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(1996) 10 CAL CK 0001

Calcutta High Court

Case No: Appeal No. 953 of 1993

Hungerford Investment Trust Ltd.		APPELLANT
	Vs	
Turner Morrison Co. Ltd. and Others		RESPONDENT

Date of Decision: Oct. 8, 1996

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 16 Rule 2, Order 47 Rule 1, Order 47 Rule 1, Order 47 Rule 1(c), Order 47 Rule 2
- Companies Act, 1956 - Section 11, 155, 21, 237, 251
- Constitution of India, 1950 - Article 113, 122, 133, 136
- Evidence Act, 1872 - Section 115
- Foreign Exchange Regulation Act, 1973 - Section 19, 19(1)(B), 29IV(A)
- Limitation Act, 1963 - Section 5

Hon'ble Judges: Nitish Kumar Batabyal, J; Bijitendra Mohan Mitra, J

Bench: Division Bench

Advocate: P.N. Chatterjee, P.K. Ghosh and Sujit Basu, for the Appellant; J.C. Sana . Md.. Nujamuddin, R.C. Nag and S. Mitra, for the Respondent

Judgement

N.K. Batabyal, J.

This appeal is directed against the Judgment and order of dismissal of an application under Sections 397 and 398 of the Companies Act, in relation to the affairs of Turner Morrison Co. Ltd. (Hereinafter referred to as T.M.L.). The details of the respective cases of the parties have been dealt with elaborately in the judgment of my Id. Brother. Mr. Justice B.M. Mitra delivered separately. So, it is unnecessary to go into those facts. The point on which the Id. Counsel have addressed the court was only the point whether the case could be disposed of on affidavits in view of the order dt. 11.12. 91 allowing the application by the appellant for Trial on evidence. During the pendency of the proceeding, applications were filed oh behalf of the appellant from

time to time for deciding the suit after taking on oral evidence because of the serious allegations of fraud, misrepresentation, malfeasance, misfeasance, etc. involved in issue. The first such application was filed on 4th April, 1990: it was dismissed with costs on 5th April, 1990. An appeal filed by Hungerford Investment Trust Ltd. (hereinafter referred to as H.I.T.) from the said order was also dismissed by the Id. Appellate court on 4th May. 1990. On 27th June, 1990, Mr. N. S. Hoon, Chairman, H.I.T. appeared in person and filed another application for trial on evidence on the same materials. The said application was again dismissed on 31st July, 1990. On 4th December, 1990, an injunction application was taken out by the H.I.T. for restraining Turner Morrison Ltd. from disposing of the assets of the Company. Ad interim order of injunction in terms of prayer (a) was passed by Hon''ble Mr. Justice Umesh Chandra Banerjee, restraining the Board of Directors of T.M.L. from disposing of the assets of the Company. The said order was subsequently confirmed by Hon''ble Mrs. Padma Khastgir J. (as her Lordship then was). But the injunction application was released by the Hon''ble Mr. Justice U.C. Banerjee on 25th January, 1991, in view of the allegations made by the HIT in its rejoinder. The main matter which was not released by Justice U.C. Banerjee, was mentioned without notice for listing before the Hon: Mrs. Padma Khastgir, J. Her Lordship was pleased to direct that the main application under Sections 397 & 398 of the Companies Act. be placed for the list (Company Matter adjourned) though the id. Advocate for the T.M.L. submitted that the main matter was not released by Hon. Mr. Justice U.C. Banerjee. On 5th March, 1991, on behalf of the H. I. T. another application for trial on evidence was filed before Hon. Mr. Justice S.C. Sen (as His Lordship then was) in the absence of Mrs. Padma Khastgir, J. Hem. Mr. Justice S.C. Sen directed the matter- to be placed to the list of Mrs. Padma Khastgir, J. on 25th March. 1991. On 26th March,. 1991 the application for trial on evidence was heard and the order was reserved. After nine months, on 11th December, 1991 Hon. Mrs. Khastger. J. allowed the application made by the HIT for trial on evidence directing that the main matter be set down on trial

2. In the mean time on 26th April. 1991. Hon. Mr. Justice U.C. Banerjee released the main application.

3. An appeal was preferred by TML against the order dated 11th December. 1991. A Division Bench of this Court presided over by the Hon. Mr. Justice Shamsuddin Ahmed on 28th April. 1992, dismissed the appeal preferred by TML on the ground that it was not an appealable order. An SLP was preferred against that order on behalf of TML. On 24th July, 1992, the SLP came up for admission before the Hon''ble Supreme Court. The application, on the submission of the Id. Counsel for the TML, was allowed to be withdrawn.

4. On 29th July, 1992, an application was made by TML for review of the order dated 11th December, 1991 passed by Hon. Mrs. Khastgir, J. On 26th August, 1992, the review petition was allowed and the order dated 11.12.91 was recalled and the main

application was set down in the list for hearing. No appeal was preferred by HIT from the said order. Thereafter, the main application under Sections 397 & 398 of the Companies Act was heard on affidavits before the Id. Trial Judge who delivered the judgment on 23rd June, 1993, dismissing the petition filed by the HIT under Sections 397 & 398 of the Companies Act, 1956 and vacating all interim orders. The judgment which was pronounced in open court on 23rd June, 1993, was signed by the Hon. Mr. Justice Kalyanmoy Ganguly, under the provisions of Chapter 10, Rule 3 of the High Court, Original Side Rules.

5. The appeal is hotly contested. Mr. P.K. Chatterjee Id. Counsel, appearing on behalf of the Hungerford Investment Trust Ltd. (The appellant) has submitted that the appeal should be allowed on the preliminary ground that Hon. Mrs. Khastgir, J. had no jurisdiction to entertain the application for review of their order dated 11.12.91, on the particular date on which she passed the order i.e. on 26th August, 1992. naturally, all the subsequent orders passed by her Lordship are without jurisdiction.

6. Mr. Nag, Ld. Counsel, appearing on behalf of TML, has submitted that there is no substance in the contention, of Mr. Chatterjee as Hon. Mrs. Khastgir, J. had no jurisdiction to pass any order in the main matter under Sections 397 & 398 of the companies Act, which was at the material time pending before the Hon. Mr. Justice U.C. Banerjee. Only the injunction application was released by Hon Mr. Justice U.C. Banerjee because of certain allegations made in the rejoinder to the application for injunction. The main matter was released by Hon. Mr. Justice Banerjee, on 26th April, 1991. But Hon. Mrs. Khastgir, J. on 26th March, 1991. heard the application for trial on evidence and reserved the judgment which was delivered on 11th December, 1991. Therefore, according to Mr. Nag. Id. Counsel, the main application was rightly disposed of on affidavits by the Id. Trial Judge. Mr. P. N. Chatterjee. Id. Counsel, at the very outset, has submitted that the impugned order dated 23rd June 1993 of the Hon. Mrs. Justice Padma Khastgir, should be set aside due to inherent lack of jurisdiction as consent, acquiescence, waiver or estoppel cannot clothe the Court with jurisdiction in as much as no right is accrued to a party in case something is done in violation of the order of the court.

7. It has been further submitted by Mr. P. K. Chatterjee, Id. Counsel, that the order of the Id. Trial Court dated 11th December. 1991, allowing the application for trial on evidence merged in the order of the Id. Appellate Court and against that order TML filed a petition for SLP before the Hon. Supreme Court of India and at the time of hearing of the SLP, the Hon''ble Supreme Court was pleased to make the following orders on 24th of July, 1992, (which is evident from page 2548 of supplementary paper book. Part 1). "Upon hearing Counsel the Court made the following :

ORDER

Counsel for the petitioner seeks leave to withdraw the petition because he wants to approach the Division Bench of the High Court for clarification which is permissible

in law. The SLP is dismissed as withdrawn".

8. After the above order was passed, TML made an application before the Id. Trial Court taking up company matters on 24th July. 1992, for review of the order made on 11th December, 1991, although there was, it has been submitted, no scope for making the application for review before the Hon''ble Trial Court In paragraph 26 of the petition for review, it has been stated as follows :

26. On or about 24th of July. 1992. the SLP came up for admission and for hearing of the stay application before the Hon. Supreme Court of India. At the hearing of the said petition, the Hon''ble Judges of the Supreme Court of India observed that it had not been specially urged as a main ground in the SLP that the order passed by the (sic). Mrs. Justice Padma Khastgir on 11th December, 1991. was erroneous and without jurisdiction in as much as when the hearing of the application for trial on evidence was concluded, the main matter u/s 397 of the Art was pending before Hon. Mr. Justice U.C. Banerjee, who releases the main Section 397 of the petition on 26th April, 1991 which was a month after the application for trial on evidence of the petition was heard by Her Lordship Hon. Mrs. Justice Padma Khastgir and judgment had been reserves. As the said point had not been urged before the Hon. Supreme Court of India, especially as a ground in the Special Leave Petition, the Hon''ble Supreme Court of India gave liberty to the applicant/Respondent No. 1 to approach the Hon''ble High Court and this application for review of the said order dated 11th of December, 1991 is being made, pursuant to such observation, In the circumstances, your applicant/Respondent Mo. 1 has withdrawn the SLP in view of the observation made by the Supreme Court of India giving the applicant/Respondent No. 1 liberty to apply to the High Court.

9. It has been submitted by Mr. Chatterjee that no such liberty as. alleged was given by the apex court and as such the application for review should have been dismissed in limine and the main application should have been tried on evidence. It has been further submitted by Mr. Chatterjee that it would be evident that the order made on 23rd June, 1993 by the Hon. Trial Court was without jurisdiction and as such that order should be set aside on this ground alone particularly when no liberty was given as alleged by the Supreme Court and any clarification of the order made by the Hon. Court could be obtained only from the Hon. Division Bench as provided in the order of the apex Court dated 24th July. ''1992.

10. Mr. P. N. Chatterjee, Id counsel, for the appellant, has in support of his contention referred to the following three decisions, the first case cited is the case of Kiran Singh us. Chairman Pushwan (AIR 1954. SC 340) The said appeal arose out of a question over the construction of Section 11 of the Suits Valuation Act In that appeal, it has been held by the Apex Court that it is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity and that its invalidity would be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction

whether it is pecuniary or territorial or whether it is in respect of a subject matter of the action, strikes at the very root of the authority of the court to pass any secure and such a defect cannot be cured even by consent of parties.

11. The second case cited by Mr. Chatterjee. Id Counsel, is the case of State of Punjab us. Gurdev Singh (AIR 1991 SC 2119). In the appeals before their Lordships, a short question arose whether a suit for declaration that an order of dismissal from service passed against the plaintiff dismissed employee was wrongful, illegal etc, was governed by. Article 113 of the Limitation Act 1963. It was held by their Lordships, a suit for declaration that an order of dismissal or termination front service passed against the plaintiff (dismissed employee) is wrongful illegal or ultra vires is govern by Article 113 of the Limitation Act 1963. It cannot be said that there is no limitation for Instituting the suit for declaration by a dismissed or discharged employee on the ground that the dismissal or discharging was void or inoperative If a suit is not coverlid by any of these specific Articles prescribing a period of limitation, it must fall within the residuary Article. The purpose of the residuary article is to provide for cases which could not be covered by any other provisions in the. Limitation Act The party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires, the Court cannot give the declaration sought for.

12. The third decision cited by Mr. Chatterjee; Id Counsel is Moni Kuntala Sarkar as. Asiatic society.& Ors 1993 (1) CLJ 91. In that case the order of upgrading was passed on the basis of the recommendations and direction of the Central Government and pursuant to the order of the Division Bench of the High Court It was held that it was not open to the Administrator to charastice the said upgradation as illegal invalid and void. As the Administrator was discharging and (sic) entrusted by the High Court, the order passed by the Court is binding upon the Administrator. The established principle is that even if an order is void, the same is set aside in a necessary proceeding. Their Lordships quoted with approval the observations of Lord Radiliffe in the case of Smith vs. East Elloe, Rural District Council reports in (1954) AG 736 at 769:- "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless, the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset. It will remain as effective for its ostensible purpose as the most impeccable of order. This observation of Lord Radcliffe was followed by the Supreme Court in the case of State of Punjab vs. Gurdev Singh (supra).

13. Mr. Nag, Id. Counsel, appearing on behalf of TML, has submitted that he firstly relies upon the first case cited by Mr. Chatterjee, i.e., Kiron Singh''s case (supra). The next case cited by Mr. Nag is Meckey vs. United African Ltd. Co., 1961(3) All England

Reports. 1169. In that case, a delivery of a statement of claim was made during the long vacation of 1958, the plaintiffs, having properly issues a writ for money alleged to be continued for goods supplied to which the defence entered an appearance, delivered and filed a statement of claim. The delivery of the Statement of the claim during the long vacation was in breach of the Rules. The defendant having failed to deliver a defense within the time allowed, such period being reckoned from the end of long vacation, the plaintiffs signed judgement against him in default of defence. Subsequently. the defendant applied to have the judgement set aside and for a stay of execution on the ground that he had a good defence on the merits of the claim. He did not then suggest that the judgment was a nullity but treated it as a regular judgment and swore an affidavit giving reasons why he was too late to file defence. The applications were dismissed and the defendant filed an appeal in the West African Court of Appeal At the hearing, of the appeal on 1.6.59, the defendant for the first time, took the point that the delivery of the statement of claim in the long vacation was a nullity and that all subsequent proceedings were therefore void. The appeal was dismissed. On appeal to the Privy Council, held, whether the judgment in default on defence should be set aside was a matter for the discretion of the court. The delivery of the statement of claim in the long vacation being a voidable act and (sic) in the circumstances of the case, the West African Court of. Appeal (sic) rightly exercised their discretion. ''

14. The third case cited by Mr. Nag is the decision of A.R. Antulay as. R.S. Nayak & Ors. (AIR 1988 SC 1531). In this case, their Lordships acting upon the maxim (actus curaic naniman gravakit) (an Act of the Court shall prejudice no man) has cited with approval in paragraph 84 of the Judgement the observations of Lord Caryans in Alexander Rozer''s case, as follows :-

84. The judgment is quoted below :

Lord Caryans in Alexander Rodger vs. Comptoir D''oscompte De Paris (1869-1971) LR 3 PC 465 at page 475 observed thus Now, their Lordships are of opinion that one of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors and when the expression ''act'' of the courts is used, it does not mean merely the act of the primary court, or of any intermediate court of Appeal but the act of the court as the whole, form the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposed all the cases. It is the duty of the aggregate of those Tribunals. If I may use the expression, to take care that no act of the court in the course of the whose of the proceeding dots an injury to the suitors in the courts.

17. The entire controversy. It appears, is centered over the question whether the order dated 11.12.91 passed by Hon. Mrs. Justice Khastgir was without jurisdiction.. The expression ''Jurisdiction'' has various implication. In Hiralal us. Kalinath AIR 1962 SC 199. It has been held that the objection as to local jurisdiction of a court does not stand on ''the same footing as an objection to the competence of a court to (sic) a

case, goes to the very root of the jurisdiction and where it is lacking it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the C.P. Code.

18. The said question received the anxious consideration of the court in Official Trustee W. B. Vs. Sachindra, AIR 1969 SC 823. In paragraph 13 of the reported decision at page 827. It has- been held (sic)

What is meant by "Jurisdiction? This question is answered by Mukherjee Acting C.J., speaking for the Full Bench of the Calcutta High court in Hirday Nath Roy v. Ramachandra Bama Sarma, ILR 48 Cal. 138 (AIR) 1921 Cal. 34 (FB) At page 148 of the report ILP (Cal.) (at p. 36 of AIR) the learned Judge explained what exactly is meant by jurisdiction. We can do no better than to quote his words:-

''In the order of Reference to a Full Bench in the case of Sukhlal v. Tara Chand, (1905) ILR 22 Cal. 68 (FB), it was stated that jurisdiction may be defined to be the power of a court to ''hear and determine a cause, to adjudicate and exercise any judicial power in relation to it'' in other words, by jurisdiction is meant ''the authority which ''a "Court has to decide matters that are litigated before it or to take cognizance of matters presentation a formal way for its decision''. An examination of the cause in -the books disclosed numerous attempts to "define the term ''Jurisdiction'', which has been stated to be "the power to hear and determine issues of law and fact'' "the -authority by which the judicial officers take congnizance of and decide causes", the authority to hear and decide a legal controversy''. "The power to hear and determine the subject matter In controversy between parties to a suit and to adjudicate or exercise any judicial power over them" "the power to hear, determine and pronounce judgement on the issue before the court", "the "power or authority which is conferred upon a court by the legislature to hear and determine causes between parties and to carry the judgements Into effect", "the power to enquire into the facts, to apply the law; to pronounce the judgements and to carry It into execution". (Emphasis herein supplied). Proceeding further the learned Judge observed :- "This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value and nature of the subject matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary of matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This classification into territorial jurisdiction pecuniary jurisdiction and jurisdiction of the subject matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, ''for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The

authority to decide a cause at all not the decision rendered therein is what makes up jurisdiction'', and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a court of the restraints attaching, to the mode of -exercise of that jurisdiction, should be included in the conception of jurisdiction itself, is some times a question of great nicety, as is illustrated by the decisions reviewed in the order of reference In (1905) ILR 33 Cal. 69 (FB) and Khosh Mahomed v. Nazir Mahomed. (1905) ILR 33 Cal. 68 (FB) and Khosh Mohamed v. Nazir Mahomed, (1905) ILR 33 Cal. 352 (FB), see also the observation of Lord Parker to Raghunath v. Sundar Das, ILR 42 Cal- 72- (AIR 1914 PC 129)..... ''we must not thus overlook the cardinal position that in order that jurisdiction may be exercised there must be a case legally before the court and a hearing as well as a determination. A judgment pronounced by a court without jurisdiction is void, subject to the well-known reservation that, when the jurisdiction of a court is challenged, the court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it; Rash Mont Dasi V. Gunada Simdari Dasi 20 Cal. L.J. 218 (AIR Cal. 49)

19. Mr. Nag, Id counsel, as emphasized, upon the point that as Hon. Mr. Kahstgir, J. lacked inherent jurisdiction to entertain the matter on 26th March. 1991, therefore, the order passed. by her Lordship regarding the decision of main matter on oral evidence was not (sic) It has been further submitted by him that the main matter was released by Hon Justice U.C. Banerjee only on 26th April, 1991. Therefore, in view of the principles laid down by a Divn. Bench of this Court in Sohanlal Void v. The State of W. B. 1989 (2) CLJ 433, Hon. Khastgir, J. lacked (sic)jurisdiction in entertaining the main matter. The power and jurisdiction to take cognizance of and to hear specified categories or classes of cases and to adjudicate and exercise any judicial power in respect of them is derived only from the determination made by the Chief Justice in exercise of his constitutional, statutory and inherent powers and from no other source and no case which is not covered by such determination can be entertained, dealt with or decided by the Judges sitting singly or in Division Courts till such determination remains operative.

20. Undoubtedly, there is substance in the contention of Mr. Nag. Id. Counsel, to the extent that the hearing given on 26th March, 1991 by Hon. Mrs. Khastgir, J. was without jurisdiction as the main matter was then lying with Hon. Mr. Justice U. C. Banerjee, as per determination made by the Hon. Chief Justice.

21. The main matter was released by Hon. Mr. Justice U. C. Banerjee on 26th April, 1991, as per determination as on that date, and the main matter ought to have gone to the particular court which had the relevant determination covering the matter. It is not in dispute that on 26th April, 1991 as per determination made by the Id. Chief Justice, Hon. Mrs. Khastgir, J. was not competent to entertain that matter. On 11th

December, 1991, the order was recorded to the effect that the matter would be decided on oral evidence as the matter was complicated. Therefore, it is obvious that Hon. Mrs. Khastgir J. had jurisdiction on the date the order dated 11th December, 1991 was passed. It has already been stated above that there was an application on behalf of the TML for review of the order passed by the Court on 11th December, 1991. On 26th August, 1992, Hon. Mrs. Khastgir, J. was pleased to allow the application for review recalling the date 11th December, 1991. On that date, the Id. Hon''ble court of Mrs. Justice Khastgir also had jurisdiction to entertain the matter. Against that order, an appeal was filed by TML and a division Bench of this Court presided over by the Hon''ble Mr. Justice S. Ahmed on 28th April. 1991 dismissed the appeal, on the ground that it was not an appealable order. An SLP was preferred against the said order of the Id. appellate Court on behalf of the TML and on 24th July, 1992, on the submissions made by the Ld. Lawyer for the TML, the SLP was allowed to be withdrawn. Only five days thereafter an application was made by the TML for review of the order dated 11th December 1991 before the Id. Trial Court From the order of the apex Court, it appears that the council for the petitioner sought leave to withdraw the SLP because he wanted to approach Division Bench of the High Court for clarification which is permissible in; law In fact, the TML did not go to the Id. Division Bench but to the Id. Trial Court, in this context, the question arises whether the order passed by the Id. Trial Court on 11th December, 1991, merged in the order passed by the Id. Appellate Court, dated 28th April. 1992. In State of Madras vs. Madurai Mills, MR 1967 SC 681. it has been held that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that whenever there are two orders, one by the inferior authority and the other by a superior authority passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject matter of the appellate of revisional order and the scope of appeal or revision contemplated by the particular statute. The application of the doctrine depends oft the nature of the appellate Or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. In that case, the example in Amritlal Bhoglal case (AIR 1958 SC 868) was referred to in that case, it was observed by the apex court of our land that the order of registration made by the Income Tax Officer did not merge in the appellate order of the Appellate Commissioner because the order of Registration was not the subject-matter of appeal before the appellate authority. In that case, the order of assessment made by the I.T.O. was a composite order namely an order granting registration of the Firm and making an assessment on the basis of the registration. It was held by the- High Court that the order of the ITO must have deemed to have merged; in the appellate order, but the apex court took a different view and held that the order granting registration, would not be deemed to have merged in the order of the Appellate Commissioner in an appeal taken, against the composite order of assessment

22. In subsequent decision of the Apex court in Kabla Ram us. Smt. Ram Lubhai (AIR 1987 SC 1304). it has been held that when a decree of the Trial Court is either confirmed, modified or reversed by the Appellate decree, except where, the decree of the Trial Court is either confirmed modified or reversed by the Appellate decree, except where the decree is (sic) without notice to the parties the Trail Court decree gets: merged in the (sic) decree.

23. In the case at hand, no final order was passed without notice to the other party. The Id. Appellate Court dismissed the appeal, though holding that the order was not appealable. The impugned order before the Id. Appellate Court was the order passed on 11th December, it has already been mentioned above that on that date, the Id. Court concerned was clothed with the authority to entertain the matter. But the fact remains that when the hearing took place before that Court on 26th March, 1991, the Id. Court has no competence to take up the matter. Therefore, at best it can be said that the order passed on 11th December, 1991, was passed by competent Court in an illegal because the order was passed without hearing the parties. The order passed on 26.3.91 was without jurisdiction. But, nevertheless the order dated 11th December, 1991 cannot be described as an order passed by a forum lacking inherent jurisdiction. The said order was challenged before the Id. Appease Court which considered the matter on merits and came to the conclusion that the order impugned was not appealable and hence, the appeal was dismissed.

24. It has been submitted on behalf of the appellant that the order passed by the Id. Trial Court on 11th December, 1991, merged in the order of the Id. Appellate Court dismissing the appeal. This content has been controverted by the Id- Counsel appearing on behalf of the T.M.L. It has been laid down in Madurai Mill''s Case (supra) that the doctrine of merger Is not a doctrine of rigid and universal obligation. There is no dogmatic fusion or merger whenever there are two orders, one by the inferior authority and the other by the superior authority passed in an appeal or revision. The application of the doctrine depends upon the scope of the statutory provisions confering appellate or revisional Jurisdiction. In the circumstances, of the case, the appellate forum has come to the conclusion that the appeal did hot lie. So in view of (he principles laid down in the decisions discussed above, there is no question of merger of the order passed by the Id. Trial Court in the order passed by the appellate court.

25. The next question which has been emphasized by the Id advocate for the appellant is that the presentation of an application for special leave to appeal to the Supreme Court amounts to presentation of an appeal or preferring the appeal. Hence if a review application is filed after the application for special leave to appeal to the Supreme Court is presented. the review application is not maintainable. In this connection, the Id advocate has relied upon the decision in Sitaram Shastri vs. Sundaramma, (AIR 1966, Andhra Pradesh 173), In this connection he has drawn the attention of the Court to another decision of the apex Court in Tungabhadra

Industries Ltd. vs. Government of Andhra Pradesh, (AIR 11964 SC 1372), where it was held a dismissal of an appeal on the ground that it was presented out of time does not bar the jurisdiction of the lower Court to hear a review petition. The Id. Advocate has submitted that in Tungabhadra Industries case, the appeal was filed after the presentation of the review petition and not one presented before. In the ease at hand, the review petition has been filed after the presentation of the application for special leave to appeal to the, Supreme Court. Therefore, the Role laid down in Tungabhadra Industry''s case (supra) will apply here.

26. The Id. Counsel appearing on behalf of TML has submitted that the mere filing of presentation of an application for special leave to appeal to the Supreme Court cannot amount to a filing of appeal before that Court The Id. Counsel has taken the Court to a discussion of the principles laid down in Tungabhadra Industry''s ease (supra). In that case, it was held that the crucial date for determining whether or not terms of Order 17 Rule 1 C. P. C. are satisfied, is the date when the application for review is filed. If on the date, no appeal has been filed, it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of the jurisdiction of the Court hearing the review petition will come to an end.

27. In that case, during the pendency of an application for review of the order of the High Court refusing to, grant a certificate under Article 133 of the Constitution, the applicant also filed art application for special leave to appeal in support of the same matter under Article 136 along with an application for condonation of delay. The Supreme Court refused to condone, the delay so that the petition for special leave never legally came on the file of the Supreme Court The High Court rejected he application for review on the ground that the SLP had been (sic) Held that in the circumstances, the refusal of the Supreme Court to entertain the application for special leave did not bar the jurisdiction of the High Court to decide the review petition nor could it he a relevant matter in deciding it. The High Court was not justified in rejecting the application on this ground.

28. According to the Id. Counsel for TML, the principles laid down by the apex court in Tungabhadra Industry''s case (supra) was not correctly interpreted in Veluri Sitaramshastri''s case (supra). In the Andhra Pradesh case (supra) it was held that the petition for review would not the under Order 47 rule 1 CPC, if filing of an appeal had been already done as a completed act when the review petition was being presented. The, presentation of the Memo of Appeal amounts to preferring the appeal. Presenting an application for leave to appeal to the Supreme Court against the judgement of the High Court amounts in effect to preferring an appeal to the Supreme Court for the purposes, of Order 47 Rule 1 CPC. An aggrieved person can only file a review petition where no appeal has already, been presented earlier than the time when review petition was presented. Consequently, review petition can be

validly presented so long as it is not filed after the presentation of an appeal petition. It is thus tenable when presented simultaneously with presentation of an application for leave to the Supreme Court:

29. In that case. Id. advocates for the respondents contended that the date of preferring the appeal for the purpose of Order 47 Rule 1 CPC, was the date on which the Supreme Court Civil Misc. Petition was presented in the High Court. The Id. advocate for the petitioners contended that it was not the date of preferring the appeal but the date on which the petition of appeal is lodged to that Supreme Court under Order 16 Rule 2 of the Supreme Court Rules 1950,-which, should be treated as "the date on which the appeal was preferred. The Id. court after discussing the several decisions placed before it unheld the contentions of the Id. (sic) for the petitioners that the dates on which the petition for preferring the appeal is lodged in the Supreme Court should be treated as the date on which the appeal was preferred

30. No decision of our High Court bearing on the exact point has been placed before this Court. No decision of the apex Court on the point contrary to the view taken by Their Lordships 1n Veluri Sitaranshastris case referred to above has been placed before" fills Court'' In the circumstances, it is found that there is substance in the contention of the Id. advocate for the appellant that the filing of the appeal for special leave to appeal to the Supreme Court should be construed as filing of the appeal and hence, we accept the contention that the review application was barred under Order 47 Rule I Sub-rule (i) Clause (a) of the CPC.

31. There is another point to which we would like to draw the attention is the question of limitation under Art. 124 of the limitation Act, 1963. The period of limitation is 30 days for a review of judgment by a court other than the Supreme Court from the date of the decree or order. In this case, the review application was filed on 29th July of 1992 for reviewing the order dated 11.12.91 passed by the Id. Trial Court directing that the main application u/s 397 of the Company Act be set down for Trial on evidence, It is obvious that the review application was filed beyond the limitation period. The Id. Trial Judge passed the order allowing the application for review on 26th August, 1992 but it does not appear from the four corners of the order dated 26th August 1992, that any application u/s 5 of the Limitation Act, was filed for the condonation of the delay. Unless the delay was condoned, there was no application for review before the Id. Trial Court Therefore, applying (AIR 1954 SC 340), it can be said that the order dated August 26. 1992 was no nest and all the subsequent orders passed; on the basis of it are similarly non-existent in the eye of law.

32. This is sufficient to dispose of the appeal but we would like to refer to some other points which; have been raised by the Id Lawyers of both sides, before we wind up the matter.

33. On the controversy whether the order dated 11.12.91 was a void or voidable order, Mr. P. K. Chatterjee. Id. advocate appearing on behalf of the appellant has drawn the attention of the court to Administrative Law by Wade & forsyth, seventh Edition, at page 343, under the Chapter Void or Voidable last paragraph under that Heading :-

"Void" is therefore meaningless in any absolute, sense. Its meaning is relative, depending upon the Court''s willingness to grant relief in any particular situation. If this principle of legal relativity is borne in mind, confusion over Void or voidable'' can be avoided. A case would be made for using either term in relation to invalid acts. But so long as the ultra vires doctrine remains the basis of Administrative Law the correct upithet must be ''Void''.

34. Lord Diplock explained in a privy Council case speaking of superior courts such as the High court The contrasting legal concepts of voidness and voidability form part of the English Law of Contract. They are in-applicable to orders made by a Court of unlimited jurisdiction in the course of contentions (sic). Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court, if it is regular it can only be set aside by an appellate court upon appeal, if there is one to which the appeal lies".

35. "Lord Diplock also said that where there was a defect such as breach of rules of natural Justice a party might have the order set aside Ex Debito Justitiae (meaning as of right) without recourse to the rules about irregularity which give the Judge discretion".

36. "An example of a superior Court''s Order being held to be void was where the court of Appeal allowed an appeal in a case where appeal was expressedly prohibited by Statute and on further appeal Its decision was held by the House of Lords to be without jurisdiction and a nullity. But, as already explained, such an order must always be obeyed, whatever it is legal defects, unless and until it is set aside".

37. Mr. Nag. Id. Counsel for the TML has drawn the attention of the court to The discipline of Law by Lord Denning, 1979 Edition, at page 17 under the Heading Void or voidable''. Mr. Nag has drawn the notice of the Court to the following paragraph :- "If it is void, what is to happen? Unless and until someone applies to quash it, the determination of the Tribunal will appear to be good. As Lord Radcliffe once said; ''It bears no brand of invalidity on its forehead. Much work may have been in pursuance of the void order. Many persons may have acted on it in the behalf that it is good. In such circumstances, the Court has a discretion whether to quash the order by certiorari or declare it bad; and if it does not quash it to make such consequential orders as it may think fit to do justice between the parties. Under the Rules of the Supreme court for Judicial Review: this includes an award of damages.

38. "I confess that at one time. I used to say that such a decision was not void but only voidable But I have seen the error of my way It was in Firman as Ellis a very complicated case. So, I will only quote The Passage Where I challenged my mind.

39. ''I think that the order of 11th July 1973 was a nullity and void ab initio for two reasons : (i) It was made under a fundamental mistake in that the registrar Was told and believed that the Saiths agreed to it when they had not and (ii) It was made contrary to the Rules of natural justice, because no notice of appointment had been given to the Saiths Solicitor. Such failures made the order a nullity and void ab initio : See Anisminic Ltd. vs. Foreign Compensation Commission (1969) 2 AC 147.171, by Lord Ried, and it at page 195 may Lord Pearce. it is true of course, that the Smiths might have waived their right to complain of It They might have entered an, unconditional appearance. But they did not waive it. They entered a conditional appearance and get it set aside. On being set aside, it is thereupon shown to have been a nullity from the beginning and void. So after some vacillation. I would, adopt the meanings of Void'' and "Voidable'' given by Prof. Wade in his "Administrative Law" 4th Edn. (1977), pp. 300,450. Seeing that it was a nullity, it follows that in point of law, no action had been ''commenced against the Smiths"

40. Mr. Nag has then drawn the attention of the Court to "Judicial Review of Administrative Action by de Smith. Woolf and Jewell Fifth Edn.; (1995), at page 259, the relevant portion reads as follows :-

The erosion of the distinction between jurisdictional errors and non-Jurisdictional errors as we have seen corresponding eroded the distinction between void and voidable decisions. The Court have become increasingly impatient With the distinction, to the extent, that the situation today can be summarized as follows :-

(i) all official decisions are presumed to be valid until set aside or otherwise held to be invalid by a Court: of competent jurisdiction. Under the terminology of void and this proposition raises a paradox, namely, that a decision, voidable decisions, although technically void, is in practice voidable. Such a paradix is, however, circumvented if we abandon those terms which lead to confusion'' and instead was the terms ''Lawful and unlawful'' decisions. Decisions are thus presumed ''Lawful unless and until a court of competent jurisdiction declares them unlawful. There is good reason for this :

The public must be entitled to rely upon the validity of official decisions and individuals should not take the law into their own hands. These reasons are built into the proceedings of the application for judicial review, which requires for example an application to quash a decision to be brought within a limited time. A decision not challenged within that time whether or not it would have been declared unlawful if challenged, and whether or not unlawful for jurisdictional error, retains legal effect. So, does a decision found to be unlawful but where a remedy is, in the Court''s discretion, withheld. The language of void and voidable cannot, however,

accommodate such an effect, as it would insist that a void decision, being ab initio is devoid of legal, consequences and that a voidable decision is capable of being set aside.

(2)...

(3)...

(4).:.

(5)....

41. Mr. Nag has next drawn the attention of the Court to "Judicial Remedies in Public Law by Clive Lewis. (1992) Edn. at p. 132; the relevant portion reads as follows :-

Even if invalidity could potentially be established there are circumstances where the Court will not intervene to quesh the act. Rules governing standing, and the time limits for bringing applications for judicial review, may prevent a particular individual from establishing the invalidity of an act. In addition, the Courts have a wide discretion to refuse a remedy. In the words of Proof, Wade :.....:.....the truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances". Nullifying a description of what the Courts do when invalidity is properly established and the Courts considered it appropriate to intervene; Nullify is not an absolute concept dictating inexorably what the Courts must do when faced with a claim an act is ultra vires. It is now clear that in practical terans of the invalidity of an act cannot be established or if the Court refuses to grant relied;'' the act will be recorded as producing valid legal effects, whatever the theoretical difficulties in explaining how this can be true of an act which is beyond the powers of a public body.

42. Mr. Nag, Id. Counsel has also drawn the attention of the court to "Judicial Review" by which Supperstone & James Goudie (1992) at page 77. The relevant portion reads as follows -

We have seen that the distinction between errors within and without jurisdiction is identical with the distinction between void and voidable decisions, and has largely passed out of our modern law

43. "Sir William Wade advances two arguments based on consequences which serve in his view to underlying the need to maintain as a matter of principle, a concept of voidness, and therefore, the ultra vires Rule as the basis of Administrative Law. They appear in a short but important passage in the Sixth Edition of his Administrative Law'' at page 353-4.

44. He says first.:

One motivate to the principle, they are void may be a desire to extend the discretionary power of the Court. This policy and: the dangers of it are to be seen

particularly clearly in the eases on the right to a fair heating.....". There are grave objections to giving the Court''s discretion to decide whether governmental action is lawful or unlawful.....The true scope for discretion is in the law of remedies where it operates within, narrow and recognised limits and is far less objectionable.

45. Mr. Nag, Id, Counsel has drawn the attention of this Court to "Administrative lam", Second Edition, by Craig (1993), at pp. 323. The relevant portion reads as follows;-

The effect of finding that a decision is ultra vires is, like many other matters, best approached from first principles. Looked at in this way our intelligent layman''s reaction has cogency and value at least as a starting point : if you, the decision-maker, had no power then your decision should have no effect whatsoever Translated into the lingna franco, of our profession, we would say that such an administrative finding was void initio, retrospectively null (sic) become more complex when we ask who is (sic) to (sic)'' of, or who can Invoke the ineffectiveness at the administrative decision? Our informed lawyer would reply by telling us that void is a relative not an absolute concept. What does this mean?

46. "In our system of administrative law there are rules of locus standi, time limits and other reasons for refusing a remedy such as acquiescence. It is only if an applicant for relief surmounts these hurdles that he will be able to obtain a remedy. The sequence of events would therefore, be as follows An administrative decision takes place. An individual feels aggrieved and challenges the decision. If the Court finds that the individual has standing, that he is within the time-limits and that there is no reason to deny him a remedy the decision would be found to be void ab initio, It is descriptive of the conclusion reached that in ultra vires act has occurred and that it is being challenged by the right person in the correct proceedings. As Lord Diplock has said, it is confusing to speak of the terms void or voidable before the validity of an order has been pronounced on by a court of competent jurisdiction''".

47. From a perusal of the discussions by the id. authors as stated above, it appears that the principles laid down by the Id: authors are centred round the line of distinction between void and voidable orders passed by administrative authorities and the principles governing judicial review of administrative decision The English Law on the point has been discussed- in detail by the Id. authors in of his arguments, Mr. Nag. Id. Counsel, submitted that the order dated 11.12.91 passed by Mrs. P. Khastagir, J. was void as the Id. Court had no jurisdiction to entertain the matter on that day. to meet this point. Mr. Chatterjee, Id. lawyer for the appellant submitted that the line of distinction between void and voidable decisions is largely out of the modern concept of law the said decision can only be irregular or regular. The brand of illegality is not written as its forehead. So it has to be declared as irregular by a. Competent forum. But the controversy is, in our opinion, pointless. Though our law on the point has emanated from the principles laid down in English

cases still the apex Court of our land has clearly laid down in Chaman Pashwan''s case (supra) that it is a fundamental principle that a decree passed by a court without jurisdiction is a nullity and that its invalidity would be set up wherever and whenever it is sought to he enforced or relied upon even in collateral proceedings. Moreover, in this case, no decision of an administrative authority is involved. The order dated 11.12.91 was passed by a Id Judge of this Court and therefore, the principles applicable in the case of administrative authority cannot be involved in such a case. I accordingly hold that the principles as laid down in the above treaties may not be applied in case of a decision rendered by a Court of Law.

48. Mr. Nag, Id Counsel for TML has also advanced the argument, regarding the locus standi of the appellant to prefer the appeal as all the shares of the plaintiffs have been auction sold by the Tax Recovery Officer, the added respondent. In support of the contention Mr. Nag has referred to many decisions of our High Court and the apex Court, There is no dispute about the fact that the question whether the shares of the appellant-company could be legally dealt with in the manner in which it was done in this case, is subjustice before a Writ Bench of this Hon''ble Court- The question is yet to receive a quietus. Therefore. It will be a-risky adventure for this Court to go into the question of locus standi of the appellant-company to file this appeal on THE ground that all the Shares have been sold out by the Tax Recovery Officer. this Court refuses to go into that aspect of the question dt 26,8,92 allowing the revision petition should; be treated as non est in the eye of law. As my esteemed brother, Hon''ble Mr. Justice B. M. Mitra has taken different views on the points having decisive bearings on the appeal as stated in his elaborate Judgment below, a reference should he wade under Clause 36 of Letters Patent.

JUDGMENT

B. M. Mitra. J.

49. The instant appeal is directed against Judgement and order date 23,6. 1993 passed by Padma Khastgir, ACJ and signed by K.. Ganguly J. rejecting CP N. 33 of 1988 which is under the composite captain of numerous Sections 155, 397, 398, 402, 403 and 406 of the Companies Act. The said proceedings were initiated on or about 14th January 1988 in relation to the affairs of the Respondent No. 1 Turner Morrison & co. Ltd. and its various subsidiaries before this Court for manifold prayers of declaration that increase in the'' issued and subscribed share capital of the Respondent No. 1 is illegal and not binding on the same and for declaration that allotment of 3000 shares of the Respondent in favor of Respondent Nos. (sic) all illegal and void for further declaration that alteration of the Articles of Association of the Respondent (sic) in the extraordinary general meeting held on 15th June, 78 is illegal and void as such increase of shares made thereupon is of no effect. There are further prayers made for ancillary relief for rectification of register of the members and of the share register of the Respondent No. 1 and for order of injunction seeking restraint against Respondent Nos. 11, 12; 13, 15 and 21 and or their

transferees from exercising any right including voting rights and right of receipt of dividends in respect of 3000 shares. There was further declaration sought that allotment of 1,50,000 ordinary shares by Respondent No. 1 in favour of Respondent Nos. 11 to 21 are all illegal and void and for consequential relief thereon, there is further declaration prayed that the Board Meetings and General Meetings of the Respondent No. 1 held in 1977, 78 and 84 are all illegal and void. There are other orders prayed for reinstatement of cooption of N. S. Hoon, as a director of the Respondent No. 1 and its subsidiaries and for termination of services of the Respondent Nos. 22 to 31 and for other ancillary reliefs. The entire conspectus of the connected petition in CP No. 33 of 1988 is very copious and is of wide range of considerable magnitude. The said petition is replete with averments of serious allegations and the allegations by themselves are of serious nature. There are also serious allegations of fraud, collusion and ante-dating documents including those of tampering of documents by the Management of the Respondent No. 1. The major thrust of attack was centered round on conspiracy, collusion tampering of documents including user of ante-dated materials''."

50. The bulk allegations are of substantial nature and of various types including that of allegations that signatures of the office bearers of the appellant petitioner have been fabricated. A plain reading of the original petition will convey an impression about substantial bulk of the range of variety of allegations, the particulars of which appear to have been mentioned though in a nonferentic style but in accordance with analogous proceeding of pleadings as contemplated under Order 6 rule 4 of the Code of Civil Procedure. There have been denials on records toy the contesting respondents with regard to the said allegations, but the nature of allegations were such for which it was contended that the same should not be substantiated by affidavits alone but for proof of the same affidavit-evidence is necessary under the provisions of Order 19 of the CPC The appellant started making endeavours to have the allegations sorted out by trial on evidence and genesis of the controversy can be traced to such attempt made by the appellant from time to time in course of pendency of the proceedings in the Trial Court in CP No. 33 of 3988. During the pendency of the proceedings series of applications were filed on behalf of the appellant and from time to time for adjudication of the proceedings after taking oral evidence because of serious allegations of fraud, collusion, misrepresentations makeasance and tampering of signatures. The first of such application was filed on 4th April 1990 and against the dismissal of the said application an appeal was filed by HIT, the appellant, which was also dismissed by the Supreme Court on 4th May 1990.

51. On 27th June 1990 one N.S. Hoon, Chairman of H.I.T. appeared in person and filed another application for trial on evidence and the same was dismissed again on 31st July 1990. Thereafter, another application for trial on evidence was filed in the Court of S.C. Sen, J and direction was given in the matter for placement of the same before the list of Padma Khastgir J. On 26th March 1991 the said application for trial

on evidence was heard and Khastgir J. by an order dated 11th December 91 allowed the application, made by HIT for trial on evidence; directing the main matter for being set down for trial. However, TMC filed an appeal against the order dated 11.12.91 which was rejected and disposed of by the Division Bench of this Court constituted by Shamsuddin Ahmed and Rajkowa JJ on 28.4.1992.

52. On trial being fixed pursuant to the order passed by the Division Bench on 28th April 1992, the matter appeared before Khastgir J. on 11th May 1992 for adducing evidence; by the respective parties. The appellant tendered its Chairman one N.S. Hoon as its witness and examination in Chief commenced on 11th May 1992 which formed part of the Court records.

Thereafter TMC filed a SLP arising from the Judgment and order dated 28th april 1992 of Shamosuddin Ahmed & Rajkowa JJ. The said SLP came up before the Hon''ble Supreme Court and the same was dismissed on 24th July 1992 as withdrawn, on inter alia recording, that the petitioner in this SLP want to approach the ''Division Bench in the High Court for clarification. The instant proceeding has a chequered career and the entire background of history and trial of litigations which were recorded in multifarious proceedings and reported in very many judgements, and a concise narration of the said facts being the background of the present controversy may be useful and necessary which is mentioned hereunder.

53. In fact it will be necessary to dilate the background of facts, as prior to 1956, HIT owned and controlled 100% shares of Turner. Morrison & Co., Ltd. in 1956 49% of the shares were sold in favour of Haridas Mundhra and his nominees, with option to buy the balance 51% shares within five years on payment of Rs. 86.60,000/. However, instead of making the payment as per agreement a suit No. 600 of 1991 was filed in the Calcutta High Court at the instance of Mundhra s Solicitors, Khaitan & Co., to exercise his option to buy the balance shares. In or about the year 1963 Mr. M.S. Hoon, after purchasing the entire estate of Turner Bros from its Executors, became associated with Turner Morrison & Co., Ltd., as the Chairman & Liquidator of HIT figured as party to Suit No. 600 of 1961. There was a long trail of litigations, giving rise to the culmination of proceedings in the Supreme Court of India, followed by off shoots of various ancillary proceedings in different forums. During the pendency of the course of litigation there was a preemptive order passed in an inter locators proceedings whereby an order was passed on the basis of an oral prayer made by the Legal Aid of Haridas Mundhra, namely Khaitan & Co. and A.N. Ray J by order dated 25.2.64, in the self-same suit, permitted Haridas Mundhra to go on enjoying voting rights in respect or those 51% HIT shares, without making the payment of Rs. 88.60.000- and without specifying the timing within which it was to be effected. It appears that when the Trial Judge was about to conclude his Judgement in that case, the Counsel for Mr. Mundhra requested the Court verbally to issue an injunction requiring HIT to exercise its voting rights in respect of its 51% shares according to the wishes of Mr. Mundhra, which was the subject matter of the

Suit until the implementation of the Decree for Specific Performances. The Ld. Trial Judge accepted that oral prayer and issued the injunction asked for. According to the observation made in the Judgement in the Civil Appeal No. 1223 of 1970 the Hon''ble'' Supreme Court in the case reported in AIR 1972 SC page 1331 and in the said Judgement it has been observed that acceptance of the prayer on an oral application, led to serious consequences, and some to the off-shoots arising there from, have been branded by the Supreme Court as an outcome of the said unfortunate order of injunction.

54. It appears that after failing to get the said injunction set aside by the Division Bench, Messrs, Hungerford Investment Trust took out Master Summons, praying for directions to implement the decree against Mundhra by directing the payment of the aforesaid amount or in default the said decree to be rescinded. The Master summons were dismissed and Messrs. HIT went in appeal to Supreme Court and by a Judgement and order dated 9.3.1972 as mentioned above, the Apex Court allowed the appeal of HIT, rescinding the decree with effect from 11.4.67, and directed the Receiver to handover 2295 shares to the Registrar of the Supreme Court. The Registrar in turn was directed to handover the same to Mr. Hoon. Chairman of HIT. The said Judgement was well-known one having been reported in AIR 1972 SC page 1826. After the judgement, at the request of Mr. Hoon, as Chairman of H.I.T., the Company Law Board by Notice dated 15.2.72 called an Annual General Meeting of the Company on 6.7.1972. The Annual General Meeting was duly convened and the elections were held, when Mr. Hoon and his other nominee directions were elected to the Board. On 4.7.1972 Mundhra filed a Writ Petition in the Calcutta High Court, challenging the validity of the Notice and obtained an order that the result of the elections held and Minutes should not be discussed until the disposal of the Writ petition. However some time in September 1972 the said Writ Petition was dismissed and the injunction was vacated. The new directors elected in the meeting on 6.7.1972 took control of the Company and Mr. Hoon became the Chairman of the Company. The purported control exercised by Mr. Mundhra over the affairs of TMCL came to an end when the new directors took control of the company under the chairmanship of Mr. N.S. Hoon.

55. During the course of litigation, it is alleged that Mr. Hoon received legal help from Sahu Jain Ltd., when Ashok Jain voluntered to help HIT from the course of said litigations. During that period on acquintance of friendship and amity developed between Mr. Hoon and Ashok Jain as per records. It was further alleged that on the basis of such friendship and mutual trust Mr. Hoon appointed B.M. Bagaria and B.N. Garg. both Advocates and who were associates and employees of Ashok Jain as Attorneys and Additional Liquidators of HIT Ltd. The allegation is also centered around the purported dilution of the shares of HIT which was attempted to be effected by the aforesaid person without any lawful '' authority and for the benefit of a person interested, mainly Ashok Jain. The same was done at a particular period coinciding with the absence of N.S. Hoon from India, who was then the Chairman of

HIT. The same was alleged to have been attempted to be done in excess of authority and confidence reposed on the said persons on the distinct understanding of the recognition of help rendered by Sahu Jain Ltd., during the course of the said litigations.

56. It appears from the records that after taking complete control of Turner Morrison & Co., Ltd., along with its various subsidiaries in terms of the two Supreme Court Judgements mentioned above, Mr. Hoon was apprised of the guidelines issued by Reserve Bank of India to reduce the foreign holding from 51% to 40%. As a result at the suggestion of Mr. Ashok Jain, Mr. Hoon agreed to sell 12% shares from his 51% holding to Sahu Jain Ltd., subject: to the permission of RBI. As a result a written agreement was entered into on 17.5.1973 between N. S. Hoon as Chairman of HIT and Ashok Jain as Chairman of Sahu Jain Ltd. this agreement envisage HIT to sell 12% shares to Ashok Jain through Sahu Jain Ltd. and in the meantime Mr. Hoon on behalf of HIT also employed Ashok Jain through Sahu Jain Ltd., as professional managers to look after day-to-day affairs of TMC and its subsidiaries, because of the long and frequent absence of Mr. Hoon from India. Thus it is alleged that Ashok Jain got a free hand, and he caused his own persons and henchmen to be appointed as directors of Turner Morrison & Co., Ltd., and in its numerous subsidiaries. Even in the order dated 6.12.1978 passed by R. Bhattacharjee J. in CP No. 204 to 206 of 1973 in the case of Turner Morrison & co. Ltd. us Shalimar Tor Products Ltd. & Ors. reported in Company Case Vol. 50 page 296 where the Ld. Judge while narrating the facts of the case made a reference of background of events and it has been mentioned that by the order of injunction as referred to hereinbefore Haridas Mundhra got control over the petitioner company with effect from 25.2.1984 for which such comments were made by the Apex Court and lawful owners were kept out of management of the company by dint of the said order and under the coverage of the protective shadow caused from that order, the present respondents are still now siding at the cost of the company by keeping legitimate claimants out of the purview of the game. Further allegation is that soon after, the agreement the said Ashok Jain prevailed on Mr. Hoon to appoint one E.V. G(sic) of Mr. Ashok Jain, being an employee of the. Times of India, Singapore Branch, which is affiliated to Sahu Jain Ltd. It is alleged that Mr. Ashok Jain prevailed upon Mr. Hoon to appoint V. Ganesh as a director-cum-resident representative of HIT Ltd. in Singapore as per requirement of the mandatory provisions of legal formalities with regard to the companies registered in Singapore. It is alleged that after the appointment of the said V. Ganesh as representative of HIT Singapore, the said gentleman in a clandestine manner removed records and documents of HIT from Companies Registry Office in Singapore, as a result of which the said Company was dissolved and caused to exist on and from 22.10.73. this fact was kept as a closely guarded secret from other directors of the Company including Mr. Hoon. It further appears from the correspondence made by Khaitan & Co. to their client Turner Morrison that HIT Ltd. was dissolved and not in existence from 22.10.73 to sometime'' about

June/July 1993. if it is a fact that the Company namely HIT Ltd. have ceased to exist as per communication made by Khaitan & Co., Solicitors, which was in the know of Turner Morrison & Co. Ltd., then the alleged directors of the non-existing Company cannot function and whatever they may have done during that period in the name of an non-existing Company, the acts done by the purported agents of a non-existing principal becomes honest in the eyes of law and they are not actionable per se.

57. From the earlier chapter of records, it appears that soon after Haridas Mundhra took full control, of Turner Morrison by virtue of the injunction granted through oral prayer, he entered into a collusion with the directors and functionaries of Turner Morrison to divest HIT of its decretal dues by taking advantage of bulk of the share-scripts lying in Turner Morrison''s office in trust for their erstwhile owners HIT, in furtherence to this evil objective Haridas Mundhra caused to file another suit by the Secretary of Turner Morrison against HIT Ltd. As such, Suit No. 2005 of 1965 was filed before the High Court at Calcutta and on a contested hearing, by a detailed by PB Mukharji J by his order dated 11/13th November 1968 disposed of the same, which is also reported in CLJ 1969 Page 94.

58. The said suit was for recovery of a sum of Rs. 1,27,67,452. 16 against KIT Ltd. The plaintiff of the said suit made out a case that the defence held 2295 shares therein, being 51% and for the assessment of the years 1940 to 1956. It had paid various sums to the Revenue. Authority aggregating to Rs. 79,70,800/- as tax on deemed dividends in respect of those shares and is therefore entitled to be indemnified and to be reimbursed in full. The contention is this that on a proposition that a statutory agent under the income tax law unlike a common law agent is liable whether the dividends have either been declared or not or paid or not on account of deemed dividend. It has been held by the said single bench on construction of the legal principle that the fiction as propounded cannot be extended beyond the limits imposed by the statute. The Agent cannot claim from the principal without paying the very income on which the taxes were deemed to have been paid. In dealing with the said proposition a catena of decisions have been referred to and relied upon and some reference may be made from some of them in the case reported in Bhor Industries Ltd. vs. Commissioner of income tax, Bombay, reported In AIR 1961 SC Page 1100, where the Supreme Court had made the position abundantly clear under the provisions of Section 23A of the income tax Act. No doubt the said section implies a fiction but the same is attempted to be given effect to that some income must be deemed to be distributed to the shareholders which must be deemed to have accrued and also received by the persons to whom it is deemed to be distributed. The said fiction according to the view of the Apex Court where it is propounded that the effect of Section 23A is to make dividends payable to the shareholders. A point thus formulated in that context that even if there was a national declaration of dividend in favour of the person who is entitled to the same but unless it is paid to the person concerned the question of refund of the same

does not and cannot arise. There have been further references inter alia amongst other in the case of Executors and Trustee of Sir C. Jahangir vs. the Commissioner of income tax, reported in AIR 1959 Bombay page 404. There are some limitations inherent in section 23A of the income tax Act as it stood. The first limit is that it deals with the profit and gains distributed as dividends by the Companies, the second limit is that it will be deemed to have been declared and shall be deemed to have been received by the shareholders, the third limit of course is that the income tax Officer must be satisfied that certain conditions as stated in section 23A exist. When the plaintiff Company in that case proposes to take the next step of recovering the tax from the deemed income of the shareholder, then other consideration will apply. One of such considerations is that Sections 69 and 70 of the Contract Act. Unless deemed (sic) as declared by the Company has been actually received by the shareholders there could have been no tax as contemplated u/s 23A as the basis of a tax is that there must be an income on which to pay the tax. A statutory illustration is given both u/s 69 and 70 of the Contract Act projecting the idea that they were not intended to apply to statutory Sections in such, circumstances namely where no dividend in terms of material index equivalent to money value has been paid to the actual shareholder. The fiction cannot be extended beyond the limit imposed in the statute, as between the Agent and the Principal, the Agent cannot claim the principal without paying to the principal the very income on which tax is deemed to have been paid. The extent to which the statutory fiction can operate has been adumbrated in the case of Bratthwaite & Co.. Ltd. vs. Employees State insurance Corporation reported in AIR 1968 SC page 413. The other decision of the point is reported in the ease of Bengal Immunity Co. Ltd. vs. state of Bihar reported in 1965 volume 2 SCC on page 603. When the plaintiff company retained the money without declaring or paying the dividend to the defendants the plaintiff company was bound by law u/s 23A of the income tax Act, as between the Revenue Authority and the plaintiff the law will assume that tax was deducted at source under Sections 23A of the I.T. Act. Therefore, the same cannot any more be deducted on the shareholder again. The eleborate judgement passed by this High Court in suit No. 2005/65 has been affirmed by the Division Bench of this High Court giving rise of the matter to be taken to the Apex Court The Supreme Court pronounced the decision in the case of Turner Morrison & Co. Ltd. vs. H.I.T. Ltd., reported in AIR SC 1972 on page 1311, as a result of which the controversy had been set at rest There has been necessity for recital about the narration of facts and law involved therein as the self-same question has been raised once again in this Appeal by Mr. Nag, the Ld. Counsel appearing for the respondents.

59. According to Mr. Nag. in an extraordinary general meeting of the shareholders of Turner Morrison & Co., lid., purported to be held on 3rd February 1977 at 3.30 p.m., a resolution was taken to increase the capital of the company by 30 lacs by creation and issue of 3000 equity share of Rs. 1000/- each. On the said date a meeting of the Board of Directors took place at 4 p.m. and both the meetings were

consecutively held at an interval of half an hour and in the meeting of shareholders one Shri B.N. Garg presided, and in the subsequent meeting the same gentleman presided purporting to represent himself as mouthpiece of HIT Ltd. on a further purported pretext of authority from Mr. Hoon. In the subsequent meeting of the directors a resolution was taken about the issuance of letter of rights, letter of applications and form of renunciation. The same was adopted on the basis of an opinion given by one Shri P.K. Khaitan of Khaitan & Co. which was ex facts misleading, purposive and colourable, by dint of which the same was done with a view to achieve the fait accompali of complete erosion of the stake and interest of HIT Ltd. The records as salvaged reveal a murky trial of one Baijnath Garg being utilised for the same with a nefarious design. The affidavit affirmed by Dr. K.N. Garg on 31st March 1988 would speak for itself the nature of allegations under cover of which late B.N. Garg was made to be used as an instrument. The object thus achieved became a question involved in these proceedings as to whether such issuance of right shares and renunciation made are lawful and they are in confirmity with relevant provisions of Foreign Exchange Regulation Act. In this context a reference may be made to an order dated 1st August 1988 passed by Hon''ble Justice Manjula Bose in the said proceedings where the question has been dealt with at great leangth. In the said Judgement it has been observed that the offer of right shares to a foreign resident and an acceptance by its nominee namely the Indian Company who obtained the allotment in respect of the shares in question covered by the letter of rights issued to the petitioner, company appear to be tainted with illegality and a permission of the Respondent No. 37 is a condition precedent for allotment of shares and consequently must be viewed to be invalid because of the contravention of Section 19(1) (B) of the FERA Act.

The law appears to be well settled that Section 81(1) of the Companies Act can have no application to private company which have become public Companies by virtue of Section 43A and which retain in their Article the three matters referred to in Section 3(1)(III) of the Act as emphasised in the case of Needle Industries India Ltd. and others us. Needle Industries (India) holding Ltd., and others, reported in AIR 1981 SC page 1298. Even a judgment and order dated 1st August 1988 the Ld. Single Judge of this High Court prima facia does not accept the case of renouncement for the reasons as stated in the aforesaid judgment of the Apex Court even if the Company''s case is required to be accepted.

The Company could not do so as it was not competent as it was categorised under provisions of Section 43A. It is also important to note that Article 2C and 7 of the Articles of Association prevented the shares in question to be offered to the public. It is apparent that there was no right to renounce any rights to be obtained qua renouncing which is void and illegal, which could not give any right to allotted.

60. There is another important dimension which has been attempted to be added to the vortex of controversy when Mr. Nag. the Ld. Counsel for the respondent has

questioned the locus standi of the appellant to prefer appeal as all shares of the plaintiff appellant have been auctioned sold by the a Tax Recovery Officer, the added respondent. The certificate of sale of moveable property has been appended to an application for stay of the appeal and for dismissal of C.P. Case No. 33 of 1988.

The auction sale seems to have taken place on 27.5.1994 during the pendency of the instant appeal, where the self-same shares are the part and parcel of the subject matter of controversy. It is peculiar that when the High Court is hearing the appeal and is in seizing of the matter in question and the TRO as the party figure in the appeal, how could the same be done without prior approval or consent of the Court. It appears from the controversy and the affidavit affirmed by N.S. Hoon on 25th July 1994 and it has been categorically averred in para 5 of the said affidavit that the share scripts are still in possession of the appellant HIT, which would be borne out from the orders of the Supreme Court, which was passed as earlier as 1972 and it is not understandable as to how the said share-scripts can be sold when the originals are alleged to be lying with HIT. There is no material before this Court at this juncture as to how and in what way the TRO would get hold of original share-across and on the face of retention of the original by HIT how can the same be duplicated. If the original are there lying in custody of whichever person, the same to be seized and traced out and TRO cannot proceed on the basis of duplicate shares. It has been further alleged that the share-scripts were forged and fabricated and fraudulently utilised for stimulating an auction sale with a view to deprive HIT of their right It is further strange that how and what for Turner Morrison & Co. Ltd., in hot haste adopted a resolution confirming the sale of shares without compliance of procedural formalities. The purported sale appear to be colourable exercise in supersession of the ratio of law laid down by the Supreme Court and it is abundantly clear unless deemed dividend as declared by the company have been actually received by the shareholder there could have been no tax as contemplated u/s 23A. as the basis of the tax is that there must be an income on which to pay the tax. A reference can be made about the statutory illustration of the same given u/s 69 and 70 the Contract Act, the fiction cannot be extended beyond the limit imposed by the statute and the same has been laid down in the Supreme Court decision in AIR 1968 page 413 and 1965 Vol. II page 603.

61. It appears from the affidavit in opposition and the annexure appointed therein from which it appears that a sale notice was published in the daily issue of "The Statesman" dated 19.2.89 for sale by auction of various share-scripts with distinctive umbers belonging to HIT and the said outstanding demands relate to four certificate cases of the Assessment Year 1949-50, 1950-1951, 1951-52 and 1966-67. In Suit No. 2005 of 1965 between T.M. & Co. Ltd. us HIT Ltd. a prayer was made by TMC for recovery of the stipulated sum and it has been pleaded that TMC paid the sum of Rs. 79,70,802 as taxes to the Revenue authority on deceased dividend u/s 23A of the (sic). Act for and on behalf of HIT Ltd. and is therefore liable to reimburse itself for the said amount. The balance of the claim is alleged to be the interest on

the amount paid by the plaintiff as aforesaid. The schedule to the (sic) the amount paid in different assessment years, the claim (sic) the period covering the A/years 1940-56 that will be a period of about 15/16 years. On this formulation of the cause of action the plaintiff claims a lien on the relative shares concerned on the ground that it has right to claim such lien under Article 122 of the Articles of Association which gives the plaintiff company. The shares in question have been numbered as 2295 shares as per the recital in Suit NO. 2005 of 1965.

62. The original share-scripts being total 2295 shares of Rupees one thousand each are (sic) to be in possession of the appellant pursuant on the Judgement and (sic) of the Supreme Court passed in the case (sic) & Ors. reported in AIR 1972 SC (sic) (sic) of the said Judgement revealed that (sic) A.P. Bose (sic) to the Library (sic) Calcutta High Court, the Receiver appointed in suit No. 2005 of 1965 to produce the aforesaid 2295 shares before the said Court and (sic) custody of the same to the Registrar. The Registrar who in (sic) over to HIT Ltd.

63. Since then it appears that the said share script have never been with Turner Morrison & Co. Ltd. because they have to part with possession of those shares by giving it to the custody of the Supreme court who delivered it to HIT. Peculiarly enough it appears form para 7 of the connected petition for stay of this appeal and for the direction of CP No. 33 of 1988 that consequent upon recognisation to the capital structure of the company the original share capital consisting of shares of Rs. 1000/- each has been sub-divided into equity shares of Rs. 10/- each had the original share scripts of Rs. 1000/- been in legal custody of HIT it is not understood as to how the share-scripts of Rs. 1000/-face-value of each share can be sub-divided into equity shares of Rs 10/- each. It is very much puzzling as to how the assessment the be made in the said petition that original share-captial lied been sub-divided in absence of the original which were lying with the lawful owners as directed by the Supreme Court. The same appears to be a trick hidden under corporate veil and on the face of it is not understood as to how and why the same can be attempted to be done. It is further curious that there is further averment that the company namely TMC regards its inability to handover the certificate in the absence of the original share certificates of equity shares of Rs. 1000/- each in terms of the company (issue of share certificate) Rules 1960. There was no adequate explanation revealing the correct state of facts that the self-same shares the originals of which were found to be wanting were caused to be handed over to HIT under orders of the Apex Court. The controversy having been set at rest and the concerned authority of the Income Tax again was found to doing on the forbidden track. It is further peculiar and strange the taxes of deemed dividends on the afore-mentioned shares were once realised as early as on earlier period of 50s. There cannot be any question of further realisation of the tax already recovered once again in view of the controversy being set at rest by the Judgements delivered by this High Court as well as by the Supreme Court in respect of the same dividends. In the backdrop of the same the question of Sub division of share scrips of Rs. 1000/- into share scrips of Rs. 10/- each appear to

be a colourable exercise to bring in confusion. Had it been done with regard to the duplicate of Rs. 1000/- each, value of share-scrips might have led to problems, and an exit door has been attempted be curved out by way of conversion and Sub-division of share-scrips of Rs. 1000/- each into share-scrips of Rs. 10/- each. It is very much perplexing as to how the income tax Authorities can be the consenting parties to such act. and contrary to its own records and knowledge of the same and can be an accomplice in the game of trans-figuration of the original share-scrips.

64. From the enclosed annexure appended to the connected petition filed by and on behalf of Respondent No. 1 namely TMC. it appears that tax authorities have been accelerated to give their consent in undue hurry and even without loss of marginal time. This type of extraordinary speed is rarely to be noted, not even in the rarest of rare cases. Neither Respondent No. 1 nor the I.T. Authorities felt any obligation to approach this Court where the dispute relating to those shares is also pending by way of ancillary questions are awaiting consideration, before this Court. Instead of approaching this Court, the connected petition was pressed to disentitle the appellant to figure as party in this contested litigation. The procedure adopted manifestly smacks of want of bonafide and it is replete with pernicious implications of attempt of abuse of process of law which should be nipped in the bud and no Court should come in aid of such erring litigants. this Court does not have any qualms for either of the contesting parties as they are not only veteran litigants but indulgence in course of litigations may subvert the entire process of law. After all process of law is a procedure meant to achieve the object of justice, and if the means resorted to are nefarious then the objects of achievement of justice cannot be fulfilled.

this Court after having noted the same has taken pains to go through antecedents of the same by trying to collect Judgements and also of the observations made in other legal proceedings and it was amazed to note that there was a history of trail of collusion between tax authorities and the parties and many caustic remarks were found in the pages of the Judgement and the report which also have eye-openers to this Court. It is a matter of coincidence that after reading carefully the contents of the connected petitioners filed by TMC to non-suit HIT (sic) wisdom prompted it to make search on the subject which resulted in delay for the formation of opinions of this Court but it is considered necessary and imperative for doing justice to the case. Delay has been caused because of the endeavor of this Court to decide and not to dispose of such controversial matters by way of routine affair. this Court refer to some of the extracts from the earlier Judgements and the records which may not be out of context and may have bearing on the present controversy.

65. In the Judgement dated 11/13.11.1968 P.B. Mukharji J of this Court in Suit No. 2005 of 1965 has made a reference "Probodh Ch. Dutta"s answers who is the TRO, to the question Nos. 29 to 38, made strange readings and their gist is that ever since the attachment on the 28th February 1964 until the end of 1968, more than four

years, nothing whatever has been done to realise the due of Haridas Mundhra....."These answers are revealing. Hormasji was being cross examined on a signed by a man called K. L. Srivastava, marked exhibit 23, dated 18.1.65. This Mr. Srivastava was a income tax Officer to begin with but he has now found employment at a salary of Rs. 3000/- p.m. with amenities and perquisites including a free-house, a car and usual medical facilities."

A further reference can be made to the Judgement and Order dated 14.7.1969 passed in suit No. 600 of 1961 between the self-same parties where it has been observed "the petitioner made a demand of 707 shares of Turner Morrison & Co., Ltd., which was lying deposited with them and a letter was sent on 22.12.1964 from the petitioner''s solicitor demanding delivery of the said shares. The income tax Authorities has nothing to do with those shares and some comments were made in the Judgement, by the Ld. Judge which is interesting and as such the same is quoted hereunder.

The Income tax Officer seems to be more catholic than the Pope and for this catholicity the income tax Officer was rewarded with a job in Turner Morrison & co., Ltd., on a salary of Rs., 3000- per month. It may be added here that Turner Morrison & Co., Ltd., did not claim lien on those 707 shares even when they were demanded in 1964.

As already, it has been indicated that the views of P.B. Mukherji J on this aspect have not been dissented from by the Supreme Court in the case, of HIT Ltd. vs. Haridas Mundhra & Ors. reported in AIR 1972 page 1826.

There are serious allegations made in the affidavit in opposition in the connected affidavit affirmed by one N. S. Hoon. It has been asserted that in no unambiguous terms that it is an undisputed fact and well known to income tax Officer as well as to the applicant that for the last 54 years starting from 1940-41 onwards HIT Ltd. have not received one paise by way of dividends and colossal demands were made on illusory basis and the H.I.T. Ltd., cannot be saddled with liability in view of the decisions in TS 2005 of 65 and also in consideration of the Judgements reported in AIR 1972 SC 1311 and 1826. It has been contended as HIT was never a recipient of the dividends and as such it cannot be saddled with liability u/s 23A of the I.T. Act. Apart from reference to the decisions which have dealt with points in issue on constructions of Section 23A of the I.T, Act. it is necessary to mention that a statutory agent cannot get the benefit which must accrue to the principal.

A reference may be made to the Memo No. TR-VI/85-86/225 dated 18th March 1966, addressed to HIT by one I.B. Choudhury, TRO VI, Calcutta & 24 Pgs. The relevant extracts of this are quoted hereunder :-

As stated earlier total amount due as per certificates issued by the ITO ''A'' Ward, FCC-II, Calcutta, is Rs. 42,75,092/- the details are as under :-

Sl. No	.Certificate Case No.	A/Y	Amount of Demand outstanding	Post Cert Intt. u/s 220(2)	Total
1.	TR-VI/FCC-II/1/84-85	49-50	9,61266/-	2,23,747/-	11,88,013
2.	TR-VI/FCC-II/2/84-85	50-51	7,69,150/-	1,78,540/-	9,47,690
3.	TR-VI/FCC-II/3/84-85	51-52	10,75,229/-	2,49.600/-	13,25,329
4.	TR-VI/FCC-II/4/84-85	66-67	8,60,960/-	1,53,600/-	8,14,560
	Total		34,69,605/-	8,05,487/-	42,76,092

The aforesaid communication as referred to above completely demolishes and erodes into the foundation of the certificate of the sale of the moveable property by D. P. Chatterjee. TRO-I, Calcutta & 24 Pgs. dt. 27th May 1994.

It is not understood as to how after realisation of tax on the selfsame pretext of deemed dividends taxes can be realised and the question of initiation of certificate proceedings in respect of the shares belonging to the lawful owners cannot and does not arise. As such, for the reasons as indicated in the earlier portion of this order while dealing with the subject that it does not appear that certificate proceedings were lawfuly pursued.

66. this Court has been consistently conscious of its limitation to deal with the same question as alternative forum is envisaged under the statute. The difficulty has arisen in view of the filing of the petition by Turner Morrison & Co., Ltd., to stay all proceeding in the present appeal and to dismiss CP Case No. 33 of 1968 in view of the pendency of that application the same is required to be disposed of as it percolates to issue of locus standi of the present appellant this Court without deciding the issue of the locus standi of the appellant cannot proceed with the appeal and as such It has got to deal with the question of the validity and or sustainability of the notice of the TRO in the certificate of sale of moveable property by an order passed on May 27th 1994 being appended as last annexure to the connected petition. The question of maintainability and or locus standi of an appellant to proceed with the same is required to be decided first. If the said issue is a pertinent controversy in an alternative proceedings, this Court can deal with the same as a Court of Limited Jurisdiction and the decision will come squarely within the ambit of explanation VIII of Section 11 of the Code of Civil Procedure. If the party raises a stumbling block to proceed with the appeal, the Court is required to resolve that controversy and If any finding is arrived at can also operate as a bar flowing from the principle of resjudicate and it may have preemptive right to decide the same.

67. The (sic) of contention sought to be repeated by (sic) repe(sic)despair on the said argument are also being attempted to be shared by the learned Advocate appearing

on behalf of (sic) Authority. There has been further dimension attempted to be added to this controversy on behalf of the Tax authority that at the present juncture this question cannot be gone into as certificate proceeding has already been initiated. The attempt has been made is to the effect that once an assessment is made which is open to challenge in Appeal, then the said challenge cannot be thrown in certificate proceedings. By way of analogy a parallel nexus can be drawn in a proceeding for execution under provisions of CPC and a general observation can be made that a decree or order which is otherwise vitiated by patent nullity can also be attempted to be assailed in execution proceedings. That in this context reference may be made to the case reported in AIR 1961 Andhra Pradesh Page 1 (FB), AIR 1965 Madhya Pradesh page 75 (FB), AIR 1970 SC page 1470.

Here in this appeal it has been sought to be submitted by Mr. Nag that when the shares impugned belonging to the defendant appellant have been sold, therefore, they cannot maintain the parent proceedings under the relevant provisions of the Companies Act. This is with a bid to knock off the contestment defendant from the arena of the legal context by subterfuge and abuse of the process of law. It is salient to mention a partinent observation of the Supreme Court reported in the case of M. Valy Pero vs. Fernandio Lopes & Ors. reported in AIR SC page 2006 where the Apex Court has opined that construction of Rules of Procedure should promote justice and prevent its miscarriage by enabling the Court to do justice in myriad situation all of which cannot be envisaged. Rules of Procedure should not be allowed to become mistress but they should be relegated to the position of handmade of justice. this Court is not oblivious of the canona of construction about Rule of Procedure as made by the Apex Court.

Therefore, this Court holds that the application for permanent stay of the connected appeal and rejection of CP No. 33 of 88, is liable to be rejected. The said question cannot be kept open and left at large and unless the same is answered it will lend to an anachronism. The question of sustainability of the certificate proceedings is linked up with the issue of locus standi of the appellant and as such in view of the observations recorded this Court is further pursuaded to hold that the appellant has locus standi not only to proceed with the instant appeal but to maintain CP No. 33 of 1988 on that score.

68. It is necessary to refer to SEC 43A coupled with 81C of the Companies Act would not be applicable and the company had no power to renounce the right of shares offered to it in favour of any other person, member or non-member. A caustic comment has been made by the Ld. single Judge of this High Court in his order dated 1.8.1988 to the effect that the affairs of the company cannot be managed by an unauthorised Board or by a Board of Management who have no locus standi to act as directors or by persons who are sought to be entrusted pursuant to resolutions which are manifestly nonest and void. The said prima facie finding recorded about the illegality has also been further tainted because of acts of

collusion and fraud being practised which have been discerned in the face of copies documents as referred to in the said Judgement "Even the handwritten letters by Mr. V. C. Jain to Mr. Garg a page 233 of the petition signed by Respondent No. 27 dt. 13.2.77 appears to be one such suspected document which cannot be said to be one which may merit no consideration". It was not disputed that the writer of the letter joined the Company in July 1977 whereas the contents of the letter indicate that the year of the said letter must be 1977. The addressee Mr. Garg was directed to bring all resolutions regarding the petitioner company including the draft one for reporting the renunciation to the writer, which letter could not have been written on the 13.2 and necessarily referred to February 3, 1977 resolutions. The writer having joined the service of the Company in July 1977 no letter in respect of draft resolutions of February 1977 would have been written by the Respondent No. 27 at the relevant time which thus calls for legitimate criticism. It has been further commented upon that the Board of directors at the relevant point of time appear to have no locus standi to manage the Board inasmuch as the Court has viewed the transaction of offer of right shares to be nonest shareholders or its nominee or reriouncees are prima facie illegal. The Court has hence proceeded in listing the catena of illustration from based and it has also gone in for detailed analysis about the motivation promoting the erring party to go on the wrong track of law to cause dilution, which is actuated by malafide design and sinister motivation to grab the company and to oust the real owners of the company by complete abuse of the process of law. In view of observations made that the said Board of Directors have no locus standi to control the management of the affairs of the company but they are allowed to indulge in legal niceties to perpetuate their unauthorised control by keeping at bay the lawful owners from the precincts of the company of its management.

69. The Company proceeded in a particular manner by adaptation of a proceeding with a view to reduce the petitioner''s foreign holding in a particular manner, which does not appear to have sanction of law. Even the decision of the Supreme Court in needle case was brought no notice as appearing in the Company''s letter dt. 7th June 61. Pursuant to this clearance which appears to have been given when the said decision emphasis that. Section 81C of the Companies Act would not be applicable to 43A proviso of the Company and such Company has no right to renounce. After writing to the petitioner at a later date on 21st March 68, that it would revert to it on the subject followed up by conspicuous silence a letter of 3rd September 81 convey that non-residential shareholder of the Company would require Reserve Bank''s permission u/s 29 IV (A) of the Foreign Exchange Regulation Act, for holding shares in the Company. The Ld. Judge Manjula Bose J made a categorical finding in unambiguous terms that to my mind from the available facts of the case and the surrounding circumstances there is prima facie justifiable cause for superseding the Board of Directors who have taken over by reason of illegal transactions and cannot be allowed to carry on the affairs of the Company, the same has been further held

to be forbidden by law even on the ground of public policy and the actions of the Company (sic) declared as illegal, nonest and not binding on the Company. In any (sic) the articles of the Company do not authorise the directors with any such power as contended nor did the directors sit to act under its articles When allotting shares to the outsiders...then in view of the conclusion reached that the transaction are prima facie illegal and void. It is necessary to appoint an Arbitrator and the Board of Directors of the company and its subsidiaries are required to be superceded. No person whether a member or non-member who have acquired any such right in such transactions and or by reasons of any alleged renunciation of the right shares offered to the petitioner company and/or through any member. The administration of the Company thus cannot be left in the hands of Executive who have no locus standi and not empowered to act and must prima facie be looked upon as interpolers.

That on the basis of the observation made in the aforesaid Judgement and order it based copious reference to facts as well as on the law on the subject including that of ratio of law expounded by the Apex Court - one may find supportive material leading credence to, the findings on the question of dilution of shares by reference to queries made from the office of the then Jt. Secretary & Legal Adviser, connected with the Ministry of Law and an advice was sought on the question formulated herein :-

1. Whether the offer of rights shares by Turner Morrison & Co., Ltd. vs. H.I.T. Ltd., without prior permission of the RBI is in contravention of Section 19 (1) (B) of the FERA Act 1973.

2. Is the reply to question No. 1 in the affirmative whether Messrs. Turner Morrison & Co., Ltd. can be dealt with for the breach of the said provision of the Act.

In answer to the query made the then Solicitor General of India Sri S. N. Kakkar accord his concurrence with an opinion of Shri M. L. Rao, Joint Secretary & Legal Advisor, and in completion the then Solicitor General of India gives his opinion- on the terms of the offer contained - I am therefore, clear in my mind that the said letter of rights dated 3.2.77 attract the provisions of Section 19 (1) (B) of the FERA and Messrs. Turner Morrison & Co., Ltd., can be dealt with for breach of the said provision" and the said written opinion was issued on 9th August 1977. In compliance with the opinion clarification came into official level which is quoted hereunder, issued by the Reserve Bank of India, Bombay, on 11.1.79, reproduced from Practice and Procedures under Foreign Exchange Regulation Act 1973 Edition 1985 published by the Institute of Company Secretaries of India. New Delhi.

The issue of right shares to non-resident share holders of the Company in India and sale of these right shares by non-resident shareholders clarification - the Reserve Bank has clarified that no company in India can issue right shares to the non-resident shareholders except with prior approval of Reserve Bank nor can any

non-resident shareholders renounce/sell the rights in favour of the person resident in India or outside India without the Reserve Bank of India''s prior approval, for such action attract (sic) of Section 198 of the Foreign Exchange Regulation Act.

70. It is strange that in spite of the ratio of laws being made public in terms of Needles'' case which is circulated to all the India Law Journals of the contemporanious period, a letter was addressed on 2.6.81 by a competent signatory of Turner Morrison & Co., Ltd., to the Controller of Exchange Control Dept., Reserve Bank of India, Bombay, stating interalia that the Supreme Court has since delivered its judgement in the matter of Needles case and has decided that the offer of the right shares to non-resident shareholders does not in any way violate the provisions of the FERA Act 1973. The said stance was taken deliberately and wilfully to cover up the decision of the Apex court under the facade of misleading, false, deliberate statement altering the position in law to mislead the appropriate authority with a view to give them a wrong handle in the matter. It is curious that the authority of the Reserve Bank of India acted on the said misrepresentation without bothering to take into confidence the decision of the Needles case and such responsible authority of the Reserve Bank of India went on in a forbidden path in collusion with the designing interested person to give a go-buy to the law of the land so that for some oblique reasons some benefits can be given in favour of the interested person who want to reap the harvest of the same-one of the respondents namely Ashok Jain became an important officer bearer and director of the Reserve Bank of India. The entire conduct of the Reserve Bank of India at the relevant point of time appeared to have been vitiated by colourable exercise of powers in supersession of statutory functions which is also tinctured by conduct of impropriety on records as the same has been done in contravention of their own notification as aforesaid published in the Official Gazette. The said notification presumably saw the light of the day because of the opinion given by the then Solicitor General of India, namely, Sri S. N. Kakkar, The express violation of the provisions of Section 19 of the FERA Act by the conduct of Turner Morrison & Co., Ltd., have also been reiterated in the Division Bench Judgement presided over by Subhas Ch. Sen J in Appeal No. 681 of 1988 between the self-same party delivered on 5th July 1989. Even on behalf of H.I.T. Ltd., a controller of the Reserve Bank of India was alterted by a Memo dated 7.12.90 but till now this Court does not know, about the outcome of the same as to whether any corrective measures for redress was taken or not. This makes the Court feel that the murkey trail is still lingering on the records of the proceedings and the veil is pernaps required to be litted.

71. There was an appeal preferred in this Court in 1988 and the Division Bench comprising of B. C. Basak J and Satyabrata Mitra J by an order dated 9th August 1988 were pleased to pass an order in terms of prayer (a) of the petition with direction that the administrator would take over the charge immediately the Respondent No. 26 namely Shri Ashok Jain shall have nothing to do in the Committee of the Management. Being aggrieved by the same a SLP petition was taken out under

Article 136 of the Constitution of India in the Apex Court and the same was dismissed, as a result of which the order of the Division Bench dated 9th August 1988 as aforesaid stood confirmed.

this Court at this juncture wants to make a passing reference;o some directions given by a Division Bench of this Court, comprising of M. M. Dutt J and A. K. Sarkar J and in the said Judgement and Appeal No. 250, 251, 252, 253, 259, 255 of 1970 the Division Bench of this High Court held there was a need for adding some parties for the purpose of effective investigation with regard to the affairs of Turner Morrison & Co. Ltd. in the proceedings u/s 397 and 398 of the Companies Act. There has been further reference made about Section 237 which authorised the Central Government to make such investigation which would be conducted in the manner as prescribed in Section 237 to 251 of the Companies Act. The Central Government was directed to make the enquiry and therefore it can be seen that even as early as the period commencing from 1969 onwards upto the period when the judgement was delivered the feeling of the Court was in favour of thorough investigation about the affairs relating to the Company. this Court does not know as to whether such enquiry was conducted as prescribed as per the division Bench of this Court and on the contrary it finds that legacy of improper handling of the Company''s affairs by different heads from time to time continued with unabated Zeal. Even as per objective and purpose of the Companies Act this Court while dealing with Company matters is to see to it that there is no recurrence of the same and the process of law should be infused in the affairs of the Company. It is further strange to note that the same is being repeated and even shareholdings of a foreign Company were attempted to be sold on the plea of purported reference to the deemed dividend. There is nothing on record to show that dividend money has been paid to the person having entitlement to receive the same and again by recourse to the self same process by reference to deemed dividend the shares belonging to the shareholders are being attempted to be forfeited. Thereafter, the private beneficiary of such illegal forfeiture want to reap the harvest by striking off the names of the shareholders from the registers, and Reserve Bank Authority merrily continue to be accomplices to the said game. After that, attempts have been made to -project before this Court that certificate proceedings have been issued and the contesting respondent want to (sic) on the tune of legal niceties that the appellants are required to be non-suited in the proceeding as they have ceased to be shareholders. this Court is made to watch the enactment of scenario of unjust act at their heights, for which the petitioner may be knocked off from the arena of legal combat to have a fair deal. Laws are not meant to come in aid of absolute unjustified act and if necessary the hands of Court are long enough to be stretched so that they can set at naught the wrongs done to a party under the coverage of pleas of legal process. The same also called for thorough investigation by the investigating agency to unveil the hidden heaps of improper actions of the persons responsible together with collusion of the agencies of the fiscal institutions including of their apex body

by the Reserve Bank of India and their concerned officers, any such investigation may make revealations and records should be made straight to undo the wrongs perpetrated on records with a view to erase (sic) colour of the same. this Court more it probes into the records and the volumes of the paper books it is puzzled to plungs into the abysmal pit to machinations hatched up by designing elements in connivance of the office bearers it shudders to behold at the behavioral pattern of the commercial institutions, and commercial civilization may pose a substantial danger and if the same is allowed continuously. The same is likely to have a broad-based dimension where institutions may be at stake and individuals to be considered as insignificant and not only corrective measures are required to be taken but persons found having involvement in matters should not be offered any shelter under the protective umbrella of law because of legal quibbles or arguments of niceties advanced on behalf of the respective parties. The saviours of the company are harbingers of welfare of the. Company "whether they are the appellants or the respondents should be taken into account and their activities are required to be scrutinised by investigating agencies and (sic) court cannot relegate itself to an investigating forum and therefore the relegation of investigation with regard to affaire of the Company should be made by way of thorough probe and this Court has no reason to side with either of the parties and whoever is found guilty should be brought to book.

72. this Court instead of giving into the details about the plethora of records and the conduct of the affairs of Turner Morrison & Co. Ltd. and the persons entrusted to look to manage of the affairs of H.I.T. Ltd. vis-�-vis the role played by RBI and its officials, the entire affairs are required to be probed by independent investigating agency instead of placement of reliance on the allegations made by either side and the records should be made clear. this Court takes with some reservations the versions of the respective parties as they are interested in the matter and they have personal axe to grind. The turner Morrison & Co. Ltd. and its subsidiaries are worth having substantial assets and with passage of time transactions may have taken place with regard to huge sums of money and it is required to be seen whether it has endured to the benefit of the Company as it is a jurisdic person in the eye of law. The object'' of the Companies Act also make it clear that the same wants to supervise the mismanagement of the Company and prevent deprivation of the interest of the shareholders. If NRIs are involved in the process then everyone should be slow and circumspect in giving a clean chit in favour of anybody so that foreign investment are not discouraged in the country. this Court also make ft abundantly clear that it does not lean in favour of appellants or respondents nor ft tends to presume that NRIs are beyond question: When subject of investigation is broached it tends to include within ambit of investigation that the conduct of affairs of the appellant Company as well as the respondent Company and the persons involved having their role to play on the affairs leading to the entire conspectus of controversy including the role played by Reserve Bank of India and its office bearers.

73. It appears that after the agreement dated 17.5.1976 was entered into and value of 12% shares of HIT was determined at Rs. 2 lacs per share of Rs. 1000/- each, subject to the final determination by the auditors. After detection of some fraud being practised upon HIT then the situation was attempted to be retrieved at the instance of mediation of B. N. Garg, and it was agreed that some formula would be devised to offset the effects of the same. There was a proposal given that a Bank Guarantee would be issued by the bankers of Shri Ashok Jain namely Handless Bank situate at Zurich for payment of 11.20 million US dollars which would be equivalent to Rs. 10.8 crores towards consideration of 12% shares in Turner Morrison & Co. Ltd., within the stipulated period of 31.3.1985. The understanding so arrived at was reduced in writing. It was also agreed that the both Mr. Hoon and Mr. Ashok Jain fly to Zurich where the Bank Guarantee for the said amount would be handed over, but mysteriously however Mr. Jain was alleged not to have honored the commitment on a purported pretext of his illness and in fact the meeting scheduled at the Bank at Zurich was cancelled. Thereafter, it appears that Mr. Jain was not in a mood to follow up his promise and as a sequence of the same a complaint was lodged with the Company Law Board in Delhi and an order was passed on 11.10.1985, stating interalia That the business of Messrs. Turner Morrison & Co. Ltd., having its office at 6. Lyons Range, Calcutta, is being conducted with an intent to defraud its members, creditors and other persons for a fraudulent purpose". Thereafter, in view of the pendency of the aforesaid proceeding before the Company Law Board for a long period a company Petition u/s 397, 398 and 155 etc of the Companies Act were sought to be filed in the High Court at Calcutta, giving rise to the proceedings being CP No. 33 off 1988. In the said proceedings on a contested hearing a judgement was passed by Manjula Bose J on 4th August, 1988 the extracts of which were referred to in earlier portion of this order, wherein it has been held that the directors of Turner Morrison & Co., Ltd., are interlopers and took control of the Company by contravention of the FERA regulations and by various manipulations as a result of which the Board off the Company was superseded by appointment of a chairman of the said Board. Thereafter three appeals were taken out and the Division Bench presided over by B. C. Basak J ordered summary removal of Shri Ashok Jain from Turner Morrison & Co. Ltd. and its subsidiary Companies. A SLP was moved to Hon''ble Supreme Court which was dismissed after hearing and in terms of the directions given therein a Division Bench was constituted of (sic) Sen and B. H. Banerjee JJ who took up the matter and the case was remitted back to the trial court o n important observation made therein that dilution of the shares in favour of nominee of Shri Ashok Jain was illegal because the directors chose a forbidden path in the issuance of the shares. The observations were in parity with the ratio laid down by the Supreme Court where Supreme Court in Needless case had made the position of law clear being bereft of any ambiguity. In the meantime serious allegations started pouring in the connected proceedings opening filling of series of documents and various types of allegations which constituted the bulk of the volume of papers which are in these proceedings numbering about dozen of

voluminous paper-books and the Court is landed in the midst of such heaps of papers which are carefully required to be gone into as it has also not been possible for the respective lawyers of the parties to refer to them distinctly and separately. Though efforts were made to advance arguments by the Ld. lawyers appearing on behalf of the parties on points of law but the crux of controversy may lie hidden in the heaps of facts alleged which are required to be discerned. this Court has taken the pains of going through them distinctly and carefully and that is why some considerable rime had been consumed not only to salvage the facts but to give anxious considerations to the same. this Court cannot be relieved of its burden unless it makes a serious endeavour with dispassionate views to go through the records to hear if the records can speak. this Court is of the view that more reliance should be placed on records and factual narration based on previous Judgments in multiplicity of proceedings rather than lending its ears to the partisan contestants in the game of commercial competition to gain control over the management of the company. The corporate World also appears to have a veil and the said veil is required to be lifted to see to the process of functioning of the same by Agents. Managerial staff and Controllers of Management because their maneuvering may subvert the process of functioning of such important Companies like the present one who have really yearly huge turnover.

In the present case the allegations of the petitioner Company relate to fraud and illegality and an application filed by the petitioner maes a mention of the names of the persons practising fraud and illegality some of the respondents were the directors of the respondent Company and the applications have been made by the petitioner Company for its own (sic) alleging that actions of the respondent were detrimental to the Company. The law does not require that before filing an application u/s 155 of the Companies Act, the petitioner is to approach the relevant company for rectification of its Register. Even if a company enters, the names of a transferee of shares on prima facie evidence of same, the entry of the same of the transferee can be challenged in an application u/s 155 on the ground of illegality and fraud. The scope of Section 155 of the Companies Act is wide and generous for doing justice against illegality and fraudulent actions. The party should be given full opportunity to take all necessary steps to prove their respective facts and objections by proving documents and by examining their witnesses. For the purpose of correct decisions the Court allowed all the parties to produce evidence by examining witnesses or otherwise in terms of the provisions of CPC. Refer volume 50,. Company Cases 1980, page 296 Turner Morrison & Co. Ltd. vs. Shalimar Tar Products Ld. & Ors.

74. That during the process of this litigation two appeals being Appeal No. 682 of 1988 and Appeal No. 719 of 1988 between Turner Morrison & Co. Ltd. vs. HIT Ltd. came up for contested hearings along with Company Application No. 288 of 1988 and Company Petition No. 33 of 1988 and by a composite judgment dated 5.7.89 the Division Bench comprising of S. C. Sen and B. P. Banerjee JJ disposed of the same.

The said order was passed by placement of reliance on a legal maxim that fraud unravels all if the signatures of Mr. Hoon to the various documents were fraudulently obtained, then of course, Mr. Hoon will have a case to argue. But that is a finding of fact which cannot be made at this stage. An allegations of facts have been made. That has to be examined on affidavit and also on documents and possibly, even on evidence. The aforesaid observations is a genesis of the controversy leading rise to a row as to whether the respondent should be allowed to lead evidence on the points as the litigant'' seems to have become wiser because of the salient observations made in the aforesaid order. There were spate of applications filed by the respondents for trial of the matter on evidence. According to the version of the present appellant the hearing of the main application after the filing of the affidavit continued for a considerable period and the same was concluded on 9th March 90 before Umesh Ch. Banerjee J, as the Ld. Judge reserved his judgment. During the pendency of the main application u/s 397 and 398, it was submitted on behalf of H.I.T. Ltd. that the main application be tried on evidence and took out summons on 4.4.90 for order. The said application was dismissed and appeal was taken out which also stood dismissed, but not on merits. On 27.6.90 chairman HIT appeared in person and filed another application for trial on evidence which was again dismissed on 31.7.90. On 4.12.90 an injunction application was taken out by HIT for restraining the Turner Morrison fit Co. from disposing of the assets of the company, and an interim order of injunction in terms of prayer (a) was passed."

75. It appeared from the perusal of the order dated 26.8.1992 by Padma Khastgir J in C.P. No. 33 of 1988 and it has been mentioned therein that on 25.1.91 the Ld. Judge namely U.C. Banerjee J released the matter from the list. After release of the matter the same was mentioned for being listed for hearing. The matter being CP No. 33 of 1988 appeared in the list and S. C. Sen J gave directions for filing affidavits. There after, the matter appeared on 25.3.91 and the Court directed the matter to appear in the list. The regular Court having jurisdiction in respect of Company matters gave hearing and by an order dt. 11.12.1991 the Court directed the main application to be tried on evidence. Thereafter, one of the parties to the petition made a dispute that U.C. Banerjee J had not released the matter from the list and as such the regular Court could not hear the matter, when the same was pending before U. C. Banerjee J and the said contention was vehemently opposed by Mr. Hoon Padma Khastagir J in her order dated 26.8.92 in the same later had the occasion to deal with such controversy and the observation made therein are quoted as follows:-

In view of such controversy raised by and between the parties this Court called for and inspect the original Minute Book of the Court which recorded the facts that the C.P. No. 3 of 1988 was released from the list of Mr. Justice U. C. Banerjee. In view of serious allegations, forgeries, fraud, defalcation of account having been made in the petition and in view of the fact when Mr. Hoon has contended'' that his signatures purported to have been recorded as his signatures in various records including the

statutory books of the (sic) were not his signatures this Court thought that such allegation could not be determined by way of affidavit evidence. Under the circumstances, this Court directed the matter to be tried on evidence.

At the concluding portion of the order it was noted the submission of Mr. Amiyanath Bose, the Ld. Lawyer on behalf of the contesting respondents in this appeal at the material point of time did not dispute the power and jurisdiction of that Court namely the Court of Padma Khastgir J to hear the matter on oral evidence and not only to dispose off the application upon affidavit evidence only. The order dated 26.8.92 seems to have clinched the issue with regard to controversy about continuation of jurisdiction of U.C. Banerjee J and the minute of the Court records will provide the clue of material to clear the cloud of controversy. Then in the self-same order a dilation has been made and the Ld. Judge has fallen back upon subsequent facts namely substance of the order passed by U.C. Banerjee J in April 1992. It becomes irreconcilable when the Ld. Judge refer to the Minutes of the editing of the Minute Book of the Court which recorded the facts that is company petition No. 33 of 1988 was released from the List of U.C. Banerjee J on 25.1.1991 then it is not understood that how does the Ld Judge U.C. Banerjee J could pass an order in the month of April 1992 clarifying his order passed on January 1992 being duly minuted. If this Court is to go by the recording made in the original Minute Book then at a subsequent stage from the month of January 1992 the self-same Ld. Judge has become functus officio. There is a categorical discrepancy in the records of the Minute book containing reference of the entire matter to be released and subsequent assumption of jurisdiction by U.C. Banerjee J at a later date in the month of April 1992 any order passed subsequent to 25th January 1991 becomes no nest. If the assumption of jurisdiction by U.C. Banerjee J at a subsequent period becomes no nest then the same could not have been brought within the pale of significance of the nomenclature subsequent event as understood under the provisions, of Order 47 Rule 1 of the Code of Civil Procedure. There was already an appeal taken out from the order date 11.12.91 passed by Padma Khastgir J in the case of HIT Ltd. vs. Turner Morrison & Co., Ltd. and in the Judgment passed in appeal from the said order dt. 28.4.02, there was reference about the matter being released by U.C. Banerjee J without making proper disposal of the pending application., Even the allegations made by HIT which are specific in nature and cannot be termed as vague After consideration of the submission of the respective parties the application under Order 19 Rule 20 stood allowed and the order dt. 11.12.91 was confirmed. Against the same, the Hon''ble Supreme Court was moved and even in the SLP petition; the self-same pleas of retention of jurisdiction by U.C. Banerjee J were canvassed and it has been sought to be pleaded that the said retention of jurisdiction by U.C. Banerjee J stood as stumbling block of assumption of jurisdiction by Padma Khatagir J and in spite of such pleadings taken therein the connected SLP petition was caused to be dismissed as withdrawn with a rider clause superadded there to that the petitioner in the SLP can seek clarification from the Division Bench of the High Court

at Calcutta Curiously enough by way of a positive departure from the directive of the Supreme Court it has been pleaded in the Review Application that the respondents have been given leave to approach the single bench. Such misleading pleading cannot but have misled the Ld. single Judge and comparison of the pleadings taken in SLP and in the Review Application before the Ld. Single Judge would manifestly indicate that the same plea of continuation of the assumption of jurisdiction by U.C. Banerjee J has been taken. If the self same pleading is taken in the SLP petition and which was invited to be dismissed then principle of estoppel by pleadings as covered by Section 115 of the evidence Act. will come into play. After dismissal of tile SLP petition it is not open to the respondents to come with the same pleading before another forum for review of a subordinate court. The scrutiny of the narration of facts as made in the order dt. 26.8.92 seems to be tinctured by misleading suggestions flowing from pleadings which is not likely to be not non-deliberate. It is necessary to make a passing reference which will be adverted at a later point of time as it appears that order dt. 11.12.91 is the subject matter of appeal before the Division Bench presided over by Shamsuddin J which is in turn sought to be taken out to the Supreme Court by way of SLP. Therefore, the original order dt. 11.12.91 is a subject matter of an appeal which is exhausted and that looms large a question that if an appeal is preferred and contested whether the original order dt. 11.12.91 shall be open to review in terms of the embargo under the provisions of Order 47 Rule 1 Sub Rule 2 of the Code of civil Procedure.

Order 47 Rule 1 Sub-rule 2 of the CPC envisages fulfillment of a pre-requisite condition to apply for a review of judgment if a party is not appealing from the said order. In the case of Chajjuram vs. Neki reported in AIR 1922 Privy Council page 112 where the Judicial Committee held that Order 47 Rule 1 of the CPC must be ready as in itself definitive in limit within which a decree or order is permitted and "any other sufficient reason" means a sufficient reason the ground at least analogous to be specified in the Rule. It is not out of context to be reminded of the celebrated observation of Rankin J that the fact as found in the application must constitute within the Rule "Sufficient Reason". The connotation of the expression "for any other sufficient reason" as contemplated in Order 47 Rule 1 means the reason thereof must be for review which is similar in nature but does not come within the first two reasons mentioned in Rule 1 of Order 47.

In the case of Binay Krishna vs. Suraj Bali Misra reported in AIR 1963 Calcutta Page 100 a Division Bench of this High Court has observed that the phrase "EJUSDEM GENERIS" is more restricted than the word "ANALOGOUS". In the case of Administrator General. West Bengal reported in AIR 1970 Calcutta Page 231 the expression "for any other sufficient reason" as contemplated under Order 47 Rule 1(c) of the CPC has been meant to be a reason sufficient on ground at least analogous to that previously specified in the said Rule. Here in the instant case the party has appealed before the Division Bench and the Division Bench by the order as aforesaid has dismissed the appeal on both the ground of maintainability and

merits. If the appeal is taken out and it is allowed to be decided on a context then the party aggrieved by the original order has preferred the appeal and have lost in the appeal. As such the prerequisite condition of a party not appealing is not fulfilled and it becomes a serious question of doubt as to whether the said party has locus standi to maintain the application for review after having lost in the appeal. A plain reading of the aforesaid provision of Sub-rule 21 of Order 47 Rule 1 of the CPC does not seem to be satisfied and as such the same is having the character of no nest proceeding as the party concerned is not competent to maintain the review application. After having failed in the appeal the self-same appellant preferred a SLP petition before the Supreme Court of India is SLP Civil No. 667892 and by an order dated 24.7.92 the same was withdrawn with a leave to approach the Division Bench for clarification before the Division Bench on a misleading averment in the petition of review it has been submitted that the Hon''ble Supreme Court has permitted the appellant to approach the Ld. Single Bench to come with an application for review. The same is contrary to the order itself passed by the Supreme Court on 24.7.92, which is apparently vitiated by manifest abuse of process of law. It is not understandable as to how something can be written on the body of the application for review by way of salient averment of facts from records of proceedings but unfortunately however particularly the records Supreme Court order belie the averment. The said averment is at contradistinction to the order passed by the Supreme Court and as such neither the petitioners for review nor their authorised agent have approached the Ld. Court of Review and the Ld. Court was misdirected and misled to entertain the application for review. Had the court concerned been not given the impression the Court will be required to consider the question of maintainability of the review application and also the same would have been opened to be assailed on the pleas of the mischief of the doctrine of estoppel by election. There is palpable want of bonafide in pleading of the review application.

76. That apart from the question of focus standi of the petitioner to maintain the connected application for review and the question of maintainability flowing from the doctrine of estoppel by election this Court scrutinises the impugned order of review passed by Padma Khastagir J on 26.8.92 and a palpable reading of the same conveys an idea that it rotates from the observation of the Ld. Judge "however, in view of the subsequent development that is in view of the Judgment and order passed by U.C. Banerjee on 26.4.91 where the Ld. Judge clarified the order". This has obvious reference to the oblique suggestion on law as incorporated in Order 47 Rule 1(c) of CPC where the epithet is used "from discovery of new and important matters or evidence and the order dated 25.4.91 by U.C. Banerjee J has been attempted to be branded as subsequent events warranting an order of review. The placement of reliance made in the impugned order runs absolutely contrary to the positive finding recorded by Padrna Khastgir J in the order dt. 26.8.92 where the finding has been recorded to the following effect:-

In view of such controversy raised by and between the parties "this Court called for and inspected the original Minute Book of the Court which recorded the facts that the Company Petition No. 33 was released from the list of U.C. Banerjee J. The finding recorded as above in the order dated 26.8.92 is binding on the concerned Ld. Judge at a subsequent stage and the said finding operates squarely as it is a reproduction of the projection reflected from the recording made in the original Minute Book of the Court. The same was also on the footing of the judgment of She Division Bench which confirmed the trial on evidence duly passed by Shamsuddin. J. The matter was taken to Supreme Court by way of SLP petition as referred to above and the self-same pleadings of allegations about nit retention of jurisdiction of U.C. Banerjee J have been attempted to be raised in the pleadings of the Supreme Court and the same was withdrawn. As a result of which the premise formulated by the Division Bench that the CP No. 33 of 88 was released by U.C. Banerjee J on 25.1.91. If there is an apparent discrepancy with the recording contained in the Minute Book as found by Padma Khastgir J in the earlier order dt. 28.8.92 another Ld. Judge cannot read at variance the recording made in the original Minute Book which has already been read and found in one way by Padma Khastgir J. In the wake of that finding this Court wonders as to how U.C. Banerjee J sat in Judgment by setting aside the finding of Padma Khastgir J passed earlier in a co-equal jurisdiction. The order referred to in the subsequent order dt. 23.6.93 made a reference was on the footing about the clarification made by U.C. Banerjee J on 26.4.91 when the Ld. Judge admittedly had no jurisdiction to entertain the matter relating to company petition, this Court wonders that the clarification made on 25.4.91 in supersession of the findings recorded that the company Petition No. 33 was released. Accordingly, there is material to warrant an inference that the decision contained in toe order dt. 26.4.91 passed by U.C. Banerjee J in superseding of a finding recorded by the Ld. Judge and the decision as aforesaid of U.C. Banerjee J by assumption of exercise of jurisdiction. In this context a reference can be made by a Division Bench Judgment of this High Court in the case of pleco Electronics & Electricals Ltd. vs. Smt. Triweni Devi reported in AIR 1990 Calcutta 135 that if the subsequent bench is absolutely convinced that the decision of the coordinate jurisdiction is enormous then the subsequent (sic) Bench is not bound by the earlier decision. A reference may be made in this context to an earlier decision of Sir Ashutosh Mukherjee (sic) Chief Justice as his Lordship then was in the case of Virjivan Dass Moolji us. Biseswar. Lal Hargovind reported in AIR 1921 Calcutta page 169 wherein His Lordship had made it clear that "the position is indefeasible on principle that although a judge may feel absolutely convinced that the decision produced before him is erroneous in law, he is bound to decide against his own opinion. To take such a view is to hold that the Judge may be reduced to an automation by the production of the earlier judgment.

77. Accordingly, the order of U.C. Banerjee J on 26.4.91 cannot be construed by the Ld. Judge in the impugned order allowing the review application as subsequent event. A finding recorded by the self-same Ld. Judge by way of reproduction of the

entire contained in the Minute Book and the same cannot be superseded by an order by another Ld. Judge making clarification of an unambiguous entry in the Minute Book by adding something which is not there. If the Ld. Judge concerned namely Padma Khastgir J would have been required to fall back upon the clarification made by U.C. Banerjee J then it is incumbent to record that the entries contained in the original Minute Book are apparently erroneous. There is no finding that entries in the original Minute Book there was error apparent on the record or the same is required to be overlooked in view of other sufficient reasons. The user of the expression "any other sufficient reason being preceded by the proposition or to that of mistake or error apparent on the fate of records. In the said context, the other sufficient reason" is to be read as in consonance with the principle of EJUSDEM GENERIS

78. The entire foundation of the order impugned allowing the application for review is by way of misplaced reliance reference about sufficient reason. Unfortunately, however, the matter has not been approached from the instant angles by the Counsels appearing for the respective parties ka-S they have proceeded at tangential direction. If after preference of the appeal and during the pendency of the same the appeal is allowed, to be deposed of on contest then the review application seeking redress of the self-same order will become infructuous. A reference may be made in the case of Messrs. Thungbadra Industries Ltd. vs. Government of Andhra Pradesh reported in AIR 1964 SC page 1372. The question of (sic) arise disposal of the appeal by the court of appeal.

The (sic) counsel of the respondent Mr. (sic) has tried (sic) before this Court that order of Padma Khastgir J dt. 11.12.91 was a overlooking the finding in categorical terms by the self-same Judge in the order dt. 26.8.92. By an order passed on 25.1.91 U.C. Banerjee J on 25.1.91 that the Company Petition No. 33 was released from his desk, Padrna Khastgir J after being satisfied about the endorsement in the Minutes of the Court proceedings on original production of the same had passed an order of trial on evidence. The same was confirmed by the Division Bench and row of controversy in spite of being raged in the SLP petition, the same was abandoned. Self-same plea cannot be resorted to contend that the order allowing review application on 11.12.91 is a nullity, as this Court has held that the order passed by U.C. Banerjee J on 25.4.91 is without jurisdiction and is erroneous in law. In the wake of positive opinion formed by this Court that order dt. 25.4.91 does not come with the pale of the ambit of subsequent events and the question of release by U. C. Banerjee J on 25.4.91 is not open to be as assailed at such a belated stage. If there is no material an operative valid order in law that subsequent to 25.1.91 the matter was released then the question of nullity with regard to assumption of jurisdiction of Padma Khastgir J in the order dt. 9.12.91 does not and cannot arise. Mr. Nag, however, referred to the caten of decisions to contend that the order dt. 11.12.91 is a nullity over looking the salient aspects of the records of the proceedings and on a misconceived basis, number of decisions have been sighted by Mr. Nag reported in

AIR 1954 SC page 340, AIR 1962 page 199, AIR 1982 SC page 823, 1989 volume II CLJ page 433, 1994 volume II CLJ page 5, AIR 1974 Cal. page 296, 1961 Vol. III All England Law Reports page 1169, AIR 1959 Calcutta page 464 and AIR 1976 Calcutta page 110. In the wake of citation of the said decisions Mr. Chatterjee referred to numerous decision including that of AIR 1959 Cal. page 464 and also adumbrated on to the proposition that of AIR 1959 Cal. page 464 and also adumbrated on to the proposition that jurisdiction is a nullity and the same can be challenged in execution or in collateral proceedings even much debate has been made by the respective counsels by radiating their lusture of learning''s with regard to a well known proposition that nullity is not branded on the forehead and it does not remain nullity for ever. this Court expresses its appreciation for adumbration of the proposition of law on a theoretical basis but unfortunately here the advancement of argument is denuded of any foundation as the order of U.C. Banerjee J dt. 25.4.91 does not and cannot be branded as subsequent event. Therefore, the arguments of the respective Ld. counsels suffer from lack lusture of misplaced significance.

79. Therefore, there is a substance in the contention of Mr. Nag, the Ld. Counsel appearing on behalf of TNC Ltd. that Khastgir J had no jurisdiction to pass the order for trial on evidence on 11.12.91 in the main matter. It is significant to make a passing reference that as it appear before the Division Bench presided over by Shamsuddin J against the order passed on 11.12.1991 by Padma Khastgir J the question of usurpation of jurisdiction by the said judge does not appear to have been seriously mooted before the Division Bench. The same ground though was available to the respondent having not been taken may likely to attract the mischief of constructive resjudicata as provided under explanation IV to section 11 of the Code of Civil Procedure. The self-same point was taken in the pleading of the SLP petition and thereafter the same was withdrawn, resulting in dismissal of the SLP petition. The pleadings taken in paragraph 26 of the petition for review apparently do, not appear to be correct as Supreme Court did not grant any leave to approach the Single Judge. In absence of anything on record from the orders passed from time to time it does not appear that by any judicial order review was kept open unless the respondent can come of its own under the four comers under Order 47 of CPC therefore, this Court does not find any merit either in from of on substance with'' regard to the sustainability of the application for review and the order allowing review passed on 26.8.1992 is liable to be set aside.

80. In the context of the findings recorded by this Court that the review application has no merit either in form or in substance and the order dated 26.8.1992 passed by Khastgir J. is liable to be set aside because of the missing link between the parity of nexus with regard to the earlier portion of the findings based on recording made in Minutes Book to the effect that Company Petition No. 33 was released by U. C. Banerjee J. on 25th January 1991 there has been further finding recorded in the instant order that the order dated 26.4.91 by U.C. Banerjee J, is no nest in the eye of law. The subsequent order passed by Khastgir J. on 23rd June 1993 is alleged to have

been delivered by the said Judge but another (sic) same. This may be possible as per provisions of Order 20 Rule 2 of CPC but there are serious allegations about the genuineness of the same. This, however, relates to the domain of the scrutiny of an administrative competence of the head of the institution namely the Learned Chief Justice of this Court but not for this forum of appeal which is conferred with a limited Jurisdiction. However, this Court has not dealt with the authorticity of the merits of the allegations which may be dealt with at any appropriate point of time by the competent authority. But a cursory glance of the impugned order dated 23rd January, 1991 amply reveals that the same has been passed in a perfunctory Manner. this Court was at a loss to salvage facts from the pleathora of records as delineated in voluminous paper books spread over a dozen of volumes. Even the affidavits relating to the main Company petition No. 33 of 88 are enormous in nature. There has been cryptic reference in the impugned order about the alleged elaborate charts submitted by Mr. R. C. Nag with facts and figures, annexures and affidavits indicating about the knowledge of the petitioner of such increased share capital. The authenticity about the alleged knowledge of the petitioner namely HIT and its nominee was very much questioned for which Mr. Hoon was clamouring for trial on evidence. There would have been no occasion for a demand for trial on evidence if the same as reflected in the order would have been admitted by Mr. Hoon. The trial or controversy lingers on series of chapters of litigations for decades and it has been indicated in the preceding paragraph from records that increase of share capital was violative of the provisions if FERA Act at a subsequent stage even the said controversy is the offshoot of alteration and there were diverse allegations in galors about collusion and connivance, even the alteration of articles of association and Memorandum of the Company have been very much the upshot of the contravention of the existing provisions of the Articles of Association. The presents of the petitioner in the Board Meeting on the date mentioned have been very much under challenge and the signature of N. S. Hoon appearing therein were controverted as not being genuine. A cryptic comment that allegation of conspiracy having not been substantiated apparently appear to be arrived at without adverting to the records and in non consideration of the version of the nominee of HIT. There has been no reason indicated in the impugned order as to what has prompted the Learned Judge to arrive at such drastic conclusion without elucidation of proper reason and detailed mention from records. There was also purported reference to the second increase of the capital from an alleged admission about the increase of share capital. It has been dilated in detail that how approval of the Reserve Bank of India to such increase of capital was obtained in supersession of law, being contrary to records maintained by the RBI. this Court in the earlier portion of this order has dealt with in exhaustive details about the same and does not want to repeat it to avoid prolixity and repetition. The findings also appeared to be non speaking one and as such no credence can be given to the same. The impugned order has dealt with the question of limitation. The said point about limitation referred to in the impugned order stand contrary to the position of law as laid down in the earlier

chapters of the proceedings by the recorded judgments flowing from the judgment and order of Manjula Bose, J. and there from as observed in the earlier position of the instant order. Even there is some apparent discrepancy in the recital in the preamble of the impugned order where a reference was made that an appeal was preferred to the Division Bench presided over by the Hon''ble Chief Justice but in the earlier order dated 25th August, 1992 in the preamble it was mentioned that the appeal was taken to the Court presided over by Mr. Justice Shamsuddin Ahmed. The recitals about narration of facts of the litigations in the impugned order is also palpably wrong for which this Court is constrained to observe that the said order dated 23rd June 1993 is perfunctory in nature which records facts with blindfolded approach.

In view of the discussions made above, I find that the order dated 23rd June, 1993 passed by Khastgir J. is liable to be set aside.

81. In the context of discussion made it is not out of context to deal with a subsisting application filed in this appeal for replacement of the present administrator by Technocrat and for suspension of the Board of Directors of the respondents No. 1 by appointment of a Receiver to look after the affairs of Respondent No. 1 and its subsidiaries and for injunction restraining Respondent No. 1 from selling, inducting, transferring or encumbering any portion of the property belonging to the Respondent No. 1 In Course of hearing this Court has extended ad interim order of status quo relating to the question sale encumbrance or transfer of property of Respondent No. 1 and the same interim order is still now subsisting. The connected application is replete with numerous allegations and also of questionable conduct of Khaitan & co. the professional agent of the Respondent No. 1 It is alleged that the said khaitan & Co. has been the Solicitor and Advocate-on-Record of the Respondent No. 1 since the days of association of the company with one haridas Mundhra. In the earlier trial of litigations which went over to Supreme Court resulting in reported decision as referred to above in this order by the Appellate court. So far as the question of misconduct of the professional agency is concerned, the proper forum where the same may be agitated in detail that is before the Bar council. this Court while dealing with an appeal does not extend to go into the question of professional impropriety on she part of Khaitan & Co. but if the litigant feels that any professional agent is guilty of misconduct, such valley of allegations should be put before that forum as this Court is not in session of a lis in between any of the litigants and the professional agents. The leveling of allegations are not scrutinised over here but Just because they are leveled before this forum, the litigant who allege the same are not prevented from pursuing their remedies before the forum meant for resolution of such dispute in accordance with law. Even obviating the question of involvement of professional agency, namely Khaitan & Co. on whom main insinuations and allegations are made, this Court in view of liberty given to a litigant to proceed in accordance with the law does not intend to deal with the same any further. There are further series of allegations which even if done by the principal at the behest of

the agent, the same will be taken as an act of the principal. The allegations are centered round mainly of manifold acts of impropriety on the part of Respondent No. 1 namely to go in for dilution against the norms of legal causes. There are series allegations of collusion by the Management with the fiscal Authorities, namely I.T. Department and also the Reserve Bank of India, causing irreparable damage to the interest of appellant. It has been attempted to be hinted at that the original owners of the company have been kept out of management and possession for long in suppression of the order of the Division Bench of this Court passed by a Bench provided over by R.C. Basak J. There has been persistent attempts to curve exit door to the appellant from the proceedings of the company and it hah been alleged that the agents who have come to the company with the authorisation and blessings of the appellant, they are trying to perpetuate their control by dubious means as alleged. The sum and substance of the characterisation of the members of the management of the Respondent No. 1 is that of interpoler vis a vis the Turner Morrison & Co. Ltd. and its subsidiaries. this Court is in the proceeding portions of the judgment while dealing with other facets of the controversy has assumed an impression that their roll is not beneficial and conductive to the interest of the company. It has been alleged that some of the properties belonging to Turner Morrison Co. including a large floor space area which situated at Turner Morrison House in Lyons Range were transferred to Respondent No. 34 Kamal Narayan Sarogi, at a gross under value further allegations was that a flat belonging to TMC & Co. Ltd. at 10, Judges Court Road, Calcutta was transferred in favour of Respondent No. 35 for an apparent consideration of Rs. 1,10,000/- but the real valuation is far higher than this. Even there is mention of other properties belonging to Respondent No. 1 at Lucknow and Delhi have been caused to be transferred at an abnormal law price by way of clandestine dealing to the detriment of the Respondent No. 1 company. Instead of going for a detailed scrutiny about the authenticity of the said allegation including that of transfer of funds of substantial figures and on top of them the order passed by a Division Bench comprising of B.C. Basalt J and S. B. Mitra J dated 9.8.1988 with directions for the administrator to take over charge and It was observed that Respondent No. 26 Ashok Jain would have nothing to do in the Committee of Management. The said order shares on the fact of records of connected proceedings as such this Court can hardly have any hesitation to accede to the prayer of the pending petitions filed in the appeal by way of removal and/or suspensions of the Board of directors of Respondent No. 1 and they should be divested of any control of physical possessions over the affairs of the company namely, the Respondent No. 1 and its subsidiaries. The Court in order to put e stop to perpetuation of unjust act and is of further of the view that the affairs of the Respondent No. 1 and its subsidiaries should be managed by a dynamic young managerial expert and Technocrat who should be selected by the larger Bench on the basis of an application for Interim appointment in consultation with the expert-body of Management of Institute of repute. It is needless to mention that the Court should be absolutely sure about the impartiality of the persons so appointed

who can be put in charge on trial basis to the satisfaction of the concerned Court till such an order is made, there should be an order of interim injunction restraining the respondents from dealing with the properties and assets of the Respondent No. 1 company and its subsidiaries in any way what so ever. The application thus stands disposed of in terms of the above directions.

82. The undersigned has been handed over a draft of the copy of the judgment and order passed by my revered brother Batabyal J. which is required to be gone through on the vortex of huge records piled up in the proceedings and there are incorporation of the same in voluminous paper books in about a dozen volumes. this Court had to apply its mind and introspection not only on the records of the proceedings but has to go through the reported judgments between the self-same parties which were spread over for decades. The judgments referred to in the interest order have come out in different Law Journals and also some of the unreported decisions. this Court has carefully travelled through the entire course of litigations leading to the present controversy and have been after due exercise given Its considered opinion after anxious consideration of the same. this Court had also to think about the matter by way of in depth analysis and has found out many facets of ramifications which are required to be unfurled for the ends of justice. this Court has been emboldened enough to prescribe ameliorative measures within the limitations of its constraint during the continuance of interregnum so that it may not be relegated to the position of a pathetic sight-seer as there is compulsion for the conscience of the court to feed hunger of justice. this Court is aware that in the event of matter being decided by the (sic) bench and superior Court the exercise made in the present judgment may be of some useful assistance which is done in an unbiased manner. this Court is not in a position to indicate its value judgment with regard to the contesting contenders of the management of Turner Morrison fit Co. Ltd. The said consideration has consumed the time which will be illustrated from the catena of decisions mentioned here which have been referred to earlier and also the other decisions referred to in the instant judgment, the list of which is catalogued hereunder.

List of Judgments

1. Judgment dt. 11.11.1988 by P. B. Mukherjee J. in Suit No. 2005 of 1965 Turner Morrison & Co., Ltd. vs. Hungerford Investment Trust Ltd reported in CLJ 1969 page 97

2. Judgment dt. 14.7.69 by Masud J in Suit No. 600 of 1981 Haridas Mundhra vs. Hungerford Investment & Ors. unreported.

3. Judgment dt. 9.3.72 by K, S. Hegde and K. K. Mathew JJ in Civil Appeal No. 1223 of 1972- Turner Morrison & Co. vs. H.I.T. Trust Ltd.-reported in AIR 1972 SC 1331.

4. Judgment dt. 9.3.72 by K. S. Hegde & K. K. Mathew in Civil Appeal No. 488 of 1971 - H.I.T. Ltd. vs. Haridas Mundhra -. reported in AIR 72 SC 1826.

5. Judgment dt. 21.12.1978 by R. Bhattacharjee J in CP. No. 204 to 206 - of 1973 - Turner Morrison & Co. vs. Shalimar Tar Products - reported in Company Case vol. 50 page 296.

6. Judgment dt. 21.5.1981 by Murari Mohan Dutt and A. K. Sarkar JJ in Appeal No. 250 to 259 of 1970 - Hungerford Investment Trust vs. Turner Morrison unreported.

7. Judgment dt 1.8.1988 by Manjula Bose J - in C.P. No. 33 of 1988 - H.I.T. vs, Turner Morison & Co. Ltd. & Ors. -unreported.

8. Judgment dt. 9.8.1988 by basak & S. B. Mitra JJ in Appeal No. 681 & 682 of 1988 Turner Morrison vs. H.I.T. Trust -unreported.

9. SLP in respect of the above order rejected on 10.8.1988 by Supreme Court.

10. Judgment dt. 5.7.89 by S. C. Sen & B. P. Banerjee JJ in Appeal No. 681 and 682 of 1988 - Turner Morrison & Co. vs. Hungerford Investment Trust - unreported.

11. Various orders of U.C. Banerjee J in respect of application for trial on evidence by H.I.T. vs. Turner Morrison - unreported.

12. Order dt. 25.1.91 by U.C. Banerjee J releasing CP No. 33 of 1988.

13. Order dt. 26.4.91 by U.C. Banerjee J again releasing CP No. 33 of 1988

14. (sic) dt. 11.12.91 by Padma Khastgir J for trial on evidence (sic) of HIT vs. TMC.

15. Order dt 28.4.1992 by Shamsuddin & S. P. Rajkhowa JJ In C.P. N. 33 of 1988 - Appeal No. O of 1991 TMC vs. HIT -unreported.

16. Order in SLP dt. 15.5.92 by V. Ramaswamy & B. Sahai, Yogeshwar Dayal JJ - TMC vs. HIT staying the trial on evidence.

17. Order dt. 24.7.1992 by S. Ranganathan, v. Ramaswamy & B. P. Jeevan Reddy JJ in TMC vs. HIT - dismissing the SLP as withdrawn.

18. Order dt. august 26 1992 by Padma Khastagir J TMC vs. HIT in CP No. 33 of 1988 allowing the review petition.

19. Judgment dt. 10.2.93 by M. F. Saldhana J in Appeal No. 111 of 1983 T.M.C vs. K. N. Tapuriah & Ors. - reported in Criminal Law Journal 1983 page 3384.

20. Judgment dt. 23.6.93 by Padma Khastgir J, in C.P. No. 33 of 1988 - HIT vs. TMC- unreported.

21. Order dt. 28.10.93 by Mukul Gopal Mukherjee & G. K. Basak JJ. Staying the operations of judgment of Padma Khastgir J. in C.P. No. 33 of 1988.

22. Judgment dt. 22.2.94 by Hazari J in C.P. No. 274 of 1967 HIT vs. TMC.

23. Opinion of solicitor General & K. Kakkar dt 8.8.78.

24. Notification in respect of the above opinion dt. 11.7.79 by RBI through Gazette.

25. Sarma Sarkar commission-application by K. A. Laxman Prabhu dt. 16.12.77.

this Court feels constrained to differ with the Judgment delivered by the Ld. Borther Batabyal, J. open the score that it could not agree with the approach taken by the Ld. Judge while dealing with the question of nullity of the order passed by Khastgir J. on 11.12.91 as the Ld. Judge has found in a later order that the subsequent clarification made by U.C. Banerjee J. on 25.4.91 is a subsequent event bringing into the purview of Order 47 Rule 1 of the Code of Civil Procedure, this Court by elaborate reasons has held that order of 25.4.91 passed by U. C. Banerjee J. does not come within the ambit of the subsequent events and as such this Court is persuaded to hold that the order allowing review application passed by Khastgir J. is liable to be set aside. this Court has further held that for the reasons as enumerated the application for review has been vitiated by the mischief flowing from Explanation IV to Section 11 of the CPC and also because of the doctrine of estoppel by election. It has been further opined that the respondent cannot maintain the review application in absence of fulfillment of pre-requisite condition of Order 47 Rule 1 & 2 of the Code of Civil Procedure. Therefore, altogether on a different set of reasons and not on the question of nullity for assumption or usurpation of jurisdiction by the Court in seisin of the matter, allowing trial on evidence it has set aside the impugned order allowing the application for review.

this Court has been constrained to differ with the Judgment as according to its considered opinion the entire nexus of collusion between the TRO an Agent of Income tax Department and the persons connected with Turner Morrison & Co. Ltd. and the entire operation of RBI leading to the issuance of certificate proceedings are required to be thoroughly probed by independent investigating agency like CBI. this Court is constrained to differ with the judgment and order of the Ld. Brother Batabyal J. as the same has not dealt with two pending applications filed in the instant appeal namely, one by Turner Morrison & Co. Ltd. for stay of the instant appeal and dismissal of C.P. No. 33 of 1988 and another application at the instance of Hungerford Investment Trust Ltd. for replacement of the present administrator an injunction from selling, transferring and encumbering any portion of the property and assets belonging to Respondent No. 1 and the said pending application in the instant appeal are required to be disposed of as while disposing of the appeal (he said application cannot be kept pending. this Court is further constrained to differ in view of penultimate observation made by the Ld. Brother Batabyal J. to the effect that "it will be a risky adventure for this Court to go into the question of locus standi of the appellant company to file this appeal on the ground that all the shares have been sold out by the Tax Recovery Officer. this Court refuses to go into that aspect of the question". this Court is of positive view that by keeping alive the question (sic) standi of the appellant company to file the appeal, the appellant question cannot be decided. The question of locus standi having been

raised in the appeal it is incumbent and within the ambit of its power to decide that question even as a court of limited jurisdiction, as otherwise the question is being left open will percolate into the domain of the foundation of the appeal. Accordingly, on this score also; this Court is constrained to differ with the judgment and order delivered by the Ld. Brother Batabyal J.

The interim orders already on record of this proceeding will continue till the reference is disposed of.

Accordingly, this Court holds that the application for permanent stay of the connected appeal and rejection of C.P. No. 33 of 88 is liable to be rejected. Therefore, the appellant has locus standi not only to proceed with the instant appeal but to maintain C.P. No. 33 of 88.

Therefore, this Court does not find any merit either in the form or on substance with regard to the sustainability of the application for review and the order allowing review passed on 26.8.92. is liable to be set aside.

I find that the order dated 23.6.93 passed by Khastgir, J is liable to be set aside. The subsisting application filed in this appeal for replacement of the present Administrator by a technocrat and for suspension of the Board of Directors of the Respondent No. 1 and its subsidiaries and for injunction restraining the Respondent No. 1 from selling, inducting, transferring or encumbering any portion of the property belonging to the Respondent No. 1. There shall be an order of interim injunction restraining the respondents from dealing with the properties and assets of the Respondent No. 1 company and its subsidiaries in any manner whatsoever. The said application thus stands disposed of in terms of the above directions.

In view of the recording of differences in opinion with my learned Brother Batabyal, J. a reference is made of the matter under Clause 36 of the Letters Patent.