

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

Judgment reserved on: 12th October, 2017

Judgment pronounced on: 07th November, 2017

+ FAO (OS) 253/2017 & CM No. 33724/2017

JAI KUMAR ARYA & ORS.

.... Appellants

Through: Mr.A.S. Chandhiok, Sr. Adv.
with Mr.Avinash Trivedi,
Ms.Ritika Trivedi, Mr.Ritesh
Kumar, Ms.Monica Tyagi and
Mr.Tejasvi Chaudhary, Advs.

Versus

CHHAYA DEVI & ANR.

.....Respondents

Through: Mr.Anil Sapra, Sr. Adv. with
Mr.Ankur Goel, Mr.Kartik
Bhardwaj, Mr.Piyush Singh,
Mr.Jaideep Singh and
Mr.Sarthak Katyal, Advs.

CORAM:-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C. HARI SHANKAR

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JUDGMENT

07.11.2017

C. HARI SHANKAR, J.

1 The order, dated 11th September 2017, under challenge in the present appeal, has been passed by the learned Single Judge in IA 9618/2017, preferred by Respondent No. 1 – Chhaya Devi – under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (“the CPC”), in CS (OS) 285/2017.

- 2 The affairs forming subject matter of the present proceedings concern M/s Prabhat Zarda Factory (India) Pvt Ltd (hereinafter referred to as “PZFIPL”), which is engaged in the manufacture of chewing tobacco and associated products. M/s Prabhat Zarda Factory was conceived as a sole proprietorship of Lalit Kumar Arya in 1962, and, subsequently, metamorphosed into a partnership in 1965 and into the present private limited Company in June 1985 – originally named M/s Prabhat Zarda Factory (Muzpur) Pvt Ltd and later rechristened as PZFIPL on 27th March 1991.

The Dramatis Personae

- 3 First, to introduce the *dramatis personae*, eschewing honorifics for ease of reference.
- 4 Lalit Kumar Arya and Rukmini Devi were husband and wife. They had three sons – Jyoti Kumar Arya (hereinafter referred to as “Jyoti”), Pradeep Kumar Arya (hereinafter referred to as “Pradeep”) and Vijay Kumar Arya (hereinafter referred to as “Vijay”).
- 5 Jyoti was married to Malti Devi. The couple had three sons, namely Jai Kumar Arya (hereinafter referred to as “Jai”),

Ujjwal Kumar Arya (hereinafter referred to as “Ujjwal”) and Gaurav Kumar Arya (hereinafter referred to as “Gaurav”).

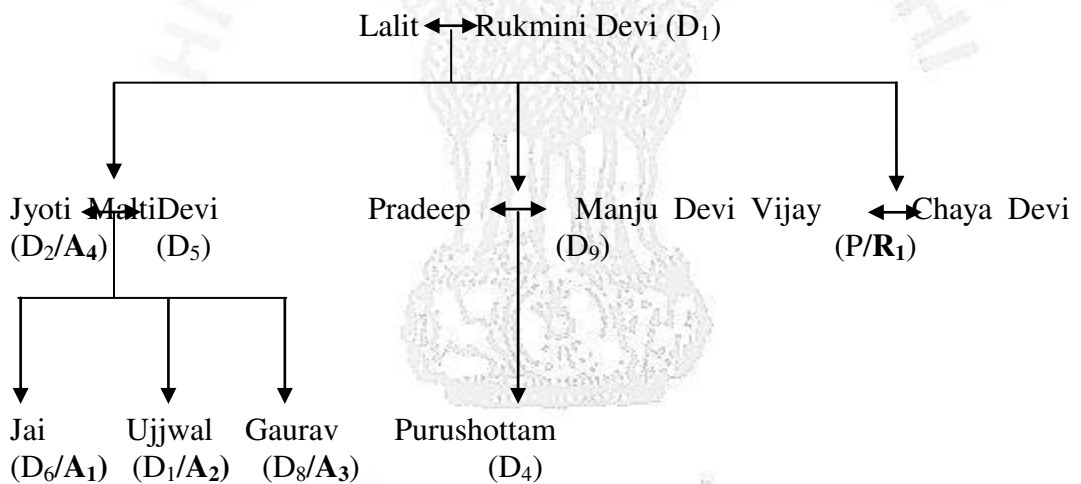
- 6 Pradeep was married to Manju Devi, and had only one son, Purushottam Kumar Arya (hereinafter referred to as “Purushottam”).
- 7 Vijay married Chhaya Devi. Their children, if any, have no part to play herein.
- 8 The relative positions of the above listed members of the PZF family tree, in CS (OS) 285/2017, and in the present appeal, with their respective shareholdings in PZFIPL, may be tabulated thus:

	In <u>CS (OS) 285/2017</u>	In the present appeal	Share-holding
Chhaya Devi	Plaintiff No. 1	Respondent No. 1	30.4%
PZFIPL	Plaintiff No. 2	Respondent No. 2	N.A.
Rukmini Devi	Defendant No. 1		8%
Jyoti	Defendant No. 2	Appellant No. 4	7.8%
Jyoti Kumar Arya HUF	Defendant No. 3		2%
Purushottam	Defendant No. 4		11%
Malti Devi	Defendant No. 5		2%
Jai	Defendant No. 6	Appellant No. 1	1.3%
Ujjwal	Defendant No. 7	Appellant No. 2	1.3%
Gaurav	Defendant No. 8	Appellant No. 3	1.3%
Manju Devi	Defendant No. 9		2.6%

- 9 The above position may, alternatively, be represented as under:
Lalit ⇔ Rukmini Devi (D₁) (8%)

- ➔ Jyoti (D_2/A_4) (7.8%) $\Leftrightarrow$ Malti Devi (D_5) (2%)
 - $\Rightarrow$ Jai (D_6/A_1) (1.3%)
 - $\Rightarrow$ Ujjwal (D_7/A_2) (1.3%)
 - $\Rightarrow$ Gaurav (D_8/A_3) (1.3%)
- ➔ Pradeep $\Leftrightarrow$ Manju Devi (D_9) (2.6%)
 - $\Rightarrow$ Purushottam (D_4) (11%)
- ➔ Vijay $\Leftrightarrow$ Chhaya Devi (P/R_1) (30.4%)

10 This position may also be represented, in the form of a family tree, thus:



The Proceedings, and associated facts

11 The internecine disputes and conflicts between the plaintiffs and defendants do not concern the present appeal, and are *in seisin* before the learned Single Judge, before whom various suits are pending. Our brief is limited to deciding whether the learned

Single Judge could, in law, have, *vide* the impugned order dated 11th September 2017, passed in IA 9618/2017, restrained the defendants from acting upon notice, dated 8th August 2017, and the resolutions passed in the meeting of the Board of Directors (hereinafter referred to as “BOD”) on 26th August 2017. The circumstances in which the said dispute arises would become clearer from the recital that follows. For ease of reference, the various parties would be denoted by their respective positions in CS (OS) 285/2017. PZFIPL would be referred to as “the Company”.

- 12** Sometime in 2014, Defendants Nos 2 and 6, i.e. Jyoti and Purushottam, filed Company Petition 136/2014 before the National Company Law Tribunal (hereinafter referred to as “the NCLT”), alleging oppression and mismanagement, of the affairs of the Company, by Plaintiff No. 1. The said petition is still pending before the NCLT, and the issues involved therein do not impact the adjudication of the present appeal in any manner.
- 13** On 24th April 2017, the Company received a requisition, from its shareholders, for convening of an Extra Ordinary General Meeting (hereinafter referred to as “EGM”) on 26th May 2017, with the following proposals:

 - (i) removal of the plaintiff (Chhaya Devi) as Director/Managing Director of the Company,

- (ii) setting aside a notice, earlier issued, for approval of an agenda item, dated 31st of May 2014, to terminate the directorship of the defendants, and
- (iii) appointment of Defendant No 1 (Rukmini Devi) as Managing Director of the Company.

14 On receiving the said requisition, the plaintiff (Chhaya Devi) responded, on 25th April 2017, alleging that the requisition was not in accordance with Section 169, read with Section 115 of the Companies Act, 2013 (hereinafter referred to as “the Act”), inasmuch as no Special Notice had been served, by the shareholders, on the Company and, instead, the Company had simply been requested to serve notice under Section 169.

15 At this juncture, it would be advantageous to reproduce Sections 115 and 169 of the Act, as under:

“115. Resolutions requiring special notice. –

Where, by any provision contained in this Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent of total voting power or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed.”

“169. Removal of directors. –

- (1) *A company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard:*

Provided that nothing contained in this subsection shall apply where the company has availed itself of the option given to it under section 163 to appoint not less than two thirds of the total number of directors according to the principle of proportional representation.

- (2) *A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.*
- (3) *On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.*
- (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 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.

- (5) A vacancy created by the removal of a director under this section may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given under sub-section (2).

(6) *A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.*

(7) *If the vacancy is not filled under sub-section (5), it may be filled as a casual vacancy in accordance with the provisions of this Act:*

Provided that the director who was removed from office shall not be re-appointed as a director by the Board of Directors.

(8) *Nothing in this section shall be taken—*

(a) as depriving a person removed under this section of any compensation or damages payable to him in respect of the termination of his appointment as director as per the terms of contract or terms of his appointment as director, or of any other appointment terminating with that as director; or

(b) as derogating from any power to remove a director under other provisions of this Act.”

16 The statutory scheme is clear and unequivocal. Save in specified exceptional situations (none of which applies here), a Director may be removed by the Company, or another Director appointed in his place, by ordinary resolution, under Section 169 (1). In such a situation, the following procedure would apply:

- (i) A special notice of such resolution has to be issued to the Company, in the manner specified in Section 115. [Section 169 (2) and (5)]
- (ii) On receiving such resolution, the Company has to send a copy thereof, to the concerned Director. [Section 169 (3)]
- (iii) The concerned Director shall be entitled to be heard on the resolution, at the meeting whereat he is proposed to be removed. [Section 169 (1) and (4)]
- (iv) The concerned Director may also make a written representation, and require its notification to the members of the Company. [Section 169 (4)]
- (v) Where such representation is made, the Company shall, if time permits,
 - (a) state the fact of such representation having been made in any notice of the resolution given to the members of the Company, and
 - (b) send a copy of the representation to every member of the Company to whom notice of the meeting is sent. [Section 169 (4)]
- (vi) If the copy of the representation made by the concerned Director is not sent as aforementioned, the Director may require the representation to be read out at the meeting. [Section 169 (4)]

- 17 Section 100 of the Act, which governs calling of EGMs, reads as under:

“100. Calling of Extraordinary General Meeting. –

(1) *The Board may, whenever it deems fit, call an extraordinary general meeting of the company.*

(2) *The Board shall, at the requisition made by,—*

(a) *in the case of a company having a share capital, such number of members who hold, on the date of the receipt of the requisition, not less than one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting;*

(b) *in the case of a company not having a share capital, such number of members who have, on the date of receipt of the requisition, not less than one-tenth of the total voting power of all the members having on the said date a right to vote,*

call an extraordinary general meeting of the company within the period specified in sub-section (4).

(3) *The requisition made under sub-section (2) shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company.*

- (4) *If the Board does not, within twenty-one days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than forty-five days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves within a period of three months from the date of the requisition.*
- (5) *A meeting under sub-section (4) by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.*
- (6) *Any reasonable expenses incurred by the requisitionists in calling a meeting under sub-section (4) shall be reimbursed to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration under section 197 payable to such of the directors who were in default in calling the meeting.”*

18 Unlike the scheme in Section 169, therefore, an EGM is necessarily required to be called by the Board of Directors of the Company (hereinafter referred to as “the Board”). An EGM would be called where there is a requisition, by the number of shareholders of the Company specified in sub-section (2) of Section 169. Such requisition is, by sub-section (3), required to set out the matters for consideration of which the EGM is to be called, and is required to be sent to the registered office of the

Company. In the case of default, by the Board, in calling the EGM within 21 days of receipt of a valid requisition, to be held not later than 45 days from the date of receipt of the requisition, the requisitionists are entitled to themselves call and hold the EGM.

- 19 On 4th May 2017, Defendant No 1 (Rukmini Devi) wrote, to the shareholders/directors of the petitioner, that an EGM would be convened on 26th May 2017.
- 20 This communication, apparently, acted as the proverbial spark in the litigative tinderbox, resulting in a spate of proceedings, leading up to the present appeal before us, but which still continue unabated before the learned Single Judge.
- 21 The above communication resulted in Plaintiff No 1 (Chhaya Devi) filing, on or around 15th May 2017, IA 17/KB/2017 in Company Petition 136/2014 already pending before the NCLT, praying for “*the following reliefs:-*”
 - (a) *The purported notice dated April 24, 2017 issued by the requisitionists/shareholders purporting to convene the Extraordinary General Meeting of Prabhat Zarda Factory (India) Private Ltd on May 26, 2017 be stayed;*
 - (b) *and/or, agents, signings or representatives from removing the applicant/respondent no. 3 as a director of the company i.e. Prabhat Zarda Factory (India) Private Ltd;*

- (c) ***Injunction be passed restraining the company from holding its Extraordinary Meeting on May 26, 2017 or any time thereafter till the disposal of the company petition;***
- (d) ***Injunction be passed restraining Prabhat Zarda Delhi (India) Private Limited (respondent no 1) from acting in terms of the purported communication/request dated April 24, 2017 or any other notice of like nature;***
- (e) *Status quo be passed in respect of the Board of directors of the respondent no 1 i.e. Prabhat Zarda Factory (India) Private Ltd;*
- (f) *Declaration that the purported notice dated April 24, 2017 allegedly issued under section 100 of the Companies Act, 2013 is illegal, null and void and not binding upon the company, its shareholders, directors and all concerned;*
- (h) *Declaration that the communication dated May 2, 2017 purportedly issued by one Shanker Prasad (respondent no 4) claiming himself to be a director is illegal and bad and has been issued without any authority and is not binding on the company, its board, the shareholders of the company and/or concerned;*
- (i) ***injunction be passed restraining the company from convening any Extraordinary General Meeting of the respondent no 1 i.e. Prabhat Zarda Factory (India) Private Ltd pursuant to the notice dated April 24, 2017 purporting to be under section 100 read with section 169 of the Companies Act, 2013 or on the basis of any other notice of like nature till the disposal of the company petition;***
- (j) ***Injunction be passed restraining the company from convening/holding any extraordinary general board meeting of the respondent no 1 company i.e. Prabhat Zarda Factory (India)***

Private Ltd, without leave of this Hon'ble Tribunal;

- (l) Costs of and/or incidental to this application be borne by the petitioners;*
- (m) Such further and/or other order (s) be made, direction (s) be given as to this Hon'ble Tribunal may deem fit and proper."*

22 Having thus moved the NCLT, Plaintiff No 1 (Chhaya Devi) proceeded to petition this court, as well, on the Original Side, by way of CS (OS) 225/2017, filed on 17th May 2017, and CS (OS) 233/2017, filed on 20th May 2017, seeking, substantially, the same reliefs as were sought by IA 17/KB/2017 before the NCLT.

23 CS (OS) 225/2017, filed by the plaintiffs against Defendant No 1 (Rukmini Devi) alone, sought "*a decree of permanent mandatory injunction in favour of the Plaintiffs and against the Defendant restraining her, her agents, servants, representatives and/or anyone acting on her behalf from threatening and/or harming and/or issuing any letter (s) with a view to stop the functioning of the company and/or notice and/or document to the Plaintiff No 1 and from acting upon the requisition dated 27.04.2017 and/or objections dated 24.04.2017 and/or notice dated 04.05.2017 and from interfering and/or obstructing and/or hindering the smooth running and functioning of the Plaintiff No 2 company and functioning of the Plaintiff No 1 as the Managing Director of the Plaintiff No 2 company*".IA

6236/2017, seeking *ad interim* stay, was also filed alongwith the suit.

24 IA 17/KB/2017 came up before the NCLT on 18th May 2017. The NCLT declined the prayer for stay of the EGM, proposed to be held on 26th of May 2017, but directed that, if the meeting took place, any resolution passed therein be not given effect, without prior permission of the NCLT. For this purpose, it was further directed that any such resolution, if passed, be submitted to the NCLT within 3 days of the meeting.

25 It does not appear that the aforementioned order, dated 18th May 2017, of the NCLT, was carried further, by way of appeal or any other proceedings, before any forum. It appears, therefore, to have been accepted by all parties.

26 CS (OS) 225/2017 came up for hearing, before a learned Single Judge of this court, on 19th May 2017, along with the application for stay filed therewith. The following order was passed by the learned Single Judge, thereon:

“CS (OS) 225/2017 & IA Nos. 6236/2017 & 6238/2017:

Issue notice to the defendant by speed post as well as one of the approved couriers, returnable on 24.05.2017. Dasti in addition.

Dasti notices shall be collected on or before 20.05.2017. The affidavit of service shall be filed prior to the next date of hearing.”

27 The plaintiffs proceeded, on 22nd May 2017, to file yet another suit, i.e. CS (OS) 233/2017, this time against Defendants Nos 2 to 9 (which includes the present appellants), praying for *a decree of permanent injunction in favour of the Plaintiffs and against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from threatening and/or harming and/or harassing the Plaintiff No 1 and/or issuing any letter and/or notice and/or document to the Plaintiff No 1 or the Plaintiff No 2 and/or anyone acting on their behalf from acting upon the requisition dated 24.04.2017 and/or objections dated 24.04.2017 and/or notice dated 04.05.2017 and/or letter dated 13.05.2017 and from interfering and/or obstructing and/or hindering the smooth running and functioning of the Plaintiff No 2 company and functioning of the Plaintiff No 1 as the Chairman and Managing Director of the Plaintiff No 2 company and/or doing any such acts or issuing any such notice/letter which obstructs the smooth functioning of the Plaintiff No 2 company*". IA 6382/2017, under Order XXXIX Rules 1 and 2 of the CPC, seeking interim injunction, was also filed therewith.

28 It is plainly apparent that the reliefs sought in CS (OS) 233/2017 were identical to those sought in CS (OS) 225/2017, which the plaintiffs could not succeed in obtaining, from the

learned Single Judge, just a day prior to the filing of CS (OS) 233/2017, i.e. on 19th May 2017. Disquietingly, however, CS (OS) 233/2017 is not only totally silent regarding the filing of CS (OS) 225/2017, or of the order passed by the learned Single Judge, thereon, on 19th May 2017, but also avers, with respect to the proceedings before the NCLT, as under (in para 13 thereof):

“That it is further submitted that the Defendant No 1 and 2 herein have filed Co. Pet. 136 of 2014 against the Plaintiffs and other persons of the Plaintiff No 2 company when the Defendant No 1 and 2 are seeking reinstatement as Directors in the company despite having sought the similar reliefs in CS (OS) No 1319 of 2013 which makes it amply evident that the Defendant No 1 and 2 are agitating the same issues before 2 different courts and moreover are making false averments. Pertinently, the subject matter of CS (OS) No 1319 of 2013 and Co Pet 1316 of 2014 is similar and the reliefs sought are also overlapping which shows the conduct of the Defendants in trying to overreach the orders of this Hon’ble Court. A copy of the Co Pet No. 136 of 2014 is annexed and marked as Annexure-P/12. A copy of the Reply to the Co. Pet. No 136 of 2014 is annexed and marked as Annexure-P/13. It is submitted that Plaintiff No 1 has filed a stay application in Co. Pet. No. 136 of 2014 which has been heard by the Hon’ble NCLT Kolkata and orders have been reserved on the said application for 22.05.2017. A copy of the stay application filed by the Plaintiff No 1 in Co P No. 136 of 2014 is annexed and marked as Annexure-P/14.”

(Emphasis supplied)

- 29 CS (OS) 233/2017 and IA 6382/2017, filed therein, came up for hearing before a learned Single Judge, of this court, on 23rd May 2017. Significantly, once again, the order did not record any

appearance, on the part of the defendants, so that the plaintiffs alone were represented during the hearing. The learned Single Judge who, apparently, was kept innocent regarding the order, dated 18th May 2017 *supra* of the NCLT, as well as all proceedings relating to CS (OS) 225/2017, went on to pass the following order, on IA 6382/2017:

“Present suit is a suit for permanent and mandatory injunction. Plaintiff No 1 is the managing director of plaintiff No 2 which is a company duly incorporated under the Companies Act. Plaintiff No 1 has 30.4% shareholding in plaintiff No. 2. Defendant No 1 is the brother-in-law of plaintiff No 1 and the brother of her deceased husband. The grievance of the plaintiff is that the defendants are proposing to hold an Extra-Ordinary General Meeting (EGM) which is scheduled for 26.05.2017. The agenda of the meeting has been circulated through a communication dated 24.04.2017. There are 3 agendas, all of which are against the statutory obligations contained in the Companies Act. It is pointed out that as is clear from the communication dated 24.04.2017, the EGM proposes to appoint Smt. Rukmini Devi as the managing director of the company; Rukmini Devi is a 78-year-old lady and in terms of Section 196(3)(a) of the Companies Act, such an appointment cannot be made; no special Resolution has been passed. The 2nd contention of the plaintiff is that the removal of plaintiff No 1 as the CMD is also against the mandate of Section 102 read with Sections 115 and 169 of the Companies Act as also the “Secretarial Standards of General Meetings”; the explanatory statement which is required to be furnished has not been furnished. The 3rd grievance of the plaintiff is that the agenda proposing to invoke the removal of defendants No 1 & 3 as directors of plaintiff No 2 (which was done in the year 2014) cannot be effected as this matter is already subjudice

before the NCLT in Company Petition No 136/2014 before the Calcutta Bench.

The submissions have been noted. They are prima facie borne out from the record of the case.

Issue summons of the suit and notice of the interim application to the defendants on the plaintiffs taking necessary steps by ordinary process, speed post as also courier.

For completion of pleadings and service, list before the Joint Registrar on 09.10.2017.

Let status quo be maintained till the next date and the EGM proposed for 26.05.2017 be not convened.

Order dastiunder the signatures of the Court Master.”

(Emphasis supplied)

- 30** Significantly, after the passing of the above order, by the learned Single Judge, in the forenoon of 23rd May 2017, Plaintiff No 1 filed an affidavit, in CS (OS) 233/2017 at 2:19 PM on the same day, i.e. 23rd May 2017, purporting to state that she had just been informed, regarding the order, dated 22nd May 2017, passed by the NCLT in Company Petition 136/2014. Asseverations, to the same effect, find place in sub-paras v) and x) of para 3 in CS (OS) 285/2017, wherein it is sought to be submitted that it was only on 22nd May 2017 that the plaintiffs received a copy of the order, dated 18th May 2017 *supra* passed by the NCLT, for which purpose the plaintiffs seek to place

reliance on the aforementioned affidavit filed by them, in CS (OS) 233/2017 at 2:19 PM on 23rd of May 2017.

- 31** It is also relevant to draw attention, here, to the averment, in sub-para w) of the same para 3, that the pendency of CS (OS) 225/2017 was, in fact, brought to the notice of the learned Single Judge on 23rd May 2017, during hearing of IA 6382/2017 in CS (OS) 233/2017. There is, however, not an iota of material to support this submission, which does not find support from the order, dated 23rd May 2017, of the learned Single Judge, either.
- 32** On 24th May 2017, the plaintiffs condescended to place, on the record of CS (OS) 233/2017, a copy of the order, dated 18th May 2017 *supra* passed by the NCLT.
- 33** The above situation resulted in Defendant No 2 (Jyoti, who is Applicant No 4 in the present appeal) moving IA 6537/2017 in CS (OS) 233/2017, under Order XXXIX Rule 4 of the CPC, for vacation of the stay granted by the learned Single Judge on 23rd May 2017. The said application came up before the learned Single Judge on 25th May 2017, on which occasion notice was issued thereon, returnable on 11th July 2017. Simultaneously, the learned Single Judge cancelled the date, of 9th October 2017, before the Joint Registrar, which was already fixed in the matter. Nothing else is stated in the order dated 25th May 2017, though the plaintiffs have, in sub-para aa) of para 3 of the plaint

in CS (OS) 285/2017, stated that the defendants had pleaded, before the learned Single Judge, that the proceedings before the NCLT, and the pendency of CS (OS) 225/2017 had been concealed from her, and that she had refused to accede to the said submission, stating that she had been informed of the said proceedings.

34 The said order, dated 25th of May 2017, of the learned Single Judge, was challenged, by the defendants, by way of FAO (OS) 179/2017 (Jai Kumar Arya v Chhaya Devi) and FAO (OS) 180/2017 (Jyoti Kumar Arya v Chhaya Devi). The said appeals came to be listed before this Bench on 30th of May 2017, whereupon the following order was passed:

- “1. Issue notice to show cause as to why these appeals be not admitted.*
- 2. We are informed that the learned Single Judge was persuaded by the respondents herein to pass the order dated 23.05.2017 concealing the proceedings and the orders passed by the National Company Law Tribunal as well as the proceedings in CS (OS) No 225/2017.*
- 3. No interim stay of the Extraordinary General Meeting dated 26.05.2017 had been granted to the respondents in these proceedings. The proceedings are stated to be still pending before the National Company Law Tribunal.*
- 4. In view thereof, there shall be stay on the effect and operation of the order dated 23.05.2017 till the next date of hearing.*

List on 16.10.2017.”

The interim stay, granted by para 4 of the above mentioned order, dated 30th May 2017, passed by us in FAO (OS) 179/2017 and FAO (OS) 180/2017 continues till date.

35 The above order, dated 30th May 2017, was carried, by the plaintiffs, in appeal, to the Supreme Court, by way of SLP (C) 16274/2017.

36 On 2nd June 2017, Defendant No 1 (Rukmini Devi), in her capacity as Director of the company, issued a notice, to the effect that the meeting of the Board of the Company would be held on 12th June 2017 to, *inter alia*, remove Plaintiff No 1 (Chhaya Devi) from the Directorship of the Company and to appoint Defendants Nos 2 (Jyoti) and 4 (Purushottam) as Additional Directors therein.

37 *Vide* order dated 9th June 2017, SLP (C) 16274/2017 was disposed of, by the Supreme Court, in the following terms:

“ *Heard learned senior counsel for the petitioners.*

These special leave petitions have been filed against an interim order dated 30th May, 2017 passed by the Division Bench of the High Court in FAO (OS) No 179/2017. Learned senior counsel for the petitioners submitted that the observations made by the Division Bench while issuing notice and granting interim order may be prejudicial to the interest of the petitioners and

the order passed by the High Court is an ex parte interim order. Learned senior counsel further states that with regard to the subsequent meeting scheduled to be held on 12th June, 2017, he is taking appropriate steps.

It shall be open to the petitioners to take such steps, as may be admissible, in accordance with law since in this case we are not concerned with the meeting which is going to be held on 12th June, 2017.

With the above observation, the specially petitions are dismissed.

Pending application, if any, also stands disposed of.”

(Emphasis supplied)

- 38** On the basis the liberty granted, by the Supreme Court, in the aforementioned order dated 9th June 2017, the plaintiffs moved the Original Side of this Court by way of a third suit, viz. CS (OS) 285/2017, praying that this Court be pleased “*to pass a decree of permanent mandatory injunction in favour of the Plaintiffs and against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from acting upon the Notice dated 02.06.2017 issued by the Defendant No 1 and a decree of permanent mandatory injunction in favour of the Plaintiffs and against the Directors or anyone acting on their behalf from attending/convening any meeting of the Plaintiff No 2 on 12.06.2017 and restraining the Defendant No 1 to from issuing any letters on the letterhead of the Plaintiff no 2*”. Essentially, therefore, the plaintiff sought

stay of the Notice, dated 2nd June 2017, issued by Defendant No 1, and injunction against holding of the meeting, on 12th June 2017, pursuant thereto. Para 12 of the plaint makes for interesting reading, and may be reproduced, to advantage, as under:

“12. *It is submitted that subsequent to the ex parte order dated 30.05.2017, the Plaintiff No 1 was shocked to receive the notice dated 02.06.2017 and being aggrieved by the order dated 30.05.2017 passed in FAO (OS) No 179 of 2017 and FAO (OS) No 180 of 2017, the Plaintiffs filed SLP (C) No 16274 of 2017 and SLP (C) No 16281 of 2017 respectively. The Plaintiffs along with the SLPs also filed an application for additional documents being email dated 01.06.2017 and impugned notice dated 02.06.2017. The SLPs were mentioned before the Hon’ble Court on 07.06.2017 and the same were listed before the Hon’ble Court on 09.06.2017. It is submitted that on 09.06.2017, the matter was heard at length by the Hon’ble Court and the Hon’ble Court was pleased to record the submission of the Plaintiffs seeking appropriate relief against the impugned notice dated 02.06.2017 for convening an illegal meeting of Board of Directors on 12.06.2017. It is submitted that the Plaintiffs are approaching this Hon’ble Court with utmost urgency as the illegal meeting is scheduled for 12.06.2017 at 11 AM.*”

(Emphasis supplied)

CS (OS) 285/2017 was accompanied by IA 7139/2017, under Order XXXIX Rules 1 and 2 of the CPC, seeking *ad interim* injunction.

- 39 CS (OS) 285/2017, along with, *inter alia*, IA 7139/2017, were listed before the learned Vacation Judge on 12th of June 2017. It was sought to be argued, on behalf of the plaintiffs, that a decision to remove a Director from the Company had necessarily to be taken at an Annual General Meeting or at an EGM and that, therefore, the impugned notice, dated 2nd June 2017 was illegal. Holding that the plaintiffs had made out a *prima facie* case in their favour, the learned Vacation Judge granted *ex parte ad interim* stay of the meeting of the Board of the Company, to be held on 12th June 2017, and further ordered that, if the said meeting had already been held, no effect be given to the decisions taken therein till the next date of hearing.
- 40 Defendant No. 2 (Jyoti), thereupon, filed IA 7150/2017 (under Order XXXIX Rule 4) and IA 7151/2017 (under Order XXXIX Rules 1 & 2) in CS (OS) 285/2017. These applications need not, however, detain us as, when they were listed before the learned Single Judge on 4th July 2017, it was submitted, on behalf of Defendants 2 to 10 (which include the present appellants before us), that the Board was proposing to convene an EGM, in terms of Section 100 of the Act, independent of the Resolution passed on 12th June 2017, which stood interdicted by the learned Single Judge. On the submission, the Single Judge noted, in the order dated 4th July 2017, thus:
- “ *Learned counsel for the defendant Nos 2 to 10 submits that an Extraordinary General Meeting was*

proposed to be held on 10.07.2017 in terms of Minutes of Meeting dated 12.06.2017. He submits that since this Court had interdicted the Resolutions passed on 12.06.2017, the Board of Director propose to convene an Extraordinary General Meeting in terms of Section 100 of the Companies Act, 2013, independent of the said resolution.

It is clarified that if the Board of Directors have any independent right to convene an Extraordinary General Meeting in terms of the Companies Act, 2013, they are at liberty to do so without the present proceedings coming in their way. The convening of an Extraordinary General Meeting, if any, would be without prejudice to the rights and contentions of the plaintiff.”

- 41** In view of the clarification contained in the above order dated 4th July 2017 passed by the learned Single Judge, Defendants 1 to 9 (which included the present appellants) issued a Special Notice, dated 8 July 2017, under Section 115 read with Section 169(2) of the Act. The said Special Notice requires to be reproduced, *in extenso*, thus:

“Date 08.07.2017

*To
The Directors of
PRABHAT ZARDA FACTORY (INDIA) PRIVATE
LIMITED
Registered office: New Area SIC Andarpur,
PO Muzaffarpur Bihar-842001,
India.*

Dear Sir/Madam,

Subject: Special notice U/S115 of the Companies Act, 2013 for removal of MrsChhaya Devi from the office of Director.

We, Rukmani Devi (6000 shares), Jyoti Kumar Arya (5850 shares), Jyoti Kumar Arya HUF (1500 shares), Malti Devi (1500 Shares), Jai Kumar Arya (1000 shares), Ujjwal Arya (1000 shares), Gaurav Kumar Arya (1000 shares), Manju Devi (8250 shares), Purushottam Kumar Arya (2000 shares), the undersigned, member of Prabhat Zarda Factory (India) Private Ltd, hereby give notice pursuant to the provisions of section 169 (2) read with section 115 of the Companies Act, 2013 that I intend to move at the extraordinary general meeting (to be convened) of the Company following ordinarily resolution that Mrs Chhaya Devi be removed from the office of director of the Company:

ORDINARY RESOLUTION:

“RESOLVED THAT MrsChhaya Devi, having the Director identification number 02354785, be and is hereby removed from the office of Director of the Company with immediate effect.”

GROUND OF REMOVAL

The Actions of the director, under proposed removal, are against the companies interest.

The company is requested that this special notice be circulated to all the directors and shareholders and auditors of the company and a copy be also served on Mrs Triad Devi, the director under proposed removal, with a request to make further representation, if she desire, in accordance with the provisions of the companies act.

Yours faithfully

1. *Rukmani Devi*
2. *Jyoti Kumar Arya*
3. *Jyoti Kumar Arya HUF*
4. *Malti Devi*
5. *Jai Kumar Arya*
6. *Ujjwal Arya*
7. *Gaurav Kumar Arya*
8. *Manju Devi*
9. *Purushottam Kumar Arya”*

42 Shankar Prasad, one of the Directors in the Company, also issued a Notice, dated 10th July 2017, of the meeting of the Board having been scheduled on 18th July 2017, and calling on Plaintiff No 1 to attend the said meeting. Nothing, however, turns thereon, as the said notice was, subsequently, withdrawn before court on 26th July 2017, with liberty to issue a fresh notice in accordance with law.

43 The plaintiffs (Chhaya Devi and the Company), thereupon, moved IA 7854/2017 and IA 7856/2017, in CS (OS) 285/2017, the former under Order VI Rule 17, and the latter under Order XXXIX Rules 1 and 2 of the CPC.

44 IA 7854/2017 sought to amend CS (OS) 285/2017. Paras 12A to 12D were sought to be added in the plaint, alleging that the proposal to remove Plaintiff No 1 from the Company, as contained in the notice dated 8th July 2017, was illegal. The

application also sought to add the following prayers, in the plaint:

- “ii) *A decree of permanent mandatory injunction against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from acting upon the notice dated 08.07.2017 and/or calling/sending any notice for convening any Extraordinary General Meeting of Plaintiff No 2 and from attending/convening the Meeting of the Board of Directors scheduled for 18.07.2017 and also from giving effect to any resolution passed in the Board Meeting of Plaintiff No 2 on 18.07.2017, if convened;*
- iii) *A decree of permanent mandatory injunction against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from convening any Board Meeting and/or Extraordinary General Meeting and/or such other meeting of the Plaintiff No 2 without the leave of this Hon’ble Court;*
- iv) *A decree of permanent mandatory injunction in favour of the Plaintiffs and against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from threatening and/or harming and/or harassing the Plaintiff No 1 and/or issuing any letter and/or notice and/or document to the Plaintiff No 1;*
- v) *A decree of perpetual injunction in favour of the Plaintiffs and against the Defendants from interfering and/or obstructing and/or hindering the smooth running and functioning of the Plaintiff No 2 company and functioning of the Plaintiff No 1 as the Managing Director/Director of the Plaintiff No 2 company and/or doing any such acts or issuing*

any such notice/letter which obstructs the smooth functioning of the Plaintiff No 2 company;”

45 IA 7856/2017, filed under Order XXXIX Rules 1 and 2 of the CPC, prayed that this Court “*be pleased to*

- (i) *pass and ad interim ex parte order against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from acting upon the notice dated 08.07.2017 and/or calling/sending any notice for convening any Extraordinary General Meeting of Plaintiff No 2 and from attending/convening the meeting of the Board of Directors scheduled for 18.07.2017 and also from giving effect to any resolution passed Board Meeting of Plaintiff No 2 on 18.07.2017, if convened;*
- (ii) *Pass and ad interim ex parte injunction against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from convening any Board Meeting and/or Extraordinary General Meeting and/or such other meeting of the Plaintiff No 2 without the leave of this Hon’ble Court;”*

46 IA 7854/2017 and IA 7856/2017 came up for hearing, before the learned Single Judge, on 17th July 2017, whereupon notice was issued on the said applications, and was accepted by the defendants. Learned counsel appearing for the defendants submitted, to this Court, that, without prejudice to the defendants’ defence, it had been decided to defer the meeting, scheduled for 18th July 2017, to 28th July 2017. The proceedings were, therefore, renotified for 26th of July 2017.

- 47 On 26th of July 2017, the learned single Judge noted that no venue, or time, for the rescheduled meeting of 28th of July 2017, was forthcoming. He also observed that the notice, dated 22nd July 2017, issued by Shankar Prasad, did not provide the statutorily required one-week period till the date of the meeting scheduled for 28th July 2017. In the circumstances, the defendants submitted, without prejudice, that they would issue a fresh notice in accordance with law, and in furtherance of the requisition received from the shareholders on 8th July 2017 and, therefore, withdrew the notices dated 10th July 2017 and 22nd July 2017. In the circumstances, the plaintiffs, too, withdrew IA 7856/2017 without prejudice to the respective rights and contentions of the parties.
- 48 IA 7854/2017, under Order VI Rule 17 of the CPC, for amendment of the plaint in the terms already set out in para 47 *supra*, was directed to be listed, for consideration, on 12th October 2017.
- 49 Six, out of the nine Directors of the Company, namely Rukmani Devi (Defendant No 1), Shankar Prasad, Ratna Devi, Amit Kumar, Rajesh Kumar and Pritam Kumar, thereafter, issued Notice, dated 8th August 2017, on behalf of the Company, for convening of a meeting of the Board on 26th of August 2017, pursuant to the requisition, dated 8th July 2017, received from

the Company. The items on the Agenda, for the meeting proposed on 26th of August 2017, as annexed to the notice dated 8 August 2017, read as under:

- “1. To discuss upon whether to issue a notice to convene an Extra Ordinary General Meeting pursuant to the Special Notice dated 08.07.2017 received from the members of the Company proposing to remove Mrs Chhaya Devi, (Director identification Number 02354785) from the office of Director of the Company and to discuss and authorise any Director to take all such steps and do all such things as may be required in this regard.
2. To transact any other business with the permission of the Chair.”

50 Predictably, Plaintiff No 1 (Chhaya Devi) filed, on 23rd August 2017, IA 9617/2017 (under Order VI Rule 17, for amendment) and IA 9618/2017 (under Order 39 Rules 1 & 2, seeking *ad interim* injunction) in CS (OS) 285/2017.

51 IA 9617/2017 sought to amend the plaint (CS (OS) 285/2017). Whereas the earlier amendment application (IA 7854/2017) – which was still pending before the learned Single Judge – proposed to add paras 12A to 12D in the plaint, IA 9617/2017 sought to add paras 12A to 12I. These paras went on to challenge the notice, dated 8th August 2017 *supra* as being “*in complete violation of the Companies Act, 2013, the Companies (Management and Administration) Rules, 2014 and the Secretarial Standards on Meetings of the Board of Directors*”

and, consequently, incapable of being acted upon. It was also contended that the said notice was “*against the Articles of Association of the company*”. The following prayers were also sought to be added, in the plaint:

- “ii) *A decree of permanent mandatory injunction against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from acting upon the notice dated 08.08.2017, notice dated 08.07.2017 and notice dated 21.08.2017 and/or calling/sending any notice for convening any Extraordinary General Meeting of Plaintiff No 2 and from attending/convening the Meeting of the Board of Directors scheduled for 26.08.2017 and also from giving effect to any resolution passed in the Board Meeting of Plaintiff No 2 on 26.08.2017, if convened;*
- iii) *A decree of permanent mandatory injunction against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from convening any Board Meeting and/or Extraordinary General Meeting and/or such other meeting of the Plaintiff No 2 without the leave of this Hon’ble Court;*
- iv) *A decree of permanent mandatory injunction in favour of the Plaintiffs and against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from threatening and/or harming and/or harassing the Plaintiff No 1 and/or issuing any letter and/or notice and/or document to the Plaintiff No 1;*
- v) *A decree of perpetual injunction in favour of the Plaintiffs and against the Defendants from interfering and/or obstructing and/or hindering the smooth running and functioning of the Plaintiff No*

2 company and functioning of the Plaintiff No 1 as the Managing Director/Director of the Plaintiff No 2 Company and/or doing any such acts or issuing any such notice/letter which obstructs the smooth functioning of the Plaintiff No 2 company;”

52 IA 9618/2017, filed under Order XXXIX Rules 1 and 2 of the CPC, prayed that this Court “*be pleased to:*

- (i) *Pass an ad interim ex parte order against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from acting upon the notice dated 08.08.2017, notice dated 08.07.2017 and notice dated 21.08.2017 and/or calling/sending any notice for convening any Extraordinary General Meeting of Plaintiff Known to and from attending/convening the Meeting of the Board of Directors scheduled for 26.08.2017 and also from giving effect to any resolution passed in the Board Meeting of Plaintiff No 2 on 26.08.2017, if convened;*
- (ii) *Pass an ad interim ex parte injunction against the Defendants restraining them, their agents, servants, representatives and/or anyone acting on their behalf from convening any Board Meeting and/or Extraordinary General Meeting and/or such other meeting of the Plaintiff No 2 without the leave of this Hon’ble Court;”.*

53 IA 9618/2017 advanced the following submissions, in support of the prayer for *ad interim* injunction made therein:

- (i) The Notice, dated 8 August 2017 was “*in complete violation of the Companies Act, 2013, the Companies*

(Management and Administration) Rules, 2014 and the Secretarial Standards on Meetings of the Board of Directors” and could not, therefore, be acted upon.

- (ii) The Notice, dated 8 August 2017, was “*against the Articles of Association of the company*”.
- (iii) Section 173(3) of the Act mandatorily required that every Director be given at least 7 days notice before the date of meeting. This condition was also violated, insofar as Plaintiff No 1 was concerned, as the notice had been sent to an e-mail address, of Plaintiff No 1 which, however, was not her registered e-mail address. Such service did not, therefore, amount to valid delivery of the notice. That apart, in the case of delivery through registered post, two additional days were required to be added.
- (iv) Standard 1.1.1 of the Secretarial Standards on Meetings of the Board of Directors (hereinafter referred to as “the Secretarial Standards”) stipulated that the Board meeting could be convened only by the Directors of the Company in consultation with the Chairman and Managing Director thereof. The notice, dated 8th August 2017 had, however, been sent by the defendants without consultation with Plaintiff No 1 who was the MD-cum-Chairman of the Company.
- (v) The basis of the notice dated 8th August 2017 was the earlier notice dated 8th July 2017 which, however, was not a “requisition” and could not, therefore, be acted upon.

That apart, more than 21 days had elapsed since the notice of 8th July 2017.

- (vi) Standard 1.3.8 of the Secretarial Standards required that each item of business requiring approval at the meeting be supported by a note setting out the details of the proposal. The notice dated 8th August 2017 merely had an agenda, without any note or reference papers in support thereof. Neither was any note appended to the “Special Notice” dated 8th July 2017 which, too, merely contained a statement that the actions of Plaintiff No 1 were against the interests of the Company.

54 IA 9617/2017 and IA 9618/2017 were both listed before the learned Single Judge on 25th August 2017. However, notice was issued only on IA 9618/2017, with a further direction that no effect be given to any decision taken in the meeting to be held on 26th August 2017, till the next date of hearing, i.e. 30th August 2017.

55 On 26th August 2017, the Board meeting took place, as scheduled, with 6, out of 9, Directors voting in favour of the resolution to convene the EGM on 7th October 2017, pursuant to the Special Notice dated 8th July 2017.

56 It was in these circumstances that, on 11th September 2017, the impugned order came to be passed by the learned Single Judge

in IA 9618/2017. The reasoning of the learned Single judge, as contained in the impugned order dated the 11th of September 2017, proceeds thus:

- (i) As regards the notice, dated 8th July 2017, issued under Section 115 of the Act, there was no dispute that it was signed by the statutorily prescribed number of shareholders.
- (ii) Further, the said notice, dated 8th July 2017, did not require the Directors of the company to convene an EGM. All it stated was that there was an intention of the shareholders to move an ordinary resolution, at the EGM, which was to be convened.
- (iii) The only ground for removal, mentioned in the notice dated 8th July 2017, was that the actions of Plaintiff No 1 were against the company's interests. No further clarification, explanation or reasons, specifying the particulars of such actions, were contained in the said notice.
- (iv) It was "candidly" submitted, by learned counsel for the defendants, that the Directors could not, of their own, seek to remove another Director, and could only act on receipt of a Special Notice.
- (v) The learned counsel for the defendants himself contended that the letter, dated 8th July 2017, was not a requisition. It was not possible, therefore, to understand how the Board exercised power to convene an EGM under Section 100

(1) of the Act, in view of the statutory position, admitted by learned counsel for the defendants, that an EGM could be convened only on a requisition.

- (vi) Even while convening an EGM on the basis of a requisition of the shareholders, it was necessary for the Board to apply its mind to consider whether the requisition was appropriate and in accordance with law.
- (vii) The notice dated 8th July 2017 was bereft of any reasons or grounds, and contained only a bald averment that Plaintiff No 1 was acting against the company's interests. Communication of the grounds on which she was being proposed to be removed, to Plaintiff No 1, was mandatory, as he was entitled to represent thereagainst.
- (viii) Curtailment of the statutory rights already enured in favour of Plaintiff No 1, who had been appointed as a whole time Director for a period of 10 years in 2008, required compliance with Section 169 of the Act. In the absence of any reasons, in the notice dated 8th July 2017, it could not be said that such compliance had taken place. The said notice had, therefore, been mechanically issued without application of mind.
- (ix) The judgement in *L.I.C. of India v Escorts Ltd, (1986) 1 SCC 264*, on which the defendants placed reliance, was not applicable, as the Supreme Court was, in that case, not considering a provision like Section 169, with specifically conferred an opportunity of being heard.

- (x) This infirmity could not be said to be cured merely by an assurance that the reasons, for removal of Plaintiff No 1, as Director in the Company, would be supplied along with the Explanatory Note for the meeting. The explanatory note had to be prepared by the Directors who convened the meeting, not by the shareholders who had requisitioned the same. If there was no material available on record with the Directors who had convened the meeting, no such material could, obviously, be supplied in the explanatory note thereto.

Holding, therefore, that permitting the defendants to convene any Board meeting or an EGM and passing the resolution as proposed, would cause irreparable loss and injury to Plaintiff No 1, who could then be removed from the Board of Directors of the Company, the impugned order, passed by the learned Single Judge proceeded to restrain the defendants from acting upon the notice dated 8 August 2017, and the resolutions passed in the consequential meeting dated 26th August 2017.

57 Defendants 2, 6, 7 and 8 are in appeal, before us, thereagainst.

The Rival Contentions

58 We have heard, Mr A. S. Chandhiok and Mr Anil Sapra, learned Senior Counsel appearing for the appellants and respondents

respectively, at great length, and exhaustively perused the record before us.

59 In support of the appeal, Mr. Chandhiok advances the following submissions:

- (i) The impugned order was without jurisdiction, in view of Section 430 of the Act, which barred civil courts from granting any injunction in respect of any matter which the NCLT was competent to adjudicate. Any grievance, with respect to the removal of a Director, or the procedure followed in respect thereof, lay within the jurisdiction of the NCLT, *vide* Section 169 (4) of the Act. Consequently, the jurisdiction of the civil court stood barred.
- (ii) The plaintiffs were also barred from invoking the jurisdiction of this Court, having elected to submit to the jurisdiction of the NCLT, while challenging the notice dated 24th April 2017. Reliance was placed, for this proposition, on the judgement of this Court in *H. B. Stockholdings v D.C.M. Shriram Industries Ltd*, 163 (2009) DLT 443.
- (iii) The plaintiffs filed CS (OS) 225/2017 and CS (OS) 233/2017, seeking the same reliefs as had been sought from the NCLT. While doing so, however, the plaintiffs intentionally suppressed the order, dated the 18th of May 2017, passed by the NCLT, from this Court. Moreover, in CS (OS) 233/2017, the plaintiffs misrepresented the facts,

by stating that the NCLT had reserved orders on IA 17/KB/2017, for 22nd May 2017. The order, dated 23rd May 2015, in CS (OS) 233/2017 was, therefore, obtained by fraud. This was also borne out from the fact that the said order was stayed by the Division Bench of this Court *vide* its order dated 30th of May 2017 in FAO (OS) 179/2017 and FAO (OS) 180/2017. The SLP, preferred thereagainst, was also dismissed by the Supreme Court on 9th of June 2017.

- (iv) The learned Single Judge erred in granting *ad interim* relief, as sought in IA 9618/2017, when IA 9617/2017, for amendment of the plaint, was still pending adjudication, notice alone having been issued thereon. Till the amendment was allowed, there was no substantive challenge, to the notice dated 8th August 2017, or the proposed meeting of the Board scheduled for 26th August 2017. Interim relief, by way of stay of the said meeting, the challenge to which was still not part of the plaint, could not, therefore, have been granted under Order XXXIX of the CPC.
- (v) The learned Single Judge erred in distinguishing the judgement in ***L.I.C. of India (supra)***. The judgement, rendered in the context of Section 284 of the Companies Act, 1956, which was *in parimateria* with Section 169 of the Act, clearly held that the shareholders, calling a meeting, were not required to disclose the reasons for the

resolutions which they proposed to move at the meeting. Every shareholder had the right to call an EGM of the Company, for the purpose of moving a resolution to remove Directors and appoint others in their place. The reasons therefor were not required to be disclosed. The statute only cast a duty on the management to disclose, in an explanatory note, all material facts relating to the resolution coming up before the general meeting to enable shareholders to form a judgement on the business before them.

- (vi) Sub-Sections (3) and (4) of Section 169 of the Act contemplated that the Director, who was being proposed to be removed, would be heard at the EGM, where the resolution of such removal was being considered. The Explanatory statement containing reasons, in terms of Section 102 of the Act, was required to be issued only if the Board deemed it fit to convene the EGM. The stage for issuance of such explanatory statement, disclosing the reasons for convening the EGM, never arose, in view of the order, dated 25th August 2017, of the learned Single Judge, which injuncted giving any effect to the resolution arrived at, in the EGM.
- (vii) Section 169 (1) of the Act permitted the Company to remove any Director/Directors by an ordinary resolution, after giving him an opportunity of being heard. All that was required was that a special notice, under Section 169

(2) be issued prior thereto, of the resolution to remove the said Director.

(viii) Section 100 empowered the Board to call an EGM, either of its own accord [under sub-section (1)] or on the requisition made by the requisite number of shareholders [under sub-section (2)]. In the present case, it was an admitted position, as recorded in para 3 of the impugned order, that 6, out of 9 Directors of the Company had proposed the convening of the EGM. As such, the EGM had been called by the Board under Section 100 (1), and not under Section 100 (2), as erroneously held by the learned Single Judge.

(ix) The contention, of the respondents (i.e. the plaintiffs), that the issue had become infructuous in view of Section 100 (4) of the Act, which specified that the Special Notice remain valid only for 3 months from the date of its issue and had, therefore, expired on 7th October 2017, was misplaced, in view of the law laid down by the Supreme Court in *Shree Chamundi Mopeds v Church of South India Trust Association*, AIR 1992 SC 1439, which holds the quashing of an order results in restoration of the position as it stood on the date of passing of the order thus quashed.

60 Mr Chandhiok highlights the following, as irrefutable evidence of the fact that the plaintiffs have been “economical with the

truth” and have, thereby, disentitled themselves to any relief from a constitutional court:

- (i) There is no whisper, anywhere in CS (OS) 225/2017, of the fact that Plaintiff No 1 had already moved the NCLT for interim injunction qua the requisition dated 27th April 2017 and notice dated 4th May 2017.
- (ii) It does not appear, either from a reading of the order, dated 18th May 2017, passed by the NCLT, or from the record otherwise available before us, that the NCLT was apprised, by the plaintiffs (who were the applicants before the NCLT) of the fact that Plaintiff No 1 had, a day earlier, filed CS (OS) 225/2017, before this Court, seeking reliefs largely similar to those sought from the NCLT.
- (iii) The plaintiffs, who alone attended the hearing of CS (OS) 225/2017, on 19th May 2017, before the learned Single Judge, apparently did not bring, to the notice of the learned Single Judge, the factum of IA 17/KB/2017 having been filed, by the plaintiffs themselves, before the NCLT, or of the order passed by the NCLT, rejecting the plaintiffs’ request for stay on 18th May 2017, i.e. just a day earlier.
- (iv) The factum of the filing of CS (OS) 225/2017, or of the order passed by the learned Single Judge, thereon, on 19th May 2017, appear to be entirely suppressed from the body of the plaint in CS (OS) 233/2017.

- (v) The averment, in para 13 of CS (OS) 233/2017, to the effect that orders had been reserved, by the NCLT, on IA 17/KB/2017 for 22nd May 2017, amounts, *ex facie*, to rank misstatement on the part of the plaintiffs, as IA 17/KB/2017, moved by the plaintiffs before the NCLT, stood unequivocally dismissed, by the NCLT, on 18th May 2017 itself.
- (vi) The plaintiffs were, therefore, doubly disingenuous while drafting CS (OS) 233/2017, inasmuch as they were guilty, not only of suppressing the facts relating to CS (OS) 225/2017, and the order dated 19th May 2017 passed thereon, but also of misstatement with respect to the proceedings before the NCLT in IA 17/KB/2017. (We may note, here, that Mr Anil Sapra, learned Senior Counsel appearing for the respondents before us, was characteristically candid in admitting that reference to CS (OS) 225/2017 ought, appropriately, to have found place in CS (OS) 233/2017.)
- (vii) It is possible to reasonably infer that the omission to disclose the factum of filing of CS (OS) 225/2017, and of the order, dated 19th May 2017, passed thereon, was with the intention of ensuring listing, of CS (OS) 233/2017, before a bench other than that before whom CS (OS) 225/2017, was listed.
- (viii) It was not possible to believe, either, the assertion, in the affidavit filed by Plaintiff No 1, in CS (OS) 233/2017 at

2:19 PM on 23rd May 2017, as also in sub-paras v) and x) of para 3 of CS (OS) 285/2017, that the plaintiffs became aware, of the order dated 18th May 2017, passed by the NCLT, only on 22nd May 2017, when they received a copy thereof.

61 *Per contra*, Mr Anil Sapra, learned Senior Counsel appearing on behalf of the plaintiffs (respondents) contends thus:

- (i) There is no universal principle that, till IA 9617/2017 was allowed, CS (OS) 285/2017 was amended, and the amended plaint taken on record, interim relief, as prayed in IA 9618/2017, could not be granted. While it could, perhaps, be argued that the learned Single Judge ought not to have finally disposed of IA 9618/2017, when IA 9617/2017 was still pending before him, the relief granted by the impugned order could legally have been granted on an *ad interim* basis, while issuing notice on IA 9618/2017.
- (ii) Section 169 (2) of the Act required issuance of special notice, under Section 115, of the resolution to remove the Director, before the resolution could be acted upon. Sub-section (3) of Section 169 mandated sending of a copy, of such special notice of resolution, to the concerned director, and sub-section (4) permitted the said Director to represent thereagainst. Further, the 2nd proviso to Section 179 (1) of the Act prohibited the Board from

exercising any power, or doing any act or thing, which was required, by the Articles of Association of the Company, to be done by the company in general meeting. In fact, the defendants (i.e. the appellants before us) had admitted, before the learned Single Judge, that Plaintiff No 1 could not be removed from Directorship of the Company without issuance of a Special Notice under Section 115.

- (iii) The Notice, dated 8th July 2017, while purporting to be a Special Notice under Section 115 of the Act, did not satisfy the requirements of one. It did not seek convening of any EGM, but merely stated that the resolution was intended to be moved as and when the meeting would be convened. Further, it was totally unreasoned, in that the only ground to remove Plaintiff No 1 from Directorship of the Company was that she had acted against the Companies interest. No particulars were forthcoming. It was impossible, therefore, for Plaintiff No 1 to respond thereto, or represent thereagainst. Such a notice did not conform to the requirement of a reasonable opportunity of hearing to Plaintiff No 1, as required by Section 169 (2) of the Act. For the proposition that a notice, under Section 169 of the Act, was required to give reasons, reliance was placed, by Mr Sapra, on *Queens Kuries & Loans v Sheena Jose, 1992 SCC Online Ker 435*.

- (iv) The notice, dated 8th August 2017 *supra*, purportedly issued under Section 169 (3) of the Act, wrongly treated the earlier notice, dated 8th July 2017, as a requisition for convening an EGM. In actual fact, it only suggested proposal of the resolution at the next EGM, when convened.
- (v) In any event, the issue had been rendered infructuous as, the time for holding of the meeting, as stipulated in Rule 23(1) of the Companies (Management and Administration) Rules, 2014, had expired on 8th October 2017. The notice, dated 8th July 2017 had, thereby, been rendered infructuous.
- (vi) The bar, to exercise of jurisdiction by the civil court, as contained in Section 430 of the Act, applied only where the Act specifically conferred power on the NCLT with respect to any specific purpose. No such specific power was conferred, on the NCLT, by Section 169 of the Act.

62 Responding in rejoinder, Mr Chandhiok submits as under:

- (i) The issue has not become infructuous as, in computing the period of 3 months specified in Rule 23(1) of the Companies (Management and Administration) Rules, 2014, the period during which the stay, granted by the order, dated 25th August 2017 *supra*, passed by this Court, continues to operate, would stand excluded.

- (ii) Section 430 of the Act applies, as the proviso to Section 169 (4) specifically refers to the NCLT. Because recourse, to the NCLT, was also available, to the plaintiff, by virtue of Section 241 (1)(a) of the Act. Reliance was also placed, in this regard, on the words “either expressly or impliedly barred”, figuring in Section 9 the CPC.
- (iii) That the plaintiffs were forum shopping was also clear from the fact that, having elected to submit to the jurisdiction of the NCLT, they approached this Court, while seeking the challenge a later notice.
- (iv) There was no justification for passing the impugned order, as the interim relief, which was finally granted thereby, already stood granted, to the plaintiffs, by the earlier order, dated 25th August 2017 *supra*, passed by this court in IA 9618/2017. This Court had, in the said order, clarified that any decision, taken in the meeting scheduled for 26th August 2017, would not be given effect to, till the next date of hearing. Having granted the said relief, there was no justification, whatsoever, for the learned Single Judge to, vide the impugned order dated the 11th September 2017, restrain the defendants even from acting on the notice dated 8th August 2017, and to finally allow IA 9618/2017 in the said terms.
- (v) The “concession”, recorded as having been given by learned counsel appearing for the defendants, in para 30

of the impugned order, to the effect that Directors, of their own, could not seek to remove another Director, and could only act on a special notice being received, did not represent the correct legal position, as Section 169 (1) entirely empowered the Company, i.e. the Board, to remove any Director or appoint any other Director in her, or his, place.

Issues

63 Though, as detailed hereinabove, learned senior counsel appearing for the appellants, and respondents, proffered, before us for our consideration, their contrasting versions of the litigative progress, in the present case, our brief, as noticed at the very outset, is limited. The impugned order, dated 11th September 2017, passed by the learned Single Judge, disposes of IA 9618/2017 by restraining the defendants (including the appellants before us) from acting upon the notice, dated 8th August, 2017, or on any resolution passed in the consequential meeting, dated 26th August 2017. We are only required to examine whether the said order, of the learned Single Judge, can be sustained, in law, or not.

64 Resultantly, though the grievance, of Mr Chandhiok, regarding the propriety of the manner in which the plaintiffs have, till now, chosen to prosecute the present proceedings, and the

allegations of fraud, forum shopping, etc, levelled by him in connection therewith, merits serious consideration, we restrain ourselves from making any comments thereon, leaving the issue open and at large to be considered by the appropriate forum at the appropriate stage.

65 Even though, as stated hereinabove, our brief is limited, it throws up quite a few issues for consideration, especially in view of the rival contentions advanced at the bar before us. These may be enumerated thus:

- (i) Has the entire controversy become infructuous, in view of Section 100 (4) of the Act or Rule 23 (1) of the Companies (Management and Administration) Rules, 2014 (hereinafter referred to as “the 2014 Rules”)?
- (ii) Was the learned Single Judge barred, by Section 430, read with Section 169 (4), of the Act, from passing the impugned order?
- (iii) Were the plaintiffs estopped, or otherwise barred, from invoking the ordinary jurisdiction of this Court, on account of their having elected to submit to the jurisdiction of the NCLT, while challenging the notice dated 24th of April 2017?
- (iv) Were the plaintiffs guilty of concealment of facts, so as to disentitle them from any relief of injunction, as claimed by them in IA 9618/2017?

- (v) Has the learned Single Judge erred in allowing IA 9618/2017, even when notice is yet to be issued on IA 9617/2017? The contention, of MrSapra, that this mistake was only technical, as the relief, which stands granted, by the impugned order, by way of final disposal of IA 9618/2017, could as well have been granted by way of interim relief, while issuing notice on the said IA, would also require to be examined in this context.
- (vi) Has the learned Single Judge erred in distinguishing the judgement in *L.I.C. of India (supra)*? What is the effect of the said judgement?
- (vii) Was the notice, dated 8th July 2017, illegal because the reason afforded, therein, for justifying the proposal to remove Plaintiff No 1 from the Directorship of the Company, was woefully inadequate, and would not allow her a meaningful opportunity to represent against the said proposal? Juxtaposed, with this, would be the issue of the appropriate stage at which the Director, whose removal was being proposed, would be entitled to be informed of the complete reasons therefor. Section 102 of the Act would also come into consideration. The judgement of the Kerala High Court in *Queens Kuries& Loans (supra)* would also be required to be examined in this connection.
- (viii) Has the learned Single Judge erred in treating the notice, dated 8th August 2017, as having been issued under sub-

section (2) of Section 100 of the Act, instead of sub-section (1) thereof? What was the distinction?

- (ix) Was the notice, dated 8th August 2017 violative of Section 179 (1) of the Act, read with the Articles of Association of the Company?
- (x) Was the notice, dated 8th July 2017, a requisition for convening of an EGM? Did the subsequent notice, dated 8th August 2017, err in treating it as such? If so, what was the effect?
- (xi) Was the impugned order unjustified, in view of the interim relief which already stood granted in favour of the plaintiffs by the earlier order dated 25th August 2017, passed in IA 9618/2017?

Discussion and Analysis

66 We proceed to address the above issues, *seriatim*.

67 Issue No. 1 – Have the present proceedings become infructuous, in view of Section 100 (4) of the Act and/or Rule 23 of the Companies (Management and Administration) Rules, 2014?

67.1 The impugned order, dated the 11th of September 2017, passed by the learned Single Judge, directs as under:

“The balance of convenience is in favour of the plaintiffs, accordingly, it is directed that the defendants are restrained from acting upon the notice dated 08.08.2017

and the resolutions passed in the consequential meeting dated 26.08.2017, which was permitted to be held by this Court by order dated 25.08.2017.”

67.2 A reading of the notice, dated 8th August 2017, reveals that it was essentially a sequel to the earlier notice dated 10th July 2017 issued by Shankar Prasad. The said notice, dated 10th July 2017, issued by Shankar Prasad, was challenged, by Plaintiff No 1 (Chhaya Devi), in CS (OS) 285/2017, on the ground that the notice of convening of the Board meeting could only be issued either by the Company Secretary, or by a Director of the Company. In the circumstances, the notice, dated 10th July 2017, was withdrawn. *Vide* letter dated 28th July 2017, Ajay Kumar, a practising Company Secretary, was requested to convene the Board meeting, pursuant to the requisition, dated 8th July 2017, received from the shareholders. Ajay Kumar, however, responded that he was not employed with the Company and could not, therefore, issue the notice for convening of the Board meeting, which would have to be issued by the Directors thereof. It was in these circumstances that the notice, dated 8th August 2017 came to be jointly issued, by 6, out of 9 Directors of the Company, for convening of the Board Meeting on 26th August 2017 at 11 AM. The agenda set out for the said Meeting was only to discuss whether to issue notice to convene an EGM, pursuant to the Special Notice (referred to as a “requisition” in para 1), dated 8th July 2017, received from the

shareholders, proposing removal of Plaintiff No 1 from her office as Director of the Company.

67.3 IA 9618/2017 came to be filed, by Plaintiff No 1, in CS (OS) 285/2017, seeking stay of the notice dated 8th August 2017 *supra*. The following order came to be passed, on 25th August 2017, by the learned Single Judge, on the said application:

“ Issue notice. Notices accepted by the learned counsel appearing for the defendants. Let reply be filed within 3 days. Rejoinder before the next date.

It is clarified that any decision taken in the meeting, scheduled for 26.08.2017, shall not be given effect to till the next date of hearing.

Renotify on 30.08.2017.”

67.4 The above interim order has effectively not only been made absolute, by the impugned order dated 11th September 2017, but has resulted in entirely prohibiting the defendants (i.e. the appellants before us) from acting upon the notice dated 8th August 2017 or the resolutions passed in the meeting which took place on 26th August 2017.

67.5 The said order, dated 11th September 2017, is under challenge before us.

67.6 The contention of Mr Sapra is that the said challenge has now become academic, and the present appeal itself infructuous, in view of Section 100 (4) of the Act and Rule 23 (2) of the 2014 Rules.

67.7 Section 100 (4) of the Act, and sub-rules (1) and (2) of the 2014 Rules, read thus:

Section 100 (4) of the Act:

“(4) If the Board does not, within 21 days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than 45 days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves within a period of 3 months from the date of the requisition.”

Rule 23 (1) and (2) of the 2014 Rules:

“23. Special Notice.-

- (1) A special notice required to be given to the company shall be signed, either individually or collectively by such number of members holding not less than one percent of total voting power or holding shares on which an aggregate sum of not less than five lakh rupees has been paid up on the date of the notice.*
- (2) The notice referred to in sub-rule (1) shall be sent by members to the company not earlier than three*

months but at least fourteen days before the date of the meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.”

67.8 Mr Chandhiok refutes the submission of Mr Sapra, essentially by contending that, in view of the interim stay granted by the learned Single Judge on 25th August 2017, which continued from time to time and has been made absolute by the impugned order dated 11th September 2017, if the present appeal were to be allowed, the period from 25th August 2017 till the date when the present appeal is allowed, would merit exclusion while computing the periods specified in Section 100 (4) of the Act, or, for that matter, Rule 23 of the 2014 Rules. Alternatively, he submits, the period stipulated in the said provisions would stand extended by the period during which the interim stay, granted by the learned Single Judge on 25th August 2017, has continued – and would continue – to remain in operation. He relies, for this proposition, on *Shree Chamundi Mopeds (supra)*.

67.9 We feel that the submission, of Mr Chandhiok, is well-taken, though the reliance, by him, on *Shree Chamundi Mopeds (supra)*, may not be entirely apt.

67.10 In deference to the submission made by Mr Chandhiok, we proceed to examine *Shree Chamundi Mopeds (supra)*.

67.11 The appellant in *Shree Chamundi Mopeds (supra)* (hereinafter referred to as “SCM”) was tenant in respect of certain premises which belonged to the respondent therein (hereinafter referred to as “the Church”). SCM committed default in payment of rent and, on its failing to purge the default despite communications from the Church, the Church issued a notice, under Section 434 of the Act, to SCM and followed it up with a petition, seeking winding up of SCM, filed before the High Court under section 433(e) of the Act.

67.12 While the said petition, seeking winding up SCM, was pending before the High Court, SCM filed a reference, under Section 15 (1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as “the SICA”), before the Board of Industrial and Financial Reconstruction (“the BIFR”), whereon the BIFR, vide order dated 26th April 1990, found that SCM had become economically and commercially non-viable and deserved to be wound up. The appeal, preferred by SCM against the said order of the BIFR, was dismissed by the Appellate Authority for Industrial and Financial Reconstruction (“the AAIFR”) on 26th April 1990. WP(C) 594/1991 was filed, thereagainst, before this Court, which, vide order dated 21st February, 1991 stayed the operation of the order of the

AAIFR. The said stay order continued to remain in operation thereafter.

67.13 *Vide* order dated 14th August 1991, the learned Single Judge of the Karnataka High Court opined that the pendency of WP(C) 594/1991, before this Court, and the grant of stay therein, did not stand in the way of his proceeding with the matter. An appeal, thereagainst, by SCM, was dismissed, by the Division Bench of the High Court, whereagainst one of the two appeals, decided by the Supreme Court (Civil Appeal 126/1992) was preferred by SCM.

67.14 In the interregnum, the Church filed an eviction petition, under Section 21(1) of the Karnataka Rent Control Act, 1961, against SCM. SCM moved an application, therein, under Section 151 of the CPC, read with Section 22 of the SICA, seeking stay of the proceedings on the ground that it had been declared sick, and a scheme for revival was pending. The said application was rejected by the Additional Small Causes Judge, who, consequently allowed the eviction petition filed by the Church. Revision petition, preferred thereagainst by SCM, was dismissed by the learned Single Judge of the Karnataka High Court on the ground of non deposit, by SCM, of the amount claimed against it. The learned Single Judge observed that the grant of stay, by this Court, on 21st February 1991, did not

operate to revive the appeal of SCM before the AAIFR, which stood dismissed on 7th January 1991.

67.15 In these circumstances, two questions were framed by the Supreme Court, of which the second is not relevant for our purposes. The first question framed by the Supreme Court read thus:

“What is the effect of the order passed by Delhi High Court dated February 21, 1991 staying the operation of the order dated January 7, 1991 passed by the Appellate Authority? Does it mean that after the passing of the said order by the High Court, the proceedings under the Act should be treated as pending and, if so, before which authority?”

67.16 On the issue thus framed, the Supreme Court held as under :

- (i) Section 22 of the SICA ordained that winding up proceedings against the company would not lie except with the consent of BIFR / AAIFR, where, in respect of such company, (i) an inquiry under Section 16 was pending, or (ii) a scheme referred to in Section 17 was under preparation or consideration, or (iii) a sanctioned scheme was under implementation, or (iv) an appeal under Section 25 relating to the industrial company was pending.
- (ii) The appeal, filed by SCM, having been dismissed by the AAIFR on 7th January 1991, no proceedings, under the

SICA, were pending before the BIFR or the AIIFR, on 21st February 1991, when this Court granted interim relief staying the operation of the order of the AIIFR.

- (iii) *The said stay order of this Court could not have the effect of reviving the proceedings which had been disposed of by the AIIFR vide its order dated 7th January 1991. The Supreme Court held, on this issue, as under :*

“The said stay order of the High Court cannot have the effect of reviving the proceedings which had been disposed of by the Appellate Authority by its order dated January 7, 1991. While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the

appeal which has been disposed of by the said order has not been disposed of and if still pending. We are, therefore, of the opinion that the passing of the interim order dated February 21, 1991 by the Delhi High Court staying the operation of the order of the Appellate Authority dated January 7, 1991 and it cannot be said that after February 21, 1991, the said appeal stood revived and was pending before the Appellate Authority.”
(Emphasis supplied)

- (iv) As, therefore, no proceedings, under the SICA were pending, it was held that there was no impediment, on the learned Single Judge, in dealing with the winding up petition filed by the Church.

67.17 The question before the Supreme Court, in *Shree Chamundi Mopeds (supra)* was whether the stay, by the High Court, of the order of the AIIFR dismissing SCM’s appeal would result in the proceedings before the AIIFR continuing to be deemed as pending during the currency of the stay order of the High Court. The question was answered, in the negative, by the Supreme Court. However, the judgment does contain an observation (underscored hereinabove), to the effect that, if the order of the AIIFR were to be quashed and the matter remanded, the appeal would stand restored and could be said to be pending before the AIIFR after quashing of the said order.

67.18 The precise issue arising, in the present case, as enunciated in the objection voiced by Mr. Sapra, read with the response of Mr. Chandhiok, is whether the time, statutorily prescribed to act on the notice dated 8th August 2017, or on the resolution arrived at during the meeting dated 26th August, 2017, stood extended by the period of currency of the stay order of this Court, or whether the said period could be excluded therefrom, for the purposes of computation of the period of limitation stipulated in Section 100 (4) of the Act or Rule 23 (2) of the 2014 Rules. *Shree Chamundi Mopeds (supra)* cannot really be said to be of aid, to us, in finding the answer, though some guidance could possibly be drawn therefrom.

67.19 An answer does, however appear to be directly forthcoming in the judgment of Supreme Court in *Kanoria Chemical Industries Limited v UPSEB, (1997) 5 SCC 772-* which, incidentally, relied on *Shree Chamundi Mopeds (supra)*. The legal position, in this regard, has been set out with precision and exactitude in para 11 of the report, thus:

“It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court.”
(Emphasis supplied)

67.20 The position in law does not, therefore, appear to be *res integra*.

If the present appeal filed by the defendants before us were to succeed, the appellants and respondents would have to be put back in the position as it existed prior to passing of the said order, by the learned Single Judge on 25th August, 2017.

67.21 As such, the present appeal cannot be said to have been rendered infructuous, as contended by Mr. Sapra.

68 Issue No. (ii) – Whether the learned Single Judge was barred from passing the impugned order because of Section 430 of the Act?

68.1 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.”

68.2 Parallely, 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.”

68.3 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*”.

68.4 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.

68.5 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."

68.6 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)

68.7 We may also note that ***U.O.I. v Tarachand Gupta & Bros, (1971) 1 SCC 486***, which cited *Mask (supra)*, worded the principle a tad differently (in para 22 of the report):

“The principle thus is that exclusion of the jurisdiction of the civil courts is not to be readily inferred. Such exclusion, however, is inferred where the statute gives finality to the order of the tribunal on which it confers jurisdiction and provides for adequate remedy to do what the courts would normally do in such a proceeding before it. Even where a statute gives finality, such a provision does not exclude cases where the provisions of the particular statute have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure.”

(Emphasis supplied)

68.8 As, perhaps, the most authoritative pronouncement on the issue, the Constitution Bench of the Supreme Court, in *Dhulabhai v State of M.P.*, AIR 1969 SC 78, set out the following 7 clear principles (of which only the first and last are really relevant to the the present case), to be applied for deciding whether a suit was barred under Section 9 of the CPC:

- “(1) *Where the statute gives a finality to the orders of the special Tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.*
- (2) *Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.*

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions

in civil courts are prescribed by the said statute or not.

- (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.*
- (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.*
- (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegality collected a suit lies.*
- (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.*
- (7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.”*

(Emphasis supplied)

68.9 From the above authorities, the primary indicia, which would govern determination of the question of whether the jurisdiction

of civil courts is, in any particular case, ousted, or not, would appear to be (i) whether the decision of the tribunal, on which jurisdiction is conferred, is also attributed finality by the statute, and (ii) whether such tribunal can do what the civil court would be able to do and is, therefore, an efficacious alternative to the civil court. Even when these two indicia stand satisfied, the jurisdiction of the civil court would continue to exist where the action, complained against, violates the statute.

68.10 We are unable to subscribe to Mr. Sapra's contention that the legislative bar to exercise of jurisdiction, by civil courts, engrafted in Section 430 of the Act, would operate only where the provision in the Act specifically, and in so many words, confers jurisdiction on the NCLT. The provision uses the expression "by *or under* this Act". Redundancy and tautology, it is trite, are not to be attributed to the legislature. ***Dilbagh Rai Jarryv U.O.I., (1974) 3SCC 554*** enunciates the principle thus:

"The legislature is not supposed to indulge in tautology, and when it uses analogous words or phrases in the alternative, each may be presumed to convey a separate and distinct meaning the choice of either of which may involve the rejection of the other."

(Emphasis supplied)

68.11 Where, therefore, Section 430 uses the words "by or under this Act" the words "by" and "under" have to be understood as conveying different and distinct meanings. The position in law may, in fact, be treated as covered by the judgement of the

Supreme Court in *Dr. Indiramani Pyarelal Gupta V. W.R.Natu*, AIR 1963 SC 274, which holds as under:

“A more serious argument was advanced by learned counsel based upon the submission that a power conferred by a bye-law framed under Section 11 or 12 was not one that was conferred “by or under the Act or as may be prescribed”. Learned counsel is undoubtedly right in his submission that a power conferred by a bye-law is not one conferred “by the Act”, for in the context the expression “conferred by the Act” would mean “conferred expressly or by necessary implication by the Act itself”. It is also common ground that a bye-law framed under Section 11 or 12 could not fall within the phraseology “as may be prescribed”, for the expression “prescribed” has been defined to mean “by rules under the Act” i.e. those framed under Section 28 and a bye-law is certainly not within that description. The question therefore is whether a power conferred by a bye-law could be held to be a power “conferred under the Act”. The meaning of the word “under the Act” is well known. “By” an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express language or by necessary implication therefrom. The words “under the Act” would, in that context, signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, bye-laws made by a subordinate law-making authority which is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment and what is done indirectly by rule-making authorities which are vested with powers in that behalf by the Act.”

(Emphasis supplied)

68.12 Nearly a hundred years ago, a Division Bench of the High Court of Bombay expressed the same sentiment, equally felicitously

(in *Manibhai Govindbhai Patel v The Nadiad City Municipality*, AIR 1927 Bom 55), thus:

“In this view, the main question is whether it is a duty "imposed under" the Act. I think it is obvious that the Legislature in using the expression "by or under this Act" did not use the word "under" simply to repeat what would he expressed by the word "by." The word "under" must have been intended to include some duties which would not be covered by the words "duty imposed by the Act." In its primary meaning the word "under" does, I think, cover the case of a duty imposed by some authority which is recognized by the Act, for instance, the common case of the Act giving power to Government or some person or body to make rules for the purposes of the Act. In such a case these may be duties imposed by those rules, and certainly such duties can be said to be imposed "under the Act," although they are not imposed "by the Act." I reject the contention of Mr. Thakor for the appellant that the words "by or under this Act" are limited to duties imposed by some provision of the Act itself.”

(Emphasis supplied)

68.13 All such proceedings which, therefore, the NCLT would be competent to adjudicate would, consequently, stand excluded from the jurisdiction of Civil Courts. The submission of Mr. Sapra, that, such exclusion would apply only to cases where power is expressly conferred, by one or other provision of the Act, on the NCLT or the NCLAT, has to be rejected in view of the above legal position.

68.14 The issue of whether the civil suit filed by the plaintiffs before this Court was maintainable, or was barred by Section 430 of

the Act, would, therefore, depend on whether the NCLT was empowered to exercise jurisdiction, on the issue, under the Act. Mr Chandhiok would rely, for supporting his stand that jurisdiction does stand expressly conferred, by the Act, on the NCLT in respect of the subject matter of CS (OS) 284/2017, on Sections 169(4) and 241 thereof.

68.15 As already reproduced hereinabove, the relief, in CS(OS) 285/2017, as also in IA 7856/2017 and IA 9618/2017 filed therein, was essentially seeking restraint, against the defendants, from acting upon the notice issued by the directors, or on any resolution taken at the meeting contemplated by such notice which, in turn, contemplated removal of Plaintiff No. 1 from Directorship of the Company. Was such a dispute amenable to adjudication by the NCLT, under Section 169(4) or Section 241? The fate of this innings, in the present litigative tournament, would depend on the answer thereto.

68.16 Section 169 (4) of the Act, in our opinion, does not apply at all. The mere reference, to the Tribunal, in the said proviso, cannot divest the Civil Court of its ordinary jurisdiction to entertain the suit filed by the plaintiffs. The jurisdiction, conferred on the Tribunal by the proviso to Section 169 (4), is to order the company's costs, on an application, moved by the Company or any other aggrieved person, to be borne by the Director of the

Company, where the Tribunal is satisfied that the facts disclosed abuse of the rights conferred by Section 169 (4).

68.17 Adverting, now to Section 241 of the Act, clause (a) thereof could, alone, be said to be of relevance. The said clause may, for ready reference, be reproduced 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;

(b) xxxxx

may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.”

68.18 The amplitude of the words used in Clause (a) of Section 241(1) of the Act are undoubtedly wide and expansive. They cover all cases, where a complaint that the affairs of a company being conducted in a manner prejudicial to public interest, or in a manner to the complaint, or oppressive to the complaint, or

prejudicial, or oppressive, to any other member or members, or prejudicial to the interests of the company, is made.

68.19 Clause (a) of Section 241 (1) of the Act limits the applicability of Section 241, however, to cases where “*an order under this Chapter*”(i.e. Chapter XVI of the Act, comprising Sections 241 to 246) is sought by the applicant, or is capable of being granted by the Tribunal. The question, therefore, arises, as to whether the cause of action ventilated by the plaintiffs, in CS (OS) 285/2017, and the reliefs claimed therein, would fall within Chapter XVI of the Act.

68.20 Section 242 sets out the powers of the NCLT, in cases where Section 241 can be invoked. The relevant clauses of Section 242 may be quoted thus:

“241. 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 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, the Tribunal may, with a view to bringing to an end the matter is 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 of 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 the property made or done by or against the company within 3 months before the date of the application under this section, which would, it 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 utilization 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.”

[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.]

68.21 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.

68.22 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.

68.23 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 exclusio 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.

68.24 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.

68.25 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.

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

68.27 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)

68.28 Panipat Woollenand 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 judgement 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.”

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”*.

68.29 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 (Ker)***, which went to the extent of holding that the Company Court could not grant relief in such matters.

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

69 Issue No. (iii)– Whether, having elected to submit to the jurisdiction of the NCLT in respect of the notice dated 24th April, 2017, the plaintiffs were estopped or otherwise barred from invoking the ordinary jurisdiction by this Court by way of CS (OS) 285/2017?

69.1 Jurisprudentially, the reliance on the doctrine of election, in the present case, is, in our view, *ex facie* misconceived. Dealing with the contours of the said doctrine, the Supreme Court, in

Transcore v U.O.I., (2008) 1 SCC 125, held (in para 64 of the report) thus:

“In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the [NPA Act](#) is an additional remedy to the [DRT Act](#). Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.”

(Emphasis supplied)

The doctrine of election, therefore, applies only where *there exists more than one alternative remedy*, and the litigant elects to choose one of them. In view of our finding, hereinabove, that the dispute raised in CS (OS) 285/2017 *does not appropriately fall within the purview of jurisdiction of the NCLT*, the first of these three essential pre-requisites, for the doctrine of election to apply, is absent. *Per sequitur*, the doctrine does not call for invocation in the present case.

69.2 That apart, in view of our above finding that CS (OS) 285/2017 was competent and maintainable, the plaintiffs, quite obviously, could not be foreclosed from maintaining it merely because, earlier, they may have invoked the jurisdiction of the NCLT for a similar cause of action. The doctrine of election, even if applicable, cannot so operate as to foreclose an litigant from approaching the forum competent to adjudicate on the dispute sought to be raised by her, or him.

69.3 Further, it has to be borne in mind that the original invocation of jurisdiction of the NCLT was not by the plaintiffs, but by the defendants, by way of Company Petition 136/2014, alleging operation and mismanagement in affairs of the company. This is not, therefore, a case of which the plaintiffs could be accused of forum shopping by invoking the jurisdiction of NCLT and later of this Court for identical reliefs. The resort, by the plaintiffs, to the jurisdiction of the NCLT, by way of IA No. 17/KB/2017, filed in Company Petition No. 136/2014 (*supra*), was only because the dispute between the plaintiffs and the defendants, was actually *in seisin* before the NCLT, at the time, in the said company petition. Whether they ought to have done so, and whether the NCLT had the jurisdiction to grant interim relief, as it did, on 18th May 2017, may be moot questions; we forbear from expressing any view thereof, as the order of the NCLT is not under challenge before us. Be that as it may, the filing of the said IA, by the plaintiffs, cannot foreclose their right to

invoke the ordinary jurisdiction of this Court for seeking declaration and mandatory injunction. It cannot be, therefore, be said that the plaintiffs were approaching different fora seeking similar reliefs.

69.4 Issue No (iii) has, therefore, necessarily to be answered in favour of the plaintiffs, and against the defendants.

70 **Issue No. (iv) - Whether the plaintiffs were guilty of concealment of facts, and thereby disentitled to injunction, as claimed in IA 9618/2017?**

70.1 Prayers (i) and (j), as made by the defendants before the NCLT in IA 217/KB/2017, read as under:

“(i) Injunction be passed restraining the company from convening any Extraordinary General Meeting of the respondent no. 1 i.e. Prabhat Zarda Factory (India) Private Limited pursuant to the notice dated April 24, 2017 purporting to be under section 100 read with section 169 of the Companies Act, 2013 or on the basis of any other notice of like nature till the disposal of the company petition;

(j) Injunction be passed restraining the company from convening or holding any extra ordinary general or board meeting of the respondent no. 1 company i.e Prabhat Zarda Factory (India) Private Limited, without leave of the Hon’ble Tribunal; ”

70.2 Clearly, therefore, the relief sought, by the plaintiffs, from the NCLT, was not restricted to the notice dated 24th April, 2017 and the consequent meeting to be held on 26th May, 2017, but also encompassed any future EGM, which might be held “*on the basis of any other notice of like nature till the disposal of the Company Petition*”. The said Company Petition, i.e. Company Petition No. 136/2014, as well as IA 217/KB/2017, continue to remain pending in the NCLT even as on date. It was, therefore, incumbent on the defendants to disclose, before this Court, in IA 9618/2017, the pendency of IA 217/KB/2017, moved by them before the NCLT, as well the nature of the prayers made in. The suppression, by the defendants, of this vital fact, appears *ex facie*, to have been deliberate, and we find considerable substance in the grievance voiced by Mr. Chandhiok on this score.

70.3 We are constrained to observe, therefore, that, even on account of their having approached this Court, in IA 9618/2017, without coming clean regarding the proceedings initiated by them and pending before the NCLT, or the order dated 18th May 2017 passed by the NCLT thereon, the plaintiffs were disentitled to seek any discretionary or equitable relief of injunction from this Court.

71 **Issue No. (v) - Whether the learned Single Judge erred in allowing IA 9618/2017 even when notice was yet to be issued IA 9617/2017?**

71.1 Mr. Chandhiok contends that Order XXXIX of the CPC permits grant of interim injunction only in respect of something which is part of the subject matter in the main suit. He points out that CS (OS) 285/2017, as it stood on the date of passing of the impugned order by the learned Single Judge, did not lay any challenge either to the notice dated 8th August 2017, or the meeting of the Board to be held on 26th August 2017, as referred to therein. The challenge, in CS (OS) 285/2017 as it stood on the said date - and, in fact as it still stands - was only to the notice dated 2nd June 2107 and the meeting to be held on 12th June 2017 referred to therein. Indeed, it could not have been otherwise, as CS (OS) 285/2017 was filed before the notice dated 8th August 2017 came to be issued. As such, challenging the notice dated 8th August 2017 or seeking restraint, on the defendants, from acting on any resolution taken at the meeting dated 26th August 2017 necessarily required amendment of the plaint by means of an appropriate application under Order VI Rule 17 of the CPC. IA 9617/2017 was such an application. The problem, as Mr. Chandhiok points out, is that IA 9617/2017 was *still pending* before the learned Single Judge when he allowed IA 9618/2017. In fact, even notice had, till then, not been issued on IA 9617/2017. (It hasn't, till now.) CS (OS) 285/2017, therefore, was still in its raw and unamended form – with no challenge, express or implied, to the notice dated 8th August 2017, or the meeting to be held on 26th August 2017 referred to

therein – when IA 9618/2017 came to be allowed by the learned Single Judge by way of the impugned order dated 11th September 2017. This, Mr.Chandhiok points out, is not permissible in law, until and unless IA 9617/2017 were allowed and CS (OS) 285/2017 amended in accordance therewith. The challenge to the notice dated 8th August 2017, or to the proposed meeting dated 26th August 2017, formed no part of the plaint in CS (OS) 285/2017. Injunction under Order XXXIX Rules 1 and 2, CPC, Mr.Chandhiok points out, could not be granted, of something which was not subject matter of the plaint.

71.2 *Per contra*, Mr.Sapra, would contend that the CPC does not contain any such absolute prohibition. He submits that it was always open to the learned Single Judge to protect his clients, by way of temporary *ad interim* injunction, during the pendency of the application for amendment. Else, he submits, the application for amendment would itself possibly be rendered infructuous. In an emergent situation, he submits, the power of the Court to pass appropriate orders in the interests of justice would be available for invocation, and there was no gainsaying this proposition.

71.3 The necessity of grappling with these rival points of view was, we are glad to say, obviated by the graceful acknowledgement, of Mr.Chandhiok, that, *de hors* his objection premised on Order

XXXIX Rules 1 and 2 of the CPC, the power to do complete justice undoubtedly inheres in this Court by virtue of various other provisions in the CPC such as Sections 94, 141 and 151.

71.4 In view of the frank acknowledgement, by Mr Chandhiok, of this legal position - for which we express our appreciation - we are obviated of the necessity to enter more deeply into this aspect of the matter.

71.5 We are also *prima facie* convinced with Mr.Sapra's alternate submission, that the relief finally granted by the learned Single Judge while disposing of IA 9618/2017 might as well have been legitimately granted by him as an *ad interim* measure pending disposal of the said IA. The learned Single Judge, at worst, could be said to have erred in finally disposed of IA 9617/2017 instead of keeping it pending and granting *ad interim* relief, as granted by the presently impugned order. The said submission appears, to us, to be well taken.

71.6 The objection, of Mr.Chandhiok, to the effect that the learned Single Judge ought not to have disposed of IA 9618/2017 by way of the impugned order, while IA 9617/2017 was still pending, stands disposed of accordingly.

72 Issue No. (vi) - Whether the learned Single Judge has erred in distinguishing of the judgment of the Supreme Court in *L.I.C. of India (supra)*?

72.1 We come, now, to the meat of the matter.

72.2 Much turns on *L.I.C. of India (supra)* and we propose, therefore, to deal with the said decision in some detail.

72.3 *L.I.C. of India (supra)*, authoritatively authored by O. Chinnappa Reddy, J., presiding over a Constitution Bench, was concerned with the scheme, known as the Portfolio Investment Scheme (hereinafter referred to as “the Scheme”), formulated by the Government of India to encourage investment by non-residents of Indian nationality or origin, in Indian companies. Under the Scheme, non-resident individuals of Indian nationality/origin, as well as overseas companies, firms and other corporate bodies, which were owned by, or in which the beneficial interest vested in non-resident individuals of Indian nationality/origin, to the extent of not less than 60%, were entitled to invest, in the shares of Indian companies, to the extent of 1% of the paid-up equity capital of such Indian company, subject to an aggregate ceiling of 5%. Though each investor was entitled, under the Scheme, to acquire shares only up to 1%, the Scheme did not prohibit acquisition of such 1% share separately by each individual member of the same family, or each individual company of the same group of companies.

73. Mr Swraj Paul, and his family members, were non-resident individuals of Indian origin. They held 61.6% shares in a foreign company, known as Caparo Group Ltd (hereinafter referred to as “Caparo”) which, in turn, held 100% shares in 12 foreign companies and 98% shares in a 13th foreign company. These 13 foreign companies desired to invest in the shares of Escorts Ltd, taking advantage of the Scheme. They designated the Punjab National Bank (PNB) as their authorized dealer-banker. The PNB wrote to the Reserve Bank of India (“RBI”), for permission to open Non-resident External (NRE) accounts, in the name of each of the 13 companies, for the purposes of investment in Escorts Ltd (hereinafter referred to as “Escorts”). In the meanwhile, investments commenced, and Caparo started sending remittances. Though this fact was brought to the notice of the RBI, by the PNB, the PNB did not disclose the fact that Swaraj Paul had separately remitted, to it, £ 1,30,000 for the purpose of opening an NRE account.

73.1 Escorts, by a resolution of its Board of Directors, refused to register the transfer of shares, and wrote, to the RBI, to consider whether the Scheme contemplated circumvention, of the 1% ceiling stipulated therein, by a single foreign company channelling investment through a dozen subsidiaries. Other illegalities, on the part of the said 13 companies, were also alleged. Ultimately, the RBI accorded permission, to the PNB,

to release the money remitted by Caparo from abroad, for making payment against shares of Escorts and DCM, subject to certain conditions.

73.2 This led to the Chairman of the Board of Directors of Escorts filing a writ petition, in the Bombay High Court, on behalf of Escorts. The financial institutions, which held 52% shares in Escorts were not, however, in favour of filing the writ petition, or of refusing to register the transfer of shares. One of the said financial institutions, the Life Insurance Corporation (LIC) issued a requisition, to Escorts, to hold an EGM for the purpose of removing 9 of the Directors of Escorts and nominating 9 others in their place.

73.3 Escorts, thereupon, amended the writ petition filed by it before the Bombay High Court, by adding a prayer, therein, for issuance of a declaration that the requisition to hold the meeting, as issued by LIC, was arbitrary and illegal. The High Court allowed the writ petition of Escorts, whereagainst appeals were preferred, to the Supreme Court, by the Union of India, the RBI and the LIC. The operative portion of the judgement of the High Court read, *inter alia*, as under:

“There shall be a declaration that the action of respondent 18 in issuing the impugned requisition notice is contrary to the provisions of Section 284 of the Companies Act and ultra vires the powers vested in the LIC under Section 6 of the LIC Act and contrary to the

intendment of the provisions of the LIC Act. The impugned requisition notice offends the principles of natural justice. The action of the LIC in issuing the impugned requisition notice is an arbitrary and mala fide action taken for collateral purpose; it is violative of Article 14 of the Constitution of India.”

73.4 The substantive challenge before the Supreme Court, on the issue of whether the 13 companies were entitled to invest in Escorts and DCM, under the Scheme, is of no relevance to the present appeal. What is of relevance is the dispute between Escorts and the LIC, the discussion whereon commences from para 93 of the report. The Supreme Court held, on this aspect of the matter, as under:

- (i) The sequence of events aforementioned clearly indicated that the financial institutions, which had a majority stake holding in Escorts, were aggrieved by the fact that the management of Escorts did not even choose to consult or inform them before filing the writ petition.
- (ii) As the management of Escorts was disinclined to withdraw the writ petition, the LIC felt that it had no option but to seek removal of the non-executive Directors and have a new Board, to reconsider the decision.
- (iii) The members of the Company, in the EGM, and the Directors, were comparable to the legislative and executive organs of a parliamentary democracy, in which legislative sovereignty rested with the Parliament

whereas administration was left to the executive government, subject to a measure of control by the Parliament through its power to force a change of government. Another view was that it was more akin to the division of powers between the Federal and State Legislature under the Federal Constitution.

- (iv) As it would be impracticable, for day-to-day administration of the Company, to be undertaken by the EGM, the modern practice was to confirm, on the Directors, the right to exercise all the company's powers except those which, by law, were expressly required to be exercised in the EGM.
- (v) *An injunction could not be granted to restrain the holding of a general meeting to remove a Director and appoint another.*
- (vi) Every shareholder of the company had the right, subject to prescribing procedural and numerical requirements, to call an EGM in accordance with the Act. *Neither could he be restrained from doing so, nor was he bound to disclose the reasons for the resolutions proposed to be moved at the meeting.*
- (vii) *The reasons for the resolutions proposed to be moved at the meeting were also immune from judicial review.*
- (viii) Though there was a statutory duty cast on the management, to disclose, in an explanatory note, all material facts relating to the resolution coming up before

the EGM, to enable the shareholders to form a judgement on the business with them, the shareholders were not required, at the time of calling the meeting, to disclose the reasons for the resolutions proposed to be moved thereat.

Following on the above reasoning, the Supreme Court held that the LIC, as a shareholder of Escorts, had the same right as every other shareholder, to call an EGM for the purpose of moving a resolution to remove some Directors and appoint others in their place, and could not be restrained from doing so, nor was the LIC bound to disclose its reasons for moving the resolution.

73.5 The learned Single Judge has, in 43 of the impugned judgement, sought to distinguish *L.I.C. of India (supra)* thus:

*“The judgement of the Supreme Court in **Life Insurance Corporation (supra)** relied on by the learned counsel for the defendants, in my view, is not applicable in the facts of the present case. The Supreme Court in the said judgement was not considering a provision like Section 169 which specifically confers an opportunity of being heard.”*

(Emphasis supplied)

73.6 We are unable to concur with the opinion, expressed by the learned Single Judge, that the judgement of the Supreme Court in *L.I.C. of India (supra)* was distinguishable, for the reason that the Supreme Court “*was not dealing with a provision like Section 169 which specifically confers an opportunity of being*

heard”, for the reason that Section 284 of the Companies Act, 1956 – which, in the view of the High Court in that case, had specifically been infringed by the notice issued by LIC – was not only *in parimateria* but practically *in haecverba* to Section 169 of the Act. While it is true that the words “after giving him a reasonable opportunity of being heard”, which figure in Section 169 (1) of the present Act, were absent in Section 284 (1) of the Companies Act, 1956, the substantive provision permitting such hearing, i.e. sub-section (3), was identical in the erstwhile Section 284 and the present Section 169, and reads thus:

“(3) *On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the Director concerned, and the director, whether or not is a member of the company, shall be entitled to be heard on the resolution at the meeting.*”

In that view of the matter, it is obvious that the “opportunity of hearing” referred to in sub-section (1) of Section 169 is not an opportunity *sui generis*, distinct and different from the opportunity of hearing referred to in sub-section (3) of the same Section. The “reasonable opportunity of being heard” contemplated by sub-section (1) of Section 169 is only required to be afforded prior to removal of the director concerned. Such opportunity is also contemplated by sub-section (3). The two provisions are, therefore, required to be read conjunctively, not disjunctively. Viewed thus, it becomes apparent that the law laid down by the Supreme Court, in *L.I.C. of India (supra)*,

albeit in the context of Section 284 of the Companies Act, 1956, applies, equally, to Section 169 the present Act.

73.7 The above statutory reality stands reinforced by the Notes on Clauses to Clause 169 of the Companies Bill, 2011 which, with respect to the proposed Section 169, states thus:

*“**Clause 169.** - This clause corresponds to section 284 of the Companies Act, 1956 and seeks to provide that a company may, by ordinary resolution remove a director (not being a director appointed by the Tribunal under section 242). Where the company has availed itself of the option given to it under section 163 to appoint less than two thirds of the total number of directors according to the principle of proportional representation, then the provisions of this section shall not apply. Special notice by specified number of members shall be required of any resolution, to remove a director or to appoint somebody in place of a director so removed. The clause further provides that the Director shall be entitled to be heard on the resolution at the meeting. A vacancy created by the removal of a director may be filled by the appointment of another director in his place by the meeting at which he is removed. The clause seeks to provide that the director was removed from office shall not be reappointed as a director by the Board of Directors.”*

(Emphasis supplied)

73.8 We are constrained, therefore, to hold that the judgement of the Constitution Bench of the Supreme Court in ***L.I.C. of India*** (*supra*) applies, *ex proprio vigore*, to the present case, and that the learned Single Judge was in error in holding otherwise.

73.9 Applying the principles emanating from *L.I.C. of India (supra)* – which already stand enumerated hereinabove – the following conclusions would clearly emerge:

- (i) The 6 Directors, who issued the notice dated 8th August 2017, for holding a meeting of the Board of Directors, to decide whether an EGM was required to be convened to consider the proposal to remove Plaintiff No 1 from Directorship of the Company, acted well within their authority in doing so.
- (ii) It was not open to any court, including the learned Single Judge, to stay the said decision, or restrain the holding of the EGM, for the said purpose.
- (iii) The notice, dated 8th August 2017, was not required to disclose the reasons for the proposed resolution to remove Plaintiff No 1 from directorship of the Company.
- (iv) All that was required was that the management had to disclose, in an explanatory note, all material facts relating to the resolution coming up before the EGM, to enable the shareholders to form a judgement on the business before them. The shareholders were not required to disclose the said reasons in advance.
- (v) The said reasons were not subject to judicial review.

73.10 A case, involving a dispute facially similar to that with which we are seized, is to be found in *S. Varadarajan v Venkateswara Solvent Extraction (P) Ltd, (1994) 80 Com Cas 693 (Mad)*,

decided by A.R. Lakshmanan, J. (as he then was), sitting singly in the Madras High Court. The petitioner, in that case, moved an application seeking an injunction restraining the second respondent from convening the EGM. The High Court decided the case after a thorough appreciation of Sections 169, 173 and 284 of the Companies Act, 1956, which correspond to Sections 115, 100 and 169 of the present Act; ergo, the decision is of considerable relevance to us. Though the said decision may not be of much assistance insofar as the scope of Section 169 of the present Act is concerned – as it dealt with removal of a Managing Director, which is outside the purview of the said provision – it offers considerable guidance, on the issue of interpretation and understanding of Sections 100 and 115 of the Act. A reading of the said decision reveals that the requisition from the shareholder, as well as the notice for holding of EGM, in the said case, parallelise the said documents in the present case (except that the notice for convening of the EGM, in that case, was by the requisitionist, as the Board did not act within the time statutorily prescribed). The High Court, after observing that most of the legal controversies arising for consideration stood settled by the judgement in *L.I.C. of India (supra)*, went on to hold thus (in paras 15 to 17, 19 and 25 of the report):

“15. A shareholder of a company possessing the numerical strength as required by Act has the right to requisition an extraordinary general meeting. Such a shareholder cannot be restrained by injunction from calling the meeting and he is not

bound to disclose the reasons for the resolutions proposed at the meeting. Nor are the reasons for the resolutions subject to judicial review. Though section 169 uses the expression "such number of member of the company" in the plural, yet the requirements of the provisions would be satisfied even if one member holding the requisite number of shares or voting rights makes the requisition. It is also well settled that words in the plural include the singular.

16. As already stated by me the requisition dated February 8, 1992, clearly mentions the purpose for which the extraordinary general meeting is to be called. Therefore it has to be held that the requisition dated February 8, 1992, made by the second respondents is in strict conformity with the statutory requirements of section 169 of the Act.
17. The notice of the meeting by the requisitionists issued on March 28, 1992, to all shareholders has been issued because the company did not call the extraordinary general meeting within 21 days from February 8, 1992 (date of deposit of the requisition) and therefore the second respondent himself called the extraordinary general meeting under the notice dated March 28, 1992, and the said meeting was convened on April 23, 1992, at 4 p.m. at No. 1, South Street, Annavasal, Pudukkottai. It is significant to notice that the aforesaid notice dated March 28, 1992, clearly sets out the business proposed to be transacted at the extraordinary general meeting convened on April 23, 1992. Hence, the notice dated March 28, 1992, has been issued in accordance with sub-section (6) of section 169. The meeting was convened on April 23, 1992, which is well within the period of three

months from February 8, 1992, that is the date of deposit of requisition.

18. xxxxxxxxx

19. Thus it is clear that the obligation to annex an explanatory statement to the notice of the meeting is only on the company when it calls for a meeting to transact special business. When a requisitionist calls for an extraordinary general meeting under section 169, there is no obligation on the requisitionist to annex an explanatory statements to the notice of the meeting. There is in my view no warrant for imposing such an obligation on the requisitionists. Therefore, I am of the view that there is no merit in the contention of Mr. A. K. Mysamy, learned counsel for the petitioner, that the requisition notice dated February 8, 1992, and the notice of the meeting dated March 28, 1992, are bad and that they contravene the provisions of the Companies Act.

25. Point No. 5 : As already observed by me, a shareholder has the statutory right subject to the fulfillment of the provision of section 169 to call an extraordinary general meeting. No injunction can be issued restraining him from calling a meeting. I have found that the requisition as well as the notice of meeting are valid. The Supreme Court in LIC's case [1986] 59 Comp Cas 548 has also ruled that no injunction can be granted restraining a shareholder from convening an extraordinary general meeting ... ”

(Emphasis supplied)

73.11 The position, in law, that (i) there is no obligation to disclose the reasons for removing a person from Directorship of a

Company prior to the EGM where such proposal is to be considered, (ii) no injunction, of the decision to hold such EGM, can be granted by the court, and (iii) the said reasons are immune from judicial review, stands reinforced by this decision.

74 Issue No. (vii) - Whether the notice, dated 8 July 2017, was illegal for want of sufficient reasons to justify the proposal to remove Plaintiff No 1 from Directorship of the Company? At what stage were the reasons required to be furnished? What is the effect of the judgement of the Kerala High Court in *Queens Kuries & Loans (supra)*?

74.1 This issue stands substantially answered by the discussion with respect to Issue No (vi) *supra*. In view of the authoritative pronouncement, of the Constitution Bench of the Supreme Court in *L.I.C. of India (supra)*, to the effect that the notice under Section 169 of the Act was not required to set out the reasons for the proposal to remove the Director, it cannot be said that the notice, dated 8th July 2017, was bad for want of sufficient reasons. As correctly contended by Mr Chandhiok, the reasons were required to be forthcoming only in the Explanatory Note at the Meeting with the proposal was to be considered. Indeed, there does appear to be substantial merit, in the grievance of Mr Chandhiok that the learned Single Judge has unjustifiably interdicted the entire proceedings at a nascent stage. On its plain terms, the notice dated 8th July 2017 merely

calls for a meeting of the Board *to decide whether an EGM is to be convened for consideration of the proposal to remove Plaintiff No 1*. It may be that the inevitable outcome of such a meeting would be that a decision would be taken to convene the EGM for the said purpose; that, however, cannot invalidate the notice calling for a meeting of the Board for deciding on convening of the EGM. Due process as its own ebb and flow, and judicial interdiction midstream is to be eschewed, save where considerations of irreparable prejudice and the like mandate otherwise.

74.2 What Section 169 guarantees to the Director, who is on the threshold of removal, is a “reasonable opportunity of being heard”. Unquestionably, this opportunity connotes, and denotes, a right which is equally valuable and inviolable. It, however, denotes only so much, and no more. The words “reasonable opportunity of being heard” have been explained, by the Supreme Court, thus, in *Fedo (P) Ltd v S. N. Bilgrami*, AIR 1960 SC 415:

“The requirement that a reasonable opportunity of being heard must be given has two elements. The first is that an opportunity to be heard must be given; the second is that this opportunity must be reasonable. Both these matters are just conceivable and it is for the Court to decide whether an opportunity has been given and whether that opportunity has been reasonable.” (Emphasis supplied)

74.3 Where, therefore, the statute provides for a “reasonable opportunity of being heard”, the opportunity is required to be reasonable, and realistic. In the absence of any specific statutory prescription to that effect, however, it is not open to the person affected by the action to contend that the opportunity ought to have been given at this stage, or that. So long as the opportunity has been given reasonably prior to the taking of the decision, and the decision takes into account the stand of the concerned person, as ventilated during such opportunity, no legitimate grievance, of violation of the principles of natural justice, or non-adherence to the statutory requirements, could possibly be voiced.

74.4 Mr Sapra has placed reliance on the judgement of the Kerala High Court in *Queens Kuries (supra)*, specifically on the following finding, contained in para 9 of the report:

“Special notice of the resolution to remove directors required by section 284 of the Act shall be given to the company, not less than 14 days before the meeting at which it is to be moved (section 190 of the Companies Act). The notice must disclose the ground on which the director is proposed to be removed. The disclosure of the ground for removal is a matter of substance and not a form because the directors contained are entitled to make representations in writing at the meeting. The company is bound to send a copy of the representation to every member of the company to whom the notice of the meeting has been sent. It is only after these steps are taken that the resolution can be passed.”

(Emphasis supplied)

Mr Sapra's submission is that the bald recital, to the effect that Plaintiff No 1 was "acting against the interests of the company", sans the specifics of such "action", did merely lip service to the requirement of law, as enunciated in the pronouncement of the Kerala High Court in *Queens Kuries (supra)*. He suggested it was impossible for his client to make a meaningful representation, without being made aware of the specific acts, committed by her, which were alleged to be against the interests of the Company.

74.5 In view of the law laid down by the Supreme Court in *L.I.C. of India (supra)*, we, with great respect, are unable to subscribe to the view, expressed by the Kerala High Court in *Queens Kuries (supra)*, that the reasons for the proposal to remove the director from the Company had necessarily to be spelt out in the Special Notice issued under Section 115 of the Act. In this context, reference may usefully be made to a judgement of a learned Single Judge of the High Court of Karnataka in *Sri B. G. Somayaji v Karnataka Bank Ltd, AIR 1995 Kant 344*, which was carried in appeal to the Supreme Court. In that case, the Karnataka bank Ltd (hereinafter referred to as "the Bank"), by notice dated 27th January 1995, convened an EGM, scheduled for 2nd March 1995. The appellants before the High Court (who were two of the Directors of the Bank) moved the trial court on the ground, *inter alia*, that the convening of the said meeting

had to be accompanied by an explanatory statement, as provided in Section 173 of the Companies Act, 1956 (corresponding to Section 100 of the present Act). As in the present case, the contention, of the said aggrieved Directors, was that *“a very cryptic explanatory statement has been annexed to the notice which states that the other directors have no interest in the item of business and only states that a requisition has been received for the convening of the meeting”*. The four resolutions, set out in the Special Notice, were for removal of four Directors, including the two directors who had appealed to the High Court. The learned Trial Judge held that the case was not one that deserved grant of *ad interim* orders stopping the meeting from taking place. In revision therefrom, the High Court opined that the act of removal of a director, from office, was one with serious repercussions, and that, therefore, the notice calling for the meeting had necessarily to set out the specifics of the allegations against the said directors, so that the shareholders at the meeting would be able to impartially adjudicate thereon. Significantly, the High Court found particular fault with the fact that a letter, dated 7th January 1995, which actually set out being a chance against the directors and was the catalyst in prompting the decision to remove them from office, was not circulated with the notice proposing the meeting. This decision substantially echoes the submission of Mr Sapra in the present case. However, the Supreme Court, in appeal

therefrom [*P. Rajan Rao v B. G. Somayaji, (1995) 83 Comp Cas 662 (SC)*], ruled as under:

“2. We are satisfied that there was no ground available to the High Court for setting aside the trial court's order refusing to grant the injunction for holding the extraordinary general body meeting (EGM) of the company. We are informed that the EGM is scheduled to be held on 30-3-1995. The injunction granted [B.G. Somayaji v. Karnataka Bank Ltd., (1995) 83 Comp Cas 649 (Kant)] by the High Court is, therefore, vacated. Moreover, the appellants also undertake to circulate a copy of the letter dated 7-1-1995, Annexure 'B' to the shareholders who attend the extraordinary general meeting before commencement of the extraordinary general meeting.

(Emphasis supplied)

74.6 After this, in our view, no manner of doubt can remain, that the reasons for removal of Plaintiff No 1, in the present case, were required to be communicated, or made known, to her, only before the proposal, for removing her from office as Director of the Company, was taken up at the EGM. *Queens Kuries (supra)* has necessarily to yield place to *L.I.C. (supra)*. This issue, therefore, as necessarily to be decided in favour of the appellants and against the respondents.

75 **Issue No. (viii) - Whether the notice, dated 8th August 2017 was issued under sub Section (1) or sub-Section (2) of Section 100 of the Act? Was the learned Single Judge wrong in treating the same having been issued under sub-Section (2) thereof?**

75.1 Sub-section (1) of Section 100 confers absolute power on the Board to call an EGM, whenever it deems fit. Sub-section (2) deals with a specific situation in which the Board is in receipt of a requisition made by the members, of sufficient strength as stipulated therein. It requires the Board, on receipt of such requisition, to necessarily call an EGM of the Company, within 21 days of receipt of such requisition, to be convened not later than 45 days from the date of such receipt.

75.2 The notice, dated 8th August 2017, issued by six out of nine directors of the Company, states that the company was in receipt of a requisition, dated 8th July 2017, from the share holders of the company, seeking removal of Plaintiff No.1 from her office as Director thereof. It is apparent, at first glance, that the notice, dated 8th August 2017, is neither relatable to sub-section (1) nor to sub-Section (2) of Section 100 of the Act. Both these provisions empower the Board to call for an EGM. The notice dated 8th August 2017, on the other hand, does not call for any EGM, or for convening of any EGM. It merely calls for a meeting of the Board on 26th August, 2017, *to discuss whether a notice, to convene an EGM, pursuant to the subject notice dated 8th July 2017, received from the members of the company, be issued or not.* In other words, the notice dated 8th August 2017, was only for fixing a meeting to discuss *whether to issue, or not to issue, a notice under Section 100 of the Act.*

In case, at such meeting, the decision taken was to issue such a notice, to convene an EGM, it is *such notice*, if and when issued, which would be liable to be regarded as a notice under Section 100 of the Act.

75.3 Mr. Chandhiok contends – and, we feel, rightly - that the learned Single Judge has not correctly appreciated the import of the notice dated 8th August 2017. As Mr. Chandhiok submits, the said notice was absolutely innocuous in nature, intended only to decide whether to issue a notice under Section 100, for convening of an EGM, or not. The law laid down by the Supreme Court in *L.I.C. of India (supra)* makes it clear that a notice under Section 100, were it to be issued, could *not have been injuncted by the Court*. If the notice which might possibly have been issued, consequent to the decision taken at the meeting to be held on 26th August 2017, was itself immune from interlocutory interdiction, we fail to understand how any interiminjunction, staying the operation of the notice dated 8th August 2017, or the decision to be taken at the meeting dated 26th August 2017, could be granted. At the cost of repetition, it needs to be emphasized that no decision, towards removal of Plaintiff No.1 from the Directorship of the company, was to be taken, this way or that, at the meeting to be held on 26th August 2017. The interests of Plaintiff No.1 were not, therefore, in any way prejudiced by the notice dated 8th August 2017, so that the

very maintainability of the application for *ad interim* injunction filed by her (in IA 9618/2007) was questionable.

75.4 As such, the notice dated 8th August 2017, in our opinion, was not a notice under Section 100 of the Act at all, and the learned Single Judge has, therefore, clearly fallen in error in regarding as it one. No occasion, therefore, for granting any protection against such notice could be said to have existed. The notice, which was innocuous in terms, did not pose any threat, by itself, to Plaintiff No.1 as would justify *ad interim* protection from the Court.

76 Issue No. (ix)- Whether the notice dated 8th August 2017 was violative of Section 179 (1) of the Act, read with the Articles of Association of the company?

76.1 In view of our opinion, expressed above, that the notice dated 8th August 2017 was not, in fact, a notice under Section 100 of the Act at all, no question of any infraction, in issuance of such notice, of Section 179 (1) of the Act, could be said to exist. No proscription, against issuance of such notice, is to be found in the Act or any cognate legislation, plenary or subordinate. It cannot, therefore, be said that the notice was illegal in any manner.

77 Issue No. (x)- Whether the notice, dated 8th July, 2017, was a requisition for convening of an EGM and whether the

subsequent notice dated 8th August 2017 erred in treating as one?

77.1 Inasmuch as the notice, dated 8th August 2017, was itself only a notice for fixing a meeting of the Board of the Company, to decide whether an EGM be convened or not, the issue of whether the notice dated 8th July 2017 was a requisition, or not, ceases to be of any serious relevance. The notice dated 8th August 2017, no doubt refers to the earlier notice dated 8th July 2017 as a requisition; however, the notice dated 8th August 2017 does not itself convene an EGM but only calls for a meeting of the Board, to decide whether an EGM should be convened, or not. As such, the decision whether to convene an EGM or not was to be taken at the meeting dated 26th August 2017, which, inasmuch as it would be taken by the Board on its own accord, would clearly be relatable to Section 100(1) of the Act rather than Section 100 (2) thereof. As the Board, in the meeting to be convened on 26th August 2017, would be acting on its own accord in deciding whether to convene an EGM or not, the aspect of whether the notice dated 8th July 2017 was, or was not, a requisition, ceases to have relevance.

77.2 Infact a reading of the agenda for the meeting of the Board proposed to be held on 26th August 2017, reveals that it does not treat the communication dated 8th July 2017, as a requisition per se but a Special Notice. In any event, as already noted in the

previous paragraphs, this distinction does not substantially impact the adjudication of the present appeal.

77.3 Having said that, a reading of the notice dated 8th July 2017 reveals that it has been signed by 9 Directors and does not even purport to be a requisition for convening an EGM. It is, quite clearly, a notice in terms of Section 169(2) read with Section 115 of the Act. The preambular subject to the said notice itself states that it is a “Special Notice u/s 115” of the Act. In that view of the matter, in our opinion, not much can be made of the reference, in Para 1 of the notice dated 8th August 2017, to the communication dated 8th July 2017 as a “requisition”. That the Board itself treats the said document as a “Special Notice” rather than a “Requisition” is additionally apparent from the agenda item attached to the notice dated 8th August 2017.

77.4 We do not intend to deliberate further on this aspect of the matter as nothing really turns on the issue of whether the communication dated 8th July 2017 was a Special Notice or a Requisition, as the decision to convene the EGM would be relatable to sub-clause (1) rather than sub-clause (2) of Section 100 of the Act. We may, however, in passing, note that no specific form or format of a “requisition” is prescribed in the Act, or in any cognate legislation, so that any document issued by the requisite member of Directors as specified in Section 100(2) of the Act (which calls for convening of an EGM) would

be eligible to be styled as a “requisition”. It does not appear to us, that the expression “requisition” is a term of art, as used in Section 100 of the Act.

78 Issue No (xi) - Whether the learned Single Judge was unjustified in granting interim relief, as granted by the impugned order in view of the earlier order dated 25th August 2017, already passed by him?

In view of our finding hereinabove that the impugned order is unsustainable as it was not open to the learned Single Judge to injunct or interdict, even at any interlocutory stage, the notice dated 8th August 2017 or the decision to be taken at the meeting, dated 26th August 2017, to be convened pursuant thereto, this issue does not survive for consideration.

79 Conclusion

In view of the above discussion, we allow the present appeal, and set aside the impugned order, dated 11th September 2013, of the learned Single Judge. Resultantly, the notice dated 8th August 2017 would stand revived, and it would open for the Board to meet, as contemplated therein, to decide on whether, or not, to convene an EGM for considering the proposal to remove Plaintiff No. 1 from Directorship of the Company. On whether such EGM should, or should not, be convened, and whether the proposal to remove Plaintiff No. 1 from

Directorship of the Company, is justified or not, we, needless to say, express no opinion.

- 80** The issues arising in this case were involved and interesting, and we have learnt from the submissions advanced by the learned Senior Counsel at the Bar, to whom we express our gratitude. In such circumstances, needless to say, there would be no order as to costs.

**C. HARI SHANKAR
(JUDGE)**

ACTING CHIEF JUSTICE

NOVEMBER 07, 2017
Gayatri/nitin