* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 17th January, 2020
Decided on: 22nd January, 2021

\+ **CS (OS) No.3444/2015**

NARESH DAYAL & ORS. ..... Plaintiffs
Represented by: Mr. Sudhir Chandra, Sr. Advocate with
Ms. Utkarsha Kohli, Advocate for plaintiff Nos.1 to 3.
Mr. Abhimanyu Garg, Advocate for plaintiff Nos.4 to 7.

versus

THE DELHI GYMKHANA CLUB LTD. & ORS. ..... Defendants
Represented by: Mr. Vikas Singh, Sr. Advocate with
Ms. Nandadevi Deka, Mr. Kapish Seth &
Ms. Shikha Rai, Advs. for defendant No.1.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present suit has been filed by seven plaintiffs who are all members of defendant No.1 Club in a representative capacity claiming that they are the permanent members of defendant No.1 which has 5553 permanent members, about 4925 person enjoy the facility of the defendant as Green Card holder and about 2305 persons and their spouses and children have been registered as UCP. Claim of the plaintiffs is that the defendant Club which is a non-profit Company by Guarantee was incorporated in 1913 and as per Clause 4 of the Articles of Association, membership of the Club is classified in five categories, i.e., Permanent, Garrison, Temporary, Casual and Special Category. The waiting list of permanent members has been sub-

classified into two categories, Government and Non-Government which is in the ratio of 50:50. The total approved Permanent membership is 5600. Besides the membership, the facilities of the Club can be enjoyed by the spouse and dependent members wherein children of the member below the age of 21 years are considered as dependent members. Children of the member up to the age of 13 years can utilize the facilities of the Club when accompanied by the parents and between 13 to 21 years, can utilize the facilities independently. Children of the member attaining the age of 21 years may continue to use the facilities of the defendant Club after applying for permanent membership in which case they are issued a Green Card despite the fact that no concept of Green Card is provided in the Articles of Association of the defendant nor does the same appear from the White Paper issued in October, 2014. Defendant No.1 extends the facility of issuing Green Card only to those children who enjoy the facilities of Club while being minors, however, the defendant No.1 denies the said Green Card to those children who did not enjoy the facilities of the Club as minors. According to the plaintiffs denying Green Card to a class of members is acting inequitably and the defendant No.1 seeks to interpret Article 13 (3) (b) only for the benefit of a section of permanent members.

2. In view of the averments as noted above, in the present suit the plaintiffs have *inter alia* prayed for a decree declaring Clause 13 (3) (b) of the Articles of Association of defendant No.1 to extend Green Card to the children of all the permanent members irrespective of their age, consequential relief of issuance of Green Card to the children of all permanent members whether they had used the facilities of the Club or not as minors, restraining spouse/children of Green Card holders from enjoying

access to the facilities of the defendant No.1, declaring membership of all those persons who have acquired permanent membership during the process of UCP as illegal and void, declaring the resolution passed by the GC on 4th November, 2015 approving issuing of dependent cards and Green Cards to the children of UCPs as also upgrading of Green Cards to UCP as illegal and void.

3. Written statement has been filed by defendant No.1 Club as also defendant Nos.5 and 6 as the plaintiffs have impleaded defendant Nos.2 to 10 in representative capacity, who are the beneficiary of the interpretation of Article 13 (3) (b) by the defendant No.1 as noted above.

4. After the parties completed their pleading issues were settled, of which the issue No.1 related to the maintainability of the present suit based on the objection raised by defendant No.1. Issue No.1 which is noted hereinafter has been treated as a preliminary issue and arguments heard thereon :-

> *"Whether this Court does not have jurisdiction to entertain the present suit in view of the provisions of the Companies Act, 2013 and the jurisdiction of the NCLT? OPD"*

5. Learned counsel for the plaintiffs states that the right which the plaintiffs seek to enforce by filing the suit is a civil right relating to interpretation of the Articles of Association of the defendant No.1 Club and hence the remedy does not lie with the National Company Law Tribunal (NCLT) but by filing the civil suit. Ouster of civil court jurisdiction cannot be readily inferred and such a provision must be strictly interpreted. Analysing the reliefs sought in the present suit, it cannot be held that the suit

is barred and the reliefs sought can be availed only by filing a petition under the Companies Act.

6. Relying upon the decision of the Division Bench of Calcutta High Court in 2019 LawSuit (Cal.) 1314, *Vikram Jairath & Ors. vs. Middleton Hotels Pvt. Ltd.;* it has been contended that before determining as to the remedy available, the real cause of action in the plaint has to be ascertained. Referring to the decision in 2015 SCC OnLine Cal. 7078 *Royal Calcutta Golf Club vs. Lalit Kumar Jhalaria;* it is contended that individual members of a company can sue in a civil court to protect their individual rights. Further, decisions taken by majority members/shareholders though are not ordinarily amenable to be challenged in court however since the actions of the defendant are fundamentally against the Memorandum and Articles of Association, a civil suit would lie.

7. It is stated that a member of a company has two kinds of right i.e. the individual membership rights and the corporate membership rights. The plaintiffs in the present suit have asserted their individual membership rights against the defendants seeking the right under Article (13) (3) (b) to be afforded to all permanent members. Referring to the decision of the High Court of Kerala in AIR 1965 Kerala 68 *C.L. Joseph vs. Jos & Anr*, it is contended that an individual membership right is a right of a member to maintain himself in full membership with all the rights and privileges appertaining to that status. Reliance is placed on the decision of the Division Bench of this Court reported as 2017 SCC OnLine Del. 11436 *Jai Kumar Arya & Ors. Vs. Chhaya Devi & Anr.* wherein the jurisdiction of the civil court was upheld and the plea that a petition under Section 430 of the Companies Act would be maintainable was rejected. Reliance is also placed

on the decisions in 2018 SCC OnLine Del. 11491 *DDCA vs. Vinod Tihara*; and 2018 SCC OnLine Del. 12387 *Dinesh Gupta Vs. Rajesh Gupta*.

8. Learned counsel for the plaintiff contends that Sections 241 and 242 of the Companies Act provide for remedies to ensure no future misconduct however does not repair the damage caused to the plaintiffs. Present suit does not allege financial irregularities, fraudulent acts, omission in books of accounts, misconduct on the part of management while conducting the administration of the company in its day to day transaction or wrongful acts committed by the employees and/or staff of the company. Hence Section 241 of the Companies Act would have no application to the facts of the case. The present suit seeks declaration of a provision of the law and the plaintiffs are not seeking winding up or alleging defalcation of accounts of defendant No.1 company.

9. Rebutting the contentions, learned counsel for defendant No.1 contends that the word 'any member' in Section 241 of the Companies Act is very wide. The word ‘member’ is defined under Section 2 (55) which not only includes the shareholders but also anybody who is subscribing to the company's Memorandum and Articles of Association. The remedy sought by the plaintiffs in the present suit can be granted under Section 242 of the Companies Act, sub-Section (2) whereof provides that without prejudice to the generality of the powers under sub-Section (1), an order under that sub-Section may provide for and by virtue of sub-clause (b) and (m) is competent to protect the interest of the members of the company. So under Section 242 of the Companies Act, not only is there a provision of the winding up of the company but other issues also can be considered and decided by the NCLT.

10. It is contended that the decision of the Division Bench of this court in *Jai Kumar Arya (supra)* is on peculiar facts for the reason three suits were filed out of which in one suit, the proceedings went up to the Hon'ble Supreme Court wherein the court held that clause (m) cannot be used to do what is prohibited under the earlier clauses. Thus, clause (m) which is a residuary clause cannot be used to perform the activity which is otherwise prohibited. In *Vijay Chhibber & Ors. Vs. Delhi Gymkhana Club Ltd.*, as the suit was based against a show cause notice issued to the member after he had filed complaints against the defendant No.1 company, hence on the facts the court held that the remedy does not lie before the NCLT but in a civil suit. Plaintiffs are members of the defendant No.1 Club and the dispute in a company need not necessarily be of shareholders. Other disputes by the members can also be decided by the NCLT. Though the suit prays for a declaration contrary to the Articles of Association of the defendant No.1 company, there is no averment in the complaint qua the age of the plaintiffs' children nor does the complaint note whether the children of the plaintiffs applied when they attained the age of 21 years.

11. It is stated that another suit of a similar nature was filed in this court titled as *Alok Mehndiratta & Ors. Vs. Delhi Gymkhana Club Ltd*. which due to the pecuniary jurisdiction was transferred to Patiala House Courts wherein the learned Additional District Judge held that the suit was not maintainable and rejected the plaint.

12. Relying upon the decision of the Division Bench of Calcutta High Court in 2018 SCC OnLine Cal. 5959 *Prasanta Kumar Mitra & Ors. Vs. India Steam Laundry (P) Ltd. & Ors.*, it is contended that when the word 'includes' is used in a provision, it has to be given an extensive and

expansive interpretation. In fact, the plaintiffs seek alteration and rectification of the registers of the member which only the NCLT is empowered to decide as held in the decision of this court reported as (2019) 212 Comp Cas 102*;* *SAS Hospitality Pvt. Ltd. & Anr. Vs. Surya Constructions Pvt. Ltd. & Ors*. Though the Co-ordinate Bench of this court in *Vijay Chhibber* (supra) held that suit was maintainable which decision was on the facts of the case as the plaintiffs therein challenged the show cause notice issued to him, however, a contrary view was taken by the same Bench in the decision reported as 2019 SCC OnLine Del. 10604*;* *ICP Investments (Mauritius) Ltd. vs. Uppal Housing Pvt. Ltd. & Ors.*

13. Before adverting to the issues raised, it would be appropriate to note Section 2(55) of the Companies Act which defines a 'member' as under :-

> *"(i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;*
> *(ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;*
> *(iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;"*

14. Sections 241, 242 and 430 of the Companies Act read as under :-

> *"241. Application to Tribunal for relief in cases of oppression, etc. - (1) Any member of a company 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, 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 alteration in the Board of Directors, 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 its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this

(2) The 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."

xxxxxxxxxxx

"242. Powers of Tribunal - (1) If, on any application made under section 241, the Tribunal 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, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—

(a) the regulation of conduct of affairs of the company in future;

(b) the purchase of shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) restrictions on the transfer or allotment of the shares of the company;

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e):
Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(h) removal of the managing director, manager or any of the directors of the company;

(i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;

(j) 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 made under clause (h);

(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;

(l) imposition of costs as may be deemed fit by the Tribunal;

(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

(3) A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

(4) The 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.

(5) Where an order of the Tribunal under sub-section (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.

(6) Subject to the provisions of sub-section (1), 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.

(7) A certified copy of every order altering, or giving leave to alter, a company"s memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

(8) If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both."

xxxxxxxxxxxx

> *"430. Civil Court Not to Have Jurisdiction. - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal."*

15. Before proceeding to decide whether this court has jurisdiction to entertain the suit, it has to be determined as to what is the real cause of action in the suit and at this stage when parties have not led their evidence, this issue has to be decided by way of demur on the pleadings of the plaintiffs. The plaintiffs have filed the present suit as a representative suit raising certain issues in the interest of the members of defendant No.1 company. The suit does not allege any oppression, misbehavior, falsification of accounts of defendant No.1 nor seeks winding up of defendant No.1 nor rectification of record. In the suit plaintiffs seek equal treatment for all members after membership is granted and permanent injunction against those who are not members but enjoying facilities which are meant only for permanent members.

16. Grievance of the plaintiffs is the manner in which Article 13 (3) (b) of the Articles of Association of the defendant No.1 is to be interpreted resulting in a situation where children of members who use the Club below the age of 21 years not only become dependent members but are given Green Cards as well, and on the basis of the said Green Cards not only they but their spouses and dependents are also permitted to enjoy the facilities of defendant No.1 Club barring category of permanent members whose

children did not enjoy the facilities of the Club before the age of 21 years as dependent members. According to the plaintiffs, this interpretation creates an inequitable classification, therefore, the plaintiffs seek the consequential relief.

17. No doubt the Division Bench of Calcutta in *Prasanta Kumar Mitra* (supra) held that the term 'including' in Section 434 (1) (c) of the Companies Act has to be given a broad interpretation, however, the said interpretation would not include issues which are not within the jurisdiction of the NCLT. Section 434(1)(c) of the Companies Act directs transfer of all cases pending in District Courts and High Court to NCLT, subject to the NCLT having jurisdiction in terms of Section 241 of the Companies Act and being barred under Section 430 of the Companies Act. Section 434(1)(c) even if expansively interpreted cannot confer jurisdiction in the NCLT to decide matters which it is not empowered in terms of the Companies Act.

18. The Division Bench of this court in *Jai Kumar Arya (supra)* adverting to Section 242 of the Companies Act held :-

> *"93. Issue No. (ii) - Whether the learned Single Judge was barred from passing the impugned order because of Section 430 of the Act?*
>
> *94. Section 430 of the Act reads thus:*
>
> > *"430. Civil court not to have jurisdiction.-*
> > *No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being, in force, by the Tribunal or the Appellate Tribunal."*

95. Parallelly, of course, Section 9 of the CPC postulates that "the Courts shall (subject to the provisions herein contained) have jurisdiction to try all sorts of possible nature excepting suits of which the cognizance is either expressly or impliedly barred."

96. Clearly, Section 430 bars the Civil Court from entertaining any suit or proceeding, in respect of any matter which the NCLT "is empowered to determine by or under this Act or any other law for time being in force".

97. Mr. Sapra emphatically submits that words "is empowered to determine" are applicable only in a case where there is a specific statutory empowerment, in other words, where one or other provisions of the Act expressly empowered the NCLT to exercise a particular jurisdiction. He contends that it is only such jurisdiction, which stands specifically conferred on the NCLT, by some provision of the Act, which has been excluded from the jurisdiction of the Civil Court. He has drawn our attention to various provisions of the Act, which contain such express statutory empowerment.

98. Mr. Chandhiok, who does not seriously join issue, on principle, with Mr. Sapra's submission, would seek, instead, to point out that such statutory empowerment of the NCLT is, indeed, to be found in the proviso to Section 169(4) of the Act. Section 169(4), may for ready reference, be reproduced as under:

> *"(4) Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so, -*
> *(a) in any notice of the resolution given to the members of the company, state the fact of the representation having been made; and*
> *(b) send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company),and if a copy of the representation is not sent as aforesaid due to insufficient time or for the company's*

default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting.

Provided that copy of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it."

99. While examining the merits of these rival contentions, we are fully aware of the interpretative principle, now trite in law, that provisions which operate to exclude the ordinary jurisdiction of civil courts are to be strictly construed, and exclusion of such jurisdiction is not to be lightly inferred. The principle of exclusion of jurisdiction is, moreover, never absolute. In what is regarded as the classic exposition of the law on the point, Thankerton, J., speaking for the Privy Council, in Secretary of State v. Mask & Co., AIR 1940 PC 105, pronounced thus:

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

(Emphasis supplied)"

xxxxxxx

114. [Clauses (b) to (g), (i), (k) and (m) of Section 242(2) are obviously inapplicable, and no reference, thereto, is being made in the discussion that follows.]

115. Does the grievance ventilated by the plaintiffs in CS (OS) 285/2017, or the relief prayed for by them therein, fall within

any of the species of cases contemplated by Section 242 of the Act? In our considered opinion, no.

116. Section 242(1) is clearly inapplicable, as it applies only in a case where the Tribunal is of the opinion that "the winding of 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". Even if the notice, dated 8th August 2017, or the Board meeting of 26th August 2017 proposed therein, were illegal, it cannot be said that any case for winding up of the Company, even prima facie, was made out.

117. Adverting, now, to Section 242, clauses (a) to (g) and (i) to (l) thereof are obviously inapplicable. Clause (h) would, in fact, indicate that the reliefs prayed for in CS (OS) 285/2017 were outside the jurisdiction of the Tribunal, as the said clause empowers the NCLT to pass an order providing for removal of the managing director, manager or any of the directors of the Company. If one were to apply the expression unius est exclusion alterius principle, by inference, it would not be open to the NCLT to adjudicate on the validity of a notice calling for a meeting, of the Board, to decide whether to convene an EGM proposing to remove one of the Directors of the Company. For that reason, such a relief may not, properly, even be sought under clause (m) of Section 242(2), despite the expensive wording of the said clause. That apart, clause (m) of Section 242(2) would, in our opinion, have appropriately to be read ejusdem generis with the preceding clauses of the said subsection, and a species of case which is impliedly excluded from one of the said preceding clauses could not be, by implication, brought into clause (m). Any attempt to do so may amount to doing violence to the legislative intent.

118. We are constrained, therefore, to observe that it is not possible to accept Mr. Chandhiok's submission that the reliefs claimed by the plaintiffs in CS (OS) 285/2017 fall, statutorily, within the purview of jurisdiction of the NCLT.

119. There is, in fact, no provision, in the Act, whereunder the claim contained in CS (OS) 285/2017, as made by the plaintiffs

- irrespective of the merit or demerit thereof - could have been preferred before the NCLT. No case of exclusion of the jurisdiction of the Civil Court, under Section 430 of the Act or, consequently, under section 9 of the CPC can, therefore, be said to have been made out.

120. As it happens, we are not alone in the view we are taking.

121. K.Shivshankar Bhat, J., as a learned Single Judge of the Karnataka High Court, was, in Prakash Roadlines Ltd. v. Vijaya Kumar Narang, (1995) 83 Comp Cas 569, concerned with a claim, legally similar to that of the present plaintiffs, to remove certain directors from the company and appoint a director in their place. As in the present case, it was sought to be contended that the claim was not maintainable before the High Court, as it lay within the purview of jurisdiction of the Tribunal, under Section 397 of the Companies Act, 1956 (the predecessor provision to Section 241 of the present Act, and in parimateria therewith). Bhat, J., opined thus:

"It is also necessary to note that under section 397, it is not only the oppression that given a cause of action but also the applicant or the applicants shall have to show that that the facts would justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up. In other words it is necessary to show that the facts are such that normally the company could be sought to be wound up under the "just and equitable" clause but such winding up would unfairly prejudice the members. Therefore, I am of the view that section 397 is not an effective forum to grant any relief of an individual member under all circumstances. Similar is the situation under section 398 also. Being a constituent of the company a shareholder has several individual rights and those rights could be enforced by invoking the civil jurisdiction of the courts. Further, the Act nowhere specifically excludes the jurisdiction of the civil courts." (Emphasis supplied)

122. Panipat Woollen and General Mills Co. v. R.L. Kaushik, 1969 (39) Comp Cas 249 (P&H) is another case in point. The memorandum and articles of Association of the petitioner Company before the High Court, in that case, provided for retirement of one third of the directors of the company every

year. The directors so slated to retire would be those who had held office for the longest period since the last election. The controversy, before the High Court, pertained to the annual general meeting of the company, scheduled to be held on 30th December 1967. The respondent RL Kaushik contended that his name was proposed to be included, in the said meeting, as one of the directors scheduled to retire the rotation, even though, in his submission, he was not so due for retirement. Mr. Kaushik, therefore, filed a suit in the Court of the Subordinate Judge, for a declaration that he was the Director of the company and that the election, held on 30th December 1967 was illegal, ultra vires and void. Consequential relief, by way of permanent injunction restraining the defendants from interfering with the management of the company, or for allowing Mr. Kaushik to act as director, was also sought. An application for interim relief, under Order XXXIX of the CPC, was also filed therewith. The company (who was the revision petitioner before the High Court) raised a preliminary objection to the effect that the jurisdiction of the civil court, to adjudicate on the matter, stood ousted by Section 9 of the CPC read with Sections 398 and 402 of the Act. These provisions, it may be noted here, were somewhat parallel to Section 241 and 242 (2) of the present Act. Consequent on a detailed discussion, the learned judge held that the civil court had jurisdiction to try the suit. Significantly, in the course of such discussion, reliance was placed on the following aphorism, from the judgment of a Division Bench of the Calcutta High Court in Sarat Chandra Chakravarti v. Tarak Chandra Chatterjee, AIR 1924 Cal 282: "An injunction may be granted on the application of a director restraining the plaintiffs co-directors from wrongful excluding him from acting as a director; there is nothing excluding the jurisdiction of the court from entertaining such a suit."

123. Notice was also taken of another decision, in Sati Nath Mukherjee v. Suresh Chandra Roy, (1941) 11 Com Cas 203, wherein it was held that "a suit for declaration that the plaintiff is a director and for the protection of his rights qua director is competent".

124. Ravinder Kumar Jain v. Punjab Registered (Iron and Steel) Stockholders Association Ltd., (1978) 48 Com Cas 401 (P & H) was concerned with a situation in which a petition was moved, before the High Court, under Section 166 of the erstwhile Companies Act, 1956, for declaration of a meeting of the Company, held on 28th September 1977, to be illegal and void. Following, inter-alia, the decision in Panipat Woollen and General Mills Co. (supra), it was held that the petition was competent. Similarly, a suit for declaration that the Annual General Meeting of the Company was illegal, was held to be competent, by the Kerala High Court, in R. Prakasam v. Sree Narayana Dharma Paripalana Yogam, (1980) 50 Comp Cas 611 CS (OS) 51/2018 & Ors. Page 18 of 45 (Ker), which went to the extent of holding that the Company Court could not grant relief in such matters.

125. The inevitable outcome of the above discussion is that the invocation, by Mr. Chandhiok, of Section 430 the Act, to nonsuit the plaintiffs, is misplaced. Per sequitur, CS (OS) 285/2017 has to be held to be competent."

19. The Calcutta High Court in *Royal Calcutta Golf Club (supra)* held:-

"23. The reference in this regard can be made to a Division Bench judgment of this Court in case of Asansol Electric Supply Co. (supra) wherein it is held:

> *"12. The law on the point has been clearly laid down in a recent decision of the court of appeal in (4) Edwards v. Halliwell, 1950 2 All. Er 1064. In that case, it has been held by Jenkins, L.J. that the cases falling within the general ambit of the rule in (1) Foss v. Harbottle are subject to certain exceptions, namely, (1) where the act complained of is wholly ultra vires the company or association, (2) when the act complained of is one which can validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority, and (3) when the individual members sue not in the right of the company but in their own right to protect from invasion their own individual rights as members.*

13. The exception which has been made to the rule in (1) Foss v. Harbottle in the English decisions referred to above has been adopted by the courts in India. In (5) Ramkissendas Dhanuka; v. Satya Charan Law 50 CWN 310, it has been held that the principle that the Court will not generally interfere with the internal affairs of a company except at the instance of the majority of the shareholders, is applicable only where the act complained of is merely irregular and not when it is ultra vires. The decision in Dhanuka's case has been approved by the Privy Council in an appeal from the decision in that case (See AIR 1950 Privy Council 80).

14. It is now an accepted principle of law that where an act by the majority of the share-holders is merely irregular and can be rectified by the majority of the share-holders, an action is not maintainable against that act, but if the act is ultra vires the company itself and is beyond the powers of the members of the company or its share-holders to ratify that act or to rectify the same, an individual member of the company may sue the company and its directors, for himself and on behalf of the other share-holders for declaring that act as illegal and for consequential reliefs. In such actions, however, the plaintiff has no larger right to relief than the company would have as plaintiff."

24. The judgment rendered in case of Jhajharia Bros. Ltd. (supra) relied upon by the petitioner laid down that the suit at the instance of an individual shareholder of the Company on his behalf and on behalf of other unspecified shareholders against the Company alleging the fraud upon the minority may not have been perfectly instituted but carved out an exception in these words:

"7. I propose, as shortly as I can without going into the cases in detail, to explain my understanding of the matter. There can of course be suits by shareholders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts ultra vires. There is no question of ultra vires in this case and I propose to confine the discussion to suits other than those

based upon complaints of acts ultra vires, although I am not suggesting that there is any fundamental difference in principle. Suit to restrain acts ultra vires and suits to restrain certain acts about to be discussed notwithstanding that the acts have the support of the majority of shareholders, are both exceptions to the rule that the Court will not interfere in the affairs of the company or with the decision of the majority. The Court interferes in cases of an ultra vires act, because it is not an act within the constitution. In the other class of cases the Court interferes upon a different basis."

25. The suit at the instance of an individual shareholder, alleging the infringement of a right for an action and the majority shareholders being opposed to the memorandum and article of association, cannot be said to be an imperfect suit liable to fail on the parameters of Order 7 Rule 11 of the Code. Mere reference of more than 3100 members does not, ipso facto, raise a presumption that the suit is not maintainable in absence of any leave under Order 1 Rule 8 of the Code. Section 9 of the Code of Civil Procedure postulates that the Civil Courts have jurisdiction to try all suits of civil nature unless there is an express or implied bar. It is no longer res integra that such exclusion should not be readily inferred and the rule of construction being that every presumption should be made in favour of his existence rather than exclusion of the jurisdiction of the Civil Court.

26. Section 397 & 398 of the Companies Act provides a remedy which is of preventive in nature so as to bring an end to oppression and mismanagement on the part of the controlling shareholders but does not in express terms take away the power of the Civil Court to declare a resolution to be ultra vires to the memorandum and article of association.

27. The subsequent events can be taken note of if the original proceeding has become infructuous as it would be a futile exercise to allow such suit to continue. It is based on the legal maxim ex debito justitiae i.e. it is a duty of the Court to take such action which is necessary in the interest of Justice. Every facts germinated after the litigation having a substantial nexus

and/or bearing on the relief claimed in the suit may be taken into consideration for ends of Justice."

20. In *SAS Hospitality Pvt. Ltd.* (supra) relied upon by learned counsel for the defendant, the prayers sought by the plaintiffs therein were a decree declaring the allotment of shares dated 5th October, 2013 in favour of defendant Nos.5 and 9 therein as null and void, a decree of permanent injunction restraining from giving effect to the allotment dated 5th October, 2013; restraining defendant Nos.5 to 9 therein from exercising voting rights and restraining defendant No.1 from creating third party rights in the assets of defendant No.1. The Court finding that the prayers sought were within the scope of NCLT held :-

"28. If these two tests are applied i.e., as to whether the Tribunal's order is attributed finality and as to whether the Tribunal would be able to do what a Civil Court could do, it is clear that an order under Section 59 of the 2013 Act has specific consequences for non-compliance. The order is appealable to the appellate tribunal. The Tribunal has to apply the principles of natural justice. Under Section 242(2)(d) of the 2013 Act, the Tribunal can impose restrictions on the transfer or allotment of the shares of the company. It can also pass an interim order under Section 242(4) of the 2013 Act. Consequences for non-compliance have also been provided under Section 242(4) of the 2013 Act. The Plaintiffs have a right to apply Section 242 of the 2013 Act as they own 99.96% shareholding which has been diluted to 21.44%. Any member with more than 1/10 of the issued share capital can approach the Tribunal. Thus, even as per Jai Kumar Arya (supra), the order being one, which can be passed under Section 242 of the 2013 Act, the NCLT has the jurisdiction. In Jai Kumar Arya (supra), the Court was concerned with the power of removal of directors, which is distinct from the disputes involved in the present case. However, by applying the tests laid down therein, it is clear in the facts of this case that involving

issues relating to allotment of share capital, alteration and rectification of the register of members, the NCLT is „empowered to decide" -leading to the conclusion that this Court has no jurisdiction."

21. This Court in *DDCA vs. Vinod Tihara* (supra) held:

"67. As regards the contention of the Appellant that the relief sought by the Respondent no.1 as sought through the suit CS No.5963/18 could not be granted in view of Companies Act, 2013, it is apparent that the provisions of Section 430 of the Companies Act, 2013 are prima facie not an embargo to the invocation of the jurisdiction of the Civil Court in terms of Section 9 of the CPC, 1908, as amended, for as held in Mumbai Cricket Association Bye-laws Rule 31(r) (supra), vide para 30 thereof the powers of the Civil Court are unlimited especially where the aspect of a formality of show cause notice is to be tested. The observations in paragraphs 30, 31, 32 of the said verdict are relevant and germane and read to the effect:

> *"30 Strikingly, we are dealing with legal rights between two private parties, as sought to be contended by the learned senior counsel appearing for the Appellant also, as Respondent No.1/plaintiff, in his individual capacity, has challenged the action of MCA. It is relevant to note that Civil court's jurisdiction, in a situation like this, in no way curtail merely because one party is a private body and the dispute is against it's member. The writ jurisdiction, power and/or public interest litigation, court's power has various other facets apart from superior court's power to pass appropriate order on the basis of material available on record, but when it comes to deciding the disputed question of facts and civil rights between the two parties, the Civil Court's power, in my view, is also unlimited. If case is made out, the Court is empowered to pass order within the frame work of law.*
>
> *31 The Court, therefore, required to consider action and/or inaction of one private party against the*

another affected and/or aggrieved party, whether it is a private body and/or public body 22 907- aost-25497-13 with caast-25580-13 - 23- 9.sxw and/or two individuals. The concept "in accordance with law", therefore, definitely take care of basic elements revolving around the principles of natural justice, fair play and equity.

32 Merely because in view of rule 31(h), the unanimous decision is taken by the majority and in view of the managing committee's opinion, a case is made out to impose such penalty, this itself means that the other side is entitled to raise objection to such unilateral opinion so formed. The formality of show cause notice, and it's related aspects, therefore, required to be tested and can be tested in court of law when it takes away and/or affects the civil rights."

22. In *Dinesh Gupta vs. Rajesh Gupta* (supra) this Court held as under:-

14. The first submission that was vehemently urged before this court was that this court does not have jurisdiction to adjudicate the present suit. Reliance was placed upon section 430 of the Companies Act, 2013. The plea was that, as the notices have been sent for mismanagement and oppression under section 100(2) of the Companies Act, 2013 this court does not have jurisdiction to adjudicate the present suit.

15. Reference may be had to Section 430 of the Companies Act, 2013. The said section 430 of the Companies Act, 2013 reads as follows:

"Section 430: Civil Court not to have jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or

under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal."

16. As per the said provision, in matters for which the tribunal or appellate tribunal has power to adjudicate the case, no suit or proceedings would lie.

17. The learned senior counsel for the defendants have also relied upon the judgment of the Supreme Court in the case of LIC of India v. Escorts Ltd., (supra) to support his plea that a civil court cannot injunct a share holder to call an AGM. The learned senior counsel for the plaintiffs in support of his contentions submits that this court has jurisdiction to try the matter. He has relied upon a recent judgment of the Division Bench of this CS (OS) 51/2018 & Ors. Page 12 of 45 Court in the case of Jai Kumar Arya & Ors. v. Chhaya Devi & Anr., 2017 SCC OnLine Delhi 11436.

18. A perusal of one of the notices dated 19.01.2018 sent by some of the defendants under section 100(2) of the Companies Act, 2013 would show that the same states as follows:-

"It has been found that the present Board of Directors comprising of Mr. Dinesh Gupta and Mr. Shreyansh Gupta have been, inter alia, engaging themselves in the acts of omission and commission prejudicial to the interest of the Company, particularly in prosecuting and defending its various litigations pending in different forums. Mr. Dinesh Gupta and Mr. Shreyansh Gupta are, therefore, not fit to continue and are liable to be removed as Directors of the Company in terms of Section 169 of the Companies Act, 2013. In order to protect the interest of the Company, the Board of Directors is required to be reconstituted immediately. We, being the members of your Company, holding more than 1/10th of the paid up share capital of the Company, as on date, hereby require you to call an Extra-Ordinary General Meeting of the Company as early as possible but not later than 21 days from the date of

this requisition, to consider and approve the following resolution(s) as Ordinary Resolution(s):

1. "RESOLVED THAT in pursuance of Section 152(2) of the Companies Act, 2013, Mr.Rajesh Gupta be and is hereby appointed as Director of the Company.

"RESOLVED FURTHER THAT Ms. Uma Sharma, the present Company Secretary or any of the Directors or the Company Secretary at the relevant time, be and are hereby directed and authorised singly and severally to file the requisite Form DlR12 with the office of the Registrar of Companies in respect of the aforesaid appointment and to do all such other acts, deeds and things as may be considered necessary or incidental thereto."

2. "RESOLVED THAT in pursuance to Section 152(2) of the Companies Act, 2013, Mr. Shashank Gupta be and is hereby appointed as director of the Company. "RESOLVED FURTHER THAT Ms. Uma Sharma, the present Company Secretary or any of the Directors or the Company Secretary at the relevant time, be and are hereby directed and authorised singly and severally to file the requisite Form DlR12 with the office of the Registrar of Companies in respect of the aforesaid appointment and to do all such other acts, deeds and things as may be considered necessary or incidental thereto."

3. "RESOLVED THAT in pursuance of Section 169 of the Companies Act, 2013, Mr.Dinesh Gupta be and is hereby removed as the Director of the Company with immediate effect. "RESOLVED FURTHER THAT Ms. Uma Sharma, the present Company Secretary or any of the Directors or the Company Secretary at the relevant time, be and are hereby directed and authorised singly and severally to file the requisite Form DlR12 with the office of the Registrar of Companies in respect of the aforesaid appointment and to do all such other acts,

deeds and things as may be considered necessary or incidental thereto."

4. "RESOLVED THAT in pursuance of Section 169 of the Companies Act, 2013, Mr.Shreyansh Gupta be and is hereby removed as the Director of the Company with immediate effect. "RESOLVED FURTHER THAT Ms. Uma Sharma, the present Company Secretary or any of the Directors or the Company Secretary at the relevant time, be and are hereby directed and authorised singly and severally to file the requisite Form DlR12 with the office of the Registrar of Companies in respect of the aforesaid appointment and to do all such other acts, deeds and things as may be considered necessary or incidental thereto. ……."

19. Hence, the resolution seeks to appoint Sh. Rajesh Gupta and Sh. Shashank Gupta as directors of the company and seek to remove Sh. Dinesh Gupta and Sh. Shreyansh Gupta as the directors of the company with immediate effect. Certain powers are also sought to be given to Sh. Rajesh Gupta and Sh. Shashank Gupta. The plea of the plaintiffs here is not that the defendants who have requisitioned the said meeting do not have power under the Companies Act, 2013 to call for such a meeting. The plea is that the said meeting is being called contrary to the terms and conditions of the Family Settlements dated 02.12.2017 and 09.12.2017. The defendants cannot be allowed to act contrary to the Family Settlement. The company in question is, namely, M/s BDR Builders and Developers Pvt. Ltd. A perusal of the Family Settlement dated 02.12.2017 shows that the said company, M/s BDR Builders and Developers Pvt. Ltd. goes to the share of Sh.Dinesh Gupta (plaintiff) being part of Annexure-B to the Family Settlement. The defendants have not been able to show any provision of the Companies Act, 2013 under which the aforesaid relief could have been obtained by the plaintiffs from NCLT..."

23. Section 242 of the Companies Act which provides for the power of the Tribunal contemplates an action relating to the affairs of the company which is being conducted in a manner prejudicial or oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members, but the facts justify the makings of a winding up order, the power of the NCLT can be invoked. However, in the present suit the plaintiffs do not claim winding up of the defendant No.1 Club which is a company by guarantee. As noted above, the cause of action pleaded by the plaintiff in this suit is the manner in which Article 13(3)(b) of the Articles of Association of the defendant company is being interpreted thereby creating irrational and illegal classification. NCLT not being empowered to determine the said cause of action, this Court is of the opinion that the plea of the defendant that the present suit is not maintainable and only a petition before the NCLT is maintainable, is liable to be rejected. Thus, issue No.1 is decided in favour of the plaintiffs and against the defendant No.1.

CS(OS) 3444/2015 & I.A. 25674/2015 (under Order XXXIX Rule 1 and 2 CPC), I.A. 3052/2016 (under Order VII Rule 11-by defendant), I.A. 6432/2016 (under Order XXXIX Rule 1 and 2 CPC-by plaintiff), I.A. 8763/2016 (under Order VII Rule 11 CPC –by defendant No.5), I.A. 1991/2017 (under Order VII Rule 11 CPC-by defendant Nos.2 and 3), I.A. 10041/2019 (under Order XXXIX Rule 1 and 2 CPC), I.A. 10242/2019 (under Order XXXIX Rule 4 CPC-by defendant No.1)

Subject to the orders of Hon'ble the Chief Justice, list before the Roster Bench on 29th January, 2021.

(MUKTA GUPTA)
JUDGE

JANUARY 22, 2021/vn