

(1994) 09 BOM CK 0039

In the Bombay High Court

Case No : Company Appeal No. 5 of 1994

Kinetic Engineering Limited

APPELLANT

Vs

Unit Trust of India and another

RESPONDENT

Date of Decision : 16-09-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Companies Act, 1930 — Section 38
Companies Act, 1956 — Section 10F, 111, 155, 82
Constitution of India, 1950 — Article 52
Monopolies and Restrictive Trade Practices Act, 1969 — Section 55
Securities and Exchange Board of India Act, 1992 — Section 11, 30
Unit Trust of India Act, 1963 — Section 43
Unit Trust of India Regulations, 1963 — Regulation 2, 36

Citation : AIR 1995 Bom 194 : (1995) 3 BomCR 656 : (1995) 84 CompCas 910

Hon'ble Judges : I.G. Shah, J

Bench : Single Bench

Advocate : M.H. Seervai, Aspi Chinoy and Vivek Chande, instructed by M/s. Kanga and Co, for the Appellant; R.A. Kapadia, Janak Dwarkadas and Ms. Geeta Rajda, instructed by y Mona Bhide and Mrs. and Mrs. R.V. Thakkar and D.V. Joshi, instructed by y M/s. Little and Co., for the Respondent

Judgement

1. The Appellants who are a public limited company and listed on the Stock Exchange, Bombay, have referred this Appeal against the order passed by the Company Law Board (hereinafter referred to as "the CL.B") in Company Petition Nos. 10 and 11/SC/CLB/VR/92, 1 to 92 of 1993, 94 to 103, 106 to 129, 132, 143 to 154, 156 to 161, 167 to 173, 177 to 187, 190, 191, 195 and 196 of 1993 and 1 of 1994.

2. Briefly stated facts giving rise to the present Appeal are as under:

3. Unit Trust of India (hereinafter referred to as "the UTI") the Respondents, as Part of its market operations, bought from the market 99, 075 shares of the Appellant-Company over a period of time and lodged the instruments of transfer with the Appellants for registration the details of which are set out in Annexure

"A" to the order passed by the CLB. The said transfer applications were considered by the Board of Directors of the Appellants in its various meetings and the Board decided to refuse registration of transfers on the ground that the registration of these transfers in favour of the UTI which already holds about 4.9% shares in the Company of the Appellants would take a total holding of the UTI in the Appellant Company beyond 5% of the paid up capital of the Company carrying voting rights, which, according to the Board, is against the guidelines of the -- Government of India or Regulations of SEBI in respect of Mutual Funds, in accordance with the provisions of Section 22A(5)(b) of the Securities Contract (Regulation) Act, 1956. According to the Appellants, the UTI is a Mutual Fund and therefore, as per Regulation 41 read with Schedule VI of the SEBI Regulations of 1993, the guide-lines issued by the -- Government of India in 1992, Mutual Funds are not supposed to hold more than 5% of the shares carrying voting powers in any company. It appears that the Board of Directors of the Appellants relied on same cases of the Government on the Government guidelines of 1992 and later on the Regulation of 1993, and the opinion formed by the Board of Directors was on the basis that the UTI is a Mutual Fund and is prohibited from holding more than 5% of the shares of the Company. In one of the Resolutions, the Board also appears to have referred to a letter written by them to the SEBI authority seeking clarification from the SEBI whether UTI is the Mutual Fund and whether the provisions of the Regulations are applicable to the UTP. The Board of Directors of the Appellants also took into consideration the reply received from the SEBI wherein it was indicated that the Appellants may follow a procedure as per Securities Contract (Regulation) Act, 1956/Companies Act, while taking decision with regard to the registration of transfer. As required by Section 22A(4)(c) the Appellants made a reference to the CLB and forwarded copies of such reference to the transferor and transferee. In the said reference, after hearing the Appellants and the present Respondents i.e. the UTI who are the transferee, held that though UTI is a mutual fund is not governed by the guidelines issued by the Government of India in 1992 or the SEBI Regulations of 1993, and therefore, the refusal to register the transfer of equity shares in favour of the UTI was erroneous, and therefore, directed the Appellants to register the transfers in favour of the UTI in respect of all the shares within 10 days from the date of receipt of the order. The CLB, however, held that the decision of the Board refusing to register the transfer was not mala fide and was taken in good faith. Being aggrieved by the said order of the CLB the Appellants have come to this Court u/s 10F of the Companies Act. According to the Appellants, the Appeal raises the following amongst other questions of law, and the same is preferred on the grounds stated below which are without prejudice to each other :--

(i) Whether the Unit Trust of India established under the Unit Trust of India Act, 1965 consumes a mutual fund within the meaning of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1993?

(ii) Whether the investment restrictions mentioned in Schedule VI of the

foregoing regulations apply to the Unit Trust of India?

(iii) Whether the said restrictions apply to the unit scheme of the Respondent No. 1 (namely Unit Trust of India) and accordingly, the Respondent No. 1 under all its schemes could own more than five per cent of the Appellants' (or any company's) paid up capital carrying voting rights?

(iv) Whether Regulation 36 of the Unit Trust of India Regulations, 1963 (framed purportedly u/s 43 of the Unit Trust of India Act) is impliedly repealed by the Securities and Exchange Board of India Act, 1992 and the Securities and Exchange Board of India (Mutual Funds) Regulations, 1993 framed thereunder?

(v) Whether the Company Law Board ought to interfere with bona fide decision of the Board of Directors of a company that the transfer of shares covered by the subject reference contravened the provisions of any law, rules, regulations and guide-lines and/or administrative instructions and ought not to be registered?

(vi) Whether the Company Law Board u/s 22A of the Securities Contracts (Regulation) Act 1956 has an original and unlimited power to decide whether the grounds for refusal of registration stipulated in Section 22A(3) are satisfied, or whether the jurisdiction of the Company Law Board is similar to that conferred by Section 111 of the Companies Act and is restricted to deciding whether the Directors have acted bona fide and in good faith in forming the opinion that registration of the transfer should be refused on the grounds stipulated in Section 22A(3)?

(vii) Whether the Company Law Board can direct registration of a transfer even after holding that the Board of Directors had acted bona fide and in good faith?

Grounds of appeal raised shortly stated are that the C.L.B. failed to appreciate that the transfer is in contravention of the laws and rules/regulations/ guidelines administrative instructions and the board of directors of the appellants rightly refused to register the transfer; that the C.L.B. erred in holding that the Unit Trust was not a mutual fund which was governed by SEBI regulations and guidelines; that the C.L.B. failed to appreciate that the respondent No. 1 constituted a fund to raise monies through the sale of units to the public under one or other schemes and that the respondent No. 1 partakes the character of trust and the sponsor of it was Central Government, that the respondents specified all the essential of a mutual fund defined under Regulation 2(m), that the fact that the fund in case of respondents was not created under a trust deed but was created under a statute and that it is not managed by the Assets Management Company are indecisive that the CLB erred in holding that there is little community between the Unit Trust Act and SEBI Regulations, that the respondents carry on their business over and above the mutual fund and therefore is not within the preview of the regulations; that the CLB failed to appreciate that the regulation 36 of the UTI Regulation are impliedly repealed by SEBI Act, and the guidelines issued and the regulations framed under the said Act; that the CLB erred in interfering with the decision of the board of directors

of the appellants; having concluded that the decision taken was bona fide taken; that the CLB exceeded its jurisdiction; that the CLB failed to appreciate that the jurisdiction was similar to one u/s 111 of the Companies Act only.

4. The Respondents have also filed cross Objections and have mainly raised the question about the maintainability of the present Appeal against the order of the CLB.

5. On behalf of the Appellants the main contentions which are urged before me are :

Firstly, that the CLB, while considering the reference u/s 22A(4)(c) of the Securities Contracts (Regulation) Act, 1956, has no power to go into the question about the correctness or otherwise of the decision of the Board of Directors of the Appellants refusing the registration having concluded that the said decision was taken in good faith and was not mala fide. The second contention tried to be raised is that the CLB erred in concluding that though the UTI is a mutual fund is excluded from the operation of the guidelines of 1992 issued by the Central Government of SEBI Regulations issued in 1993. The Appellants have also very strenuously urged that the appeal of the Appellants is maintainable u/s 10F of the Companies Act. It is also very strenuously contended on behalf of the Appellants that the Cross-objections of the Respondents are in fact not maintainable.

6. Now, as far as the Cross-objections are concerned, even if it is assumed that the Cross-Objections are not maintainable, the Respondents can always substantiate the final decision of the CLB on any other ground available in law to them, and therefore, the said contention of the Appellants about the non-maintainability of the Cross-Objections of the Respondents does not have much substance.

7. On behalf of the respondents, the maintainability of the appeal itself is challenged and therefore it would be proper to decide the said question before I go to the merits of the appeal. On behalf of the respondent it is contended that the appeal is purported to have been filed u/s 10F of the Companies Act. According to the respondents right of appeal has to be restricted to the statute which gives right of an appeal. Under the Companies Act also the Company Law Board is assigned several functions under the Companies Act. The present impugned order is obviously an order passed u/s 22A of the Securities Contracts (Regulation) Act 1956 as amended in 1985 and therefore it is tried to be contended though Section 10F provides that any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order. Apparently would cover the impugned order being an order passed by the Company Law Board but as a right of appeal has to be restricted to the statute which gives the right of appeal, the impugned order being not an order passed

under the Companies Act but under the Securities Contracts (Regulation) Act it would not be covered under the said Section 10F of the Companies Act. Thereafter it is contended that even if Section 10E of the Companies Act is taken into consideration it is clear that the said section only is to provide jurisdiction to the Company Law Board. For this purpose reliance is placed on the wording of subsection (1A) of Section 10E that the Company Law Board shall exercise and discharge such powers and functions as may be conferred on it, by or under Companies Act or any other law and shall also exercise and discharge such other powers and functions of the Central Government under the Companies Act or any other law as may be-conferred on it by the Central Government, by notification in the Official Gazette under the provisions of this Act or that other law. The submission tried to be made is that the said provision only gives power to the Company Law Board of exercising and discharging the powers and functions as may be conferred on it by or under the Companies Act or any other law but that would not mean that the decision given by the Company Law Board under any other law could be appealed against u/s 10F of the Companies Act. According to Shri Kapadia appearing for the Respondents if the impugned decision is under the Companies Act then appeal would lie u/s 10F but if the impugned decision is under any other law that law must provide for an appeal and in the present case admittedly the decision is under the Securities Contracts (Regulation) Act 1956 and under the said law there is no provision of appeal against the decision of the CLB arrived at u/s 22A of the said Act. It is also pointed out that this becomes clear if one looks at the provision of Section 55 of the Monopolies And Restrictive Trade Practices Act, 1969 which provides for an appeal. It is contended that under the said Section 55 of the said Act an appeal is provided against the decision of the CLB taken under the said Act. Shri Kapadia contended that if under the said Act also the decision is taken by CLB then if an appeal was envisaged to be provided u/s 10F of the Companies Act being a decision of the Company Law Board there was no necessity of providing any appeal u/s 55 of the Monopolies And Restrictive Trade Practices Act, 1969. Now it is true that the provision of Section 10E of the Companies Act gives jurisdiction to the Company Law Board and the Company Law Board is by the said provision empowered with a jurisdiction to exercise and discharge such powers and functions as may be conferred upon it by or under the Companies Act and also any other law. The said section according to the appellants has to be read with Section 10F of the Companies Act and when under the Securities Contracts (Regulation) Act, 1956 CLB has been conferred with a power of confirmation of the opinion of the Board of Directors u/s 22A(4)(c) of the Securities Contracts (Regulation) Act and therefore, the decision given by the CLB in exercise of the said powers under the said provision of the said Act would in any event become a decision of the CLB and therefore according to the appellants Section 10F of the Companies Act which provides for an appeal against any decision or order of the CLB is wide enough to cover such a decision also. On behalf of the appellants it is contended that merely because in the Monopolies And Restrictive Trade Practices Act, 1969 a provision of appeal is made u/s 55 against the decision of the CLB it would not

necessarily mean that if in any other law no such provision is made then no appeal would lie u/s 10F. How even if the provision of sub-section (1A) of the Section 10E is considered as section empowering the CLB to take a decision in respect of any other law also it would become a decision of the CLB and then normally one would consider that the said decision is appealable u/s 10F. The argument sought to be advanced by Shri Kapadia though no doubt is attractive on reading Sections 10E and 10F together I find that the appeal would be maintainable u/s 10F of the Companies Act against the decision of the CLB under the power- conferred on it under any other law also. Hence I am answering in favour of the appellants on this point.

8. Now the next contention that arises for determination is as to whether the contention of the appellants that the CLB had no power to go into the question about the correctness or otherwise of the decision of the Board of Directors of the appellants refusing the registration having concluded that the said decision was taken in good faith and was not mala fide. On behalf of the appellants it is tried to be contended that the CLB has no power to go into the correctness or otherwise of the decision of the Board of Directors of the appellants once it concluded that the decision taken by the Board of Director was taken in good faith and was not mala fide decision. Now it is true that the CLB has in terms concluded that the decision taken by the Board of Directors of the appellants was not a mala fide decision and that the said decision was taken in good faith and for that purpose of the CLB has given its own reasons. It is true that the Board of Directors of the appellants in the resolution that they have passed to refuse the registration of the shares in favour of the respondents was considered on the basis of the provision of Section 22A(3)(b) of the Securities Contracts (Regulation) Act, 1956 read with the provisions of regulations and guidelines and or administrative instructions framed under the Securities and Exchange Board of India (Mutual Funds) Regulation Act 1993 and that also after reading the letter received from the said SEBI. On behalf of the appellants it is very strenuously contended that even though by making a provision of Section 22A in the Securities Contracts (Regulation) Act 1956 the position of law as it stood earlier to the introduction of the present section does not really change very much except in respect of the Forum onus of proof and grounds stated in Sec. 22A on which company can refuse registration, Shri Seervai appearing for the appellants has very strenuously contended that the law prior to coming into force of the provision of Section 22A of the Securities Contracts (Regulation) Act 1956 is very well settled. He also pointed out that prior to 31-5-1991 the Companies Act provided power of rectification of register of members of the company u/s 155 of the Companies Act and the said provision was omitted by Companies (Amendment) Act, 1988 with effect from 31-5-1991. Similarly, there was a provision of Section 111 in the Companies Act which provided for power to refuse registration and appeal against refusal and the said section also suffered amendment and a new Section 111 came to be substituted by the Companies (Amendment) Act 1988 with effect from 31-5-1991. Under Old Section 111 an

appeal was provided under sub-section 3 of the said section to the Central Government. In the new amended section the said power of appeal is given to the Company Law Board and if all these provisions are read it does appear that there is not much of a change made in Section 22A of the Securities Contracts (Regulation) Act 1956 under which now an appeal has been provided against the refusal of the company to transfer the share certificate. Shri Seervai therefore contended that the earlier interpretation put on the provision of Section 111 of the Companies Act still holds good as the only change effected by introducing Section 22A of the Securities Contracts (Regulation) Act is in respect of Forum, onus of proof and four grounds stated in Section 22A on which the Board of Directors could refuse the registration and that the decision of the Board of Directors formerly was required to be appealed against but now is required to be confirmed by the CLB. Shri Seervai therefore contended that there being no change except the above and as the power in appeal for over a 100 years was considered to be restricted only to see whether the decision taken by the Board of Directors was bona fide, in the interest of the company or in mala fide manner even now the power u/s 22A(4) of the CLB of confirmation must be held to be restricted power to that extent only. To substantiate this contention that the said power in appeal has been interpreted to be so restricted Shri Seervai has relied upon several decisions. He has mainly relied upon the decision reported in *In Re: Dehri Rohtas Light Railway Co. Ltd.*, . He pointed out that in AIR 1956 Nagpur 20 wherein the provision under consideration was of Section 38 of the Companies Act 1930 which was also similar to the provision of Section 111 and 155 of the Companies Act, the Court held that an appeal under the proviso to S. 38 has to be treated as equivalent to one filed under S. 100, Civil P.C. A finding fairly reached on the evidence would, therefore, be binding. But where the Judge in allowing the application for rectification of the register, reached his decision after placing the onus wrongly, the decision is open for further consideration. Reliance was tried to be palced on paragraph 10 of the said decision which reads as under :

"10. The law on the subject has been summed up in Halsbury's Laws of England, Volume 5, p. 281 (Hailsham's Edn). It is there stated :

"The power of refusing to register a transfer is a usually conferred on the directors, and in such a case must be exercised by a resolution of the board of directors. It is a discretionary power and must be exercised reasonably and "bona fide" and for the company's benefit and not arbitrarily, though in the absence of evidence to the contrary, the power will be presumed to have been properly exercised.

Where there are several grounds on which the power can be exercised, the directors are bound to state on which ground they act unless excused from so doing by the articles although they need not in any case give the reasons which influenced them in exercising their discretion on that ground whether they do so under an absolute power or under a power to refuse in specified events.

If the directors do give their reasons, the Court will examine them, but it will not overrule the decision of the directors because it disagrees with the conclusion they reached as to the advisability of refusing the transfer. It will, however, do so if the directors have acted on a wrong principle".

In the next case relied upon by Harinagar Sugar Mills Ltd. Vs. Shyam Sundar Jhunjhunwala and Others, , the Supreme Court held that (at p. 1677 of AIR) :

"Rectification of the register of members of a company u/s 155 of the Companies Act, 1956 can be granted only if it is established that the directors had, in refusing to register the shares in the names of the transferee, acted oppressively, capriciously or corruptly, or in some mala fide and not in the interest of the company. Such a plea has, in a petition for rectification, to be expressly raised and affirmatively proved by evidence. Normally, the Court would presume, where the directors have refused to register the transfer of shares when they have been invested with absolute discretion to refuse registration, that the exercise of the power was bona fide."

The Supreme Court also held in the said decision that (at p. 678 of AIR) :

"The power to entertain an appeal u/s 111 is not unrestricted, being an alternative to the right to approach the civil court, it must be subject to the same limitations which are implicit in the exercise of the power by the civil Court u/s 155. The Central Government may, therefore, exercise the power to order that the transfer which the directors have in their discretion refused be registered if it is satisfied that the exercise of the discretion was mala fide, arbitrary or capricious and that it is in the interest of the company that the transfer should be registered".

Mr. Seervai also relied on a decision reported in (1877) 6 CD 82 in the case of Duckett v. Gover to contend that error in fact or law did not make any difference while taking the decision and therefore even if the decision is taken erroneously, bona fide even in respect of law it would not make any difference. Shri Seervai also pointed out that the existing settled law can only be altered or departed from only to the extent of term which is altered and he relied on the decision reported in A.C. Sharma Vs. Delhi Administration, to support his contention. He also contended that strong presumption arises when the legislature uses a term or phrase which has received a judicial interpretation that such a term or phrase is used in concerned legislation as judicially interpreted and in support of this contention he relied upon the rulings reported in P. Vajravelu Mudaliar Vs. Special Deputy Collector, Madras and Another, and Sakal Deep Sahai Srivastava Vs. Union of India (UOI) and Another, . In fact there is no quarrel with the proposition which Shri Seervai has advanced but it appears that even in the cases relied by Shri Seervai to substantiate his contention in favour of the appellants that the appellate authority has a limited power restricted only to the extent of considering whether the decision was taken bona fide or mala fide, capriciously, arbitrarily or otherwise it is clear that in all these cases the power of

board of directors emanated from Articles of Company were unrestricted and therefore the Courts held that if the powers of the board of directors was giving them complete discretion as per the Articles of the Company then they could be only challenged if the board of directors have acted mala fide, arbitrarily or capriciously and not otherwise. But if the powers are restricted then of course it would become necessary to consider as to whether the board of director's decision was taken in the manner prescribed by the Articles of the Company and in accordance with the restricted power. Shri Kapadia appearing the respondent has pointed out that in all the cases which have been relied upon by Shri Seervai, the powers of the board of directors were absolute powers without any restriction. He also contended that there is no inherent power to refuse transfer and he relied on the decision reported in (1990) 67 Com Cas 518 Luxmi Tea Co. Ltd. v. Pradip Kumar Sarkar to substantiate his contention. In the said decision, the Supreme Court laid down that there is no inherent power to refuse to register transfer and the power must be conferred by law or otherwise and the said words "or otherwise" do not imply to inherent power and the power must emanate from some provision in the Act or Articles of Association. The Supreme Court observed in the said decision that :

"Unless there is any impediment in the transfer of a share of a public limited company, shareholder has the right to transfer his share, Correspondingly, in the absence of any impediment in this behalf, the transferee of a share, in order to enable him to exercise the rights of a shareholder as against the company and third parties which is not possible until the transfer is registered in the company's register, is entitled to rectification of the share register of the company by insertion of his name therein as a registered shareholder of the share transferred to him. This right of the transferee can be defeated by the company or its directors only in pursuance of some power vested in them in this behalf. Such power has to be specified and provided for. It may be residuary but it should be provided for and traceable to some provision either in the Act or the articles of association of the company. Even if the power of refusal is so specified and provided for, the registration of a transferred share cannot be refused arbitrarily or for any collateral purpose and can be refused only for a bona fide reason in the interest of the company and the general interest of the shareholders".

In this decision even the earlier decisions of the Supreme Court in the cases of Bajaj Auto Ltd. Vs. N.K. Firodia and Another etc., and Life Insurance Corporation of India Vs. Escorts Ltd. and Others, as well as Moffat v. Farquhar (1878) 7 Ch D 591 were referred to and considered and the Supreme Court observed as under :

"Lastly reliance was placed on Life Insurance Corporation of India Vs. Escorts Ltd. and Others, . In that case with reference to an earlier decision of this Court in Bajaj Auto Ltd. Vs. N.K. Firodia and Another etc., , it was held that where the articles permitted the directors to decline to register the transfer of shares without assigning reasons, the Court would not necessarily draw an adverse

inference against the directors but will assume that they acted reasonably and bona fide. Here again, as is apparent from the decision in the case of Bajaj Auto Ltd. Vs. N.K. Firodia and Another etc., , Article 52 of the appellant company in that case provided that the directors might, at their absolute and uncontrolled discretion, decline to register any transfer of shares. This too was, therefore, a case of power being conferred by the articles of association and not a case of exercise of inherent power. We may also point out that at page 997 of the reports of Life Insurance Corporation of India Vs. Escorts Ltd. and Others, it was held that even though it was open to the company and, indeed, it was bound to refuse to register the transfer of shares of an Indian company in favour of a non-resident where the requisite permission under the Foreign Exchange Regulation Act was not obtained once permission was obtained, whether before or after the purchase of the shares, the company could not thereafter refuse to register the transfer of shares".

Both these cases of Bajaj Auto Ltd. and Escorts Ltd. were also placed for consideration before me. The ratio of the same has been crystalised in the above referred decision of the Supreme Court in Luxmi Tea Co. Ltd. and therefore the proposition tried to be advanced by Shri Seervai that in no case the decision of the Board of Directors can be challenged except on the grounds of mala fide or arbitrariness or capricious exercise of power does not appear to be a sound proposition: If there is an unrestricted power no doubt the proposition will hold good but if the power is restricted either by the Articles of Association of the company or law then of course it would be necessary to see as to whether the decision taken by the Board of Directors was taken in accordance with the said framework of law or Articles of Association. As a matter of fact a major change that is tried to be effected by introduction of S. 22A of the Securities Contracts (Regulation) Act, 1956 is that the power of the company to refuse registration of shares is tried to be restricted. Sub-clause (3) of the said section runs as under :

"(3) Notwithstanding anything contained in its articles or in S. 82 or S. 111 of the Companies Act, 1956 (1 of 1956), but subject to the other provisions of this section, a company may refuse to register the transfer of any of its securities in the name of the transferee on any one or more of the following grounds and no other ground, namely :

- (a) that the instrument of transfer is not proper or has not been duly stamped.....;
- (b) that the transfer of the security is in contravention of any law or rules made thereunder or any administrative instructions or conditions of listing agreement laid down in pursuance of such laws or rules;
- (c) that the transfer of the security is likely to result in such change in the composition of the Board of Directors as would be prejudicial to the interests of the company or to the public interest; and
- (d) that the transfer of the security is prohibited by any order of any Court,

Tribunal or other authority under any law for the time being in force.

Now the non obstante clause appearing in the said sub-section (3) clearly shows that the legislature intended a departure from the provision of S. 82 and S. 111 and the position thereunder and wanted to provide that the refusal to transfer could only be on the ground stated under S. 22A(3)(b), (c) and (d). There is also a departure from the earlier position that the decision of the Board was being converted into an opinion of the Board and these were the major changes made with a view to give power to the CLB to see the correctness of the opinion given by the Board of Directors. Now it is only when the CLB confirms the opinion, that the decision of refusal is finalised. Much stress is tried to be placed on the words "in good faith" occurring in sub-section (4) of Sec. 22A on behalf of the appellants and it is tried to be contended that the said words also indicate that once the company arrives at a decision in good faith that cannot be challenged even u/s 22A(4). On the other hand it is contended that the words "in good faith" occurring in the said sub-section are only to emphasise that the opinion which has to be formed has to be arrived in good faith and it does not mean that the decision of the company cannot be challenged on any other ground than lack of good faith. Shri Kapadia is right in contending that now that powers of the company which are listed on the Stock Exchange are sought to be restricted by making the provision of S. 22A so as to achieve free transfer-ability and registration of transfers of listed securities of the companies. It is difficult to understand that the decision taken by the Board of Directors of the Company to refuse the transfers would be required to be tested only on the ground of mala fide or lack of bona fide. What is sought to be done is that in spite of power in the Articles of Association or S. 82 or S. 111 of the Companies Act, the company cannot refuse registration on any other ground than the grounds enumerated in clauses (a), (b), (c) and (d) of the said sub-sec. (3) of S. 22(A). Sub-section (4) of the said S. 22A provides that if the company has formed an opinion that such registration ought not to be so refused they are to effect registration as provided in cl. (a) of the said sub-section (4). If the company forms an opinion that such registration ought to be refused on the grounds mentioned in cl. (a) of sub-sec. (3) then the company is required to intimate the transferor or the transferee by a notice in the prescribed form about the requirement under the law which has or which have to be complied with for securing such registration and in any other case as per clause (c) of sub-sec. (4), the company is required to make a reference to the CLB. Now, therefore, if the refusal is on the grounds envisaged under clauses (b), (c) or (d) of sub-sec. (3) then the company has to make a reference for confirmation to Company law Board for its opinion. This clearly is with a purpose to achieve free transferability and registration of transfers in respect of listed securities of companies and this change definitely also would be required to be kept in mind while considering as to whether the CLB can go into any other question than that of bona fides or mala fides of the company while forming an opinion. It is clear even from the earlier decisions that there could be unrestricted powers to the Board of Directors of the Company to refuse transfer,

that if the refusal was on the basis of the Articles of Association then the refusal if it was not in accordance with the Articles of Association it could be challenged in the Court of Law. Shri Kapadia has relied upon the decision reported in (1917) 1 Ch D 123, *In re Bede Steam Shipping Co. Ltd.* and pointed out that in the said case the Court went into the ground of refusal to transfer and concluded that the transfer on the ground was not within the articles and consequently the refusal was not dropped. The view expressed in the said decision is that the Court could go into the ground on which the transfer was refused. In view of this submission made by Shri Kapadia that where uncontrolled discretion is given to the Board of Directors only bona fides and mala fides could be seen but where the discretion is not uncontrolled but power is specified to be exercised in any manner one has to see apart from bona fides and mala fides whether there is a power to refuse the transfer and the manner in which it has to be refused and then conclude whether the refusal is legitimate or not. Shri Seervai of course contended that even while doing so only the principles could be considered meaning thereby that whether the Board of Directors had committed an error on principles only in the matter. It is difficult to accept the said proposition. In the present case therefore I am of the view that the CLB has a power to consider as to whether the refusal of transfer is legitimate or not and to see whether the grounds on which the refusal was made were legitimate or not and then they would be required to consider also the said grounds which they have done in the present matter and concluded that the view taken by the Board of Directors that the respondents are a mutual fund and therefore the guidelines and regulations of SEBI are applicable to them is erroneous. It is a different thing to say that the view taken in that respect of the CLB is not correct but the CLB has a power to consider the said question and arrive at a conclusion and merely because the CLB felt that the decision taken and the opinion formed by the Board of Directors of the appellants was a bona fide decision it would not mean that they should have stayed their hands from going into the said question.

9. Before I turn to the next point it is also necessary to mention here that on behalf of the appellants it was tried to be contended that the point that the appellants had no power to refuse the registration of transfer of shares is not taken or pleaded by the respondents in the petition and therefore also the said question can not be gone into in this appeal. Now the said contention though is factually correct as far as Company Petition No. 10 of 1994 is concerned, the same is taken in the other petition namely Company Petition No. 11 of 1994 before the CLB. It is also clear that all the appeal is against the decision in all the petitions and therefore as the said point is pleaded in one of the matters, the objection tried to be raised on the ground of absence of pleading does not have much value.

10. Now the next question that arises is as to whether the respondents are a mutual fund. Now it is true that the respondents are mutual fund. Even the CLB has held accordingly. But according to the respondents as well as the CLB as is apparent from its decision the respondents though are mutual fund they are not

a mutual fund as envisaged in the SEBI guidelines or regulations which were relied upon by the Board of Directors to hold that the respondents in view of the said guidelines and being covered by the said guidelines cannot acquire more than 5% of equity of the appellants. On behalf of the respondents as a matter of fact the first challenge is as to whether the said guidelines can be considered as law or rules made under the guidelines or in administrative instructions and or condition of listing agreement laid down in pursuance of such laws or rules envisaged under clause (b) of sub-sec. (3) of S. 22A of the Securities Contracts (Regulation) Act. I will consider that aspect later on. First I am considering on an assumption that the said guidelines do fall under the said clause. On behalf of the appellants it is very strenuously contended that the CLB was in error in holding that the respondents though are mutual funds are different than the mutual fund envisaged under the guidelines of administration. Reliance is placed on Securities and Exchange Board of India Mutual Fund Regulation 1993 and contended that under the said regulation also the respondents are covered as under clause (3) of the said regulations it is provided that the said regulation will apply to all mutual funds except (i) money market mutual funds established for investment exclusively for money market instrument, and (ii) mutual funds established outside India and therefore the only mutual funds which are excluded are stated in the said original guidelines themselves and therefore as the respondent though admittedly are mutual funds are not those excluded by the said provision. It is also pointed out that even under the definition provided in clause 2(m) "mutual fund" is defined to mean a fund established in the form of a Trust by a sponsor to raise monies by the Trustees through the sale of units to the public under one or more schemes for investing in securities in accordance with these regulations. It is also contended that the said definition necessarily includes the respondents. As against this on behalf of the respondents it is pointed out that as per Chapter III of Regulation which provides for constitution and amendment of the mutual fund -- every mutual fund shall be constituted in the form of a trust in accordance with the provisions of the Indian Trusts Act and an Asset Management Company has to be appointed to manage the said mutual fund. It is an admitted position that the Unit Trust of India i.e. the respondents though are mutual funds are not constituted in the form of trust in accordance with the provisions of Indian Trust Act but are a statutory mutual funds. Similarly it is also pointed out that the provisions of clause 2(q) would not be applicable in the case of the respondents. Similarly even clause 8(b) according to the respondents has no relevance in respect of the respondents as according to it mutual fund is to be in the form of a trust and the trust deed has to be approved by the Board and the Board necessarily mean the Security and Exchange Board of India and there is no such trust deed much less the trust deed approved by the Board and therefore the SEBI regulations are not applicable to the respondents at all. On behalf of the appellants on the other hand it is contended that merely because certain requirements envisaged under the Securities and Exchange Board of India (Mutual Funds) Regulations 1993 cannot be made applicable or are not applicable to the respondents it would not mean that the

respondents though a mutual funds are excluded from application of the said regulations. It is difficult to accept this position. If the regulations were to be made applicable to the mutual funds of respondents which have come into existence by virtue of a statute the regulation would have provided accordingly when it is clear that the other mutual funds would be under a trust deed as also they have to get the trust deed approved by the Board, it would necessarily mean that only those mutual funds which are established by execution of a trust deed and registered under Indian Trust Act would only be covered and the mutual fund of the respondents would not be covered. On behalf of the respondents, it is also tried to be pointed out that even in the income tax Act distinction was made between the mutual funds generally established and the Unit Trust. I do not think that merely because the Income Tax Act has made distinction between the two it would necessarily mean that on that basis it could be said that SEBI regulations would not be applicable but I have already come to a conclusion that the respondents though are mutual funds they are not covered under the SEBI Mutual Funds Regulation and therefore the CLB was right in holding so and concluding that the Board of Directors of the appellants had committed an error in holding that the respondents are governed by the said regulation of SEBI and therefore they cannot hold more than 5% of the equity of the appellants.

11. In respect of certain shares sought to be transferred only the guidelines of 1992 were alleged to be applicable and not the SEBI regulations. The guidelines were only issued under a press note and therefore would have even lesser value than the regulations. The guidelines could never be considered as rules and therefore as far as the guidelines are concerned it is difficult to accept that they would be applicable to the respondents.

12. On behalf of the appellants it is tried to be contended that earlier to the regulations there were guidelines issued by the Ministry of Finance. It is pointed out that initially first guideline was issued on 20-6-1990. However, it is an admitted position that in the said guideline the respondents were excluded. However it is contended that in the second guidelines dated 14-2-1992 issued by the Ministry of Finance the exclusion or exemption provision was omitted and therefore it is strenuously contended that the second guidelines covered the respondents and according to the said guidelines also no individual scheme of mutual funds could invest in more than 5% of the equity in any one company and therefore the appellants were right in refusing the registration of shares, as if they were registered, the respondents could be investing more than 5%. Even according to the 2nd guidelines there has to be an Asset Management Company of the mutual funds which are envisaged to be covered by the said guidelines.

There is no provision of any Asset Management Company in respect of the respondents. Apart from this, these are only guidelines and cannot be considered as rules and therefore they would not be applicable to the respondents. There is nothing to show that they were issued under any law, rules or administrative

instructions issued under law or rules. Hence these guidelines cannot be considered as applicable. Under the regulations of 1993 which I have referred to earlier no mutual fund is to hold more than 5% of the paid up capital carrying voting rights in any company.

13. Now it is necessary to consider as to whether the guidelines and the regulations could be considered as law or rules made therein or in administrative instructions or conditions of listing agreement laid down in pursuance of such laws or rules. As far as the guidelines are concerned obviously they cannot be considered as either law or rules made thereunder. As far as regulations are concerned, it may be possible to construe the same as rules as they have been framed and issued in exercise of powers conferred by clause (3) of sub-sec. (2) of S.11 read with S. 30 of the Securities and Exchange Board of India (SEBI) 1992 and therefore it may be possible to hold that if they cover the respondents they would be applicable to them. An attempt was made to contend that as the respondents were formed or brought into existence by a statute and they are governed by the same it is not possible to hold that the said regulations could govern them. In this respect merely because the respondent is a statutory body it would not mean that they could not be governed by any other rules or regulations which are framed under a statute. As far as guidelines are concerned of course it is not possible to apply the same principles and therefore as far as the second guidelines are concerned it must be held that they would not apply to the respondents. It is not necessary to go into the details in this respect as I have already held that even if the said regulations are held to be applicable the respondents are not included under the said regulations. As far as the guidelines are concerned, they cannot apply to the respondents as they are only guidelines and have no effect of rules or laws. At the most it is possible to suggest that they are administrative instructions and conditions of listing agreement. However, it is also necessary to show that the said guidelines even if they are held to be administration instructions or condition they were issued in pursuance of law or rules as stated earlier. There is no material on record to show this. They are at the most issued by the Finance Ministry. Hence it is also not necessary to go into the said aspect in respect of the said guidelines.

14. It may also be stated that on the basis of punctuation of S. 22A and particularly S. 22A(4) an attempt was made to substantiate the contention that the (sic) given to CLB under the said provision while considering as to whether the fund of the Board of Directors of the Company should be confirmed or not the CLB could entertain the question only as to whether the opinion expressed was taken in good faith or not. As a matter of fact in the view which I have taken it is not very material to consider the said arguments based on punctuation of the said section. Rule of antecedent was also tried to be pressed into service for the interpretation of S. 22A(4). On behalf of the respondents it was tried to be contended in this respect that the rule of antecedent is not an imputable principle. It has to be always considered after taking into consideration the context in which the words are used. It is not necessary to consider the

arguments in this respect in detail in view of the fact that I have already concluded that in the absence of unrestricted powers of refusal being available to the company the CLB has power to consider whether the grounds on which the refusal was made were legitimate or not and the CLB was not only to consider whether the decision was taken bona fide or not.

15. Hence the CLB rightly held that the opinion of the Board of Directors of the appellants was erroneous.

16. In the result, the appeal has no merit and the same will have to be dismissed and as such is dismissed. The appellants to suffer their own costs and give costs of the respondents.

17. The appellants seek stay of the order for a period of six weeks. The request is opposed by the respondents. No prejudice is likely to be caused to the respondents by grant of stay. No doubt an attempt was made to contend that if there is an annual general meeting to be held within a short period then the respondents would be deprived from exercising their rights on the basis of such shares. There is some force in this contention but still as the appellants want to go to the higher court to challenge the order passed by this Court it would be in the interest of justice to grant stay for a period of six weeks. The order shall not take effect for a period of six weeks.

18. Issuance of certified copy expedited.

Appeal dismissed.