
(2006) 11 MAD CK 0278

In the Madras High Court

Case No : C.M.A. No's. 656 and 909 of 1997 and C.M.A. No. 162 of 1998 and
CMP. No. 6010 of 1997

Lakshmi Natarajan

APPELLANT

Vs

Bharatan Publications Limited, V. Murali and S. Appaswami

RESPONDENT

Date of Decision : 03-11-2006

Acts Referred:

Companies Act, 1956 — Section 111, 111(4), 192, 36, 82
Contract Act, 1872 — Section 7

Citation : (2006) 11 MAD CK 0278

Hon'ble Judges : Chitra Venkataraman, J

Bench : Single Bench

Advocate : T.K. Seshadri in C.M.A. No. 162 of 1998 and Mr. Aravind P. Datar in C.M.A. Nos. 656 and 909 of 1997, for the Appellant; Aravind P. Datar for R1 in C.M.A. No. 162 of 1998, Mr. R. Venkatavaradhan for R1 in C.M.A. Nos. 656 and 909 of 1997 and Mr. T.K.S. Seshadri for R2 in C.M.A. Nos. 656 and 909 of 1997, for the Respondent

Final Decision : Allowed

Judgement

Chitra Venkataraman, J.—C.M.A. No. 656 of 1997 is filed by the third respondent, S. Appaswami, in the company petition before the Company Law Board. C.M.A. No. 162 of 1998 is filed by the petitioner, Lakshmi Natarajan, in the company petition and C.M.A. No. 909 of 1997 is filed by the second respondent, V. Murali, in the company petition. The issue relates to transfer of shares in favour of appellant in C.M.A. No. 656 of 1997, which is objected to by the appellant in C.M.A. No. 162/98. For the purpose of convenience, we refer the parties as per C.M.A. No. 162 of 1998.

2. The first respondent in C.M.A. No. 162 of 1998, M/s. Bharatan Publications Limited, Chennai is engaged in the publication and sale of periodicals. The appellant is a shareholder in the first respondent company. The second respondent herein is a shareholder as well as Director and the third respondent is a shareholder in whose favour the second respondent had transferred 240 equity

shares. This has given rise to the company petition u/s 111 of the Companies Act before the Company Law Board at the instance of the appellant herein.

3. It is stated by the appellant herein that the second respondent expressed his intent to sell his shares to the first respondent herein (hereinafter referred to as "the company") in terms of Article 32 of the Articles of Association. The grievance of the petitioner herein is that she along with other two shareholders of the company, who are her father and sister, offered to purchase 54 shares at the rate of Rs. 2500/-. The appellant alleged that the company had never communicated the fair value of the shares belonging to the second respondent as per the terms of the Articles of Association. The same were sold to the third respondent at a sum of Rs. 3000/-. The offer for sale was intimated by the company on 22.4.1993 indicating the intrinsic value as on 31.3.1992 based on the auditor's certificate. It is alleged by the appellant that there is total violation of the requirements of Article 32 of the Articles of Association. Consequently, a rectification needed to be ordered.

4. After hearing the parties, the Company Law Board passed an order dated 3.3.1997 in C.P. No. 31/111/SRB/95 holding that there was no violation of Article 32 of the Articles of Association. There was no ulterior motive in the transfer to declare the entire transfer as invalid or on the allegation that the fair value had not been indicated and that only intrinsic value was given. The Company Law Board held that there was nothing to show from the appellant's side that the intrinsic value was excessive, that there was no fair value fixed by the Board. The Company Law Board further held that the procedure for transfer of shares as per the terms of the Articles was that where the Board of Directors did not receive any offer from the members within 30 days, it was bound to find a buyer within a period of 90 days from the date of offer. The negotiated price between the second and third respondents was approved by the Board. Consequently, the Company Law Board held that the sale being on a fair value and the only complaint was with reference to non determination of the fair value, it was not appropriate to declare the transfer of the entire 240 shares as invalid.

5. Referring to Article 32 of the Articles of Association, the Company Law Board held that the appellant along with her father and sister had offered to buy 55 shares at a sum of Rs. 2500/- per share to the second respondent even before the actual transfer was effected, who had later on negotiated for Rs. 3000/- per share with the third respondent. Hence, it held, in fairness, the Board should have offered to the petitioner and two other shareholders 55 shares at Rs. 3000/- and should have waited for their willingness and thereafter go ahead with the approval as regards the sale in favour of the third respondent. According to the Company Law Board, this would have been in full conformity with the provisions of Article 32 of the Articles of Association. Hence, the Company Law Board adopted the principle of equity that the third respondent was directed to retransfer 55 shares to the three shareholders, if they were still desirous of purchasing the shares within 30 days from the date of receipt of the order of the

Company Law Board. It directed that the three shareholders would inform the company indicating the number of shares they desired to purchase from the third respondent with payment of Rs. 3000/- per share. Thereafter-wards, the company should obtain the transfer instruments from the third respondent and register the shares in the name of the appellant and two other shareholders.

6. Aggrieved of the findings, the petitioner before the Company Law Board has filed an appeal in CMA. No. 162/92 raising the following questions of law:

(1) Whether on the facts and circumstances of the case, the Company Law Board is right in interpreting that the share value fixed by the Auditor as intrinsic value would be considered as fair value for the purpose of offering such value to the shareholders?

(2) Whether on the facts and circumstances of the case, the Company Law Board is right in ordering rectification of Register of Members of the company in relation to remaining 185 shares of the company and thereby offering the said shares also to the shareholders at the negotiated price of Rs. 3000/- per share in terms of Article 32 of the Articles of Association of the company?

7. Aggrieved by the latter portion of the order of the Company Law Boards, as regards the equitable manner of disposal of the petition, the transferee has filed their appeal in CMA. No. 656 of 1997 raising the following questions of law:-

(i) Whether the Company Law Board was right in holding that the company should have offer 55 shares at Rs. 3000/- per share from the second respondent to the petitioner and other shareholders overlooking the provisions in the Articles of Association.

(ii) The appellant therein also questioned the correctness of the Company Law Board's order directing the transfer of 55 shares to the shareholders who were not parties to the proceedings.

8. The appeal in CMA. No. 909 of 1997 is by the transferor, whose questions of law are almost identical to that of the appellant in CMA. No. 656/97 preferred by the transferee company. The common question of law raised by all the parties herein is with reference to this aspect of equity. Apart from that, as already stated the appellant in C.M.A. No. 162/98 questions the correctness of the Company Law Board's interpretation on intrinsic value to be considered as fair value for the purpose of considering the transfer of value of the shares.

9. Mr. T.K. Seshadri, the learned senior counsel representing the counsel for the appellant in C.M.A. No. 162/98 challenges the correctness of the view taken by the Company Law Board as follows.

10. The internal affairs of the company are matters governed by the terms of the Articles of Association. Article 31 of the Articles of Association clearly mentions transfer of shares shall be governed by Articles 31, 32, 33, 34 and 35. He made a particular reference to Article 31 to state that any member who wanted to

transfer the shares has to give notice of his intention indicating the number of shares which the transferor member proposes to sell and denoting number of such shares. The transferor member shall constitute the Board of Directors as his agent for sale of such shares at fair value. Article 32 speaks about the Board's power on such notice, particularly, as regards determination of the fair value at which the shares should be sold. The time frame given for such determination is stated to be 30 days from the date of receipt of the sale notice. The fair value should be fixed by the Board of Directors based on the certificate given by the auditors of the company. Thereafter, the Board shall first offer the shares to the existing shareholders by giving notice in writing to them the number of shares offered for sale and the price at which it is offered. Considering the detailed manner in which the sale is required to be conducted and the finding of the Company Law Board that the company had not complied with the Articles 31, 32, 33, 34 and 35 of the Articles of Association, the learned senior counsel appearing for the appellant submitted that the transaction itself was void. In this connection, the learned counsel placed reliance on 87 CC 792 = 1992 SC 470 (Miheer H. Mafatlal vs. Mafatlal Inds. Ltd) and also referred to the unreported decision of the Karnataka High Court in C.P. No. 104 of 1986 dated 1.8.1991 in connection with the requirement for fixing the fair value. He submitted that the Company Law Board was not a Court of equity to substitute its relief when the Articles was not adhered to. He referred to Section 82 as well as Section 36 of the Companies Act as to the effect of Articles on the shareholders and that the transfer of shares should be in the manner provided in the Articles of Association. Considering the definite prayer in this application before the Company Law Board, the learned senior counsel questioned the Company Law Board granting the relief on equitable grounds. In this connection he referred to the decisions reported in 1976 SC 2403 at 2412 (CIT Bangalore v. H. Narayaniah), (1928) 30 BOM LR 523 (H Vs. H), 2005 2 CHN (Calcutta High Court) 74 (Swapan Kumar Pani vs. Canara Bank and Ors.), AIR 2000 AP 113 in para 26 (Chivukula Ranjith Kumar and others vs. Santhilal Nemichand and another). He also referred to 2004 Vol. 51 SCL 158 (S. Bhuvaneswari vs. ACI Ltd.) in support of his contention that once the Company Law Board finds that the procedure had not been followed, it ought to have granted the relief in accordance with law and not to go for an equitable settlement of claim which was not the prayer.

11. Countering the argument on the compliance of Articles of Association, the learned senior counsel Mr. Aravind P. Datar, representing the counsel in C.M.A. Nos. 656/97 as well as 909/2007, defended the order of the Company Law Board in its view on the substantial compliance of Article 32 of the Articles of Association. He pointed out that the second respondent, Murali offered 240 shares. The Board intimated its decision on the fair value as per the Chartered Accountant certificate indicating the intrinsic value. Consequently, the company had made, substantial compliance of Article 32 of the Articles of Association. He also pointed out that there was no market value available. Therefore, the networth and the break up value, which was readily available was decided. He

also pointed out that when the offer was 240 shares and the appellant had offered to purchase 54 shares only along with her father and sister, it was not in terms of the intimation of the Board. As such, there was no question of this appellant having any locus standi to challenge the transfer. He also pointed out that the offer must be an absolute one as per the terms of the offer. The learned senior counsel made a particular reference to the letter written on 7th May 1993 by Lakshmi Natarajan, appellant in C.M.A. No. 162/98 that she wished to purchase 15 shares only. In this connection he referred to Section 7 of the Contract Act that the offer to be acceptable must be in terms of the notice for sale of 240 shares. Hence, her offer could not be acted upon, it being not in accordance with the notice sent. He challenged the appellant's locus standi to file this petition. The learned senior counsel also pointed out that Articles 31 and 32 of the Articles of the Association conferred the choice to sell the number of shares only with the transferor and as such, the appellant had no right to offer for a lesser number of the shares. The learned counsel also referred to the Board's resolution passed approving the sale in which the appellant's father and sister participated. As such, once the Board had approved the same, the appellant could not question the same. He also referred to the Board's resolution dated 5th June 1993 wherein the second respondent had brought to the attention that the shareholders had not taken action in finalising the buyer for 240 shares. Consequently, as the Executive Director he called on the third respondent, Mr. Appaswamy, negotiated with him the sale of the shares who offered to buy at Rs. 3000/- per share. After a detailed discussion, the Board had permitted the second respondent to sell his shares. He also referred to letter dated 16th June 1993 written by the said Murali explaining in the detail about the offer at Rs. 2500/-. He stated therein that he had waited up to 22.5.1993. He also pointed out to the discussion that he had with Rajendran, appellant's father. He also pointed out that the letter dated 22.4.1993 addressed to the Board, that the Board of Directors had not considered the appellant's plea. In view of the lapse of time up to 30.2.1993, the responsibility of the Board of Directors to find out a suitable buyer arose. However between 2.5.1993 and 1.6.1993, the Board could not find a buyer and the Managing Director was asked to take steps to find a prospective buyer. Even at that point of time, the Managing Director, Rajendran, appellant's father did not disclose that he and his daughter were interested in buying even the 60 shares or indicated the price to have controlling interest in the company. In the absence of any positive move from them from 3.6.1993, he met Mr. Appasamy, the third respondent and settled the price. In the light of this, the learned counsel questioned the stand made by the appellant that it was in accordance with the terms of Articles of Association. The learned counsel also referred to the minutes of the meeting on 17th June 1993 and to the draft letter written by the appellant addressed to the Chairman of the meeting. He also brought to my attention the decision of the Chairman on the sale of 240 shares sold by the second respondent to the third respondent. Hence, he submitted that there was no violation of the Articles of Association. The learned counsel also referred to the fact that considering the fact that the offer

from Lakshmi Natarajan was for far less number of shares and for a price much below what the second respondent could negotiate, the plea on fixing the fair value has become an academic issue. Consequently, in the absence of any valid offer, the question of looking into the aspect of valuation does not arise. He submitted that by making a limited offer in violation of the prescriptions under Article 32 of the Articles of Association, she was not qualified to question the sale.

12. He also pointed out that except for Lakshmi Natarajan, neither her father nor her sister, who were present in the Board's meeting expressed their grievance as regards the process culminating into a sale. He submitted that considering the approval by the Board, the claim itself was not sustainable.

13. Commenting on the order of the Company Law Board directing 55 shares to be given to the appellant and to her father and sister, the learned senior counsel for the respondent objected that the Company Law Board exceeded its jurisdiction in granting the relief which was not asked for. The learned senior counsel submitted that in any event there was no indication of the price at which the appellant were willing to buy. The letter did not disclose the price at which the appellant had offered to purchase nor she made an attempt to deposit the same immediately to create an obligation. He also submitted that the appellant had not placed any material to show how the value fixed vitiated the fair value. Apart from this, he submitted that there being no material supporting the said plea by the said valuation, no prejudice is caused to the said appellant, Consequently, he submitted that the question of invoking the principle of equity did not arise.

14. Defending the order of Company Law Board on other grounds, learned senior counsel submitted that there is no fixed concept on the fair value, particularly in a case of an unlisted companies. There are no inflexible standards as regards the fair value working. The Board had taken note of balance sheet as the basis for arriving at the fair value. There is no allegations that the valuation done was not answering the prescriptions of the accounting standards. Consequently, the intrinsic value fixed by the Chartered Accountant was taken as the fair value for the purpose of quoting the share. He also submitted that the Articles of Association is a contract binding on the parties which regulates the internal affairs of the company. There being substantial compliance on the side of the respondent, the appellant was not justified in her pleas on the mere observance of the Articles requirements.

15. In this connection he referred to a decision reported in 1973 SC 1164 (State of M.P. vs. Firm G. Dass) as well as to pages 101 and 102 of Ramaiyya Company Laws, 16th Edition.

16. Mr. Seshadri, learned senior counsel for the appellant, in his reply submitted particularly to the objection of Mr. Arvind P. Datar, learned senior counsel for the respondents, on the question of the locus standi of the appellant to file the petition. Considering the scope of Section 111 of the Companies Act that any

person aggrieved can file a petition, the appellant stated that the appellant had legal right to question the register on transfer. He submitted that the Articles of Association is a commercial documents in respect of rights of the parties. He referred to the decision reported in 132 CC 565 (SBI vs. Mula Sahakari Sakhar Karkhana Ltd.) and Section 82 as well as Section 36 of the Companies Act. Referring to the objection raised by the respondents that the appellant had not complied with the terms of the notice, hence, committed violation of the requirement under Article 32 of the Articles of Association, the learned counsel submitted that once the first respondent had violated the requirements under Article 32 of the Articles of Association namely the determination of the fair value by the Board, the question of getting into whether the appellant had complied with the Articles does not arise. Hence, when the very fundamental aspect on extending the invitation is defective, the respondent cannot take shelter in saying that this appellant had no locus standi. Consequently, the learned counsel submitted that the appeal merited acceptance in toto.

17. The sum and substance of the claims of the parties herein relates to questions on the compliance of Articles of Association, in the matter of sale of the shares and whether the appellant has right to question the transfer and lastly, as regards the equitable relief granted.

18. On the efficacy of the Articles of Association and its binding nature, the Supreme Court in 124 CC 685 (Smt. Claude-Lila Parulekar vs. Sakal Papers P. Ltd.), considered the question of its purpose and the binding nature. There is no dispute as regards the absoluteness of the binding character of the Articles of Association. It must at the same time be noted that a substantial compliance of the requirement cannot be defeated as no compliance. In the case of 1960 LR Chancery Division 1 (Rayfield v. Hands and others), it was held that,

...the proper way to construe the articles of association of a company is as a commercial or business document to which the maxim "validate if possible" applies,.....

In 1958 (2) All ER 129 (Holmes v. Keyes), Jenkins LJ held as follows:-

I think that the Articles of Association of a company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible in the language of the Articles, in preference to a result which would or might prove unworkable.

19. Referring to Section 36 of the Companies Act, the Supreme Court in the case of Smt. Claude-Lila Parulekar v. Sakal Papers P. Ltd. (124 CC 685), held that,

Articles of Association constitute a contract not merely between the shareholders and the company but between individual shareholder also.

20. While there cannot be any dispute as regards the binding character of the Articles of Association given under the nature of these documents, it must be

remembered that a substantial compliance of the requirements cannot be defeated as no compliance on hyper technical interpretation of the clauses in the Articles. The dispute herein centers much on the determination of fair value as per clause 32, which according to the appellant is mandatory, that considering the total failure in determining the same, the entire transfer is bad and not in conformity with the Articles of Association requirements.

21. It must be noted that valuation of share is an expression of opinion. In the case of shares, for which there is no regular market, it is not possible to estimate the value or the very price at which the actual sale may take place. The Private Limited company by their very nature restrict their transfer of their shares. Invariably these features have thus a disbursing effect on the fair value. Consequently, if the preemptive clause in the Articles require that the shares could be offered first to the members at a fair price, determined by the Board on the basis of the Chartered Accountant's certificate, normally, the Court would not venture into the valuation unless it is shown that valuation is intrinsically bad or suffers from improper application of principle of valuation.

22. A perusal of clause 31 of the Articles of Association shows any member desirous of transferring his share holdings must first indicate to the Board clearly his intention to transfer the number of shares that he proposed to sell and denoting the number of such shares. The Board thereupon is constituted as an agent of the transferor shareholder for the sale value of such shares. Thereupon, the Board of Directors within the period of 30 days from the date of receipt of sale notice determine the share value at which shares should be sold. The determination of fair value is based on the certificate given by the Auditors of the company. Thereafter, the Board of Directors offer such shares to the existing shareholders by putting them on notice as to the number of shares offered for sale and the price at which it is offered. Thereupon within 30 days from the date of receipt of such notice, the share-holders willingness to purchase the shares at the price fixed by the Board has to be communicated, apart from depositing with the Board the consideration for the shares they are willing to take up. Only in the event of the members failing to indicate their willingness within the time limit of 30 days, then the Director shall enjoy the liberty of offering the same to any person whether members or not. In such cases, preference should be given to the existing shareholders who have exercised their desire to purchase shares so offered. The Article 33 states that where the Board of Directors failed to find a purchaser within 90 days from the date of the offer, the transferor member is at liberty to sell to any person whether a member or not, at such price as may be negotiated by him and the purchaser, provided, such transfer shall be subject to the provisions contained in Clauses 29 and 30 of the Articles of Association.

23. A perusal of the facts stated herein would show that Murali, the second respondent herein, holding 240 shares intimated his desire to sell the entire share holding to the existing members. Thereupon, the Board by its letter dated 22nd April 1993 intimated that the intrinsic value of each share was fixed at Rs.

5001/- by the Chartered Accountant. The Board called upon the members to intimate their willingness or otherwise to purchase the shares within 30 days by enclosing Chartered Accountant certificate is dated 10th August 1992. As per the certificate, the intrinsic value was worked as on 31st March 1992. The intrinsic value per share was arrived adopting the break up value method by taking note of the assets and liabilities of the company and thereby dividing it by the total number of shares.

24. As per the offer letter, the last date for intimation of the willingness to buy falls on 22nd May 1993. It is an admitted fact that there was an offer intimated in writing by the appellant herein, however, the offer was for 15 shares. She intimated her intention to buy, but then expressed that the price would be negotiable. In the context of Clause 32 of the Articles of Association, in respect of members offering to purchaser pursuant to the declaration by the Board, the offer must be with reference to the shares indicated in the notice. In terms of Clause 32 of the Articles of Association, as rightly contended by the learned counsel for the respondent, it was only a part offer and part performance and not in full compliance of the Article, that appellant had not deposited the price fixed by the Board. To this, the learned counsel for the appellant submitted that the fundamental premise on which the entire proceedings begin is the determination of fair price. With only an indication of intrinsic price, the offer letter itself by the Board was in total contravention of Article 32, there being no determination of fair price. Consequently, the respondent could not find fault with the appellant's offer.

25. We have already noted that Article 32 enjoins on the Board in deterring the fair value.

26. On the question of "determination", the Supreme Court in the decision reported in 2004(3) SCC 1 (Ashok Leyland v. State of T.N.) considered the phrase "determination" in the context of issue arising under the Central Sales Tax Act. Referring to Black's Law Dictionary as well as to the Law Lexicon by Mr. P. Ramanathan, the Apex Court held that determination pre-supposes application of mind and expression of the conclusion. In the context of the requirements under Articles of Association, the fair value hence has to be determined meaning thereby, by a conscious expression of a conclusion.

27. As stated already valuation of shares is an expression of an opinion. The fair value as per Law Lexicon is defined as the present market value which means the value of the asset that could be obtained in an arms length transaction between willing buyer and willing seller. Intrinsic value is the true, inherent and essential value not depending on accident, place, or persons, but the same everywhere and to every one. It is further stated that intrinsic value is also a value of traded option brought about by a favourable difference between the market price and exercise price.

28. Taking note of the above said circumstances, in a private company, the

guidelines are found in the principle given in the notification published in 68 CC 121 Statute. 68 CC 121 Statute - "the guidelines for valuation of equity shares of the companies and the business and net assets of branches issued by the Ministry of Finance, Department of Economic Affairs, Investment Division, (vide file No. S11(21) C.C.I.(11) of 1990 dated 13th July 1990). Paragraph 5 of part 11 says that the objective of the valuation price is to make a reasonable judgment on value of equity share of the company.

29. As per the guidelines 68 CC 121 Statute, the average market price shall be kept in the background as relevant factor while settling the fair value unless there are reasons to believe that the market price is vitiated by speculative transactions or manipulative practices. Fair value is determined on the basis of the average of the net asset value and the profit earning capacity value. In determining the fair value of listed share, the market value is normally taken note of. The press release also gives the different method of competitive fair value. In the case of companies not listed, it is taken as an average of the net asset value and profit earning capacity value discounted by 1:15% of the restricted mobility of the shares as to the market value as willing buyer and willing seller concept. It is further stated therein that the guidelines given therein cannot be taken as an inflexible arithmetic exercise. In the ultimate analysis, valuation will have to be tempered by the exercise of judicious discretion and judgment taking into account relevant factors. There will always be several factors, example, quality and integrity of the management, present and prospective competition yield on comparable securities and market sentiment etc., which are not evident from the face of the balance sheets but which will strongly influence the worth of a share. Similarly, the accounts might be "window dressed" with a view to presenting a bright picture. The guidelines are intended to provide the basic frame work for valuation and to minimise the element of subjective consideration. It may be noted that the guidelines issued are more from the point of view of private and public companies, sterling tea companies and branches of foreign companies.

30. In the decision reported in 87 CC 792 (Miheer H. Mafatlal v. Mafatlal Inds. Ltd.) at page 835, the Supreme Court noted the principles to be kept in mind in the valuation of shares. It held that for arriving at the fair value of shares, three well known methods applied,

- (i) the changeable profit basis method (the earning per share method),
- (ii) the net worth method or break up value method, and
- (iii) the market value method.

31. As to the methods to be adopted in valuing the shares, in the case of CWT v. Mahadeo Jalan 86 ITR 621, the Apex Court held that where there is a listed company there existed no difficulty in fixing the fair value of the share. However, where there is no regular market, the break up value method would be a relevant consideration to be taken into account. The Apex Court further

cautioned against ignoring the restriction as to the transfer while determining the value since they are an inherent element in the property which has to be valued.

32. Referring to the decisions in the above case and a later decision in 122 ITR 38 (SC) (Commr. of Gift Tax Bombay v. Kusumben Mahadevia), the Supreme Court, in the case of 207 ITR 1 (Bharat Hari Singhania v. CWT) stated that these decisions recognise that the various factors in each case need to be taken into account to determine the method of valuation to be applied in each case. The Apex Court held "para (5) in part 11 says that the objective of the valuation process is to make a best reasonable judgment of the value of the equity shares of a company referred to in the guidelines as the fair value. Referring to the notice issued by the Ministry of Finance reported in 68 CC Statute 121 for determining the fair value, 3 methods are advised viz., net asset method, the profit earning capacity value method and the market value method. The relevance of the guidelines lies in the fact that they do indicate and reaffirm that in arriving at the fair value the break up method is one of the recognized methods employed of valuing the shares.

33. It must be noted that considering the fact that there is no direct definition on the fair value and going by the guidelines as stated above, in the case of an unquoted share or shares which are not subjected to market forces but restricted again by the terms of the articles of association, the fair value fixation of necessity must go by some settled principles or the guidelines issued by the expert body.

34. The learned counsel referring to the above said passage in 87 CC 792 (Miheer H. Mafatlal v. Mafatlal Inds. Ltd.) at 835, submitted that unless valuation had been done in any one of these methods and intrinsic value could not be treated as a fair value, satisfying any of the known method of valuation. Hence, there cannot be any determination said to have taken place in compliance of the requirements under Articles of Association relating to the share transfer.

35. A look at the valuation done by the Chartered Accountant discloses how the value per share is worked out. Taking into account the assets and liabilities and calculated on the net assets, this intrinsic value per share is worked out. Revaluation hence is done as per the net asset value or break up value. This is one of the recognised methods of valuation. Going by the decisions of the Supreme Court in the context of arriving at a fair value by adopting brake up value method, I do not find any difficulty in accepting this intrinsic value worked out as to fair value. The facts in this case show that the value settled is much below the intrinsic value arrived at by the Chartered Accountant. In any event, the learned counsel submitted that in the absence of any determination based on the Chartered Accountant's calculation, there is totally a non confirming to the standards stipulated in the Articles of Association. As already referred to earlier to the decision of the Supreme Court, in 2004 3 SCC 1 (Ashok Leyland v. State of T.N.), a determination necessarily involves a conscious application of mind to the facts before. The fact that the letter dated 22nd April 1993 sent by the Executive

Director enclosing just the intrinsic value alone as fixed by the Chartered Account, cannot be rejected that there was a non application of mind on the determination of the fair value. The conscious enclosing of the value of the Chartered Accountant's certificate is indicative of the determination of the value fixed therein as regards the sale of shares proposed.

36. Given the fact that the fair value may be done on any one of the methods available as stated above and given the shortcomings in a private company as to the uncertainties in the working of the profits therein and the dividend declaration, the profit earning method or the yield method hence unsuited, the one recommended for a private company as best suited is stated as the net asset valuation method or the break up method. A perusal of the working by the Chartered Accounts shows that value had been made on the break up method or the net asset valuation method, that I do not find any reason to accept the contention of the appellant that the intrinsic method is not reflective of the fair value of the share. Learned counsel could not point out that the value indicated could not be a fair value. Except for this objection the Board had not deliberated on the valuation of the Chartered Accountant to independently arrive at the fair value. I do not agree with this too. If the Board had felt that the value fixed was acceptable as fair value and hence needed no further deliberation except to forward the same, the members to enable them to make their offer fair value, there could be nothing to be found fault with. In any event, as I had stated an intrinsic value is nevertheless a fair value given the guidelines governing in the matter of valuation of the shares in a private company.

37. Consequently, I do not find that there had not been a proper compliance of the provisions of the Articles of Association in the matter of determining the fair value, as the first condition for compliance of the Articles of Association in the matter of setting in motion the sale of the shares. The fact that the Board had not expressed this as a fair value does not mean that there is no determination nor intrinsic value worked out at fair value. The judgments referred to above and the guidelines prescribed, supports the view that I have taken.

38. I accept the arguments of the learned counsel appearing for the respondents that when there being no market value, the method adopted is in full and substantial compliance of the requirements.

39. Mr. Aravind P. Datar, learned senior counsel appearing for the respondents pointed out that the appellants had no locus standi to question the action when there was hardly no compliance of any requirement of Article 32. He questioned the competency of the appellant to question the transfer u/s 111 of the Companies Act. In this connection he invited my attention to the offer letter from the appellant.

40. A perusal of the documents filed show that the offer for sale from the second respondent was for 240 shares. Under Article 35, the offer for purchase has to be with reference to the shares quoted for sale. Apart from this, the Articles also

enjoins that the willing buyer should deposit within 30 days the price quoted. In the case of the appellant, as is evident from the letter dated 7th May 1993, the offer to purchase was for 15 shares only. Except to express that the price would be negotiable, even to the extent of her offer, there was no deposit made in compliance of the requirement. There was hardly even a part performance of what was expected of the willing buyer as per the Articles of Association. The Articles does not contemplate a truncated exercise on the offer to be made to purchase the shares. Consequently, as rightly submitted by the learned counsel for the respondents, when the transferor had expressed his proposal to sell the number of shares, the Articles in clause 31 and 32 do not contemplate any such reservation to the intending buyer to purchase a portion of a share offered.

41. The minutes of the meeting of the Board of Directors which is annexed at Page 78 shows that no action was taken in the matter of finding a buyer for 240 shares even after the expiry of the stipulated time. Hence, he called on the third respondent, Appaswamy and negotiated with him for the sale of 240 shares for Rs. 3000/- per share, that after a detailed discussion, it was decided by the Board to permit the second respondent, Murali to sell his shares to Appaswamy at Rs. 3000/- per share. In the context of the resolution passed, the sale was confirmed. Learned senior counsel for the respondent pointed out that the meeting was attended by the sister and father of the present appellant and there was no protest or an objection from any one of them, who according to the appellant herein wanted to buy the shares.

42. The learned senior counsel for the respondent referring to Section 192 of the Companies Act as to the presumption raised that every resolution passed by the company in accordance with the Articles of Association would be binding on the parties concerned, relied on the minutes of the meeting held on 17th June 1993 recording the minutes of the meeting on 5.6.93, viz., the offer from Appaswamy for the purchase of 240 shares at Rs. 3000/-. The minutes referred to the letter in reply to the appellant and about the decision of the Board to permit Murali to sell the shares to Appaswamy. A reading of the draft letter addressed to the appellant herein, shows that Murali was not in favour of selling shares at Rs. 2500/- offered by her sister Seetha Ravi and father Rajendran. Since there was no understanding as to the price of shares reached between the buyer and seller up to 22.5.93, quite naturally, the Directors had to find the buyer and was informed by said Murali that Appaswamy had offered to buy the 240 shares at Rs. 3000/-. The same was permitted to be sold at that price. The minutes of the meeting on 19th June 1993 records the sale of shares by the 2nd respondent to the 3rd respondent. A resolution was passed to the effect that in the place of the share certificate cancelled, fresh certificate be issued in the name of Appaswamy. The said resolution also referred to the affixing of the company seal in the presence of Rajendran, the Managing Director, father of the appellant and authorising Rajendran and Murali to sign the fresh share certificate on behalf of the company. In the light of the above said documents, there could be no denial of the compliance of the requirements under Articles of Association in toto. As

rightly submitted by the learned counsel for the respondents, the presumption u/s 192 of the Companies Act operates. In the absence of any allegation to rebut the same and in the absence of valid offer for purchasing the entire shares, the offer made by the appellant could not be acted upon as a valid offer.

43. As rightly pointed out by Mr. Aravind P. Datar, learned senior counsel appearing for the respondents that Articles required the offer to be one to fit in with the specified number of shares given for sale, apart from other clauses as regards deposit of the sale consideration. On both counts, the appellants had failed to comply with the requirement, as such, the question of considering the offer for 50% or 15% as the case may be, even taking note of what the appellant claimed as one on behalf of Rajendran and Seetha Ravi could not be taken as a valid offer for any further acceptance. It is stated by the appellant that Seetha and Rajendran were anxious to buy the shares. These two persons were parties to the resolution passed. No grievance was expressed at any point of time on lines of allegations made by the appellant herein either in the Board meeting or at any time prior to or thereafter too. In these circumstances, when the appellant had not complied with the offer for sale of 250 shares and no price had been indicated, it stands to reason that the appellant could not complain as to the non compliance of the Articles of Association. Even assuming that no fair value had been indicated as had been contended by the appellant, even to the extent what the appellant considered as a fair value, there had not been an indication to deposit the amount, apart from the further aspect that offer itself was below the quoted number of shares. The decision relied on by the learned senior counsel supports the stand of the respondents on the question of locus standi of the appellant to question the transfer or raise a question u/s 111 of the Act.

44. The learned senior counsel for the respondents submitted that the fixation of fair value is extraneous for the purpose of Section 111 of the Act. He contended that the petition does not disclose how the intrinsic value indicated as the value determined vitiates the fair value. There is hardly any prejudice shown in any of the communication. He stated that as admitted by the appellant, her attempt to purchase the shares was merely a power gain and hence the petition could only be viewed as cry in desperation. Viewed in the context of the non compliance or non observance of the Articles, the claim of the appellant has to fail. In this connection, the learned counsel for the respondents placed reliance on the decision reported in 1973 SC 1164 (State of Madhya Pradesh v. Firm G. Dass) in support of his contention that the condition precedent for acceptance of the tender is the compliance of the terms of the tender, failing which there was no concluded contract for any further action. He also referred to 1992 1 WLR 277 (Jones and others v. Sherwood Computer Services PLC.) in support of his contention that once there had been a proper valuation by an expert body, viz., Accountants, it shall be binding on the parties. Since the terms of Articles 32 create binding contractual obligations, failure to comply with the offer letters defeats the stand of the appellant herein. In the light of the view I had expressed, I accept the case of the respondents and reject the appellant's case

that the transfers are void, they being in total violation of the Articles.

45. There is yet another question to be considered as regards the order of the Company Law Board wherein it had applied the principle of equity in an attempt to satisfy both the parties. It is seen from the order of the Company Law Board that after a gap of nine months, the appellant herein preferred a petition u/s 111(4) of the Companies Act for a declaration that the transfer of 240 shares was illegal. As already noted and even as per her admission, her intent to buy the shares was motivated by her desire to hold majority. Admittedly the other two members had not petitioned the Company Law Board disputing the transfer. Having found no ulterior motive in the negotiation and in the transfer of shares between the second and third respondent, surprisingly, the Company Law Board directed the transfer of 55 shares to three shareholders which included the appellant herein and her sister and father, who were on the Board but who however had no grievance on the transfer to the third respondent. The Company Law Board directed that within 30 days from the date of the receipt of its order, the three shareholders would indicate the company the number of shares they desired to purchase together with payment of Rs. 3000/- per share, that the company in turn would obtained transfer instrument along with share certificate from Murali and register the same within one week thereafter.

46. The second and third respondents are on appeal before this Court challenging this aspect of the order of the Company Law Board. The third respondent in company petition viz., Appaswamy has preferred the appeal in C.M.A. No. 656 of 1997, the second respondent, Murali has preferred the appeal in C.M.A. No. 909 of 1997. The grievance of these appellants before this Court are one and the same on the principle of equity adopted by the Company Law Board.

47. In this connection, Mr. T.K. Seshadri, learned senior counsel submitted that the Company Law Board is a first court of law and then only it comes as court of equity to grant a relief thereon. When there is total violation to the compliance of Articles of Association even from the earliest of the step as regards the determination, the Company Law Board ought to have stopped with considering the issue. Hence, when the determination itself was in violation, the consideration as to the appellant complying with or not is totally immaterial.

48. Learned senior counsel submitted that the course open before the Company Law Board was only one either to accept the transaction as done in accordance with the Articles or reject them in toto as in total violation of the Articles. The jurisdiction of the Company Law Board permits no via media action on the principles of equity. Consequently, he submitted that given the scope of Section 111, the Company Law Board ought to have set aside the order and follow the procedure contemplated in law. He referred to the decision reported in 2005(2) CHN 74 (Swapan Kumar Pani v. Canara Bank And Ors.), AIR 2000 AP 113 (Chivukula Ranjith Kumar And Others v. Santhilal Nemichand And Another), (2004) 52 SCL 159 (S. Bhuvaneswari v. ACI Limited), apart from 1976 SC 2403

(CIT Bangalore v. H. Narayaniah), Vol. 30 Bombay LR 523 (H v. H) and 2005 2 CNN Calcutta 74 (Swapan Kumar Pani v. Canara Bank & others). He submitted that Section 82 of the Companies Act contemplates transfer in the manner provided in the Articles of Association. Section 36 speaks about effect of memorandum and Articles of Association in the context of statutory prescription. Article 30 and 31 lead no ambiguity. As such, the question of equitable consideration carry no meaning at all. It is a well settled principle of law that equity follows law. The learned counsel for the respondents has no different view from the appellant on the question of the legality of the direction given.

49. Referring to the objection from the respondents' side as regards locus standi of this appellant to prefer this petition, he pointed out that such a plea as regards locus standi is a question of law which must arise out of the order of the Company Law Board. He submitted that as there was no plea in the counter as regards the locus standi, no question of law arises now at this juncture for the respondents to question the right of this appellant to file a petition before the Company Law Board. As such, in respect of matters not considered, no question of law arises.

50. In the context of the view that I have taken, there is no breach of Articles 30 and 31. I do not find any justification in the Tribunal invoking the principle of equity in an attempt to pacify the parties in the fray. As rightly submitted by the learned counsel for the appellant, given the jurisdiction of the Company Law Board and the finding rightly given, it is not for the Company Law Board to act as a neutral agency to pass this order or any supposed notion on equitable justice. I find no justification as regards the view expressed by the Company Law Board on the application of equitable principles. Consequently, the appeal filed by the appellant in company petition viz., C.M.A. No. 162 of 1998 fails and the appeals filed by Appaswamy and Murali in C.M.A. Nos. 656 and 909 of 1997 merit to be allowed. Consequently, connected C.M.P. No. 6010 of 1997 is closed. The transfers effected as approved by the Board of Directors in a resolution passed, is in accordance with the requirements of the Articles of Association and hence, the order of the Company Law Board as regards the invoking of equity principles directing the retransfer of 50 shares fails. No costs.