsel for the appellant that since the Supreme Court has remanded the matter to this court on the issue referred in the said order and judgment of the Supreme Court, the same has to be decided on the basis of the facts as originally existed. He submits that the issue in the present case is not the effect of the deletion of the Article 57 but the effect of number of members exceeding 50. When the Company Law Board had decided the matter on 14th May, 2010, Article 57 was existing. On the date

when the High Court in appeal decided the matter on 20th December,2012, Article 57 was existing. On the date when the Supreme Court passed an order of remand on 28th October,2014, Article 57 has been deleted.

94. It is submitted that the civil appeal filed by the appellant objecting to such deletion was admittedly pending in the Supreme Court when the Supreme Court remanded the matter to this court by the said order dated 28th October,2014. He submits that notwithstanding such deletion, the entire matter before the Supreme Court was argued and has been decided on the basis that the Article 57 exists. It is submitted that this court has to consider whether on 31st December,2001, the membership of the respondent no.1 had exceeded 50 when Article 57 was existing.

95. Insofar as judgment of Supreme Court in case of ***Ram Parshotam Mittal and another*** (supra) relied upon by the learned senior counsel for the respondent nos. 1 to 5 is concerned, learned senior counsel for the appellant distinguished the said judgment on the ground that admittedly in that case, the company had passed a special resolution on converting itself into a public company and also filing the statement in lieu of prospectus. Supreme court has also clarified that the findings therein was only *prima facie* and were meant for disposal of the Special Leave Petition alone.

96. Insofar as judgment of Supreme Court in case of ***Needle Industries (India) Ltd. and others*** (supra) relied upon by the learned senior counsel for the respondent nos. 1 to 5 is concerned, it is submitted by the learned senior counsel for the appellant that the said judgment would not apply to the facts of this case and would not assist the case of the respondent nos. 1 to 5 on the ground that in

this case Supreme Court has expressly and categorically considered the status of the respondent no.1 and has held that it would continue to operate as Hybrid Company.

97. It is submitted that the transfer of twenty five shares by the appellant from the single name to himself jointly with his wife and children on 31st December, 2001 did not result in the membership of the respondent no.1 exceeding 50 and even if it exceeded 50, it did not render the respondent no.1 a public company. He submits that the interim order passed by the Supreme Court against the respondents to be continued by this court.

98. It is submitted that the judgment of the Company Law Board has merged with the judgment delivered by Shri Justice S.C.Dharmadhikari in the first round of litigation and the said judgment has merged with the judgment of Supreme Court. The judgment of Company Law Board and judgment of this court thus does not subsist. On this aspect, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Union of India vs. West Coast Paper Mills*** (supra) and in particular paragraphs 11, 14 and 41.

99. Insofar as interpretation of proviso to section 2(1)(iii) of the Companies Act, 1956 as sought to be interpreted by the respondent nos. 1 to 5 is concerned, it is submitted that the term 'unless the context otherwise requires' referred in section 3(1) itself suggests that in case of joint shareholding, the same has to be counted as one member. In this context, he also placed reliance on section 399(2) of the Companies Act, 1956. He submits that interpretation of the respondent nos. 1 to 5 would lead to absurd consequences and would lead to an inappropriate unintended result which is not intended by legislation. He submits

that the appellant was admittedly first shareholder in all five certificates. He submits that if the submissions of the respondent nos. 1 to 5 is accepted, if both the shareholders are present, both will have to be permitted to vote for the same shares at the same time. He submits that in this case all the notices sent by the respondent no.1 were sent to the first shareholder and not to the joint shareholders.

100. It is submitted by the learned senior counsel for the appellant that the Supreme Court has already held that the respondent no.1 is not a public company but a deemed public company. The deemed public company can have such an article prescribing right of pre-emption with restriction of transferability. He submits that Supreme Court has already allowed the civil appeal filed by the appellant and thus the company petition filed by the appellant also stand allowed and consequently the judgment of Company Law Board stand reversed. He submits that only because the Supreme Court found that there was no factual finding on the issue raised by the parties whether the number of members exceeded 50 or not rendered by the High Court in the judgment delivered in the company appeal, the Supreme Court remanded the matter back to the High Court after giving findings on the other issues in favour of the appellant.

101. It is submitted that since the civil appeal filed by the appellant has been allowed and if this court takes a view on remand that the members have not exceeded 50, the appeal filed by the appellant under section 10F before this court has to be allowed. In his alternate submission, he submits that if this court comes to the conclusion that the members of the respondent no.1 have exceeded 50, this court will have to decide the effect and consequence thereof under section 43 of the Companies Act, 1956. He submits that the requirement of the membership of 50 is one of the three conditions setout under section 3(1)(iii). He submits that

even if, the members exceeds 50, a private company would not become public but it would at the most lose privileges and exemption available to a private company. He submits that the Supreme Court has already taken a view that the respondent no.1 is a hybrid company and thus section 44 of the Companies Act, 1956 does not apply. He submits that no statement in line of prospectus is filed by the respondent no.1 under section 44 of the Companies Act, 1956.

102. Learned senior counsel distinguished the judgment of Supreme Court in case of ***Ram Parshotam Mittal and another*** (supra) on the ground that the said judgment does not lay down the proposition of law as sought to be canvassed by the respondent nos. 1 to 5 and thus cannot be treated as binding precedent. He invited my attention to paragraphs 26 and 33 of the said judgment and would submit that in that matter, a resolution was passed and conditions of section 44 of the Companies Act, 1956 were satisfied. He submits that in any event, the view taken by the Supreme Court in the said judgment was a prima facie view and not a conclusive finding rendered by the Supreme Court.

103. It is lastly submitted that the appeal filed by the appellant under section 10F of the Companies Act, 1956 thus deserves to be allowed and interim injunction granted by the Supreme Court be continued.

104. Mr.Dhond, learned senior counsel for the respondent nos. 1 to 5 submits that insofar as scope of remand by the Supreme Court of this court is concerned, the court has to decide the issue based on the condition prevailing today and not when the Company Law Board as well as this court had passed the order. He submits that the Supreme Court though has allowed the civil appeal filed by the appellant, Supreme Court has not remanded back the company appeal

under section 10F of the Companies Act, 1956 filed by the appellant. This court thus cannot decide the consequence of the factual findings as may be rendered by this court.

105. Insofar as applicability of Article 3A of the Articles of Association is concerned, it is submitted by the learned senior counsel that the said Article has to be read with various other articles and once Article 57 itself is deleted, Article 3A is redundant. He submits that in the facts of this case, the number of members have already exceeded 50.

REASONS AND CONCLUSIONS

106. Supreme Court passed an order dated 28th October, 2014 in Civil Appeal No.2481 of 2014 filed by the appellant herein holding that the only other submission of the respondents which is required to be dealt with is regarding transfer of five shares of the appellant which, according to the respondents resulted in the membership of the 1st respondent company exceeding 50 thereby rendering the 1st respondent a public company. It is held that though the High Court noted the submission at para 9, it did not record any finding in this regard. The Supreme Court accordingly declined to examine that question holding that the Supreme Court could not be converted into a Court which enquires into the questions of fact for the first time. The Supreme Court accordingly deemed it appropriate to remit the matter to this court only for the purpose of considering the said submission of the respondents and to take appropriate decision.

107. This court has to thus consider whether the transfer of twenty five shares of the appellant resulted into membership of the 1st respondent company

exceeding 50 thereby rendering the 1st respondent a public company. Learned senior counsel appearing for the appellant and the respondent no.1 addressed this court on this issue and several other issues.

108. I shall now decide the issue as to whether the membership of the respondent no.1 had exceeded 50 by virtue of the transfer of 25 shares by the appellant in favour of himself and his family members.

109. It is not in dispute that prior to 30th October,2001, it was not the case of the respondent no.1 that the members of the respondent no.1 had exceeded 50. On 30th October,2001 the appellant had applied for transfer of 25 shares held by him. Till 18th May, 2001, the appellant had 7555 shares of the respondent no.1. As on 31st December,2001, the appellant was shown as member in respect of 7535 shares and other 20 shares were shown in the name of the other family members of the appellant. On 14th January,2002, the respondent no.1 transferred those 25 shares in the name of the appellant and his family members. It is the case of the respondent no.1 that the said company created a separate folio in the share register and in the register of members.

110. The name of the appellant was first in all those shares though the second name on the share certificate issued by the respondent no.1 was of family members of the appellant. It is the case of the appellant that 25 shares in each were transferred by the appellant jointly with his wife and 3 children and thus number of members under section 3(1) (iii) did not exceed 50 as the appellant continued to remain first name member.

111. Section 41 of the Companies Act, 1956 defines “a member”. It is

provided in the said section that the subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members. Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company. Section 3(1)(iii) of the Companies Act, 1956 defines “private company” which means a company which is a paid up capital of Rs.1 lakh of such high paid up capital as may be and as its Article (a) restrict the right to transfer its share if any, and (b) limits the number of its members to 50 not including (i) persons who are in the employment of the company, and (ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased. The proviso to the said section provided that if two or more persons hold one or more shares, in a company jointly, they shall, for the purposes of this definition, be treated as a single member.

112. It is the case of the appellant that thus for the purpose of counting 50 members under section 313 of the Companies Act, 1956, the employees' shareholders are to be excluded and joint shareholders are to be treated as single. Learned senior counsel for the appellant tendered a chart showing number of members including the existing and retired employees who were the shareholders of the respondent no.1 and some of the employees having transferred their shares and the transferee having been considered as members by the respondent no.1 to buttress his arguments that even if the said 25 shares of the appellant were transferred by the respondent no.1 jointly in favour of the appellant and his family members in the ratio of 5 shares each, the membership of the respondent no.1 had not exceeded 50. Both the learned senior counsel for the parties addressed this

court in great detail on this issue including the effect of transfer of shares by the existing employees of the respondent no.1 allotted by the respondent no.1 company to their family members partly or fully upon their retirement or during the course of their employment.

113. The appellant also placed reliance on Articles 3, 15, 20, 52, 57, 59(a) and (b), 101 and 193 of the Articles of Association of the respondent no.1 in support of his submission. It is the case of the appellant that for the purpose of counting 50 members under section 3(1)(iii) of the Companies Act, 1956, the employee shareholders are to be excluded and joint shareholders are to be treated as single. For the purpose of computation of number of members of respondent no.1, some of the provisions of the Companies Act, 1956 and Articles of Association of respondent no.1 which will be relevant and will have bearing on the computation of members are setout hereinafter.

114. Article 3 of the Articles of Association provided that the right to transfer shares of the company is restricted in the manner provided in the Articles. It is further provided that the number of members of the company not including (1) persons in the employment of the company , (2) persons who having been formerly in the employment of the company, were members of the company while in employment and have continued to be members after the employment ceased, shall not exceed at any time fifty, provided that where two, or more persons hold one or more shares in the company jointly they shall for the purpose of this definition, be treated as a single member.

115. Article 15 makes a provision where two or more persons are registered as the holders of any shares. It is provided that the company would not

be bound to issue more than one certificate and shall deliver the same to person named first on the register of members. Any notice shall be considered sufficiently given to all the joint members if given to the one whose name stands first on the register in respect of share held jointly. Upon the death of the joint holder the survivor/s shall be the only person or persons recognized by the company as having any title to or interest in the shares and the directors may require such proof to be given of the death as they shall think fit.

116. Article 17 provides that the company is not bound to recognize any interest in shares other than the death of the registered holders. Article 20 provides for a right of the member to one certificate for all the shares registered in his name subject to the proviso mentioned in the said Article.

117. Article 52 of the Articles of Association provides for Execution of Transfer of any share to be signed by both i.e. transferor and transferee. Article 57 makes the provision for an application for transfer of shares including the procedure for offering shares to the existing members, notice in writing, various restrictions on transfer of shares etc. Article 59 (a) provides for closing the transfer books and register of members. Article 59 (b) provides that in every case, where it is proposed to transfer or allot shares to an employee of the company, such transfer or allotment shall only be passed or made on the condition that the transferee or allottee at any time after he ceases to be in the employment of the company shall be bound upon the request in relation to such shares. In the case of transfer, such condition must be embodied in the transfer and the certificate relating to every share which is transferred or allotted subject to such a condition shall bear a memorandum referring thereto.

118. It further provides that where the holder of any share held subject to such a condition ceases to be employed by the company, the company may at any time afterwards give him notice in writing requesting him to serve the company with a transfer notice and he shall thereupon be bound to serve the company with such notice accordingly and to transfer the shares to another member of the company. Article 59 provides that in the case of every member of the company, if he is found to be working or doing activities which are against the interest of the company, he shall be bound upon the request of the company to serve the company with a transfer notice in relation to such shares and to transfer the shares to another member of the company.

119. Article 101 provides that if there are joint registered holders of any shares, any one of such persons may vote at any meeting either personally or by proxy in respect of such share as if he were solely entitled thereto and if more than one of such joint holders be present at any meeting personally or by proxy then one of the said persons so present whose name stands first on the Register in respect of such share shall alone be entitled to vote in respect thereof.

120. Article 193 provides that unless otherwise directed any dividend may be paid by cheque or warrant sent through the post to the registered address of the member or person entitled or in the case of joint holders in the registered address of that one whose name stands first on the Register in respect of the joint holding and every cheque or warrant so sent shall be made payable to the order of the person to whom it is sent or to his bankers.

121. It is not in dispute that the respondent no.1 had issued certain number of shares to the employees of the respondent no.1 subject to the

provisions of law as well as Articles of Association of the respondent no.1.

122. Section 36 of the Companies Act, 1956 provides that subject to the provisions of the said 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. Section 41 of the said Act defines “member.” Under the said provision, every other person other than provided in Section 41(1) who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

123. A perusal of Section 3(1)(iii) which defines “private company” clearly indicates that the company would be a private company which by its articles, restricts the right to transfer its shares, if any and limits the number of its members to fifty. It further provides that such number of members fifty does not include (i) persons who are in the employment of the company, and (ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased. There is proviso to the said provision which states that where two or more persons hold one or more shares, in a company jointly, they shall, for the purposes of the said definition, be treated as a single member.

124. In my view, the said definition of a private company will have to be read with various articles referred to aforesaid by this Court while determining the issue whether number of members of the respondent no.1 exceeded fifty or not under Section 3(1)(iii) of the Companies Act, 1956. This Court also has to

consider as to whether while computing the number of members of the respondent no.1, joint share holdings of the members and the share holdings of the employees of the respondent no.1 or transfer of shares by those employees in favour of their family members or otherwise will have to be excluded under Section 3(1)(iii)(b) of the Companies Act, 1956 read with proviso to the said section.

125. Learned senior counsel appearing for the parties have addressed this Court also on the issue whether Article 57 of the Articles of Association which provides for various restrictions on transfer of shares already stood deleted by the respondent no.1 or not and the effect of the Supreme Court admitting the Special Leave Petition filed by the appellant against one of the judgments delivered by this Court in the company appeal filed by the appellant. In view of the limited issue required to be decided in view of the order of remand by the Supreme Court, this Court did not go into the issue as to whether the said Article 57 was in force when transfer of 25 shares by the appellant in favour of himself and his family members was effected by the respondent no.1 or that the same stood deleted subsequently or the effect of such subsequent deletion on transfer already effected in favour of the appellant and his family members.

126. A perusal of the record clearly indicates that the respondents had specifically created an employee quota and had identified the employee share certificate separately as employee share. The transfer of shares by these employees during their employment and thereafter was restricted under Article 59(b) of the Articles of Association. In my view, in view of the condition imposed in Section 3(1)(iii)(b)(ii), even if the employee share holders who continued to be the members after their employment ceased are also required to be

excluded categorically while computing the number of members fifty as restricted under Section 3(1)(iii)(b). In my view, any such transfer made by such employee share holder in favour of his wife or children would not make his wife or children as a member to be included within the number of fifty members and such member, if any, would be continued to be excluded for the purpose of computation of fifty members under Section 3(1)(iii)(b) of the Companies Act, 1956.

127. I am thus not inclined to accept the submission of the learned senior counsel for the respondent no.1 that only the actual employee or ex-employee has to be excluded while computing number of members fifty under the said provisions of Section 3(1)(iii)(b) of the Companies Act, 1956. Even if any of such employee has transferred his shares during the course of his employment in favour of his family members or even an outsider, the shares having been allotted to such an employee being allotted in his capacity as an employee would not provide any separate or additional membership to such transferee of shares through such an employee.

128. In my view, the argument of the learned senior counsel for the respondent no.1 that the said provision of Section 3(1)(iii)(b) of the Companies Act, 1956 clearly indicates that it is personality-centric or pre-centric i.e. on the holder of the share and not “share centric” without merit. It would amount to granting permission to such an employee to transfer his share holdings to his family members or to an outsider contrary to the terms and conditions of allotment and would be in violation of plain meaning of Section 3(1)(iii)(b)(ii) and also various Articles of Association referred to aforesaid prohibiting such transfer of shares otherwise than the manner prescribed therein.

129. It is not the case of the respondent no.1 that such transfer of shares by such employees which were allotted to them under the employee quota shares were in accordance with the Articles of Association and were validly transferred. In my view, Mr.Samdhani, learned senior counsel for the appellant is thus right in his submission that all such employee share holders of the respondent no.1 who were transferred the shares under a specific quota i.e. “employee quota share” or any transferee of shares claiming through such employee were transferred during the course of their employment or otherwise will have to be excluded for the purpose of computation of number of members as fifty.

130. I am not inclined to accept the submission of the learned senior counsel for the respondent no.1 that such employee quota share does not remain as employee quota or that there is no bar for transfer of such shares by the employees under Article 59 of the Articles of Association. The commentary of Pennington on Company Law would not assist the case of the respondent no.1. In my view, there is no merit in the submission of the learned senior counsel for the respondent no.1 that proviso to definition of “private company” under Section 3(1)(iii) is limited to the purposes of definition of “private company” under Section 3(1)(iii) alone or that the other provisions of the Companies Act, 1956 or Articles of Association cannot be referred to for construing the said provision.

131. In so far as the submission of the learned senior counsel for the respondent no.1 that a fiction is created under Section 3(1)(iii) of the Companies Act, 1956 which is only restricted to the private company for limited purposes is concerned, in my view, there is no merit in this submission of the learned senior counsel. There is no merit in the submission that for the purpose of definition and

proviso, the joint holders are one distinct unit, different constituent and the second holder of shares held jointly with another is a member in all respects since his name even otherwise appears in the register of members. In my view, there is also no merit in the submission of the learned senior counsel for the respondent no.1 that the respondent no.1 having created or recognized separate folio in respect of new joint shareholding units/entities upon transfer of 25 shares of the appellant in favour of himself and his family members in five parts and by virtue thereof, the membership had exceeded to 54.

132. In my view, Mr.Samdhani, learned senior counsel for the appellant has rightly given an illustration that if an existing member transferred his shares in favour of himself being the first holder in his own favour jointly with his family members, there would not be multiple number of members based on such shareholdings on inclusion of names of 2nd and 3rd shareholders jointly with 1st shareholder for the purposes of computing the number of members as fifty under Section 3(1)(iii)(b) of the Companies Act, 1956. Such person stands first in the share certificate is recognized by the respondent no.1 company for the purposes of payment of dividend and for the purposes of voting rights unless the named holder is absent.

133. In my view, Mr. Samdhani, learned senior counsel for the appellant has rightly placed reliance on Section 399(2) of the Companies Act, 1956 for interpreting the term “unless the context otherwise requires” referred in Section 3(1) of the Companies Act, 1956 in support of his submission that the said provision itself suggests that in case of joint shareholding, the same has to be treated as share holder. It is not in dispute that the name of the appellant was admittedly first shareholder in all five certificates. It is also not in dispute that all

the notices were sent by the respondent no.1 to the first shareholder and not to the joint shareholders.

134. In so far as the submission of the learned senior counsel for the respondent no.1 that the word “they” present in proviso to Section 3(1)(iii) of the Companies Act, 1956 would mean an aggregation of two or more persons and thus draws a distinction between the individual members and joint members viz. members who together hold one common share is concerned, in my view, this submission of the learned senior counsel is contrary to the plain reading of proviso to Section 3(1)(iii)(b). In my view, on the contrary, the said proviso makes it clear that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of the definition of “private company” be treated as a single member. In my view, the name of the appellant being the first in all the shares which were transferred in favour of himself and his family members would thus be treated as one single member and not four members.

135. Mr.Samdhani, learned senior counsel for the appellant has rightly placed reliance on the judgment of this Court in the case of ***Dinesh Vrajlal Lakhani vs. Parke Davis (India) Limited (supra)*** in support of the submission that merely because the names of the family members are included on the share certificate jointly with the appellant, those family members would not be considered as a separate member.

136. Article 3 of the Articles of Association also clearly provides that the number of members of the company shall not exceed at any time at fifty. It further provides that where two or more persons hold one or more shares in the

company jointly, they shall for the purpose of computation of private company, be treated as a single member. The exclusion provided in the Article 3 is identical to the exclusion provided in Section 3(1)(iii)(b).

137. It is not in dispute that in past, the respondent no.1 company has refused to transfer the shares on the ground that the number of members would have exceeded fifty. It is not the case of the respondent no.1 that the transfer of shares by the respondent no.1 in favour of the appellant and his family members in question was contrary to any in violation of Article 3 of the Articles of Association and other related Articles referred to aforesaid. In my view, on perusal of Chart submitted by the appellant and on interpretation of Section 3(1)(iii)(b) read with proviso and various Articles of Association referred to aforesaid and the other documents referred to aforesaid clearly indicates that the respondent no.1 has considered the joint shareholding of the appellant with his family members as separate members and has also considered employees who are allotted shares by the respondent no.1 who have transferred those shares in the name of their family members which shares were allotted to those employees because of their employment with the respondent no.1. In my view if the joint membership of the appellant and his family members and the names of those employees and other persons claiming through those employees are deleted from the list of members of respondent no.1, the number of members would be 34 and in any case below 50.

138. In my view, the judgment of the Supreme Court in the case of *Kedarnath Jute Manufacturing Co. vs. Commercial Tax Officer, Calcutta & Ors. (supra)* and in case of *Haryana State Cooperative Land Development Bank Ltd. vs. Haryana State Cooperative Land Development Banks Employees Union*

& Anr.(supra) would assist the case of the appellant in interpretation of Section 3(1)(iii)(b) as sought to be interpreted by the appellant in support of his submission that the joint shareholdings has to be treated as one.

139. In so far as the judgment of this Court in the case of **Narandas Munmohandas Ramji vs. Indian Manufacturing Co. Ltd.(supra)** relied upon by the learned senior counsel for the respondent no.1 is concerned, in the said judgment, the issue was whether the joint share holders could be held liable on the death of the co-holder or not. There was no issue as to how the membership of the private company could be counted under Section 3(1)(iii)(b) of the Companies Act, 1956. The said judgment is thus clearly distinguishable in the facts of this case and would assist the case of the respondent no.1. Be that as it may, the said judgment in the case of **Narandas Munmohandas Ramji vs. Indian Manufacturing Co. Ltd.(supra)** has been already referred by the Division Bench of this Court in the case of **Dinesh Vrajlal Lakhani vs. Parke Davis (India) Limited (supra)** which judgment of the Division Bench would assist the case of the appellant.

140. In so far as the judgment of the Punjab High Court in case of **Jarnail Singh and another (supra)** relied upon by the learned senior counsel for the respondent no.1 is concerned, there was no issue before the Punjab High Court that the number of members of the company in that case had exceeded fifty and whether two joint holders with the first common name should be treated as one member or two members. The said judgment of the Punjab High Court in case of **Jarnail Singh and another (supra)** is clearly distinguishable in the facts of this case.

141. In so far as the submission of the learned senior counsel for the respondent no.1 that the appellant was fully aware that the number of members had exceeded fifty in view of the fact that the appellant had taken inspection of the records of the respondent no.1 is concerned, I am inclined to accept the submission of the learned senior counsel for the appellant that if the number of members of the company would have exceeded fifty upon transfer of 25 shares of the appellant in his name jointly with his family members, the respondent no.1 would not have transferred those shares as refused in past.

142. In my view, the judgment of the Supreme Court in the case of ***Reserve Bank of India vs. Peerless General Finance & Investment Co. Ltd.*** (supra) relied upon by the learned senior counsel for the appellant in support of his submission that the first shareholder has to be considered as a member and not the entire unit would assist the case of the appellant.

143. In so far as the submission of the learned senior counsel for the appellant that even if this Court comes to the conclusion that the number of members of the respondent no.1 have exceeded fifty, the consequence thereof is limited as provided under Section 43A of the Companies Act, 1956 and in such event, the respondent no.1 would only lose its certain privileges and exemptions is concerned, in my view, since this Court is of the view that the number of members of the respondent no.1 had not exceeded fifty, this Court need not decide the consequences upon the membership of exceeding 50 provided under Section 43A of the Companies Act, 1956. Be that as it may, since the remand by the Supreme Court is limited and more particularly only to the extent whether the transfer of twenty five shares from the appellant (singly) to the appellant jointly with his children and wife resulted in the total members of the respondent no.1

exceeding 50, this Court cannot decide the consequences upon the findings rendered by this Court that the membership of the respondent no.1 did not exceed fifty.

144. A perusal of the order and judgment dated 28th October, 2014 passed by the Supreme Court of India in Civil Appeal No.2481 of 2014 indicates that the Supreme Court has held as under in the said judgment :-

- a) 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.
- b) The concept of Hybrid companies is not altogether abolished. Atleast insofar as the companies falling under section 43A(1C) are concerned, which were in existence on 13th December, 2000 would continue as a Hybrid under section 43A.
- (c) The real question is whether the failure to amend the Articles of Association by companies destroyed the collective right of the members of the 1st respondent company to have share whose transferability is subject to limitations and restrictions contained in Article 57 of its Articles of Association.
- (d) Before the Amendment Act 53 of 2000 if the private company incorporated as stipulation not to accept deposits from the company and commit default in compliance with such stipulation, company only ceased to be entitled to a

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 which 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.

(e) 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. In none of the four contingencies contemplated under section 43A(1), (1A), (1B) and (1C), Parliament thought it necessary to restrict such collective right of the shareholders of a private company. Such private companies are to be treated as public companies for certain purposes.

(f) If a private company chooses not to incorporate as 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.

(g) 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 the individual shareholder to freely transfer shares.

(h) To believe that such restriction is now sought to be imposed only in the case of those private companies in existence on 13th December, 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.

(i) The arguments of the respondent that by 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 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.

(j) If a private company 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) i.e. Hybrid companies and can continue to have provisions in their Articles of Association referable to section 3(1)(iii)(a), (b) and (c).

(k) 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. The failure of the 1st

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.

145. Insofar as the submission of the learned counsel for the respondent that even if this court comes to the conclusion that the membership of the respondent no.1 company would not exceed 50 or does not exceed 50, this court cannot decide consequences of such findings as may be rendered by this court is concerned, learned senior counsel for the appellant led emphasis on the words “take appropriate decision” in paragraph (97) of the order and judgment dated 28th October, 2014. This Court cannot decide the consequence of the finding rendered by this Court in view of the limited order of remand by the Supreme Court.

146. Insofar as submission of the learned senior counsel for the respondent nos. 1 to 5 that this court in the judgment delivered in Company Appeal (L) No.45 of 2012 having already rendered a finding that there was no dispute between the parties that the members of the respondent no.1 had exceeded 50 and such findings also having been rendered by this court in order and judgment in Company Appeal (L) No.41 of 2012 as well the Company Law Board including the findings that the respondent no.1 has become a public limited company, those findings are binding on this court and cannot be allowed to be argued once again in this proceedings is concerned, learned senior counsel for both the parties invited my attention to various paragraphs of the pleadings filed by both the parties, findings and observations made by the Company Law Board and in the orders and judgments delivered by this court in Company Appeal (L) No.41 of 2012 and Company Appeal (L) No.45 of 2012.

147. In the affidavit in reply filed by the respondent no.1 before the Company Law Board in Company Petition No. 132/397-398/CLB/MB/2009, it was pleaded by the respondent no.1 that it has more than 50 members. The appellant in its rejoinder filed before the Company Law Board on 28th December,2009 denied that the respondent no.1 had more than 50 members. It was contended by the appellant before the Company Law Board in the said affidavit that if in breach of the provisions of law, a private company exceed statutory limit for 50 members or exceed the deposit than the company will be in breach of the provisions of law. In such a event, the company will cease to enjoy the exemptions and privileges of a private company but that does not mean that the company ceases to be a private company.

148. The respondent no.2 in its affidavit filed before the Company Law Board had contended that as a result of transfer applied by the appellant, the strength of members of respondent no.1 had increased to 54. The respondent no.1 in its reply dated 24th February, 2010 reiterated that the respondent no.1 had more than 50 members. The respondent no.2 in its reply dated 24th February, 2010 reiterated that the membership of the respondent no.1 had increased to 54. The appellant in its rejoinder dated 28th March,2010 before the Company Law Board once again denied that the membership of the respondent no.1 had exceeded 50. The appellant also contended that Article 57 of the Articles of Association was binding. It was averred in the said affidavit that the transfer that were applied by the appellant that were not transferred to the outsiders but were transferred within the scope of Article 57. It is the case of the appellant that the issue whether the number of members crossed 50 or not was not argued before the learned Single Judge of this court and thus there was no discussion found in the judgment and order dated 14th June, 2011 on that issue.

149. A perusal of the grounds raised by the appellant in appeal before the Supreme Court in Civil Appeal No.2488 of 2014 clearly indicates that the appellant had challenged the findings rendered by this court that there was no dispute that the 1st respondent has more than 50 members. It is contended by the appellant in the Special Leave Petition that there were no pleadings on that issue and there was certainly no arguments nor any admission. The respondent no.1 denied this contention of the appellant by filing affidavit in reply dated 23rd August,2011. The respondent no.1 had contended in affidavit in reply that as a result of the transfer of twenty five shares held by the appellant by the respondent no.1 on 31st December,2001, the number of members of respondent no.1 became 54. The appellant had filed a rejoinder before the Supreme Court on 23rd September,2011 and once again denied that as a result of application for transfer of five shares made by the appellant on 30th October,2001, the respondent no.1 became a public company.

150. The appellant also contended that he had made an application for transfer of twenty five shares in accordance with Article 57 whereby shares were sought to be transferred from his single name to the joint name of himself along with his children and his wife. The said transfer neither created any new shareholder/member nor did it seek to induct an outsider not permissible in Article 57. The appellant also contended that it was the duty and responsibility of the respondent no.1 to ensure that as a result of any transfer, the number of member did not exceed 50. Even in past, the 1st respondent had refused to entertain the application on the ground that the number of members was likely to exceed the maximum permissible number of 50.

151. It is thus clear that the appellant had disputed the averments of the respondent no.1 that the membership of the respondent no.1 had exceeded by virtue of application for transfer of shares by the appellant in favour of himself and his family members. The findings rendered by this court were also impugned by the appellant before the Supreme Court. It was specifically contended by the appellant that he had never admitted that the membership of respondent no.1 exceeded 50 in view of some of the shares of the appellant having been transferred by the appellant in favour of himself and his other family members.

152. Be that as it may, there is no dispute that the Supreme Court in the order of remand dated 28th October, 2014 has directed this court to render a finding as to whether by virtue of transfer of five shares of the appellant, it had resulted into the membership of the respondent no.1 company exceeding 50 thereby rendering the 1st respondent as a public company in view of the fact that this court in the order and judgment delivered by this court which was subject matter of the said civil appeal in the said impugned order and judgment had not rendered any finding on that factual issue. I am thus not inclined to accept the submission of the learned senior counsel for the respondent no.1 that the finding rendered by the Company Law Board and confirmed by this court in the judgment and order passed by this court that it was an admitted position that the membership of the respondent no.1 had exceeded 50 and accordingly the respondent no.1 company had become a public company, this court cannot render a fresh finding on the issue whether membership of the respondent no.1 company had exceeded 50 or not. The respondent no.1 did not apply for any clarification from the Supreme Court on this issue. The directions issued by the Supreme Court are binding on this Court.

153. It is not in dispute that the judgment and order dated 20th

December,2012 rendered by this court in Company Appeal (L) No.41 of 2012 has been impugned by the appellant in the Supreme Court in the Special Leave Petition No.13640 of 2013 which is now converted into Civil Appeal No.2481 of 2014 by an order dated 14th February,2014. The Supreme Court has granted leave in the said Special Leave Petition No.13640 of 2013.

154. Insofar as judgment of Supreme Court in case of ***Kunhayammed*** (supra) and in case of ***Union of India vs. West Coast Paper Mills*** (supra) in support of the submission that the Supreme Court having granting leave and the Special Leave Petition filed by the appellant having been converted into the Civil Appeal No.2481 of 2014, the findings contain in the decision dated 20th December,2012 cannot be looked into by this Court is concerned, in my view none of these judgments referred to and relied upon by the learned senior counsel for the appellant would assist the case of appellant. The findings if any, rendered in the said decision dated 20th December,2012 are admittedly not set aside by the Supreme Court till date. The Special Leave Petition filed by the appellant against the findings rendered by this court on 20th December,2012 is pending. In my view the findings if any, rendered by the High Court are not stayed by the Supreme Court. Merely because Special Leave Petition filed by the aggrieved party against such finding is admitted, finding or the judgment is not automatically stayed.

155. Insofar as the judgment of Supreme Court in case of ***Mohd.Akram Ansari*** (supra) relied upon by the respondent no.1 in support of the submission that if the point is not mentioned in the judgment of a court, a presumption is that point was never pressed before the learned Single Judge and it was given up is concerned, there is no dispute about the preposition of law laid down by the Supreme Court in the said judgment. A perusal of the pleadings filed by the

appellant before this Court as well as before the Supreme Court clearly now brought to the notice of this Court indicates that the appellant had all throughout disputed the position that the membership of the respondent no.1 had exceeded 50 in view of the transfer of five shares by the appellant in favour of himself and his family members. The judgment of Supreme Court in case of ***Mohd.Akram Ansari*** (supra) thus would not assist the case of the respondent no.1.

156. This Court need not deal with the other submissions made by the learned senior counsel for both the parties on the issues other than the issue whether the number of members exceeded 50 or not in view of the limited remand made by the Supreme Court. I have thus not dealt with those issues though raised and argued at great length by the learned senior counsel appearing for both the parties. Whether those findings rendered by the Supreme Court are in favour of the appellant or the respondents need not be gone into by this Court in this judgment in view of the limited remand.

157. It is therefore held as under:-

- (i) The number of members of the respondent no.1 has not exceeded 50 by virtue of transfer of shares by the appellant (singly) to the appellant jointly with his children and wife.
- (ii) Interim protection granted by the Supreme Court in favour of the appellant to continue for a period of twelve weeks.

(R.D. DHANUKA, J.)