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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Pronounced on: 23.11.2023

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W.P.(C) 17415/2022 & CM APPLNs. 55448-49/2022

H.R. SHARMA

.....Petitioner

Through: Mr. P. Chidambaram, Sr. Adv., Mr. Ankur Chawla, Mr. Gautam Dutta, Ms. Prerna Mahajan and Mr. Aditya Samaddar, Advs.

versus

DELHI AND DISTRICT CRICKET ASSOCIATION & ORS.

..... Respondent

Through: Mr. Sandeep Sethi, Mr. Rajiv Nayar, Sr. Adv., Mr. Rajshekhar Rao, Sr. Advs. with Mr. Manik Dogra, Mr. T. Singhdev, Mr. Saurabh Chadha, Mr. Bhanu Gulati, Ms. Ramanpreet Kaur, Mr. Abhijit Chakraborty, Mr. Aabhaas Sukhramani, Ms. Anum Hossain, Mr. Tanishq Srivastava, Mr. Rohit Bhagat and Ms. Tanvi, Advs. for R-1/DDCA.

Mr. Sacchin Puri, Sr. Adv. with Mr. Praveen Kumar, Ms. Nidhi Rana and Mr. Sahil Nagpal, Advs. for R-3.

Mr. Kirtiman Singh, CGSC with Ms. Vidhi Jain and Mr. Madhav Bajaj, Advocates for R-14 to R-16.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

CM APPL. 8079/2023 (under Section 151 CPC seeking to place additional facts on record)

W.P.(C) 17415/2022

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Signature Not Verified

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By: NARENDRA SINGH
ASWAL
Signing Date: 28.11.2023
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1. As notice has not been issued in the present writ petition, the application stands allowed.

W.P.(C) 17415/2022

2. The petitioner being a life member of the Sports Body of the Delhi & District Cricket Association (hereinafter referred to as “DDCA” or “respondent no. 1”) has filed the present writ petition seeking the following reliefs:

“A. Issue a writ of Certiorari or any other appropriate writ order or direction quashing and setting aside the order dated 21.11.2022 of the Ld. Ombudsman;

B. Issue a writ of Mandamus or any other appropriate writ order or direction, thereby declaring that the tenure of the Ld. Ombudsman is a fixed tenure of 1 year from the date of appointment in terms of Article 41 of the Articles of Association and also in terms of the judgment of the Hon'ble Supreme Court of India reported in (2016)8 SCC 535 entitled, "BCCI Vs. Cricket Association of Bihar" and further that the said term cannot be extended;

C. Issue a writ of Certiorari or any other appropriate writ order or direction setting aside Agenda No.4 and 5 of the Notice dated 04.12.2022 issued in respect of holding of meeting of the General Body of DDCA proposed to be held on 27.12.2022;

D. Issue a writ of Mandamus or any other appropriate writ order or direction, thereby directing and declaring that DDCA is bound to hold elections for retiring Directors in terms of Article 17(3) read with Article 10(2) of Articles of Association on or before 30.09.2022 every year so as to ensure that fixed term of 1 year of any Director is not extended either directly or indirectly and also does not allow the directors to extend their term beyond three years from the date of their first election;

E. Issue a writ of Mandamus or any other appropriate writ order or direction, thereby directing inclusion of an Agenda for



holding elections through secret ballot in respect of the retiring Directors in terms of Article 17 of Articles of Association and also for appointing an Election Officer and an Observer in respect of the said election, which election Officer may either be a retired judge of Hon'ble Supreme Court or a former Chief Justice of this Hon'ble Court or a former Election Commissioner of India;

F. Issue a writ of Mandamus or any other appropriate writ order or direction, thereby directing and declaring that Government nominees have retired with effect from 31.08.2022 in terms of their letter dated 01.09.2020;

G. Issue a writ of Mandamus or any other appropriate writ order or direction, thereby directing the DDCA to appoint a CEO and CFO in terms of the judgment of the Hon'ble Supreme Court.”

3. The facts as pleaded by the petitioner are that the DDCA is a company incorporated under the Companies Act, 1956 and respondent nos. 2-18 are its office bearers. The DDCA is an affiliate state unit of the Board for Control for Cricket in India (BCCI) and has the exclusive authority to run the game of Cricket in the territory of NCT of Delhi. Respondent nos. 2-6 are the five office bearers of the DDCA and have a fixed term of three years which expires on 29.10.2024. The respondents no. 7 to 13 are ordinary directors of the DDCA.

4. It is pleaded by the petitioner that in terms of Article 17(3) of the AoA, 1/3rd of the ordinary directors shall retire by rotation each year at every Annual General Meeting through a draw of lots as all the directors were appointed on the same date i.e. 29.10.2021. Article 17(3) of the AoA reads as under:-

“(3) One third of all Directors, except the office bearers, nominee of the Chief Controller of Accounts of the Government



of National Capital Territory of Delhi and three nominees of the Government of India, shall retire by rotation at every Annual General Meeting. The Directors to retire by rotation at every Annual General Meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot. At the Annual General Meeting at which a Director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director if he is eligible for such appointment as per these Articles or some other person thereto ”

5. Respondent nos. 14 to respondent No. 16 are nominees from various departments of the Central Government as the DDCA was allotted land by the Central Government for the construction of Feroz Shah Kotla Stadium (now renamed as Shri Arun Jaitley Stadium). The Central Government has the power to appoint its nominees from the Ministry of Housing Affairs, Ministry of Sports and Sports Authority of India to the Board of Directors of the respondent no. 1, who have full voting rights.

6. In order to seek a declaration to the effect that 4 Directors out of 7 (seven) elected directors shall retire by rotation in terms of Article 17(3) of the Articles of Association (AoA), the petitioner had filed a complaint dated 27.06.2022 before the Ld. Ombudsman-cum-Ethics officer of the DDCA. The prayers made in the said complaint read as under:

“(A) Pass an order, declaring and directing that 4 Directors/Councillors out of 7 Elected Directors/ Councillors currently in the Apex Council of the DDCA who were elected on 28th Oct 2021 shall necessarily retire by rotation through a draw of lotto be conducted by the Hon'ble Ombudsman and the resultant vacancy shall be filled in the ensuing AGM to be held latest before 30 September 2022; And



(B) Pass an order, direction specifically directing the Respondent (DDCA) to carry out urgent and time bound exercise to weed out the dead and defaulting members from the "Statutory Register of Members of the Company" latest before 15th August 2022 by publishing Notice in two National Newspapers of repute and thereafter file compliance report with the Hon'ble Ombudsman and permanently upload the latest verified list of members on the official Website of DDCA."

7. The grievance of the petitioner is that vide order dated 21.11.2022 passed in another complaint titled as *Sanjay Bhardwaj v. Shashi Khanna*, the Ld. Ombudsman-cum-Ethics officer has decided not to adjudicate any complaint pending before it, because of the expiry of her tenure due to efflux of time. The petitioner apprehends that the fate of his petition will be similar and an identical order will be passed in his case also. The operative portion of the impugned order dated 21.11.2022 passed in the complaint of *Sanjay Bhardwaj (supra)* reads as under:

"29. For the above reasons, I am of the view that the term of the Ombudsman cum Ethics Officer ought to continue till the conclusion of the next Annual General Meeting, which must be held within 3 (three) months from 30.09.2021 as per the Order dated 12.09.2022 passed by the Office of Registrar of Companies, Ministry of Corporate Affairs, Government of India under Section 96(1) of the Companies Act, 2013. The General Body at the Annual General Meeting, will deal with the Agenda of fresh appointment / re-appointment of the Ombudsman cum Ethics Officer.

30. Accordingly, the preliminary objection raised by the Complainant is rejected., However, in order to preserve the sanctity of the office of the Ombudsman cum Ethics Officer, no proceedings will be taken up by the incumbent Ombudsman, till



a decision is taken by the Annual General Meeting in the next meeting.

It may also be noted that the incumbent Ombudsman-cum-Ethics Officer will not take any remuneration for the aforesaid extended period till a decision is taken regarding the appointment of the Ombudsman at the next Annual General Meeting.”

8. The petitioner also impugns Notice & Agenda dated 04.12.2022 issued by the DDCA/respondent no. 1 calling for an Annual General Meeting which was scheduled to be held on 27.12.2022. As clarified by the learned senior counsel for the petitioner, the grievance of the petitioner is confined only to agenda no. 4 & 5 of the said notice, which read as under:

"Agenda - 4

To take note of the directors retiring by rotation and to fill up the Vacancy by appointing the retiring directors being eligible for such appointment as per the Articles of Association of the Company

To consider and if thought fit to pass with or without modification(s) the following resolution as an Ordinary Resolution:

4(a) "Resolved that pursuant to provisions of Article 17 of the Articles of Association of the Company, Mr. Ashok Sharma, the Director retiring by rotation be and is hereby reappointed as the Member of the Apex Council (Director of the Company)".

4(b) "Resolved that pursuant to provisions of Article 17 of the Articles of Association of the Company, Mr. Harish Singla, the Director retiring by rotation be and is hereby reappointed as the Member of the Apex Council (Director of the Company)."



4(c) "Resolved that pursuant to provisions of Article 17 of the Articles of Association of the Company, the Director retiring by rotation be and is hereby reappointed as the Member of the Apex Council (Director of the Company)."

Agenda-5 (to be considered if Agenda No. 4(a), 4(b) or 4(c) is not carried through

To hold the elections to the vacant post of directors.

*To consider and if thought fit to pass with or without modification(s) the following resolution as an **Ordinary Resolution**:*

"Resolved that pursuant to provisions of Article 17 read with Article 34 of the Articles of Association of the Company, Electoral Officer appointed by the Chairperson is requested to hold the elections to the Vacant post of Directors on or before 27TH January 2023."

9. According to the petitioner, the afore-noted acts of omission and commissions were causing prejudice to him. However, when the writ petition was pending consideration on the question of its entertainability, the Annual General Meeting was held on 27.12.2022. The grievances of the petitioner in respect of the conduct of the Annual General Meeting were brought on record *vide* CM Appl. No. 8079/2023 dated 16.02.2023 which has been allowed in the opening part of this judgment.

10. In the meanwhile, the Ld. Ombudsman-cum-Ethics officer *vide* order dated 22.02.2023 adjourned the complaint of the petitioner *sine die* on the ground that the present writ petition is pending. The relevant part of the order dated 22.02.2023 reads as under:-

"In view of the statement made by the Counsel for the Complainant that there are some overlapping issues in the Writ Petition. And to avoid parallel proceedings, it is



deemed appropriate that the present complaint is adjourned sine die, subject to the orders passed by the Hon'ble Delhi High Court"

SUBMISSIONS ON BEHALF OF THE PETITIONER

11. Arguments were addressed by the parties confined to the preliminary objection with respect to the entertainability of the present writ petition, raised by the respondents at the outset.

12. Mr. P. Chidambaram, learned senior counsel for the petitioner submits that a writ petition under Article 226 of the Constitution of India will lie before this Court, in as much as prayers A & B of the Writ petition, which has been reproduced above for ready reference, can only be granted by this Court as the petitioner has challenged the order of the learned Ombudsman-cum-Ethics Officer and no tribunal has the power to set aside the order of learned Ombudsman-cum-Ethics Officer.

13. He submits that under the Articles of Association of the respondent no.1, the decision of the learned Ombudsman-cum-Ethics Officer is final and binding and since no appeal mechanism has been provided under the Articles of Association, the remedy of the petitioner against the impugned order lies before this Court by way of a writ petition under Article 226 of the Constitution of India. To buttress his contention, Mr. Chidambaram referred to Article 42(3) of the Articles of Association (AoA) of the DDCA, which reads as under:

"42. GRIEVANCE REDRESSAL

3) The decision of the Ombudsman shall be final and binding and shall come into force forthwith on being pronounced and delivered"



14. Referring to Section 241 of the Companies Act, 2013, Mr. Chidambaram submits that a member of a company can file a complaint before the NCLT in case the affairs of the company are being conducted in a manner which is prejudicial to the public interest or to him or to any other member or members or to the interests of the company. He, however, adds that such a right to approach the tribunal is not absolute and has been qualified under Section 244(1)(b) of the Act, inasmuch as, the petitioner cannot approach the NCLT unless the petition is supported by not less than 1/5th of the total number of members of the respondent no.1/DDCA.

15. Further, referring to Section 430 of the Companies Act, Mr. Chidambaram submits that the said Section bars the jurisdiction of the Civil Court to entertain a suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under the Companies Act, 2013, but this Court would not fall within the ambit of a Civil Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution of India.

16. Mr. Chidambaram, submits that the office of the learned Ombudsman-cum-Ethics Officer was created on the basis of the recommendations of the 'Lodha Committee' which came to be accepted by the Supreme Court in *Board of Control for Cricket v. Cricket Association of Bihar and Ors.*, (2016) 8 SCC 535. He submits that the learned Ombudsman-cum-Ethics Officer has been tasked with providing institutional resolution to resolve disputes/differences between the DDCA and its members. Referring to Article 42(1) of the AoA, the learned senior counsel for the petitioner submits that the learned ombudsman has *suo moto* powers to adjudicate disputes including (a) member



and association disputes, (b) detriment caused by member or administrator, (c) misconduct or breach by others, (d) by the public against the DDCA.

17. Mr. Chidambaram, submits that the learned Ombudsman-cum-Ethics Officer was appointed on 25.10.2021 for a term of one year and the tenure of the learned Ombudsman-cum-Ethics Officer had expired on 24.10.2022. He submits that the petitioner had filed his complaint before the learned Ombudsman-cum-Ethics Officer on 27.06.2022 and orders were reserved on 13.09.2022, much before the expiry of the term of the learned Ombudsman-cum-Ethics Officer, therefore, there was ample time for the learned Ombudsman-cum-Ethics Officer to pass an order on the complaint of the petitioner.

18. He submits that the hands-off approach adopted by the learned ombudsman has allowed the respondent no. 1 to act in a manner which causes grave prejudice to the petitioner as well as the public at large. Further referring to paragraph 37(b) of the decision of the Supreme Court in *Board of Control for Cricket (Supra)*, the learned senior counsel for the petitioner submits that the learned Ombudsman-cum-Ethics Officer is bound to resolve complaints within 30 (thirty) days from the receipt of the complaint, whereas, in the present case, the complaint of the petitioner remained unresolved for a period of 4 months.

19. Mr. Chidambaram also made submissions impugning various decisions taken in the Annual General Meeting held on 27.12.2022, but at this stage, those submissions need not be referred to, as this Court for now is confining itself only to the preliminary objection raised by the respondents as to the entertainability of the present petition.



SUBMISSIONS ON BEHALF OF THE RESPONDENTS

20. Mr. Rajiv Nayar, learned senior counsel appearing on advance notice on behalf of the DDCA submits that the petitioner has no *locus standi* to challenge the impugned order passed by the Ld. Ombudsman-cum-Ethics Officer as the petitioner is neither a party to the said proceedings nor he is a party aggrieved by the order dated 21.11.2022. Elaborating on his argument, he submits that the impugned order has been passed in the case entitled "*Sanjay Bhardwaj vs. Shashi Khanna & Ors.*" and not in the complaint filed by the petitioner. He contends that neither the parties to the aforesaid proceedings nor the Ld. Ombudsman-cum-Ethics officer have been arrayed as a parties to the present petition.

21. Next, Mr. Nayar referred to Section 430 of the Companies Act, 2013 to contend that the legislature has specifically conferred jurisdiction upon the NCLT to adjudicate any matter which falls within the ambit of the Companies Act, 2013 and in such a case, this Court may refrain from exercising its extraordinary jurisdiction under Article 226 of the Constitution.

22. Inviting the attention of the Court to the prayers made in the writ petition, Mr. Nayar submits that the petitioner is in essence aggrieved by the mismanagement of the respondent no.1 and has made complaints of oppression by the directors of the company for which purpose the petitioner should be relegated to the NCLT, where he may seek redressal of his grievances in accordance with Sections 241 and 242 of the Companies Act, 2013.

23. He further submits that the NCLT has been conferred wide powers under Section 242 of the Act and thus, this Court may refrain from exercising its jurisdiction under Article 226 of the Constitution of India. Referring to Section 242(2) of the Act, Mr. Nayar submits that the NCLT has been



conferred jurisdiction by the legislature to make an order to redress all the grievances articulated by the petitioner as the same falls within the purview of the NCLT.

24. It was further urged by Mr. Nayar that the power to issue writs under Article 226 of the Constitution is an extraordinary power and should not be exercised in a routine manner but only when exceptional circumstances warrant. He contends that the petitioner by way of the present petition is seeking to espouse a private cause in his favor, therefore, this Court may not entertain the present petition.

25. Reliance is placed by Mr. Nayar on a judgment passed by a Co-ordinate Bench of this Court titled as *Delhi & District Cricket Association v. Sudhir Kumar Aggarwal, 2020 SCC OnLine Del 1223* to contend this Court has held that the National Company Law Tribunal (NCLT) has been conferred with special powers to redress grievances relating to the affairs of a company. He further contends that the Co-ordinate Bench has also held that the issue of appointment of the Ld. Ombudsman would form part of the conduct and management of the affairs of the company and accordingly, he urged that the present writ petition may not be entertained.

26. Mr. Nayar has also repelled petitioner's contention that he is not eligible to approach the NCLT to seek redressal of his grievances. He refers to the proviso to sub-section (1) of Section 244 to contend that the NCLT, on an application being filed by the petitioner, may waive off all the requirements/perquisites under Section 244, which according to Mr. Chidambaram are posing as an impediment for the petitioner to approach the NCLT.



27. Mr. Rajshekhar Rao, the learned senior counsel appearing for the respondent no. 2, has supported the submissions made by Mr. Rajiv Nayar. Additionally, he submits that in ***Sudhir Kumar Aggarwal (supra)***, it has been held that the grievance of an individual with respect to the “appointment” of the learned Ombudsman falls within the purview of the NCLT and once it has been so held, by extension, any grievance of the petitioner in respect of the alleged hands-off approach which is stated to be adopted by the learned Ombudsman will also fall within the ambit of the NCLT.

28. Mr. Rao has also relied upon the decision of the Supreme Court in ***Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement, (2010) 4 SCC 772***, to contend that when a statutory forum has been created by law for redressal of a grievance, especially in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation.

31. Mr. Rao has further relied upon the judgment of a Co-ordinate Bench of this Court in ***Shriraj Investment and Finance Limited and Ors. v. Union of India and Anr., 2021 SCC OnLine Del 4361***, to contend that if an alternate efficacious remedy exists, this Court should not exercise its extraordinary jurisdiction under Article 226 of the Constitution unless there are extreme and/or extraordinary circumstances.

32. Mr. Rao further submits that the writ petition as filed by the petitioner does not contain any averment that there is no alternate efficacious remedy available to the petitioner.

33. In rejoinder Mr. Ankur Chawla has made submissions on behalf of the petitioner and broadly canvassed and reiterated the arguments made by Mr. Chidambaram, learned senior counsel.



34. To be noted that after the procedural anomaly that the writ petition lacks an averment to the effect that the petitioner does not have an alternate efficacious remedy was pointed out by Mr. Rao, the petitioner has filed an additional affidavit dated 27.04.2023 making a formal averment that the petitioner does not have an alternate efficacious remedy.

35. I have heard the learned senior counsel for the parties and have perused the relevant record.

36. At this stage, the short question which arises for the consideration of this Court is whether there is an alternate and efficacious statutory remedy available to the petitioner, in view of which, this Court should refrain from entertaining the present Writ Petition.

ANALYSIS AND FINDINGS

37. Before proceeding to answer the question at hand, profitable would it be to briefly recapitulate the law as laid down by the Hon'ble Supreme Court in regard to the exercise of jurisdiction under Article 226 of the Constitution of India especially when an alternate and efficacious statutory remedy exists.

38. In ***United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110***, the Hon'ble Supreme Court held that though the powers of the High Court under Article 226 of the Constitution are unfettered still the High Court must insist that before availing remedy under Article 226, a person must exhaust the remedies available under the relevant statute. The relevant part of the decision reads as under:-

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other



financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution."

(emphasis supplied)

39. Likewise, in ***State Bank of Travancore v. Mathew K.C., (2018) 3 SCC 85***, the Supreme Court held that when a statutory remedy is available or a statutory forum is created by law for redressal of grievances, a writ petition ought not to be entertained ignoring the statutory dispensation, except in cases falling within the well-defined exceptions carved therein. The relevant part of the decision reads thus:



*“5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loath to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. **The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in CIT v. Chhabil Dass Agarwal [CIT v. Chhabil Dass Agarwal, (2014) 1 SCC 603] , as follows: (SCC p. 611, para 15)***

“15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [Thansingh Nathmal v. Supt. of Taxes, AIR 1964 SC 1419] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.”

(emphasis supplied)



40. The exceptions under which the High Court may exercise its jurisdiction under Article 226 of the Constitution notwithstanding the availability of alternate remedy, were again articulated by the Hon'ble Supreme Court in ***Harbans Lal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107***, as under:

“7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1]).....”

(Emphasis Supplied)

41. In ***Varimadugu Obi Reddy v. B. Sreenivasulu, (2023) 2 SCC 168***, the Hon'ble Apex Court deprecated the practice of entertaining a writ petition in exercise of jurisdiction under Article 226 of the Constitution without insisting on exhaustion of alternative statutory remedy available under the law, in the following words:

36. In the instant case, although the respondent borrowers initially approached the Debts Recovery Tribunal by filing an application under Section 17 of the Sarfaesi Act, 2002, but the order of the Tribunal indeed was appealable under Section 18 of the Act subject to the compliance of condition of pre-deposit and without exhausting the statutory remedy of appeal, the respondent borrowers approached the High Court by filing the writ application under Article 226 of the Constitution. We deprecate such practice of entertaining the writ application by



the High Court in exercise of jurisdiction under Article 226 of the Constitution without exhausting the alternative statutory remedy available under the law. This circuitous route appears to have been adopted to avoid the condition of pre-deposit contemplated under 2nd proviso to Section 18 of the 2002 Act.

(emphasis supplied)

42. The principle that emerges from the aforementioned judgments is that the existence of an alternative remedy does not completely bar the jurisdiction of the High Court under Article 226 of the Constitution of India. The bar of alternative remedy is a rule of convenience and discretion which is a self-imposed restriction on the exercise of power under Article 226 evolved through judicial precedents. As a normal rule, the High Court should not entertain a writ petition under Article 226 of the Constitution if an effective and efficacious alternative statutory remedy is available under the law.

43. In the present context, the distinction between the 'maintainability' and 'entertainability' of a writ petition also needs to be borne in mind as restated by the Supreme Court in *Godrej Sara Lee Ltd. v. Excise and Taxation Officer-cum-Assessing Authority*, 2023 SCC OnLine SC 95, in the following words:

"4. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even



be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper."

(emphasis supplied)

44. It is not in dispute that the present writ petition is maintainable, but the question that looms large in the present petition is whether there is an effective alternative statutory remedy available to the petitioner to ventilate his grievance which is the subject matter of the present petition, and if yes, whether this Court should entertain the instant petition.

45. For answering the question at hand, it is also imperative to examine the statutory scheme with regard to the acts of oppression and mismanagement which could be entertained by the NCLT under the provisions of the Companies Act, 2013.

46. Chapter 16 of the Companies Act, 2013, more specifically Sections 241, 242 and 244 thereof, deals with the prevention of oppression and mismanagement of a company. Section 241 of the Act enables the petitioner to make an application to the Tribunal in cases of oppression, mismanagement etc. Section 241(1)(a) of the Act has been incorporated with the purpose to put an end to acts of oppression and mismanagement, promptly and speedily. Section 241 of the Act reads as thus:-

"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 Chapter.

(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.

47. The relevant part of Section 242 of the Companies Act, 2013 reads as under:-

“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 subsection (1), an order under that subsection 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.”.....*

48. Section 244 of the Act provides as to who has the right to apply to the NCLT under Section 241 of the Act. The relevant part of Section 244 reads thus:

“244. Right to apply under section 241.— *(1) The following members of a company shall have the right to apply under section 241, namely:—*

(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 member or members holding not less than one-tenth 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 one-fifth 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 requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Explanation.—For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(2) Where any members of a company are entitled to make an application under subsection (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”....

49. The controversy involved in the present petition and the relief sought by the petitioner needs to be examined in the light of the aforesaid statutory provisions as well as the judicial precedents on the subject.

50. As far as the jurisdiction of NCLT to entertain the challenge to the order dated 21.11.2022 of learned Ombudsman is concerned, a Co-ordinate Bench of this Court in ***Siddharth Sahib Singh v. Apex Council of DDCA, 2023 SCC OnLine Del 3967***, has already taken a view that an order passed by the Ombudsman or any action taken by him / her can be set aside or reversed by the NCLT, if the same is not in the interest of the DDCA. It thus, follows that the order of Ombudsman can be the subject matter of challenge before the NCLT. The relevant paragraph of the judgment reads as under:-

“22. If the appointment of Ombudsman is contrary to the laws laid down in the AoA, it is always open for the NCLT to stay the effect of the resolution dated 10.04.2023 and reverse any order passed by the Ombudsman or any action taken by him/her if it is not in the interest of the DDCA. The Petitioner has not made out a case that it is imperative for this Court to entertain the present Writ Petition even though an equally efficacious alternative remedy/forum is available to the Petitioner and that the Ombudsman can pass such orders which are irreversible in nature and cannot be rectified if they are found to be faulty. This Court can take judicial notice of the fact that the NCLT is situated in Delhi and it was always open for the Petitioner to approach the NCLT which is the forum under the Companies Act to address the grievances which are raised by the Petitioner in the present Writ Petition. The present case also does not fall within the exceptions that have been laid down by the Apex Court in South Indian Bank Ltd. (supra) which would compel this Court to entertain the



present Writ Petition even in the presence of an equally efficacious alternative remedy to the Petitioner."

51. Even the relief sought in para (B) of the prayer clause wherein a declaration has been sought that the tenure of the Ld. Ombudsman is a fixed tenure of one year from the date of appointment, will fall within the domain of the NCLT, in as much as, this Court in ***Delhi & District Cricket Association v. Sudhir Kumar Aggarwal, 2020 SCC OnLine 1223*** has observed that the appointment of an Ombudsman would also form part of the conduct and management of the affairs of the company and the controversy as regard the manner of Ombudsman's appointment too will come within the ambit of NCLT. This being the position, the dispute as regard the tenure of the Ombudsman, by necessary implication, will also fall within the purview of the NCLT's jurisdiction. The relevant part of the said decision reads thus:

*"20. What emanates from the preceding arguments and on consideration of the comparative chart hereinabove, is that sections 241, 242 and 244 of the Companies Act deal with all the issues which have been raised in the suit. **The NCLT has been specifically conferred powers to address grievances relating to the affairs of the company, which may be prejudicial or oppressive to any member of the company, or for issues of appointment of directors. The appointment of an Ombudsman, would also form a part of the conduct and management of the affairs of the company.** The Supreme Court has held in *Shashi Prakash Khemka* that the scope of Section 430 is vast, and jurisdiction of the civil court is completely barred when the power to adjudicate vests in the Tribunal.*

*21. As has been held in *Viji Joseph*, the issue of election to the Board of Directors would be amenable to jurisdiction of the NCLT. The issue is the same in the present suit. Likewise, the lis and grievances raised in the suit can be agitated only before the NCLT. A civil court would have no jurisdiction. As*



far as the specific allegation apropos the manner in which the Ombudsman was appointed are concerned, it too, is an issue which will come within the ambit of Tribunal i.e. appointment of people who would conduct the affairs of the company/the management. The video recording of the manner of appointments at the AGM in question, could well be examined by the NCLT. That being the position, the issue of maintainability ought to have been determined first by the trial court. It did not have jurisdiction to entertain the suit. Accordingly, the impugned order is set aside. The appeal is allowed."

(Emphasis Supplied)

52. Reading of above quoted para 21 from **Sudhir Kumar Aggarwal** (*Supra*) also makes amply clear that it is no more *res integra* that the dispute *qua* the appointment and election of Director(s) to the Board of Directors of DDCA / respondent no. 1, is amenable to the jurisdiction of the NCLT. It being so, the relief seeking a declaration that the DDCA/respondent no.1 is bound to hold elections for retiring directors on or before 30.09.2022 as prayed in para (D) of the prayer clause, as well as, the declaration that the Government nominees/directors have retired with effect from 31.08.2022 in terms of their letter dated 01.09.2020 as prayed in para (F) of the prayer clause, essentially relate to the issue of election/nomination & tenure of directors or composition of the board of directors/Apex Council of the DDCA/respondent no. 1, which will also necessarily fall within the jurisdiction of the NCLT.

53. Likewise, the objections of the petitioner *apropos* agenda 4 and 5 of the notice dated 04.12.2022 proposing to retire the Directors mentioned therein, and to reappoint them as members of the Apex Council (Director of the DDCA), as well as, proposing to hold elections to the Vacant post of Directors on or before a particular date, contrary to the Articles of Association, are also



issues which would fall within the purview of mismanagement and oppression and will come within the ambit of powers of NCLT as jurisdiction has specifically been conferred upon the NCLT to pass appropriate orders (i) to bring to an end the matters of mismanagement and oppression complained of,¹(ii) to regulate the conduct of the company in future² and (iii) to provide for any other matter which in the opinion of the NCLT is just and equitable.³

54. In regard to the relief sought in para (G) praying for a direction to the respondent no. 1 to appoint a CEO or CFO in terms of the judgment of the Hon'ble Supreme Court, to be noted that the petitioner did not lay emphasis on the said relief. However, as noted, the NCLT has been conferred ample jurisdiction to make an order, which it thinks fit to bring to an end any act of the company which is oppressive or prejudicial to the interest of the company or its members or, for regulating the conduct of the company's affairs. Therefore, it is well within the jurisdiction of the NCLT to entertain the prayer articulated in para (G) of the prayer clause as well.

55. As far as the contention of the learned Senior Counsel for the petitioner in respect to the bar under Section 244 of Act to approach the National Company Law Tribunal under Section 241 is concerned, suffice it to say that the Tribunal has been granted the power to relax the requirement of having the minimum number of members needed to approach the Tribunal. Further, it is not the case of the petitioner that he has approached the NCLT with a prayer in terms of the first proviso to Section 244 (1) of the Act to waive off the condition and that the same has been declined, therefore, the petitioner is constrained to approach this Court under Article 226 of the Constitution of

¹Section 242(1) of the Companies Act, 2013.

²Section 242(2)(a) of the Companies Act, 2013.

³Section 242(2)(m) of the Companies Act, 2013.



India. This Court in ***Siddharth Sahib Singh (Supra)*** while dealing with a somewhat similar situation in a case pertaining to DDCA/ respondent no. 1 has observed that the petitioner therein instead filing a writ petition ought to have approached the NCLT at the first instance and it is only in the event of NCLT refusing to waive off the stipulated requirement of requisite number of members filing the application, he could have approached this Court contending that no equally efficacious alternate remedy is left to him. Reference to the relevant paragraph of the said decision could advantageously be made at this stage, which reads thus:-

“20. Though Section 244 (1)(b) of the Companies Act provides that an application under Section 241 of the Companies Act can be entertained only if it is supported by one-fifth of the total number of members of the company but the NCLT has power to waive of this requirement. The Petitioner, therefore, ought to have approached the NCLT and if the NCLT would have refused to waive off the stipulated requirement of support of one-fifth members of the company then it was always open for the Petitioner to approach this Court by contending that no equally efficacious alternative remedy is left to him. It cannot be said that this Court does not exercise its jurisdiction under Article 226 of the Constitution of India an irreversible damage would be caused to the DDCA and the same cannot be rectified by the Courts or that DDCA will be subjected to an irreparable loss which needs urgent restraint orders.”

56. Keeping in view the subject matter of the present petition, as well as, the decisions in ***Siddharth Sahib Singh (Supra)*** and ***Sudhir Kumar Aggarwal (Supra)***, this Court is of considered view that the petitioner has an alternate efficacious statutory remedy available to him to seek redressal of his grievances before the NCLT. Clearly, it is not a case falling under the well-defined exceptions to the rule of alternate remedy. Accordingly, having regard to the law laid down by the Hon’ble Supreme Court, as discussed above, this



Court is not inclined to exercise jurisdiction under Article 226 of the Constitution.

57. The writ petition, along with pending applications, if any, is thus, disposed of, with liberty to the petitioner to take appropriate legal remedies in accordance with law, if so advised.

58. Before parting with judgment, it needs to be brought out that when the arguments were concluded by both sides, Mr. Sacchin Puri, learned senior counsel appeared along with Mr. Siddharth Sahib Singh, Secretary of the respondent no. 1 (who has been arrayed as respondent no. 3 to the present petition) submitted that the *vakalatnama* dated 17.01.2023 which has been filed on behalf of the respondent no. 1 has not been signed by the respondent no. 3. Further, referring to Article 45 of the Articles of Association (AoA), Mr. Puri submitted that the respondent no. 1 shall or be sued in the name of the Secretary, and without the authorization of the secretary, the respondent no. 1 cannot be represented before this Court. However, no application was filed by the respondent no.3 seeking any relief premised on the aforesaid allegation, therefore, this Court refrains from making any observation on such an allegation which is beyond the contours of the controversy raised and dealt with in the present judgment.

VIKAS MAHAJAN, J.

NOVEMBER 23, 2023

N.S. ASWAL