

# Shareholders' Democracy & Corporate Disputes

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## SHAREHOLDERS' DEMOCRACY:

The concept of shareholders' democracy in the present day corporate world denotes the **shareholders' supremacy** in the governance of the business and affairs of corporate sector either directly or through their elected representatives. But a large and sustained investor participation will depend much on the presence and effectiveness of regulatory framework which aims to ensure overall fairness to investors and bring about a high degree of confidence in the market.

Democracy means the rule of people, by people and for people. In that context the shareholders democracy means the **rule of shareholders, by the shareholders', and for the shareholders'** in the corporate enterprise, to which the shareholders belong.

It is a widely acclaimed fact that in any corporate enterprise the shareholders are the owners. But in fact they are seldom able to exercise any ownership rights except to sometimes cast votes at Annual General Meetings. The members therefore, are only passive investors rather than active participants in the governance of the corporate process. Still the directors, as per law, are answerable to the shareholders.

**Under the Companies Act the powers have been divided between 2 segments:**

- 1. The Board of Directors and**
- 2. The other is of shareholders.**

U/s 179 of the Companies Act a general power has been conferred on the Board of directors. Board of directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorised to exercise and do. **Proviso** to this Sec restricts the power of the BOD to do things which are specifically required to be done by shareholders in the General Meetings under the provisions of Companies Act or MOA or AOA.

**Thus the Companies Act has tried to demarcate the area of control of directors as well as that of shareholders.**

## Challenges in shareholder's democracy:

Despite the powerful weapons handed over to the shareholders by the Companies Act, the shareholders have not been able to use them and most of the provisions **remain dead provisions**. Consequently, the BOD of a large number of companies are elected only by a few shareholders who attend the Annual General Meetings and those who can muster sufficient number of proxies and can demonstrate their voting power. This is because, most of the shareholders **do not have enough time** to spare from their busy schedules to concern themselves with the affairs of the company in which they have invested.

**Government Companies are an exception.** In Government Companies all the directors are appointed on the advice of the Government by the President of India or the Governor of concerned State. Hence, theoretically it can perhaps be said that the **shareholders democracy is absolute** in such companies.

For achieving the shareholders' democracy, the shareholders have to unite and organise themselves on national, state and district levels and **get their associations registered** under the Societies Registration Act or any other applicable statute so that their voice is heard and they can assert themselves and safeguard the interests of their members.

### **MAJORITY POWERS AND MINORITY RIGHTS:**

A company being an artificial person with no physical existence, functions through the instrumentality of the Board of directors who is guided by the wishes of the majority. According to **Sec 47** of the Companies Act, 2013, every member of a company, which is limited by shares, holding any equity shares shall have a right to vote in respect of such capital on every resolution placed before the company. **Member's right to vote is recognised as right of property.**

#### CASE LAW

##### **[North-West Transportation Co. v. Beatty]**

The resolution of a majority of shareholders, passed at a duly convened and held general meeting, upon any question with which the company is legally competent to deal, is *binding upon the minority* and consequently upon the company.

Thus, the majority of the members enjoy the supreme authority to exercise the powers of the company and generally to control its affairs.

#### **But this is subject to 2 very important limitations**

1. Powers of the majority of members is *subject to the provisions of the Company's MOA & AOA*. A company cannot legally authorise or ratify any act which being outside the ambit of the memorandum, is ultra vires of the company **[Ashbury Rly. Carriage and Iron Co. v. Riche]**
2. The resolution of a majority *must not be inconsistent with the provisions of the Act or any other statute, or constitute a fraud on minority* depriving it of its legitimate rights.

### **THE PRINCIPLE OF NON-INTERFERENCE (Rule in Foss v. Harbottle):**

The rule provides that when majority does anything in the exercise of powers of internal administration, the court will not usually intervene, at the instance of the shareholders in the matters of internal administration by directors, so long they act within the powers conferred on them under the articles.

Basic principle of non-interference with internal matters of administration of company was laid down by court in the celebrated case of **FOSS v/s HARBOTTLE**. It provides that no action can be brought by a member against directors in respect of a wrong alleged to be committed to a company. The company(i.e. majority) itself is the proper party of such an action.

CASELAW  
**FOSS v/s HARBOTTLE**

**INTRODUCTION:** Two shareholders, Foss and Turton brought an action on behalf of themselves and all other shareholders against the directors and solicitor of the company.

**ALLEGATIONS:** It was alleged that by their concerted and illegal transactions they had caused the company's property to be lost to the company. It was also alleged that there was no qualified board.

**DAMAGES CLAIMED:** plaintiffs claimed damages to be paid by defendants to the company.

**VERDICT:** It was held by the court that the action could not be brought by the minority shareholders. **The company (i.e. the majority) is the proper plaintiff** for wrong done to the company, so the majority of members are competent to decide whether to commence proceedings against the directors.

Same was held by SUPREME COURT in the case of *Rajahmundry Electric Supply Co. v/s Nageshwara Rao*.

**From the above it follows then that a company being a separate legal person from the members who compose it, the company is the proper person to bring an action.**

**Justification cation and Advantages of the Rule in Foss v. Harbottle:**

The justification of this rule is that **WILL OF THE MAJORITY SHALL PREVAIL**. On becoming member of the company, a shareholder agrees to submit to the will of the majority. Therefore rule encourages the right of the majority to decide how company's affairs shall be conducted.

**The main advantages of the rule are follows:**

- Recognition of the separate legal personality of company.
- Need to preserve right of majority to decide.
- Multiplicity of futile suits avoided.
- Litigation at suit of a minority futile if majority does not wish it.

**Application of Foss v. Harbottle Rule in Indian context (an exception):**

In the case of *ICICI v/s Parasrampuriah synthetic LTD*. Delhi H.C. held that, Indian corporate sector does not involve a large number of small investors whereas it is predominantly funded by FIs (here FIs were considered as minority).

Though they hold only small % of shares, it is these FIs which have provided finance for company's existence. Hence automatic application of rule of FOSS v/s HARBOTTLE to the Indian corporate realities would be improper.

## EXCEPTIONS TO THE RULE IN FOSS V. HARBOTTLE:

The rule of supremacy of the majority is subject to certain **exceptions** and thus, minority shareholders are not left helpless, but they are protected. The cases in which the majority rule does not prevail are commonly known as exceptions to the rule in Foss v. Harbottle and are available to the minority. In all these cases minority member may sue.

<b>Ultra Vires Acts</b>	Where the directors representing the majority of shareholders perform an illegal or ultra vires act for the company, an individual shareholder has right to bring an action. The majority of shareholders have no right to confirm an illegal or ultra vires transaction of the company.
<b>Fraud on Minority</b>	Where an act done by the majority amounts to a fraud on the minority; an action can be brought by an individual shareholder.
<b>Wrongdoers in Control</b>	If the wrongdoers are in control of the company, the minority shareholders' representative action for fraud on the minority will be entertained by the court. The reason for it is that if the minority shareholders are denied the right of action, their grievances in such case would never reach the court, for the wrongdoers themselves, being in control, will never allow the company to sue.
<b>Resolution requiring Special Majority but is passed by a simple majority</b>	A shareholder can sue if an act requires a special majority but is passed by a simple majority. An individual shareholder has the right of action to restrain the company from acting on a special resolution to which the insufficient notice is served.
<b>Personal Actions</b>	Individual membership rights cannot be invaded by the majority of shareholders. He is entitled to all the rights and privileges appertaining to his status as a member. An individual shareholder is entitled to enforce his individual rights against the company.
<b>Breach of Duty</b>	The minority shareholder may bring an action against the company, where although there is no fraud, there is a breach of duty by directors and majority shareholders to the detriment of the company.
<b>Prevention of Oppression and Mismanagement</b>	The minority shareholders are empowered to bring action with a view to preventing the majority from oppression and mismanagement. These are the statutory rights of the minority shareholders. [sec 241 to sec 246 of co. act 2013]

*The exceptions to the rule in Foss v. Harbottle are not limited to those covered above. Further exceptions may be admitted where the rules of justice require that an exception to the rule should be made.*

### Meaning of Oppression:

The words “oppression” and “mismanagement” are not defined in the Act. The meaning of these words for the purpose of Company Law should be used in a broad generic sense and not in any strict literal sense.

“oppression” as explained by Lord Cooper in the Scottish case of *Elder v. Elder & Western Ltd.* is as under :

Conduct complained of should at the lowest →involve visible departure from→STANDARDS OF FAIR DEALING→on which every shareholder is entitled to rely.

#### CASE LAW

##### *[Hindustan Co-operative Insurance Society Ltd.]*

Life insurance business of a company was acquired in 1956 by the LIC of India on payment of compensation. The directors, who had the majority voting power, **refused to distribute** this amount among shareholders, rather they **passed a special resolution** changing the objects of the company to utilise the compensation money for the new objects. This was held to be an “Oppression”. The court observed: “something done by majority forcing it on unwilling minority may be in some circumstances be called oppression.

### Other Important Points:

- ✚ Minor acts of mismanagement, however, are not to be regarded as oppression. As far as possible, shareholders should try to resolve their differences by mutual readjustment. Moreover, the courts will not allow these special remedies to become a vexatious source of litigation. *[Lalita Rajya Lakshmi v. Indian Motor Co.]*
- ✚ A member can complain of oppression only in his capacity as a member and not in his capacity as director or creditor. *[In Bellador Silk Ltd.]*
- ✚ In an appropriate case, if the court is satisfied about the act of oppression or mismanagement, relief can be granted even if the application is made by a majority, who have been rendered completely ineffective by the wrongful acts of a minority group. *[Calcutta High Court in In Re. Sindhri Iron Foundry Ltd.]*
- ✚ Oppression must be a continuous process. This is suggested by the words, ‘are being conducted in a manner...’ used in Sec 241. Hence isolated acts of oppression or mismanagement will not give rise to an action. In *Shanti Pd. Jain’s Case*, the court said:... “events have to be considered not in isolation but as a part of a consecutive story.”
- ✚ However in *Tea Brokers P. Ltd. v. Hemendra Prosad Barooah* Calcutta High Court observed that: “an act may be even a single act done on one particular occasion if the effect of such an act will be of a **continuing nature** and the member concerned is deprived of his rights and privilege for all time to come in future.”

- ✚ Past acts of oppression will not entitle a plaintiff to seek the remedy u/s 241.  
*[Thakur Prem Singh v. Thakur Hotel (Simla) Co. (P) Ltd]*

### **Application to Tribunal for Relief in Cases of Oppression [Sec 241]:**

1. any member of the company may apply to the Tribunal, provided such member has a right to apply u/s 244, for an order under this Chapter, if he who complains that:
  - a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or
  - b) the material change, has taken place in the management or control of the company, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members.
2. Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

### **Right to members to apply [Sec 244]:**

Following members of a company shall have the right to apply u/s 241, namely:

- a) in the case of a company **having a share capital**, not less than **100 members** of the company **OR not less than 1/10<sup>th</sup>** of the total number of its members, whichever is less, or any member or members holding not less than **1/10<sup>th</sup>** of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;
- b) in the case of a company not having a share capital, not less than **1/5<sup>th</sup>** of the total number of its members:

Provided that the Tribunal may, on an application made to it in this behalf, **waive all or any** of the specified requirements so as to enable the members to apply u/s 241.

### **Powers of Tribunal [Sec 242]:**

1. Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, if it is of the opinion—
  - a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; 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 wound up.
2. Without prejudice to the generality of the powers under sub-Sec (1) an order under that sub-Sec may provide for –
  - ✚ the regulation of conduct of affairs of the company in future

- ✚ purchase of shares or interests of any members of the company by other members thereof or by the company and the **consequent** reduction of its share capital
- ✚ restrictions on the transfer or allotment of the shares of the company
- ✚ the termination, setting aside or modification, of any agreement between the company and the managing director, any other director or manager
- ✚ the termination, setting aside or modification of any agreement between the company and any person other than those referred above
- ✚ removal of the managing director, manager or any of the directors of the company
- ✚ recovery of undue gains made by any managing director, manager or director
- ✚ the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company
- ✚ appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal
- ✚ imposition of costs as may be deemed fit by the Tribunal
- ✚ any other matter for which, in the opinion of the Tribunal, it is just and equitable

### Other important points:

- ✚ Tribunal may, on the application of any party to the proceeding, 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 it to be just and equitable. **[Sec 242(4)]**
- ✚ where an order of the Tribunal u/s 242(1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles. The alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered. **[Sec 242(5) & (6)]**
- ✚ company contravenes the provisions of sub-Sec (5) → Fine **1-25 lakhs**
- ✚ and officer in default → imprisonment up-to **6 months** OR fine **0.25-1 lakh** OR both. **[Sec 242(8)]**

### TRANSFER AND TRANSMISSION OF SECURITIES [SEC 56]:

(1) A company shall not register a transfer of securities of the company, or the interest of a member in the company in the case of a company having no share capital, other than the transfer between persons both of whose names are entered as holders of beneficial interest in the records of a depository, unless a proper **instrument of transfer**, duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company by the transferor or the transferee within **60 days** from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities:

**Provided** that where the instrument of transfer has been lost or the instrument of transfer has not been delivered within the prescribed period, the company may register the transfer on such terms as to **indemnity** as the Board may think fit.

(2) Nothing in sub-Sec (1) shall prejudice the power of the company to register, on receipt of an intimation of **transmission** of any right to securities by operation of law from any person to whom such right has been transmitted.

(3) Where an application is made by the transferor alone and relates to **partly paid shares**, the transfer shall not be registered, unless the company gives the notice of the application, in such manner as may be prescribed, to the transferee and the transferee gives no objection to the transfer **within 2 weeks** from the receipt of notice.

(4) Every company shall, unless prohibited by any provision of law or any order of Court, Tribunal or other authority, deliver the certificates of all securities allotted, transferred or transmitted –

- a) within **2 months** from the date of incorporation, in the case of subscribers to the memorandum;
- b) within **2 months** from the date of allotment, in the case of any allotment of any of its shares;
- c) within **1 month** from the date of receipt by the company of the instrument of transfer or, as the case may be, of the intimation of transmission;
- d) within **6 months** from the date of allotment in the case of any allotment of debenture:

**Provided** that where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.

(5) The transfer of any security or other interest of a deceased person in a company made by his legal representative shall, even if the legal representative is not a holder thereof, be valid as if he had been the holder at the time of the execution of the instrument of transfer.

(6) Where any default is made in complying with the above provisions, the company shall be punishable with fine which shall not be less than Rs. 25,000 but up to Rs. 5,00,000 and every officer of the company who is in default shall be punishable with fine not less than Rs. 10,000 but up to Rs. 1,00,000.

(7) Without prejudice to any liability under the Depositories Act, 1996, where any depository or depository participant, with an intention to defraud a person, has transferred shares, it shall be liable u/s 447.

### **PUNISHMENT FOR PERSONATION OF SHAREHOLDER [SEC 57]:**

If any person deceitfully personates as an owner of any security or interest in a company, or of any share warrant or coupon issued in pursuance of this Act, and thereby obtains or attempts to obtain any such security or interest or any such share warrant or coupon, or receives or attempts to receive any money due to any such

owner, he shall be punishable with imprisonment for a term which shall not be less than **1 year** but which may extend to **3 years** and with fine which shall not be less than Rs. **1 lakh** but which may extend to Rs. **5 lakh**.

### **REFUSAL OF REGISTRATION AND APPEAL AGAINST REFUSAL [SEC 58]:**

1. If a private company limited by shares refuses, whether in pursuance of any power of the company under its articles or otherwise, to register the transfer of, or the transmission by operation of law of the right to, any securities or interest of a member in the company, it shall within **30 days** from the date on which the **instrument of transfer, or the intimation of such transmission**, as the case may be, was delivered to the company, send notice of the refusal to the transferor and the transferee or to the person giving intimation of such transmission, as the case may be, giving reasons for such refusal.
2. The securities or other interest of any member in a public company shall be freely transferable:  
**Provided** that any contract or arrangement between 2 or more persons in respect of transfer of securities shall be enforceable as a contract.
3. The transferee may appeal to the Tribunal against the refusal within **30 days** from the date of receipt of the notice or in case no notice has been sent by the company, within **60 days** from the date on which the instrument of transfer or the intimation of transmission, as the case may be, was delivered to the company.
4. If a public company without sufficient cause refuses to register the transfer of securities within **30 days** from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within **60 days** of such refusal or where no intimation has been received from the company, within **90 days** of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.
5. The Tribunal, while dealing with an appeal, may, after hearing the parties, either dismiss the appeal, or by order –
  - a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within **10 days** of the receipt of the order; or
  - b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.
6. If a person contravenes the order of the Tribunal, he shall be punishable with imprisonment **for at least 1 year** but up to 3 years **and** with fine which shall not be less than Rs. 1 lakh but up to Rs. 5 lakh.

### **PUNISHMENT FOR WRONGFUL WITHHOLDING OF PROPERTY [SEC 452]:**

- (1) If any officer or employee of a company –
  - a) wrongfully obtains possession of any property, including cash of the company; or
  - b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or

directed in the articles and authorised by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof,

be punishable with fine which shall not be less than Rs. **1 lakh** but which may extend to Rs. **5 lakh**.

(2) The Court trying an offence, may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo **imprisonment** up to **2 years**.

### **Class Action Suits**

A class action suit is a lawsuit where **a group of people representing a common interest** may approach the Tribunal to sue or be sued. It is a **procedural instrument** that enables one or more plaintiffs to file and prosecute litigation on behalf of a larger group or class having **common rights and grievances**.

So, class action suits are expected to play an important role to address numerous prejudicial and abusive acts committed by the Board of Directors and other managerial personnel as it has been statutorily recognized under the Companies Act, 2013. It is also known as **representative action**.

#### **Evolution In India:**

Lack of provisions of representative action in Companies Act, 1956 left stakeholders high & dry in cases of fraud etc. The need of this was felt at the time of Satyam fiasco, where the small shareholders were left to see their money going into drain while American depositors of Satyam were able to receive money in settlement as a result of strong class action framework in US.

Thereafter in Companies Bill, 2009 CAS were included as a measure to be available to the members & depositors. Class action suits will provide a window to the small shareholders to redress their grievances irrespective of their jurisdictional limitation. Class action suits will benefit the Indian landscape on various fronts, some of which are illustrated below:

- ✚ CLUBBING OF SIMILAR APPLICATION AND BAR ON FUTURE LITIGATION
- ✚ REDUCTION OF COST
- ✚ COMPENSATION IN CASE SECURITY FRAUD
- ✚ INVESTOR EDUCATION AS WELL AS AWARENESS

#### **Filing of application before the Tribunal on behalf of the members or depositors [ Sec 245(1)]:**

Number of member or members, depositor or depositors or any class of them, may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, **namely**: –

- a) **to restrain** the company from committing an act which is ultra vires the articles or memorandum of the company;
- b) **to restrain** the company from committing breach of any provision of the company's memorandum or articles;
- c) **to declare** a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;
- d) **to restrain** the company and its directors from acting on such resolution;
- e) **to restrain** the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;
- f) **to restrain** the company from taking action contrary to any resolution passed by the members;
- g) **to claim damages or compensation or demand any other suitable action** from or against—
  - i. the **company or its directors** for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
  - ii. the **auditor** including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
  - iii. **any expert or advisor or consultant** or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;
- h) to seek any other remedy as the Tribunal may deem fit.

**Required number of members to apply [Sec 245(3)]:**

- a) In the case of a company having a share capital, not less than **100 members** of the company or not less than **such %** of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than **such %** of the issued share capital of the company as may be prescribed, **subject to** the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;
- b) In the case of a company not having a share capital, not less than **one-fifth** of the total number of its members.
- c) Not less than **100 hundred depositors** or not less than **such %** of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes **such %** of total deposits of the company as may be prescribed.

**Effect of admission of Application [Sec 245(5)]:**

- a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;
- b) all similar applications prevalent in any jurisdiction should be consolidated into a single application
- c) two class action applications for the same cause of action shall not be allowed;
- d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

**Other important points:**

- ✚ order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company. **[Sec 245(6)]**
- ✚ company which fails to comply with an order passed by the Tribunal under this Sec shall be punishable with fine which shall not be less than Rs. **5 lakh** but which may extend to **25 lakh** Rs. and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than Rs. **25 thousand** but which may extend to Rs. **1 lakh**. **[Sec 245(7)]**
- ✚ **Sec 245(8) states that** where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding **1 lakh** Rs., as may be specified in the order.
- ✚ **According to Sec 245(9), nothing contained in this Sec shall apply to a banking company.**
- ✚ **Sec 246** provides that the **provisions of Sec 337, 338, 339, 340 and 341 (both inclusive)** related to winding up, shall apply mutatis mutandis, in relation to an application made to the Tribunal u/s 241 or Sec 245.