

RAM PARSHOTAM MITTAL & ANR.

v.

M/S HILLCREST REALTY SDN.BHD. & ORS. ETC.
(Special Leave Petition (Civil) Nos.1069-1071 of 2009)

JULY 20, 2009

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

COMPANIES ACT, 1956:

Sections 3, 87(2)(b), 90(2) – Interpretation and applicability of – Held: The very fact that Form 23 was filed along with the necessary resolutions and a statement in lieu of prospectus was filed is sufficient for arriving at a prima facie conclusion that the company has altered its status and had become a public company – Also having regard to the definition in Section 3(1)(iii) as soon as its number of members exceeds 50, the company loses its character as a private company – The observations made in this case are of prima facie nature only for disposal of the Special Leave Petitions and not to influence the final decision in the suits – However, High Court functioning as Trial Court to dispose of the suits early so that the management and affairs of the company are not left in a state of uncertainty.

Respondent No.3, M/s. Hotel Queen Road Pvt. Ltd., was incorporated as a Special Purpose Vehicle from 23rd August, 2001 for taking over the assets of Hotel Ashok Yatri Niwas, which was a unit of the India Tourism Development Corporation ('ITDC'), and to manage the same as part of the disinvestment process initiated by the Government of India. After the transfer of assets was completed through a Scheme of Arrangement of Demerger between the ITDC and Hotel Queen Road Pvt. Ltd., which was sanctioned by the Government of India on 5th July, 2002, the Government of India invited bids

- A for the purchase of 99.97% of the total voting equity share capital of Hotel Queen Road Pvt. Ltd. The requisite shares in the said Company were sold to the successful bidder, Moral Trading and Investment Ltd., by two share purchase agreements dated 8th October, 2002, entered into between the President of India, Moral Trading and Investment Ltd. and Hotel Queen Road Pvt. Ltd. On the same date an agreement was entered into between the President of India and Hotel Queen Road Pvt. Ltd., whereby the land on which Hotel Ashok Yatri Niwas was erected, was leased out to the Company for 99 years.

- In June, 2005, Hillcrest Realty served a notice on Hotel Queen Road Pvt. Ltd. asking the Company to convene an Extraordinary General Meeting (EGM) to remove Mr. Ram Parshotam Mittal and Mrs. Sarla Mittal as Directors of Hotel Queen Road Pvt. Ltd. and to appoint the nominees of Hillcrest Realty in their place. Since, Hotel Queen Road Pvt. Ltd. declined to hold such a meeting, Hillcrest Realty issued another notice for holding an EGM on 4th August, 2005 for the same purpose. Hotel Queen Road Pvt. Ltd. thereupon filed a Suit before the Delhi High Court for an injunction to restrain Hillcrest Realty from going ahead with the proposed meeting and from exercising voting rights therein. Holding that the requisition for an EGM by Hillcrest Realty was illegal, the Single Judge, held that any Resolution passed in the said meeting was ineffective and that Hotel Queen Road being a private company, Hillcrest Realty had no voting rights which it could have exercised in the EGM.

- Hillcrest Realty filed Suit in the Delhi High Court for a declaration that by virtue of certain resolutions passed by Hotel Queen Road Pvt. Ltd. on 30th September, 2002, the Company had converted itself from a private company to a public company. On an interim application,

filed in the Suit by Hillcrest Realty, the Single Judge, upon holding that Hotel Queen Road Pvt. Ltd. had fraudulently concealed the fact that it had acquired the status of a public company in the year 2002 and had obtained order of injunction on 12th August, 2005 by virtue of such concealment, allowed the application and permitted Hillcrest Realty to vote in the meeting which was scheduled to be held on 16th October, 2008.

Hillcrest Realty also filed an application, in the Suit filed by Hotel Queen Road Pvt. Ltd., inter alia, for a declaration that Hotel Queen Road was a Public Company and for vacation of the order of injunction passed on 12th August, 2005. By his order dated 20th October, 2008, the Single Judge vacated the interim order dated 12th August, 2005, on the ground that it was a natural consequence of the earlier order passed on 15th October, 2008, whereby Hotel Queen Road Pvt. Ltd. was held to have become a Public Company on account of the resolutions dated 30th September, 2002.

On appeal, the Division Bench of the Delhi High Court by a common judgment decided not to go into the status of Hotel Queen Road, and kept the question of conversion of Hotel Queen Road Pvt. Ltd. into a public company and acquisition of voting rights by Hillcrest Realty in the Company, for decision in the two other appeals; that denial of natural justice was curable even at the appellate stage and that instead of remanding the said appeals to the Single Judge for fresh consideration, the appeals could be taken up for decision by the Division Bench itself; and that as a cumulative preference shareholder in Hotel Queen Road Pvt. Ltd., Hillcrest Realty was entitled to vote at any EGM of its shareholders. The Division Bench took into consideration the statements made on behalf of Hillcrest Realty that since it had not been paid dividend on its

- A preference shares for over two years, it became entitled to exercise voting rights on every resolution placed before the Company at any meeting, in accordance with the provisions of Section 87(2) of the Companies Act. The Division Bench decided the question on the assumption that Hotel Queen Road Pvt. Ltd. was a public company. Hence the Special Leave Petitions.

Dismissing the SLPs, the Court

- HELD: 1.1. As will be evident from the pleadings in both the suits, the reliefs sought for in the two suits are dependent on the question as to whether by the resolutions adopted on 30th September, 2002, Hotel Queen Road had lost its private character and had been converted into a Public Company. While the issues are the same in the two suits, the interim orders passed therein operate in contradictory fields. On the one hand, the Single Judge has passed an order on the basis that Hotel Queen Road was a Private Limited Company in which Hillcrest Realty, as a preference shareholder, had no voting rights and, on the other, an interim order has been passed on the basis that the said company was, a Public Company and by operation of Section of 87(2)(b) of the Companies Act, 1956, Hillcrest Realty, as a preference shareholder, was entitled to vote at all the meetings of the company. In an attempt to reconcile the two contradictory positions, the Division Bench of the High Court, without deciding the core issue, proceeded to dispose of the appeals before it by treating Hotel Queen Road to be a Public Company, and based upon such presumption proceeded further to hold that on account of non-payment of dividend on its cumulative preference shares for two years, Hillcrest Realty became entitled to vote at the meeting of the company under the provisions of Section 87(2)(b) of the Companies Act, 1956. [Para 32] [1144-F-H; 1145-A-C]

1.2. Although, the language of the first resolution was different from the language of the two following resolutions, and at first glance appears to militate against each other, on a closer look at the three resolutions taken one after the other, it is not difficult to discern that they were all part of the same thinking process or meeting of minds of the shareholders. Without the first resolution being accepted as a final decision taken by the company to convert itself from a private company into a public company, there could be no occasion for the subsequent two resolutions to have been passed. [Para 33] [1145-C-E]

1.3. This Court is unable to appreciate the methodology adopted by the Division Bench of the High Court, but is in agreement with the end result by which the Division Bench had set aside the interim order dated 12th August, 2005, passed in Suit No.992 of 2005. Apart from endorsing the view of the Single Judge that the interim order of 12th August, 2005, had been obtained by suppression of material facts, in order to decide the appeals, the Division Bench had to arrive at a prima facie finding as to whether by virtue of the resolutions adopted on 30th September, 2002, Hotel Queen Road had shed its private character and had been converted into a public company with all its consequences. [Para 34] [1145-E-H; 1146-A]

1.4. From the materials on record, prima facie this Court is of the view that by the said resolutions, a final decision had been taken by Hotel Queen Road to convert itself into a public company with immediate effect without having to wait for any decision to be rendered by the Registrar of Companies who, in any event, had no authority to make any decision in that regard. The very fact that Form 23 was filed along with the resolutions dated 30th September, 2002, coupled with the fact that a

A Statement in lieu of Prospectus, which is required to be
filed by a private company when it converts itself into a
public company, was filed on behalf of Hotel Queen Road,
is sufficient for the purpose of arriving at a prima facie
conclusion that Hotel Queen Road had altered its status
B and had become a public company even though the
necessary alterations had not been effected in the
records of the Registrar of Companies. [Para 35] [1146-
A-D]

C 1.5. Having regard to the definition of "private
company" in Section 3(1)(iii), as soon as the number of
its members exceeds 50, it loses its character as a private
company. Since in the instant case shares were said to
have been allotted to 134 persons on 30th September,
2002, on which date the resolutions were passed by Hotel
D Queen Road Pvt. Ltd., the company lost its private
character requiring the subsequent resolutions to be
passed regarding alteration of the share capital. [Para 35]
[1145-F-H]

E 1.6. Whichever way one may look at the three
resolutions passed one after the other on 30th
September, 2002, it appears to have been the intention
of the company to convert itself from a private company
to a public company and that the same was effected by
the three resolutions passed on 30th September, 2002.
F [Para 36] [1147-A]

G 1.7. The moment the resolutions were passed by the
company on 30th September, 2002, the provisions of the
Companies Act became applicable and by operation of
law, Hotel Queen Road simultaneously ceased to be a
private limited company and under the conditions
prescribed in the Act, Hillcrest Realty acquired voting
rights in the meetings of the company by operation of
Section 87(2)(b) and Section 44 of the said Act. The right
H of a preference shareholder to acquire voting rights is

also indicated in clear and unambiguous terms in the Explanation to Section 87(2)(b). [Para 37] [1147-C-E]

1.8. In the event dividend had not been declared or paid for a period of two years as far as Hillcrest is concerned, the Explanation to Section 87(2)(b) would come into play thereby giving Hillcrest Realty, as a cumulative preference shareholder, the right to vote on every resolution placed before the Company, at any meeting, in keeping with Clause (i) of Section 87(2)(b) of the aforesaid Act. [Para 38] [1148-A-B]

A.V. Papayya Sastry vs. Govt of Andhra Pradesh (2007) 4 SCC 221; S.P. Chengalvaraya Naidu vs. Jagannath (1994) 1 SCC 1; Gowrishankar vs. Joshi Amba Shankar Family Trust (1996) 3 SCC 310 and State of Andhra Pradesh vs. T. Suryachandra Rao (2005) 4 SCC 149, referred to.

Cane vs. Jones and others, 1981 (1) All ER 533; Lazarus Estates Ltd. vs. Beasley 1956 (1) All E.R. 341; Bradford Investments Ltd. (1991) BCLC 224 and Walters' Deed of Guarantee in Walters' "Palm" Toffee, Limited vs. Walters 1932 W. 3978, referred to.

2. It is made clear that the observations made in this judgment are of a prima facie nature only for disposal of the Special Leave Petitions and should not influence the final decision in the suits, where the question relating to the status of Hotel Queen Road has been left open for decision. However, the High Court, functioning as the Trial Court is requested to dispose of the suits at an early date so that the management and affairs of Hotel Queen Road are not left in a state of uncertainty. [Para 39] [1148-B-D]

Case Law Reference :

(2007) 4 SCC 221

referred to

Para 22

A	(1994) 1 SCC 1	referred to	Para 23
	(1996) 3 SCC 310	referred to	Para 23
	(2005) 4 SCC 149	referred to	Para 23
B	1981 (1) All ER 533	referred to	Para 20
	1956 (1) All E.R. 341	referred to	Para 22
	(1991) BCLC 224	referred to	Para 25
	932 W. 3978	referred to	Para 30

C CIVIL APPELLATE JURISDICTION : SLP (Civil) Appeal Nos. 1069-71 of 2009.

From the Judgment & Order dated 14.01.2009 of the High Court of Delhi at New Delhi in FAO (OS) No. 282 of 2005, FAO (OS) No. 426 of 2008 and FAO (OS) No. 440 of 2008.

WITH

SLP (C) Nos. 9212-9214 of 2009.

E Soli J. Sorabjee, S. Ganesh, Jayant Bhushan, Shyam Diwan, P.S. Patwalia, Mahesh Agarwal, Sandeep Mittal, Nikhil Rohatgi, E.C. Agrawala, Mohit Chaudhary, Puja Sharma, Shobha, Manish Jain, Jyoti Mendiratta, Devesh Tripathi, Tushar Bakshi, Aman Preet Rahi and Ajay Singh Chauhan for the
F appearing parties.

The Judgment of the Court was delivered by

G **ALTAMAS KABIR, J.** 1. These Special Leave Petitions have been taken up for final disposal at the admission stage itself. SLP(C)Nos.1069-1071 of 2009 have been filed by Ram Parshotam Mittal and Mrs. Sarla Mittal, who were the Respondent Nos.2 and 3 in FAO(OS)No.282 of 2005 and Appellant Nos.2 and 3 in FAO(OS)Nos.426 and 440 of 2008, against the common judgment dated 14th January, 2009
H passed by the Division Bench of the Delhi High Court in the

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above-mentioned appeals. SLP(C)Nos.9212-9214 of 2009 have been filed by M/s. Hillcrest Realty Sdn. Bhd., which was the appellant in FAO(OS)No.282 of 2005 and the Respondent No.1 in FAO(OS)Nos.426 and 440 of 2008, against the same judgment.

2. Although, the Special Leave Petitions mainly involve the interpretation and application of Section 87(2)(b) and Section 90(2) and other connected provisions of the Companies Act, 1956, to the facts of this case, it is necessary to briefly set out the said facts to appreciate the background in which the said questions have arisen.

3. M/s. Hotel Queen Road Pvt. Ltd, which is the proforma Respondent No.3 in all these Special Leave Petitions, was incorporated as a Special Purpose Vehicle from 23rd August, 2001 for taking over the assets of Hotel Ashok Yatri Niwas, which was a unit of the India Tourism Development Corporation (hereinafter referred to as 'ITDC'), and to manage the same as part of the disinvestment process initiated by the Government of India. After the transfer of assets was completed through a Scheme of Arrangement of Demerger between the ITDC and Hotel Queen Road Pvt. Ltd., which was sanctioned by the Government of India on 5th July, 2002, the Government of India invited bids for the purchase of 99.97% of the total voting equity share capital of Hotel Queen Road Pvt. Ltd. The requisite shares in the said Company were sold to the successful bidder, Moral Trading and Investment Ltd., by two share purchase agreements dated 8th October, 2002, entered into between the President of India, Moral Trading and Investment Ltd. and Hotel Queen Road Pvt. Ltd. On the same date an agreement was entered into between the President of India and Hotel Queen Road Pvt. Ltd., whereby the land on which Hotel Ashok Yatri Niwas was erected, was leased out to the Company for 99 years. Simultaneously, a meeting of the Board of Directors of the Company was convened in which Mr. Ram Parshotam Mittal, Mr. Ashok Mittal, Mrs. Sarla Mittal and

A Mr. C.S. Paintal were appointed as Additional Directors and
in December, 2002, their appointment was approved at a
meeting of the Company. A further resolution was passed to
increase the share capital of the Company from Rs.90 lakhs
to Rs.33 crores. The additional capital was divided into 71 lakh
B equity shares of Rs.10/- each and 25 lakh preference shares
of Rs.100/- each. The Articles of Association of Hotel Queen
Road Pvt. Ltd. were amended to exclude preference
shareholders from having any voting rights.

C 4. Subsequently, M/s. Hillcrest Realty (a Malaysian
company) purchased 23,65,000 redeemable preference shares
from Hotel Queen Road Pvt. Ltd. bearing interest at the rate of
8.5% per annum. The Board of Directors of the Company
approved the allotment in favour of Hillcrest Realty on 5th May,
2003, subject to the condition that the allotment would not carry
D any voting rights. In July, 2003, Hillcrest Realty purchased
another 4,64,290 preference shares on similar terms.

5. For a period of 2 years from the date of purchase of
the preference shares by Hillcrest Realty, no dividend was
E declared or paid by the Company. In June, 2005, Hillcrest
Realty served a notice on Hotel Queen Road Pvt. Ltd. asking
the Company to convene an Extraordinary General Meeting
(EGM) to remove Mr. Ram Parshotam Mittal and Mrs. Sarla
Mittal as Directors of Hotel Queen Road Pvt. Ltd. and to appoint
F the nominees of Hillcrest Realty in their place. Inasmuch as,
Hotel Queen Road Pvt. Ltd. declined to hold such a meeting,
Hillcrest Realty issued another notice for holding an EGM on
4th August, 2005 for the same purpose. Hotel Queen Road Pvt.
Ltd. thereupon filed Suit No.992 of 2005 before the Delhi High
G Court in its original jurisdiction for an injunction to restrain
Hillcrest Realty from going ahead with the proposed meeting
and from exercising voting rights therein. Holding that the
requisition for an EGM by Hillcrest Realty was illegal, the
learned Single Judge, by his order dated 12th August, 2005,
further held that any Resolution passed in the said meeting was
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ineffective and that Hotel Queen Road being a private company, Hillcrest Realty had no voting rights which it could have exercised in the EGM.

6. In August, 2008, Hillcrest Realty filed Suit No.1832 of 2008 in the Delhi High Court for a declaration that by virtue of certain resolutions passed by Hotel Queen Road Pvt. Ltd. on 30th September, 2002, the Company had converted itself from a private company to a public company. On an interim application, being I.A. No.12164 of 2008, filed in the Suit by Hillcrest Realty, the learned Single Judge, upon holding that Hotel Queen Road Pvt. Ltd. had fraudulently concealed the fact that it had acquired the status of a public company in the year 2002 and had obtained order of injunction on 12th August, 2005 by virtue of such concealment, allowed the application and permitted Hillcrest Realty to vote in the meeting which was scheduled to be held on 16th October, 2008.

7. Apart from the above, Hillcrest Realty also filed an application, being I.A. No.12638 of 2008, in Suit No.992 of 2005 filed by Hotel Queen Road Pvt. Ltd., inter alia, for a declaration that Hotel Queen Road was a Public Company and for vacation of the order of injunction passed on 12th August, 2005. By his order dated 20th October, 2008, the Single Judge vacated the interim order dated 12th August, 2005, on the ground that it was a natural consequence of the earlier order passed on 15th October, 2008, whereby Hotel Queen Road Pvt. Ltd. was held to have become a Public Company on account of the resolutions dated 30th September, 2002.

8. Being aggrieved by the said two orders passed by the learned Single Judge in Suit No.1832 of 2008 filed by Hillcrest Realty and Suit No.992 of 2008 filed by Hotel Queen Road Pvt. Ltd., Hotel Queen Road Pvt. Ltd., through Mr. Ram Parshotam Mittal and others, filed FAO(OS) Nos.426 and 440 of 2008 before the Division Bench of the Delhi High Court. Hillcrest Realty Sdn. Bhd. had earlier filed FAO(OS)No.282 of 2005 against the order dated 12th August, 2005, which had been

A passed by the learned Single Judge in Suit No.992 of 2005 filed by Hotel Queen Road Pvt. Ltd.

B 9. All the three appeals were taken up together for hearing and disposal by the Division Bench of the Delhi High Court and were disposed of by a common judgment on 14th January, 2009. Although, the status of Hotel Queen Road, after the resolutions were passed on 30th September, 2002, which included filing of a Statement in lieu of Prospectus and the filing of Form No.23 with the Registrar of Companies on 8th October, 2002, along with the text of the two special resolutions passed by the shareholders of Hotel Queen Road Pvt. Ltd. on 30th September, 2002, was the core issue, the Division Bench of the High Court decided not to go into the aforesaid question since the very same issue was the subject matter of Suit No.1832 of 2002 filed by Hillcrest Realty Sdn. Bhd.. The Division Bench set aside the order dated 12th August, 2005, passed by the learned Single Judge in I.A.No.5505 of 2005 and dismissed the same, while holding further that the Suit itself could not be dismissed outright on such score. Having held as above, the Division Bench kept the question of conversion of Hotel Queen Road Pvt. Ltd. into a public company and acquisition of voting rights by Hillcrest Realty in the Company, for decision in the two other appeals.

F 10. On the question of denial of natural justice to the appellants in the two remaining appeals, the Division Bench held that such denial was curable even at the appellate stage and that instead of remanding the said appeals to the learned Single Judge for fresh consideration, the appeals could be taken up for decision by the Division Bench itself. In that context, the Division Bench held that as a cumulative preference shareholder in Hotel Queen Road Pvt. Ltd., Hillcrest Realty was entitled to vote at any EGM of its shareholders. The Division Bench took into consideration the statements made on behalf of Hillcrest Realty that since it had not been paid dividend on its preference shares for over two years, it became entitled to

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exercise voting rights on every resolution placed before the Company at any meeting, in accordance with the provisions of Section 87(2) of the Companies Act and discarding the submissions made on behalf of Hotel Queen Road that by virtue of Section 90(2) of the aforesaid Act, the provisions of Section 87(2) thereof were not applicable to a private company, unless it was a subsidiary of a public company, the Division Bench decided the question on the assumption that Hotel Queen Road Pvt. Ltd. was a public company. The latter part of the decision of the Division Bench was, therefore, based on the supposition that Hotel Queen Road Pvt. Ltd. had become a public company which entitled Hillcrest Realty to vote at the EGM held on 4th August, 2005, as well as the EGM scheduled for 16th October, 2008. The Division Bench, however, appeared to be undecided as to the course of action to be taken and without deciding the question as to whether Hotel Queen Road was a private company or a public company, proceeded on the assumption that the company was a public company and directed that Hillcrest Realty would thenceforth be permitted to exercise voting rights in all meetings of Hotel Queen Road, subject to the decision at the trial stage regarding the status of the company. While disposing of the appeals, the Division Bench awarded costs of Rs.19,76,000/- in favour of Hillcrest Realty Sdn. Bhd. and Rs.5,94,000/- in favour of Mr. Ashok Mittal, as per statements submitted by them, which was to be paid within a period of four weeks from the date of the order.

11. As mentioned hereinbefore, two different sets of Special Leave Petitions have been filed, one set by Ram Parshotam Mittal and Mrs. Sarla Mittal and the other set by M/s. Hillcrest Realty Sdn. Bhd.

12. Appearing for the petitioners in SLP(C) Nos.1069-1071 of 2009, Mr. Soli J. Sorabjee submitted that the core issue in these petitions was with regard to the application of Section 87(2)(b) of the Companies Act to the facts of the case having regard to the bar imposed under Section 90(2) thereof.

A Mr. Sorabjee submitted that the main plank of the case made out by Hillcrest Realty rested on the two resolutions which had been passed by Hotel Queen Road Pvt. Ltd. on 30th September, 2002, in the following terms :

B “Resolved that the company be converted into Public Limited Company and that such consequential amendments as may be necessary, in such a manner that no longer the provisions of Section 3(1)(iii) of the Companies Act, 1956 are required to be included in the Memorandum and Articles of Association of the Company.

C Further the Board of Directors of the Company be and is hereby authorised to do such acts, deeds, things that may necessary to effect the above resolutions.

D Resolved that the authorised share capital of the company be and is hereby increased from Rs.1,00,000/- divided into 10,000 equity shares of Rs.10/- each, to Rs.90,00,000/- divided into 9,00,000 equity shares of Rs.10/-.

E Resolved further that the Memorandum and Articles of Association of the Company be and is hereby altered to reflect the above increased authorised share capital of the company.

F Further resolved that the Board of Directors of the Company be and is hereby authorised to do such acts, deeds, things that may necessary to effect the above resolution.”

G 13. Mr. Sorabjee urged that the difference between the first resolution and the other resolutions would be clear from the very language used in respect of the said resolutions. Mr. Sorabjee submitted that while the first resolution was merely an enabling resolution for the conversion of the Company into a Public Limited Company, the other resolutions became effective immediately. As a result, the authorised share capital of the Company was increased from Rs.1,00,000/- divided into

10,000 equity shares of Rs.10/- each to Rs.90,00,000/- divided into 9,00,000 equity shares of Rs.10/- each and a further resolution was also adopted whereby the Memorandum and Articles of Association of the Company were altered to reflect the increased authorised share capital of the Company. Mr. Sorabjee urged that while the other resolutions took effect instantaneously, the first resolution was merely to enable the Company to take steps for its conversion from a private company to a public company and did not alter the nature and character of the Company *eo instanti*. It was submitted that in the absence of a positive resolution changing the nature and character of the Company to a Public Company, the Division Bench of the High Court committed a serious error in proceeding on assumptions in order to give voting rights to Hillcrest Realty without determining the issue and leaving the same for determination to the learned Single Judge. Mr. Sorabjee urged that this was a classic example of putting the cart before the horse, which has had the effect of taking away the management of the Company from the equity shareholders and handing over the same to the preference shareholders who were not entitled to the management.

14. Mr. Sorabjee urged that the equity shareholders had been wrongly deprived of the management of the company based on the order passed by the learned Single Judge on 15th October, 2008, which had been passed on the supposition that Hotel Queen Road Pvt. Ltd. had suppressed the fact that it had acquired the status of a Public Limited Company on the basis of the resolutions dated 30th September, 2002. Mr. Sorabjee urged that the question of suppression of the said resolutions did not arise since Hillcrest Realty was fully aware of the 'conversion' resolution of 30th September, 2002, which was part of the Directors' Report for the year ended 31.3.2004, wherein it had been clearly mentioned that the Company's application for conversion into a public company was pending with the Registrar of Companies and had not attained finality. Accordingly, with the passing of the resolutions on 30th

A September, 2002, Hotel Queen Road Pvt. Ltd. did not automatically become a public company and the Division Bench had erred in assuming it to be so in giving voting rights to Hillcrest Realty which was only a preference shareholder without voting rights, particularly when the Company was ready and willing to pay the dividend for the two years in question to Hillcrest Realty out of funds arranged by it for such purpose. Learned counsel also urged that along with Form No.23, copies of the resolutions adopted on 30th September, 2002, had also been forwarded to the Registrar of Companies and certified copies thereof could have been obtained by Hillcrest Realty from the office of the Registrar of Companies. Mr. Sorabjee urged that the very basis on which the Division Bench vacated the injunction order dated 12th August, 2005, passed by the learned Single Judge, was non-est, as no fraud had been perpetrated by Hotel Queen Road Pvt. Ltd. since the conversion resolution of 30th September, 2002, was not a final decision which would have had the effect of converting Hotel Queen Road Pvt. Ltd. into a public limited company with immediate effect.

E 15. Mr. Sorabjee submitted that the approach of the Division Bench of the High Court treating Hotel Queen Road Pvt. Ltd. to be a public company was wholly erroneous leading to the peculiar situation which had been created in the management of the company by giving Hillcrest Realty, a preference share holder, the right to vote at the meetings of the company. Mr. Sorabjee urged that since the very basis of the order passed by the Division Bench was fallacious, the same was liable to be set aside and the management of Hotel Queen Road Pvt. Ltd. was liable to be restored to the equity share holder Directors.

H 16. The submissions of Mr. Sorabjee were strongly opposed by Mr. Jayant Bhushan, learned Senior Advocate appearing for M/s. Hillcrest Realty Sdn. Bhd. Learned counsel submitted that the crucial question in the case was whether

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Hotel Queen Road Pvt. Ltd. was a private company or a public company. If it was a private company and not a subsidiary of any public company, Hillcrest Realty would not have any voting rights. Mr. Bhushan submitted that the resolutions adopted by Hotel Queen Road Pvt. Ltd. on 30th September, 2002 were, therefore, of great relevance in deciding the said question. Mr. Bhushan contended that the suppression of the said resolutions had a definite effect on the decision-making process of the learned Single Judge while passing an interim order on 12th August, 2005. Learned counsel submitted that the first of the three resolutions passed on 30.9.2002, was not of an enabling nature as had been contended by Mr. Sorabjee. It was submitted that the two following resolutions could not have been passed simultaneously with the first resolution unless a final decision had been taken to convert Hotel Queen Road Pvt. Ltd. from a private company to a public company. Mr. Jayant Bhushan urged that the same would be even more evident from the fact that Hotel Queen Road Pvt. Ltd also filed a "statement in lieu of prospectus", which is required to be filed only when a private company converts itself into a public company, as contemplated under Section 44(1)(b) of the Companies Act, 1956.

17. It was urged that even if the above-mentioned resolutions were available with the Registrar of Companies, by not mentioning the same in its application for injunction, Hotel Queen Road had perpetrated a fraud by misleading the Court into believing that Hotel Queen Road was a private limited company, which disentitled Hillcrest Realty from having voting rights at the company's meetings.

18. In addition to the above, learned counsel submitted that the reference made in the Directors' Report regarding the pendency of the application for conversion of the company from a private limited company into a public limited company, was a complete misnomer, since the conversion of a company from a private company to a public company did not require the

- A sanction or permission of the Registrar of Companies. Such a conversion can only be made upon a decision being taken by the shareholders and only an intimation of such decision is required to be given to the Registrar of Companies who is required to act thereupon for alteration of the records of the company maintained in his office.

19. Mr. Jayant Bhushan also pointed out that the Form 23 which had been submitted to the Registrar of Companies makes reference to Section 31 of the aforesaid Act which relates to the alteration of the Articles of the Company, which lent strength to the submission that a positive decision had been taken to convert the company into a public limited company and that the said resolution was not an enabling provision as was contended by Mr. Sorabjee. Learned counsel submitted that the same would be borne out from the two subsequent resolutions which with immediate effect increased the share capital and the number of members beyond 50, which simultaneously took the company out of the definition of "private company" as defined in Section 3(1)(iii) of the Companies Act, 1956. The Memorandum and Articles of Association were also altered with immediate effect to reflect the increased authorised share capital of the company which made it abundantly clear that the first resolution was, in fact, a definitive decision to convert Hotel Queen Road Pvt. Ltd into a public limited company. It was urged that once a decision was taken to convert the company into a public limited company, the provisions of Section 87 of the Companies Act became operative, as far as the company was concerned, as the bar of Section 90(2) of the said Act was no longer applicable to the company. Mr. Jayant Bhushan also referred to the certificate issued by the Company Secretary on 20th September, 2003, indicating that Hotel Queen Road Pvt. Ltd. had altered its Articles of Association in the financial year 2002-2003.

20. In support of his aforesaid submission, Mr. Jayant Bhushan firstly referred to and relied on the decision of the

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Chancery Division in *Cane vs. Jones and others*, reported in 1981 (1) All ER 533, wherein the question as to whether the Articles of Association of a company could be altered, other than by way of a special resolution passed at a General Meeting, fell for decision. Upon consideration of the provisions of Section 10(1) of the Companies Act, 1948 (English Act), it was held that all the Corporators of the company acting together could do anything which was intra vires the Company and that Section 10(1) of the Act did not undermine that principle but merely laid down the procedure whereby some only of the shareholders of a company could validly alter the articles. In the facts of that case, it was further held that an agreement arrived at between the then shareholders, though not drafted as a resolution and though not signed by the signatories in each other's presence, represented a meeting of all the shareholders' minds which was the essence of a general meeting and the passing of a resolution on the said agreement was effective. Drawing a parallel, Mr. Jayant Bhushan submitted that the first resolution adopted by Hotel Queen Road Pvt. Ltd. at its meeting held on 30th September, 2002, was a clear meeting of minds of the Directors of the Company and would have effect *eo instanti* whereupon the provisions of Section 44(1)(b) simultaneously came into play. Learned counsel submitted that simultaneously with the passing of the conversion resolution Hotel Queen Road Pvt. Ltd. ceased to be a private limited company and was converted into a public company by operation of law.

21. Regarding non-disclosure of the resolutions passed on 30th September, 2002, Mr. Jayant Bhushan urged that even if the said resolutions were available with the Registrar of Companies, it did not absolve Hotel Queen Road from disclosing the same before the learned Single Judge. It was submitted that it was all the more so because it was the case of Hotel Queen Road that the said company was a private company and that as a result, the provisions of Section 87(2)(b) of the Companies Act were not applicable to the company,

- A being barred under Section 90(2) thereof. It was submitted that having come to a finding that a fraud had been perpetrated by Hotel Queen Road in obtaining an order of injunction by suppression of material facts, the Division Bench erred in not dismissing the suit filed by Hotel Queen Road and only vacating the interim order passed on 12th August, 2005.

- B 22. Learned counsel submitted that the Division Bench of the High Court ought not to have left the decision as to the company's status as a public company or a private company to the learned Single Judge. Instead, it should have decided the same and should have dismissed the suit. Referring to the oft-repeated observation of Lord Denning in *Lazarus Estates Ltd. vs. Beasley* [1956 (1) All E.R. 341], Mr. Jayant Bhushan submitted that no judgment of a Court could be allowed to stand if it had been obtained by fraud as fraud unravels everything.
- C D Reliance was also placed on the decision of this Court in *A.V. Papayya Sastry vs. Govt. of Andhra Pradesh* [(2007) 4 SCC 221], wherein also it was observed that fraud vitiates all judicial acts whether in rem or in personam and the judgment, decree or order has to be treated as non-est and a nullity, whether the same was passed by the Court of first instance or by the final Court. It could be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings and was an exception to the doctrine of merger and also the provisions of Article 141 of the Constitution.

- F 23. Mr. Jayant Bhushan also referred to the decisions of this Court in (i) *S.P. Chengalvaraya Naidu vs. Jagannath* [(1994) 1 SCC 1]; (ii) *Gowrishankar vs. Joshi Amba Shankar Family Trust* [(1996) 3 SCC 310], where the view taken in *Chengalvaraya Naidu's* case was upheld; and (iii) *State of Andhra Pradesh vs. T. Suryachandra Rao* [(2005) 4 SCC 149], which reiterated the principle that suppression of a material document in order to gain advantage over the other side, would also amount to a fraud on the Court.

- H 24. Mr. Jayant Bhushan submitted that having regard to the

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views expressed in the aforesaid decisions and its own findings, the Division Bench of the High Court ought to have dismissed the suit itself.

25. As an off-shoot of his aforesaid submissions, Mr. Jayant Bhushan submitted that since Hotel Queen Road had not paid dividend for more than two consecutive years, under Section 87(2)(b)(i) of the Companies Act, Hillcrest Realty as a preference shareholder became entitled after 5th May, 2005, to vote on every resolution placed before the Company at any meeting, as provided under Section 87(2)(b) of the said Act. It was submitted that even if the Company had not made profits and no dividend had been declared for more than two years, dividend would be deemed to be due for the purpose of Section 87(2)(b), as indicated in the Explanation thereof, which reads as follows :

“Explanation : For the purposes of this clause, dividend shall be deemed to be due on preference shares in respect of any period, whether a dividend has been declared by the company on such shares for such period or not. -”

It was urged that the aforesaid Explanation created a legal fiction that dividend would be deemed to be due for the purpose of Clause (b) of Section 87(2) of the Companies Act, whether a dividend is declared by the Company on such shares or not. It was submitted that the rationale for the legal fiction was that if the company is managed in such a manner that no profits are being made and no dividend is, therefore, declared or paid to preference shareholders, such preference shareholders would then be entitled to have voting rights on every resolution for the selecting a better management. Learned counsel referred to and relied on a decision of the *Chancery Division in Bradford Investments Ltd.* [(1991) BCLC 224], where a similar question arose regarding the right of preference shareholders to vote at a General Meeting of the Company on account of non-declaration of dividend. On a consideration of the relevant provisions of the Companies Act, 1985 (English

- A Act), it was held that the deeming provisions contained in
Article 3(b)(3) regarding “dividend deemed to be payable”
meant that the dividend was deemed payable whether or not
there were profits out of which it could be paid. Consequently,
as the dividend on the preference shares was in arrears, the
B preference shareholders were entitled to vote.

26. Regarding the offer made on behalf of the Hotel Queen
Road to pay the dividend to the preference shareholders, Mr.
Jayant Bhushan contended that such offer to make payment of
dividend not having been made by the Company out of its
C profits, as required under Section 205 of the Companies Act,
the same could not be accepted for the purpose of depriving
the shareholders of their right to vote which had already accrued
to them on account of non-payment of dividend. In fact,
according to learned counsel, such an offer was itself bad on
D account of the statutory bar imposed under Section 205 which
makes it very clear that dividend could be declared or paid only
out of profits made by the company.

27. Mr. Jayant Bhushan then referred to the provisions of
E Section 43 of the Companies Act dealing with the
consequences of default in complying with the conditions by
which a company was constituted as a private company.
Learned counsel submitted that consequent upon the
resolutions adopted on 30th September, 2002, it was
F incumbent upon Hotel Queen Road to take immediate steps
for amendment of its Articles of Association by changing its
status as a private company and having failed to do so, it
attracted the consequences indicated in Section 43 to the
extent that the provisions of the Act would apply to the company
as if it was not a private company. Responding to Mr.
G Sorabjee’s objection that the said point had not been urged
either before the learned Single Judge or the Division Bench
of the High Court, learned counsel submitted that not only had
the aforesaid point been pleaded, but the same had also been
argued before the Division Bench, as would be evident from
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the impugned judgment itself.

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28. It was lastly submitted by Mr. Bhushan that the company ought not to have been saddled with the costs directed to be paid by the Division Bench of the High Court since all decisions to commence and pursue the litigation on behalf of the company had been taken almost single-handedly by Shri R.P. Mittal, particularly, when the management of the company had changed hands. Mr. Bhushan urged that while the Special Leave Petitions filed by Ram Parshotam Mittal were liable to be dismissed, those filed by Hillcrest Realty should be allowed.

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29. Mr. Shyam Diwan, learned Senior Counsel and Mr. P.S. Patwalia, learned Senior Counsel, appearing for the Respondent Nos.2 and 3, adopted Mr. Jayant Bhushan's submissions. In addition, Mr. Shyam Diwan submitted that the discretionary and equitable exercise of jurisdiction by the High Court was not liable to be disturbed in a proceeding under Article 136 of the Constitution. He urged that the suppression resorted to by Hotel Queen Road was sufficient for the Division Bench of the High Court to vacate the interim order passed earlier and even to dismiss the suit.

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30. In reply to Mr. Jayant Bhushan's submissions, Mr. Sorabjee, while reiterating his earlier submissions, joined issue on the question of payment of dividend due by private arrangement other than from out of the profits of the company, as envisaged under Section 205 of the Companies Act. Mr. Sorabjee contended that in *Bradford Investments Ltd.'s* case (supra) no occasion had arisen to consider a statutory provision similar to Section 205 of the Companies Act, 1956 (Indian Act) and reliance was placed only on one of the Articles in the Articles of Association and was, therefore, clearly distinguishable from the facts of this case. Referring to the decision of the *Chancery Division in re Walters' Deed of Guarantee in Walters' "Palm" Toffee, Limited vs. Walters* [1932 W. 3978], Mr. Sorabjee submitted that in the said decision it

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- A had been held that dividend guaranteed to preference shareholders could also be paid by the guarantor, who would then be subrogated to the rights of a preference shareholder. In other words, payment of dividend on the preference shares did not necessarily have to be made from out of the company's profits, but could also be paid from other sources.
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31. In deciding the two separate sets of Special Leave Petitions, it has to be kept in mind that they arise out of two separate suits, one filed by Hotel Queen Road and the other filed by Hillcrest Realty. While Suit No.992 of 2005 was filed by Hotel Queen Road Pvt. Ltd. for an injunction to restrain Hillcrest Realty from proceeding with the proposed EGM on 4th August, 2005, and from exercising voting rights therein, Suit No.1832 of 2008 was filed by Hillcrest Realty for a declaration that Hotel Queen Road had become a public company by virtue of the resolutions passed on 30th September, 2002. While in the suit filed by Hillcrest Realty, the learned Single Judge permitted the Plaintiff to vote in the meeting of Hotel Queen Road to be held on 16th October, 2008, in the suit filed by Hotel Queen Road, the learned Single Judge also passed an interim order prohibiting any effect being given to the resolutions passed in the EGM on 4th August, 2005, upon holding that Hotel Queen Road being a private company, Hillcrest Realty could not have exercised voting rights in the EGM.
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32. As will be evident from the pleadings in both the suits, the reliefs sought for in the two suits are dependent on the question as to whether by the resolutions adopted on 30th September, 2002, Hotel Queen Road had lost its private character and had been converted into a Public Company. While the issues are the same in the two suits, the interim orders passed therein operate in contradictory fields. On the one hand, the learned Single Judge has passed an order on the basis that Hotel Queen Road was a Private Limited Company in which Hillcrest Realty, as a preference shareholder, had no voting rights and, on the other, an interim
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order has been passed on the basis that the said company was, A
a Public Company and by operation of Section of 87(2)(b) of
the Companies Act, 1956, Hillcrest Realty, as a preference
shareholder, was entitled to vote at all the meetings of the
company. In an attempt to reconcile the two contradictory B
positions, the Division Bench of the High Court, without deciding
the core issue, proceeded to dispose of the appeals before it
by treating Hotel Queen Road to be a Public Company, and
based upon such presumption proceeded further to hold that
on account of non-payment of dividend on its cumulative
preference shares for two years, Hillcrest Realty became C
entitled to vote at the meeting of the company under the
provisions of Section 87(2)(b) of the Companies Act, 1956.

33. Although, as pointed out by Mr. Sorabjee, the language
of the first resolution was different from the language of the two D
following resolutions, and at first glance appears to militate
against each other, on a closer look at the three resolutions
taken one after the other, it is not difficult to discern that they
were all part of the same thinking process or meeting of minds
of the shareholders. Without the first resolution being accepted E
as a final decision taken by the company to convert itself from
a private company into a public company, there could be no
occasion for the subsequent two resolutions to have been
passed.

34. We are unable to appreciate the methodology adopted F
by the Division Bench of the High Court, but we are in
agreement with the end result by which the Division Bench had
set aside the interim order dated 12th August, 2005, passed
in Suit No.992 of 2005. In our view, apart from endorsing the
view of the learned Single Judge that the interim order of 12th G
August, 2005, had been obtained by suppression of material
facts, in order to decide the appeals, the Division Bench had
to arrive at a prima facie finding as to whether by virtue of the
resolutions adopted on 30th September, 2002, Hotel Queen
Road had shed its private character and had been converted H

A into a public company with all its consequences.

35. From the materials on record, we are prima facie of the view that by the said resolutions, a final decision had been taken by Hotel Queen Road to convert itself into a public company with immediate effect without having to wait for any decision to be rendered by the Registrar of Companies who, in any event, had no authority to make any decision in that regard. The very fact that Form 23 was filed along with the resolutions dated 30th September, 2002, coupled with the fact that a Statement in lieu of Prospectus, which is required to be filed by a private company when it converts itself into a public company, was filed on behalf of Hotel Queen Road, is sufficient for the purpose of arriving at a prima facie conclusion that Hotel Queen Road had altered its status and had become a public company even though the necessary alterations had not been effected in the records of the Registrar of Companies. We are unable to agree with the contention canvassed on behalf of Hotel Queen Road that till such time as the records of the Registrar of Companies were not altered to show that Hotel Queen Road had become a public company, it could not be treated as such. It is not the records of the Registrar of Companies which determines the status of a company but whether it falls within the definition of a "private company" or "public company" as defined in Section 3(1)(iii) and 3(1)(iv) of the Companies Act. On the other hand, the records of the Registrar of Companies reflect the status of the Company as per the information received from the company in accordance with the provisions of the aforesaid Act. Having regard to the definition of "private company" in Section 3(1)(iii), as soon as the number of its members exceeds 50, it loses its character as a private company. Since in the instant case shares were said to have been allotted to 134 persons on 30th September, 2002, on which date the resolutions were passed by Hotel Queen Road Pvt. Ltd., the company lost its private character requiring the subsequent resolutions to be passed regarding alteration of the share capital.

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36. Whichever way we look at the three resolutions passed one after the other on 30th September, 2002, it appears to have been the intention of the company to convert itself from a private company to a public company and that the same was effected by the three resolutions passed on 30th September, 2002. A

37. Then again, the offer to pay dividends from a private source and not out of the company's profits, is not contemplated under Section 205 of the Companies Act. The decision referred to by Mr. Sorabjee in the Walters' Deed of Guarantee in Walters' "Palm" Toffee, Limited's case (supra) had not been required to take into consideration a provision similar to Section 205 of the Companies Act, 1956. The said decision is, therefore, of no help to the petitioners' case, particularly when the language of the Section is clear and unambiguous. The moment the resolutions were passed by the company on 30th September, 2002, the provisions of the Companies Act became applicable and by operation of law, Hotel Queen Road simultaneously ceased to be a private limited company and under the conditions prescribed in the Act, Hillcrest Realty acquired voting rights in the meetings of the company by operation of Section 87(2)(b) and Section 44 of the said Act. The right of a preference shareholder to acquire voting rights is also indicated in clear and unambiguous terms in the Explanation to Section 87(2)(b). B
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38. Since the question as to whether Hotel Queen Road ceased to be a private company upon the resolutions being passed on 30th September, 2002, is the crucial issue for decision in both the two suits referred to hereinabove, it would not be proper for this Court to delve into the question further. However, for the purpose of disposing of these Special Leave Petitions, we are prima facie of the view that by virtue of the resolutions dated 30th September, 2002, Hotel Queen Road had become a public company thereby attracting the provisions of Section 87(2)(b) of the Companies Act, 1956, upon the bar under Section 90(2) thereof having been lifted. A natural F
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- A consequence is that in the event dividend had not been declared or paid for a period of two years as far as Hillcrest is concerned, the Explanation to Section 87(2)(b) would come into play thereby giving Hillcrest Realty, as a cumulative preference shareholder, the right to vote on every resolution placed before the Company, at any meeting, in keeping with Clause (i) of Section 87(2)(b) of the aforesaid Act.

- C 39. In keeping with the aforesaid principle, while dismissing the Special Leave Petitions filed by Hotel Queen Road and Hillcrest Realty, we make it clear that the observations made in this judgment are of a prima facie nature only for disposal of the Special Leave Petitions and should not influence the final decision in the suits, where the question relating to the status of Hotel Queen Road has been left open for decision. We, however, request the High Court, functioning as the Trial Court, to dispose of the suits at an early date so that the management and affairs of Hotel Queen Road are not left in a state of uncertainty.

- E 40. The Special Leave Petitions are, accordingly, dismissed, but there will be no order as to costs.

G.N.

Special Leave Petitions dismissed.