IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:-30-12-2004

Coram:-

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice AR. RAMALINGAM

Civil Misc., Appeal Nos. 3188 and 3223 of 2004

and C.M.P.Nos. 17656 and 17925 of 2004

C.M.A.No. 3188/2004

1. M/s. Dove Investments Private Ltd.,
   No.41, Nariman Bhavan,
   4th Floor, 227, Nariman Point,
   Mumbai - 400 021

2. M/s. Maxworth Investments Private Ltd.,
   No.112, Sterling Road,
   Nungambakkam, Chennai-600 034.

3. Mr. P.N. Mohan,
   Plot No. 490, 4th South Cross Street,
   Kapaleeshwar Nagar,
   Neelankarai, Chennai-600 041.

.. Appellants/Respondents 2,3 and 4.

Vs.

1. M/s. Gujarat Industrial Investment
   Corporation Ltd., Udyog Bhavan,
   6th Floor, Block No.11 and 12,
   Sector No.11, Gandhi Nagar- 382 011.

2. M/s. Sterling Holiday Resorts (India) Ltd.,
   Regd.Off.at No. 406, T.T.K.Road,
   Alwarpet, Chennai-600 018.
   ..1st Respondent.

.. Respondents/Petitioner & Ist Respt

C.M.A.No. 3223/2004

M/s. Sterling Holiday Resorts (India) Ltd.,
Regd.Off.at No. 406, T.T.K.Road,
Alwarpet, Chennai-600 018.
..Appellant/1st Respondent.

Vs.

1. M/s. Gujarat Industrial Investment
Corporation Ltd., Udyog Bhavan,
6th Floor, Block No.11 and 12,
Sector No.11, Gandhi Nagar- 382 011.
.. Petitioner.

2. M/s. Dove Investments Private Ltd.,
No.41, Nariman Bhavan,
4th Floor, 227, Nariman Point,
Mumbai – 400 021
.. 2nd Respondent.

3. M/s. Maxworth Investments Private Ltd.,
No.112, Sterling Road,
Nungambakkam, Chennai-600 034.
.. 3rd Respondent.

4. Mr. P.N. Mohan,
Plot no.490, 4th South Cross Street,
Kapaleeshwar Nagar,
Neelangarai, Chennai-600 041.
..4th Respondent.

.. Respondents/Petitioner RR 2 to 4

Civil Misc., Appeals are filed under Section 10F of the Companies Act, 1956, against Order dated 23-08-2004 in C.P. 13/111A/SRB/2003 passed by Company Law Board, Southern Region Bench, Chennai.

Mr. Alagiriswamy, Senior Counsel for Mr.S. Murugan:- For Appellants in CMA No.3188/2004 and for Respondents 2 to 4 in CMA 3223/04

Mr. P.H. Aravindh Pandian: For Appellant in C.M.A.No. 3223/2004 and for 2nd respondent in CMA 3188/04

Mr. Arvind P. Dattar, Senior counsel for Mr. Shivakumar:- For 1st Respondent in CMA Nos. 3188/2004 and 3223/2004.

COMMON JUDGEMENT

(Judgment of the Court was delivered by P. Sathasivam, J.,)

By consent of all the parties, the Appeals themselves have taken up for disposal. M/s. Dove Investments Private Limited, Mumbai-21; M/s. Maxworth Investments Private Limited, Chennai-34; and Mr. P.N. Mohan, partner of M/s. Sandhya Priya Investments, Chennai-41-respondents 2 to 4 in Company Petition N.13/111A/S.R.B of 2003 on the file of Company Law Board, Southern Region Bench, Chennai, aggrieved by the order dated 23-08-2004, directing M/s. Sterling Holiday Resorts-first respondent therein to register transfer of 22,93,000 shares in the name of the M/s. Gujarath Industrial Investment Corporation Ltd., petitioner therein within 30 days of receipt of the said order, have preferred C.M.A.No. 3188 of 2004 under Section 10F of the Companies Act, 1956. Questioning the very same order, M/s. Sterling Holiday Resorts, first respondent therein filed C.M.A.No. 3223/2004. Since both the appeals arise against the very same order of the Company Law Board, the same are being disposed of by the following common order:

Brief facts:

For convenience, we shall refer the parties as arrayed before the Company Law Board. M/s. Gujarat Industrial Investment Corporation Limited/petitioner is a Government of Gujarat Undertaking, filed Company Petition No. 13/111A/SRB of 2003 under Section 11A of the Companies Act, 1956 (hereinafter referred to as "the Act") against M/s. Sterling Holiday Resorts (India) Limited ("Company" in short) and three others, namely, M/s. Dove Investments Private Limited, M/s. Maxworth Investments Private Ltd., and P.N. Mohan before the Company Law Board, Southern Region Bench, Chennai to register the transfer of 22,93,000 shares of the company pledged by respondents 2 to 4 in favour of the petitioner. It is seen that the Gujarat Industrial Investments Corporation Ltd., a wholly owned Government of Gujarat financial institution advanced a loan of Rs.5 Crores in 1996 to the company for conduct of its business, for which the company offered the shares held in the name of respondents 2 to 4 being the Company's promoters and associates, by pledging the shares (A-2 to A-9). Since the Company committed default in repayment of the loan amount, the petitioner lodged with the Company, the original certificates of the pledged shares together with duly stamped and executed instruments of transfer for effecting registration of the transfer thereof in their name. It is the grievance of the petitioner that though the Company had registered the transfer of 2,99,800 shares pledged by respondents 2 and 3, failed to effect the registration of the transfer in respect of the remaining 22,93,000 shares. It is also the claim of the petitioner that in spite of repeated demands and lawyer's notice dated 29-7-2003, calling upon the company to

transfer the balance 22,93,000 shares in the name of the petitioner in demat form, the Company failed and refused to register the transfer of the pledged shares in favour of the petitioner. In order to circumvent the claim of the petitioner, the respondents 2 to 4 have filed Civil Suits in O.S.Nos. 3740, 3741 and 3742 of 2000 on the file of City Civil Court, Chennai for permanent injunction restraining the Company from effecting the transfer of the pledged shares in favour of the petitioner. The impugned shares are freely transferable and the conduct of the respondents in not effecting registration of the transfer of the pledged shares is with an oblique motive and without sufficient cause and, therefore, the petitioner being a pledgee is entitled for registration of shares in its favour on default committed by the Company.

2. The respondents 2 to 4 filed a common counter affidavit wherein it is stated that the petitioner failed to comply with the provisions of Sub-section (1C), according to which the instruments of transfer ought to have been stamped or endorsed by the petitioner and thereafter delivered them to the Company together with the share certificates for registration of the transfer within two months from the date so stamped or endorsed. The requirements of sub-section (1C)(B)(iv)(1)(c)(2), being mandatory have not been duly satisfied and therefore the Company is not under an obligation to effect the transfer of shares in the name of the petitioner. The Company cannot be compelled to register the transfer of shares until a proper instrument of transfer duly stamped and executed has been delivered to the Company. By virtue of the deed of pledge executed by the respondents 2 to 4, the petitioner could dispose of the pledged shares either by public auction or private contract and appropriate the sale proceeds towards the dues of the Company. Therefore, the petitioner does not have the right to get the shares transferred in its name without a corresponding reduction in loan obligations.

3. The petitioner filed a Rejoinder stating that the plea of non compliance with the requirements of section 108 (1C) has neither been raised before the Civil Court nor in the present proceedings. The Company has already given effect to the transfer of 2,99,800 shares. Further, the Company by letter dated 23-07-2001 admitted that it is in the process of transferring and converting the balance of 22,93,000 shares into marketable lots. Their only grievance in the Civil Suit is that the petitioner is attempting to transfer the pledged shares in its favour at a value far below the market value. The Company has, therefore, waived its rights to enforce the requirements of sub-section (1C) of Section 108. The requirements of section 108 (1C) are only directory and not mandatory. The petitioner has every right to effect the transfer of the impugned shares in its favour, in view of the default committed by the Company. As against the loan amount of Rs.5 Crores availed in 1996, the present outstanding amount as on

August, 2003 payable by the Company comes to Rs.38,84,50,793/-. The Company is neither settling the dues nor giving effect to the transfer of the pledged shares in the name of the petitioner in terms of the loan agreement, thereby jeopardising the public interest, on account of the huge public money blocked in the subject transaction. Therefore, no sympathy should be shown to a chronic defaulter and the requirements of sub-section (1C) being only directory. The Company Law Board in exercise of Powers vested in section 111A may direct the company to effect registration of the transfer of the remaining pledged shares in the name of the petitioner.

4. In the light of the stand taken by all the parties and after considering the relevant provisions as well as judicial decisions thereon, the Company Law Board by the order under challenge after holding that compliance of Section (1C) is directory in nature and not mandatory and taking note of the conduct of the company having waived all the requirements of sub-section (1C), directed the Company to register the transfer of 22,93,000 shares in the name of the petitioner within 30 days of the receipt of the said order. Questioning the same, the Company as well as the investors have preferred the above appeals.

5. Heard Mr.Alagiriswamy, learned senior counsel for the appellants in C.M.A.No. 3188/2004, Mr. P.H. Aravindh Pandian, learned counsel for the appellant in C.M.A.No. 3223/2004 and Mr. Arvind P. Datar, learned senior counsel for the first respondent/Gujarat Industrial Investment Corporation Limited.

6. After taking us through the Company Petition, counter, rejoinder, the details regarding Civil Suits, impugned order of the Company Law Board and relevant provisions of the Companies Act, Mr.Alagiriswamy, learned senior counsel for the investors, and Mr. P.H. Aravindh Pandian, learned counsel for the Company, have raised the following contentions:

i) Whether the Company Law Board was correct in holding that the provisions of Section 108, except sub-section (1) of the Companies Act, 1956 are only directory and not mandatory in nature?

ii) Whether the Company Law Board was right in arriving a conclusion that the share transfer has to be registered by the appellant in spite of the fact that certain provisions of law has not been duly complied with by M/s Gujarat Industrial Investment Corporation Limited/petitioner before the Company Law Board.

7. On the other hand, Mr. P. Arvind Datar, learned senior counsel appearing for the Gujarat Industrial Investment Corporation / petitioner, would submit that Section 108 (1C) of the Act is directory and not mandatory. Even otherwise, according to

him, in view of the conduct of the company and also of the fact that transfers would complete only if procedural formalities were complied with, the conclusion and ultimate direction of the Company Law Board cannot be faulted with.

8. We have carefully considered the claim of both parties with reference to the materials placed and the statutory provisions applicable to them.

9. Before considering the rival contentions, it would be useful to refer the relevant provisions of the Companies Act, 1956 applicable to the case on hand:

> "Transfer not to be registered except on production of instrument of transfer.
>
> Section 108. (1) A company shall not register a transfer of shares in, or debentures of, the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures:
>
> Provided that where, on an application in writing made to the company by the transferee and bearing the stamp required for an instrument of transfer, it is proved to the satisfaction of the Board of directors that the instrument of transfer signed by or on behalf of the transferor and by or on behalf of the transferee has been lost, the company may register the transfer on such terms as to indemnity as the Board may think fit:
>
> Provided further that nothing in this section shall prejudice any power of the company to register as shareholder or debenture-holder many person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law.
>
> "Section 108 (1A) Every instrument of transfer of shares shall be in such form as may be prescribed, and-
>
> (a) every such form shall, before it is signed by or on behalf of the transferor and before any

entry is made therein, be presented to the prescribed authority, being a person already in the service of the Government, who shall stamp or otherwise endorse thereon the date on which it is so presented, and

(b) every instrument of transfer in the prescribed form "with the date of such presentation stamped or otherwise endorsed thereon shall, after it is executed by or on behalf of the transferor and the transferee and completed in all other respects, be delivered to the company,-

(i) in the case of shares dealt in or quoted on a recognised stock exchange, at any time before the date on which the register of members is closed, in accordance with law, for the first time after the date of the presentation of the prescribed form to the prescribed authority under clause (a) or within twelve months from the date of such presentation, whichever is later;

(ii) in any other case, within two months from the date of such presentation.

(1B) xx xx

(1C) Nothing contained in sub-sections (1A) and (1B) shall apply to-

(A) any share-

(i) which is held by a company in any other body corporate in the name of a director or nominee in pursuance of sub-section (2), or as the case may be, sub-section (3), of section 49, or

(ii) which is held by a corporation, owned or controlled by the Central Government or a State Government,in any other body corporate in the name of a director or nominee, or

(iii) in respect of which a declaration has been made to the Public Trustee under section 153B,

if-

(1) the company or corporation, as `the case may be, stamps or otherwise endorses, on the form of transfer in respect of such share, the date on which it decides that such share shall not be held in the name of the said director or nominee or, as the case may be, in the case of any share in respect of which

any such declaration has been made to the Public Trustee, the Public Trustee stamps or otherwise endorses, on the form of transfer in respect of such share under his seal, the date on which the form is presented to him, and

(2) the instrument of transfer in such form, duly completed in all respects, is delivered to the-

(a) body corporate in whose share such company or corporation has made investment in the name of its director or nominee, or

(b) company in which such share is held in trust, within two months of the date so stamped or otherwise endorsed; or

(B) any share deposited by any person with-

(i) the State Bank of India, or

(ii) any scheduled bank, or

(iii) any banking company (other than a scheduled bank) or financial institution approved by the Central Government by notification in the Official Gazette (and any such approval may be accorded so as to be retrospective to any date not earlier than the 1st day of April, 1966), or

(iv) the Central Government or a State Government or any corporation owned or controlled by the Central Government or a State Government,

by way of security for the repayment of any loan or advance to, or for the performance of any obligation undertaken by, such person, if-

(1) the bank, institution, Government or corporation, as the case may be, stamps or otherwise endorses on the form of transfer of such share-

(a) the date on which such share is returned by it to the depositor, or

(b) in the case of failure on the part of the depositor to repay the loan or advance or to perform the obligation, the date on which such share is released for sale by such bank, institution, Government or corporation, as the case may be, or

(c) where the bank, institution, Government or corporation, as the case may be, intends to get such share registered in its own name, the date on which the instrument of transfer relating to such share is executed by it; and

2) the instrument of transfer in such form,

duly completed in all respects, is delivered to the company within two months from the date so stamped or endorsed.

Explanation: xx xx
(1D) xx xx "

Among the above mentioned provisions, we have to see whether the entire Section 108 including (1C) is mandatory or 108 (1) alone is mandatory. We have already referred to the fact that the petitioner before the Company Law Board is the Government of Gujarat Undertaking registered under the Companies Act and that the provisions of State Financial Corporations Act, 1951 are made applicable to it. It is not in dispute that the Company, namely, Sterling Holiday Resorts (India) Limited had availed a loan of Rs.4.5 Crores during the year 1996 and as per the security for the same, the investors had pledged their respective shares in the petitioner Corporation to the extent of 25,92,800 in favour of Gujarat Industrial Investment Corporation Limited. Since the Company had failed to repay the loan, the petitioner had exercised its powers under the pledged Agreement and Power of Attorney duly executed by the respondents and requested them to transfer those shares in its name. Since there is no response from the Company even after repeated registered notices and reminders, the petitioner had filed a petition under Section 111A of the Companies Act before the Company Law Board. It is the claim of the Company that the provisions contained in Section 108 (1C) of the Act are mandatory, and without strict compliance of which, the petitioner cannot seek for the relief of the registration of the remaining 22,93,000 shares in favour of the petitioner though it had effected transfer of 2,99,800 shares. On the other hand, it is the claim of the petitioner that the provisions of Sub-Section (1C) of Section 108 of the Act are only directory and not mandatory, and that more over the requirement of which is waived by the Company by way of effecting the transfer of 2,99,800 shares out of 25,92,800 pledged shares in the name of the petitioner. sub-section (1) of Section 108 provides that a Company shall not register a transfer of shares in the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee has been delivered to the company. Sub-section (1) provides that a company shall not register a transfer of shares in the company, unless a proper instrument of transfer duly stamped or executed by or on behalf of the transferor and by on behalf of the transferee has been delivered to the company. Though several decisions have been cited on either side, the decision of the Apex Court in Mannalal Khetan v. Kedar Nath Khetan, reported in (1977) 47 Company Cases 185 is relevant wherein the Supreme Court held that the provisions contained in Section 108 (1) are mandatory. By heavily relying on the said decision, it was contended that therefore the Company cannot be compelled to register the transfer

of shares until the mandatory requirements of law are complied with. As per Section 108 (1A) (a) every instrument of transfer, before it is signed by or on behalf of transferor, and before any entry is made therein, be presented to the 'prescribed authority', who shall stamp or otherwise endorse thereon the date on which it is presented to him. After an instrument is duly dated by the prescribed authority and completed in all respects, it shall be delivered to the company for registration of the transfer, together with related certificate of shares or the letter of allotment, within the time limit specified in clause (b) of sub-section (1A). In sub-section (1A) and sub-section (1C) two months time limit has been prescribed for presentation, stamping or compliance of all other conditions. It is the categorical claim of the Company and the investors that sub-section (1C) has not been fulfilled since the instrument is not duly stamped by the prescribed authority and not presented within the time prescribed. There is no obligation on the part of the company to register the transfer of 22,93,000 shares in the name of the petitioner as directed by the Company Law Board. At the foremost, Mr. P.H. Arvindh Pandian, learned counsel appearing for the Company, by relying on a decision in Union of India v. International Trading Company, reported in 2003 AIR SCW 2828, would contend that merely because the Company had registered the transfer of 2,99,800 at the first instance, it cannot be compelled to commit a wrong action. The following statement of law made in para 14 of the said decision has been pressed into service: (para 14)

> "14.....A party cannot claim that since something wrong has been done in another case, direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Art. 14 of the Constitution of India, 1950 cannot be presented into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on par. Even if hypothetically it is accepted that wrong has been committed on some other cases by introducing a concept of negative equality respondents cannot strengthen their case. They have to establish strength of their case on some other basis and not by claiming negative equality."

On going through the factual details in that case and considering the fact that in the present case the said objection was admittedly not raised before and that a portion of the shares have been transferred and registered in the name of the petitioner without any objection, we are of the view that the principle referred above is not applicable to the case on hand.

10. Regarding compliance of sub-Section (1C) as well as fulfilment of certain conditions "within the prescribed time", Mr. P.H. Aravindh Pandian has heavily relied on the following decisions:

i) AIR 1935 Privy Council 85-MAQBUL AHMAD v. ONKAR PRATAP.

ii) AIR 1972 Mysore 50-THIPPASWAMY v. M.R.A.TRIBUNAL

iii) AIR 1953 Nagpur 81-Miss CAMA v. BANWARILAL.

iv) AIR 1961 SC 1107-M.PENTIAH v. VEERAMALLAPA.

v) AIR 1928 Privy Council 273-ARSECULERATNE v. PERERA.

vi) AIR 2003 SC 511-BHAVNAGAR UNIVERISITY v. PALITANA SUGAR MILL PVT. LTD.,

vii) AIR 1991 SC 754-ROHIT PULP AND PAPER MILLS LTD. v. COLLECTOR OF CENTRAL EXCISE,BARODA.

viii) (1995) All England Law Reports 367-WANG v. COMMISSIONER OF INLAND REVENUE.

In AIR 1935 Privy Council 85 (supra), it is stated that while interpreting Statutes, when an Act which in some limited respects gives the Court a statutory discretion, there cannot be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions.

11. The decision reported in AIR 1972 Mysore 50 (supra) speaks about time limit i.e., 30 days prescribed for filing appeal. The said decision is not helpful to the case of the company. In that case, the Appeal has to be filed within 30 days after the receipt of communication and factually it was found that the appeal has not been filed beyond 30 days. Even if there is any doubt about the matter, the Court should lean in favour of the person who is given the right of appeal.

12. In AIR 1953 Nagpur 81 (supra), a learned Single Judge of Nagpur High Court has given explanation for the expression "at any time" stipulated in Section 428 (1) of City of Nagpur Corporation Act, 1948. According to him, the words "at any time" made it clear that a voter is entitled to make an application at any time after the cause of action accrues. On going through the factual details, absolutely there is no dispute in the principles laid down in AIR 1928 Privy Council 273; AIR 1961 SC 1107; AIR 2003 SC 511; and AIR 1991 SC 754.

13. It is relevant to note the decision rendered in

(1995) All England Law Reports 367 (supra). The following statement is relevant for our consideration:

> " Having reviewed the authorities cited by the taxpayer in this appeal, not all of which are referred to in this opinion, their Lordships consider that when a question like the present one arises-an alleged failure to comply with a time provision-it is simpler and better to avoid these two words 'mandatory' and 'directory' and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision-maker of jurisdiction and render any decision which he purported to make null and void?"

14. Mr. Aravind P. Datar has also relied on the following decisions to find out whether a particular provision is mandatory or directory. The first decision relied on by him is in Administrator, Municipal Committee Charkhi Dadri and another v. Ramji Lal Bagla, reported in (1995) 5 SCC 272 wherein their Lordships have held that absence of provision for consequence in case of non-compliance with the requirements prescribed would indicate directory nature despite use of word 'shall'. They further held that one of the well-accepted tests for determining whether a provision is directory or mandatory is to see whether the enactment provides for the consequence flowing from non-compliance with the requirement prescribed. In the absence of any specific provision namely, that non-compliance therewith results in nullification of the acquisition which has to be construed that those provision is only directory in nature despite use of the word "shall" in Section 44-A of Punjab Town Improvement Act, 1922.

15. In Mohan Singh v. International Airport Authority of India [(1997) 9 SCC 132] regarding the use of words "shall" or "may". The Supreme Court held that the distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect. The distinction reflected in the use of the word 'shall' or 'may' depends on conferment of power. General rule of law is that where a general obligation is created by statute and statutory remedy is provided for violation, statutory remedy is mandatory. The scope and language of the statute and consideration of policy at times may, however, create exception showing that the legislature did not intend a remedy to be exclusive. The language is the medium of expressing the intention and the object that particular provision or the Act seeks to achieve. Therefore, it is necessary to ascertain the intention.

The word 'shall' is not always decisive. Regard must be had to the context, subject-matter and object of the statutory provision in question in determining whether the same is mandatory or directory. According to their Lordships, no universal principle of law could be laid in that behalf as to whether a particular provision or enactment shall be considered mandatory or directory and it is the duty of the court to try to get at the real intention of the legislature by carefully analysing the whole scope of the statute or section or a phrase under consideration. According to them, the question as to whether the statute is mandatory or directory depends upon the intent of the legislature and not always upon the language in which the intent is couched. The meaning and intention of the legislature would govern design and purpose the Act seeks to achieve. While considering the language used under Section 41 and Section 6 of the Land Acquisition Act, 1894 in para 26 Their Lordships have held:

> "26....The word "shall", though prima facie gives impression of being of mandatory character, it requires to be considered in the light of the intention of the legislature by carefully attending to the scope of the statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. In that behalf, the court is required to keep in view the impact on the profession, necessity of its compliance; whether the statute, if it is avoided, provides for any contingency for non-compliance; if the word "shall" is construed as having mandatory character, the mischief that would ensue by such construction; whether the public convenience would be subserved or public inconvenience or the general inconvenience that may ensue if it is held mandatory and all other relevant circumstances are required to be taken into consideration in construing whether the provision would be mandatory or directory. If an object of the enactment is defeated by holding the same directory, it should be construed as mandatory where if by holding it mandatory serious general inconvenience will be created to innocent persons of general public without much furthering the object of enactment, the same should be construed as directory but all the same, it would not mean that the language used would be ignored altogether. Effect must be given to all the provisions harmoniously to suppress public mischief and to promote public justice."

After holding so, they concluded that though compliance with publication of the 3 steps required under Section 4 (1) is mandatory while exercising the power of eminent domain under Section 4 (1), when the appropriate Government exercises the power

under sub-section (4) of Section 17 dispensing with the enquiry under Section 5-A and directs the Collector to take possession of the land before making the award as the lands are needed urgently either under sub-section (1)or (2) thereof, it is not mandatory to publish the notification under Section 4 (1) in the newspapers and giving of notice of the substance thereof in the locality; the last of the dates of publication should not be the date for the purpose exercising the power under Section 17 (4). They further held that this interpretation would subserve the public purpose and suppress mischief of non-compliance and seeks to elongate the public purpose, namely, taking immediate possession of the land needed for the public purpose, envisaged in the notification.

16. In DLF Universal Ltd., v. Appropriate Authority and another [AIR 2000 Supreme court 1985], the Supreme Court after considering the language used in Section 269-UC (3) of Income-tax Act, has held that it is only directory and not mandatory.

17. In Sashikant Singh v. Tarkeshwar Singh [(2002) 5 Supreme Court Cases 738], Their Lordships while considering the requirement under sub-section (1) of Section 319 of the Code of Criminal Procedure that the person summoned "could be tried together with the accused" is directory, whereas requirement under sub-section (4) of Section 319 regarding denovo trial of such person is mandatory, have held that whether a particular provision is mandatory or directory, the legislative intention has to be ascertained by Court having regard to the whole scope of the statute. They further held that where a statute does not consist merely of one enactment, but contains a number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to be treated as being directory only, while others are to be considered absolute and essential; that is to say, some of the provisions may be disregarded without rendering invalid the thing to be done, but others not. It was further held that the mandate of law of fresh trial is mandatory, whereas the mandate that newly added accused could be tried together with the accused is directory.

18. In P.T. Rajan v. T.P.M. Sahir [(2003) 8 Supreme Court Cases 498], while considering certain provisions in the Representation of the People Act, 1951, the Supreme Court has held that even if a statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory and such a provision would be directory in nature. The Supreme Court further held that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. They also held that a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory

if thereby no prejudice is caused and that the Court cannot supply casus omissus.

19. In the light of the various decisions relating to use of the word "shall" or "may" in different statutes, now let us consider the judgement of the Supreme Court in Mannalal Khetan v. Kedar Nath Khetan [(1977) 47 Company Cases 185] and the judgements of the Karnataka High Court rendered by a Single Judge in Mukundlal Manchanda v. Prakash Roadlines [(1991) 72 Company Cases 575] as well as by a Division Bench in Mukundlal Manchanda v. Prakash Roadlines Ltd., [(1995) 1 Company Law Journal 126 (Karnataka)].

20. In Mannalal Khetan's case (supra), the question that was considered by the Supreme Court was whether the provisions of Section 108 of the Companies Act, 1956 are mandatory in regard to transfer of shares. Mannalal Khetan, appellant before the Supreme Court, filed a petition in the High Court, Allahabad under Section 155 of the Companies Act, 1956 against the respondents, namely, Kedar Nath Khetan and others contending that the transfers of all the shares in the Company's register were illegal because the transfers were without any proper instrument of transfer. He also contended that the transfers were in contravention of the mandatory provisions of section 108 of the Act. The Single Judge of Allahabad High Court, before whom the petition was originally filed seeking rectification of the register of members by annulling shares transfer register pursuant to the resolution of the board of directors of the first respondent therein and for enforcement of the procedure prescribed in Article 7 of the Articles of Association of the first respondent-company, issued direction to the Company to rectify the register of its members by removing the names of respondents 1 and 2 and to restore the names of the original shareholders. Aggrieved by the said order, the respondents preferred an appeal before the Division Bench of the same Court (Allahabad High Court). The Division Bench, while setting aside the order passed by the Company Judge and dismissing the applications of the appellant, held that the provisions contained in Section 108 of the Act are directory and not mandatory. Against the order of the Division Bench, the appellant preferred appeal to the Supreme Court. The Supreme Court considered sub-section (1) of Section 108, particularly the provisos made therein, and held that the words "shall not register" are mandatory in character, since the negative form of the language is used therein. Their Lordships have also held that negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative. Ultimately, the Supreme Court has held that "the provisions contained in section 108 of the Act are directory because non-compliance with section 108 of the Act are, for the reasons indicated earlier, mandatory. The High Court erred in holding that the provisions are directory." Since the said decision of the

Supreme Court is with reference to the very same provisions namely Section 108 of the Act, we considered the entire judgement dated 25-11-1976. Except sub-section (1) of Section 108, Their Lordships have not considered sub-sections 1A, 1B, 1C and 1D, which were inserted in Companies Amendment Act, 1965, which came into force from 1-4-1966. In other words, though on the date of the judgement of the Supreme Court i.e., on 25-11-1976, the inserted provisions, namely (1A), (1B), (1C) and (1D) were available for consideration. The Lordships have not expressed specific opinion with reference to those inserted provisions. In other words, the Supreme Court was interpreting Section 108 (1) as it stood at the time of the impugned transaction therein and it had no occasion to make any observation concerning sub-sections (1A), (1B), (1C) and (1D) of Section 108 of the Act. In such a circumstance, as rightly contended by Mr. Arvind P. Datar, learned senior counsel for the petitioner and concluded by the Company Law Board, in Mannalal Khetan's case, the Supreme Court had no occasion to make any observation concerning sub-section (1A) of Section 108, in view of the fact that the Supreme Court was dealing with the case concerning Section 108 when it did not contain sub-section (1A). Sub-section (1B) is not relevant in the context of the subject dispute. In so far as Sub-section (1C) is concerned, if the transfer of shares falls within any one of the exempted cases mentioned in that sub-section, the requirements as to presentation of the instrument of transfer in favour of the prescribed authority and delivery thereof to the company within the prescribed time limit, as contemplated in sub-section (1A) are not applicable, provided the conditions stipulated in sub-section (1C) are satisfied. In view of the same, any bank or financial institution or the Central Government or a State Government or any corporation owned or controlled by the Central Government or a State Government, granting a loan against the security of shares, intends to get such shares registered in its own name, in the event of failure on the part of the borrower to repay the amount loan, it shall complete the instrument of transfer and lodge it with the company for registration of the transfer in its own name. In such a circumstance, they will have to stamp or otherwise endorse on the instrument of transfer the date on which the bank or financial institution decides to get such share registered in its own name and the instrument so stamped or endorsed will have to be delivered to the company, together with the share certificate, for registration of the transfer within two months from the date so stamped or endorsed. It is not in dispute that the instruments of transfer are neither stamped nor endorsed by the petitioner, as required under sub-section (1C), however, stamped by the prescribed authority contemplated under sub-section (1A). As rightly pointed out by the Company Law Board, we have to consider whether the delivery of the instruments of transfer beyond 2 months from the date so stamped as specified in sub-section (1C) is proper, for which the learned senior counsel for the petitioner heavily relied

on a decision of the Karnataka High Court in Mukundlal Manchanda v. Prakash Roadlines Ltd., (1991) 72 Company Cases 575. Though it is a judgement of the learned Single Judge of the Karnataka High Court, he had an occasion to consider the very same provisions and similar questions. The learned Judge considered the decision of the Supreme Court in Mannalal Khetan's case wherein the Supreme Court has held that the provisions in section 108 are mandatory. The learned Judge was also aware that the transactions in Mannalal Khetan's case were prior to the amendment made in the year 1965-66 and sub-section (1A), (1B), (1C) and (1D) were introduced for the first time by the Companies (Amendment) Act, 1965 [Act 31/1965]. The learned Judge has observed that the Supreme Court was interpreting the provisions of Section 108 as it stood at the time of the impugned transaction therein and the Supreme Court had no occasion, therefore, to make any observation concerning sub-section (1A) of Section 108. As said earlier, since the learned Judge dealt with the very same question which is being canvassed before us, we considered the facts of that case and the ultimate decision arrived at therein. The following conclusion of the learned Judge is relevant: (page 586)

> "The question therefore is, whether the bar under section 108 (1) is attracted to the requirements as to the period stated in clause (b) of sub-section (1A). Can it be said that, when a blank transfer form is stamped, and, thereafter, it is signed by the transferor and the transferee, the form still continues to be blank? I think not.
>
> Delivery of the instrument of transfer to the company, no doubt, is a mandatory requirement as per section 108 (1). But the time limit of two months stated in sub-section (1A)(b)(ii) does not say that the company shall not accept the instrument of transfer delivered thereafter. The stipulation of time for the performance of an act is not read as a mandatory stipulation under certain circumstances. If the person who has to perform the act has no control over the event which would result in the expiry of the period, then, he cannot be defeated of his rights by insisting on the performance being within the prescribed period. Cases may arise when delay may occur in transit, i.e., even though the instrument of transfer is sent immediately on execution, it is not delivered by the postal department or the courier, or the movement is delayed for reasons beyond the control of the person sending the instrument; it is also possible that the company's office is closed due to strike or for some other reason resulting in the non-delivery of the instrument of transfer, in time. It is not possible to foresee the several factors which may cause the delay in

the delivery of the instrument. In these circumstances, the requirement of sub-section (1A)(b)(ii) has to be read reasonably, so as to enable its smooth functioning; a delivery of an instrument of transfer within a reasonable time should be held as a proper delivery. It is only where the company opines that the instrument of transfer has become stale and that it is improper to act upon it, the instrument of transfer has to be held as liable to be ignored.

Nowhere the Companies Act declares that a duly executed instrument of transfer ceases to be effective or becomes void after the period referred to in sub-section (1A) of Section 108. In fact, under certain circumstances, those instruments can be acted upon by moving the Central Government under sub-section (1D) of Section 108. The reasonable mode of understanding the scheme of section 108 will be, not to render delivery of an instrument of transfer after the period specified in sub-section (1A) as invalid, but as vesting a discretion in the company either to recognise the transfer or not to recognise it depending upon the staleness of the instrument, and even in the latter case, the affected person may move the Central Government under sub-section (1D) by explaining the circumstances under which the delay occurred and the hardship that results by the non-recognition of the transfer. While understanding the scheme of section 108, the court has to bear in mind that trivialities would not render an act futile and technical formalities required to be complied with for a valid transaction cannot outweigh the importance to be given to the substance of the transaction."

The said decision of the learned Judge was taken by way of appeal before the Division Bench of the Karnataka High Court in Mukundlal Manchanda v. Prakash Roadlines Ltd., [(1995) 1 Company Law Journal 126 (Karnataka)]. The Division Bench accepted the merits pleaded by the Prakash Roadlines and confirmed the conclusion of the Company Judge that the appellants-petitioners before him had not made out any case for grant of relief under the provisions. However, the Division Bench has not expressed its view, including the question whether Section 108 (1A) of the Act is mandatory in character. Inasmuch as they disposed of the appeal in the light of the factual details, particularly with reference to acquisition and waiver, they had not gone into the question whether sub-section (1A) is mandatory or directory.

21. The analysis of the above referred three decisions would clearly show that in Mannalal Khetan's case, the Supreme Court had considered only sub-section (1) of Section 108

and no decision was made with reference to sub-sections (1A), (1B), (1C) and (1D) of Section 108, since the subject matter of transactions had taken place prior to the coming into force of the Companies (Amendment) Act, 1965. Then we have left with the judgements of Karnataka High Court, particularly the judgement of the Single Judge in Mukundlal manchanda's case (supra), wherein the learned Judge, after referring to the judgement of the Supreme Court in Mannalal Khetan's case, holding that the Supreme Court has no occasion to consider sub-sections (1A),(1B), (1C) and (1D) and in the absence of any specific bar as provided in sub-section (1) had concluded that sub-section (1A) is only directory in nature. As rightly observed by the learned Judge, the requirement of sub-section (1A) (b) (ii) has to be read reasonably, so as to enable its smooth functioning, a delivery of instrument of transfer within a reasonable time should be held as a proper delivery. We also agree with the conclusion that only where the Company opines that the instrument of transfer has become stale and that it is improper to act upon it, the instrument of transfer has to be held as liable to be ignored. Further, as rightly pointed out by him, even the belated delivery can be acted upon under certain circumstances while moving Central Government under sub-section (1) of Section 108. In the light of the said provision, even though the discretion lies in the company either to recognise the transfer or not to recognise it depending upon the staleness of the instrument, as rightly observed by the learned Judge, the affected person can very well move the Central Government under sub-section (1D) by explaining the circumstances under which the delay occurred and the hardship that results by the non-recognition of the transfer. We also agree with the conclusion that in the light of the scheme of section 108, particularly after the insertion of sub-sections (1A), (1B), (1C) and (1D), the Courts have to bear in mind the trivialities would not render an act futile and technical formalities required to be complied with for a valid transaction cannot outweigh the importance to be given to the substance of the transaction. As said earlier, though the matter was taken up by way of appeal before the Division Bench of the Karnataka High Court, the Division Bench had not gone into the said aspect, namely, whether mandatory or directory, however, confirmed the judgement of the Single Judge on merits. In the light of the above discussion, more particularly in view of the fact that in Mannalal Khetan's case the Supreme Court has no occasion to go into the inserted provisions, namely, sub-sections (1A), (1B), (1C) and (1D) of Section 108, in the absence of specific bar in sub-sections (1A), (1C) as found in sub-section (1) of Section 108, considering the scheme of the said provisions, we are in agreement with the view expressed by the learned Judge in Mukundlal Manchanda's case (1991) 72 Company Cases 575 and we hold that except sub-section (1) of Section 108, other provisions, namely, (1A) and (1C) are directory and not mandatory in nature.

22. Now we shall consider the other aspects, namely, the conduct of the Company, objection relating to maintainability of the appeal, and the rights of pledger/pledgee. The materials furnished by the petitioner would show that on 2-1-2001 all the share certificates with transfer form were delivered. The total number of shares pledged were 25,92,800. Out of this, it is not in dispute that 2,99,800 were transferred within the time and the transfer forms were submitted belatedly. The transfer with regard to the other shares has also been approved. The shares have only to be converted into Demat form. This was made clear by letter dated 23-7-2003 and thereafter several letters were written for completion of the transfer. The last letter was 19-9-2002. Subsequently, a legal notice was also issued on 29-7-2003. All the details have been furnished in the form of typed set of papers before this Court. As rightly pointed out by Mr. Arvind Datar, the Company never took the plea that Section 108 (1C) had not been complied with. Not a single defect has been specified. The learned senior counsel has also brought to our notice that even in the counter filed before the Company Law Board, the plea of Section 108 (1C) has not been raised.

23. Admittedly, the shares are owned by two investment companies and one individual, namely (1) M/s. Dove Investments Private Limited; (2) M/s. Maxworth Investment Private Limited; (3) P.N. Mohan, former M.D. of the company. The above said transferees have not objected to the transfer. Even in the suits filed by the pledgers before the City Civil Court, all the 3 plaintiffs have categorically admitted that they have no objection to transfer all the shares. As rightly pointed out by Mr. Datar, the only objection raised by them is with regard to the consideration of the share transfer. On perusal of all the materials, we are satisfied that non-compliance of Section 108 (1C) has not been raised at any stage. Further, even if the objection with regard to non-compliance of Section 108 (1C) had been raised, it is the claim of the petitioner that it would not immediately approach the Central Government under Section 108 (1D) for extension of time.

24. The conduct of the Company is also not appreciable. They borrowed a sum of Rs.5 Crores and repaid only Rs.2.5 lakhs. It is the stand of the company that the loan would never have been given, but for the pledge of the shares. It is not dispute that the petitioner is a State Government undertaking and the amounts advanced are public fund. As rightly pointed out by Mr. Arvind Datar, the Company has raised frivolous technical objection only to prevent the petitioner from realising its dues.

25. Learned senior counsel for the petitioner has raised an objection that the above appeals are not maintainable under Section 10F of the Act. He also contended that the appeals

lie only on a question of law arising out of the Company Law Board. He further contended that any question which is neither pleaded nor dealt with by the Company Law Board will not be considered by this Court under the appellate power. We are unable to accept the said contention. Since this Court has entertained the appeals on satisfying them and after formulating questions of law and the petitioner/contesting respondent in the appeals put on Notice regarding the same and both parties were heard on the question of law, we are of the view that the above appeals are maintainable under Section 10F of the Act.

26. Though Mr. Alagiriswamy has contended that in the light of the pendencv of the suits, the petitioner is not entitled to any relief at the hands of the Company Law Board, on going through the relief prayed for, in the light of the contract/written agreement, particularly clause 8 and also of the fact that the Company and their investors confirmed the right in favour of the petitioner to get the shares transferred in their names, the said contention is liable to be rejected and the decisions relied on on that score are not helpful to their case.

27. In the light of the above discussions, we are in agreement with the conclusion arrived at by the Company Law Board; consequently, both the Appeals are liable to be dismissed as devoid of merits; accordingly dismissed. No costs. Consequently, connected C.M.Ps., are closed.

R.B.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:-

1. M/s. Gujrat Industrial Investments
   Corporation Ltd., Udyog Bhavan,
   6th Floor, Block No.11 and 12,
   Sector No.11, Gandhi Nagar- 382 011.

2. The Presiding Officer,
   The Company Law Board, Southern Region Bench,
   Chennai.

+ One CC to Mr.P.H.Aravinda Pandian, Advocate SR 58480.

+ Two CC to Mr.S.Murugan, Advocate SR 58192.

+ Two CC to M/s.Shiva Kumar & Suresh, Advocate SR 58178.

Common Judgement in

C.M.A.Nos.3188 and 3223/2004

and CMP Nos. 17656 and
17925/2004.

Dt:- 30-12-2004

MDR (CO)
EJ