Delhi High Court
Universal Music India Ltd. And ... vs Union Of India (Uoi) on 7 September, 2006
Author: G Mittal
Bench: G Mittal
JUDGMENT Gita Mittal, J.

1. The present case raises very basic and interesting questions of the content and contours of fairness in administrative action. In fact, it would appear that the oft repeated words of V.R. Krishna Iyer, J in , The Chairman, Board of Mining Examination and Chief Inspector of Mines, and Ors. v. Ramjee to the effect that natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor firm in this jurisdiction. No man shall be hit below the belt - that is the conscience of the matter were said in the light of issues as have arisen for consideration in the instant case. The impugned order and action of the respondents seeks to expand the requirement of compliance of principles of natural justice to exercise of purely administrative jurisdiction which results in no civil consequences.

2. By this writ petition, the petitioners assail the order and action of the respondents in requiring them to serve on the other side a copy of their application under Section 399(4) seeking leave to maintain a petition under Section 397 and 398 of the Companies Act. The petitioners contend that they are not required to serve notice or grant hearing on such application to the company against whom the applicant is seeking permission to initiate such proceedings.

3. The petitioners are music companies carrying on business, inter alia, of producing, publishing and marketing music albums, cassettes and compact disks.

4. The Indian Performing Rights Society was incorporated on the 23rd August, 1969 as a company limited by guarantees, having no share capital. In 1996, this company was registered as a copyright society under Section 33 of the Copyright Act, 1957 with the object of carrying out copyright business in respect of literary and musical copyrights in musical works. It is stated to have 1413 members divided into four broad categories consisting of song writers(367 members); composers (532 members); film producers (188 members); and music companies (171 members). Apart from these, there are 155 members who are stated to be legal heirs of certain deceased song writers and composers.

The petitioners claim that they are amongst the top six music companies which are members of the society.

Alleging that the society was constituted and is required to function in terms of the dicta of the Apex Court in Indian Performing Right Society v. Indian Motion Pictures Association and the amendments made to the Copyright Act, 1957 with effect from 10th May, 1995, it is contended that

the respondent is not so functioning. An attempt was even made to remove the petitioners from the governing council, that is the board of directors of the society.

5. In these circumstances, the petitioners were of the view that the Company Law Board be requested to exercise its jurisdiction under Section 397, 398 and 402 of the Companies Act, 1956 in respect of the functioning and working of the Indian Performing Rights Society Ltd.

6. Since the petitioners were not in a position to satisfy the conditions laid down by the provisions of Section 399(1) of the Companies Act, 1956 to file the petition under Section 397 and 398, they applied to the respondents to exercise its jurisdiction under Section 399 (4) of the Act by way of an application for this purpose on 10th January, 2005. Instead of considering this application, upon its receipt, the respondent appears to have issued a letter dated 19th January, 2005 requiring the petitioner to serve a copy of its contemplated petition under Section 397 and 398 of the Companies Act, 1956 on the Indian Performing Right Society. This communication of the respondent has been impugned in the present writ petition and deserves to be considered in extenso and reads thus:

To, M/s Universal Music India Pvt. Ltd.

Samir Complex St. Andrews Road, Bandra (West) Mumbai 400050

2. BMG Sony Music Entertainment(India) Pvt. Ltd.

Centre, South Avenue, Mumbai 400054 Subject: Application Under Section 399(4) of the Companies Act 1956 for Permission to file a Petition Under Section 397 and 398 of the Act, in respect of the affairs of The Indian Performing Right Society Limited.

Sir, I am directed to refer to your application dated 10th January, 2005 on the abvoe subject and to request you to serve a copy of the petition on the subject Company at an early date under intimation to this Ministry. Thereafter, the matter will be processed further.

Yours faithfully, Sd/-

(N.K.Vig) Under Secretary to the Government of India

7. The petitioners contend that it has been indicated to their authorised representative that upon completion of service and pleading, there would be a full fledged hearing of the application in order to determine whether the same should be granted or not. Aggrieved by this threatened action and the requirement of the respondents to serve a copy upon the society, the petitioners have filed the present writ petition.

8. Mr. Ashok Desai, learned senior counsel on behalf of the petitioners has submitted that Section 399 (4) of the Companies Act and Rule 13 of the Companies(Central Government) General Rules and Forms, 1956 does not postulate any notice to the company in question nor grant of any hearing to it. The consideration of an application under Section 399 (4) of the Act, is contended to be a

subjective consideration by the Central Government and that, at this stage of the matter, where the applicant is seeking to file the petition, there is no lis and no adversarial party or interests have come into play which would require that hearing be given to the other side. It is further contended that the government is required to form an opinion and pass an order based thereon and that it is not acting in discharge of any judicial or quasi-judicial functions when it is considering an application under Section 399 (4) of the Companies Act but is acting in discharge of administrative and executive functions. It is further contended that there can be no requirement to comply with principles of natural justice at this stage inasmuch as the rights of the other side are not effected. It is further contended that in the event of permission being granted, the other side would have adequate and full opportunity to place its case and to get a hearing before the Company Law Board after the permission is granted.

9. My attention has also been drawn to the fact that even if permission was not granted, if so satisfied, then the Central Government is itself empowered to initiate proceedings under Section 401 of the Companies Act and to file a petition seeking initiation of proceedings under Section 397 and 398 of the Companies Act against the company. According to Mr. Desai, learned senior counsel appearing for the petitioner, an applicant cannot be required contest a matter twice, one at the stage when it would be held entitled to removal of the prohibition whereby it is prohibited from bringing the petition under Section 397 of the Companies Act and, thereafter, before the Company Law Board during the hearing.

It is further contended that as per the statutory scheme, no hearing is postulated at the stage of consideration of an application under Section 399(4). Reliance is placed on rule 13 of the Companies(Central Government) General Rules and Forms, 1956 to submit that this rule provides the manner in which an application is to be made and decided under Section 399 (4) of the Companies Act. The submission is that, therefore, at the stage of consideration of this application, no hearing is required to be given to the other side under any statutory provision.

10. It was lastly urged that so far as several comparable statutory provisions which inter alia, include, Section 92 of the Code of Civil Procedure; Section 10 of the Industrial Disputes Act, 1947; Section 197 of the Code of Criminal Procedure etc where the authorities have been vested with powers similar to those under Section 399 (4) are concerned, it has been repeatedly held that no prior hearing has to be given to persons who are likely to be effected by the proceedings which are to be instituted if the prohibition is removed under Section 399 (4) of the Companies Act, 1956.

11. In support of its contentions, the petitioners have also relied heavily on the pronouncement of a Single Judge of this Court in 1978 (48) Company cases 728 Sri Krishna Tiles And Potteries(Madras) P. Ltd. v. Company Law Board and Anr. which was upheld by the Division Bench in the judgment reported at 1979 (49) Company Cases 409 Sri Krishna Tiles and Potteries(Madras) P. Ltd. v. Company Law Board and Anr.

12. On the other hand, Mr. Rajiv Shakdhar, learned counsel appearing for the respondents has opposed the writ petition on the ground that the judicial pronouncements noticed hereinabove have to be disregarded on the ground that they are per incurium for the reason that they do not take into

account the judgments of the Supreme Court reported at AIR 1967 SC 1268 State of Orissa v. Binapani Dei and A.K. Kraipak and Ors. v. UOI and Ors. According to the respondents, the Apex Court has held that principles of natural justice apply to all administrative actions and that since the rights of the company are severely effected in case the permission is given to a member to file a petition under Section 397 and 398, failure to give a hearing would result in violation of principles of natural justice and consequently result in failure of justice.

13. Having heard learned counsels and having been taken through the available record and the judgments relied upon by both parities, the fulcrum of the dispute in the present matter can be enumerated thus:

(i) is the Central Government required to comply with the principles of natural justice while considering an application under Section 399 (4) of the Companies Act, 1956.

(ii) if it is held that principles of natural justice have to be complied with, then, what would be the scope and ambit of the requirement and the procedure which the Central Government would be required to adopt ?

These questions can be conveniently examined under the following heads and aspects:

(i) Statutory scheme and applicable provisions;

(ii) Scope of the expression 'in its opinion' as used in Section 399 and elsewhere in the statute;

(iii) Judicial pronouncements on the spirit, intendment and purpose of Section 399(4) of and scope of enquiry there under;

(iv) Principles governing exercise of similar discretion under other statutes;

(v) Scope and limits of applicability of principles of natural justice to the consideration by the Central Government of an application under Section 399(4).

Statutory Scheme & applicable provisions

14. In order to fully appreciate the questions raised raised in the present matter, it would be instructive to examine the statutory scheme and the relevant provisions. Section 397 and 398 of the Companies Act, 1956 which have been adverted to, read thus:

397. Application to [Tribunal} for relief in cases of oppression. _ (1) Any member of a company who complaint that the affairs of the company [are being conducted in a manner prejudicial to public interest or] in a manner oppressive to any member or members (including any one or more of themselves) may apply to the [Tribunal] for an order under this Section, provided such members have a right so to apply in virtue of Section 399.

(2) If, on any application under Sub-section (1), the Court is of opinion -

(a) that the company's affairs [are being conducted in a manner prejudicial to public interest or] in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be would up, the [Tribunal], may, with a view to bringing to an end the matters complained of, making such order as it thinks fit.

398. Application to [Tribunal] for relief in cases of mismanagement.-(i) Any members of a company who complaint -

(a) That the affairs of the company [are being conducted in a manner prejudicial to public interest or] in a manner prejudicial to the interests of the company; or

(b) that a material change not being a change brought about by , or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alternation in its Board of directs, [or manager], or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company [will be conducted in a manner prejudicial to public interest or] in a manner prejudicial to the interests of the company, may apply to the [Tribunal} for an order under this section, provided such members have a right so to apply in virtue of Section 399.

(2) If, on any application under Sub-section (1), the [Tribunal} is of opinion that the affairs of the company a re being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the [Tribunal] may, with a view to bringing to an end or preventing the matters complained or of apprehended, make such order as it thinks fit.

15. It is also necessary to consider the provisions of Section 399 of the Companies Act, 1956 which reads as follows:

399. Right to apply under Sections 397 and 398. - (1) The following members of a company shall have the right to apply under Section 397 or 398:

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less or any members or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares ;

(b) in the case of a company not having a share capital, not less held by two or more persons jointly, they shall be counted only as one member.] (2) For the purposes of Sub-section (1), where any share

or shares are held by two or more persons jointly, they shall be counted only as one member.

(3) Where any members of a company are entitled to make an application in virtue of Sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the [Tribunal] under Section 397 or 398, notwithstanding that the requirements of Clause (a) or Clause (b), as the case may be, of Sub-section (1) are not fulfillled.

(5) The Central Government may, before authorizing any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the [Tribunal] dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

16. Prior to the amendment being effected by Act 31 of 1988, the power to adjudicate on proceedings under Section 397 was vested in the court. Subsequently, by virtue of Section 44 of the Companies(IInd Amendment) Act, 2003, 'Court' was substituted by the 'Company Law Board' which is empowered to undertake proceedings under Sections 397 and 398 of the Companies Act, 1956.

17. Examination of the statutory scheme shows that the Companies Act, 1956 vests executive or administrative powers in the Central Government as also quasi-judicial powers. Section 10E of the Companies Act empowers the Central Government to constitute a Board to be called the Board of Company Law Administration by issuance of a notification in the official gazette. This Board is authorised to exercise and discharge such powers and functions as may be conferred on it under the statute and is also empowered to exercise and discharge such other powers and functions of the Central Government as are statutorily required. The power to appoint a chairman of the Company Law Board is also vested in the Central Government by virtue of the proviso to Sub-section (2) of Section 10E of the enactment and Sub-section 3 of Section 10E. Sub-section 4b permits the Company Law Board to form Benches. It is these Benches which have the powers of a court under the Code of Civil Procedure, 1908 while trying a suit under Sub-section 4C of Section 10E. Further, Sub-section 4D provides that every Bench of the Company Law Board shall be deemed to be a civil court for the purposes of Section 195 and Chapter XVI of the Code of Criminal Procedure, 1973 and every proceeding before the Bench shall be deemed to a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code and for the purposes of Section 196 of the Criminal Procedure Code.

18. It is noteworthy that Sub-section 5 of Section 10E specifically provides that, without prejudice to the provisions of Sub-sections 4C and 4D, the Company Law Board shall, in exercise of its powers and the discharge of its functions under the Act or any other law, be guided by the principles of natural justice and shall act in its discretion. The Company Law Board has the power to regulate its own procedure by virtue of Sub-section 6 of Section 10E.

19. Prior to the amendment effected by Act 31 of 1988, Sub-section 5 of Section 10E laid down that the procedure of the Company Law Board shall be such as may be prescribed. The Central Government had framed rules in exercise of powers conferred by Section 642 read with Sub-section 4B of Section 10E of the Act and had notified the Company Law Board(Bench) Rules, 1975.

After the amendments effected in 1988 which came into effect with effect from 31st May, 1991, the Company Law Board has been vested with wide powers and can regulate its own procedure guided by principles of natural justice and is required to act in its discretion. It is statutorily mandated that it would have the powers vested in a civil court for the purposes stated in Sub-section 4C and shall be deemed to be a civil court for the specific purposes noted under Section 4D.

20. So far as proceedings in respect of complaints under Section 397 and 398 of the Companies Act, 1956 are concerned, Section 399 enables a section of the members to bring a complaint there under provided they satisfy the conditions laid down in Sub-section 1, 2 and 3 there under. Sub-section 4 of Section 399 enables any member or members to apply to the Company Law Board under Section 397 and 398 even if they do not satisfy the requirements of Clause (a) or (b) of Sub-section 1, if they are able to satisfy the Central Government that circumstances exist which make it just and equitable to authorise such member to so apply.

21. The powers of the Company Law Board on receipt of an application under Section 397 or 398 of the Companies Act, 1956 have been delegated under Section 402. Perusal of the statutory scheme shows that the Board is empowered to make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to be just and equitable under Section 403 of the statute.

Therefore, as per the statutory scheme, the statute draws a clear distinction between administrative jurisdiction and functions requiring constitution of benches, distribution of work and judicial functions requiring adjudication. A distinction is also drawn between an interim stage, an interim application and substantive proceedings.

22. Some light on the exercise of discretion by the Central Government under Section 399(4) is thrown by the procedure provided for making an application under Section 399 (4). It is to be found that in order to enable effective discharge of the functions, the Central Government was authorized by Section 642 of the statute to frame rules in respect of all or such matters which under the Companies Act, 1956 are, or may be, prescribed by the Central Government and generally to carry out the purposes of the Act. Pursuant to exercise of these powers, the Central Government promulgated the Companies (Central Government) General Rules and Forms, 1956. Rule 13 of these rules provides the procedure for making and consideration of an application under Section 399 (4). This rule reads thus:

Rule 13. Section 399(4)-(1) Every application under Clause (4) of Section 399 to the Central Government by any members of a company who wish to be authorised to apply to the Court shall specify -

(a) the names and addresses of the applicants.

(b) if the company has a share capital, the voting power held by each applicant.

(c) the total number of applicants;

(d) their total voting power; and

(e) the reasons for making the application.

(2) The reasons given in pursuance of Clause (e) of Sub-rule (1) shall be precise and specific.

(3) Every such application shall be accompanied by such documentary evidence in support of the statements made therein as are reasonably open to the applicants.

(4) Every such application shall be signed by the applicants and shall be verified by their affidavit stating that paragraphs thereof are true to their knowledge and paragraphs to the best of their information and belief.

(5) The Central Government may, before passing orders on the application, require the applicants or any one or more of them, to produce such further documentary or other evidence as the Central Government may consider necessary -

(a) for the purpose of satisfying itself as to the truth of the allegations made in the application; or

(b) for ascertaining any information which, in the opinion of the Central Government, is necessary for the purpose of enabling it to pass orders on the application.

23. The statutory rules clearly provide the manner in which the Central Government would function in consideration of the application under Section 399(4). The applicants can be required to produce documentary evidence as considered necessary to enable the Central Government to form an opinion as to whether circumstances exist which would make it just and equitable to give the authorisation which has been sought. The manner in which the application is to be made and the contents thereof are clearly deleniated. Sub-rule 5 of Rule 13 provides the nature of enquiry which the Central Government may conduct and requires production of evidence only by the applicant.

24. Having regard to the statutory scheme, more specifically, the provisions of Section 397, 398 and 399 of the Companies Act, 1956 coupled with the specific provisions of Rule 13 noticed hereinabove, it is therefore noteworthy that diverse functions are to be performed by the Central Government and the Company Law Board. Now a tribunal has been proposed under further amendments to the Companies Act, 1956 which are yet to take effect. While some of the functions may be executive or administrative, there are others which require quasi-judicial determination. Matters which are required to be heard judicially include applications under Section 397 and 398 as well as petitions under Section 79 of the Companies Act or other petitions for confirming or alterations of

memorandum of associations.

25. However, the functions of the Central Government postulated by Sub-section 4 of Section 399 of the Companies Act involve a subjective process. It only requires that there must be material before the Central Government to form its "opinion" that circumstances exist which make it just and equitable to give the requisite authorisation. The legislature has specifically empowered to the Central Government, an executive authority, to formulate its opinion and then take a subjective decision.

26. In view of the submissions made before this Court, it becomes necessary to scrutinise the provision of Section 399(4) which empowers the Central Government to authorise any member of the company to apply to a tribunal under Section 397 or 398 notwithstanding the prohibition contained in clauses a or b of Sub-section 1 of the section. The statute permits the Central Government to so authorise the member, if, "in its opinion" circumstances exist which make it just and equitable to do so. The power which is specific is conferred in the Central Government.

Scope of the expression 'in its opinion' as used in Section 399 and elsewhere in the statute

27. It would be topical and instructive to consider other provisions of the Companies Act, 1956 which contain the same expression as utilised by the legislative in Section 399(4).

28. It is noteworthy that the statutory scheme contains a similar power under Section 237 of the Companies Act. This section again empowers the Central Government to appoint investigators to investigate the force of a company and to report thereon if, inter alia, "in the opinion" of the Central Government, there are circumstances suggesting that the business of the company is being conducted with the intend to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in an oppressive manner. Other circumstances have been set out in Section 237 (b).

29. Under Section 237 of the Companies Act, the Central Government, inter alia, thus may appoint inspectors to investigate the prayers of the company, if, 'in its opinion', there are circumstances suggesting that the business of the company is being conducted with intend to defraud its creditors, members of other persons etc. Undoubtedly the same is as serious a matter as an application under Section 397 or Section 398 of the Companies Act, 1956. The expression "in the opinion of" used in Clause (b) of Section 237 are similar to the words used in Sub-section (4) of Section 399 of the Companies Act, 1956. It is a basic principle of statutory interpretation that the words used in the enactment in its various provisions have to be construed as having been used in the same sense at all places where they occur unless the legislature has specifically otherwise so provided or the context justifies any other interpretation.

30. It is equally well settled that observations made in a judicial precedent with reference to one statute cannot be applied with reference to the provisions of another statute which is not in pari materia with the statute which forms the subject matter of the previous decision. However, in the instant case, at this point, this Court is considering the expression "in its opinion" which has been

utilised in two places in the same statute both of which confer the discretion on the Central Government. It would therefore be useful to consider the consideration of the courts of the scope and spirit of the expression "in the opinion" occurring in Section 237 and elsewhere.

31. The parameters of judicial review into the "opinion" and the manner in which it is to be formed under Section 237 (b) of the Companies Act came up for consideration in a pronouncement of the Apex Court in Barium Chemicals Ltd. v. Company Law Board. The court was of the opinion that so long as the order was not malafide, it must be held to have been made in exercise of administrative powers and the words "reason to believe" or "in the opinion" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such a "reason to believe" or "the opinion" was not formed on relevant facts or within the limits or the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative.

The court noticed that the object of Section 237 of the Act was to safeguard the interests of those dealing with a company by providing for an investigation where the management is conducted so as to jeopardise those interests or where a company is floated for a fraudulent or an unlawful object. It was held that ordering the investigation was left to the purely subjective satisfaction of the Government or the Board and that such an opinion was not subject to challenge on the grounds of propriety, reasonableness or sufficiency. The opinion is based on existence of circumstances suggesting what is set out in Sub-clauses (i), (ii) and (iii). The court held that if it is shown that the circumstances set out in Sub-clauses (i), (ii) and (iii) do not exist or that they are such that it is impossible for any one to form an opinion there from suggestive of the aforesaid, the opinion is then challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

Thereby, the Apex Court recognised the permissibility of the scrutiny by a court as to existence of some circumstances within limited parameters and not as to the sufficiency thereof.

32. The same expression also arose for consideration before the Apex Court in Rohtas Industries v. S.D. Agarwal wherein the court was also considering the scope of judicial scrutiny into the opinion formed by the Government under Section 237 of the Companies Act. After detailed consideration of the judicial dicta, the court reconciled the law laid down in various decisions.

The court noticed that the subject matter of a legislation has an important bearing on the interpretation of a provision. It is well settled that when something is to be done which is within the discretion of the authorities, then that something is to be done according to the rules of reason and justice and not according to private opinion. Discretion necessarily implies good faith in discharging a public duty. There is always a perception within which a statute is intended to operate. It is to be done according to law and is to be legal and regular and not arbitrary, vague or fanciful. The power is to be exercised by the authority in good faith. As was held by Lord Denning M.R. in Associated Provincial Pictures Houses Ltd. v. Wednesbury Corporation (1948) 1 KB 223 CA 'that a person entrusted with the discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from its consideration matters which

are irrelevant to the matters that he is to consider'.

In Rohtas Industries (Supra), the Apex Court re-stated the principle laid down in Barium Chemicals Company Limited case (supra) to the effect that the power conferred on the Central Government under Section 237 of the Companies Act, was not an arbitrary power and that the same has to be exercised in accordance with the restraints imposed by law. Upon existence of circumstances which were a condition precedent for the Government to form the required opinion, it has been held by the Supreme Court that if the existence of these conditions is challenged then the courts are entitled to examine whether those circumstances were existing when the order was made or not. Therefore, as per the law laid down by the Apex Court, though the opinion formed by the Government was not amenable to review by the court, however, the existence of the circumstances in question was open to judicial review.

Judicial pronouncements on the spirit, intendment and purpose of Section 399(4) & scope of enquiry there under

33. The very contentions raised by the respondents justifying compliance of principles of natural justice and hearing to the company prior to passing an order under Section 399 (4) are concerned, fell for consideration on identical contentions which were urged before this Court in 1978 (48) Company Cases 728 Sri Krishna Tiles and Potteries(Madras) Pvt. Ltd. v. The Company Law Board and Ors. The arguments raised on behalf of the company were rejected by this Court, inter alia, on the ground that:

(i) if the central government arrived at a decision on the basis of non-existent or untenable material, it is always open to the effected party to come to court and challenge the subjective decision by invoking the rule enunciated in the Barium Chemicals Limited Case (supra);

(ii) Sub-section 5 of Section 399 of the Companies Act empowers the Central Government before authorising any member or members as contemplated by Sub section 4 to require the applicant or applicants to give security for the payment of any costs which the court dealing with the application may order, such member or members to pay to any other person or persons who are party to that application. This is adequate protection for preventing frivolous application being moved or if moved, then from being granted;

(iii) Rule 13 above-noticed provides sufficient safeguards. The application of the member/members has to be accompanied by documentary evidence in support of the statements made in the application. The application is required to be signed and verified by an affidavit and the Central Government may, before passing orders thereon, require the applicant (s) or all or one or more of them to produce further documentary or other evidence considered necessary for satisfying itself as to the truth of the allegations made by the applicant;

(iv) the Central Government, upon a report being made to it by a member or members, is empowered to itself move an application under Section 397 or 398 by virtue of the provisions of Section 401. This being the position, there is no legal basis as to why the company has to be heard

prior to grant of an authorisation contemplated by Sub-section 4 of Section 399.

(v) The provisions of Section 399 do not provide protection to the company. A company is constituted by its members. On the contrary, provisions of Sub-section 1 Section 399, contain a bar and provide eligibility conditions as to when a member or members can bring a petition under Section 397 and 398 against the company. The statutory bar created by the legislature can be removed "if circumstances exist". For this reason, there is no legal justification as to why the member should be required to first battle with the company before the Central Government and then battle again when the substantive petition under Section 397 and 398 is permitted to be brought before the Company Law Board.

34. So far as the scope of inquiry which is postulated by Sub-section 4 of Section 399 of the Companies Act is concerned, it was held by the learned Single Judge that the same is two fold; firstly, Section 399 (4) requires ascertainment as to whether, indeed, primafacie, any case is made out of oppression or mis-management so as to effect public interest prejudicially as postulated by Section 397 and Section 398.

Secondly, the statutory scheme necessitates consideration as to whether the applicant or applicants are indeed members who should in the circumstances be allowed to move the court, not for their personal gain but in the interest of the company and the general body of shareholders and the public. Whether such circumstances, infact, exist to grant the application under Section 397 of Section 398 is a question and matter which the court while considering the substantive application has to decide.

The learned Single Judge rejected all the contentions raised by the company and held that while passing orders on an application under Section 399(4) of the Companies Act, 1956, the authorities are acting in discharge of executive and administrative functions, which consideration is based on their subjective satisfaction.

35. This judgment of the learned Single Judge was affirmed by the Division Bench in its decision reported at 1979 (49) Company Cases 409 Sri Krishna Tiles and Potteries Pvt. Ltd. v. The Company Law Board. The Division Bench divided its consideration into three broad aspects - firstly, the nature of the functions under Section399; secondly, the nature of inquiry to be made by the Government before granting or refusing to grant the authorisation and thirdly, the nature of the right or interest of the company to be heard before the decision was taken by the Government or the Board under Section 399 (4).

The Division Bench rejected all contentions raised on behalf of the company on a consideration of the relevant provisions of the Act and the rules and even on first principles.

36. It is noteworthy that at the relevant point of time when the aforestated judgments came to be pronounced, the statute contained Section 10A to Section 10D in the Companies Act, 1956 wherein further powers and functions of the Government were envisaged.

So far as the present case is concerned, the amendment to the statute has made no material difference to the state of position as was before the court in Krishna Tiles and Potteries Pvt. Ltd. and now. There is no change in the provisions of Section 399 (4) of the Companies Act, 1956. The only difference which has come into effect is that whereas earlier the petition under Section 397 and 398 had to be filed before the Company Court, however by virtue of statutory amendment, the same now has to be brought before the Company Law Board. Otherwise the principles laid down by the learned Single Judge as were sustained in appeal by the Division Bench apply on all fours to the instant case.

37. In addition to the aforestated reasoning given by the learned Single Judge, the Division Bench held as under:

(i). granting authorisation by the Central Government under Section 399(4) is similar to the granting of such authorisation by it under Section 401. Even if a person does not make an application under Section 399 (4), the Central Government can grant him the authorisation under Section 401, or, itself make an application to the court under Section 397 and 398 by virtue of Section 401. The Bench held that on reading of the statutory scheme, it would appear that it is the right of the Central Government either to make the application itself under Section 397 and 398 or allow such application to be made by authorising any other person to do so either under Section 401 or under Section 399 (4);

(ii) the object of enacting Section 399 (1) was to effectuate the recommendations made in the report of the Company Law Committee, 1952. The committee took note of Section 210 of the English Act which allowed any member to present a petition to the court against the company under statutory provisions similar to Section 397 and 398 of the Companies Act. The committee then advised that in this country, such right, which is freely accessible in England, should be restricted 'to discourage the presentation of frivolous petitions by one or more disgruntled shareholders'. The restriction under Section 399 (1) was provided against members filing frivolous petitions against the company. The exception to this restriction is to be found under Section 399 (4) whereby the Central Government is empowered to authorise such persons to apply under Section 397 and 398 even though he does not hold one-tenth of the issued share capital of the company. Though where the statute confers the right, in the same breadth, it provides the remedy for enforcement of such right. The remedy provided by the statute is an exclusive one.

(iii) Placing reliance on the principles laid down in Premier Automobiles Ltd. v. Kamlalkar Shantaram Wadke and Ors., it was held by the Division Bench that a company does not have any common law right not to be sued. In fact, the continuous trend of development of statutory law reflects that it is intended more and more to discourage immunity from being sued. Immunity of persons who could not fairly be sued has been whittled down. For instance, even a sovereign can be sued in respect of non-sovereign functions discharge by him or by a foreign government.

(iv) There are no parties while considering of the application under Section 399(4) and there is no lis in these proceedings.

(v) In fact, it is well settled that no hearing is given to a person in a preliminary inquiry which is to lead to a regular inquiry or action against such a person during which a full hearing would be available to him. The Bench noticed that this conclusion was arrived at by a Division Bench of this Court and placed upon G.S. Harmal v. Union of India 2nd (1971) 2 Delhi 129 at 137 wherein reliance was upon Amalender Ghosh v. District Traffic Superintendent, North Eastern Railway ; Champaklal Chimanlal Shal v. Union of India ; State of U.P. v. Akbar Ali Khan and Parry-Jones v. Law Society [1968] 2 WLR 397 (CA).

38. Placing reliance on Raja Narain Lal Bansi Lal v. Manik Feroz Mistri , the Division Bench in Krishna Tiles and Potteries Pvt. Ltd. case (supra) also noticed that the Apex Court had drawn a distinction between the interest of the shareholders and the interest of the persons in charge of the management of a company. The court identified the interest of the company with the interest of shareholders and it was recognised that it was necessary to provide for necessary safeguards and checks against the possible abuse of powers vesting in the manager. It was therefore held that when a request is made that a hearing must be given to the other side while considering an application under Section 399(4), it is the manager and not the company itself who is seeking a prior hearing before a member is authorised under Section 399(4) to file a petition under Section 397 and 398. Since the very right of the management is a result of the Companies Act, the right of a shareholder under the same Act to file a petition under Section 397 and 398 cannot be made subject to such a restriction that even the authorisation of the Central Government cannot be granted to such a member under Section 399 (4) except after the company management is heard.

39. In this behalf, Lord Dening M.R. put it trenchantly in Norwest Holst Limited v. the Secretary of State for Trade reported in the Times of 2nd February; [1978] (3) WLR 73 when it was observed that new shareholders often in practice had little control over their company's affair, the directors were often "a self-perpetuating hierarchy". The department's power to appoint inspectors should be seen as a substitute for inadequate shareholder control and consequently, the court should not fetter investigations that "might be, only machinery available for keeping the public interest and seen that companies were properly conducted", even if this machinery might be slightly unfair to individuals. Thereby the policy reasons for not applying the principles of natural justice were made explicit. The court of appeal was concerned that the duty of the Government to appoint investigators should not be elaborated and expanded so as to turn a basically inquisitorial procedure into an accusational one so as to defeat the public interest in encouraging witnesses to be frank and in enabling the inspectors to complete their task as speedily as possible.

Principles governing exercise of similar discretion under other statutes

40. At this stage, it would be instructive to notice some pari-materia statutory provisions which are provided in other statutes wherein the legislature has recognised more and more that immunity to protection from judicial scrutiny of the responsibility and actions of a person or body has to be restricted. Such examination would certainly facilitate an understanding of the permissible limits of judicial review when discretion is conferred by legislative exercise on various authorities.

In this behalf, an examination of the provisions of Section 92 and 86 of the Code of Civil Procedure and Section195 and 197 of the Code of Criminal Procedure which envisage authorisation or permission or sanctions to sue or prosecute would be of some relevance. It has been repeatedly held that the authorities who are to give the sanction, authorisation or permission are acting in administrative capacities and not in quasi judicial capacity. In a Full Bench decision of the Kerela High Court Mayer Simon v. Advocate General of Kerala, the court held that no civil rights of the applicant are effected nor can anyone said to be prejudicially effected by a grant or refusal of consent under Section 92(1) of the Code of Civil Procedure. Under Section 92 of the Code, consent of the Advocate General is necessary to file a suit in case of a breach of a public trust. The intendment of this statutory provision is also to prevent frivolous petitions against public trusts by persons having no real interest in its affairs. The court held that the Advocate General acted as a statutory administrative authority while considering such an application; that grant of the application does not prejudicially effect persons who were proposed to be made defendants as no rights are determined and that the administrative order is amenable to correction in proceedings under Article 226 of the Constitution if it is not based on relevant facts. In this behalf the court held thus:

12. If the petitioner before us has been prejudicially affected by the conclusion reached by the Advocate General, he would be entitled to move this Court under Article 226 of the Constitution. This leads us to the question when a person can be said to be prejudicially affected as a result of the grant or refusal of the consent by the Advocate-General? The grant of the consent cannot, of course, prejudicially affect the grantee. It is urged that it would prejudicially affect the rights of those who opposed the grant of consent and who are likely to be imp leaded in a suit as defendants and who would then be called upon to spend time and money and energy in defending the action. We do not think it would be open to the persons who are likely to be made defendants in the action to contend that they would be prejudicially affected by the grant of the consent. It is well established that the Advocate General does not determine any question that will affect the rights of parties. It will be open to the defendants to raise all the contentions that they had raised before the Advocate-General or even all the contentions that are available to them in the action. None of their rights is affected by the consent granted by the Advocate-General. The inconvenience and temporary expenses caused by a suit being filed against such persons cannot be said to be such a prejudice which will enable to sustain a petition under Article 226 of the Constitution. After all no one has the right to say that no suit should be filed against him.

xxx

16. xxx The Advocate-General acts as a statutory administrative authority performing the parens partriae jurisdiction of the State in regard to public trusts and while acting thus can and does cause substantial injury at times : preventing the taking of a step in aid of vindicating a right and this can cause injury for Section 92(2) bars any action for the reliefs mentioned in Section 92(1). Nor are we able with equal respect to agree with the decision in . The support sought to be derived for the conclusion arrived at in that decision from the decision in State of Madras v. C.P. Sarathy is no more available. The Supreme Court in Rohtas Industries Ltd. v. S.D. Agarwal has explained that decision. The Court said that the decision in "cannot be considered as an authority for the proposition that whenever a provision of law confers certain power on an authority on its forming a certain opinion

on the basis of certain facts, the courts are precluded from examining whether the relevant facts on the basis of which the opinion is said to have been formed were in fact existed.

And the rejection of the argument of Counsel that even treating the order as an administrative one, it is amenable to be corrected in proceedings under Article 226 of the Constitution on the ground that the Advocate-General decides nothing, does not, with due respect, appeal to us. His conclusion to refuse consent can very adversely affect those who had applied for consent, certainly cause substantial injury. This aspect had not been considered in the decision. Indeed, this has not been considered in any of the numerous decisions on the subject to which our attention has been drawn and which were referred to by us earlier. None of these decisions also considered the distinction between granting and refusing consent. It is quite true, and we have already said so, that while granting consent no one is adversely affected, not even such prejudice as to sustain a petition under Article 226 is caused. But can the same be said while refusing consent? The answer must be no in the light of what we have said."

41. Section 10 of the Industrial Disputes Act, 1947 confers a similar discretion on the appropriate government to decide as to whether an industrial dispute raised should be referred for industrial adjudication or not. The scope of the enquiry which the Government is required to conduct and the nature of the order have been repeatedly questioned in proceedings before the Supreme Court and the parameters laid down indubitably make relevant reading. It stands authoritatively stated that the order of the Appropriate Government under Section 10 of the Industrial Disputes Act, 1947 is an administrative order and not a judicial or a quasi-judicial one. No lis is involved and the order is made on the subjective satisfaction of the Government. The consideration by the Government is restricted to a primafacie determination as to whether the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons not for justice or industrial peace and harmony. If the administrative determination is based on the irrelevant, extraneous or grounds not germane to the exercise of power, it is liable to be questioned in exercise of the power of judicial review (Re: Secretary, Indian Tea Association v. Ajit Kumar Bharat and Ors.; Ram Avtar Sharma and Ors. v. State of Haryana; 1989 SCC L and S 465 Telco Convey Drivers Mazdoor Sangh and Anr. v. State of Bihar).

42. While considering the question raised with regard to exercise of the power of the Central Government under Section 19 of the Army Act, 1950 with Rule 14 of the Army Rules, 1954, the Apex Court in Union of India and Ors. v. Harjeet Singh Sandhu held that the parameters of administrative law governing the judicial review of administrative action are well settled. Such power to review administrative action shall be undertaken when the exercise of power is shown to have been vitiated by malafides or is found to be a clear case of colourable exercise of/or abuse of power or what is sometimes called fraud on power i.e. where the power is exercised for achieving an oblique end. The truth or correctness or the adequacy of the material available before the authority exercising the power cannot be revalued or weighed by the court while exercising power of judicial review. Even if some of the material, on which the action is taken is found to be irrelevant, the court would still not interefere so long as there is some relevant material available on which the action can be sustained. The court would presume the validity of the exercise of power but shall not hesitate to interfere if the invalidity or unconstitutionality is clearly demonstrated. If two views are possible, the court shall

not interefere by substituting its own satisfaction or opinion for the satisfaction or opinion of the authority exercising the power.

It is well settled that whether an administrative tribunal has a duty to act judicially or administratively has to be gathered from the provisions of the particular statute or the rules made there under. If an authority is called upon to decide respective rights of contesting parties or, to put in other words, if there is a lis, ordinarily there will be a duty on the part of the said authority to act judicially. (Re : Gullapalli Nageswara Rao and Ors. v. Andhra Pradesh State Road Transport Corporation and Anr.; Nagendra Nath Bora v. Commissioner of Hills Division; Province of Bombay v. Khushaldas S. Advani). In Gullapalli Nageswara Rao and Ors. v. Andhra Pradesh State Road Transport Corporation and Anr. , the Supreme Court laid down the following criteria to ascertain whether a particular act is a judicial act or an administrative one; (a) the body of persons must have legal authority; (b) the authority should be given to determine questions affecting the rights of subjects and (c) they should have a duty to act judicially. In this case, the Apex Court had further stated thus:

(i) that if a statute empowers an authority not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

Therefore, the correctness of the material or the truth thereof is not material at the stage of formation of the opinion.

43. In Baikuntha Nath Das and Anr. v. Chief District Medical Officer, Baripada and Anr., the court was concerned with a challenge to an order of compulsory retirement from service passed against the appellant. It was held by the court that an order for compulsory retirement was not a punishment which did not imply stigma. It was to be passed by the Government on forming the opinion that it was in public interest to retire the Government servant. The order was passed on the subjective satisfaction of the Government. The court held that therefore principles of natural justices would have no place in the context of the order of compulsory retirement. Judicial scrutiny would not be excluded altogether. The court can interfere if it was satisfied that the order was passed malafide or that it was based on no evidence or was arbitrary in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it was found to be a perverse order. The court held that the nature of the notification of the Government was not quasi judicial in nature and because action had to be taken on the subjective satisfaction of the Government, there was no room for importing the facet of natural justice in such a case, more particularly when the

order was not a punishment and did not involve stigma.

44. Similar questions have arisen for consideration in respect of the scope of power of the appropriate government under Section 17(4) of the Land Acquisition Act. Under Section 17(4) of the Land Acquisition Act, the acquiring authority has been empowered to invoke urgency powers for acquisition of a land on a subjective satisfaction that the purpose of acquisition of the land is urgent. The Apex Court has held that such a decision was in the nature of an administrative order and no reasons are necessary. It has even been held that the language of the order or notification is not conclusive of the urgency of the purpose. (Re: Rajasthan Housing Board v. Sri Krisna; UOI v. Praveen Gupta (Paras 7, 8 and 9); Jai Narayan v. UOI (Paras 4, 5, 10 and 11).

45. Several statutory provisions have similarly empowered authorities to act in a particular manner upon their having `reasons to believe' of the existence of some particular state of affairs. The decision of the authorities also impacts availability or foreclosure of judicial review remedies. It would be instructive to examine the manner in which this expression has been explained which could be of use in understanding of the issue before this Court. While considering the provisions of the Foreign Exchange Regulation Act, the Apex Court has held that the expression 'reason to believe' is not synonymous with the subjective satisfaction of the officer. The belief must be held in good faith; cannot merely be a pretence. The question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section, is open to the court for examination (Re: Dr. Partap Singh and Anr. v. Director of Enforcement, Foreign Exchange Regulation Act and Ors.).

Reasons to believe' suggests that the belief must be that of an honest and reasonable person based on reasonable grounds not merely suspicion, gossip or rumour. The court can examine whether the reasons for the belief that the pre-conditions statutorily required are satisfied, actually exist or not. It is however well settled that the declaration or sufficiency of the reasons to believe cannot be investigated by the court. (Re: 1996 (3) SCC 757 The Income-Tax Officer, I Ward District, District VI, Calcutta and Ors. v. Lakhmani Mewal Das; Sheo Nath Singh v. Appellate Assistant Commissioner of Income Tax, Calcutta).

Reasons to believe' conveys that there must be some rational basis to form the belief. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings. However, if the grounds are relevant and have a nexus with the formation of the belief, then the authority would be clothed with the jurisdiction to take action under the statutory provisions. (Re: The Commissioner of Sales Tax, U.P. v. Bhagwan Industries Private Limited, Lucknow).

The expression `reasons to believe' means that even though the formation of the opinion may be subjective, it must be based on material on the record. There is thus a check on the exercise of peremptory powers. (Re: N. Nagendra Rao and Company v. State of A.P.) Therefore, sufficiency of reasons is not a justiciable issue but existence of reasons is. These principles would guide examination of a challenge to the exercise of discretion and formation of opinion by an authority as well.

46. "In the opinion of" signifies the subjective opinion of the Government and not an opinion subject to objective tests. In AIR (36) 1949 Privy Council 136 The Hubli Electricity Co. Ltd. v. The Province of Bombay, the court was required to consider the opinion of the Government under Section 4(1)(a) of the Electricity Act, 1910. It was observed that there was nothing in the language of the Sub-section or in the subject matter to which it relates upon which to found the suggestion that the opinion of the Government is to be subject to objective tests. In terms the relevant matter is the opinion of the Government - not the grounds on which the opinion is based. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion.

47. Undoubtedly these principles laid down by the courts would guide the consideration by the Central Government in exercise of its discretion under Section 399(4). These principles would also guide examination of a challenge to the exercise of discretion and formation of opinion by an authority as well. Thus, once the circumstances statutorily provided are shown to exist, then the opinion of the Central Government that it was just and equitable to grant the authorisation there under, is not open to challenge.

If this be the position in law, then certainly it cannot be held that the company in respect of which the permission has been sought has a right to challenge the circumstances asserted by the applicant in support of its application under Section 399(4) before the Central Government.

48. In the light of the foregoing discussion, I have no hesitation in holding that the consideration of the Central Government of the application under Section 399(4) is subjective. So long as there is some material to enable it to be satisfied that the circumstances envisaged under Section 399(4) exist, the order passed by the Central Government would not be justiciable. I am fortified in the view I have taken by the weight of judicial precedents noticed by me hereinabove.

Scope and limits of applicability of principles of natural justice to the consideration by the Central Government of an application under Section 399(4)

49. It becomes necessary now to deal with the contention of learned counsel for the respondent that the judgment of the Division Bench is per incurium on the ground that it had ignored the law laid down by the Apex Court in State of Orissa v. Binapani Dei AIR 1967 SC 1268 and A.K. Kraipak and Ors. v. Union of India and Ors. . It has been contended that in view of the law laid down by the Apex Court in these judgments, the Government is bound to comply with the principles of natural justice even when it is considering an application made under Section 399 of the Companies Act, 1956.

So far as the pronouncement of the Apex Court in AIR 1967 SC 1268 State of Orissa v. Dr. (Miss) Binapani Dei and Ors. was concerned, the case related to an inquiry conducted by the Government of Orissa on the issue relating to the correctness of the date of birth of the respondent who was employed with it. The State of Orissa conducted the enquiry but the report of the enquiry was not made available to the respondent and an order of compulsory retirement based on such enquiry was passed. This order of compulsory retirement was challenged by the petitioner on the ground that the same was arbitrary and malafide and violative of the principles of natural justice inasmuch as the

order of retirement amounted to a punishment involving consequences such as loss of pay, status and deprivation of service. It was in these circumstances held by the Apex Court that the decision of the state could be based upon the result of an enquiry which is conducted in a manner consonant with the basic concept of justice. As per the Apex Court, an order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fairplay. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is, however, under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defense and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing, applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed: it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

50. Therefore, it is in the nature of the power which is being exercised that the manner of the exercise of the power is to be found. In this case, the order which was impugned worked civil consequences on the respondent and hence it was held that the principles of natural justice had to be abided by.

51. In A.K. Kraipak and Ors. v. UOI and Ors., the court was concerned with a challenge by the petitioners for quashing the notification notifying the list of officers of state forest service for appointment to post in senior and junior service of the service on the ground that the selections which were notified were vitiated by the contravention of the principles of natural justice as the power conferred on the selection board was a quasi judicial power. The court held that dividing line between the administrative power and quasi judicial power was being gradually obliterated. So far as the submission that the selection was in violation of rules of natural justice was concerned, the court held thus:

20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely : (1) no one shall be a judge in his own case (Nemo debet esse judex propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably.

But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. The University of Kerala and Ors. the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.

52. As noticed hereinabove, in the instant case, the legislature has specifically permitted formulation of an opinion and then a subjective decision to be taken. The statutory scheme envisages that while considering an application under Section 397 and 398 of the statute, the Board would be required to comply with the principles of natural justice. The Company Law Board has been empowered with the discretion to evolve its own procedure. So far as consideration of an application under Section 399(4) of the statute is concerned, Rule 13 of the Companies (Central Government) General Rules and Forms, 1956 specifically provides the procedure which is required to be followed.

53. Even in The Chariman, Board of Mining Examination and Chief Inspector of Mines and Anr. v. Ramjee, the Apex Court had observed that general observations relating to principles of natural justice must be tested on the concrete facts of each case and every minuscule violations do not spell illegality. In the totality of circumstances satisfy the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.

54. The petitioner before this Court has approached this Court at the stage when the Government of India vide a communication dated 19th January, 2005 has required it to serve a copy of the petition on the special company and it stated that the matter would be processed thereafter. The petitioner has contended that it was informed that the government would follow principles of natural justice in deciding upon the application filed by them under Section 399(4) of the Companies Act, 1956.

55. Before this Court, Mr. Shakdhar, learned counsel for the respondent has submitted that in the light of the Supreme Court in Dr. Binapani's case and A.K. Kraipak's case (supra), the requirement to comply with the principles of natural justice is essential. The principles governing requirement of compliance principles of natural justice in administration action and judicial function have fallen for consideration in several later judgments of the Apex Court and now are well settled. The Apex Court

has clearly delineated the exceptions to the requirement of exceptions to the principles of natural justice. In view of the submission made on behalf of the respondent, it becomes necessary to examine them in some detail.

In cases of the authority seeking to blacklist a contractor, it has been held by the Apex Court that compliance with the principles of natural justice is a must, even if the rules do not so postulate. It was so held in (1994) Supp. 2 SCC 699 Southern Painters v. Fertilizers and Chemicals Travencore Ltd. This was so because the effect of the order has serious consequences to the contractor.

56. In Shrikrishnadas Tikara v. State Government of Madhya Pradesh and Ors. , the Supreme Court had an occasion to consider a challenge to second notice under the Mineral Concession Rules, 1960, Rule 27 (5) when the mining lease already stood cancelled after failure to comply with such earlier notice. The petitioner had set up a plea of contravention of principles of natural justice. Observing that principles of natural justice cannot be petrified or fitted into rigid moulds, it was held that the petitioner had the opportunity to fully and fairly state his case and was even given a personal hearing pursuant to the second notice and consequently, failure to hear the petitioner personally pursuant to the first notice would not lead to the conclusion that there was failure of justice on account of contravention of principles of natural justice.

57. Even a duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give a fair consideration to the facts and to consider the representations, but, not to disclose to those persons details of information in its possession. Sometimes, a duty to act fairly can also be sustained without providing an opportunity for an oral hearing. It will depend on the nature of interest to be affected, the circumstances in which a power is exercised and the nature of the sanctions involved therein. It was so observed in Erusian Equipment and Chemicals Ltd. v. State of West Bengal and Anr. . The court noticed that since a disability is created by an order of blacklisting, it is indicative of the requirement that the relevant authority is to have an objective satisfaction. Fundamentals of fair play requires that the person concerned should be given an opportunity to represent his case before he is put on a black list.

58. This issue has been elaborated in later judgments wherein the courts have been called upon to consider as to what would constitute adequate opportunity to represent against impugned action.

59. In Union of India v. G.R. Prabhavalkar and Ors., the apex court held that it is not implicit in every decision that there is an obligation on the authority to give personal hearing to the officers concerned in the matter. Principles of natural justice cannot be put in any straitjacket. Their applicability depends upon the context and the facts and circumstances of each case, the objective being to ensure a fair hearing and a fair deal to a person whose rights are going to be affected.

In Ganesh Santa Ram Sirur v. State Bank of India and Anr. the court cited with approval the principles laid down in ECIL v. B. Karunakar, which approach and test should govern all cases where the complaint is not that there was no notice, no opportunity and no hearing but one of not affording a proper hearing, that is adequate or a full hearing or violation of a procedural rules or

requirement governing the enquiry.

As back as in Union of India v. Col. J.N. Sinha, it was held that rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights.

60. It was held by the Supreme Court in A.K. Kripak v. Union of India , that the aim of the rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law, but supplement it. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power.

61. Placing reliance on these principles, in Union of India and Ors. v. Ex-constable Amrik Singh, upon a consideration of the statutory scheme and legislative intent, the Apex Court held that the authority which disposed of a post-confirmation petition under the Border Security Force Act, 1968 and rules framed there under is not a court and every order passed administratively cannot be subjected to the rigors of principles of natural justice.

62. In entitled Sundarjas Kanyalal Bhatija and Ors. v. Collector, Thane, Maharashtra and Ors., the Apex Court had occasion to consider the nature of functions of the government in establishing a corporation under the provisions of Bombay Provincial Municipal Corporation Act, 1949. The court held that this function was neither executive nor administrative. It is a legislative process. No traditional duty is laid on the government in discharge of the statutory duties and that in exercise of the powers to establish a Corporation, the government is not required to comply with the rules of natural justice any more than the legislature itself. This was because the rules of natural justice were not applicable to legislative action, plenary or subordinate, of the government.

63. It is well settled that rules of natural justice are not applicable to legislative action, plenary or subordinate. The procedural requirement of hearing is not implied in the exercise of legislative powers, unless hearing was expressly prescribed.

64. The scope and applicability of the principles of natural justice and the requirement of a hearing in different eventualities have also arisen for consideration before the courts. In James Edward Jeffs v. New Zealand Dairy Production and Marketing Board (1967) 1 AC 551 : (1966) 3 All ER 863, the court made observations of a general nature indicating circumstances when evidence could be recorded and submissions of the parties heard by a person other than the decision making authority.

65. In Chandra Bhavan Boarding and Lodging v. State of Mysore , the Supreme Court found that the procedure adopted by the Government in fixing the minimum wage under Section 5(1) of the Minimum Wages Act, 1948 was not vitiated merely on the ground that the government had failed to constitute a committee under Section 5(1) (a) of the statute. In this case, the court found that reasonable opportunity had been given to all the concerned parties to read their case before the government made the impugned order.

66. In K.L. Tripathi v. State Bank of India , the petitioner complained of prejudice to the principles of natural justice on the ground that he was not given an opportunity to rebut the material gathered in his absence. In this case, the Supreme Court held that no real prejudice had been suffered by the complainant in the circumstances of the case.

67. In Institute of Chartered Accountants of India v. L.K. Ratna and Ors., an issue arose as to whether the Tribunal or the body responsible to take the first determinative decision which has grave adverse effects on the persons against whom it is taken should afford opportunity of hearing to the concerned persons before taking a decision. The fact that such an opportunity had already been afforded to him by a subordinate body, the conclusions of which are not "finding" but is subject to the decision of the parent body and that the statute provided for appeal against that decision, was not sufficient to deny opportunity of hearing before the parent body or Tribunal before taking the decision.

68. There is yet another very pertinent aspect of the matter which requires to be considered. It is necessary to understand and clearly discern as to the real implications and the consequences of the order passed by the Government under Section 399(4). In a case where an order causes serious injury as soon as it is made, which injury is not capable of being entirely erased when the error is corrected on subsequent appeal, the damage can be immediate and far-reaching. In such kind of a case, after the blow suffered by the initial decision, it is difficult to contemplate complete restitution through an appellate decision. Therefore, there is a manifest need to ensure that there is no breach of fundamental procedure in the original proceeding and to avoid treating an appeal as an overall substitute for the original proceeding. It is in proceedings and orders having such consequences that the compliance with principles of natural justice is an absolute must and failure to do so would vitiate the action.

69. Such principles would hold where, for instance, the order by the trial body has the effect of expelling a member from membership of the expelling body. Denial of principles of natural justice by such trial body would have the far-reaching effect if a respected and public trusted professional is prima facie found guilty of misconduct resulting in the penalty of expulsion. The damage which is thus caused to the professional by a decision taken in violation of principles of natural justice would be irreparable after the blow has been suffered on account of the initial decision. There can be no complete restitution through any appellate decision, unlike restitution in the case of a money decree where interest etc. may adequately compensate or cause restitution of the loss suffered.

70. In this behalf, Sir William Wade in his classic treatise "Administrative Law" 5th edition observed at page 487 "in principle there ought to be an observance of natural justice equally at both stages". It was so observed because the erudite author observed that "if natural justice is violated at the first stage, the right of appeal is no so much a true right of appeal as a corrected initial hearing : instead of fair trial followed by appeal, the procedure is reduced to unfair trail followed by fair trial".

Such a view was taken by Megarry, J in Leary v. National Union of Vehicle Builders (1971) Ch 34, 49, wherein it was held by the learned Judge that an unfair trial, though not resulting in the valid expulsion would nevertheless have the effect of depriving the member of his right of appeal when a

valid decision to expel him is subsequently made.

Therefore, it appears that it is the impact and consequences of the initial order as soon as it is passed which would require to be considered to decide as to whether a breach in fundamental procedure in the original proceeding results in manifest injustice or was a curable irregularity.

71. There is yet another consideration where an issue is raised that there is failure of justice on account of violation of principles of natural justice. It has been repeatedly held that a person so asserting must be able to establish a legal right with regard to the claim raised. Thus, where a person did not have the pre-requisite minimum qualifications for appointment to a post resulting in cancellation of his illegal appointment, the Apex Court held that the action was taken swiftly within a short interval and mere continuance of the person on the post to which he was appointed in pursuance of the interim order, would not vitiate the action taken by the employer nor would it entitle the persons to the posts on which they were illegally appointed. It was so held in entitled State of M.P. v. Shyama Pardhi.

72. In this behalf, it would be useful to also notice the observation of the Apex Court in entitled Mohd. Sartaj and Anr. v. State of U.P. and Ors., several judicial pronouncements were noticed and discussed and the court held thus:

12. It is the case of the appellants that once appointed, their services could not have been cancelled, without affording them an opportunity of being heard and giving them a chance to explain their position.

13. In the matter of S.L.Kapoor V.Jagmohan this Court has observed that a separate showing of prejudice caused is not necessary and the non-observance of natural justice is in itself a prejudice caused. The Court has relied upon the decision given in State of Orissa v. Dr. Binapani Dei for the proposition that even if an administrative action involves civil consequences it must observe the rules of natural justice. Mohinder Singh Gill v. Chief Election Commr. has also been cited, as civil consequences undoubtedly cover infraction of not merely property or personal rights but of the civil liberties, material deprivation and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence. The Court has also cited the observation of one of the judges of the House of Lords in Ridge v. Baldwin for the purpose that the administrative body may in a proper case be bound to give a person who is affected by their decision, an opportunity of making representation. But all depends on whether he has some right or interest or some legitimate expectation of which it would not be fair to deprive him. Similarly, the Privy Council's decision in Alfred Thangarajah Jaurayappah v. W.J. Fernado has also been referred to show that there are three matters which should always be borne in mind while considering whether the principle audi alteram partem should be complied with or not. First, what is the nature of property, the office held, the status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when the right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly

be determined.

14. However, in S.L.Kapoor v. Jagmohan this Court has also observed as under: (SCC p. 395, para 24) In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference it natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will comes from a person who has denied justice that he person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only oen conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs.

15. In the matter of Shrawan Kumar Jha v. State of Bihar the appellants were appointed as Assistant Teachers and before joining they were supposed to get their certificates and other qualifications verified form the authorities and as per the appellants, they had joined their respective schools. By an order dated 2-11-1988, the Deputy Development Commissioner cancelled the appointment of the appellants because, according to him the District Superintendent of Education had no authority to make the appointments and the conditions which were part of the appointment order were not complied with. The Court set aside the order of cancellation holding that it is settled that no order to the detriment of the appellants could be passed without complying with the rules of natural justice.

16. Shrawn Kumar Jha was distinguished in State of M.P. v. Shyama Pardhi. In this case, the persons not possessing the prerequisite qualifications prescribed by the statutory rules, were wrongly selected. They have completed their training and were appointed as Auxiliary Nurse-cum-Midwife. Their services were terminated without giving any prior notice. Holding it to be illegal, the termination was challenged before the service Tribunal and the order of termination was set aside as the principle of natural justice was not followed. This Court had found in an appeal that the original petitioners did not possess the prerequisite qualifications viz. 10 +2 with Physics, Chemistry and Biology as subjects. The rules specifically provided that qualification as condition for appointment to the post. Since the prescribed qualifications had not been satisfied, the appointment and training was per se illegal and, therefore, the Tribunal was not right in directing their reinstatement. Shrawan Kumar case was distinguished on the ground that they were not disqualified to be appointed but they had not undergone the training and the appointment was set aside on the ground of want of training. The Court has drawn a distinction between the initial disqualification for appointment and irregularity in the appointment and subsequent training for application of the principle of natural justice.

17. In M.C. Mehta v. Union of India this Court has laid down that there can be a certain situation in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution. For example, where no prejudice is caused to the person concerned, interference under Article 226 is not necessary.

18. In Aligarh Muslim University v. Mansoor Ali Khan this Court considered the question whether on the facts of the case the employee can invoke the principle of natural justice and whether it is a

case where even if notice has been given, result would not have been different and whether it could be said that no prejudice was caused to him, if on the admitted or proved facts grant of an opportunity would not have made any difference. The Court referred to the decisions rendered in M.C. Mehta v. Union of India, the exceptions laid down in S.L. Kapoor case and K.L. Tripathi v. State Bank of India where it has been laid down that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) has to be proved. The Court has also placed reliance in the matter of State Bank of Patiala v. S.K. Sharma and Rajendra Singh v. State of M.P. where the principle has been laid down that there must have been some real prejudice to the complainant. There is no such thing as merely technical infringement of natural justice. The Court has approved this principle and examined the case of the employee in that light. In Viveka Nand Sethi v. Chairman, J and K Bank Ltd. this Court has held that the principles of natural justice are required to be complied with having regard to the fact situation obtaining therein. It cannot be put in a straitjacket formula. It cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case. The principle of natural justice, it is trite, is no unruly horse. When facts are admitted, an enquiry would be an empty formality. Even the principle of estoppel will apply. In another recent judgment in State of U.P. v. Neeraj Awasthi while considering the argument that the principle of natural justice had been ignored before terminating the service of the employees and therefore, the order terminating the service of the employees was bad in law, this Court has considered the principles of natural justice and the extent and the circumstances in which they are attracted. This Court has found in Neeraj Awasthi case that if the services of the workmen are governed by the U.P. Industrial Disputes Act, they are protected under that law. Rules 42 and 43 of the U.P. Industrial Disputes Rules lay down that before effecting any retrenchment the employees concerned would be entitled to notice of one month or in lieu thereof pay for one month and 15 days' wages for each completed year of service by way of compensation. If retrenchment is to be effected under the Industrial Disputes Act, the question of complying with the principles of natural justice would not arise. The principles of natural justice would be attracted only when the services of some persons are terminated by way of a punitive measure or thereby a stigma is attached. Applying this principle, it could very well be seen that discontinuation of the service of the appellants in the present case was not as a punitive measure but they were discontinued for the reason that they were not qualified and did not possess the requisite qualifications for appointment.

Upon consideration of the case of the petitioners, it was held that no prejudice had been caused by the appellants in similar circumstances by not serving notice for the date of hearing before the order of cancellation of appointment was made in this case.

73. It would also be useful to notice the observations of the apex court wherein the court was called upon to consider the question as to whether the failure to observe the principles of natural justice would mandate issuance of a writ in every case. In this behalf, in S.L. Kapoor v. Jagmohan and Ors., the court held thus:

17. Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its

writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary.

74. The issue raised in the instant case can be looked at yet another angle. If it were to be held that the consideration by the Central Government is akin to an interlocutory stage in the entire proceeding, then is it enough if the company is required to answer the material against him after a preliminary consideration. A similar issue arose for consideration before the Apex Court in entitled Liberty Oil Mills and Ors. v. Union of India and Ors. wherein the court considered the applicable law in detail. The court noticed several judicial pronouncements of different courts. The issue raised before the court was noticed thus:

15. xxx Has a show- cause notice to be issued first, then followed by an investigation and finally concluded by yet another show-cause notice? Or is it enough if a show-cause notice is issued after the investigation is concluded and the person concerned is tasked to explain the evidence gathered against him? When may investigation be said to be have commenced? Should investigation be necessarily preceded by a show-cause notice? We do not think that the Central Government or the Chief Controller is bound to follow any rigid, hide-bound, pre-determined procedure. The procedure any be different in each case any may be determined by the facts, circumstances and exigencies of each case. The authority may design its own procedure to suit the requirements of an individual case. The procedure must be fair and not so designed as to defeat well-known principles of justice and thus deny justice. That is all. If the procedure is fair it matter not whether the investigation is preceded, interjected or succeeded by a show-cause notice. The word ' Investigation' is not defined but in the context it means no more than the process of collection of evidence or the gathering of material. It is not necessary that it should commence with the communication of an accusation to the person whose affairs are to be investigated. That may follow later. xxxx We do not think that it is permissible to interpret any statutory instrument so as to exclude natural justice, unless the language of the instrument leaves no option to the Court. Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of parties. It may be that the opportunity to be heard may not be pre- decisional; It may necessarily have to be post-decisional where the danger to be aerated or the act to be prevented is imminent or where the action to be taken can brook no delay. If an area is devastated by flood, one cannot wait to issue show-cause notices for requisitioning vehicles to evacuate population. If there is an outbreak of an epidemic, we presume one does not have to issue show-cause notices to requisition beds in hospitals, public or private. In such situations, it may be enough to issue post-decisional notices providing for an opportunity. It may not even be necessary in some situations to issue such notices, but it would be sufficient but obligatory to consider any representation that may be made by the aggrieved person and that would satisfy the requirements of procedural fairness and natural justice. There can be no tape-measure of the extent of natural justice. If may and indeed it must vary from statute to statute, situation to situation and case to case. Again, it is necessary to say that pre-decisional natural justice is not usually contemplated when the decisions taken are of an interim nature pending investigation or enquiry. Ad interim orders may always be made ex parte and such orders may themselves provide for an opportunity to the aggrieved party to be heard at a later stage. Even if the interim orders do

not make provision for such an opportunity, an aggrieved party has, nevertheless, always the right to make an appropriate representation seeking a review of the order and asking the authority to rescind or modify the order. The principles of natural justice would be satisfied if the aggrieved party is given an opportunity at his request. There is no violation of a principles of natural justice if an ex parte ad interim order is made unless of course, the statute itself provides for a hearing before the order is made as in Clause 8-A. Natural justice will be violated if the authority refuses to consider the request of the aggrieved party for an opportunity to make his representation against the ex parte ad interim orders.

75. The court considered the law laid in several judicial precedents including Queen v. Randolph et. al. 56 DLR (2d) 283; Commissioner of Police v. Tanos 98 CLR 383; Lewis v. Heffer (1978) 3 All ER 354 (CA); Furnell v. Whangarei High Schools Board 1973 AC 660 : (1973) 1 All ER 400 : (1973) 2 WLR 92 (PC) and Chingleput Bottlers v. Majestic Bottling Co. .

76. The maxim audi alteram partem has reference to the making of decisions affecting rights of parties which are final in nature [Re : Queen v. Randolph etc at 56 DLR(2nd) 283 of the Supreme Court of Canada].

In Furnell v. Whangarei High Schools Board 1973 AC 660 the Privy Council upheld the suspension of a teacher pending determination of charges against him. It was held that suspension in such a case is merely done in the interest of the public payments and of the public and a situation has arisen in which something must be done at once.

However in Lewis v. Heffer (1978) 3 All ER 354 (CA), Lord Denning MR distinguished the observations of Megarry J in John v. Rees (1969) 2 All ER 274 to point out the difference between suspension which is inflicted by way of punishment, as for instance when a member of the Bar is suspended from practice for six months when principles of audi alteram partem would mandatorily apply. But they would not apply to suspensions made pending enquiries as for irregularities allegedly done by an employee in a Government department or in a business house. In the later case, the suspension is effected only by way of good administration.

The Apex Court also considered the decision rendered by the High Court of Australia (Dixon C. J and Webb, J) in the Commissioner of Police v. Tanos 98 CLR 383. The court was considering the question whether an ex parte order of closure of a Disorderly House may be made. It was held that it is in a broad sense a procedural matter and while the general principle must prevail, it is apparent that exceptional cases may be imagined in which because of some special hazard or cause of urgency an immediate declaration is demanded.

77. Upon noticing the principles laid down in the aforenoticed cases, the Apex Court in Liberty Oil Mills and Ors. (supra) held thus:

20. We have referred to these four cases only to illustrate how ex parte interim orders may be made pending a final adjudication. We, however, take care to say that we do not mean to suggest that natural justice is not attracted when orders of suspension or like orders of an interim nature are

made. Some orders of that nature, intended to prevent further mischief of one kind, may themselves be productive of greater mischief of another kind. An interim order of stay or suspension which has the effect of preventing a person, however temporarily, say, from pursuing his profession or life of business, may have substantial, serious and even disastrous consequences to him and may expose him to grave risk and hazard. Therefore, we say that there must be observed some modicum of residual, core natural justice, sufficient to enable the affected person to make an adequate representation. (These considerations may not, however, apply to cases of liquor licensing which involve the grant of a privilege and are not a matter of right : See Chingleput Bottlers v. Majestic Bottling Company . That may be and in some cases, it can only be after an initial ex parte interim order is made.

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26. We have held that action under Clause 8-B is of an interim nature and it may be ex parte, in which case the affected party may make a suitable representation bringing out all the outweighing circumstance in his favor. That is the real remedy of the party. Courts do not enter the picture at that stage unless the action is mala fide or patently without jurisdiction. The action will be patently without jurisdiction if it is not based on any relevant material whatsoever. If the authority declines to consider the representation, or if the authority after consideration of the representation eschews relevant consideration and prefers to act on irrelevant considerations or from oblique motive, or the decision is such as no reasonable man properly directed on the law would arrive at on the material facts it will be open to the party to seek the intervention of the court at that stage. Our attention was drawn to the well known cases of Barium Chemicals Ltd. v. Company Law Board , Rohtas Industries Ltd. v. S.D. Agarwal , M.A. Rasheed v. State of Kerala , and the recent cases of Shalini Soni v. Union of India , and CIT v. Mahindra and Mahindra Ltd. and we have considered all of them in arriving at our conclusion.

78. A question arose before the Apex Court as to whether the power exercised by the Chief Justice of India or by the Chief Justice of the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 is a judicial power or exercise of merely administrative power. The reasons and findings of the Apex Court in this case have material bearing on the questions raised before this Court as well. In the Constitution Bench pronouncement reported at (2005) 8 SCC 618 SC entitled S.B.P. and Co. v. Patel Engineering Limited, it was held that the Chief Justice or his designate while functioning under Section 11(6) of the Arbitration and Conciliation Act, 1996 is bound to decide whether he has jurisdiction; decide also on the validity of an arbitration agreement; whether the person requesting the arbitration is a party to the arbitration agreement; whether there is a live claim/dispute subsisting capable of being arbitrated upon and other such like issues. Holding that this power is conferred not on an administrative authority, but on the highest judicial authority in the country or in the state and that the power under Section 11 is derived from statute which itself describes the conditions that should exist for the excise of that power, it was held that in the process of exercise of such power, obviously the parties would have the right of being heard. This was so because the existence of the conditions for the exercise of the power are found on accepting or overruling the contentions of one of the parties, it necessarily amounts to an order, judicial in nature, having attained finality not subject to any available judicial challenge as envisaged by the

Arbitration and Conciliation Act, 1996 or any other statute or the Constitution of India. It was held that it was the nature of the power that is relevant and not the mode of exercise in determination of whether the function performed requires a judicial adjudication or is merely administration. In this context, the court observed thus:

9. Normally, any tribunal or authority conferred with a power to act under a statute, has the jurisdiction to satisfy itself that the conditions for the exercise of that power existed and that the case calls for the exercise of that power. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts, is not generally final, unless it is made so by the Act constituting the tribunal. Here, Sub-section (7) of Section 11 has given a finality to the decisions taken by the Chief Justice or any person or institution designated by him in respect of matters falling under Sub-sections (4), (5) and (6) of Section 11. Once a statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty exist. Therefore, unaided by authorities and going by general principles, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfillled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final.

10. The very scheme, if it involves an adjudicatory process, restricts the power of the Chief Justice to designate, by excluding the designation of a non-judicial institution or a non-judicial authortity to perform the functions. For, under our dispensation, no judicial or quasi-judicial decision can be rendered by an institution if it is not a judicial authority, court or a quasi-judicial tribunal. This aspect is dealt with later while dealing with the right to designate under Section 11(6) and the scope of that designation.

11. The appointment of an arbitrator against the opposition of one of the parties on the ground that the Chief Justice had no jurisdiction or on the ground that there was no arbitration agreement, or on the ground that there was no dispute subsisting which was capable of being arbitrated upon or that the conditions for exercise of power under Section 11(6) of the Act do not exist or that the qualification contemplated for the arbitrator by the parties cannot be ignored and has to be borne in mind, are all adjudications which affect the rights of parties. It cannot be said that when the Chief Justice decides that he has jurisdiction to proceed with the matter, that there is an arbitration agreement and that one of the parties to it has failed to act according to the procedure agreed upon, he is not adjudicating on the rights of the party which is raising these objections. The duty to decide the preliminary facts enabling the exercise of jurisdiction or power, gets all the more emphasis, when Sub-section (7) designates the order under Sub-sections (4), (5) or (6) a "decision" and makes

the decision of the Chief Justice final on the matters referred to in that sub-section. Thus, going by the general principles of law and the scheme of Section 11, it is difficult to call the order of the Chief justice merely an administrative order and to say that the opposite side need not even be heard before the Chief Justice exercises his power of appointing an arbitrator. Even otherwise, when a statute confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise, has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist.

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36. Going by the above test it is seen that at least in the matter of deciding his own jurisdiction and in the matter of deciding on the existence of an arbitration agreement, the Chief Justice when confronted with two points of view presented by the rival parties, is called upon to decide between them and the decision vitally affects the rights of the parties in that, either the claim for appointing an Arbitral Tribunal leading to an award is denied to a entertaining a claim is facilitated by the Chief Justice. In this context, it is not possible to say that the Chief Justice is merely exercising an administrative function when called upon to appoint an arbitrator and that he need not even issue notice to the opposite side before appointing an arbitrator.

37. It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an arbitrator or an Arbitral Tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the party concerned had certified that he had no further claims against the other contracting party. In other words, there have been occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuances of notice. Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the arbitration clause concerned at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by Ridge v. Baldwin (1963) 2 All ER 66 are well known. Therefore, to the extent, Konkan Rly.Corpn.Ltd. v. Rani Construction (P) Ltd. states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be not sustainable.

The clear principle laid down by the Apex court thus is that if rights of the parties are being finally effected, then even if such decision is being taken in performance of administrative functions, there must be compliance of principles of natural justice. This would not be so if, as in present case, the rights of the parties are not finally affected.

79. The respondents have urged that principles of natural justices would have to be complied with in view of the law laid down by the Apex Court in A.K. Kraipak (supra) or in Dr. Binapani's case (supra). It is trite that no judgment can be read or applied without reference to the factual context in which it was rendered. In this behalf, it would be useful to advert to the words of the Apex Court which indubitably make relevant reading. The following passages of the Apex Court in Haryana Financial Corporation and Anr. v. M/s Jagdamba Oil Mills and Anr. are of irreplaceable and irrefutable topicability:

19. Courts should not place reliance on decisions without discussing as to how the factual sitaution fits in with the fact situation jof the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton 1951 AC 737 at P. 761, Lord Mac Dermot observed:

The matter cannot, of course, be settled merely be treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.

In Home Office v. Dorset Yacht Co. 1970 (2) All ER 294 Lord Reid said, "Lord Atkin's speech...is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed:

One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament.

And, in Herrington v. British Railways Board (1972) 2 WLR 537 Lord Morris said:

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

20. The following words of Lord Denning in the matter of applying precedents have become locus classicks:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line as case falls, the broad resemblance to another case is not at all decisive.

xxx xxx xxx Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.

80. From the above discussion, it is apparent that the absolute proposition urged on behalf of the respondent that principles of natural justice would have to apply in every case where a decision was to be taken by an authority was not laid down by the Apex Court in either A.K. Kraipak (supra) or in Dr.(Miss) Binapani Dei (supra). The parameters of discretion and requirement of compliance of the principles of natural justice have been laid down in the aforenoticed binding judicial precedents. In the Board of Mining Examination and Chief Inspector of Mines and Anr. v. Ramjee , the Supreme Court had warned the courts how over judicialization can be subversive of the justice of law. This note of caution would clearly apply to the instant case. In view of the above, the contentions of the respondent that the judgment of the Division Bench in Shri Krishna Tiles and Potteries P. Ltd. v. Company Law Board and Ors. is per incurium for the reason that it has ignored principles laid down by the Apex Court in A.K. Kraipak and Dr. (Miss) Binapani Dei (supra) has to be rejected. It has already been noticed hereinabove that while granting the permission under Section 399 (4), the Central Government merely removes the prohibition which would obstruct an opportunity to the members of a company from making a complaint against the company with regard to matters set out in Section 397 and 398 of the Companies Act, 1956. There is no adjudication on the merits of the case or of the dispute.

So far as the jurisdiction of the Government under Section 399 is concerned, there is no finality to its order. There is also no adjudication nor is there any binding decision effecting rights of any party rendered by the Government on the matters raised by the petitioner seeking leave to agitate the matter before the Company Law Board. Therefore, it cannot at all be contended that the rights of the other side are in any manner impinged or effected. The adjudication has to be undertaken by the Company Law Board which issues notices to the other side and grants full opportunity to it to place its defense and its side of the case before a decision effecting rights of the parties is taken. The company would have the right of being heard before adjudication is completed and a view taken by the Company Law Board. No issue of jurisdiction even arises for consideration before the Central Government while considering an application under Section 399(4) of the Companies Act.

81. In the instant case undoubtedly, the exercise of the discretion 'by the government' does not impact the rights of the company in as much as there is no decision on the contentions of the petitioner or the person against whom the initiation of the proceeding has been sought.

82. The consequence of an order under Section 399(4) granting the request of a member is to permit him to bring a petition under Section 397 and 398. It merely removes the prohibition contained under Section 399(1) without anything further. There is no adjudication on the merits of the allegations made. The company against whom the allegations are made would have ample opportunity to repudiate the same in the proceedings before the Company Law Board.

83. In the light of the afore-stated well settled legal principles, therefore, the scope of inquiry before the central government in Section 399 (4) is narrow. It is exercising executive or administrative powers and does not act in a judicial or a quasi judicial capacity. It is not a main proceeding but a subordinate proceeding.

The scope of consideration has to be found in the object and reasons for incorporating Section 399 (1) and Section 399 (4). The government is required to have only a preliminary look at the application proposed to be made by the member under Section 397 and 398 with a view to see whether the application can be said to be a frivolous one by a disgruntled member. The petitioners are required to have provided all the information required to be furnished under Rule 13 afore-noticed. Very little scrutiny is required to know whether the same is a frivolous application. An application without merits would not necessarily be frivolous and the scrutiny by the Central Government does not involve any finding about the merits of the case.

It has been held by the Division Bench in the Krishna Tiles and Potteries Pvt. Ltd. case (supra) that it would be desirable that the Central Government should not be required to give reasons for grant of the authorization under Section 399(4) for such reasons would needlessly prejudge the merits of the case. It would be rather in the interest of the company or the management of the company that no observations on merits should be made by the government at that stage.

84. I am in respectful agreement with the reasoning given by the learned Single Judge in Krishna Tiles and Potteries (supra) and I am bound by the authoritative pronouncement by the Division Bench in the appeal which was filed assailing the judgment of the learned Single Judge.

As noticed hereinabove, there is nothing which effects the reasoning or the principles of law laid down by the Bench in the Krishna Tiles and Potteries case (supra) which could make any material difference to the conclusions which I have arrived at.

In the light of the detailed discussion hereinabove, I have no hesitation in rejecting the submission on behalf of the respondent that the judgments of the Division Bench and the Single Bench are per incurium for the reason that they have ignored the law laid down by the Apex Court in A.K. Kraipak (supra) or in Dr. Binapani's case (supra).

85. The petitioners have further placed before this Court that apprehending interpolation in the lists of members and other actions which would have impacted the proposed petition of the petitioners, they have been constrained to file a composite petition under Section 397, 398, 402 as well as Section 111 (4) of the Companies Act, 1956 being Company petition No. 21/2005. Vide an order passed on 16th March, 2005, the Company Law Board directed the company officers, Mumbai to

authenticate the rights of members/owners of the company immediately.

Along with the written submissions filed by the petitioners on 6th February, 2005, a report dated 4th April, 2005 filed by the branch officer pursuant to the afore-stated affairs has been placed on record wherein it is stated that the company is not maintaining any register of members or proper records of ownership of copyright and no proper record has been maintained of the company in this behalf. Further that the company has not given any membership numbers to the members.

86. The application of the petitioner under Section 399(4) is yet to be decided by the respondent.

Accordingly the writ petition is allowed. In view of the position in law discussed hereinabove, there can be no requirement of the petitioner's to serve a copy upon the company concerned and as such the direction made in the letter dated 19th January, 2005 is hereby set aside and quashed.

87. Consequently, the Central Government is required to consider and make appropriate orders on the application of the petitioners under Section 399 (4) of the Companies Act, 1956 within a period of eight weeks from today without joining the special company in its consideration and after compliance of Rule 13 of the Companies (Central Government) General Rules and Firms, 1956 and any other statutory provision, rule or regulation. Orders passed in this behalf shall be communicated to the petitioner within the aforestated period.

This writ petition is allowed in above terms. There shall be no order as to costs.