LIFE INSURANCE CORPORATION OF INDIA A

v.

ESCORTS LTD. & ORS.

DECEMBER 19, 1985

[O. CHINNAPPA REDDY, E.S. VENKATARAMIAH, V. BALAKRISHNA B
ERADI, R.B. MISRA AND V. KHALID, JJ.]

A. Foreign Exchange Regulation Act, 1973, section 29(1)(b) - Whether the Reserve Bank of India had the power or authority to give "ex-post facto" permission under section 29(1)(b) of the Act for the purchase of shares in India by a company not incorporated C in India or whether such permission had necessarily to be previous permission - Words and Phrases "Permission" meaning of.

B. Corporate democracy, concept of, explained.

C. Company Law - Shares - Nature of the property in shares D - Law relating to transfer of property in shares under the law and the effect of the provisions of the Foreign Exchange Regulation Act explained - Companies Act, 1956, sections 2(46), 82, 84, 87, 106, 108(1), 108 (1-A) (a) and (b), 108 to 108 H, 110, 111(1) & 3, 206, 207, 397, 398, 428, 439 and 475 read with section 27 of the Securities Contracts (Regulation) Act, Sale of Goods Act, E Sections 2 (7), 19, 20 to 24 and Transfer of Property Act, section 6.

D. Companies Act, 1956, sections 291-293 - Position and nature of discretionary powers of the Directors in a company.

E. Shares of a company, transfer of - Refusal to transfer F the shares, extent of - Whether the refusal to transfer the shares by the company even after the permission was granted by the Reserve Bank under the FERA, proper - Companies Act, 1956 section 111(1) & (3).

F. Shares, Purchase of by the foreign investor of Indian G nationality/origin - On the facts of the instance case, whether involved any contravention of Foreign Exchange Regulation of the Non-Residents' Investment Scheme.

G. Doctrine of lifting the corporate veil - Investments by company owned by non-residents of Indian nationality in accordance with the Foreign Exchange Regulations, the Non-Residents H

A External Account Rules, 1970, the Portfolio Investment Scheme, the Exchange Control Manual, Stock Exchange Control (Regulation) Act, 1956 and its bylaws - Whether the Court could pierce the veil of the transactions.

B H. Shareholders' right to call extraordinary general meeting on requisition either to alter the Articles of Association of removal/change of directors - State and its instrumentalities being shareholders have the same rights of an ordinary shareholder - Companies Act, 1956, sections 169, 172, 173(3), 284, - L.I.C. Act, Section 6.

C I. Constitution of India, 1950, Articles 14, 19, 32, 226 read with order XXXIX Rule 1 - Whether the Courts can interfere with the shareholder's right to call a general body meeting and grant injunctions - Judicial Review and Article 14 explained.

J. Construct of statutes enacted in national interest, explained.

D K. English cases, reference to as external aids permissibility - Forms, whether can control the Act.

L. Exchange Control Manual - Paras 24, 24 A-1 and 28 A-1 - Titled "Introduction to Foreign Investment in India - Nature of - Whether statutory direction.

E M. Foreign Exchange Regulation, 1973 - Grant of permission by the Reserve Bank of India under the N.R.P. scheme - Whether can be questioned by the company whose shares are purchased by N.R.I. in a petition under Article 226 of the Constitution.

F N. Rule against retrospectivity, applicability of.

G O. Portfolio Investment Scheme by companies and overseas bodies owned by non-residents of Indian nationality/origin in accordance with circulars issued from time to time by the Reserve Bank of India under section 73(3) of FERA and clarifications thereof contained in Press Release dated 17.9.83 and the circular dated 19.9.83 (both) issued by the Reserve Bank of India and the letter dated 19.9.83 issued by the Government of India, whether valid.

H P. Mala fides, whether the Union of India, the Reserve Bank of India and the Life Insurance Corporation of India be said to

have acted malafides, in the matter of requisiting general meeting and in the investment by purchase of shares made by the Caparo companies, respectively.

Indian economy which has to operate under the existing world economic system needs lots of foreign exchange to meet its developmental activities. For the purpose of earning, conserving and building up a reservoir, thereof, and to improve its proper utilisation Parliament and the Executive government including the Reserve Bank of India have been taking several steps from time to time under the Foreign Exchange Regulation Act, 1973 and other allied Acts and Rules made thereunder. In exercise of the powers conferred by section 79 of the Foreign Exchange Regulation Act, the Central Government made Rules called the Non-Resident External Account Rules, 1970. With a view to earn foreign exchange by attracting non-resident individuals of Indian nationality or origin to invest in shares of Indian companies, the Government of India decided to provide incentives to such individuals and formulated a "Portfolio Investment Scheme". This scheme was announced by the Government on 27.2.1982 was incorporated in Circular No.9 dated 14.4.1982 of the Reserve Bank of India issued under section 73(3) of the Foreign Exchange Regulation Act. Paragraph 4(a) thereof provides that under the liberalised policy non-residents of Indian nationality or origin will be permitted to make portfolio investment in shares quoted on stock exchanges in India with full benefits of repartriation of capital invested and income earned subject to provisos therein. This was followed by further circulars No. 10 dated 22.4.1982, No.15 dated 25.8.1982, No.27 dated 10.12.82, No.12 dated 16.5.1983 and No.18 dt. 19.9.83.

The net result of all the circulars was that non-resident individuals of Indian nationality/origin as well as overseas companies, partnership firms, societies, trusts and other corporate bodies which were owned by or in which the beneficial interest vested in non-resident individuals of Indian nationality/origin to the extent of not less than 60 per cent were entitled to invest, on a repatriation basis, in the shares of Indian companies to the extent of one per cent of the paid up equity capital of such Indian company provided that the aggregate of such portfolio investment did not exceed the ceiling of 5 per cent. It was immaterial whether the investment was made directly or indirectly. What was essential was that 60 per cent of the ownership or the beneficial interest should be in the hands of non-resident individuals of Indian nationality/origin. Though a

limit of one per cent was imposed on the acquisition of shares by each investor there was no restriction on the acquisition of shares to the extent of one per cent separately by each individual member of the same family or by each individual company of the same family (group) of companies.

Desiring to take advantage of the Non-Resident Portfolio Investment Scheme and to invest in the shares of Escorts Ltd., (an Indian company), thirteen overseas companies, twelve out of whose shares was owned 100% and the thirteenth out of whose shares was owned 98 per cent by Caparo Group Ltd., designated the Punjab National Bank as their banker (authorised dealer) and M/s. Raja Ram Bhasin & Co. as their broker for the purpose of such investment. Their designated bankers M/s Punjab National Bank E.C.E. Branch informed the Reserve Bank of India through their letter dated 4.3.1983 that according to OAC & RPC forms received the Caparo group of companies were incorporated in England and that 61.6 per cent of the shares thereof are held by the Swaraj Paul Family Trust, one hundred per cent of whose beneficiaries are one Swaraj Paul and the members of his family, all non-resident individuals of Indian origin and requested the Reserve Bank to accord their approval for opening Non-Resident External Accounts in the name of each of thirteen companies for the purpose of "conducting investment operations in India" through the agency of Raja Ram Bhasin and Co. Stock Investment Adviser and member of the Delhi Stock & Share Department Delhi. It was mentioned in the letters to the Reserve Bank that the proposed accounts would be "effected" by remittances from abroad through normal banking channels and credits and debits would be allowed only interms of the scheme contained in the scheme for investment by non-residents. Though a remittance of $1,30,000 equivalent to Rs.19,63,000 made by Mr. Swaraj Paul to the Punjab National Bank, Parliament Street Branch on 28.1.1983 for the purpose of opening on N.R.E. account in the name of Swaraj Paul, his bankers advised the Reserve Bank that only four remittances had been received from Caparo Group Ltd. the holding company on 9.3.83, 12.4.83, 13.4.83 and 23.3.83, of amounts equivalent to Rs.1,35,36,000, Rs.2,36,59,000, Rs.76,35,000 and Rs.1,31,38,681.13p.

Payments under the Stock Exchange Rules may be made within two weeks after the purchases contracted for. M/s. Raja Ram Bhasin & Co. had, therefore, purchased shares of Escorts Ltd. worth Rs. 33,40,865 from Mangla & Co. prior to 9.3.83, the date of the first remittance as disclosed by Punjab National Bank. However, the statements of purchases of shares made by the said brokers show that even by 14.3.83, shares of Escorts Ltd. worth

Rs.3,85,920 had been purchased from Bharat Bhushan & Co. and shares worth Rs.45,81,677 had been purchased from Mangla & Co. The brokers had advised the designated bank that out of 75000 shares of Escorts Ltd. purchased upto 28.4.83, 35,560 shares purchased by each of the twelve companies and 35667 shares purchased by the thirteenth company were lodged by them with Escorts Co. Ltd. in the names of H.C. Bhasin and Mr. Bharat Bhushan for the purpose of transfer of the shares in the books of the company. Under byelaw 242 of the Stock Exchange Regulations which permit the brokers to lodge the shares in their own names insteads of their principals, if they are unable to complete the formalities before the closing of the books. In the meanwhile, on 31.5.83, Punjab National Bank wrote to Escorts Ltd. informing them that the thirteen companies had been making investments in shares of Escorts Ltd. in terms of the scheme for Investment by overseas corporate bodies predominantly owned by non-residents of Indian nationality/origin to an extent of at least 60% and that the thirteen overseas companies had designated them as their banker and M/s Raja Ram Bhasin & Co. as their brokers for the purpose of investment.

Escorts Ltd., sought detailed information from Punjab National Bank and the brokers about the names of investors and also whether the Reserve Bank of India had accorded permission to them. As there was no response from either of them, Escorts Ltd. constituted a committee to look into the question of transfer of shares in their books and according to its recommendations the Board of Directors passed a resolution refusing to register the transfer of shares.

Escorts Ltd., although they had already refused to register the transfer of shares, wrote to the Punjab National Bank for information on several points as they desired to make a representations to the Reserve Bank of India, intervene and assist in the inquiry being conducted by the Reserve Bank at the behest of the Government of India. They also wrote several letters to the Reserve Bank purporting to give information regarding various irregularities committed in the purchase of shares of their company by the thirteen foreign companies, suppressing the fact that they have refused to register the transfer of shares in their favour.

In accordance with the clarificatory letter dated 17.9.83 from the Government of India, its Press Release of the same date and its circular No. 18 dated 19.9.83, the Reserve Bank, by a telex message conveyed to the Punjab National Bank their

permission to release the money remitted by Caparo Group Ltd. from abroad for making payment against the shares of DCM and Escorts Ltd. Subsequent to the grant of permission by the Reserve Bank of India, another attempt was made to have the transfer of shares registered. The request was turned down once again by Escorts Ltd. who by their letter dated 13.10.83 stated that apart from the question of obtaining the permission of the Reserve Bank of India, the decision of the Board to refuse to register the shares was based on other grounds which contained to be valid. Respondent No.19, therefore, preferred an appeal to the Central Government under section 111(3) of the Companies Act.

Escorts Ltd. alleging undue pressure from the financial institutions like ICICI, IFC, LIC, IDBI and UTI for the registeration of the transfer of shares and explaining the circumstances and instances commencing from the meeting held on 18.10.83 onwards upto 29.12.83, filed Writ Petition No.3068/83 on 29.12.83 under Article 226 of the Constitution challenging the validity of Circular No.18 dated 19.9.83 and the Press Release of the same date as arbitrary and violative of not only Articles 14, 19(1)(c) and 19(1)(g) of the Constitution, but also the provisions of Foreign Exchange Regulations, the provisions of Securities Contract Regulation Act etc.

Subsequent to the filing of the Writ Petition the Life Insurance Corporation of India who along with other financial institutions held as many as 52% of the total number of shares in the company, issued a requisition dated 11.2.84 to the company to hold an extra ordinary general meeting for the purpose of removing nine of the part-time Directors of the company and for nominating nine others in their place. Alleging that the action of the Life Insurance Corporation of India was malafide and part of a concerted action by the Union of India, the Reserve Bank of India and the Caparo Group Ltd. to coerce the company to register the transfer of shares and to withdraw the Writ Petition, the Writ Petitioners sought to suitably amend the Writ Petition and to add prayers (ia), (ib), (ic) and (id) to declare the requisition to hold the meeting arbitrary, illegal, ultra vires etc. The writ petition was amended. Paragraphs 149A(1) to (44) were added as also prayers (ia), (ib), (ic) and (id).

The High Court of Bombay allowed the writ petition and granted reliefs in the following manner:-

"Section 29(1)(b) of FERA is mandatory. No Non-Resident Indian Investor is authorised to purchase share in an Indian

Company without the prior permission of R.B.I. under section 29(1)(b) of FERA; any purchase of shares without such prior permission is illegal: Neither the Union of India or the R.B.I. is empowered to order otherwise either by issuing a direction under section 75 or under section 73(3) of the FERA; nor are they empowered to grant permission after the shares are purchased without obtaining prior permission. The Press Release dt. 17.9.83 (Ex.A.), the circular dt. 19.9.83 (Ex.B) and the letter dt. 19.9.83 (Ex.C) cannot operate retrospectively so as to validate the purchase of shares made by N.R.I. companies which were ineligible on the date of purchase; nor can they authorise purchase of shares without obtaining prior permission of the R.B.I. under section 29(1)(b) of the FERA. In so far as the impugned Press Release circular and letter permitting the respondent-companies to hold the shares purchased without obtaining prior permission of the R.B.I., they are ultra vires of section 29(1)(b) of FERA and the powers vested in the Union of India under section 75 and the R.B.I. under section 73(3) of the FERA. To that extent they are void and inoperative both prospectively and retrospectively. The impugned Press Release and the circular, however, amount to amending the Portfolio investment Scheme with full repatriation benefits introduced under Circular No. 9 dated 14th April, 1982, and such amendments operates only prospectively. The action of respondent No.18 in issuing the impugned requisition notice is contrary to the provisions of section 284 of the Companies Act and ultra vires the powers vested in the L.I.C. under section 6 of the L.I.C. Act and contrary to the intendment of the provisions of the L.I.C. Act. The impugned requisition notice offends the principles of natural justice. The action of the L.I.C. in issuing the impugned requisition notice is an arbitrary and mala fide action taken for collateral purpose; it is violative of Article 14 of the Constitution of India. The Union of India and the R.B.I., respondents Nos. 1 and 2, are in no way responsible for the action of the L.I.C. in this regard. The allegation of mala fides made against them and the Union Finance Minister are unsubstantiated. The requisition notice and the resolutions passed at the meeting held in pursuance of the said notice are quashed". Aggrieved by the said judgment and decree the Life Insurance Corporation of India has come in appeal, and cross-appeals have been filed by Escorts Ltd. and Mr. Nanda, the Managing Director of Escorts.

Allowing CA 4598/84 filed by the Life Insurance Corporation of India, Union of India and the Reserve Bank of India and dismissing the cross appeals No.497-499/85 filed by Escorts Ltd. and Nanda, the Court

A **HELD** : 1.1 The action of the Life Insurance Corporation of India in issuing the requisition notice dated 11.2.84 to hold an extra ordinary general meeting of the Escorts Company Ltd. for the purpose of removing nine of the part time Directors of the company and for nominating nine others in their place is neither contrary to the provisions of section 284 of the Companies Act, B 1956 nor ultra vires the powers vested in the Life Insurance Corporation under section 6 of the Life Insurance Corporation of India Act. The notice does not offend the principle of natural justice. The said action of the L.I.C. cannot be said to be arbitrary and malafide and taken for collateral purpose or violative of Article 14 of the Constitution of India. [1022 F]

C 1.2 A company is, in some respects, an institution like a State functioning under its "basic constitution" consisting of the Companies Act and the Memorandum of Association. "The members in general meeting" and the directorate are the two primary organs of a company comparable with the legislative and the executive organs of a Parliamentary democracy where legislative sovereignty rests with Parliament, while administration is left to the D Executive government, subject to a measure of control by Parliament through its power to force a change of Government. Like the Government, the Directors will be answerable to the Parliament constituted by the general meeting. But in practice (again like the government), they will exercise as much control over the parliament as that exercises over them. Although it would be E constitutionally possible for the company in general meeting to exercise all the powers of the company, it clearly would not be practicable (except in the case of one or two-man companies) for day to day administration to be undertaken by such a cumbersome piece of machinery. So the modern practice is to confer on the Directors the right to exercise all the company's powers except F such as the general law expressly provides must be exercised in general meeting. Of course, powers which are strictly legislative are not affected by the conferment of powers on the Directors as section 31 of the Companies Act provides that an alteration of an article would require a special resolution of the company in general meeting. Under the Company Act, in many G ways the position of the Directorate vis-a-vis the company is more powerful than that the Government vis-a-vis the Parliament. The strict theory of Parliamentary sovereignty would not apply by analogy to a company since under the Companies Act, there are many powers exercisable by the Directors with which the members in general meeting cannot interfere. The most they can do is to H dismiss the directorate and appoint others in their place or alter the articles so as to restrict the powers of the Directors for the future. The only effective way the members in general

meeting can exercise their control over the Directorate in a democratic manner is to alter the Articles of Association so as to restrict the powers of the Directors for the future or to dismiss the Directorate and appoint others in their place. The holders of the majority of the stock of a Corporation have the power to appoint, by election, Directors of their choice and the power to regulate them by a resolution for their removal. This is the essence of corporate democracy. [1010 G-H; 1011 A-H]

In the instant case, the financial institutions which held 52% of the shares of Escorts company had a very big stake in its working and future and were aggrieved that the management did not even choose to consult them or inform them that a Writ Petition was proposed to be filed which would launch and involve the company in difficult and expensive litigation against the Government and the Reserve Bank of India. The institutions were anxious to withdraw the writ petition and discuss the matter further. As the Management was not agreeable to this course, the Life Insurance Corporation thought that it had no option but to seek a removal of the non-Executive Directors so as to enable the new Board to consider the question whether to reverse the decision to pursue the litigation. Evidently the financial institutions wanted to avoid a confrontation with the Government and the Reserve Bank and adopt a more conciliatory approach. At the same time, the resolution of the Life Insurance Corporation did not seek removal of the Executive Directors, obviously because they did not intend to disturb the management of the company Therefore, the Life Insurance Corporation of India cannot be said to have acted mala fide in seeking to remove the nine non-Executive Directors and to replace them by representatives of the financial institutions. No aspersion was cast against the Directors proposed to be removed. It was the only way by which the policy which had been adopted by the Board in launching into a litigation could be reconsidered and reversed, if necessary. It was a wholly democratic process. A minority of shareholders in the saddle of power could not be allowed to pursue a policy of venturing into a litigation to which the majority of the shareholders were opposed. That is not how corporate democracy may function. [1010 A-G]

1.3 Every shareholder of a company has the right, subject to statutorily prescribed procedural and numerical requirements to call an extra ordinary general meeting in accordance with the provisions of the Companies Act, 1956. He cannot be restrained from calling a meeting and he is not bound to disclose the

reasons for the resolution proposed to be moved at the meeting. Nor are the reasons for the resolutions subject to judicial review. [1016 B-C]

1.4 It is true that under section 173(2) of the Companies Act, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each item of business to be transacted at the meeting, including in particular, the nature of the concern or the interest, if any therein, of every director, the managing agent, if any, the secretaries and treasures, if any, and the manager if any. That is a duty cast on the management to disclose, in an explanatory note, all material facts relating to the resolution coming up before the general meeting to enable the shareholders calling a meeting to disclose the reasons for the resolutions which they propose to move at the meeting. The Life Insurance Corporation of India, though an instrumentality of the State, as a shareholder of Escorts Ltd. has the same right as every shareholder to call an extraordinary general meeting of the company for the purpose of moving a resolution to remove some Directors and appoint others in their place. The Life Insurance Corporation of India cannot be restrained from doing so nor is bound to disclose its reasons for moving the resolutions. [1016 C-F]

1.5 When a requisition is made by a shareholder calling for a general meeting of the company under the provisions of the companies Act validly to remove a director and appoint another, an injunction cannot be granted by the Court to restrain the holding of a general meeting. [1011 G-H]

Shaw & Sons (Salford) Ltd. v. Shaw [1935] 2 KB 113; **Isle of Wight Railway Company v. Tahourdin** (1883) 25 Ch. D.320; **Inderwick v. Snell** 42 Eng. Rep.83; **Bentley-Stevens v. Jones** [1974] 2 All E.R.653; **Ebrahimi v. Westbourne Galleries Ltd.** [1972] 2 All E.R. 492 referred to.

1.6 Every action of the State or an instrumentality of the State must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. But Article 14 cannot be construed as a charter for judicial review of state action, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. If the action of the State is political or sovereign in character, the Court will keep away from it. The Court will not debate academic matters or concern itself with the intricacies of

trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of tort, the Court may not ordinarily examine it unless the action has some public law character attracted to it. Broadly speaking the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. [1017 C-D; E-G]

When the State or an instrumentality of the State ventures into the corporate world and purchases shares of a company it assumes to itself the ordinary role of a shareholder and dons the robes of a shareholder, with all the rights available to such a shareholder. Therefore, the State as a shareholder should not be expected to state its reasons when it seeks to change the management by a resolution of the company, like any other shareholder. [1017 G-H; 1018 A-B]

O'Reilly v. Mackman [1982] 3All E.R. 1124; **Devy v. Spelthonne** [1983] 3 All E.R. 278; **I Congress Del Partido** [1981] 2 All E.R. 1064; **R. v. East Berkshire Health Authority** [1984] 3 All E.R. 425; and **Radha Krishna Aggarwal & Ors. v. State of Bihar** [1977] 3 S.C.R. 249 referred to.

2. It cannot be said that the attitude taken by the Life Insurance Corporation of India in regard to (i) the issue of Equity linked Debentures; (ii) Repayment of loans to Indian Financial Institutions; and (iii) the proposal of the merger of Goetze with Escorts were mala fide and an attempt on its part to exert pressure on Escorts Ltd. to register the shares of Caparo Group. The result of accepting the proposal for the issue of Equity linked Debentures would be that the L.I.C.'s holdings would be reduced from 30 per cent to 18.14 per cent, while the holding of all the financial institutions would be reduced from 52% to 31.21% besides involving great financial loss to them. Similar would be the position if the proposals for the merger of Goetze with Escorts was accepted. None holding a majority of the equity capital of a company would allow himself to be hustled into becoming a minority shareholder. The object of prepayment of loans was to get rid of the directors who the financial institutions had a right to nominate. True Escorts offered to appoint Mr. Davar as a Director even if the financial institutions had no right to nominate him. But it is one thing to have the right to nominate a director and quite another thing to be a director at sufference. [1018 D-E; 1019 A-B; 1021 C-D]

3.1 On an overall view of the several statutory provisions and judicial precedents, it is clear that a shareholder has an

undoubted interest in a company, an interest which is represented by his share holding. Share is movable property with all the attributes of such property. The rights of a share holder are (i) to elect directors and thus to participate in the management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the company in the shape of dividends; (iv) to apply to the court for relief in the case of oppression; (v) to apply to the court for relief in the case of mismanagement; (vi) to apply to the court for winding up of the company; and (vii) to share in the surplus on winding up. [995 G-H; 996 A]

3.2 A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register. A transfer effective between transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company's register. Indeed until the transfer is registered in the books of the company, the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares. However, on the transfer of shares, the transferee becomes the owner of the beneficial interest though the legal title continues with the transferor. The relationship of trustee and cestui que trust is established and the transferor is bound to comply with all reasonable directions that the transferee may give. He also becomes a truscee of the dividends as also of the rights to vote. The right of the transferee "to get on the register" must be exercised with due diligence and the principle of equity which makes the transferor a constructive trustee does not extend to a case where a transferee takes no active interest "to get on the register". [996 A-D]

3.3 Where the transfer is regulated by a statute, as in the case of transfer to a non-resident which is regulated by the Foreign Exchange Regulation Act, the permission, if any, prescribed by the statute must be obtained. In the absence of the permission, the transfer will not clothe the transferee with the "right to get on the register" unless and until the requisite permission is obtained. A transferee who has the right to get on the register, where no permission is required or where permission has been obtained, may ask the company to register the transfer and the company who is so asked to register the transfer of shares may not refuse to register the transfer, except for bona

fide reasons, neither arbitrarily, nor for any collateral purpose. The paramount consideration is the interest of the company and the general interest of the shareholder. On the other hand, where, the requisite permission under FERA is not obtained, it is open to the company, and indeed, it is bound to refuse to register the transfer of shares of an Indian company if favour of a non-resident. [996 E-H]

But once permission is obtained, whether before or after the purchase of the shares, the company cannot, thereafter refuse to register the transfer of shares. Nor is it open to the company or any other authority or individual to take upon itself or himself, thereafter the task of deciding whether the permission was rightly granted by Reserve Bank of India. The FERA makes it its exclusive privileges and function. The provisions of the Foreign Exchange Regulation Act are so structured and woven as to make it clear that it is for the Reserve Bank of India alone to consider whether the requirements of the provisions of the Foreign Exchange Regulation Act and the various rules, directions and orders issued from time to time have been fulfilled and whether permission should be granted or not. The consequences of non-compliance with the provisions of the Act and the rules, orders and directions issued under the Act are mentioned in secs. 48, 50, 56 and 63 of the Act. There is no provision of the Act which enables an individual or authority functioning outside the Act to determine for his own or its own purpose whether the Reserve Bank was right or wrong in granting permission under section 29(1) of the Act. Under the scheme of the Act, it is the "custodian-general" of foreign exchange. The task of enforcement is left to the Directorate of Enforcement, but it is the Reserve Bank of India and the Reserve Bank of India alone that has to decide whether permission may or may not be granted under section 29(1) of the Act. The Act makes it its exclusive privilege and function. No other authority is vested with any power nor may it assume to itself the power to decide the question whether permission may or may not be granted or whether it ought or ought not to have been granted. The question may not be permitted to be raised either directly or collaterally before any Court. However, the grant of permission by the Reserve Bank may be questioned by an interested party in a proceeding under Article 226 of the Constitution on the ground that it was malafide or that there was no application of the mind or that it was opposed to national interest as contemplated by the Act. [996 H; 997 A-G]

3.5 It is certainly not open to a company whose shares have been purchased by a non-resident company to refuse to register the shares even after permission is obtained from the Reserve Bank of India on the ground that permission ought not to have been granted under the FERA. The permission contemplated under section 29(1) of the Foreign Exchange Regulation Act is neither intended to nor does it impinge in any manner or any legal right of the company or any of its shareholders. Conversely neither the company nor any of its shareholders is clothed with any special right to question any such permission. [997 G-H; 998 A]

3.6 Where the articles permitted the Directors to decline to register the transfer of shares without assigning reasons, the Court would not necessarily draw adverse inference against the Directors but will assume that they acted reasonably and bona-fide. Where the Directors gave reasons the Court would consider whether the reasons were legitimate and whether the Directors proceeded on a right or a wrong principle. If the articles permitted the Directors not to disclose the reasons, they could be interrogated and asked to disclose the reasons. If they failed to disclose that reason adverse inference could be drawn against them. [995 C-F]

Manekji Pestonji Bharucha and Anr. v. Wadilal Sherabhai and Co. 52 I.A. 92; **Bank of India v. Jamshetji A.R. Chinoy** A.I.R. 1950 Pc 90; **In Re Fry** [1946] 2 All E.R. 106; **Swiss Bank Corporation v. Lloyds Bank Ltd.** [1982] A.C. 584; **Charanjit Lal Chaudhury v. Union of India** A.I.R. 1951 S.C. 41; **Mathalone and Ors. v. Bombay Life Assurance Company Ltd.** A.I.R. 1953 S.C. 385; **Vasudev Ramachandra Shelat v. Pranlal Jayanand Thakkar** [1975] 1 S.C.R. 534; **A.K. Ramiah v. Reserve Bank** (1970) 1 M.L.J. PI referred to.

4. The purchase of shares made by and or on behalf of the Caparo Group Ltd. cannot be said to be in violation of the Portfolio Scheme in as much as: (i) the permission of the Reserve Bank contemplated by section 29(1)(b) of the Foreign Exchange Regulation Act, 1973 need not be "prior" or "previous" but the permission should be obtained at some stage for the purchase of shares. It could be ex post facto, subsequent and conditional; (ii) Payments under the Stock Exchange Rules may be made within two weeks after the first purchase and there would have been no difficulty in making payments out of foreign remittances; (iii) the provisions of sections 19(4), 29(1)(b), 47, 48, 50, 56 and 63 of the Foreign Exchange Regulation Act do not stipulate that the purchase of shares without obtaining the permission of the

Reserve Bank shall be void. On the other hand, legal proceedings arising out of such transactions are contemplated subject to the condition that no sum may be recovered as debt, damage or otherwise, unless and until requisite permission is obtained. If permission may be granted ex post facto, the transaction cannot be a nullity and without effect whatsoever; (iv) under section 27 of the Securities Contracts (Regulation) Act, it shall be lawful for the holder of the company issuing the said security to receive and retain any dividend declared by the company in respect thereof for any year, notwithstanding that the security has already been transferred by him for consideration, unless the transferee who claims the dividend from the transferor has lodged the security and all other documents relating to the transfer which may be required by the company with the company for being registered in his name within fifteen days of the date on which the dividend became due; (v) Even under the Bye-law 242 of the Stock Exchange Regulations the brokers are permitted to lodge the shares purchased on behalf of their principals in their own names, if they are unable to complete the formalities before the closing of the books; and (vi) under the scheme, any foreign company whose shares were owned to the extent of more than 60% by persons of Indian nationality or origin could avail the facility given by the scheme irrespective of the fact whether the same group of shareholders figured in the different companies. Where any of the purchases were made subsequent to 2.5.83, they were subject to the ceiling of 5% in the aggregate. Merely because more than 60% of the shares of the several foreign companies who have applied for permission are held by a Trust of which Mr. Swaraj Paul and the members of his family are beneficiaries, the companies cannot be denied the facilities of investing in Indian companies. In fact, if such of the six beneficiaries of the Trust had separately applied for permission to purchase shares of Indian companies, they could not have been denied such permission. Therefore, merely on this account it cannot be said that there has been any violation of the Portfolio Investment Scheme or that the permission granted is illegal. [1022 B-C; 988 F-H; 989 A-B; 1004 A-H; 1005 A-B]

5. Generally and broadly speaking, the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented or a taxing statute or a beneficient statute is sought to be evaded or where associated companies are inextricably connected as to be in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the corporate veil is permissible, since that must necessarily depend

on the relevant statutory or other provisions the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, and the effect on the parties who may be affected etc. In the instant case "lifting the veil" is neither necessary nor permissible beyond the essential requirement of the Foreign Exchange Regulation Act and the Portfolio Investment Scheme. The object of the Act is to conserve and regulate the flow of foreign exchange and the object of the scheme is to attract non-resident investors of Indian nationality or origin to invest in shares of Indian companies. In the case of individuals, there can be no difficulty in identifying their nationality or origin. In the case of companies and other legal personalities, there can be no question of nationality or ethnicity of such company or legal personality. Who of such non-resident companies or legal personalities may then be permitted to invest in shares of Indian companies. The answer is furnished by the scheme itself which provides for "lifting the corporate veil" to find out if at least 60 per cent of the shares are held by non-residents of Indian nationality or origin. Lifting the veil is necessary to discover the nationality or origin of the shareholders and not to find out the individual identity of each of the shareholders. The corporate veil may be lifted to that extent only and no more. Further it would be beyond the scope of the writ petition in the High Court. [1006 F-H; 1007 A-D]

Wallersteiner v. Moir, [1974] 3 All E.R. 217; **Tata Engineering and Locomotive Company Ltd. v. State of Bihar**, [1964] 6 S.C.R. 885; **The Commissioner of Income Tax v. Meenakshi Mills**, A.I.R. 1967 S.C. 819; **Workmen v. Associated Rubber Ltd.**, [1985] 2 Scale 321; and **Salomon v. A. Salomon & Co. Ltd.**, [1897] A.C. 22 referred to.

6.1 The permission of the Reserve Bank contemplated by the Foreign Exchange Regulation Act, 1973 need not be "prior" or "previous" and it could be ex post facto subsequent and conditional. [1021 H]

6.2 The expression used in section 29(1) of the Foreign Exchange Act, 1973 is "general or special permission of the Reserve Bank of India". It is not qualified by the word "prior" or "previous". While the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands if, there is no such compelling circumstances justifying reading any such implication into section 29(1). Though the Parliament has not been unmindful of the need to clearly express its intention by using the expressior

"previous permission". Whenever if thought previous permission was necessary, as for example, sections 8(1), 8(2), 27(1), 30 and 31 of the Act, it deliberately avoided the qualifying word "previous" in section 29(1) so as to invest the Reserve Bank of India with a certain degree of elasticity in the matter of granting permission to non-resident companies to purchase shares in Indian companies. Therefore, the word permission must be interpreted to mean "permission previous or subsequent" - and that it is necessary that the permission of the Reserve Bank of India should be obtained at some stage for the purchase of shares by non-resident companies. [979 F-H; 980 A-C]

6.3 The scheme of the Foreign Exchange Regulation Act does not make previous permission impertive under section 29(1)(b), though failure to obtain prior permission may expose the foreign investor to prosecution penalty, conviction, confiscation, if permission is ultimately refused. Even if permission is granted, it may be made conditional. The expression "special permission" is wide enough to take with in its stride a "conditional permission", the condition being relevant to the purpose of the statute, in this case, the conservation and regulation of foreign exchange. [981 F-H]

6.4 Nor is the Reserve Bank of India bound to give ex post facto permission whenever it is found that business has been started or shares have been purchased without its previous permission. In such cases, wherever the Reserve Bank of India suspects an oblique motive, it will not only refuse permission but will further resort to action under section 50, 61 and 63 not merely to punish the offender but also confiscate the property involved. [981 E-F]

6.5 Parliament did not intend to lay down in absolute terms that the permission contemplated by section 29(1) had necessarily to be previous permission. The principal object of section 29 is to regulate and not altogether to ban the carrying on in India of the activity contemplated by clause (a) and the acquisition of an undertaking or shares in India of the character mentioned in clause (b). Hence, Parliament left to the Reserve Bank of India as the saftest authority to grant permission previous or ex post facto, conditional or unconditional. And the Reserve Bank could be expected to use the discretion wisely and in the best interests of the country and in furtherance of declared Government fiscal policy in the matter of foreign exchange. [982 F; G-H]

6.6 Reading together sections 13 and 67 of the Foreign Exchange Regulation Act and section 11 of the Customs Act, it is seen that an order under section 13 FERA operates as a prohibition and there, can therefore, be no question of the Reserve Bank of India granting subsequent permission to validate the importation of the prohibited goods and avoid the consequences prescribed by the Customs Act. To accept the analogy of section 13 to interpret sections 19 and 29, therefore, is not possible. [983 D-E]

6.7 It is true that the consequences of not obtaining the permission of the Reserve Bank or not to follow the procedure prescribed are serious and even severe. It is also true that the burden of proof is on the person proceeded against and that mensrea may consequently be interpreted as ruled out. But that cannot lead to the inevitable conclusion that the permission contemplated by section 29 is necessarily previous permission. [983 G-H; 984 A]

6.8 If it was the intention of Parliament to comprehend both previous and subsequent permission, the word "confirmation" as in section 19(5) would not do at all. While it may be permissible to construe the word "permission" widely, the word "confirmation" could never be used to convey the meaning "previous permission". The word "confirmation" is totally misplaced in section 29. [984 E-F]

6.9 The rule against retrospectivity cannot be imported into the situation presented here. The rule against retrospectivity is a rule of interpretation aimed at preventing with rights unless expressly provided or necessarily implied. To invoke the rule against retrospectivity in a situation where no vested rights are involved is to give statutory status to a rule of interpretation forgetting the reason for the rule. [984 G-H; 985 A-B]

6.10 Paragraph 24A.1 of the Exchange Control Manual is neither a statutory direction nor is it a mandatory instruction issued under section 73(3) of the Foreign Exchange Regulation Act, but is in the nature of a comment on section 29(1)(b). The paragraph is an explanatory statement of guideline for the benefit of the authorised dealers. It reads as if it is in the nature of and, indeed it is, advice given to the authorised dealers that they should obtain prior permission of the Reserve Bank of India, so that there may be no later complications. It is a helpful suggestion rather than a mandate. The Manual itself is a sort of guide book for authorised dealers, money changers, etc. and is a compendium or collection of various statutory

directions, administrative instructions, advisory opinions, comments, notes, explanations, suggestions etc. The expression "prior permission" used in paragraph 24.A(1) is not meant to restrict the range of the expression "general and special permission" found in sections 29(1)(b) and 19(1)(b). It is meant to indicate the ordinary procedure which may be followed. [986 B-E]

6.11 The forms cannot control the Act, the Rules or the directions. None of the prescribed forms, no doubt, provided for the application and grant of subsequent permission, but that is so because ordinarily one would expect permission to be sought and given before the act. [986 E-F]

6.12 The Portfolio investment Scheme does not talk of any prior or previous permission. Further a power possessed by the Reserve Bank under a Parliamentary legislation cannot be so cut down as to prevent its exercise altogether. It may be open to subordinate legislating body to make appropriate rules and regulations to regulate the exercise of a power which the Parliament has vested in it so as to carry out the purposes of the legislation, but it cannot divest itself of the power. Therefore, the Reserve Bank, if it has the power under the FERA to grant ex post facto permission cannot divest itself of that power under the scheme. [987 A-D]

Shakir Hussain v. **Candoo Lal & Ors.**, AIR 1931 All. 567, **Vasudev Ramchandra Shelat** v. **Pranlal Jayanand Thakur**, [1975] 1 S.C.R 534 referred to.

7.1 When construing statutes enacted in the national interest, the Courts must necessarily take the broad factual situations contemplated by the Act and interpret its provisions so as to advance and not to thwart the particular national interest whose advancement is proposed by the legislation. Traditional norms of statutory interpretation must yield to broader notions of the national interest. [980 G-H; 981 A]

The object of the Foreign Exchange Regulation Act, is to earn, conserve, regulate and store foreign exchange. The entire scheme and design of the Act is directed towards that end. Section 76 emphasises that every permission or licence granted by the Central Government or the Reserve Bank of India should be animated by a desire to conserve the foreign exchange resources of a country. The Foreign Exchange Regulation Act, is therefore, clearly a statute enacted in the national interest. [980 C-G]

7.2 The proper way to interpret statutes is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. The significance of the use of the qualifying word in one provision and its non-use in another provision may not be disregarded. [980 B-C]

7.3 Every word has different shades of meaning and different words may have the same meaning. It all depends upon the context in which the word is used. [984 E]

8. The Press Release (Ex.A) dated 17.9.83, the circular (Ex.B) dated 19.9.83 and the letter (Ex.C) dated 19.9.83 are all valid. [1022 A]

9. The Reserve Bank of India was not guilty of any malafides in granting permission to the Caparo Group of companies. Nor was it guilty of non-application of mind. Every question involving investments by non-resident companies and foreign exchange is bound to have different facets which present themselves in different lights when viewed from different angles. If after full discussion with those in higher rungs of the Government who are concerned with policy-making, the Reserve Bank of India changed its former negative attitude to a more positive attitude in the interests of the economy of the country, its decision cannot be said to be the result of any pressure or non-application of the mind. And merely because, the Reserve Bank of India did not choose to send a reply to the communications received from the company it did not follow that the Reserve Bank of India was not acting bonafide. [999 E; G-H; 1000 B]

10. No malafides could be attributed to the Union of India either. [1022 D]

11. There was a total and signal failure on the part of Punjab National Bank in the discharge of their duties as authorised dealers under the Foreign Exchange Regulation Act and the Portfolio Investment Scheme with the result there was no monitoring of the purchases of shares made on behalf of the Caparo Group of companies. [1022 D-E]

12. The question that would involve the adduction of evidence or as in the instant case a probe into individual purchases of shares - Whether they were purchased with foreign exchange or locally available funds would be beyond the scope of the writ petition in the High Court under Article 226 of the Constitution. [1004 G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4598 of 1984. A

From the Judgment and Order dated 9.11.1984 of the Bombay High Court in Civil Writ No. 3063 of 1983.

K. Parasaran, Attorney General, M.K. Banerjee, Additional Solicitor General, V.C. Kotwal, F.S. Nariman, K.K. Venugopal, Soli J. Sorabjee, A.B. Divan, O.P. Malhotra, T.R. Andhyarujina, Mahendra H. Shah, S.C. Maheshwari, Shardul S. Shroff, Mrs. Pallavi S. Shroff, Cyril S. Shroff, Amit Desai, Sasi Prabhu, Ms. Prema Baxi, Suresh A. Shroff, M/s. J.B. Dadachanji, B.H. Antia, Aspi Chonay, Ravinder Narain, O.C. Mathur, Rajive Sawhney, R.F. Nariman, Mrs. A.K. Verma, Joel Peres, Miss Ratna Kapoor, D.N. Misra, Talyarkhan, A.K. Ganguli, H.S. Parihar, A. Subba Rao, A.K. Chakravarty, R.N. Poddar and R.D. Aggarwala for the appearing parties. B C

The Judgment of the Court was delivered by D

CHINNAPPA REDDY, J. Problems of high finance and broad fiscal policy which truly are not and cannot be the province of the court for the very simple reason that we lack the necessary expertise and, which, in any case, are none of our business are sought to be transformed into questions involving broad legal principles in order to make them the concern of the court. Similarly what may be called the 'political' processes of 'corporate democracy' are sought to be subject to investigation by us by invoking the principle of the Rule of Law, with emphasis on the rule against arbitrary State action. An expose of the facts of the present case will reveal how much legal ingenuity may achieve by way of persuading courts, ingenuously, to treat the variegated problems of the world of finance, as litigable public-right-questions. Courts of justice are well-tuned to distress signals against arbitrary action. So corporate giants do not hesitate to rush to us with cries for justice. The court room becomes their battle ground and corporate battles are fought under the attractive banners of justice, fair-play and the public interest. We do not deny the right of corporate giants to seek our aid as well as any Lilliputian farm labourer or pavement dweller though we certainly would prefer to devote more of our time and attention to the latter. We recognise that out of the dust of the battles of giants occasionally emerge some new principles, worth the while. That is how the law has been progressing until recently. But not so now. Public interest litigation and public assisted litigation are today taking over many unexplored fields and the dumb are finding their voice. E F G H

A In the case before us, as if to befit the might of the financial giants involved, innumerable documents were filed in the High Court, a truly mountainous record was built up running to several thousand pages and more have been added in this court. Indeed, and there was no way out, we also had the advantage of listening to learned and long drawn-out, intelligent and often B ingenious arguments, advanced and dutifully heard by us. In the name of justice, we paid due homage to the causes of the high and mighty by devoting precious time to them, reduced, as we were, at times to the position of helpless spectators. Such is the nature of our judicial process that we do this with the knowledge that more worthy causes of lesser men who have been long waiting in the queue have blocked thereby and the queue has consequently C lengthened. Perhaps the time is ripe for imposing a time-limit on the length of submissions and page-limit on the length of judgments. The time is probably ripe for insistence on brief written submissions backed by short and time-bound oral submissions. The time is certainly ripe for brief and modest arguments and concise and chaste judgments. In this very case we heard arguments for 28 days and our judgment runs to 181 pages D and both could have been much shortend. We hope that we are not hoping in vain that the vicious circle will soon break and that this will be the last of such mammoth cases. We are doing our best to disentangle the system from a situation into which it has been forced over the years by the existing procedures. There is now a public realisation of the growing weight of the judicial E burden. The cooperation of the bar too is forthcoming though in slow measure. Drastic solutions are necessary. We will find them and we do hope to achieve results sooner than expected. So much for sanctimonious sermonising and now back to our case.

We do not for a moment doubt that this is a case which F require our scrutiny, more particularly so because of a most singular and remarkable feature of the case namely the absence of the principle dramatis personnae from the stage. Mr. Swraj Paul, the hero of the drama, did not appear before the High Court and did not appear before us; nor did his broker and his power of attorney holder, Raja Ram Bhasin & Co. Though the investments G madeand in question run into several crores of rupees, they have acted as if they care a tuppence for them. Obviously, Mr. Swraj Paul, a Foreign National, does not want to submit himself to the jurisdiction of Indian Courts and his broker Raja Ram Bhasin & Co. has nothing to lose by keeping away from the court and perhaps everything to gain by standing by the side of his princi- H pal. These may be excellent reasons for them for not choosing to appear before us, but their non-appearance and abstemious

silence in court have certainly complicated the case and embarrassed the Government of India, the Reserve Bank of India and the Life Insurance Corporation of India to whose lot it fell to defend the case since it was their policies, decisions and actions that were assailed. We must however express our strong condemnation of the conduct and tactics employed by Swraj Paul and Raja Ram Bhasin which we consider deplorable. The Pubjab National Bank, the designated bank of Mr. Swraj Paul's companies did appear before us but their appearance was of no assistance to the court. They had put themselves in such a hapless situation. It was apparent to us from the beginning that if there was much front-line battle strategy, there was considerably more back stage 'diplomatic' manouvering, as may be expected when financial giants clash, though we are afraid neither giant was greatly concerned for justice or the public interest. For both of them the court room was just another arena for their war, except that one of the giants carefully kept himself at the back behind a screen as it were. One was reminded of the Mahabharta War where Arjuna kept Shikhandi in front of him while fighting Bhishma, not that neither of the warriors in this case can be compared with Bhishma or Arjuna nor can the Government of India and Reserve Bank of India be downgraded as Sikhandies. But the case does raise some questions which do concern the public interest and we are greatly concerned for the public interest and administration of administrative justice in the public interest. It is from that angle alone that we propose to examine the several questions arising in the case.

The present state of India economy which has to operate under the existing World Economic System is such that India needs foreign exchange and, lots of it, to meet the demands of its developmental activities. It has become necessary to earn, conserve and build-up a reservoir of foreign exchange. So the Parliament and the Executive Government have been taking steps, from time to time, to regulate, to conserve and improve the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country. The Foreign Exchange Regulation Act, 1973 was enacted for that purpose.

'Foreign Exchange' is defined by sec. 2(h) of the Act to mean foreign currency and includes -

> "(i) all deposits, credits and balances payable in any foreign currency and any drafts, traveller's cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency;

A (ii) any instrument payable, at the option of the drawee or holder thereof or any other party thereto, either in Indian currency or in foreign currency or partly in one and partly in the other."

'Authorised dealer' is defined to mean a person for the time B being authorised under sec. 6 to deal with foreign exchange.

'Owner' is defined by sec. 2(c), in relation to any security, as including -

"any person who has power to sell or transfer the security, or who has the custody thereof or who C receives, whether on his own behalf or on behalf of any other person, dividends or interest thereon, and who has any interest therein, and in a case where any security is held on any trust or dividends or interest thereon are paid into a trust fund, also includes any trustee or any person entitled to enforce the performance of the trust or to revoke or vary, with or D without the consent of any other person, the trust or any terms thereof, or to control the investment of the trust money."

Section 3 provides for the establishment of a Directorate of Enforcement consisting of a Director of Enforcement and other E officers.

Section 6(1) enables the Reserve Bank on an application made to it, to authorise any person to deal in foreign exchange. Sec. 6(2) prescribes what may be authorised and sec. 6(4) and sec. 6(5) prescribe the duties of the authorised dealer.

F

Section 8(1) provides that, except with the previous general or special permission of the Reserve Bank, no person other than the authorised dealer shall deal in foreign exchange. Sec.8(2) provides that except with the previous general or special permission of the Reserve Bank, no person shall enter into any G transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than those authorised by the Reserve Bank.

Section 13(1) prescribes that subject to such exemption as H may be specified, no person shall, except with the general or

special permission of the Reserve Bank, bring or send into India any gold or silver or any foreign exchange or any Indian currency. Sec. 13(2) provides that no person shall, except with the general or special permission of the Reserve Bank or with the written permission of a person authorised by the Reserve Bank take or send out of India any gold, jewellery or precious stones or Indian currency or foreign exchange other than foreign exchange obtained by him from an authorised dealer or from a money-changer.

Section 19(1)(b) provides that no person shall, except with the general or special permission of the Reserve Bank of India, transfer any security or credit or transfer any interest in the security to or in favour of a person resident outside India.

Section 19(4) and (5) which are relevant for our purpose are as follows :-

> "(4) Notwithstanding anything contained in any other law, no person shall, except with the permission of the Reserve Bank-
>
> (a) enter any transfer of securities in any register or book in which securities are registered or inscribed if he has any ground for suspecting that the transfer involves any contravention of the provisions of this section, or
>
> (b) enter in any such register or book, in respect of any security, whether in connection with the issue or transfer of the security or otherwise, an address outside India except by way of substitution for any such address in the same country or for the purpose of any transaction for which permission has been granted under this section with knowledge that it involves entry of the said address, or
>
> (c) transfer any share from a register outside India to a register in India.
>
> (5) Notwithstanding anything contained in any other law, no transfer of any share of a company registered in India made by a person resident outside India or by a national of a foreign State to another person whether resident in India or outside India shall be

valid unless such transfer is confirmed by the Reserve Bank on an application made to it in this behalf by the transferor or the transferee."

Section 29(1) which is also relevant for the purposes of this case is as follows:

"29(1) Without prejudice to the provisions of s.28 and s.47 and notwithstanding anything contained in any other provision of this Act or the provisions of the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India, or a company (other than a banking company) which is not incorporated under any law in force in India or in which the non-resident interest is more than forty per cent, or any branch of such company, shall not except with the general or special permission of the Reserve Bank-

(a) carry on in India, or establish in India a branch, office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained under sec. 28; or

(b) acquire the whole or any part of any undertaking in India or any person or company carrying on any trade, commerce or industry or purchase the shares in India in any such company."

Section 29(2) makes provision for applying for permission to continue after the commencement of the Act any activity of the nature mentioned in clause (a) of sec. 29(1) which was being carried on at the commencement of the Act, while sec. 29(4) makes similar provision for applying for permission to continue to hold after the commencement of the Act shares of a company referred to in sec. 29(1) (b) which were held by a person at the commencement of the Act.

Section 30 prescribes that no national of a foreign State shall, without the previous permission of the Reserve Bank-

(i) take up any employment in India, or

(ii) practise any profession or carry on any occupation, trade or business in India.

Section 31 prohibits any person, who is not a citizen of India or a company not incorporated in India or in which the non-resident interest is more than 40 per cent, from acquiring or holding or transferring or disposing of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India, except with the previous general or special permission of the Reserve Bank.

Section 47 deals with contracts in evasion of the Act. Sec. 47(1) prohibits any person from entering into a contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of the Act or of any rule, direction or order made thereunder. Section 47(2) provides that any provision of the Act requiring that a thing shall not be done without the permission of the Central Government or Reserve Bank of India, shall not render invalid any agreement to do that thing if it is a term of the agreement that that thing shall not be done unless permission is granted. Where such a term is not explicit, it is to be implied in every contract. Section 47(3) further provides that, subject to certain specified conditions, legal proceedings may be instituted to recover any sum which would be due, apart from and despite the provisions of the Act or any term of the contract requiring the permission of the Central Government or the Reserve Bank of India for the doing of a thing.

Section 50 prescribes the levy of a penalty if any person contravenes any of the provisions of the Act except certain enumerated provisions, the adjudication is to be made by the Director of Enforcement or an Officer not below the rank of an Assistant Director of Enforcement, specially empowered in that behalf. Section 51 provides for the enquiry and the power to adjudicate. Section 52 provides for an appeal to the Appellate Board and sec. 54 for a further appeal to the High Court on questions of law. Section 56 provides for prosecutions, for contraventions of the provisions of the Act and the rules, directions or orders made thereunder. Section 57 makes the failure to pay the penalty imposed by the adjudicating officer or the Appellate Board or the High Court or the failure to comply with any directions issued by those authorities, an offence punishable with imprisonment. Section 59 prescribes a presumption of mens-rea in prosecutions under the Act and throws upon the accused the burden of proving that he had no culpable mental

state with respect to the act charged in the prosecution. Section 61 provides for congnizance of offences. Section 61(1)(ii) obliges the court not to take cognizance of any offence punishable under section 56 or 57 except on a complaint made in writing by - (a) the Director of Enforcement; or (b) any officer authorised in writing in this behalf by the Director of Enforcement or the Central Government; or (c) any officer of the Reserve Bank authorised by the Reserve Bank by a general or special order. The proviso to this provision enjoins that no complaint shall be made for the contravention of any of the provisions of the Act, rule, direction or order made thereunder which prohibits the doing of the Act without permission, unless the person accused of the offence has been given an opportunity of showing that he had such permission. Section 63 empowers the adjudicating office adjudging any contravention under sec. 51 and any court trying a contravention under sec. 56, if he or it thinks fit to direct the confiscation of any currency, security or any other money or property in respect of which the contravention has taken place.

Section 67 treats the restrictions imposed by secs. 13, 18(1)(a) and 19(1)(a) as restrictions under s.11 of the Customs Act and makes all the provisions of the Customs Act applicable accordingly.

Section 71(1) lays the burden of proving that he had the requisite permission on the prosecuted or proceeded against for contraventing any of the provisions of the Act or rule or direction or order made thereunder which prohibits him from being an Act without permission.

Section 73(3) enables the Reserve Bank of India to "give directions in regard to the making of payments and the doing of other acts by bankers authorised dealers, money-changers, stock brokers, persons referred to in sub-sec.(1) of sec. 32 or other persons, who are authorised by the Reserve Bank to do anything in pursuance of this Act in the course of their business, as appear to it to be necessary or expedient for the purpose of securing compliance with the provisions of this Act and of any rules, directions or orders made thereunder."

Section 75 enables the Central Government to give and the Reserve Bank to comply with general or special directions as the former may think fit.

Section 76 requires the Central Government or the Reserve Bank, while giving or granting any permission or licence under the Act, to have regard to all or any of the following factors, namely,

(i) conservation of the foreign exchange resources of the country;

(ii) all foreign exchange accruing to the country is properly accounted for;

(iii) the foreign exchange resources of the country are utilised as best subserve the common good; and

(iv) such other relevant factors as the circumstances of the case may require.

Section 79 invests the Central Government with the power generally to make rules and in particular for various specified purposes.

In exercise of the powers conferred by sec. 79 of the FERA, rules called 'the Non-Resident (External) Account Rules, 1970's have been made, Rule 3 enables, subject to the provisions of the rules, any person resident outside India to open and maintain in India an account with an authorised dealer, to be called, a Non-Resident (External) Account. Rule 4(1) prescribes that no amount other than the amounts mentioned therein shall be credited to a Non-Resident (External) Account. One such is 'any amount remitted by the account holder from outside India through normal banking channels as an amount which may be credited to a Non-Resident (External) Account'. Rule 4(4) provides that amounts accruing by way of a dividend or interest on shares, securities or deposits held in India, shall not be credited on Non-Resident External Account unless certain conditions are fulfilled. One of the conditions is that the account-holder is the registered holder of such shares, securities or deposits. Another condition is that the account-holder has deposited the certificates relating to the shares with an authorised dealer along with an undertaking in writing to the effect that he will not dispose of any of the shares except with the previous approval of the Reserve Bank. Rule 5 further prescribes that no such amount as is referred to in rule 4(1) shall be credited to a Non-Resident (External) Account unless the Reserve Bank having regard to the desirability of permitting remittance of funds held in India by Non-Residents, either by general or special order, gives

permission in this behalf. Rule 6 provides that a person resident outside India who wishes to open Non-Resident (External) Account, shall make an application in this behalf to an authorised dealer. The authorised dealer, unless there is a general or special order of the Reserve Bank so directing, shall refer every such application to the Reserve Bank together with the particulars.

The Exchange Control Manual published by the Reserve Bank of India incorporates various statutory and administrative instructions, advisory opinions, comments, notes, explanations etc. issued from time to time. Paragraph 24.1(i) states,

> "Investment in India by non-residents of Indian nationality or origin is subject to a different set of rules in order to give them wider investment opportunities. Ordinarily investment is allowed freely if the investment proposed to be made is not of an undesirable nature, but subject to the condition that no repatriation of capital invested and income earned thereon will be allowed. The non-resident investor is also required to give an undertaking agreeing to forgo the benefits of repatriation. Investment with repatriation benefits is allowed only in restricted fields subject to certain conditions. The schemes under which such investments are permitted are explained in this Chapter".

Paragraph 24.1(ii), however, states

> "Foreign investment in India is also subject to regulation through the various provisions in the Foreign Exchange Regulation Act, 1973, viz. Sec. 19 governing issue and transfer of securities in favour of non-residents, sec. 29 governing establishment of a place of business by non-residents for carrying on trading, commercial or industrial activities or acquiring such an undertaking or shares in such companies in India and sec. 31 governing acquisition, disposal, etc. of immovable property in India. **But once foreign investment is permitted by Government under its foreign investment and industrial policy, requisite permissions under the relative sections of Foreign Exchange Regulation Act, 1973, are more or less automatically issued.**"

Section 24A.1 provides

"In terms of Section 29(1)(b) of Foreign Exchange Regulation Act, 1973, no person resident outside India whether an individual, firm or company (not being a banking company) incorporated outside India can acquire shares of any company carrying on trading, commercial, or industrial activity in India without prior permission of Reserve Bank. Also, under sec. 19(1)(b) and 19(1)(d) of the Act, the transfer and issue of any security (which includes shares) in favour of or to a person resident outside India require prior permission of Reserve Bank. When permission has been granted for transfer or issue of shares to non-resident investor under sec. 19(1)(b) or sec. 19(1)(d), it is automatically deemed to be permission under sec. 29(1)(b) for purchase of shares by him. Non-resident Indians are however permitted to invest freely in securities of Central and State Governments, Units of Unit Trust of India and National Savings/Plan Certificates of Government of India (see paragraph 24B.2). All other investments requires specific permission of Reserve Bank."

Paragraph 28A.4 states,-

"Authorised dealers may freely open a Non-Resident (External) Account in the names of individuals of Indian nationality or origin, resident of outside India, provided funds for the purpose are transferred to India in an approved manner from country of residents of the prospective account-holder or in other foreign country if the foreign country of residence of the account holder and the country from which remittance is received are both in external group."

Paragraph 28A.4(iii) however, prescribes that firms, companies and other corporate bodies as well as institutions and organisations resident abroad are not eligible to open Non-Resident (External) Accounts in India. Paragraph 28.A8(ii) states that under sec. 29(1)(b) of the Foreign Exchange Regulation Act, 1973, persons resident outside India require prior permission of Reserve Bank for purchase of shares in Indian companies. Investment of Non-Resident (External) Account funds in shares of Indian companies is not therefore permitted without prior approval of the Reserve Bank.

A With a view to earn foreign exchange by attracting non-resident individuals of Indian nationality or origin to invest in shares of Indian companies, the Government of India decided to provide incentives to such individuals and formulated a 'portfolio investment scheme' for investment by non-residents of Indian nationality or origin. This scheme, announced by the B Government on February 27, 1982, was incorporated in circular No.9 dated April 14, 1982 of the Reserve Bank of India issued under sec.73(3) of the Foreign Exchange Regulation Act. Paragraph 2 of the Circular explains that in order to provide further incentives and facilitate investment by non-residents of Indian nationality or origin in shares of Indian companies existing facilities had been liberalised and procedural formalities had C been simplified as explained in the subsequent paragraphs of the circular. Paragraph 3 deals with investment without repatriation benefits while paragraph 4 deals with investment with repatriation benefits. Paragraph 4 (a) provides that under the liberalised policy, non-residence of Indian nationality or origin will be permitted to make portfolio investment in shares quoted on stock exchanges in India with full benefits of repatriation of D capital invested and income earned thereon provided that (a) the shares are purchased through a stock exchange, (b) the purchase of shares in any one company be each non-resident investor does not exceed Rs. one lakh in face value or one per cent of the paid up equity capital of the company, whichever is lower, and (c) payment for such investments is made either by fresh remittances E from abroad or out of the funds held in the investor's non-resident (external) account/FCNR account with a bank in India. It further provides that the Reserve Bank will grant permission to designated banks authorised to deal with any foreign exchange for purchasing shares through a stock exchange on behalf of their non-resident customers of Indian nationality/origin, subject, F inter-alia, to the limits and conditions mentioned. Paragraph 5 deals with another significant relaxation in the existing policy and provides "the entire gamut of the facilities of direct and portfolio investments as outlined in paragraphs 3 and 4 above will now be extended to overseas companies, partnership firms, trusts, societies and other corporate bodies owned predominently G by non-residents individuals of Indian nationality/origin. The criterion for determining such predominent ownership is that at least 60% of the ownership of these entities should be with non-residents of Indian nationality/origin. It would be necessary for such entities to submit a certificate in this regard in the prescribed form OAC from Overseas Auditor/Chartered Accountant/ H Certified Public Accountant, along with their applications for investment in shares, to the Reserve Bank of India either through the designated banks authorised to deal in foreign exchange or the Indian companies offering new issues, as the case may be."

Applications from those entities for permission to designated banks for investments with repatriation benefits are required to submit form RPC to the Controller, Exchange Control Department, Reserve Bank of India, Central Office (Foreign Investment Division), Bombay. Paragraph 7 stresses the importance of encouraging investments in India by non-residents of Indian nationality/origin and overseas companies, etc. predominently owned by them and requires authorised dealers to render prompt and efficient service by centralising their work in a few selected branches in places where stock exchange facilities are readily available. Paragraph 8 enables non-resident investors to appoint residents in India (other than the authorised dealers) to be their agents with appropriate power of attorney to arrange purchase/sale of shares/securities. Such agents would include recognised stock exchange brokers. It is however made clear that 'permission for investment in shares on behalf of such investors will, however be granted to the designated banks authorised to deal in foreign exchange since these banks would be responsible for compliance with the relevant exchange control requirements. Proper coordination and understanding between the designated bank and the investor's agents would be necessary for handling the investment procedures efficiently'. Paragraph 11 prescribes among other matters, the duty of designated banks

> "to maintain separately a proper record of the investments made in shares with repatriation benefits and without repatriation benefits on account of each investor, showing the relevant particulars including the numbers of share certificates and distinctive numbers of shares. Likewise, the designated branches of authorised dealers should keep a systematic and up-to-date investor-wise record of the shares purchased by them through stock exchange on repatriation basis on behalf of their overseas customers of Indian nationality/origin so that they are able to ensure that the purchase of shares in any one company by each non-resident investor does not exceed Rs. 1 lakh in face value or 1 per cent of the paid up equity capital of the company, whichever is lower."

Circular No. 9 was followed by Circular No.10 dated April 22, 1982 from the Reserve Bank to all authorised dealers in foreign exchange. The purpose of the circular was to ensure that the overseas companies, partnership firms, societies, other

corporate bodies and overseas trusts to whom the benefits of the investment scheme formulated by circular No. 9 were extended are owned to the extent of at least 60 per cent by non-residents of Indian nationality/origin or in which at least 60 per cent of the beneficial interest (in the case of trusts) is irrevocably held by such persons. 'In order to ensure that the ownership interest in the overseas company/firm/society or the irrevocable beneficial interest in the trust held by persons of Indian nationality/origin is not less than 60 per cent, authorised dealers are required to obtain, along with the account opening form, a certificate from an overseas Auditor/Chartered Accountant/Certified Public Accountant in Form OAC enclosed with A.D. (M.A.Series) Circular No. 9 of 1982.' 'The account holder is further required to submit such a certificate to the authorised dealer on an annual basis so as to ensure that the ownership/ beneficial interest of the above persons continues to be at or above the level of 60 per cent.'

By Circular No. 15 dated August 28, 1982, the Reserve Bank partially relaxed Circular No. 9 dated April 14, 1982 by removing the monetary limit of Rs. One lakh on portfolio investment in shares on repatriation basis. However, the limit of one per cent of the paid-up capital of the company was retained.

By Circular No. 27 dated December 10, 1982, it was prescribed,

> "Where permission is granted by the Reserve Bank for purchase/sale of shares/debentures on stock exchange in India by non-residents of Indian nationality/ origin, the transactions should be effected at the ruling market price as may be determined on the floor of the stock exchange by normal bid and offer method only."

On May 16, 1983 the Reserve Bank clarified and modified the 'Non-residents of Indian nationality/origin Portfolio Investment Scheme' in the following manner: Referring to Circular No. 9 which extended portfolio scheme to overseas companies, partnership firms, societies and other corporate bodies which were owned to the extent of at least 60 per cent by non-residents of Indian nationality/origin and to overseas trusts in which at least 60 per cent of the beneficial interest was irrevocably held by such persons, Circular No. 12 dated May 16, 1983 imposed an overall ceiling of (i) 5 per cent of the total paid-up capital of the

company concerned and (ii) 5 per cent of the total paid-up value of each series of the convertible debentures issue, as the case may be. For the purpose of determining and monitoring the 5 per cent ceiling the cut-off date was prescribed as May 2, 1983, the date on which the policy was announced in Parliament. It was made clear that purchase of equity shares and convertible debentures in excess of 5 per cent would require **prior and specific approval of the Reserve Bank.** The procedure for making applications for permission was prescribed and it was further provided that where investment in excess of the 5 per cent ceiling is to be made on behalf of the non-resident investor who has not submitted any application to the Reserve Bank earlier in the prescribed form, the initial application for such investments should be made in the appropriate form giving details of the equity shares/ convertible debentures to be purchased. Paragraph 3 of Circular No. 12 prescribed procedure for monitoring the ceiling of 5 per cent. Authorised dealers through their link offices were required to submit to the Reserve Bank a consolidated statement of the total purchases and sales (company wise) of equity shares/ convertible debentures made by their designated branches. The daily statements were to be serially numbered and submitted to the Controller positively on the following working day. It was further provided "all purchases and sale transactions for which a firm commitment has been made to acquire or transfer equity shares/convertible debentures in the form of the broker's contract notes issued by recognised stock exchange brokers should be included in the daily statement irrespective of whether the actual deliveries have been effected or not." It was further provided that with a view to effectively monitor the 5 per cent ceiling, the Reserve Bank would, as soon as the aggregate reached the limit of 4 per cent, notify the fact to the link offices of the authorised dealers in Bombay. Thereafter the link offices were required to give the total number and value of equity shares/convertible debentures proposed to be purchased through the stock exchange during the next 15 days. Clearance for the purchase of equity shares/convertible debentures would be granted by the Reserve Bank after taking into account the purchases proposed to be made under the Portfolio Investment Scheme by all the authorised dealers from whom intimations have been received.

On September 19, 1983, another circular (18) was issued by the Reserve Bank of India advising all authorised dealers in foreign exchange that the facilities made available to the overseas companies, etc. by Circular No.9 dated April 14, 1982 were also available where such overseas bodies were owned even indirectly to the extent of at least 60 per cent by such

non-residents of Indian nationality/origin. What was necessary, was that the ultimate ownership of beneficial interest in the overseas bodies to the extent of at least 60 per cent must be in the hands of one or more non-resident individuals of Indian nationality/origin.

The net result of all the circulars was that non-resident individuals of Indian nationality/origin as well as overseas companies, partnership firms, societies, trusts and other corporate bodies which were owned by or in which the beneficial interest vested in non-resident individuals of Indian nationality/origin to the extent of not less than 60 per cent were entitled to invest, on a repatriation basis, in the shares of Indian companies to the extent of one per cent of the paid-up equity capital of such Indian company provided that the aggregate of such portfolio investment did not exceed the ceiling of 5 per cent. It was immaterial whether the investment was made directly or indirectly. What was essential was that 60 per cent of the ownership or the beneficial interest should be in the hands of non-resident individuals of Indian natonality/origin. Curiously enough though a limit of one per cent was imposed on the acquisition of shares by each investor there was no restriction on the acquisition of shares to the extent of one per cent separately by each individual member of the same family or by each individual company of the same family (group) of companies. In the absence of any such restriction, any non-resident determined to destabilise an Indian Company could do so by forming a combination of different individuals and companies each of whom could separately obtain permission to purchase one per cent of the shares of an Indian company. The authority authorised to grant permission could not, for example, refuse to grant permission to B who has applied for permission in his own right on the mere ground that permission has been granted to his father A. Similarly permission could not be refused to Company C in which D a non-resident Indian owns 20 per cent of the share and E another non-resident Indian owns 40 per cent of the Shares on the ground that Company L in which owns 60 per cent of the shares has already been granted permission. Would it make any difference if D owns 60 per cent of the shares in both Companies C and L ? One can well imagine half a dozen overseas companies in which a dozen non resident individuals of Indian origin hold shares in varying proportions but holding in the aggregate more than 60 per cent of the shares of the overseas companies applying for permission to purchase shares in an Indian Company. Could permission be refused to them ? Is the Reserve Bank to concern

itself with the individual identity of the share holders of the overseas companies or the nationality or origin of the share-holders? Is the Reserve Bank to concern itself only with the colour of the skin, as it were, and not with the personality of the share holder of overseas company? We will revert to this question later. Obviously, the one per cent rule was introduced to prevent largescale acquisition of shares of Indian companies by non-residents and their possible destabilisation. Also, obviously the rule was a futile exercise as it was incapable of yielding the desired result. Quite obviously therefore a better solution had to be found and it was found by the 'aggregate of 5 per cent' rule. This would automatically limit the total outside holdings and effectively prevent destabilisation. Of course, it would still be necessary to satisfy the requirements of the Foreign Exchange Regulation Act, more particularly the requirement of sec. 29 of the Act providing for the general of special permission of the Reserve Bank to purchase the shares in India of the company. Though the ultimate authority under the scheme is the Reserve Bank, an important feature of the scheme is that the monitoring of the remittances and the investments has to be done by the designated Bank, which is the authorised dealer.

Two of the principal questions argued before us were whether the permission contemplated by sec.29 was previous permission or whether the permission could be granted ex-post-facto and whether the purchase of the shares by the foreign investor of Indian nationality/origin in this case involved any contravention of the FERA or the Non-Residents' Investment Scheme. To appreciate how the questions arise it is necessary to state here a few facts.

Desiring to take advantage of the Non-resident Portfolio Investment Scheme and to invest in the shares of Escorts Limited, an Indian company, thirteen overseas companies, twelve out of whose shares was owned 100 per cent and the thirteenth out of whose shares was owned 98 per cent by Caparo Group Limited, designated the Punjab National Bank as their banker(authorised dealer) and M/s. Raja Ram Bhasin & Co. as their brokers for the purpose of such investment. It must be mentioned here that 61.6 per cent of shares of Caparo Group Limited are held by the Swraj Paul Family Trust, one hundred per cent of whose beneficiaries are one Swraj Paul and the members of his family, all non-resident individuals of Indian origin. Their designated banker, the Punjab National Bank, E.C.E. House Branch by their letter dated 4th March, 1983, but despatched on 9th March, 1983 and by another letter dated 12th March, 83, addressed the Controller, Reserve Bank of India, Exchange Control Department and requested

A the Reserve Bank to accord their approval for opening Non-resident External accounts in the name of each thirteen companies, three named in the First letter and ten named in the second letter, for the purpose of 'conducting investment operations in India' through the agency of Raja Ram Bhasin & Co., Stock Investment Adviser, Member of Delhi Stock & Share
B Department, Delhi. These letters were received by the addressee on 14th and 18th March. It was mentioned in the letters that the proposed accounts would be 'effected' by remittances from abroad through normal banking channels and debits and credits would be allowed only in terms of the scheme contained in the scheme for investment by non-residents. The first letter was in respect of (1) Caparo Tea Company Limited, UK, (2) Empire Plantation and
C Investment Limited, UK and (3) Assam Frontier Tea Holding PLC, UK, while the second letter was in regard to (1) Caparo Investments Limited, (2) Caparo Properties Limited, (3) Steel Sales Limited, (4) Atlantic Merchants Limited, (5) Buchanan Limited, (6) Scymour Shipping Limited, (7) Caparo Group Limited, (8) Natural Gas Tube Limited, (9) Single Holdings Limited and (10) Deborne Hotel Torkey Limited. Forms RPC signed by each of the
D companies and forms OAC signed by the auditors of the companies accompanied the two letters. Each form RPC mentioned that the company was incorporated in England and that 61.6% of the company was owned by non-residents of Indian nationality/origin. In each form OAC the auditor certified that the percentage of holding of the company by persons of Indian nationality/and/or origin was
E 61.6% and that the name of the share-holder was 'Swraj Paul Family Trust through their interest in the holding company.' The auditors certified that the ownership interest of persons of Indian origin in the company was 61.6% of the total ownership of interest as on the date of certificate and that the entire beneficial interest in the family trust was held irrevocably by
F persons of Indian origin. On 23rd April, 83, Punjab National Bank addressed the Controller, Reserve Bank of India, Exchange Control Department, inviting their attention to their former letters dated 4th and 12th March, 1983, which were accompanied by the RPC and OAC forms relating to the 13 companies and advising the Reserve Bank that the investment operations were being conducted
G through the company Raja Ram Bhasin & Co., Share & Stock Investment Advisers, Member of Delhi Stock Exchange Association Ltd. The Reserve Bank was also advised that four remittances had been received from Caparo Group Limited, the holding Company on 9.3.83,12.4.83, 13.4.83 and 23.3.83 of amounts equivalent to Rs.1,35,36,000, Rs.2,36,59,000, Rs.76,35,000 and Rs.1,31,38,681.
H 13p. The Punjab National Bank also mentioned in the letter that

although all necessary formalities prescribed by the Reserve Bank's Circular dt. 22.4.82 had been complied with, approval had not yet been accorded to their clients. It was requested that the approval might be communicated to their client by cable.

We would like to mention at this juncture that the letters dated 4th March, 12th March and 23rd April, 1983 as well as all other subsequent letters written by the Punjab National Bank, E.C.E. House Branch to the Reserve Bank are totally silent about a remittance of L 1,30,000 equivalent to Rs. 19,63,000 made by Mr. Swraj Paul to the Punjab National Bank, Parliament Street Branch on 28.1.1983 for the purpose of opening an NRE account in the name of Mr. Swraj Paul. The remittance was said to have been made pursuant to the discussion of Mr. Swraj Paul with the Chairman of Punjab National Bank. We have no information as to what those instructions were. We are told that the cable and the letter relating to the remittance were handed over to the judges across the bar when the writ petition was being argued in the High Court. We may further mention here that on 26th January, 83, three of the Caparo Companies, namely, Assam Frontier Tea Holding Public Limited Company, Caparo Tea Company Limited and Empire Plantations and Investment Limited addressed three identical letters to Raja Ram Bhasin & Co. instructing the broker to purchase equity shares of Delhi Cloth Mills Limited at the best market price on a repatriation basis. Each letter mentioned that a letter addressed to the Punjab National Bank, Parliament Street authorising payment of an advance of Rs.20 lakhs was enclosed. Delivery of shares could be given as and when they were received from the market. It was also mentioned that the Bank would pay the full purchase value of the shares delivered and the advance of Rs.20 lakhs would be adjusted on the final delivery of the shares. Curiously enough, these letters were tendered by the company Escorts Limited. Letters to the Punjab National Bank said to accompany the letters were not placed before us and the counsel for the Punjab National Bank denies that any such letter was ever received by the Punjab National Bank. Be that as it may, we have the circumstance that a remittance of L 1,30,000 was undoubtedly made to the Parliament Street Branch of the Punjab National Bank, unbeknown or at any rate said to be unknown to the ECE House Branch of the Punjab National Branch. The record produced before us does not indicate what was done with the amount of L 1,30,000 nor does it indicate that the Reserve Bank of India was ever informed of this remittance by the Punjab National Bank. The money appears to have come in and disappeared like a will-o'-the-wisp. The learned counsel for the Punjab

A National Bank frankly confessed before us that the ECE House Branch of the Punjab National Bank which was monitoring NRE accounts and the purchase of shares by the Caparo Group of Companies was not aware of the remittances received by the Parliament Street Branch. In other words, the right hand did not know what the left hand was doing. It is surprising that in a B matter concerning valuable foreign exchange the Punjab National Bank, a nationalised bank and an authorised dealer under the Foreign Exchange Regulation Act, should have acted in such an irresponsible manner. Whatever else requires a probe by the Reserve Bank of India, the disappearance or the expending of the amount of L 1,20,000 without the knowledge of the Reserve Bank is a matter which requires thorough investigation. No one should be C allowed to break the law with impunity, if he has so done, and get away with it in this bizarre way.

The statements filed by Raja Ram Bhasin & Co. show that prior to 9.3.1983, the date of the first remittance as disclosed by Punjab National Bank to the Reserve Bank, Raja Ram Bhasin & Co. had purchased shares of Escorts Limited worth Rs.33,40,865.00 D from Mangla & Co. We have already mentioned that according to the correspondence which passed between the Punjab National Bank and the Reserve Bank, the remittances were made on 9.3.83, 24.3.83, 12.4.83, 15.4.83, 28.4.83 and 28.4.84. In the correspondence, there is no mention of any remittance having been made prior to 9.3.83. We may also notice here that the letter dated 4.3.83 from E the Punjab National Bank seeking permission for investment in shares by three of the Caparo Group of Companies was actually despatched on 9th and received by the Reserve Bank on 14.3.83 only, while the letter dated 12.3.83 seeking permission on behalf of the remaining Caparo Group of Company was received by the Reserve Bank on 18.3.83. The statements of purchases of shares F made by Raja Ram Bhasin & Co. show that even by 14.3.83, shares of Escorts Limited worth Rs. 3,85,920.00 had been purchased from Bharat Bhushan & Co. and shares worth Rs.45,81,677.00 had been purchased from Mangla & Co. Based on the circumstances that shares appeared to have been purchased even before remittances were received a seemingly serious complaint has been made that G Rupee funds must have been freely used to purchase shares for the Caparo Group under the Non-Resident Investment Scheme. We do not think that there is any genuine basis for the complaint. Payments under the Stock Exchange Rules may be made within two weeks after the purchases contracted for. In the present case the remittances from abroad started coming in less than two weeks after the first H purchase and there would have been no difficulty in making payments out of foreign remittances.

The Reserve Bank of India having been approached for permission to purchase shares on behalf of the thirteen Caparo Group of companies by the letters of 4th and 12th March, 1983, wrote to the Punjab National Bank on 29.4.83 seeking information regarding "the exact percentage of holding of (i) Mr. Swraj Paul and other Non-resident individuals of Indian origin (ii) Family Trusts and (iii) others separately in respect of each of the thirteen companies." Information was also sought as to whether any shares of Indian Companies had already been purchased by or on behalf of their Indian clients. It is not clear why the Reserve Bank wanted information as to "the exact percentage of holdings" etc. since the relevant information had already been furnished in the RPC and OAC forms sent along with the letters dated 4.3.83 and 12.3.83. **The letter dated 29.4.83 is also important for the reason that the Reserve Bank merely wanted to know whether any shares of Indian Companies had already been purchased but did not give any indication that it would be objectionable to do so without prior permission of the Reserve Bank.** Thereafter the Punjab National Bank wrote three letters to the Reserve Bank on 6.5.83, 19.5.83 and 25.5.83, the purport of which was that the Swraj Paul Family Trust held 61.6% of the share capital of Caparo Group Limited which in turn held 100 per cent of the Share Capital of eleven of the Companies and 98% of the share capital of the twelfth Company. The names of the beneficiaries of the Trust were given as Shri Swraj Paul, Mrs. Aruna Paul, Mr. Amber Paul, Mr. Akash Paul, Miss Anjali Paul and Mr. Angad Paul. In all the three letters it was pointed out that the necessary RPC and OAC forms had already been submitted. The request for expedition of approval was reiterated. The Reserve Bank of India was also informed that their non-resident clients had advised them that details of shares of Indian Companies purchased by or on their behalf would be supplied as soon as the purchases were complete. On 25.5.83 the Reserve Bank of India wrote to the Punjab National Bank, in answer to the letter dated 23.4.83 and without reference to any of the later letters, asking for clarification as to how, without obtaining the Reserve Bank's permission for purchase of shares on behalf of thirteen overseas companies, the purchase consideration of the shares of Indian Companies was paid to Indian sellers out of the Non-Resident External account of the overseas purchasers. Information was once again sought regarding the exact percentage of share holding of (i) Mr. Swraj Paul (ii) other non-resident individuals of Indian nationality/origin (if any), and (iii) Family Trust of such persons in Caparo Group Limited in U.K. separately. On 28.5.83, the Punjab National Bank sent a telegram to the Reserve Bank and

A followed it up with a letter dated 30.5.83 to the effect that the beneficial interest of Mr. Swraj Paul and his family trust in Caparo Group Limited was 61.6% as already clearly mentioned in forms RPC and certificates OAC delivered to the Reserve Bank in February, 83. The other non-residents of Indian origin who were members of the Family Trust were Mrs. Aruna Paul, Mr. Akash Paul, B Mr. Ambar Paul, Mr. Angad Paul and Miss Anjali Paul, all members of Mr. Swraj Paul's family. It was further pointed out in the letter that as required by the scheme which mentioned that the Reserve Bank of India will grant permission on application being made in the prescribed manner, the thirteen companies had submitted their applications complying with all the formalities. The letter of 23.4.83 was also referred to and it was mentioned that C all particulars were given therein. The Punjab National Bank further expressed its view that they were not required under the provisions of the scheme to await the clearance of the Reserve Bank before purchasing shares of Indian companies, once proper applications had been submitted. The Reserve Bank was informed that the remittances from Caparo Group Limited were made in favour of Raja Ram Bhasin and Co., their designated brokers and D power of Attorney holders. So the operations were executed by Punjab National Bank through NRE account on various date upto 23.4.83 and thereafter. Payments were made according to the bye-laws and regulations of Delhi Stock Exchange. On 31.5.83, a further telegram was sent by the Punjab National Bank to the Reserve Bank informing them that they had been advised by the E agent brokers that up till 28.4.83 they had purchased 80,000 equity shares of Delhi Cloth and General Company Limited and 75,000 equity shares of Escorts Limited on behalf of each one of the thirteen overseas companies predominantly owned by non-residents of Indian origin.

F On 1.6.83, the Assistant Controller, Reserve Bank of India, wrote to the Government of India informing them about the receipt of applications from the Punjab National Bank on behalf of thirteen overseas companies, eleven of which were wholly owned by Caparo Group Limited which in turn owned by Family Trust of Mr. Swraj Paul to the extent of 61.6%. In the twelfth company, Caparo G Properties Limited, Caparo Group Limited had a holding of 98 per cent. Caparo Group Limited was owned to the extent of 61.6% by the family trust of Mr. Swraj Paul, the other members of the family trust being Mrs. Aruna Paul, Mr. Akash Paul, Mr. Ambar Paul, Mr. Angad Paul and Miss Anjali Paul. The Reserve Bank pointed out that it was to be noticed that even the Caparo Group H Limited was not directly owned by non-resident individuals of Indian origin but only indirectly to the extent of 61.6% through

the family trust whose beneficiaries were persons of Indian origin. The Reserve Bank appeared to be of the view that the investment facilities under the scheme were intended to be extended to Overseas Companies, Family Trusts etc. owned predominantly non-residents of Indian Nationality/origin atleast to the extent of 61.6% and that it was not the intention to open these investment facilities to overseas companies which were not directly owned by non-resident individuals of Indian nationality/ origin but owned by them indirectly via some other trust or company. It was observed that if investment facilities were to be extended to overseas companies indirectly owned by non-residents of Indian nationality/origin, it would be very difficult to enforce the scheme and the conditions of FERA. The Reserve Bank also informed the Government that their Legal Department supported thair view that none of the thirteen overseas companies were eligible to invest in shares of Indian companies and the existing policy. They, therefore, proposed to reject the applications of all the thirteen overseas companies. They requested the Government of India to confirm by telex. To this the Government of India replied by telex on 8.6.83 in these words:

> "REFERENCE D.O.NO. EC.CO. FID (II) 294/344-82/83 DATED NIL JUNE 1983 REGARDING APPLICATION FROM THIRTEEN OVERSEAS COMPANIES FOR PURCHASING SHARES ON OF INDIAN COMPANIES THROUGH THE STOCK EXCHANGE WITH REPATRIATION RIGHTS UNDER THE PORTFOLIO INVESTMENT SCHEME (.) IT IS REPORTED THAT SOME PURCHASES HAVE ALREADY BEEN MADE IN TERMS OF THE ABOVE PROPOSAL BY THE PUNJAB NATIONAL BANK(.) ALTHOUGH IT DOES APPEAR THAT PRIOR TO SECOND MAY 1983 UNDER THE PORTFOLIO INVESTMENT SCHEME AUTHORISED DEALERS COULD WITHOUT RBI'S PRIOR APPROVAL PURCHASE SHARES THROUGH STOCK EXCHANGE ON BEHALF OF THEIR NON RESIDENT CLIENTS, THE CIRCUMSTANCES IN WHICH SOME SUCH PURCHASES WERE ALREADY MADE BEFORE THE CONCERNED COMPANIES GOT THE NECESSARY APPROVAL FROM THE R.B.I. DO NOT SEEN TO BE CLEAR (.)
>
> THE RBI IS REQUESTED TO ENQUIRE FURTHER INTO THE MATTER AND SUBMIT A DETAILED REPORT TO THE GOVERNMENT COVERING ALL ASPECTS OF THE MATTER INCLUDING THE DETAILS OF SUCH PURCHASES, THE FINANCIAL STATUS AND THE ACTIVITIES OF THE APPLICANT COMPANIES AND THEIR DATES OF INCORPORATION AND ALSO THE GENERAL LEGAL ISSUE AS TO WHETHER SUCH PURCHASES ON THE STOCK

EXCHANGE BY OVERSEAS NON RESIDENT INDIAN COMPANIES ETC. PRIOR TO SECOND MAY 1983 ARE VALID WITHOUT THE PRIOR SPECIFIC APPROVAL OF THE RBI(.) YOUR REPORT SHOULD REACH US QUICKLY AS POSSIBLE IN ORDER TO ENABLE THE GOVERNMENT TO TAKE DECISION(.)"

The importance of 2nd May, 1983 so frequently mentioned in the telex message is apparently because 2nd May, 1983 was fixed as the cut-off date for the introduction of the ceiling of 5 per cent in shares of Indian companies by foreign investors of Indian origin by the Circular No. 12 dated May 16, 1983 issued by the Reserve Bank of India.

In the meanwhile, on 31.5.83, Punjab National Bank wrote to Escorts Limited informing them that the thirteen overseas companies had been making investments in shares of Escorts Limited in terms of the scheme for investment by overseas corporate bodies predominantly owned by non-residents of Indian nationality/ origin to an extent to atlest 60 per cent and that the thirteen overseas had designated them as their banker and M/s Raja Ram Bhasin & Co. had been designated as the brokers for the purpose of investment. The brokers had advised the bank that upto 28th April, 83, 75,000 equity shares of Escorts Limited had been purchased by them for each of the thirteen overseas companies. Out of the shares so purchased 35,560 shares purchased by each of companies had been lodged by the brokers with Escorts Limited in the names of H.C. Bhasin and Mr. Bharat Bhushan for the purpose of transfer of the shares in the books of the company. 35,667 shares purchased for the 13th company were also lodged for the purpose of transfer in the name of Mr. H.C. Bhasin and Mr. Bharat Bhushan. Escorts Limited replied on June 1st, 1983 and requested the Punjab National Bank to furnish informations whether the non-resident companies had executed and handed over applications to be filed with Reserve Bank of India for prior permission to purchase the shares of the company through them as the designated bank and whether any permission had been granted by the Reserve Bank of India to Punjab National Bank to purchase shares on behalf of the thirteen companies mentioned in the letter. Escorts Limited did not refer in this letter to the circumstance that H.C. Bhasin and Bharat Bhushan had lodged the shares with them for transfer in their own names instead of the names of any of the overseas companies. Escorts Limited obviously did not think it strange that the brokers lodged the shares in their own names instead of their principals, for the simple reason that Bye-law 242 of the Stock Exchange Regulations permit the brokers to do so if they are unable to complete the formalities before the closing

of the books. They now seek to make a point of it. It is obviously without substance. In fact in their letter to Punjab National Bank, Escorts Limited did not even think it worthwhile mentioning that when they wrote to the brokers on 27.5.83 requesting information whether they were the beneficial owners of the shares and whether the shares had been purchased on behalf of non-residents of Indian origin with the requisite permission of the Reserve Bank of India they had been curtly refused the information by Mr. H.C. Bhasin and Mr. Bharat Bhushan who had also questioned their authority to ask for such information, and even threatened legal action of the transfer was not registered. We are unable to fathom the reason behind the attitude of the brokers. We can but make a guess. It was probably they were still awaiting the permission of the Reserve Bank of India. That they had purchased the shares for overseas investors was no secret since they had already so informed the Punjab National Bank. They seem to have, thought that they were within their rights under the Stock Exchange Regulations in asking the shares to be transferred in their names. It was suggested by the learned counsel for Escorts Limited that the brokers were loath to disclose the names of their principals as they had utilised rupee funds and wanted to cover up that fact. The suggestion appears to be far fetched as the funds remitted till then from abroad were more than ample to cover the purchase of the shares until then lodged. We must, however, notice that the record does not disclose how Bharat Bhushan came into the picture, who authorised him to purchase the shares on behalf of Caparo Group and who directed him to deposit the shares in his own name? He was not the stock broker designated to purchase shares on behalf of the overseas companies. If so, one wonders what authority he had to enter into transactions on behalf of overseas companies! This is also a matter which may require investigation by the Reserve Bank. As already mentioned the Punjab National Bank wrote to Escorts Limited on 31.5.83 about purchase of shares by each of the thirteen companies and the lodging of the shares with the company in the names of H.C. Bhasin and Mr. Bharat Bhushan for the purpose of transfer of shares in the books of the company. We have also referred to the reply of Escorts Limited to Punjab National Bank on 1.6.83. Punjab National Bank immediately wrote to Escorts Limited on 2.6.83 that they had already informed the company that the purchase of shares for the thirteen companies had been handled by designated brokers M/s. Raja Ram Bhasin & Co. and wanted to know the purpose for which Escorts Limited was seeking information from them. They however, stated that they

A B C D E F G H

were designated as bankers of the thirteen companies and that they had acted in terms of the procedure laid down by the scheme. Without much further ado, that is, without making any further enquiry either from M/s. Raja Ram Bhasin or from the Punjab National Bank or without seeking any information of guidance from the Reserve Bank of India, Escorts Limited proceeded to consider the question of registering the transfer of shares. A Committee was constituted by Escorts Limited to scrutinize the transfer of the shares. After taking expert legal opinion, the Committee submitted a report to the Board of Directors of Escorts Limited recommending against the registration of the transfer of shares. The primary ground on which the recommendation was based and with which we are now concerned is ground No.5 which stated,

> "that the company is prohibited by the provisions of section 19 of FERA from registering transfer of shares in its books when it has reasons to suspect that there has been a violation of the provisions of section 19 of FERA."

The Committee reported that it had reasonable ground to believe that the requisite permission of the Reserve Bank of India has not been obtained for the purchase of the shares in question. It was also mentioned in the report of the Committee that they took serious notice of 'attempts made to intimidate and coerce the company to register the shares and to pre-empt the free and proper exercise of the Board's discretion in accordance with the Articles of Association of the Company and the provisions of Law.' However, the report did not mention what the attempts were that were made 'to intimidate and coerce the company to register the shares and to pre-empt the free and proper exercise on the Board's discretion.'

On 9.6.83, the Board of Directors of Escorts Ltd. considered the Committee's Report and passed a resolution refusing to register the transfer of shares. The resolution was in the following terms:-

> "The Board considered the report of the Share Scrutiny and Transfer Committee of Directors. The Board further considered exhaustively all aspects of the matter, all the materials which were gathered and placed before the Board and legal opinions and records of legal advice which had been secured by the Company on the points in issue. The Board further considered whether - having regard to the provisions of FERA and FERA

regulations and other relevant laws including the Company Law, the Stamp Act, the Public Securities Act and other regulations relating to the Stock Exchange and transfer of shares - requirement of law have been complied with. The Board further considered the various statements reported in the Press and made by the non-resident concerned, as also by his associates in Delhi which are contradictions to the policy of the Government underlying the liberalised scheme for 'Portfolio Investment' by eligible residents. The Board further considered whether the purchases of the shares in question would qualify as 'Portfolio Investment' as envisaged under the RBI Scheme. The Board further considered whether it is in the interest of the Company and its shareholders to approve of the proposed transfers and whether it is desirable in the aforesaid interests to accept the proposed transferees as Shareholders. Upon full discussion of the Share Scrutiny and Transfer Committee's Report - the Board in acceptance thereof adopted the same. Further after a full examination of the issues legal as well as factual and the circumstances and further on account of the reasons contained in the Share Scrutiny and Transfer Committee's Report and in the light of the said Committee's recommendations and further on account of the view of the Board of Directors that it would not be in the interest of the company or the General Body of shareholders to register the transfer of the shares in question and on account of the Board's view that the transferees in question could not be approved for purposes of admitting them as members in view of the facts and circumstances taken note of by the Board of Directors, the Board decided to refuse registration of the shares under consideration.

Accordingly it was -

Resolved that the transfer of 2,88,390 Equity Shares in Rs.10 each fully paid-up lodged by Mr. Harish Chander Bhasin and Rs.1,73,947 Equity Shares of Rs.10 each fully paid-up lodged by Mr. Bharat Bhushan as per distinctive Nos. appearing in the lists marked Annexure A and B respectively placed before the Directors and initialled by the Chairman for the purpose of identification be and is hereby refused.

A

> Further resolved that Mr. Charanjit Singh, Vice-President and Secretary of the Company be and is hereby authorised to give and send notices of the refusal to the transferors under sec.111(2) of the Companies Act, 1956 and take such other steps as may be necessary and appropriate in the matter of the above resolution.
>
> The resolution was passed with all the 13 Directors (out of total 15 Directors of the Company) present and voting for the resolution excepting Mr. D.N. Davar, who did not take part of the discussion and voting on the resolution. There was no dissenting vote."

B

C

In respect of another block of shares lodged with Escorts Ltd. on 19th and 22nd August, 1983 for registration in the name of the thirteen foreign non-resident companies, a similar report was submitted by the committee on 29.9.83 and a similar resolution was passed by the Board of Directors on the same day.

D

Escorts Limited, although they had already refused to register the transfer of shares, nonetheless, wrote to the Punjab National Bank for information on various points as they desired to make a representation to the Reserve Bank of India in the enquiry being conducted by the Reserve Bank under the directions of the Government. The Company wanted to know whether the remittances were received from M/s. Caparo Group Limited only and from none of the other twelve foreign companies. The company also wanted to know why 4,62,337 shares only had been lodged with them for transfer although it had been stated that 9.75 lakhs shares had been purchased by thirteen non-resident companies. The Company further wanted to know whether instructions to purchase the shares were given to the brokers by the Punjab National Bank and whether the non-resident companies indicated the maximum price at which the shares might be bought. The company further desired to know to whom the share scripts should be returned as they had decided to refuse registration of the transfer of shares. The Punjab National Bank, we may state here, refused to receive the share scripts and suggested to Escorts Limited that they should return the scripts to those that had lodged them with the Company.

E

F

G

More important still is the fact that Escorts Limited, having already rejected the registration of the transfer of shares, wrote to the Reserve Bank of India on 14th June, 1983, 20th June, 1983 and 23rd July, 1983 purporting to give information regarding various illegalities committed in the matter of

H

purchase of shares of their company by the thirteen foreign companies, Caparo Group Limited, etc. It was stated that the information was being furnished to the Reserve Bank because it was understood that the Reserve Bank was holding an enquiry in the matter of the purchase of shares in Indian companies by the Caparo Group Companies. One remarkable feature about the letters is that for some reason best known to themselves, Escorts Limited did not disclose to the Reserve Bank the circumstance that they had already refused to register the transfer of shares. In the first letter, it was stated that their information revealed that Caparo Group Limited was the holding company and the remaining twelve companies were its subsidiaries and that a majority of them were in no financial position to make such large investments. The Reserve Bank was particularly requested to consider whether it was ever intended that an overseas company could **circumvent the stipulated ceiling of one per cent by channelling investment through a dozen subsidiaries.** It was pointed out that a colourable device of that nature would defeat the very purpose of the ceiling. The Reserve Bank was also requested to take serious notice of the fact that while the scheme permitted repatriation benefits to investments upto the maximum of one per cent in an Indian company, shares to the **tune of over 7 per cent** had been acquired in the names of thirteen companies though funds were remitted only by one company. It was also mentioned that the stock-brokers and not the bank purchased the shares and that the stock brokers unauthorisedly lodged for registration their own names, the shares purchased on behalf of non-residents. The Reserve Bank was requested to enquire into the dates and rates of the purchases of the shares, whether the shares were purchased on the floor of the stock exchange, whether the delivery of shares was taken, whether the bank had a day-to-day record of the transactions and so on. The Reserve Bank was also requested to seize the scrips and the books of account in the possession of the stock exchange. The next letter dated 20th June, 1983 drew attention to the circumstances that though 9,75,000 shares were purported to have been purchased before 28th April, 1983, only 4,62,337 shares had been lodged by 13th May, 1983 and therefore, it appeared that there were forward transactions and the purchases were not in accordance with the scheme. In their third letter dated 23rd July, 1983, Escorts Limited asserted that a large amount of money to the tune of about Rs.2.61 crores were remitted from overseas to the Punjab National Bank and was utilised to purchase shares in addition to the shares purchased in the names of thirteen companies. The provisions of the FERA were violated and the ceilings of one per

cent and 5 per cent imposed under the scheme were also circumvented. Rupee funds to the tune of Rs.4.0 crores appeared to have been unauthorisedly diverted for the purchase of the shares for and on behalf of the thirteen non-resident companies in the two Indian Companies, that is, Escorts Limited and Delhi Cloth and General Mills Limited. Though the purchases made on behalf of the thirteen non-resident companies were said to have been purchased before 28th April, 1983, only 4,62,337 shares were lodged with the company for registration of transfer, leaving a shortfall of 5,12,663 shares. The non-lodgment of these shares raised a doubt whether those shares had been purchased in accordance with the scheme. It was pointed out that the share transfer deeds lodged with Escorts Limited bore the date 28th April, 1983 and disclosed consideration of Rs.65 per share although the highest rate at which sales of Escorts shares were transacted at the Stock Exchange upto 28th April, 1983 was Rs.55 only per share. This fact demonstrated that an incorrect statement had been made that the shares had been purchased prior to 28th April, 1983. Further the share transfer deeds lodged with the companies in regard to the 9,75,000 shares of Escorts Limited and 10,30,000 shares of Delhi Cloth Mills Limited said to have been purchased on behalf of non-resident Indian companies showed that a total amount of Rs.6,33,75,000 of non-resident funds was spent for purchasing the shares of Escorts Limited and a sum of Rs.9,88,69,020 of non-resident funds was spent of purchasing shares of Delhi Cloth Mills Limited making a grand total of Rs.16,22,44,020. As against this a sum of Rs.13 crores only had been remitted from abroad for the purchase of shares. Out of the Rs.13 crores, a sum of Rupee One crore had been frozen by the Reserve Bank of India making only a balance of Rs.12 crores of non-resident funds available for purchase of shares. There was thus a short-fall of Rs.2.61 crores which was unaccounted. It was also brought to the notice of the Reserve Bank that the brokers had lodged the shares for registration of the transfers in their names of the foreign companies. When asked by the company to disclose the names of the principals, the brokers had refused to do so. The company therefore, suggested various steps that should be taken by the Reserve Bank to detect the several illegalities committed and to prevent the circumvention of the one per cent limit imposed by the scheme for acquisition of shares by any single non-resident individual or company.

To none of these letters did the Reserve Bank of India deign a reply or even the courtesy of an acknowledgement. Though the Reserve Bank did not choose to write or make any further enquiry from Escorts Limited, there is no doubt that the Reserve Bank did

enquire in its own way into the allegations made by Escorts Limited against the Caparo Group of Companies. It was not as if the Reserve Bank want only refused to worry itself in regard to the allegations against the Caparo Group of Companies. The Punjab National Bank was the designated bank of the Caparo Group of Companies and it was an authorised dealer under the FERA, owing a serious responsibility to the Reserve Bank under the FERA and the Portfolio Investment Scheme. It was, therefore, to the Punjab National Bank that the Reserve Bank turned for elucidation in the matter.

On 11th June, 1983, the Reserve Bank of India wrote to the Punjab National Bank advising them that mere submission of an application under sec. 29 (1) (b) of FERA was not sufficient to enable the non-resident Indian company to purchase shares without the general or special permission of the Reserve Bank. Reserve Bank's permission had to be obtained before buying any shares of Indian companies. The contention of Punjab National Bank that submission of an application was sufficient to enable a non-resident company to purchase shares was not accepted as correct and the bank was told that they had committed a serious irregularity in purchasing shares. The Punjab National Bank was also asked to explain as to how they had allowed the Non-Resident External Account of Caparo Group Limited to be debited in contravention of the provisions of paragraph 28B.9 of the Exchange Control Manual. The Punjab National Bank was informed that the applications of all the companies for approval of opening of Non-Resident Accounts were pending with them and that until specific permission for purchase of shares was granted, no payment should be made out of the accounts for purchasing shares on behalf of any of the thirteen companies. On the same date, another letter was written by the Reserve Bank of India to the Punjab National Bank asking for particulars of the thirteen companies purchased by them and the dates of remittances so far received from the thirteen companies. On 17th June, 1983 and 23rd June, 1983, the Punjab National Bank sent their reply to the Reserve Bank by telex and by letter. They stated in the telex message that consequent on the letter of the Reserve Bank, they had withheld payment of a sum of Rs.107,22,610 in favour of the brokers and that they had advised the remitter about the same. It was stated that the brokers had written to them asking for payment stating that it would amount to default if payment pertained to shares purchase prior to 2nd May, 1983 under the portfolio investment scheme. By their letter dated 23rd June, 1983, they informed the Reserve Bank that upto December 1982 and from 1st January, 1983 to 28th February, 1983 no shares on behalf

of the thirteen non-resident companies were purchased. Between 1st March, 1983 and 2nd May, 1983, 80,000 shares of Delhi Cloth and General Mills Company Limited and 75,000 shares of Escorts Limited were purchased for each of the thirteen companies. After 2nd May, 1983 no share was purchased. All remittances were received through their London Branch for the credit of M/s. Raja Ram Bhasin & Co., for purchase of shares on behalf of the thirteen companies. On 9th March, 1983, 24th March, 12th April, 15th April, 28th April and 28th April, 1983 remittances of Rs.1,35,36,000 Rs.1,31,38,681, Rs. 2,36,59,900, Rs.76,35,000, Rs.1,56,76,000 and Rs.1,56,80,000 were received and transferred to the account of Raja Ram Bhasin & Company from the account of Caparo Group Limited. A balance of Rs.38,682 in the NRE account of Caparo Group Limited was allocated pro rata to the thirteen accounts on 2nd June, 1983 in terms of the letter of their broker M/s.Raja Ram Bhasin & Company. The broker derived his authority in terms of the investors' letters which were annexed to the letter of the bank. The Punjab National Bank also stated that the broker had confirmed by their letter dated 22nd June, 1983, a copy of which was enclosed, that apart from the shares mentioned they had not purchased any other shares for the thirteen companies. Along with their letter the Punjab National Bank also sent to the Reserve Bank, copies of the certificates of incorporation, the memoranda of articles of associations and the balance sheets of the thirteen companies. One of the letters enclosed with the letter of the Punjab National Bank was a letter from the Caparo Group Limited to the Punjab National Bank confirming that they had appointed M/s. Raja Ram Bhasin & Company as their designated brokers and that the bank was authorised to act upon the instructions of the aforesaid brokers, entirely at the risk and responsibility of Caparo Group Limited. On 24th June, 1983, the Punjab National Bank again wrote to the Reserve Bank in reply to their letter of 11th June, 1983, they stated that they were under the impression that the clause ".....RBI will grant permission to designated bank....." meant that permission would automatically be granted on the submission of applications in the prescribed form by the NRE Investors, accompanied by auditors' certificates of the eligibility. As a matter of abundant caution they had intimated the NRE investors and their brokers that the transactions were being put through entirely at their risk and responsibility. Details of the remittances received and transferred to the account of Raja Ram Bhasin & Company were once again given and the request for permission was reiterated.

On 6th July, 1983, the Controller Foreign Exchange, Reserve Bank of India, wrote to the Government of India informing them that the relevant documents had been called for and examined and

the report which was desired by the Government's telex dated 8th June, 1983 was being submitted along with the letter. It was stated that they had taken the legal opinion 'an eminent jurist and senior counsel' Mr. H.M. Seervai, which was to the effect that the circular did not grant general permission to non-residents or their designated banks and that overseas bodies where they were not directly owned by non-resident individuals were not eligible to invest under the liberalised scheme. It was, therefore, stated that none of the thirteen overseas companies was eligible to invest in shares of Indian companies under the scheme. The question of further action in the matter of failure of the Punjab National Bank to follow the relevant Exchange Control Regulations would be taken up separately after a final decision was taken on the applications, that is, the applications of the overseas companies for permission to purchase shares. The Report of the Reserve Bank of India which was sent along with their letter was not produced before the High Court, nor has it been placed before us. The Government of India, on 11th August, 1983, replied the Reserve Bank's letter of 6th July, 1983 communicating to the latter the opinion given by the Attorney General and asked the Reserve Bank to dispose of the applications made by the Punjab National Bank in the light of the opinion of the Attorney General. The Government of India also mentioned that they agreed with the opinion of the Attorney General who had given primary importance of the intention behind the Government policy which was spelt out in the report of the working group. By another letter dated 17th September, 1983, the Government of India clarified the position and it was pointed out that the portfolio investment scheme by companies and overseas bodies owned by non-residents of Indian nationality/origin was introduced as part of a package of measures to facilitate remittances and investments by non-residents of Indian nationality/ origin in India in the overall context of the difficulties of our balance of payments. It was pointed out that in formulating the scheme, there were three paramount considerations:

> (a) as much flexibility as possible should be available to non-residents for bring foreign exchange into India and the concern should be the purpose of investments rather than legal entity of the non-resident investor of Indian origin;
>
> (b) it was to be ensured that the benefits of the scheme should not be available to non-resident persons or overseas bodies other than those of Indian nationality/origin; and

(c) the investment of funds under the scheme should not lead to take over of existing companies through operations in the stock market.

It was in the context of the first two considerations that it was insisted that the overseas companies etc. should be owned by non-residents of Indian nationality/origin to the extent of at least 60% and it was in the context of the third consideration that a ceiling of one per cent of paid up capital for each investor was imposed. Further to the same considerations, in May, 1983, a ceiling of 5 per cent on aggregate investment was also imposed. The Government of India pointed out that the question of direct or indirect ownership should be considered in the context of these considerations. It was pointed out:

> "In many countries there is no bar on the number of companies an individual can pre-dominantly own directly or indirectly. A person of Indian origin could, if he wished, set up a number of companies directly owned by him and investment through each of these companies upto one per cent of the paid up capital of a company in India within the framework of our portfolio Investment Scheme. This situation is not different in its economic implications than if the same amount of investment was made by the same person in the same companies in India by the same number of companies, which were indirectly (and not directly) owned by him. As such having regard to the objectives of the scheme and the intention of the Government, the fact whether a company is predominantly directly owned or predominantly indirectly owned is not a material consideration.
>
> Taking the above consideration into account, and in order to remove any doubt regarding the eligibility of companies, it is clarified that overseas bodies, whether owned directly or indirectly, are eligible to invest under the scheme so long as it is clear that the ultimate ownership to the extent of at least 60 per cent is in the hands of non-residents of Indian nationality/origin. Each such applicant company is eligible to make investment subject to the existing ceiling of one per cent irrespective of whether the ultimate ownership is in the hands of one or more individuals.

> Since this clarification merely reflects the original intention of the Government, the investments made by the applicants before 2nd May, 1983 but pending for approval should not be subject to five per cent ceiling. Pending applications may be disposed of accordingly."

This letter was apparently delivered personally to Dr. Man Mohan Singh, Governor of the Reserve Bank of India and he made the following endorsement on the letter :

> "I have discussed this case with FS and FM. This matter has been approved by CCPA. As such we should faithfully carry out consequential action. I have discussed with FS, FM and Principal Secretary to PM the issue of Press Note regarding clarification by the Government regarding the NRI Scheme. It has been agreed that the Press Note will be issued at 6.30 PM by RBI in Delhi itself."

We are told that the letters FS stand for Finance Secretary, FM for Finance Minister and CCPA for Cabinet Committee on Political Affairs.

As mentioned in the note of Dr. Manmohan Singh, a Press release was issued by the Reserve Bank the same day to the effect that the Government, having regard to the objectives of the scheme for investment by non-residents of Indian nationality/ origin had clarified that their original intention was that the facilities of direct and portfolio investments in shares/ debentures of Indian companies and deposits with public limited companies should be available to the overseas companies, partnership firms, trusts, societies and other bodies in which the ownership/beneficial interest was indirectly but ultimately held to the extent of at least 60 per cent by non-resident individuals of Indian nationality or origin. It was further stated in the Press release that the Government had also clarified that each overseas body was eligible to invest up to one per cent of the equity capital under the portfolio investment scheme irrespective of whether the ultimate ownership/beneficial interest in such body was in the hands of one or more

non-resident individuals of Indian nationality/origin subject to an overall ceiling of 5 per cent of the total paid up equity capital if the investment was made after 2nd May, 1983. The overseas bodies desiring to make investment under the scheme were required to submit their applications to the Controller, Reserve Bank of India, Exchange Control Department, Bombay. The overseas bodies were required to maintain accounts with banks authorised to deal in foreign exchange in India under the Non-resident (External) Account Scheme.

On 19.9.1983, the Reserve Bank also issued Circular No. 18 under sec. 73(3) of FERA. We have already referred to the Circular earlier. On the same day (19.9.1983), the Reserve Bank by a telex message, conveyed to the Punjab National Bank their permission to release the money remitted by the Caparo Group of companies from abroad for making payment against shares of DCM and Escorts Limited purchased on behalf of the 13 Caparo Group of Companies provided the shares in question were purchased up to and inclusive to 2nd May, 1983. It was also mentioned that the purchase of shares shall be deemed to have taken place up to and inclusive of 2nd May, 1983 if firm purchase commitments as evidenced by brokers' contract notes had been entered into and the shares had been/would be taken delivery of pursuant to such firm commitments at the price mentioned in the relative brokers' contract notes. The letter granting permission for purchase of shares was stated to follow. A letter did follow on the same day by which the 13 group of companies were given the approval of the Reserve Bank 'to make investments in and hold shares of Delhi Cloth and General Mills Limited and Escorts Limited to the extent of one per cent of the paid up capital of the respective companies subject, where the purchase had been made after 2nd May, 1983 subject to an overall ceiling of 5 per cent of paid up equity capital of each of the investee companies.' Purchases made up to and inclusive of 2nd May, 1983 were not subject to the 5 per cent ceiling. Information was requested as to the number of face value of the shares purchased up to 2nd May, 1983 as also details of shares, if any, purchased after 2nd May, 1983. Permission was also accorded for purchase of shares/debentures of other Indian companies on behalf of 13 non-resident companies, through stock exchanges in India at the ruling market price subject to the condition that the shares/debentures would be purchased out of fresh remittances received from abroad and/or out of the funds held in the applicant companies' Non-Resident (External) Account to be opened with the banker. Purchases of equity shares with repatriation benefits could be purchased up to

one per cent of the total paid up equity capital of the company, subject to the overall ceiling of 5 per cent. Another condition was that the shares acquired under the permission should be retained by the non-resident investor company for a minimum period of one year from the date of their registration with the Indian company. The permission was to be valid for a period of three years from the date of the letter.

In the meanwhile, Escorts Limited wrote several frantic letters to the Reserve Bank of India and the Government of India on 23.7.83, 5.9.1983, 16.9.1983 and 17.9.1983 reiterating the allegations in regard to the purchase of shares by the 13 non-resident companies. Although the Reserve Bank granted the requisite permission to the non-resident companies on 19.9.83, the Reserve Bank of India, on 22.10.1983, perhaps in view of the persistence with which Escorts Limited continued making allegations against the non-resident companies and perhaps with a view to further satisfy itself, wrote to the Punjab National Bank asking them for a report on the issues raised in the letters of Escorts Limited dated 5th and 17th September'83, the DCM's letters dated 11th and 24th August '83 and the letters of their advocates. Copies of the letters were forwarded to the Punjab National Bank who in turn asked the brokers Raja Ram Bhasin & co. to submit a report to them about the various issues raised in the Reserve Bank's letter. Raja Ram Bhasin & Co. replied on 12.12.1983 and expressed their surprise that these questions were being raised after the Reserve Bank had granted its permission on 19.9.1983. However, they explained that no illegality had been committed by them or their clients the Caparo Group of Companies with regard to the purchase of shares before 2.5.1983. The queries raised by the companies did not dispute the date of purchases made by them up to 28.4.1983. The queries were misleading and were merely an attempt to create a confusion. The Reserve Bank had satisfied itself and declared the eligibility of the companies to invest. All contracts for the sale or purchase of shares were made subject to the rules, bye-laws and regulations of the stock exchange and delivery could be made and accepted pursuant to the contracts earlier entered into. It was not essential that the transfer deeds must bear the date of stamp of the Registrar of Companies as the date of the contract. Deliveries could be taken even after 28.4.1983 . The dates stated in the transfer deeds were the dates of execution of the deeds of transfer by the transferee and had no relevance to the date of

purchase of the date of delivery. The sale consideration shown in the transfer deed was for the purpose of computation of the stamp duty had to be paid at the rate prevalent on the dates stated on the transfer deeds and not as on the actual date or purchase. No shares were purchased in the benami names. The queries for which answers were now sought, were already before the Reserve Bank of India and considered by them before permission was granted.

Raja Ram Bhasin & Co. wrote a further letter on 27.12.1983 with regard to the query whether shares were purchased from rupee loan raised in India from the Reserve Bank of India. It was stated that a remittance of about Rs.107 crores was with-held by the Punjab National Bank without disclosing any reason. Shares had already been purchased and consequently, the brokers had to take delivery from the seller broker and monies had to be paid to them. Otherwise the brokers would be declared as defaulters for non-payment. In the premises, the brokers had to take deliveries and arrange payments. Reserve Bank's permission was not necessary for this purpose.

Thereafter, the Punjab National Bank wrote to the Reserve Bank of India answering the queries raised by them and reiterating that they had acted in accordance with the instructions and guidelines contained in the Reserve Bank's letter dated 19.9.1983. All the other points raised by the Escorts Limited and DCM Limited required answers from the brokers. So they wrote to the brokers and the brokers had replied to them stating that no illegality had been committed. The comments of the brokers were summarised and it was then added that a sum of Rs.1,05,30,000 was released to the brokers in accordance with the directions of the RBI as conveyed by their telex message and letter dated 19.9.1983.

Subsequent to the grant of permission by the Reserve Bank of India another attempt was made to have the transfer of shares registered. The request was turned down once again by the Escorts Ltd. who by their letter 13.10.83 stated that apart from the question of obtaining the permission of the Reserve Bank of India the decision of the Board of Directors to refuse to register the transfer of shares was based on other grounds also which continued to be valid. We may mention here that before the High Court, all the other grounds mentioned by the Board of Directors were abandoned except the ground relating to want of permission of the Reserve Bank of India. Before the High Court, a resolution passed by the Directors by Circulation was filed and it was to this effect:-

"Resolved that it is not the Board's intention to get adjudicated in some other proceeding the grounds of rejection contained in para 7 of the Share Scrutiny and Transfer Committee of Directors Report dated 8th June, 1983 or in paras 6, 7 and 8 of the Report dated 29th August 1983 and the Board hereby resolve not to rely on the said grounds in any proceeding."

The High Court also recorded the concession in the following words:

"Para 214 : **In the rejoinder** affidavit filed by petitioner No.2 **it was specifically pleaded that the petitioners do not want adjudication on the other grounds of refusal of registration of shares, and as such failure to obtain prior permission under section 29 of the FERA remained the sole ground for rejection.** The respondents urged that since other grounds of refusal to register the shares are not now pressed and are not required to be adjudicated in this Writ Petition, the Court should refuse to go into this question. That would amount to piece-meal adjudication on the validity of the purchase and refusal to register, which is not permissible even in the case of a suit, which principle, according to the learned Attorney-General, also applies to Writ Petition mutatis mutandis.

Para 215 : Whether there is a live issue for adjudication and whether the petitioners have locus standi cannot be viewed in isolation or in the abstract, divorced from the facts and circumstances of the case.

Para 216 : In our view, in raising this contention certain relevant factors are being overlooked. The Union of India, the RBI and PNB and the other respondents dispute the correctness of the decision taken by the petitioners not to register the transfer of shares purchased by respondents Nos. 4 to 17. Respondent No.19 has preferred an appeal under section

111 of the Companies Act before the Company Law Board and the same is still pending. Respondent Nos. 20 and 21, the stock-brokers, continue to insist upon reconsideration of the decision taken by the Board of Directors in regard to registration of the shares. D.N. Davar, on behalf of the financial institutions, put in written note on 6.1.1984 signed by him demanding the Board of Directors to reconsider its decision. Further the petitioner-company has to pay dividend on these shares accruing from time to time to the holders of these shares. The dividend on these shares amounting to Rs.7,50,000 per annum is obviously payable to those in whose names the shares stand registered in the books of the company. If the dividend is not paid within the stipulated time, the petitioner-company and its Directors would be exposed to penalties under the Companies Act. The question of payment of dividend would recur year after year. In fact, on the question of payment of interim dividend arose, while the respondent-companies claim to be entitled to the payment of the dividend because they have purchased the shares, the petitioners object to payment because the registration of transfer of shares purchased without prior permission could not be effected and the dividend cannot be paid to persons whose shares are not registered. When petitioner No.2 addressed a letter dated 2nd December 1983 to D.N. Davar, Executive Director, IFCI, inviting his comments on the decision to withhold the interim dividend with respect to shares purchased by the respondent-companies, he replied through his letter dated 17th December, 1983 inter alia as follows:

"Since the payment of dividend in question, as referred to in your letter under reply pertains to interim dividend as resolved by the Board of Directors on the 20th July 1983 there does not appear to be legal bar in withholding the same according to the second opinion. However in view of the conflicting legal opinions on the issue, we are referring the matter to the Ministry of Law, Department of Company Affairs for their clarification. On hearing from them, we shall revert to you on the subject".

Thus the matter was under reference to the Government of India and the question whether registration of transfer of shares should be effected or not and who would be entitled to receive dividend on these shares was a live issue even on 17th December 1983 and was not decided even by the time the writ petition was filed. None of the respondents has taken back the shares lodged with the petitioner-company for registration of transfer. Upon the sale of the shares and lodging of application for their transfer with the petitioner-company, it had to take a decision. The Company has rejected the request for registration on grounds which, according to the well considered opinion of their legal advisers, are valid and justified. The RBI as well as the other respondents and their legal advisers seem to hold a different view. Of course, as discussed above, that legal opinion has not been placed before the court; nor is the Court entitled to require them to disclose it. **It must be recorded that petitioners' learned counsel, Mr. Nariman, fairly conceded that it was an error on the part of the petitioners to have referred in the petitioner No.2's affidavit to the legal advice tendered to the respondents and requested that it may be treated as withdrawn. It was not pressed at the hearing of the writ petition.** Be that as it may, the fact remains that the respondents held a different view on this legal issue and have pressed the same before this court. The question whether prior permission is necessary or not is thus not concluded by the rejection of transfer of the shares purchased by respondents Nos.4 to 16. It would arise from time to time as and when such purchases are made in future. The petitioner-company itself would have to consider the same whenever such shares are presented for registration. Even the Solicitors of respondent No.18 in their letter dated 27th February 1984 addressed to the Petitioners' Solicitors stated :

"……the controversy regarding transfer of shares has been raging throughout the length and breadth of

the country and various forums including the shareholders associations, chambers of commerce and other public bodies have been making observations and suggestions on such issues. ....."

They also specifically said in that letter that they would refer to that letter at the hearing of the writ petition. This legal issue would arise for decision whenever the action of the petitioners not to register the shares is questioned by any of the transferors or transferees of the shares. If the respondents could still insist upon the registration of the shares and claim that permission granted to the respondent-companies by the respondent No.2 subsequent to the purchase of shares is valid which claim is strongly supported by the stand taken by respondents Nos.1 and 2, the petitioners are certainly entitled to seek a declaration in this behalf. Whether such a declaratory relief in this behalf could be granted or not will be considered in due course, but certainly it cannot be said that the petitioners have no cause of action for seeking a declaration. Notwithstanding the decision taken by the Board of Directors, the company continues to be under pressure to transfer the shares. If the stand taken by the petitioners is incorrect, then they would be bound under the statute as well as under the directions of the RBI, to register the transfer of shares in the books of the Company even now. While forwarding the copy of the letter dated 27th September 1983 addressed by the PNB to the respondent No.4 Company, Haresh Bhasin (respondent No.20) by his letter dated 8th October 1983 addressed to the petitioner-company and sent by Registered Post A.D., had requested that the decision of the Board of Directors dated 29th August 1983 refusing to register the shares be reviewed. In reply the petitioner-company conveyed through its letter dated 13th October 1983 that notwithstanding the impugned Circular and the letter of the RBI, the refusal to register continued to hold good for various other reasons. In that letter the petitioners-company also disputed the claim that the thirteen non-resident companies had purchased the shares prior to 2nd May 1984. The petitioner-company thus maintained that the permission granted subsequently is not valid and that the refusal to register the shares for other reasons

still holds good. Of course, at the hearing of the writ petition, having regard to the decision of the Supreme Court in **Bajaj Auto Ltd. v. N.K. Firodia** A.I.R. 1971 S.C. 321 the learned counsel **Mr. Nariman conceded that the other grounds for not registering the shares were not being pressed in support of the refusal of registration.** It was, therefore, argued for the respondents that this letter would indicate that even the petitioners at that stage accepted that the permission granted under Exh."B" and Ext."C" validated the purchase and no longer stood in the way of registration of the shares. We are unable to agree with this contention; firstly because if under sec.29 prior permission was require for a valid purchase, any such statement made in the letter on behalf of the petitioner-company cannot validate such transfer so as to entitled the purchase to claim registration of the shares. Any registration of transfer by the petitioner-company would steel be in contravention of section 19 read with section 29 of the FERA; secondly the letter cannot be interpreted to mean that the stand taken by the company and its Board of Directors unanimously that the purchase is invalid for not obtaining prior permission was given up. Further even if Exh.'B' and Exh.'C' are construed as a grant of permission, it would amount to granting permission subsequent to the purchase. When the letter of the petitioner-company expressly states that "notwithstanding grant of the permission by the RBI as refer by you", it could only mean the grant of permission subsequent to the purchase could not hold good and that they were not prepared to transfer the shares on the basis of that permission. The fact that they actually proceeded to challenge the very permission granted by way of Writ Petition fully establishes that the company repudiated its liability to transfer the shares on the strength of the impugned Circular and letter. While so, it is the case of the petitioners that D.N. Davar one of the Directors, armed with the authority to speak for all the Financial institutions including the LIC continued to insist that the writ petition be withdrawn. Apart from the other pressures exerted on the petitioner-company and its Managing Director, already discussed above, at the meeting of the Board of Directors of the petitioner-company held on 6th January 1984, D.N. Davar tabled four pages of

signed note inter alia insisting upon the Board of Director to recall the cheques lodged with the institutions towards repayment of loans and to withdraw the writ petition filed in the court and not to take note of the correspondence exchanged between the financial institutions and the management. The Board of Director, however, did not concur with his proposal; on the contrary, it ratified the filing of the writ petition. Apart from petitioner No.2 each of the other nine Directors filed an affidavit in this court supporting the filing of the writ petition. It is also the allegation of the petitioners that financial institutions, finding that notwithstanding the unanimous request made on their behalf by D.N. Davar at the meeting of the Board of Directors, the Company and its Managing Director were refusing to withdraw the Writ Petition and effect the transfer of shares, with the ulterior purpose of obtaining registration of shares, requisitioned an EGM of the petitioner-company so that they may secure a controlling majority in the Board of Directors. The petitioners allege that the action of the LIC (respondent no. 18) which by itself holds 30% of the shares and along with this other financial institutions, collectively represented by Davar, holds 52% shares, is malafide and is calculated to secure the registration of the shares which were purchased in contravention of FERA. In the circumstances referred to above, it cannot be said that the company and its Managing Director had no cause of action to file this Writ Petition hold that there was no longer any live issue to be adjudicated. The petitioner-company thus maintained that the permission granted subsequently is not valid and the refusal to register the shares for other reasons still hold good. **Of course, at the hearing of the Writ Petition, having regard to the decision of the Supreme Court in Bajaj Auto Ltd. v. N.K. Firodia, the learned counsel Mr. Nariman conceded that the other grounds for not registering the shares were not being pressed in support of the refusal of registration.** "

In view of the rejoinder and the concession made before the High Court, in regard to the refusal of the company to register the transfer of shares, the only ground which it is necessary for

us to consider is whether the permission granted by the Reserve Bank of India was in order.

Escorts Limited having refused permission to register the transfer of shares, one would have thought that it was thereafter upto the purchasers or the sellers of the shares, if they were so minded to proceed to take further appropriate action in the matter to have the transfer of shares registered. However it was not they that moved but it was the Escorts Limited that filed the writ petition out of which the present appeals arise. They explain that the pressure of circumstances was such that they had no option except to go to court under Art.226 of the Constitution. It appears that on 18.10.83, Escorts Limited met with the representatives of the Financial Institutions, the ICICI, the IFC, the IDBI and the UTI. It has to be mentioned here that 30 per cent of the shares of Escorts Limited are held by the Life Insurance Corporation, 16 per cent by the Unit Trust of India and 6 per cent by the General Insurance Corporation and its subsidiaries. According to Escorts Limited, at this meeting their representatives gave full particulars of the various illegalities committed by the Caparo Group of Companies in the purchase of shares of Escorts Limited but they were repeatedly pressed by the representatives of the institutions to get their Board of Directors to reconsider their earlier refusal to register the transfer of shares. It was said that Mr. Patel the Chairman of the Unit Trust of India even said that the Financial Institutions who owned 52 per cent of the shares were in a position to remove the management at will. There were other meetings also with the representatives of the Financial Institutions. Mr. Nanda, the Chairman of Escorts Limited was requested to meet with Mr. Punja, Chairman of IDBI, and a Director of Life Insurance Corporation who had just returned from abroad. At this meeting also, it was said, Mr. Punja insisted that the transfer of shares purchased by the thirteen Caparo Companies should be registered. Again on 1.11.83 there was a meeting between the lawyers of Escorts and the legal advisers of the Financial Institutions. There was a further meeting between Mr. Nanda and Mr. Punja on 9.11.83 when Mr. Nanda of Escorts Limited requested Mr. Punja to expedite the proposal for merger of goetze India Limited with Escorts Limited and the proposal for pre-payment of the outstanding loans of Escorts Limited to the Financial Institutions at the inter-institutional meeting to be held on the afternoon of 9th. Mr. Nanda was later informed by Mr. Davar that the proposals of Escorts Limited had been discussed

A and accepted but the formal clearance would have to await Mr. Punja's discussion with Mr. Nanda. Thereafter, it was said, Mr. Nanda was informed by Mr. Punja that Escorts Limited must register some shares purchased by the Caparo Group of Companies. In answer Mr. Nanda informed Mr. Punja that the RBI itself was enquiring into the purchase of shares by Caparo Group of Companies and therefore Mr. Punja should await the outcome of the B investigation. On 10.11.83 Mr. Sen Gupta, the Controller of capital issues telephoned to Mr. Nanda and insisted that Escorts Limited should atleast register some shares purchased by the Caparo Group immediately. On 12.11.83 Mr. Punja once more insisted that some shares atleast should be registered immediately. On 16.11.83 Mr. Nanda met Mr. Nadkarni, the Chairman of ICICI C who informed him that Mr. Punja was most upset at the refusal of Escorts Limited to register the transfer of shares. Thereafter in the first week of December, the Unit Trust of India wrote a letter to Escorts Limited to induct their Dy. General Manager as a nominee Director on the Board of Directors of Escorts Limited. On 13th December, 83 there was a meeting between Mr. Nanda and the representatives of Financial Institutions when once again D there was renewed insistence that the transfer of shares should be registered. On 20.12.83 Mr. Nanda telephoned and had a discussion with Mr. Punja who, it was said, informed him that the question of clearance of the proposal of Escorts Limited for merger, for pre-payment of loans and issue of debentures were inter-linked with the question of register of transfer of shares E purchased by the Caparo Group of Companies. According to Mr. Nanda this conversation was contemporaneously recorded by him in a letter addressed by him to Mr. Punja that very day.

While so the 'Telegraph' and the 'Financial Express' published a statement by Mr. Swraj Paul that the fight was now F between the Government and the management of Escorts Limited and that he would consider himself defeated if the Government cleared the proposal of Escorts for the issue of debentures without first settling the matter of registration of transfer of the shares purchased by him. Mr. Swraj Paul was also reported to have said that the Governor of the Reserve Bank (Dr. Man Mohan Singh, a G highly respected Civil Servant of our country) was applying double standards and was feeding wrong information to the Union Finance Minister. (If the reported statement is correct, we can only characterise it as saucy, rude and impudent coming as it does from a foreign national seeking the permission of the Reserve Bank to invest in shares of Indian Companies. Perhaps H those are the ways of the markets in which he operates. People

afflicted with double vision are ready to see double standards in others. We appreciate neither his conduct nor his statements. Dr. Man Mohan Singh, we presume, could not and did not think it proper to go to the press as readily as Mr. Swraj Paul and involve himself in an unsavoury controversy). On 24.12.83, there was a report of a speech of the Union Finance Minister (Mr. Pranab Mukherjee), at the Platinum Jubilee Celebration of the Calcutta Stock Exchange in which he referred to the dominant position held by the Financial Institutions in the equity shares of some large private companies and added, "I have a very effective instrument under my command to end the uncertainty." According to Escorts Limited it was in this factual background, that they were compelled to file the writ petition in the High Court of Bombay. One remarkable tactic of Mr. Nanda of Escorts deserves special mention here. The Writ Petition was filed on 29.12.83 and some interim directions were also sought on the same day. On that very day Mr. Nanda also had a meeting with the representatives of the Financial Institutions at the Office of Mr. Punja at which Mr. Nanda was asked to arrange for the induction of a representative of the U.T.I. on the Board of Escorts and was further informed that the proposal for merger of Goetze Limited may not be acceptable as it would reduce the holding of the financial institutions from 52 per cent to 49 percent but that the matter was still under consideration. What is remarkable and what may even be considered dubious conduct on the part of Mr. Nanda is his failure to inform the representatives of the financial institutions about the filing of the Writ Petition that very day.

Writ Petition No.3063 of 83 thus filed in the High Court of Bombay was perhaps both protective and a pre-emptive strike. The writ petition is at once remarkable for its length and the number of prayers. The Writ Petition runs to as many as 172 pages and innumerable documents running into several volumes are now placed before us. There were originally thirteen prayers(a)...to (m). To these prayers four more prayers were added subsequently. Prayer (a), (b) and (c) seek declarations that Circular No.18 dated 19.9.83 are illegal and void as contrary to the provisions of the Foreign Exchange Regulation Act as arbitrary and issued for collateral purposes, as constituting an abuse of statutory authority and as violative of Articles 14, 19(1)(c) and 19(1)(g) of the Constitution. Prayer (d) is for a declaration that the purchases of shares made by and/or on behalf of the Caparo Group

Limited are illegal and violative of the Foreign Exchange Regulation Act, the circulars of the Reserve Bank of India issued from time to time and the provisions of the Securities Contracts Regulation Act and the bye-laws of the Stock Exchange. Prayers (e),(f),(g),(h),(i) again relate to Circular No. 18 dated 19.9.83 and the letter dated 19.9.83. Prayer (j) is directed towards securing the relevant documents. Prayer (k) is to restrain the first respondent (Union of India) from pressuring the company to register the transfer of shares. Prayer (l) is for ad-interim reliefs in terms of prayers (j) and (k). Prayer (m) is for costs of the Petition. It will be of interest to notice at this juncture that the learned single judge before whom the writ petition came up for preliminary hearing thought fit not to issue a rule nisi in regard to prayer(d). The learned judge made a speaking order refusing to issue a rule nisi in regard to prayer (d). There was no appeal against that order by Escorts Limited and the order became final so far as prayer(d) was concerned. The entire cause of action of the petitioner centres round the purchase of shares made by and on behalf of Caparo Group Limited and if those purchases are left unquestioned, one is left wondering what survives in the writ petition, particularly in view of the fact that the Board of Directors of the Company had already refused their permission to register the transfer of shares. The prayers relating to Circular No. 18 dated 19.9.83 and the letter dated 19.9.83 were only in aid of prayer (d) which, as we see it, was the main prayer in the writ petition. But we do not propose to dispose of the case on any such preliminary ground. Apparently, when the learned single judge refused to issue a rule nisi in regard to prayer(d) what he meant was that transactions of purchase of shares would not be allowed to be separately and individually questioned as that would involve adduction of evidence in regard to each of the transactions and would be ordinarily outside the province of a court exercising jurisdiction under Article 226 of the Constitution. This becomes clear from what the learned judge has himself stated. He has referred to the objection to prayer(d) in the following words:

> "It was also submitted that prayer (d) should not be entertained and if the Petitioners wanted to urge the contentions beyond those restricted to Exhibit 'B' and 'C' they should be relegated to an ordinary action or to urge these contentions in the pending appeal before the Company Law Board."

He has dealt with the objection and concluded :

"As stated earlier I think what is sought for in prayer(d) must be regarded as ordinarily beyond the function of the Writ Court but this should not be taken to imply that there is no warrant in the various complaints made by Escorts and Petitioner No.2 in connection with this aspect of the matter. Indeed it would be clear that what had been stated by Petitioner No. 2 in his letter dated 19th September 1983 was substantial and serious but these allegations have not been gone into either by the Government of India or the Reserve Bank of India."

Ex.B we may mention in the Circular dated 19.9.83 and Ex-C in the permission granted by the Reserve Bank of India.

Subsequent to the filing of the Writ Petition the Life Insurance Corporation of India (who later was impleaded as the 18th respondent in the Writ Petition) who along with other financial institutions held as many as 52 per cent of the total number of shares in the Company, issued a requisition dated 11.2.84 to the company to held an extraordinary general meeting for the purpose of removing nine of the part-time Directors of the Company and for nominating nine others in their place. Alleging that the action of the Life Insurance Corporation of India was malafide and part of a concerted action by the Union of India, the Reserve Bank of India and the Caparo Group Limited to coerce the company to register the transfer of shares and to withdraw the Writ Petition, the Writ Petitioners sought to suitably amend the Writ Petition and to add prayers (ia), (ib), (ic) and (id) to declare the requisition to hold the meeting arbitrary, illegal, ultra vires etc. The writ petition was amended. Paragraphs 149A(1) to (44) were added as also prayers (ia), (ib), (ic) and (id).

The High Court after an elaborate enquiry summarised their conclusions and granted reliefs in the following manner:

"Rule nisi is made absolute as under :

Section 29(1)(b) of FERA is mandatory. No NRI Investor is authorised to purchase shares in an Indian company without prior permission of the RBI under section 29(1)(b) of FERA; any purchase of shares without such

prior permission is illegal. Neither the Union of India nor the RBI is empowered to order otherwise either by issuing directions under section 75 or under section 73(3) of the FERA; nor are they empowered to grant permission after the shares are purchased so as to validate such purchases or to permit holding of the shares purchased without obtaining prior permission. The press release dated 17th September, 1983 (Exh. 'A'), the Circular dated 19th September, 1983 (Exh. 'B') and the letter dated 19th September, 1983 (Exh. 'C') cannot operate retrospectively so as to validate the purchase of shares made by NRI Companies which were ineligible on the date of purchase; nor can they authorise purchase of shares without obtaining prior permission of the RBI under section 29(1)(b) of the FERA. In so far as the impugned press release, circular and the letter permit the respondent-companies to hold the shares purchase without obtaining prior permission of the RBI, they are ultra vires of section 29(1)(b) of the FERA and the powers vested in the union of India under section 75 and the RBI under sec. 73(3) of the FERA. To that extent, they are void and inoperative both prospectively and retrospectively. The impugned press release and the Circular, however amount to amending the Portfolio Investment Scheme with full repatriation benefits introduced under Circular No. 9 dated 14th April, 1982 (Exh.'G') and such amendment operates only prospectively. A writ of mandamus shall issue restraining respondents Nos. 1 and 2 from issuing any directions -

(a) to register transfer of shares purchased by the respondent-companies (which form the subject-matter of this writ petition) pursuant to the letter dated 19th September, 1983 (Exh.'C'); and

(b) to further forbear from implementing the said Circular dated 19th September 1983 (Exh.'B') and the said letter dated 19th September 1983 (Exh.'C') with respect to the shares purchased by the respondent-companies which form the subject-matter of this writ petition.

There shall be a declaration that the action of respondent No.18 in issuing the impugned requisition notice is contrary to the provisions of sec.284 of the Companies Act and ultra vires the powers vested in the LIC under section 6 of the LIC Act and contrary to the intendment of the provisions of the LIC Act. The impugned requisition notice offends the principles of natural justice. The action of the LIC in issuing the impugned requisition notice is an arbitrary and mala fide action taken for collateral purpose; it is violative of Article 14 of the Constitution of India. The Union of India and the RBI, respondents Nos.1 and 2, are in no way responsible for the action of the LIC in this regard. The allegation of this mala fides made against them and the Union Finance Minister are unsubstantiated. The requisition notice and the resolutions passed at the meeting held in pursuance of the said notice are quashed. A writ of mandamus shall issue restraining the respondents from taking any steps or action in pursuance of the resolutions passed any meeting held pursuant to that notice any step or action on or under or in furtherance of the impugned requisition notice."

From what has been narrated above, one of the principle questions to be considered is seen to be whether the Reserve Bank of India had the power or authority to give ex-post-facto permission under sec.29(1)(b) of the Foreign Exchange Regulation Act for the purchase of shares in India by a company not incorporated in India or whether such permission had necessarily to be "previous" permission.

We do not propose to refer to any dictionary to find out the meaning of the word 'permission', whether the word is comprehensive enough to include subsequent permission. We will only refer to what Sir Shah Sulaiman, CJ. said in **Shakir Hussain v. Chandoo Lal & Ors.**, A.I.R. 1931 Allah, 567.

"Ordinarily the difference between approval and permission is that in the first the act holds good until disapproved, while in the other case, it does not become affective until permission is obtained. But permission subsequently obtained may all the same validate the previous act."

A We have already extracted sec.29(1) and we notice that the expression used is "general or special permission of the Reserve Bank of India" and that the expression is not qualified by the word "previous" or "prior". While we are conscious that the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find B no such compelling circumstances justifying reading any such implication into sec.29(1). On the other hand, the indications are all to the contrary. We find, on a perusal of the several, different sections of the very Act, that the Parliament has not been unmindful of the need to clearly express its intention by using the expression "previous permission" whenever it was thought that "previous permission" was necessary. In secs.27(1) C and 30, we find that the expression 'permission' is qualified by the word 'previous' and in sections 8(1), 8(2) and 31, the expression 'general or special permission' is qualified by the word "previous", whereas in sections 13(2), 19(1), 19(4), 20, 21(3), 24, 25, 28(1) and 29, the expressions 'permission' and 'general' or 'special permission' remain unqualified. The distinction made by Parliament between permission simpliciter and D previous permission in the several provisions of the same Act cannot be ignored or strained to be explained away by us. That is not the way to interpret statutes. The proper way is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. The significance of the use of the qualifying in one provision and its non-use in another E provision may not be disregarded. In our view, the Parliament deliberately avoided the qualifying word 'previous' in sec.29(1) so as to invest the Reserve Bank of India with a certain degree of elasticity in the matter of granting permission to non-resident companies to purchase shares in Indian companies. The object of the Foreign Exchange Regulation Act, as already F explained by us, undoubtedly, is to earn, conserve, regulate and stored foreign exchange. The entire scheme and design of the Act is directed towards that end. Originally the Foreign Exchange Regulation Act, 1947 was enacted as a temporary measure, but it was placed permanently on the Statute Book by the Amendment Act of 1957. The Statement of Objects and Reasons of the 1957 Amend- G ment Act expressly stated, "India still continues to be short of foreign exchange and it is necessary to ensure that our foreign exchange resources are conserved in the national interest." In 1973, the old Act was repealed and replaced by the Foreign Exchange Regulation Act, 1973, the long title of which reads : "An Act to consolidate and amend the law regulating certain H payments, dealings in foreign exchange and securities, tran-

sactions indirectly affecting foreign exchange and the import and export of currency and bullion, **for the conservation of foreign exchange resources of the country and the proper utilisation thereof in the interest of the economic development of the country.**" We have already referred to sec.76 which emphasises that every permission or licence granted by the Central Government or the Reserve Bank of India should be animated by a desire to conserve the foreign exchange resources of the country. The Foreign Exchange Regulation Act is, therefore, clearly a statute enacted in the national economic interest. When construing statutes enacted in the national interest, we have necessarily to take the broad factual situations contemplated by the Act and interpret its provisions so as to advance and not to thwart the particular national interest whose advancement is proposed by the legislation. Traditional norms of statutory interpretation must yield to broader notions of the national interest. If the legislation is viewed and construed from that perspective, as indeed it is imperative that we do, we find no difficulty in interpreting 'permission' to mean 'permission', previous or subsequent, and we find no justification whatsoever for limiting the expression 'permission' to 'previous permission' only. In our view what is necessary is that the permission of the Reserve Bank of India should be obtained at some stage for the purchase of shares by non-resident companies.

An argument was strenuously pressed before us by Shri F.S. Nariman, learned Senior Advocate for the company, was that the very scheme of the Act shows that the permission contemplated by Sec. 29(1) could only be previous permission, notwithstanding the circumstance that the word 'previous' does not qualify the expression 'general or special permission' in sec.29(1) though it does in several other provisions. According to Sri Nariman, the Act was designed not merely to attract but also to regulate the inflow of Foreign Exchange. That was why, he said, the provisions were very stringent. We have no hesitation in agreeing with Mr. Nariman that while the inflow of Foreign Exchange is welcomed by the Act, the inflow is also subject to stringent checks as otherwise in no time the economy of the country will be swamped with Foreign money and taken over by giant multinationals. But that really does not affect the interpretation of the expression 'permission' in Sec.29(1). The Reserve Bank of India is not bound to give ex-post-facto permission whenever it is found that business has been started or

shares have been purchased without its previous permission. In such cases, wherever the Reserve Bank of India suspects an oblique motive, we presume that the Reserve Bank of India will not only refuse permission but will further resort to action under sections 50, 61 and 63, not merely punish the offender but also confiscate the property involved. We do not think that the scheme of the Act makes previous permission imperative under sec.29(1) though the failure to obtain prior permission may expose the foreign investor to prosecution, penalty, conviction and confiscation if permission is ultimately refused. Even if permission is granted, it may be made conditional. The expression 'special permission is wide enough to take within its stride a 'conditional permission', the condition being relevant to the purpose of the statute, in this case, the conservation and regulation of foreign exchange. For example, ex-post-facto permission may be granted subject to the condition that the person purchasing the shares will not be entitled to repatriation benefits.

Snri Nariman then suggested that even if we look at the provisions of s.29 by themselves it would clear that the permission contemplated by s.29 could only be 'previous'. He pointed out to us that while secs. 29(2) and 29(4) made due provision for applying for permission to continue to carry on any activity of the nature mentioned in s.29(1)(a) and continue to hold shares of a company of the character mentioned in s.29(1)(b) if such activity was carried on and such shares were held on the date of the commencement of the act, no such provision was found for the application for permission to carry on such activity or to hold such shares if such activity was commenced or if such shares were acquired after the commencement of the Act but without the previous permission of the Reserve Bank of India. It was suggested that the very absence of any prescribed form for the grant of permission for an activity started or shares acquired subsequent to the commencement of the Act without previous permission of the Reserve Bank of India, were clearly indicative of the imperative nature of the need for previous permission. It was submitted that whatever argument was possible in regard to the acquisition of shares it was clear that no activity of the nature mentioned in sec.29(1)(a) could be commenced without the previous permission of the Reserve Bank. Since the word 'general or special permission' of the Reserve Bank occuring in sec.29(1) qualified both

clauses (a) and (b) the expression had to be given the same meaning with reference to clause (b) as it had to be given with reference to clause (a) and that was that previous permission was necessary. The argument is attractive and not altogether without substance but it proceeds on the assumption, for which there is no basis, that permission required for carrying on business under sec.29(1)(a) must necessarily be previous permission. We do not think that the Parliament intended to lay down in absolute terms that the permission contemplated by sec.29(1) had necessarily to be previous permission. The principal object of sec. 29 is to regulate and not altogether to ban the carrying on in India of the activity contemplated by clause (a) and the acquisition of an undertaking or shares in India of the character mentioned in clause (b). The ultimate object is to attract and regulate the flow of Foreign Exchange into India. If that much is obvious, it becomes evident that the Parliament did not intend to adopt too rigid an attitude in the matter and it was, therefore, left to the Reserve Bank of India, than whom there could be no safer authority in whom the power may be vested, to grant permission, previous or ex-post-facto, conditional or unconditional. The Reserve Bank could be expected to use the discretion wisely and in the best interests of the country and in furtherance of declared Governmental fiscal policy in the matter of Foreign Exchange.

It was contended on behalf of Escorts Limited that sec. 13 of the Foreign Exchange Regulation Act which enable the Central Government, by a notification in the gazette, to order that no person shall except with the general or special permission of the Reserve Bank bring or send into India any gold or silver or any Foreign Exchange or Indian currency, would be rendered ineffective if the expression 'general or special permission' accuring in sec. 13 could be construed to include subsequent permission. So, it was urged, both in s.13 and secs. 19 and 29 the expression should be construed to exclude subsequent permission. There is no force in this submission. Section 67 of the Foreign Exchange Regulation Act provides that the restriction imposed by or under sec. 13 is to be deemed to have been imposed under sec. 11 of the Customs Act, and, further, makes the provisions of the Customs Act applicable accordingly. Section 11 of the Customs Act empowers the Central Government to prohibit absolutely or subject to conditions the import or export of goods of any specified description. Reading together sections 13 and 67

of the Foreign Exchange Regulation Act and Section 11 of the Customs Act, it is seen that an order under sec. 13 of the Foreign Exchange Regulation Act operates as a prohibition and there, can, therefore, be no question of the Reserve Bank granting subsequent permission to validate the importation of the prohibited goods and avoid the consequences prescribed by the Customs Act. It is, therefore, not possible to accept the analogy of section 13 to interpret sections 19 and 29.

Our attention was drawn to the very serious nature of the consequences that follow the failure to obtain the permission of the Reserve Bank, and the circumstance that even the burden of proof that requisite permission had been obtained, was on the person prosecuted or proceeded against for contravening a provision of the Act or rule or direction or order made under the Act thus ruling out mensrea as an essential ingredient of an offence. It is true that the consequences of not obtaining the requisite permission where permission is prescribed are serious and even severe. It is also true that the burden of proof is on the person proceeded against and that mensrea may consequently be interpreted as ruled out. But that cannot lead to the inevitable conclusion that the permission contemplated by section 29 is necessarily previous permission. Action under section 50 or under section 56 is not obligatory and in the case of a prosecution under section 56, the delinquent is further protected by the requirement that the complaint has to be made by one or other of the officers specified by section 61(2)(ii) only and even then only after giving an opportunity to the person accused of the offence of showing that he had the necessary permission. We presume that when called upon to show that he had the necessary permission, the person accused of the offence could satisfy the officer concerned that he had applied for permission as that there was a reasonable prospect of his obtaining the permission. We may further add here that ordinary prudence would warn a foreign national who is man of the world, particularly of the commercial world, to seek and obtain permission before venturing to invest his money in shares of Indian Companies. If not he would chance a refusal of permission and risk other consequences. The chance and the risk, of course, would not be there if everything was clean. Even if permission is granted, it may be subject to a condition such as withholding of repatriation benefits, which may not be palatable to him. That is another chance that he takes when he seeks ex-post-facto permission. One

of the submissions of Shri Nariman was that the Parliament took care to use the word 'confirmation' as distinguished from the word 'permission' where it thought such confirmation was sufficient, as in sec. 19(5). The Parliament, according to Shri Nariman, could well have made a provision for confirming transactions coming into existence after the commencement of the Act, if it was so minded, but since, it did not do so, but chose the word permission', it must follow that sec. 29 contemplates previous permission only. We see no true foundation for this submission. A reference to any dictionary or any book of synonyms will show that every word has different shades of meaning and different words may have the same meaning. It all depends upon the context in which the word is used. If it was the intention of Parliament to comprehend both previous and subsequent permission, the word 'confirmation' would not do at all. While it may be permissible to construe the word 'permission' widely the word 'confirmation' could never be used to convey the meaning 'previous permission'. The word confirmation would be totally misplaced in sec.29.

A B C D

It was also submitted on behalf of the company that if the word 'permission' was construed to include ex-post-facto permission, it would really amount to giving retrospective operation to the permission. The Reserve Bank, it was said was not competent to grant permission with retrospect effect. In our view, the rule against retrospectivity cannot be imported into the situation presented here. The rule against retrospectivity is a rule of interpretation aimed at preventing interference with vested rights unless expressly provided or necessarily implied. To invoke the rule against retrospectivity in a situation where no vested rights are involved is to give statutory status to a rule of interpretation forgetting the reason for a rule.

E F

One of the submission very strenuously urged before us was that the very authority which was primarily entrusted with the task of administering the Foreign Exchange Regulation Act, namely, the Reserve Bank of India was itself, of the view that the 'permission' contemplated by sec. 29(1)(b) of the Foreign Exchange Regulation Act was 'prior permission. Our attention was invited to paragraph 24-A.1 of the Exchange Control Manual where the first three sentences read as follows :-

G

"In terms of sec. 29(1)(b) of Foreign Exchange

H

A Regulation Act 1973, no person resident outside India whether an individual, firm or company (nor being a banking company) incorporated outside India can acquire shares of any company carrying on trading, commerce or industrial activity in India without prior permission of Reserve Bank. Also under sec. 19(1)(b) and 19(1)(d) of the Act, the transfer and issue of any security (which includes shares) in favour of or to any person outside India require prior permission of the Reserve Bank of India. When permission has been granted for transfer or issue of shares to non-resident investors under sec. 19(1)(b) or 19(1)(d) it is automatically deemed to be permission under sec. 29(1)(b) for purchase of shares by him.

The submission of Shri Nariman was two-fold. He urged that paragraph 24-A.1 was a statutory direction issued under sec. 73(3) of the Foreign Exchange Regulation Act and, therefore, had the force of law and required to be obeyed. Alternately he urged that it was the official and contemporary interpretation of the provision of the Act and was, therefore, entitled to our acceptance. The basis for the first part of the submission was the statement in the preface to the Exchange Control Manual to the effect:

> "The present edition of the Manual incorporates all the directions of a standing nature issued to authorised dealers in the form of circulars upto 31st May, 1978. The directions have been issued under sec. 73(3) of the Foreign Exchange Regulation Act which empowers the Reserve Bank of India to issue directions necessary or expedient for the administration of exchange control. Authorised dealers should hereafter be guided by the provisions contained in this Manual."

There is no force whatever in this part of the submission. A perusal of the Manual shows that it is a sort of guide book for authorised dealers, money changers etc. and is a compendium or collection of various statutory directions, administrative instructions, advisory opinions, comments, notes, explanations suggestions, etc. For example, paragraph 24-A.1 is styled as Introduction to Foreign Investment in India. There is nothing in

the whole of the paragraph which even remotely is suggestive of a direction under sec.73(3). Paragraph 24-A.1 itself appears to be in the nature of a comment on sec. 29(1)(b), rather than a direction under sec.73(3). Directions under sec. 73(3), we notice, are separately issued as circulars on various dates. No Circular has been placed before us which corresponds to any part of paragraph 24-A.1. We do not have the slightest doubt that paragraph 24-A.1 is an explanatory Statement of guideline for the benefit of the authorised dealers. It is neither a statutory direction nor is it a mandatory instruction. It reads as if it is in the nature of and, indeed it is, advice given to authorised dealers that they should obtain prior permission of the Reserve Bank of India, so that there may be no later complications. It is a helpful suggestion, rather than a mandate. The expression 'prior permission' used in paragraph 24-A.1 is not meant to restrict the range of the expression 'general and special permission found in sections 29(1)(b) and 19(1)(b). It is meant to indicate the ordinary procedure which may be followed. Shri Nariman argued that none of the prescribed forms provided for the application and grant of subsequent permission. That may be so for the obvious reason that ordinarily one would expect permission to be sought and given before the act. Surely, the Form cannot control the Act, the Rules or the directions. As one learned judge of the Madras High Court was fond of saying 'it is the dog that wags the tail and not the tail that wags the dog.' We may add what this Court had occasion to say in **Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakkar,** [1975] 1 S.C.R. 534:

> "The subservience of substance of a transction to some rigidly prescribed form required to be meticulously observed, savours of archaic and outmoded jurisprudence."

According to Shri Nariman even if as found by us, the permission to purchase shares of an Indian company by a non-resident investor of Indian origin or nationality under section 29(1)(b) of the FERA could be obtained after the purchase, the Reserve Bank ceased to have such power after the formulation of the Portfolio Investment Scheme since it did not reserve to itself any such power under the Portfolio Investment Scheme promulgated in exercise of its powers under sec. 73(3) of the Foreign Exchange Regulation Act. We do not see any foundation for this argument in the scheme itself. The scheme does not talk of any prior or previous permission, nor are we able to

understand how a power possessed by the Reserve Bank under a Parliamentary legislation can be so cut down as to prevent its exercise altogether. It may be open to a subordinate legislating body to make appropriate rules and regulations to regulate the exercise of a power which the Parliament has vested in it, so as to carry out the purposes of the legislation, but it cannot divest itself of the power. We are, therefore, unable to appreciate how the Reserve Bank, if it has the power under the FERA to grant ex-post-facto permission, can divest itself of that power under the scheme. The argument was advanced with particular reference to the forms prescribed under the scheme. We have already pointed out that the forms under the scheme cannot abridge the legislation itself.

Before proceeding further, it is just as well to have a clear picture of the nature of the property in shares, the law relating to transfer of property in shares under the law and the effect of the provisions of the FERA. For that purpose, it is desirable that we read together all the relevant statutory provisions relating to the acquisition, transfer and registration of shares. Besides referring to the relevant statutory provisions, we will also refer to the leading cases on the topic.

Section 2(46) of the Companies Act defines "shares" as meaning "share in the share capital of a company, and includes stock except where a distinction between stocks and shares is express or implied." Section 82 of the Companies Act states "the shares or other interests of any member in a company shall be movable property **transferable in the manner prescribed by the articles of the company.**" Section 84 makes a certificate, under the common seal of the company, specifying any shares held by any member prima facie evidence of the title of the member to such shares. Section 87 gives every member of the company holding any equity share capital there-in a right to vote, in respect of such capital, on every resolution placed before the company, his voting right to be in proportion to his share of the paid-up equity capital of the company. Section 106 makes provision for 'alteration of rights of holders of special classes of shares' under certain circumstances. Section 108(1) prohibits a company from registering a transfer of shares in a company unless a proper instrument of transfer duly stamped and executed by or on behalf of the transfer or and by or on behalf of the transferee

has been delivered to the company along with the certificate relating to the shares. Section 108(1a)(a) provides for the presentation of the instrument of transfer, in the prescribed form, to the prescribed authority for the purpose of having duly stamped on it the date of such presentation. Section 108(1A)(b) provides for the delivery of the duly stamped instrument to the company generally within two months from the date of such presentation. Sections 108-A to 108-H impose certain restrictions on transfer of shares in the company with which we are not concerned for the purpose of this case. Section 110 provides for application for transfer of shares. Section 111 (1) preserves the power of the company under its articles to refuse to register the transfer of any shares of the company, and sec.111(3) provides for an appeal to the Central Government against such refusal to register. Section 206 obliges a company not to pay the dividend in respect of any share except to the registered holder of such share or to his order or to his bankers or where a share warrant has been issued in respect of the share to the bearer of such warrant or to his banker. Default in payment of dividend is also made punishable under sec. 207. A share-holder along with others, making a minimum of one hundred members of the company or one-tenth of the total number of members, has the right to apply to the court under sec. 397 for relief in case of oppression and under sec. 398 for relief in case of mismanagement. Section 428 defines 'contributory' and it includes the holder of any shares which are fully paid-up. The share-holder, as a contributory, has also the right to apply for winding up of the company under sec. 439. On winding up, sec. 475 enables the court to adjust the rights of the contributories amongst themselves and to distribute the surplus among the persons entitled thereto.

We have also no notice here sec. 27 of the Securities Contracts (Regulation) Act which provides that it shall be lawful for the holder of any security, whose name appears on the books of the company issuing the said security to receive and retain any dividend declared by the company in respect thereof for any year, notwithstanding that the said security has already been transferred by him for consideration, unless the transferee, who claims the dividend from the transferer has lodged the security and all other documents relating to the transfer which may be required by the company with the company for being registered in his name within fifteen days of the date on which the dividend became due.

A We have to further notice here that the sale of Goods Act also applies to stocks and shares. Section 2(7) of the Sale of Goods Act defines 'goods' as meaning "every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be sold before sale B or under the contract of sale."

Section 19 prescribes that where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Intention may be ascertained having regard to the terms of the contract the C conduct of the parties and the circumstances of the case. Unless a different intention appears, the rules contained in section 20 to 24 are to determine the intention as to the time at which the property in the goods is to pass to the buyer. Section 20 deals with specific goods in a deliverable state. Section 21 deals with specific goods to be put into a deliverable state. Section 22 deals with specific goods in a deliverable state when the seller D has to do anything thereto in order to ascertain the price. Section 23 deals with sale of unascertained goods and appropriation and section 24 deals with goods sent on approval or "on sale or return".

E We have referred at the outset and indeed we have extracted some of the important provisions of the Foreign Exchange Regulation Act which have relevance to the case before us. We have seen that while sec. 19(1)(b) prescribes that no person shall, except with the general or special provision of the Reserve Bank, transfer any security or create or transfer any interest in a secur- F ity, to or in favour of a person resident outside India, sec. 29(1)(b) provides that no person resident outside India (whether a citizen of India or not) or a company is not incorporated under any law in force in India or in which the non-resident interest is more than 40 per cent, shall except with the general or special permission of the Reserve Bank purchase the shares in G India or any company carrying on any trade, commerce or industry. The provisions of sec. 29 are stated to be without prejudice to the provisions of sec. 47 which while prohibition any person from entering into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of the Act or rule or direction or order made thereunder

H

also provides that the provisions of the Act requiring that anything for which the permission of the Central government or the Reserve Bank is necessary shall not prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions would be due as debt, damages or otherwise, subject to the condition that no step shall be taken for the purpose of enforcing any judgment or order for the payment of any sum, unless the Central Government or the Reserve Bank as the case may be, may permit the sum to paid. We have also referred earlier to sec. 19(4) which stipulates that no person shall, except with the permission of the Reserve Bank, enter the transfer of securities in any register if he has any ground for suspecting that the transfer involves any contravention of the provisions of sec. 19. Sections 48, 50, 56 and 63 prescribe the consequences of non-compliance with the provisions of the Act and the rules, orders and directions issued under the Act and provide for penalties and prosecutions. The provisions of the Foreign Exchange Regulation Act, to which we have just now referred, do not appear to stipulate that the purchase of shares without obtaining the permission of the Reserve Bank shall be void. On the other hand, legal proceedings arising out of such transactions are contemplated subject to the condition that no sum may be recovered as debt, damages or otherwise, unless and until requisite permission is obtained. We have already held that the permission may be ex-post-facto. If permission may be granted ex-post-facto, quite obviously the transaction cannot be a mullity and without any effect whatsoever.

In the course of the submissions we were referred to **Manekji Pestonji Bharucha and Anr. v. Wadilal Sarabhai and Company,** 52 I.A.92, **Bank of India v. Jamshetji A.H. Chinoy,** A.I.R. 1950 P.C.90, **In Re Fry,** 1946 (2) All E.R. 106 **Swiss Bank Corporation v. Llodys Bank Ltd.** 1982 A.C. 584, **Charanjit Lal Choudhury v. Union of India** A.I.R. 1951 S.C. 41, **Mathalone and Ors. v. Bombay Life Assurance Company Limited** A.I.R. 1953 S.C. 385 and **Vasudev Ramachandra Shelat v. Pranlal Jayanand Thakkar,** (supra) **A.K. Ramiah v. Reserve Bank** 1970 (1) M.L.J. 1 and **Baliv Chopra** I.A.R. 1971 (2) Delhi 637. We have read all of them and we think it is enough if we refer to some of them.

In **Charanjit Lal Choudhury v. Union of India** (supra), Mukherjee, J. summarised the rights of a shareholder in a company in the following manner :

> "The petitioner as a shareholder has undoubtedly an interest in the company. His interest is represented by the share he holds and the share is a movable

A property according to the Indian companies Act, with all the incidence of such property attached to it. Ordinarily, he is entitled to enjoy the income arising from the shares in the shape of dividends; the share like any other marketable commodity can be sold or transferred by way of mortgage or pledge. The holding B of the share in his name gives him the right to vote at the election of Directors and thereby take a part, though indirectly in the management of the company's affairs. If the majority of share-holders sides with him, he can have a resolution passed which would be binding on the Company and lastly, he can institute proceedings for winding up of the Company which may C result in a distribution of the net assets among the share holders."

It is interesting to notice that Mukherjee, J. in the course of his opinion, expressed the view that a Corporation, which is engaged in the production of a commodity vitally essential to the community has a social character of its own and it must not be D regarded as the concern primarily or only of these who invest their money in it.

In **Mathalone and Ors. v. Bombay Life Assurance Company Ltd.** (supra), the question of relationship between the transferor and transferee of shares before registration of the transfer in the books of the company came to be considered in connection with the E right of the transferee to the 'right-shares' issued by the company. On the transfer of shares transferee became the owner of the beneficial interest though the legal title was with the transferor the relationship of trustee and 'cestui que trust' was established and the transferor was bound to comply with all the reasonable directions that the transferee might give and that he F became a trustee of dividends as also a trustee of the right to vote. The relationship of trustee and cestui que trust arose by reason of the circumstance that till the name of the transferee was brought on the register of shareholders in order to bring about a fair dealing between the transferor and the transferee G equity clothed the transferor with the status of a constructive trustee and this obliged him to transfer all the benefits of property rights annexed to the sold shares of the cestui que trust. The principle of equity could not be extended to cases where the transferee had not taken active steps to get his name registered as a member on the register of the company with due H diligence and in the meantime, certain other privileges or opportunities arose for purchase of new shares in consequences of

the ownership of the shares already acquired. The benefit obtained by a transferor as a constructive trustee in respect of the share sold by him cannot be retained by him and must go to the beneficiary, but that cannot compel him to make himself liable for the obligations attaching to the new issues of shares and to make an application for the new issue by making the necessary payments, unless specially instructed to do so by the beneficiary.

In **Vasudev Ramachandra Shelat v. Pranlal Jayanand Thakkar** (supra), the question arose this way, The donor gifted certain shares in companies to the appellant by a registered deed. She also signed several blank transfer forms to enable the donee to obtain transfer of shares in the register of companies. However, she died before the shares could be transferred to the appellant in the books of the companies. The respondent, a nephew of the donor, filed the suit, claiming the shares on the ground that the gift was incomplete for failure to comply with the formalities prescribed by the Indian Companies Act 1913 for transfer of shares. Noticing that in 53 Indian Appeals, 92 a distinction was made between "the title to go on the register" and "the full property in the shares in a company",the court expressed the view that sec.6 of the Transfer of Property Act also justified such a splitting up of a right constituting "property" on shares just as it was well recognised that rights of ownership of property might be split up into a right to the "Corpus" and another to the "usufruct" of the property and then separately dealt with. On the delivery of the registered deed of gift together with the share certificate to the donee, the donation of the right to get the share certificate transfereed in the name of donee became irrevocable by registration as well as by delivery. Either was sufficient. The actual transfer in the registers of the companies constituted more enforcement of this right to enable the donee to exercise the rights of the shareholder. The more fact that such transfers had to be recorded in accordance with the Company Law did not detract from the completeness of what was donated. Referring to Regulation 18 of the first schedule to the Companies Act of 1913 which prescribed the mode of transfer of shares, it was observed by the court that there was nothing either in the Regulation or elsewhere to indicate that without strict compliance with some rigidly prescribed form, the transaction must fail to achieve its purpose. It was said, "the subservience of substances of a transaction to some rigidly prescribed from required to be meticulously observed, savours of arohaic and outmoded jurisprudence." The Court referred to the passage in Buckley on the **Companies Acts** XXXI Edn. Page 813 :

"Non-registration of a transfer of shares made by a donor does not render the gift-imperfect", and the passage in Palmar's **Common Law** : 21st Edn. page 334 : A transfer is incomplete until registered. Pending registration, the transferor has only an equitable right to the shares transferred to him. He does not become the legal owner until his name is entered on the register in respect of these shares." The two statements of law were reconciled by the court and its was stated "the transferee under a gift of shares, cannot function as a shareholder recognised by Company Law until his name is formally brought upon the register of a company and he obtain a share certificate as already indicated above. Indeed, there may be restrictions on transfers of shares either by gift or by sale in the articles of association." It was pointed out that, "a transfer of "property" rights in shares, recognised by the Transfer of Property Act, may be antecedent to the actual vesting of all or the full rights of ownership of shares and exercise of the rights of shareholders in accordance with the provisions of the Company law," and that while transfer of property in general was not the subject matter of the companies Act, it deals with "transfers of shares only because they give certain rights to the legally recognised shareholders and imposes some obligations upon them with regard to the companies in which they hold shares. A share certificate not merely entitles the shareholder whose name is found on it to interest on the share hold but also to participate in certain proceedings relating to the company concerned.

In **Re Fry**, (supra), F, a resident of the United States of America desiring to make a gift to his son of certain shares of an English company, executed a deed of transfer and sent it to the company for registration. As the Defence (Finance) Regulations prohibited any transfer of any securities or any interest in securities held by a non-resident without permission from the Treasury, the company wrote to F that certain forms had to be completed by him and the transferee and that a licence had to be obtained from the Treasury. Before F could apply and obtain the permission of the Treasury, he died. The question arose whether F's son was entitled to require F's personal representatives to obtain for him legal and beneficial position of the shares. It was held that the permission of the Treasury not having been obtained, the company could not register the transfer and, therefore, the son acquired no legal title to the shares in question. Nor was there a complete gift of the equitable interest in the shares to the son because F had not

obtained the consent of the Treasury and had, therefore, not done all that was necessary to divest himself of his equitable interest in favour of his son. The son was, therefore, not entitled to sue the father's personal representatives to obtain for him legal and beneficial position of the shares.

In **Swiss Bank Corporation v. Lloyds Bank Ltd. & Ors.,** (supra), the question was about the consequence of an authorised depositary under s. 16(2) of the Exchange Control Act, parting with a certificate relating to a foreign currency security without the permission of the Treasury contrary to Bank of England Exchange Control Notice E.C.7. In the court of appeal, Buckley L.J. observed :

> "....the Bank of England, we must assume for sufficient reasons, declined to validate the transfer of custody. It must consequently be treated as having been made in contravention of section 16(2), which, as I have already mentioned, is conceded; but an act done in contravention of a statute is not necessarily nullity. Whether it is so or not must depend upon the terms and effect of the statute, and may depend upon the policy of the statute and the nature of the act itself. By section 34 of the act effect is given to the provisions of Schedule 5 to the Act for the purposes of the enforcement of the Act. Paragraph 1(1) of Part II of that Schedule provides that any person in or resident in the United Kingdom who contravenes any restriction or requirement imposed by or under the Act shall be guilty of an offence punishable under the part of that Schedule. The subsequent provisions of that part of the Schedule impose maximum penalties by way of imprisonment or find for such offence -
>
> "In my judgment, offences under the Act are clearly mala prohibita, not mala in se; they are not acts the validity of which the law refuses to countenance for any purpose. As such they are not devoid of any effect; they merely expose the culprits to the penalties prescribed by the Act none of which, so far as I am aware, has been exacted or sought to be exacted in this case.....
> .....If the legislature had intended that such a security, if transfered from the custody of the one authorised depositary to the custody of another

A without compliance with all the conditions of any relevant permission, should not be treated as being in the custody of the latter depositary, one would. I think, expect to find an express provision to that effect, for otherwise the consequences of an irregular transfer of custody is left in doubt."

B Earlier we mentioned that S.111 of the Companies Act preserves the power of the company under its articles to refuse to register the transfer of any shares of the company. The nature and extent of the power of the company to refuse to register the transfer of shares has been explained by this court in **Bajaj Auto Limited v. N.K. Ferodia and Anr.** 41 Company Cases 1 = [1971] 2 C S.C.R. 40. It was said that even if the article of the company provided that the directors might at their absolute and uncontrolled discretion decline to register any transfer of shares, "such discretion does not mean a bare affirmation or negation of a proposal. Discretion implies just and proper consideration of the proposal in the facts and circumstances of the case. In the exercise of that discretion, the Directors will act for the general interest of the shareholders because the D Directors are in a fiduciary position both towards the company and towards every shareholder. The Directors, are, therefore, required to act bona fide and not arbitrarily and not for any collatoral motives" Where the articles permitted the Directors to decline to register the transfer of shares without assigning reasons, the court would not necessarily draw adverse inference E against the Directors but will assume that the acted reasonably and bona fide. Where the Directors gave reasons the court would consider whether the reasons were legitimate and whether the Directors proceeded on a right or wrong principle. If the articles permitted the Directors not to disclose the reasons, they could be interrogated and asked to disclose the reasons. If F they failed to disclose that reason, adverse presumption could be drawn against them.

On a overall view of the several statutory provisions and judicial precedents to which we have referred we find that a G shareholder has an undoubted interest in a Company, an interest which is represented by his share-holding. Share is movable property, with all the attributes of such property. The rights of a shareholders are (i) to elect directors and thus to participate in the management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the Company in the shape of dividends; (iv) to apply to the Court for H

relief in the case of oppression; (v) to apply to the Court for relief in the case of mismanagement; (vi) to apply to the Court for winding up of the Company; (vii) to share in the surplus on winding up. A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register. A transfer effective between the transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company's register. Indeed until the transfer is register in the books of the company the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares. However, on the transfer of shares, the transferee becomes the owner of the beneficial interest though the legal title continues with the transferor. The relationship of trustee and 'cestui que trust' is established and the transferor is bound to comply with all the reasonable directions that the transferee may give. He also becomes a trustee of the dividends as also of the right to vote. The right of the transferee 'to get on the register' must be exercised with due diligence and the principle of equity which makes the transferor a constructive trustee does not extend to a case where a transferee takes no active interest 'to get on the register'. Where the transfer is regulated by a statute, as in the case of a transfer to a non-resident which is regulated by the Foreign Exchange Regulation Act, the permission, if any, prescribed by the statute must be obtained. In the absence of the permission, the transfer will not clothe the transferee with the right to 'get on the register' unless and until the requisite permission is obtained. A transferee who has the right to get on the register, where no permission is required or where permission has been obtained, may ask the company to register the transfer and the company who is so asked to register the transfer of shares may not refuse to register the transfer except for a bona fide reason, neither arbitrarily nor for any collateral purpose. The paramount consideration is the interest of the company and the general interest of the shareholder. On the other hand, where, for instance, the requisite permission under the FERA is not obtained, it is open to the company and, indeed, it is bound to refuse to register the transfer of shares of an Indian company in favour of a non-resident. But once permission is obtained, whether before or after the purchase of the shares, the company cannot, thereafter, refuse to register the transfer of shares.

Nor is it open to the company or any other authority or individual to take upon itself or himself, thereafter, the task of deciding whether the permission was rightly granted by the Reserve Bank of India. The provisions of the Foreign Exchange Regulation Act are so structured and woven as to make it clear that it is for the Reserve Bank of India alone to consider whether the requirements of the provisions of the Foreign Exchange Regulation Act and the various rules, directions and orders from time to time have been fulfilled and whether permission should be granted or not. The consequences of non-compliance with the provisions of the Act and the rules, orders and directions issued under the Act are mentioned in secs. 48, 50, 56 and 63 of the Act. There is no provision of the Act which enables an individual or authority functioning outside the Act to determine for his own or its own purpose whether the Reserve Bank was right or wrong in granting permission under sec. 29(1) of the Act. As we said earlier, under the scheme of the Act, it is the Reserve Bank of India that is constituted and entrusted with the task of regulating and conserving foreign exchange. If one may use such an expression, it is the 'custodian-general' of foreign exchange. The task of enforcement is left to the Directorate of Enforcement, but it is the Reserve Bank of India and the Reserve Bank of India alone that has to decide whether permission may or may not be granted under sec. 29(1) of the Act. The Act makes it its exclusive privilege and function. No other authority is vested with any power nor may it assume to itself the power to decide the question whether permission may or may not be granted or whether it ought or ought not to have been granted. The question may not be permitted to be raised either directly or collaterally. We do not, however, rule out the limited class of cases where the grant of permission by the Reserve Bank of India may be questioned, by an interested party in a proceeding under Art. 226 of the Constitution, on the ground that it was mala fide or that there was no application of the mind or that it was opposed to the national interest as contemplated by the Act, being in contravention of the provisions of the Act and the rules, orders and directions issued under the Act. Once permission is granted by the Reserve Bank of India, ordinarily it is not open to anyone to go behind the permission and seek to question it. It is certainly not open to a company whose shares have been purchased by a non-resident company to refuse to register the shares even after permission is obtained from the Reserve Bank of India on the ground that permission ought not to have been granted under the FERA. It is necessary to remind ourselves that the permission contemplated by sec. 29(1) of the Foreign Exchange Regulation Act is neither intended to nor does

it impinge in any manner or any legal right of the company or any of its shareholders. Conversely neither the company nor any of its shareholders is clothed with any special right to question any such permission.

Much was said before us about the mala fides of the Government of India and the Reserve Bank of India and the non-application of mind by the Reserve Bank of India which was said to amount to legal mala fides. Though Shri Nariman, learned counsel for the company, now and then, in the course of his argument mentioned that Shri Swraj Paul had been issuing press statements which were generally followed up, according to him, by some action or the other by the Government or the Reserve Bank, he properly refrained from reading to us the press statements said to have been made by Shri Swraj Paul. However, the gist of some of the press statements and releases of Shri Swraj Paul has been included in the pleadings which were read out to us. It may be that Shri Swraj Paul was ever ready and anxious to issue press releases for his own ends either because he had an inkling or made a guess of what course of action the Government or the Reserve Bank was likely to pursue or because he, like every interested party, was interested in making statements which may find some respective ears some where. There is nothing whatever to indicate that Shri Swraj Paul had any access to anyone who was in a position to take a decision in the matter or influence a decision in the matter. We do not think we can attach any importance to the vainglorious and grandiloquent press statements and releases made by Shri Swraj Paul. They deserve to be ignored as the over-rated statements of a person, who rated himself very high. The most important circumstance on which reliance was placed on behalf of the company in support of the argument relating to mala fides was the 'turn-about of the attitude of the Reserve Bank of India in the matter. It was said that in the beginning, the Reserve Bank of India had serious reservations on the question whether indirect purchase of shares by non-residents of Indian nationality/origin was permissible under the original scheme. Later after the Governor of the Reserve Bank had discussions with the Finance Secretary, Finance Minister and the Personal Secretary to the Prime Minister the Reserve Bank of India changed its attitude and issued the impugned circular and the permission. Our attention was particularly invited to: (i) the letter dated June 1, 1983 from the Reserve Bank of India to the Government of India in which the Reserve Bank appeared to take the view that the scheme did not contemplate indirect

investment by non-resident individuals of Indian nationality origin and proposed to reject the application of all the 13 overseas companies, but sought the confirmation of the Government of India, (ii) the reply dated September 17, 1983 of the Government of India to the Reserve Bank of India and (iii) the endorsement made on the letter dated 17.9.83 by the Governor or the Reserve Bank of India. We have already referred to the contents of (i) and (ii), the two letters in the proceeding paragraphs. We have also extracted the endorsement of Dr. Man Mohan Singh in full. The inference sought to be drawn from (i), (ii) and (iii) is that though the Reserve Bank of India had expressed itself strongly in (i), it was under the pressure of the Finance Secretary, Finance Minister and the Personal Secretary to the Prime Minister that the Governor of the Reserve Bank of India finally agreed to adopt the line suggested by the Government in its letter dated 17.9.83 and that the decision of the Reserve Bank of India was not that of a free agent. The Circular issued by the Reserve Bank of India and the permission granted by it, it was suggested, were so issued and granted under the pressure of the Government of India. We do not think that we will be justified in drawing any such inference. It would be wholly unfair and uncharitable to Dr. Man Mohan Singh. An enormous amount of foreign exchange vital to the economy of the country was involved. Though the Reserve Bank of India appeared to have taken, in the beginning, a certain position in the matter, it thought it necessary to consult and seek the advice of the Government of India in the matter. There were high level discussions obviously because of the amount of foreign exchange and the question of policy involved and the matter had also attracted considerable attention from the Press as the public. If after high level discussions the Reserve Bank of India changed its views, it would be unreasonable and impermissible to hold that it was done under pressure. Every question of this nature is bound to have different facets which present themselves in different lights when viewed from different angles. If after full discussion with those in the higher rungs of the Government who are concerned with policy-making, the Reserve Bank of India changed its former negative attitude to a more positive attitude in the interests of the economy of the country, one fails to see how its decision can be said to be the result of any pressure.

It was argued that, from time to time, the company had addressed several communications to the Reserve Bank of India drawing the latter's attention to several irregularities and illegalities, which it claimed, had been committed by Mr. Swraj

Paul and the Caparo Group of Companies, but to no avail, as the Reserve Bank failed to respond and make any enquiry into the matter. It was said that the Reserve Bank of India was guilty of total non-application of the mind and, therefore, mala fides in law could be attributed to it. We are unable to agree with this submission. Merely because the Reserve Bank of India did not choose to send a reply to the communications received from the company, it did not follow that the Reserve Bank of India was not acting bonafide. While we may say that the Reserve Bank would have done well to acknowledge the communications received from the company and to reply to them, we are unable to infer malafide from their failure to do so. It was not as if the Reserve Bank ignored the complaints of the company. They did enquire into the matter in their own way. As already mentioned by us during the course of the narration of events, the Reserve Bank pursued its enquiry by seeking information from the Punjab National Bank, who was an authorised dealer appointed under the provisions of the Foreign Exchange Regulation Act and who, therefore, could be expected to supply the Reserve Bank with full and accurate information. At that stage, there was nothing to doubt the bona fides and the ineptitude of the Punjab National Bank. The company also in its several communications to the Reserve Bank did not make any allegations against the Punjab National Bank. In those circumstances, if the Reserve Bank thought fit to seek information from the Punjab National Bank and proceeded to act on the information obtained from the Punjab National Bank, the Reserve Bank cannot be accused to non-application of mind. The Reserve Bank was entitled to rely on the Punjab National Bank and the information supplied by that bank as the bank held a statutory position under the Foreign Exchange Regulation Act. It may be that the Punjab National Bank did not act with that degree of competence and diligence as should be expected from it, but at that stage, there was nothing to provoke any suspicion in the mind of the Reserve Bank. We will revert to the part played by the Punjab National Bank presently, but there is no reason to change the Reserve Bank with want of bona fides and non-application of mind merely because it placed reliance upon the Punjab National Bank and the information supplied by it although with the aid of some of the material now brought out during the hearing, we perceive that the Reserve Bank could have acted with greater wisdom than to rely on the Punjab National Bank. But that would really be speaking with 'hind-sight'.

Earlier we referred to the failure of the Punjab National Bank to inform the Reserve Bank, as it was bound to do, about the remittance of L 1,30,000 received from Mr. Swraj Paul by their

Parliament Street Branch. It was a sorry confession to hear from the Punjab National Bank that their ECE House Branch which was monitoring the NRE Accounts and the purchase of shares by the Caparo Group of Companies was not aware of the remittance received by the Parliament Street Branch. We are now told that this amount of L 1,30,000 was also utilised for purchasing shares for the Caparo Group of Companies. If that was so, the ECE House Branch should have known about it. Otherwise, one wonders what was the monitoring that was done by the ECE House Branch, if it was not even aware that a large remittance of L 1,30,000 received by their Parliament House Branch had been utilised for purchase of shares for the Caparo Group of Companies. If the amount was not utilised for the purchase of shares for the Caparo Group of Companies, it must necessarily follow that locally available funds and not foreign remittances must have been utilised for purchasing some of the shares. The fact that this large sum had been remitted by Shri Swraj Paul and received by the Punjab National Bank was never brought to the notice of the Reserve Bank of India who was apparently kept in the dark about it. We consider this a serious matter which requires further probe by the Reserve Bank. We find that the entire conduct of the Punjab National Bank in this affair has been most irresponsible. They had been appointed as authorised dealers under the Foreign Exchange Regulation Act and by virtue of such appointment great confidence had been reposed in them for the purpose of regulating the flow and conserving the foreign exchange and protecting the national interest. The Portfolio Investment Scheme provided that the banks which were designated as authorised dealers could purchase shares on behalf of their non-resident customers of Indian nationality/origin through a stock exchange. The applications of the foreign investors for permission to invest in shares of Indian companies were in fact to be made through the designated banks. By paragraph 11 of Circular No.9 dated April 14, 1982 the designated banks were required to maintain separately a proper record of the investment made in shares, with and without repatriation benefits, on account of the investor, showing all relevant particulars including the numbers of share certificates and distinctive numbers of shares. They were required to keep a systematic and upto-date record of the shares purchased by them for each investor through the stock exchange so that they would be able to ensure that the purchase of shares in any one company by a single investor would not exceed Rs. One lakh in face value of the company. Again by circular No. 10 of April 22, 1982, the authorised dealer (designated bank) was required to obtain from the investing overseas companies a certificate from an auditor/chartered accountant/certified public

accountant in form CAC. The certificate was to be obtained by the authorised dealer every year. When by circular No. 12 of May 16, 1983, an overall ceiling of 5 per cent of the total paid-up equity capital of the company was imposed, it was prescribed, for the purpose of monitoring the ceiling of 5 per cent, that authorised dealers who were permitted to purchase shares under the Portfolio Investment Scheme on behalf of the eligible non-resident investors should nominate a link office in Bombay for the purpose of coordinating the purchases and sales of equity shares made by their designated branches on a daily basis and notify the same to the Controller, Control Exchange Department, Reserve Bank of India. The link officers were required to submit a consolidated statement of the total purchases and sales of equity shares made by the designated branches in the prescribed form. The daily statements were to be submitted to the Controller positively on the succeeding day. We may straight away say that the Punjab National Bank, apart from receiving the remittances from the Caparo Group Limited and passsing on the amounts to the stock brokers, Raja Ram Bhasin & Co. did nothing whatsoever to discharge their prescribed duties as authorised dealers. It is now admitted that they did not give any instructions to Rajaram Bhasin & Co. regarding the purchase of shares, that they never maintained any systematic, uptodate and proper record of the investments made in shares and that they did not submit daily statements of purchases and sales of shares to the Controller. Of course, in the beginning, they submitted the applications of the Caparo Group of Companies to the Reserve Bank for permission to purchase shares in Indian Companies. That was on the 4th and the 12th of March, 1983. Thereafter, they wrote to the Reserve Bank on April 23, 1983 reminding the latter about the applications of their customers for permission and informing them about the receipt of four remittances on 9.3.1983, 12.4.1983, 13.4.1983 and 23.3.1983. They also mentioned that investment operations were being conducted through Raja Ram Bhasin & Co. What shares, how many, and for what amount, these details were not mentioned, not even the total number of shares purchased and the amount expended till then. Therefore, in answer to a letter from the Reserve Bank, they wrote on May 6, 1983 that they had been advised that Mr. Swraj Paul and family members hold 61.6 per cent of share capital of Caparo Group Limited and that Caparo Group hold 100 per cent of share capital of the remaining companies except Caparo Properties in which the holding was 98 per cent. In this letter, it was expressly stated "As regards details of shares of Indian Companies purchased by or on behalf of said non-resident clients, they have advised us that the same would be supplied when the purchases were complete." This statement appears to us

to be in complete breach of the duties of the authorised dealer under the Portfolio Investment Scheme. The letter shows that not only the sales were not put through by the authorised dealers, the authorised dealers were not even aware of the transactions that had taken place till then, though we are now told that all the shares had been purchased by April 28, 1983. It was only on 31.5.1983 that the Punjab National Bank sent a telegram to the Reserve Bank of India that they had been advised by the brokers that up to 28.4.83, 75,000 equity shares of Escorts Limited had been purchased on behalf of and for the benefit of each of the thirteen overseas companies. The Reserve Bank sought information by their letter dated 11.6.1983 of the purchases of shares made for the benefit of the overseas companies, (i) upto December, 1982; (ii) from 1.1.83 to 28.2.83; (iii) from 1.3.83 to 2.5.83; and (iv) after 2.5.83. Details of purchases including the total number and face value of the shares were required to be given. The Punjab National Bank replied on 23.6.83 to the effect that their brokers had informed them by their letter dated 22.6.83 that 75,000 shares of Escorts Limited had been purchased for each of the thirteen companies during the period from 1.3.83 to 2.5.83, but none were purchased before or after. It was also stated that the brokers had confirmed that no other purchases had been made besides these shares. This letter again discloses how casual they were in the discharge of their duties as authorised dealers. Not only did they not maintain upto date and proper record of the purchases made on behalf of each of the companies, not only did they not submit daily statements to the Controller, they were not even aware of the transactions which had taken place but were solely dependant on the information supplied to them once in a way by Raja Ram Bhasin & Co. Though the Reserve Bank did make some enquiries from the Punjab National Bank, the Reserve Bank did not pursue the matter as vigorously as they might have done but, apparently, preferred to rely upon the Punjab National Bank probably for the reason that they were authorised dealers under the Foreign Exchange Regulation Act and could be expected to have been doing everything properly and in a manner authorised and contemplated by the Act and the scheme. It has to be remembered that Escorts Limited also had made no complaint regarding the Punjab National Bank. It is only now it has come to light that the Punjab National Bank acted no better than a mere dumb, dummy and signally failed to discharge the functions entrusted to them under the Act and the scheme.

The result of the dereliction of duty on the part of the Punjab National Bank is that there had been no proper monitoring of the purchase of shares by the thirteen Caparo Group of Companies. While we are unable to hold that the Reserve Bank of India did not act bona fide or apply its mind to the relevant facts and circumstances which were required to be considered by it before granting permission, because, it did bona fide apply its mind to whatever material was then available to it and supplied to it by the Punjab National Bank, we must hold on the material now available to us that their implicit reliance on the Punjab National Bank was entirely misplaced. What further action must be taken on that finding is a question which we have to consider. We will do so later after considerating the other questions argued before us.

Shri Nariman contended that there were several circumstances in the record which established that a large number of shares were purchased with funds which were made available locally and not funds remitted from abroad and also that the shares were purchased subsequent to 2.5.83. The circumstances were : (i) the purchase of shares commenced before the remittances started; (ii) the price at which the shares were available in the market showed that funds in excess of what was remitted must have been utilised for purchasing the shares and this could only have been with rupee funds; (iii) the company was able to obtain two brokers' notes from two of the sellers' brokers which showed that the sales were made long subsequent to 2.5.83 and (iv) out of the total number of shares purchased on behalf of the thirteen companies, 4,62,000 shares only were lodged with the company on 14.5.83 for registering the transfers. 3,68,463 shares were lodged on 19.8.83, that is 3-1/2 months after 2.5.83, which was the cut-off date fixed for the imposition of the ceiling of 5 per cent. 1,44,200 shares were not lodged at all with the company. The failure to lodge the shares within a reasonable period at 28.4.83 which was supposed to be the date by which all the purchases had been made indicated that the purchases must have been made long afterwards. Everyone of these circumstances is capable of some explanation, adequate or not, we do not have the necessary material to say on the record now before us. The question will involve a probe into individual purchases and the adduction of evidence. That would be beyond the scope of the writ petition in the High Court. It is to be remembered that the High Court refused to issue a rule nisi in regard to prayer(d), obviously as it was thought that the court exercising jurisdiction under Article 226 of the Constitution should not explore the evidence

to determine the dates of the various transactions of purchase of shares and whether they were purchased with foreign exchange or locally available funds. We consider that it is really a matter for the consideration of the final monitoring authority, namely, the Reserve Bank of India. We will later indicate what we propose to do about this aspect of the matter.

It was submitted that the thirteen Caparo Companies were thirteen companies in name only; they were but one and that one was an individual, Mr. Swraj Paul. One had only to pierce the corporate veil to discover Mr. Swraj Paul lurking behind. It was submitted that thirteen applications were made on behalf of thirteen companies in order to circumvent the scheme which prescribed a ceiling of one per cent on behalf of each non-resident of Indian nationality or origin of each company 60 per cent of whose shares were owned by non-residents of Indian nationality/origin. Our attention was drawn to the picturesque pronouncement of Lord Denning M.R. in **Wallersteiner v. Moir** 1974 3 All E.R. 217, and the decisions of this court in **Tata Engineering and Locomotive Company Ltd. v. State of Bihar** 1964 6 S.C.R. 885, **The Commissioner of Income Tax v. Meenakshi Mills** A.I.R. 1967 S.C. 819, and **Workmen v. Associated Rubber Ltd.** 1985 2 Scale 321. While it is firmly established ever since **Salomon v. A. Salomon & Co. Limited** 1897 A.C. 22, was decided that a company has an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional circumstances. Pennington in his Company Law (Fourth Edition) states :

> "Four inroads have been made by the law on the principle of the separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The Government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the tax-payer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes. Taxation of Companies is a complex subject, and is outside the scope of this book. The reader who wishes

to pursue the subject is referred to the many standard text books on Corporation Tax, Income Tax, Capital Gains Tax and Capital Transfer Tax.

"The other inroads on the principle of separate corporate personality have been made by two section of the Companies Act, 1948, by judicial disregard of the principle where the protection of public interests is of paramount importance, or where the company has been formed to evade obligations imposed by the law, and by the courts implying in certain cases that a company is an agent or trustee for its members."

In Palmer's Company Law (Twenty-third Edition), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories. Similarly in Gower's Company Law (Fourth Edition), a chapter is devoted to 'lifting the veil' and the various occasions when that may be done are discussed. In **Tata Engineering and Locomotives Co.Ltd.** (supra), the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under Art.32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was not possible to treat the company as a citizen for the purposes of Art.19. In **Commissioner of Income Tax v. Meenakshi Mills** (supra), the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In **Workmen v. Association Rubber Industry** (supra), resort was had to the principle of lifting the veil to prevent devices to avoid welfare legislation. It was emphasised that regard must be had to substance and not the form of a transaction. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.

In the present case, we do not think 'lifting the veil' is necessary or permissible beyond the essential requirement of the Foreign Exchange Regulation Act and the Portfolio Investment Scheme. We have noticed that the object of the Act is to conserve and regulate the flow of foreign exchange and the object of the scheme is to attract non-resident investors of Indian nationality or origin to invest in shares of Indian companies. In the case of individuals, there can be no difficulty in identifying their nationality or origin. In the case of companies and other legal personalities, there can be no question of nationality or athnicity of such company or legal personality. Who of such non-resident companies or legal personalities may then be permitted to invest in shares of Indian companies? The answer is furnished by the scheme itself which provides for 'lifting the corporate veil' to find out if at least 60 per cent of the shares are held by non-residents of Indian nationality or origin. Lifting the veil is necessary to discover the nationality or origin of the shareholders and not to find out the individual identity of each of the shareholders. The corporate veil may be lifted to that extent only and no more.

The particulars of the scheme have already been extracted by us. First, a ceiling of one per cent of the equity capital of the Indian company was imposed on the purchase of its shares by any single foreign investor. The obvious object of the imposition of the ceiling was the prevention of destabilisation of the Indian company by foreign investors purchasing large blocks of shares and attempting to take over the Indian company. We have already explained the futility of the imposition of the one per cent ceiling since that would not effectively prevent a group of foreign investors of Indian origin from investing in shares of the Indian company by each of them purchasing one per cent of the shares. We also pointed out that different Foreign companies in which several different groups of resident Indians with one individual common to all together held more than 60 per cent of the shares could not be denied the facility of investing in shares of Indian companies merely because the Foreign companies were dominated by the single common non-resident individual. That would be unfair to the other non-resident Indian shareholders of the Foreign companies who would otherwise be entitled to the benefit of investment in Indian companies, via the Foreign companies in which they held shares. Clearly, it was the realisation of the futility of the one per cent limit that led to the imposition of the five per cent aggregate limit. The five per cent aggregate limit would effectively prevent any single foreign

investor or a combination of foreign investors from attempting to destabilise Indian companies by purchasing large blocks of shares. If this is borne in mind it will be clear that the lifting of the corporate veil is necessary and permissible in the present case, only to find out the nationality or origin of the shareholders of the Foreign companies seeking to invest in shares of Indian companies and not to explore the individual identity of the shareholders. We do not think that merely because more than 60 per cent of the shares of the several Foreign companies who have applied for permission are held by a trust of which Mr. Swraj Paul and the members of his family are the beneficiaries, the companies can be denied the facility of investing in Indian companies. In fact, if each of the six beneficiaries of the trust had separately applied for permission to purchase shares of Indian companies, they could not have been denied such permission. It cannot, therefore, be said that there has been any violation of the Portfolio Investment Scheme merely on that account or that the permission granted is illegal.

We now turn to the case of Escorts Limited against the Life Insurance Corporation of India. While narrating the sequence of events, we referred to the impleading of the Life Insurance Corporation of India as a respondent to the Writ Petition a few months after it was originally filed. The primary allegation which led to the impleading of the Life Insurance Corporation of India was that there was confabulation between the Government of India, Reserve Bank of India and the Life Insurance Corporation to pressurise the Escorts Limited to register the transfer of shares in favour of the Caparo Group of Companies. The inference of collusion and conspiracy was sought to be drawn from the sequence of certain events which we will mention immediately. A few days before the filing of the writ petition there was the report of a speech of the Finance Minister, to which we have earlier made a reference, to the effect that he has in his possession an effective weapon to end the uncertainty. After the writ petition was filed and before it was admitted, there was a meeting of the Board of Directors of Escorts Limited on 6th January, 1984 at which Mr. D.N. Davar, claiming to speak for the financial institutions holding 52 per cent of the shares of Escorts Limited, circulated three notes and moved resolutions the purport of which was that the writ petition should be withdrawn as it had been filed without consulting the financial institutions and that the matter should be placed before the Board for careful consideration of all aspects of the case and that the cheques sent in part payment of certain institutions loans should be recalled as the

A question was still under consideration. The resolutions proposed by Mr. Davar were rejected. On 9th January, 1984 Mr. Nanda wrote to Mr. Punja informing him about the events that took place at the Board meeting on 6.1.1984 and pointing out that in the last 20 years, there had not been a single occasion on which the financial institutions had even a single word to say against any B decision taken or proposed by the Management. Complete confidence was reposed in each other in the past by the management of Escorts Limited and the Financial Institutions. Mr. Nanda explained the position of the Management of Escorts Limited in regard to pre-payment of loans of financial institutions and the filing of the writ petition. Mr. Nanda pointed out that though the Reserve Bank had granted permission to the Caparo Group of C Companies to purchase shares, it had not condoned any of the illegalities that had already been committed and it was strange that the financial institutions should continue to press the company to register the shares. It was also stated by Mr. Nanda that he had repeatedly drawn the attention of Mr. Punja and others to the fact that funds far in excess of those remitted by the Caparo Group of Companies had been invested in the purchase D of shares and, therefore, repatriation benefits in foreign exchange could not be allowed to such shares by registering their transfer. Mr. Nanda complained that he was forced to believe that the institutions were adopting this attitude against the company because of external pressures brought upon the institutions as a result of the non-registration of the shares purchased by Mr. E Swraj Paul's companies. There was no reply to this letter by Mr. Punja. But on 13.1.1984, Mr. Punja informed Escorts that the financial institutions had decided to accept the proposal of Escorts Limited for pre-payment of the outstanding loan. At this stage, that is on 7.1.1984, a meeting of the Board of the Life Insurance Corporation was held and it was resolved that a requi- F sition should be served on Escorts Limited to convene an extra-ordinary general meeting to pass resolutions for the removal of the nine non-Executive Directors and for the appointment as new Directors, officers and nominees of the financial institutions, in their place. This subject was not one of the matters listed in the agenda for the meeting of the Board of Life Insurance Corpo- G ration. The resolution was considered after all the officers of the Corporation, except one, left the meeting. The minutes of the meeting did not record any discussion. But the minutes do show that Mr. Punja of the I.D.B.I. was present in his capacity as a Director of the Life Insurance Corporation. It was thereafter that the Life Insurance Corporation served a requisition on H Escorts Limited to call an extraordinary general meeting of the company.

What does the sequence of events go to show? It shows that the financial institutions which held 52% of the shares of the company and, therefore, had a very big stake in its working and future were aggrieved that the management did not even choose to consult them or inform them that a writ petition was proposed to be filed which would launch and involve the company in difficult and expensive litigation against the Government and Reserve Bank of India. The financial institutions must have been struck by the duplicity of Mr. Nanda who was holding discussions with them while he was simultaneously launching the company of which they were the majority shareholders into a possibly trouble some litigation without even informing them. The financial institutions were instrumentalities of the State and so was the Reserve Bank and it must have been thought unwise to launch into such a litigation. The institutions were, therefore, anxious to withdraw the writ petition and discuss the matter further. As the Management was not agreeable to this course, the Life Insurance Corporation thought that it had no option but to seek a removal of the non-Executive Directors so as to enable the new Board to consider the question whether to reverse the decision to pursue the litigation. Evidently the financial institutions wanted to avoid a confrontation with the Government and the Reserve Bank and adopt a more conciliatory approach. At the same time, the resolution of the Life Insurance Corporation did not seek removal of the Executive Directors, obviously because they did not intend to disturb the management of the company. It is, therefore, difficult to accuse the Life Insurance Corporation of India of having acted mala fide in seeking to remove the nine non-Executive Directors and to replace them by representatives of the financial institutions. No aspersion was cast against the Directors proposed to be removed. It was the only way by which the policy which had been adopted by the Board in launching into a litigation could be reconsidered and reversed, if necessary. It was a wholly democratic process. A minority of shareholders in the saddle of power could not be allowed to pursue a policy of venturing into a litigation to which the majority of the share-holders were opposed. That is not how corporate democracy may function.

A Company is, in some respects, an institution like a State functioning under its 'basis Constitution' consisting of the Companies Act and the Memorandum of Association. Carrying the analogy of constitutional law a little further, Gower describes "the members in general meeting" and the directorate as the two primary organs of a company and compares them with the legis-

lative and the executive organs of a Parliamentary democracy where legislative sovereignty rests with Parliament, while administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Government. Like the Government, the Directors will be answerable to the 'Parliament' constituted by the general meeting. But in practice (again like the Government), they will exercise as much control over the Parliament as that exercises over them. Although it would be constitutionally possible for the company in general meeting to exercise all the powers of the company, it clearly would not be practicable (except in the case of one or two - man - companies) for day-to-day administration to be undertaken by such a cumbersome piece of machinery. So the modern practice is to confer on the Directors the right to exercise all the company's powers except such as general law expressly provides must be exercised in general meeting. Gower's Principles of Modern Company Law. Of course, powers which are strictly legislative are not affected by the conferment of powers on the Directors as section 31 of the Companies Act provides that an alteration of an article would require a special resolution of the company in general meeting. But a perusal of the provisions of the Companies Act itself makes it clear that in many ways the position of the directorate vis-a-vis the company is more powerful than that of the Government vis-a-vis the Parliament. The strict theory of Parliamentary sovereignty would not apply by analogy to a company since under the Companies Act, there are many powers exerciseable by the Directors with which the members in general meeting cannot interfere. The most they can do is to dismiss the Directorate and appoint others in their place, or alter the articles so as to restrict the powers of the Directors for the future. Gower himself recognises that the analogy of the legislature and the executive in relation to the members in general meeting and the Directors of a Company is an over-simplification and states "to some extent a more exact analogy would be the division of powers between the Federal and the State Legislature under a Federal Constitution." As already noticed, the only effective way the members in general meeting can exercise their control over the Directorate in a democratic manner is to alter the articles so as to restrict the powers of the Directors for the future or to dismiss the Directorate and appoint others in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, Directors of their choice and the power to regulate them by a resolution for their removal. And, an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another.

In **Shaw & Sons (Salford) Ltd. v. Shaw** 1935 2 K.B. 113, Greer, L.J. expressed : A

> "The only way in which the general body of the shareholders can control the exercise of powers vested by the articles in the Directors is by altering the articles or, if opportunity arises under the articles, by refusing to re-elect the Directors on whose action they disapproved." B

In **Isle of Wight Railway Company v. Tahourdin** (1883) 25 Chancery Division 320, Cotton L.J. said :

> "Then there is a second object, "To remove (if deemed necessary or expedient) any of the present directors, and to elect directors to fill any vacancy in the board." The learned Judge below thought that too indefinite, but in my opinion a notice to remove "any of the present directors" would justify a resolution for removing all who are directors at the present time; "any" would involve "all". I think that a notice in that form is quite sufficient for all practical purpose." C D

Fry, L.J. said, E

> "The second objection was, that a requisition to call a meeting "to remove (if deemed necessary or expedient) any of the present directors" is too vague. I think that it is not. It appears to me that there is a reasonably sufficient particularity in that statement. It is said that each director does not know whether he is attacked or not. The answer is, all the directors know that they are laid open to attack. I think that any other form of requisition would have been embarrassing, because it is obvious that the meeting might think fit to remove a director or allow him to remain, according to his behaviour and demeanour at the meeting with regard to the proposals made at it." F G

In the same case considering the question whether an injunction should be granted to restrain the holding of general meeting, one of the purposes of the meeting being the appointment of a committee to reorganise the management of the company, Cotton L.J. Said : H

> "It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere if the majority of them think that the course taken by the Director, in a matter intra vires of the Directors, is not for the benefit of the company."

In **Inderwick v. Snell,** 42 English Reports 83, the deed of settlement of a company provided for the removal of any director "for negligence, misconduct in office or any other reasonable cause". Some directors were removed and others were appointed. The directors who were removed sued for the injunction to prevent the new directors from acting on the ground that there was no reasonable cause for their removal. The Court negatived the claim for judicial review of the reasons for removal and made the following interesting observations:-

> "The argument for the Plaintiffs rested on the allegation that the general cause of removal referred to in the clause being expressed to be 'reasonable' prevents the power referred to from being a power to remove at pleasure arbitrarily or capriciously, and made it requisite that the proceeding for exercising the power should be in its nature judicial, and that the reasonable cause should be such as a Court of Justice would consider good and sufficient. If this argument could be sustained, all proceedings at such meetings would be subject to the review of the Courts of Justice, which would have to inquire whether the cause of removal which was charged was in their reasonable, whether the charges were bona fide brought forward, whether they were substantiated by such evidence as the nature of the case required, and whether the conclusion was come to upon a due consideration of the charge and evidence. But the deed is silent as to these matters, and the question is whether any such power of control in the Courts of Justice is to be inferred from the words "reasonable cause" contained in the 27th clause; whether the expression "reasonable clause" contained in such a deed of a trading partnership can be held to be such a cause, as upon investigation in a Court of Justice must be held to be bona fide founded on sufficient evidence and just; or whether it ought not to be held to mean such cause as in the opinion of the

share-holders duly assembled shall be deemed reasonable. We think the latter is the true construction and effect of the deed. A

In a moral point of view, no doubt every charge of a cause of removal ought to be made bona fide substantiated by sufficient evidence, and determined on a due consideration of the charge and evidence; and those who act on other principles may be guilty of a moral offence; they may be very unjust, and those who (being misled by the statements made to them, have no doubt a just right to complain that they have been led to concur in an unjust act. But the question is, whether by this deed the sharesholders duly assembled at a general meeting might not, or had not a right to, remove a director for a cause which they thought reasonable, without its being incumbent upon them to prove to this or any other Court of justice that the charge was true and the decision just, or that the case was substantiated after a due consideration of the evidence and charge. We cannot take upon ourselves to say that in the case of a trading partnership like this, this Court has upon such a clause in the deed of partnership jurisdiction or authority to determine whether, by the unfounded speech of any supporter of the charge, the shareholders present may not have been misled or unduly influenced. B C D E

All such meetings are liable to be misled by false or erroneous statements, and the amount of error or injustice thereby occasioned can rarely, if ever, be appreciated. This Court might inquire whether the meeting was regularly held, and in cases of fraud clearly proved, might perhaps interfere with the acts done; but supposing the meeting to be regularly convened and held the shareholders assembled at such meeting may exercise the powers given them by the deed. The effect of speeches and representations cannot be estimated, and for those who think themselves aggrieved by such representations, or think the conclusion unreasonable, it would seem that the only remedy is present defence by stating the truth and demanding time for investigation and proof, or the calling of another meeting, at which the whole matter may be re-considered. The Plaintiff, objecting to this F G H

A meeting and considering it illegal, protested against it, but abstained from attending and, therefore, made no answer or defence to, and required no proof of, the charges made against them. The adoption of this course was unfortunate, but does not afford any grounds for the interference of this Court."

B Again in **Bentley-Stevens v. Jones,** 1971 (2) All E.R. 653, it was held that a share holder had a statutory right to move a resolution to remove a Director and that the court was not entitled to grant an injunction restraining him from calling a meeting to consider such a resolution. A proper remedy of the Director was to apply for a winding-up order on the ground that it was 'just and equitable' for the court to make such an order. C The case of **Ebrahimi v. Westbourne Galleries Ltd.,** 1972 (2) All E.R. 492, was explained as a case where a winding-up of order was sought. In the case of **Ebrahimi v. Westbourne Galleries Ltd.** (supra), the absolute right of the general meeting to remove the directors was recognised and it was pointed out that it would be open to the Director sought to be removed to ask the Company Court for an order for winding-up on the ground that it would be D 'just and equitable' to do so. The House of Lords said,

"My Lords, this is an expulsion case, and I must briefly justify the application in such case of the just and equitable clause.....
E The law of companies recognises the right, in many way, to remove a director from the board. Section 184 of the Companies Act 1948 confers this right on the company in general meeting whatever the articles may say. Some articles may prescribed other methods, for example, a governing director may have the power to remove (cf Re Wondoflex Textiles Pvt. Ltd.). And quite F apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director- member may find himself no longer a director, through removal, or non-re- G election: this situation he must normally accept, unless he undertakes the burden of providing fraud or mala fides. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, H that as long as the business continues he shall be entitled to management participation, an obligation so

basic that if broken, the conclusion must be that the association must be dissolved". A

Thus, we see that every shareholder of a company has the right, subject to statutorily prescribed procedural and numerical requirements, to call an extraordinary general meeting in accordance with the provisions of the Companies Act. He cannot be restrained from calling a meeting and he is not bound to disclose B the reasons for the resolutions proposed to be moved at the meeting. Nor are the reasons for the resolutions subject to judicial review. It is true that under s. 173(2) of the Companies Act, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each item of business to be transacted at the meeting including, in C particular, the nature of the concern or the interest, if any, therein, of every director, the managing agent if any, the secretaries and treasurers, if any, and the manager, if any. This is a duty cast on the management to disclose, in an explanatory note, all material facts relating to the resolution coming up before the general meeting to enable the shareholders to form a D judgment on the business before them. It does not require the shareholders calling a meeting to disclose the reasons for the resolutions which they propose to move at the meeting. The Life Insurance Corporation of India, as a shareholder of Escorts Limited, has the same right as every shareholder to call an extraordinary general meeting of the company for the purpose of E moving a resolution to remove some Directors and appoint others in their place. The Life Insurance Corporation of India cannot be restrained from doing so nor is it bound to disclose its reasons for moving the resolutions.

It was, however, urged by the learned counsel for the company that the Life Insurance Corporation was an instrumentality of the State and was, therefore, debarred by Art. 14 from F acting arbitrarily. It was, therefore, under an obligation to state to the court its reasons for the resolution once a rule nisi was issued to it. If it failed to disclose its reasons to the court, the court would presume that it had no valid reasons to give and its action was, therefore, arbitrary. The learned G counsel relied on the decisions of this court in Sukhdev Singh, Maneka Gandhi, International Airport Authority and Ajay Hasia. The learned Attorney General, on the other hand, contended that actions of the State or an instrumentality of the State which do not properly belong to the field of public law but belong to the field of private law are not liable to be subjected to judicial review. He relied on **O'Reilly v. Mackman** [1982] 3 All E.R. 1124, H

A **Davy v. Spelthonne** [1983] 3 All E.R. 278, **I Congress del Partido** 1981 2 All E.R. 1064, **R. v. East Berkshire Health Authority** [1984]3 All E.R. 425, and **Radha Krishna Aggarwal and Ors. v. State of Bihar** [1977] 3 S.C.R. 249. While we do find considerable force in the contention of the learned Attorney General it may not be necessary for us to enter into any lengthy discussion of
B the topic, as we shall presently see. We also desire to warn ourselves against readily referring to English cases on questions of Constitutional law, Administrative Law and Public Law as the law in India in these branches has forged ahead of the law in England, guided as we are by our Constitution and uninhibited as we are by the technical rules which have hampered the development of the English law. While we do not for a moment doubt that every
C action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Art. 226 or Art. 32 of the Constitution, we do not construe Art.14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions.

D

For example, if the action of the State is political or sovereign in character, the court will keep away from it. The court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of
E the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the
F private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circum-
G stances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks
H to change the management, by a resolution of the Company like any other shareholder.

In the instant case the reason for the resolution stares one in the face. The financial institutions who held the majority of the stock were not only not told by the management about the filing of the Writ Petition in the High Court but were deliberately kept in the dark about it. The matter was not even discussed at a meeting of the directors before the Writ Petition was filed. It was filed in a furtive manner even as Mr. Nanda was purporting to hold discussions with Mr. Punja and others. And that was not all. Mr. Nanda was also unduly exerting himself in certain matters to the detriment of the majority shareholders. We will immediately refer to those matters.

One of the circumstances relied upon to establish the mala fides of the Life Insurance Corporation of India, a consideration of which leads us to the conclusion that the boot was on the other leg, was the attitude taken by the Life Insurance Corporation of India in regard to (i) the issue of Equity-Linked-Debentures; (ii) Repayment of loans to Indian Financial Institutions; and (iii) the proposal for the merger of Goetze with Escorts. It was argued that the facts clearly disclosed an attempt on the part of the Life Insurance Corporation of India to exert pressure on Escorts Limited. It is impossible to agree with the submission.

In regard to the proposal for the issue of Equity-Linked-Debentures, the facts are as follows : Escorts obtained the approval of the Government under the M.R.T.P. Act to establish a new undertaking to manufacture motor cycles/scooters. According to Escorts, the proposal for the issue of Equity-linked-Debentures was conceived to meet the cost of the new project. According to the Life Insurance Corporation, the issue was solely motivated by an anxiety to reduce the percentage of the holdings of the Life Insurance Corporation and other financial institutions in the equity capital of the company. The barest scrutiny of the proposal as it finally emerged from Escorts Limited is sufficient to expose the game of Escorts Limited. The proposal, as it finally emerged from Escorts Limited, was to issue debentures 17,50,000 Secured Redeemable Debentures of Rs.100 each and equity shares of the value of Rs.17.50 crores divided into 87,50,000 equity shares of Rs.10 each for cash at a premium of Rs.10 per share. It was proposed that 20 per cent of the new issue would be offered on preferential basis to existing resident equity share holders of Escorts Limited and Goetze Limited (in accordance with amalgamation proposal) **subject to maximum allotment of 100 debentures and 500 equity shares** to any single shareholder. The Promotors, Directors and their friends and relatives, business associates and employees were to be

offered 15 per cent of the new issue on a preferential basis, but in their case there was to be no ceiling on the number of shares which might be allotted to any one of them. 30 per cent of the new issue was to be offered to the public. Having regard to the ceiling of 500 shares proposed to be imposed in the case of allotment to existing equity shareholders, the Life Insurance Corporation, notwithstanding the fact that it owned 30 per cent of the shares of Escorts Limited would be entitled to a meagre 500 shares in the new issue. The result would be that its holding would be reduced from 30 per cent to 18.14 per cent. The holding of all the financial institutions would be reduced from 51.62 to 31.21 per cent. Not merely would it result in the reduction of the percentage of the holding of the financial institutions in the capital stock of the company, but it would also result in great financial loss to the institutions in the following manner: if the existing shareholders were to be given preferential allotment in the new issue on the basis of their existing holdings, without any ceiling, the Life Insurance Corporation and other financial institutions would be entitled not to the meagre 500 shares each, but to some tons of thousands of shares in the new issue. Taking the market value of the shares into account at Rs.50 per share, the loss to the financial institutions would be in the neighbourhood of about Rs. 10 crores. We do not think that any financial institution with the slightest business acumen could possibly accept the proposal as it finally emerged from Escorts Limited. No man of ordinary prudence would have accepted the proposal. To expect the financial institutions to agree to the proposal, we must say, was sheer audacity on the part of these that made the proposal. That was evidently the reason why at all the initial stages, the details of the proposal were never put to the financial institutions or before the Board of Directors. It was urged by Shri Nariman that Mr. Davar, who represented the financial institutions in the Board of Directors also voted in favour of the proposal at earlier stages, and, therefore, it must be inferred that the later change of attitude on the part of the financial institutions was not bonafide. We are afraid we cannot agree with Mr. Nariman. The resolution of the Board of Directors merely accepted in principle the issue of convertible debentures to raise finances required by the company, subject to the approval of financial institutions. At that stage no details of the proposal were placed before the Board and even then there was the reservation that it was subject to the approval of the financial institutions. We think that it was too much for Mr. Nanda and his associates to expect the financial institutions or for that matter any other shareholder having large holdings in the company to agree to the proposal as it finally emerged. We reach the limit when we hear the complaint of

Mr. Nanda and his associates that the refusal of the financial institutions to accept their proposal was mala fide. It is a clear case of an attempt on the part of Mr. Nanda and his associates to over reach themselves. We do not think it is necessary for us to go into any further details in regard to the Equity-Linked-Debenture issue.

The proposal to merge Goetze with Escorts Limited was also agreed to in principle in the first instance. However, the share exchange ratio had apparently not been agreed to by the financial institutions even at that time. This is evident from the letter dated 30.12.1983 of Mr. Nanda to Mr. Nadharna ICICI in which he stated :

> "The proposals together with the report of the Chartered Accountants and the Resolution of the Board of Directors are with ICICI and IFCI and we understand that the matter has been discussed in the Inter-Institutional meeting of the Financial Institutions. We have been eagerly waiting and have made several requests to all the financial institutions to expedite their approval so that the other processes of the merger including the permission of the High Court followed by the Extraordinary Shareholders meeting of both the Companies may proceed. Yesterday's meeting with the Chairman and Senior Executive of the Financial Institutions, I was informed, for the first time, that the financial Institutions were still examining our request for approval they were primarily concerned about the 53% holding of all the investing financial institutions (LIC, GIC, UTI) post merger coming down close to 49 per cent."

It is seen from the letter that Mr. Nanda was not proceeding on the basis that the financial institutions had already agreed to the proposal for merger, but was in fact awaiting their approval. When he learnt the reason for the hesitation of the financial institution to agree to the proposal, he wrote a letter on 30.12.1983 explaining his views and requesting the financial institutions to expedite the approval of the proposal. It is, therefore, futile for Mr. Nanda to centend that the proposal for merger of Goetze with Escorts Limited was a lever which the Financial Institutions were using to exert pressure on him to agree to register the transfer of shares in favour of the Caparo Group of Companies. It is difficult to understand why anyone holding a majority of the equity capital of a company should allow himself to be hustled into becoming a minority shareholder.

A The proposal for pre-payment of institutional loans, though finally agreed to by the institutions, was not quite as straight as claimed by Escorts. In the first place, Escorts asked for pre-payment of loans by Indian financial institutions, but not the foreign currency loan. In the second place, the cost of pre-payment of institutional loans was to be met by part of the B debenture issue which would entail payment of interest at the rate of 14 per cent whereas the institutional loans carried interest at the rate of 10 per cent only. It certainly could not be said to be in the interests of the company to pay interest at a higher rate than that payable to Indian financial institutions. Obviously the object of pre-payment was to get rid of the directors who the financial institutions had a right to nominate. C True Escorts offered to appoint Mr. Davar as a Director even if the financial institutions had no right to nominate him. But it is one thing to have the right to nominate a director and quite another thing to the director on sufferance.

We do not think that it is necessary to discuss these proposals at greater length than we have done. The correspondence D which passed between the parties and which has been read to us shows that Mr. Nanda was certainly trying to hustle the financial institutions into accepting the proposals.

We have discussed the submissions made to us in broad perspective. We have not referred to the myriad minutiae which E were presented to us, as we consider it unnecessary to do so and we do not wish to further lengthen an already long judgment. This does not mean that we have not taken into account all the little submissions and trifling details which were brought to our notice.

F We may now state our conclusions as follows :

1. The permission of the Reserve Bank contemplated by the FERA could be ex-post-facto and conditional.

2. The press release (Ex.A) dated 17.9.83, the circular G (Ex.B) dated 19.9.83 and the letter (Ex.C) dated 19.9.83 are all valid.

3. Under the scheme, any foreign company whose shares were owned to the extent of more than 60 per cent by persons of Indian nationality or origin could avail the facility given by the H scheme irrespective of the fact whether the same group of shareholders figured in the different companies.

4. Where any of the purchases were made subsequent to 2.5.83, they were subject to the 5 per cent ceiling in the aggregate.

5. The Reserve Bank of India was not guilty of any mala fides in granting permission to the Caparo Group of Companies. Nor was it guilty of non-application of mind.

6. No mala fides could be attributed to the Union of India either.

7. There was a total and signal failure on the part of the Punjab National bank in the discharge of their duties as authorised dealers under the FERA and the scheme with the result that there was no monitoring of the purchases of shares made on behalf of the Caparo Group of Companies.

8. The allegation of mala fides against the Life Insurance Corporation of India was baseless.

9. The notice requisitioning a meeting of the Company the Life Insurance Corporation of India was not liable to be questioned of any of the grounds on which it was sought to be questioned in the writ petition.

On our finding that there was no monitoring whatsoever of the purchase of shares made on behalf of the Caparo Group of Companies by the Punjab National Bank and on our further finding that though the Reserve Bank of India was not actuated by malice and was not guilty of non-application of mind, the reliance placed by the Reserve Bank of India on the Punjab National Bank was misplaced in the event, the Punjab National Bank having totally abandoned its duties as authorised dealer, it follows that the permission granted by the Reserve Bank must be reconsidered by the Reserve Bank in the light of the failure of the Punjab National Bank to discharge its duties. Therefore, while allowing the appeals of the Union of India, the Reserve Bank of India and the Life Insurance Corporation of India and dismissing the appeal of Escorts Limited and setting aside the judgment of the High Court, we direct the Reserve Bank of India to make a full and detailed enquiry into the purchase of shares of Escorts Limited by the Caparo Group of Companies and consider afresh the question whether permission ought or ought not to have been granted. If the Reserve Bank of India is satisfied that permission ought not to have been granted, it may cancel the permission already granted and take such further action as may be necessary under the FERA if it considers that there has been any infraction

of the FERA or the scheme: if the Reserve Bank of India is of the view that the permission may be granted subject to restrictions, it may impose such restrictions and conditions as it may think fit, in addition to the condition that either the capital or the profits or both cannot be repatriated. We further direct Respondents 3 to 17, 20 and 21 (in the Writ Petition), that is the Punjab National Bank, the thirteen Caparo Group of Companies, Mr. Swraj Paul, M/s Raja Ram Bhasin and Co. and M/s Bharat Bhushan and Co., to make available to the Reserve Bank of India each and every document in their possession pertaining to the remittances made for the purchase of shares on behalf of thirteen Caparo Group of Companies and the purchase of shares made on their behalf. They are also directed to produce every document which the Reserve Bank of India may require them to produce. The enquiry by the Reserve Bank should be concluded within three months from today.

We also direct the Reserve Bank of India to enquire into the conduct of Punjab National Bank and take such action as may be necessary including cancellation of the authorisation granted under sec. 6 of the Foreign Exchange Regulation Act. In regard to costs, the Union of India, the Reserve Bank of India and the Life Insurance Corporation of India are certainly entitled to their costs. We do not see any reason why the company Escorts Limited should be mulcted with costs. The litigation was launched by Mr. Nanda and he should be personally made liable for the costs. We also think that the litigation has been unnecessarily complicated by the failure of Mr. Swraj Paul and Raja Ram Bhasin & Co. to cooperate by appearing before the court. We think that they should also be liable for a portion of the costs. So also the Punjab National Bank. The appeals filed by the Union of India, the Life Insurance Corporation of India and the Reserve Bank of India are allowed with costs payable as follows : Three-fifths of the taxed costs in each case will be payable by har Prasad Nanda, one-fifth by Swraj Paul and one-fifth by the Punjab National Bank. The cross appeal filed by Escorts Limited and Nanda is dismissed with the costs of the Union of India, the Reserve Bank of India and the Life Insurance Corporation of India. The Union of India, the Reserve Bank of India and the Life Insurance Corporation of India are entitled to their costs in the High Court, three-fifths payable by Nanda, one-fifth by Swraj Paul and one-fifth by Punjab National Bank. In modification of our order dt. 4.4.85 in C.M.P. No. 12832/85, we direct Shri H.P. Nanda and Rajan Nanda to continue as Managing Directors until the Board of Direcotrs takes a decision in the matter.