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IN THE HIGH COURT OF DELHI AT NEW DELHI*Reserved on : 20th September, 2018**Date of decision : 16th October, 2018*

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CS (COMM) 1496/2016, I.As. 4565/2014, 8964/2014, 2523/2017 & 2524/2017**SAS HOSPITALITY PVT LTD & ANR.**

..... Plaintiffs

Through: Mr. Brij Bhushan Gupta, Senior Advocate with Mr. Amarjeet Singh and Mr. Uday Khanna, Advocates. (M:9540954431)

versus

SURYA CONSTRUCTIONS PVT LTD & ORS.

..... Defendants

Through: Ms. Anisha Mahajan, Advocate for D-1. (M:8860273364)
Mr. Dhruv Surana and Mr. Ashish Choudhury, Advocates for D-2 and 3. (M:9836411111)
Mr. Jayant Mehta, Mr. N. Raja Singh and Mr. Sumit Malhotra, Advocates for D-4, 6 to 9. (M:9871128442)**CORAM:****JUSTICE PRATHIBA M. SINGH****JUDGMENT****Prathiba M. Singh, J.**

1. The Plaintiff - SAS Hospitality Pvt. Ltd. (SAS) has filed the present suit seeking a declaration that the allotment of shares in favour of the Defendant Nos.5 to 9 is null and void and a permanent injunction be passed from giving effect to the allotment dated 5th October, 2013. Reliefs prayed in the plaint are as under:

“a. Declaring that the allotment of shares, dated 05th October, 2013, in Defendant No.1 Company in favour of Defendant No.5-9 as set in Schedule I to the Plaint to be null, void and illegal;

b. Issue a decree of Permanent Injunction restraining

the Defendant No.1 and Defendant No.2-4 from giving effect to allotment dated 05th October, 2013.

c. Issue a decree of Permanent Injunction restraining the Defendant No. 5-9 to exercise any voting rights or whatsoever rights in Defendant No.1 Company in view of the illegal allotment of shares dated 05th October, 2013.

d. Issue a decree of Permanent Injunction restraining the Defendant No.1 from selling, disposing or creating third party rights on the assets of the Defendant No.1, that is, the hotel property, J-14, Community Centre Rajouri Garden, New Delhi-110027.

e. And/or pass any other order as your lordship may deem fit in the facts and circumstances of the case.”

2. SAS Hospitality Pvt. Ltd. is the Plaintiff No.1 in the present suit and Plaintiff No.2 Mr. Anant Kumar Aggarwal is the shareholder of the Plaintiff No.1. The Defendant No.1 – Surya Construction Pvt. Ltd. (Company) is a company, which owned a hotel property at J-14, Community Centre, Rajouri Garden, New Delhi-110027. The authorised share capital of the Company was 1 crore divided into 1 Lakh equity shares of Rs.100/- each. The actual issued share capital as on 31st March, 2013 was Rs.85,76,500/- comprising of 85,765 shares of Rs.100/- each. The Defendant Nos.2 to 4 Mr. Samir Nawalgari, Mr. Sharad Nawalgari and Mr. Vaibhav Jhavar were managing the Company. The majority shareholder of the Defendant No.1 Company to the tune of 99.96% was the Plaintiff Company.

3. The suit was filed on the basis of the following allegations.

- a) That the Defendant Nos.5 to 9 were allotted shares of the Company in an illegal and clandestine manner on 5th October, 2013.
- b) That the said allotment was made known by virtue of returns filed on 7th December, 2013

- c) That the allotment of shares was done in an illegal and unlawful manner by transferring the moneys belonging to the Company and showing artificial deposit of Rs.1.6 crores. In fact, the same amount of Rs.48 Lakhs belonging to the Company was rotated repeatedly to show that the Defendant Nos.5 to 9 had paid the Company between 6th and 9th September, 2013, whereas in fact they had not made the said payments.
- d) That in a fraudulent manner the shareholding of the Plaintiff in the Company, which was to the tune of 99.96%, was diluted to 21.44%.
- e) That the share warrants, which were purportedly issued on 30th March, 2013, were illegal as the share capital did not permit issuance of share warrants. Moreover, share warrants could only be issued by a public limited company and not by a private limited company.
- f) That by circulating the same amount on four different occasions and showing that the Defendant Nos.5 to 9 had subscribed to the share capital, allotment of share was made in their names, which is completely illegal.

4. The plaint also mentions that one of the directors approached the Company Law Board ('CLB') seeking redressal and vide order dated 24th October, 2013, a *status quo* order was passed by the CLB. Proceedings therein are stated still to be pending.

5. The Defendants have filed their written statement and raised a preliminary issue as to the maintainability of the present suit. It is stated that the Company was in severe financial crisis due to a loan taken by the Company from India Bulls Housing Finance Ltd. In fact, it is stated that the

only property of the Company has already been attached under Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (*hereinafter*, 'SARFAESI Act') and the same has, in fact, been sold. The purported sole asset of the Defendant No.1 Company is no longer an asset of the Plaintiff Company.

6. The Defendants, further, contend that in view of the notification and coming into effect of the National Company Law Tribunal ('NCLT'), this Court has no jurisdiction to try and entertain the suit in view of the bar contained in Section 430 and Section 434(1)(c) of the Companies Act, 2013 (*hereinafter*, '2013 Act'). Applications under Order VII Rule 11 CPC have been filed seeking rejection of the plaint. The Plaintiffs have also filed an application under Order XXXIX Rules 1 & 2 CPC in which an *ex-parte* injunction order was granted in the following terms vide order dated 12th March, 2014.

9. I am satisfied that the plaintiff has made out a prima facie case for grant of an ex parte ad interim injunction and in case the ex parte ad interim injunction is not granted, the plaintiff shall suffer an irreparable loss and injury. The balance of convenience is also in favour of plaintiff. It is directed that till the next date of hearing defendants No. 5 to 9 shall not exercise any rights in respect of shares allotted to them on 5.10.2013. Further, defendants No.2 to 4 are restrained from disposing of any asset of the company or creating any third party interest in the assets of the company except in the ordinary course of business. In case any immovable asset is disposed of or any third party is created even in the ordinary course of business, the said defendants shall file such a statement before the court.

7. The Defendants have filed an application seeking vacation of the said injunction, as well. The Defendant Nos.2 & 3 have also filed an application under Order 40 CPC being I.A. No.13437/2017 seeking appointment of receiver. Thus, the present order is being passed in all the pending applications.

8. On behalf of the Defendants, Mr. Jayant Mehta, Advocate seeks rejection of the plaint on the following grounds.

- a) Lack of jurisdiction of this Court in view of Section 59 of the Companies Act, 2013 read with Section 430 and Section 434 (1)(c) of the Companies Act, 2013.
- b) That the board resolution authorizing filing of the suit is defective as no board meeting was, in fact, conducted on 21st January, 2014 on which date Mr. Mohit Mittal, who has signed the plaint, had been purportedly authorised. Thus the suit is defective.
- c) That the matter, in any case, was before the CLB and has, now, been transferred to the NCLT. Thus, two different forums cannot adjudicate the same issue. He relies upon the judgment of the Supreme Court in *Amonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd.* AIR 1998 SC 3153 (hereinafter, 'Ammonia Supplies SC'). He also relies upon the judgment of this Court in *Jai Kumar Arya v. Chhaya Devi* (2018) 142 CLA 365 (hereinafter, 'Jai Kumar Arya') to argue that the interpretation given in this judgment supports his case.
- d) Mr. Mehta also relies upon *Telecommunications Consultants India Ltd. v. TCIL Bellsouth Ltd.* ILR (2006) II Delhi 780 (hereinafter,

'Telecommunications Consultants India Ltd.') to argue that the NCLT is the appropriate forum to adjudicate the present dispute.

9. On the other hand, Mr. B. B. Gupta, Counsel appearing for the Plaintiffs submit that this Court has jurisdiction to entertain the present suit as the present dispute is not one covered by Section 59 of the Companies Act, 2013 but in fact, one which is covered by Section 62 of the same, which deals with the issuance of further share capital. He also submits that this issue has now been decided by a learned Single Judge of this Court in ***Satish Chandra Sanwalka v. Tinplate Dealers Association Pvt. Ltd. & Ors.*** 189 (2012) DLT 785 (hereinafter, '*Satish Chandra Sanwalka*') and the Division Bench judgment of this Court in ***Jai Kumar Arya*** (*supra*) which hold that the jurisdiction of the civil court under Section 9 CPC is not ousted. In fact, he relies upon the judgment of the Supreme Court in ***Amonia Supplies SC*** (*supra*) to argue that if the matter required rectification of the register of the Company under Section 155 of the Companies Act, 1956, it is to be adjudicated before the civil Court. He further submits that the argument of the Defendants that Mr. Mohit Mittal is not duly authorised by the board is untenable as he can produce the original board meeting minutes dated 21st January, 2014 to show that the board meeting, in fact, took place.

Analysis & Findings

10. Before going into the question as to whether this Court has the jurisdiction to entertain and try the present suit and grant reliefs prayed for, it is necessary to analyze the scheme of the Companies Act, 2013, along with the constitution of the NCLT. The NCLT has been vested with powers that are far reaching in respect of management and administration of

companies. The said powers of the NCLT include powers as broad as “*regulation of conduct of affairs of the company*” under Section 242(2)(a), as also various other specific powers. NCLT is a tribunal which has been constituted to have exclusive jurisdiction in the conduct of affairs of a company and its powers can be contrasted with that of the CLB under the unamended Companies Act, 1956.

11. In the 2013 Act, Sections 407 onwards deal with the constitution of the Tribunal. Section 420 has vested the Tribunal with powers to ‘*pass such orders thereon as it thinks fit*’. The Tribunal is also vested with the power of review. Under Section 424 of the Companies Act, 2013, the Tribunal also has the same powers and functions as are vested with a Civil Court. In addition to the above, the Tribunal also has the power to punish for contempt which was hitherto not available with the CLB. In various ways, the NCLT is not merely exercising the jurisdiction of a Company Court under the new Act, but is also vested with inherent powers and powers to punish for contempt. It is in this background that the court has to decide the issue of jurisdiction, which has been raised by the Defendant.

12. Under Section 62 of the 2013 Act, a procedure has been prescribed for issuance of share capital. The said procedure involves sending of a letter of offer to existing shareholders [Section 62(1)(a)] and to employees [Section 62(1)(b)]. The manner of sending of the said offer is also prescribed. The said offer also has to contain the details as to the terms under which the offer is being made, including the terms for conversion of debentures or loans to shares. Upon this procedure being followed, the subscribed share capital can be increased by the company.

13. The effect of the increase in the share capital and allotment of the

same to any person has an automatic effect, i.e., it results in the alteration of the register of members under Section 59 of the 2013 Act. Thus, while the power to issue share capital vests in the company, the said power, without the section implementing the said issuance, is of no effect, and has no consequence. Any dispute in respect of rectification of the register of members under Section 59, can be raised by any person aggrieved to the Tribunal i.e., the NCLT.

14. Section 430 of the 2013 Act, which bars the jurisdiction of the Civil Court, has to be given effect to in this background, and reads as under:

“Section 430: Civil court not to have jurisdiction.

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

15. The bar contained in Section 430 of the 2013 Act is in respect of entertaining “any suit”, or “any proceedings” which the NCLT is “empowered to determine”. The NCLT in the present case would be empowered to determine that the allotment of shares in favour of the Defendant Nos.5 to 9 was not done in accordance with the procedure prescribed under Section 62 of the 2013 Act. The NCLT is also empowered to determine as to whether rectification of the register is required to be carried out owing to such allotment, or cancellation of allotment ordered, if any. The NCLT can also determine if in the interregnum, the Defendant

Nos.5 to 9 ought to exercise any voting rights. The NCLT would be empowered to pass any such orders as it thinks fit, for the smooth conduct of the affairs of the company, which would include an injunction order protecting the assets of the Defendant No.1 Company. The NCLT would also be empowered to oversee and supervise the working of the company, and also appoint such persons as it may deem necessary to regulate the affairs of the company.

16. The allegations in the present case relate to non-compliance of the stipulations in Section 62 of the 2013 Act. The non-compliance of any conditions contained in Section 62 of the 2013 Act also constitutes mismanagement of the company, inasmuch as under Section 241 of the 2013 Act, the conduct of affairs of the company “*in a manner prejudicial*” to any member or “*in a manner prejudicial to the interest of the company*”, would be governed by the same. The jurisdiction to go into these allegations, vests with the Tribunal under Section 242 of the 2013 Act. Under Section 242(2), the NCLT has the power to pass “*such order as it thinks fit*”, including providing for “*regulation of conduct of affairs of the company in future*”. These powers are extremely broad and are more than what a Civil Court can do. Even if in the present case, the Court grants the reliefs sought for by the Plaintiff, after a full trial, the effective orders in respect of regulating the company, and administering the affairs of the company, cannot be passed in these proceedings. Such orders can only be passed by the NCLT, which has the exclusive jurisdiction to deal with the affairs of the company.

17. Moreover, the powers of the NCLT being broader and wider than what can be exercised by this Court in exercise of civil jurisdiction under Section 9 CPC. The NCLT is a specialised Tribunal constituted for the

purpose of speedier and effective regulation of the affairs of the companies. As observed by the Supreme Court in ***Union of India v. R. Gandhi* (2010) 11 SCC 1** (hereinafter, '*R. Gandhi*') and thereafter, in ***Madras Bar Association v. Union of India* (2015) 8 SCC 583** (hereinafter, '*Madras Bar Association*') the NCLT has been created by a specific amendment in the law. The constitution of the NCLT has been upheld. The relevant observations in the said ***R. Gandhi* (supra)** is set out below:

“33. The argument that there cannot be 'whole-sale transfer of powers' is misconceived. It is nobody's case that the entire functioning of courts in the country is transferred to Tribunals. The competence of the Parliament to make a law creating Tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act, empowered to deal with disputes arising under the said Act and the statute substitutes the word 'Tribunal' in place of 'High Court' necessarily there will be 'whole-sale transfer' of company law matters to the Tribunals. It is an inevitable consequence of creation of Tribunal, for such disputes, and will no way affect the validity of the law creating the Tribunal.”

18. In ***Madras Bar Association* (supra)**, relying upon the decision in ***R. Gandhi* (supra)**, the Supreme Court observed as under:

“11. First of all the creation of Constitution of NCLAT has been specifically upheld in 2010 judgment. It cannot be denied that this very Petitioner had specifically questioned the Constitutional validity of NCLAT in the earlier writ petition and even advanced the arguments on this very issue. This fact is specifically noted in the said judgment. The provision pertaining to the constitution of the Appellate Tribunal i.e. Section 10FR of the Companies Act, 1956 was duly

taken note of. Challenge was laid to the establishments of NCLT as well as NCLAT on the ground that the Parliament had resorted to tribunalisation by taking away the powers from the normal courts which was essentially a judicial function and this move of the Legislature impinged upon the impartiality, fairness and reasonableness of the decision making which was the hallmark of judiciary and essentially a judicial function. Argument went to the extent that it amounted to negating the Rule of Law and trampling of the Doctrine of Separation of Powers which was the basic feature of the Constitution of India. What we are emphasising is that the petitions spearheaded the attack on the constitutional validity of both NCLT as well as NCLAT on these common grounds. The Court specifically went into the gamut of all those arguments raised and emphatically repelled the same.

12. The Court specifically rejected the contention that transferring judicial function, traditionally performed by the Courts, to the Tribunals offended the basic structure of the Constitution and summarised the position in this behalf as under:

We may summarize the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated

with Judicial Tribunals.

(c) Whenever there is need for 'Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.

13. Thereafter, the Constitution Bench categorically dealt with the Constitutional validity of NCLT and NCLAT under the caption "Whether the constitution of NCLT and NCLAT under Parts 1B & 1C of Companies Act are valid", and embarked upon the detailed discussion on this topic. It becomes manifest from the above that the question of validity of NCLAT was directly and squarely in issue. Various facets of the challenge laid to the validity of these two fora were thoroughly thrashed out. No doubt, most of the discussion contained in paras 107 to 119 refers to NCLT. However, on an insight into the said discussion contained in these paragraphs, would eloquently bear it out that it is inclusive of NCLAT as well. In para 121 of the judgment, which is already extracted above, the Court specifically affirmed the decision of the High Court which held that creation of NCLT and NCLAT was not unconstitutional. In view of this, it is not open to the Petitioner even to argue this issue as it clearly operate as res judicata."

19. The bar under Section 430 of the 2013 Act being absolute in nature, this Court is of the view that the jurisdiction to adjudicate the disputes raised in the present case vests with the NCLT.

20. While deciding so, this Court is conscious of the difference between the terms "*High Court*" and "*Civil Court*". Under the Companies Act prior to the amendments, references to the High Court mean the High Court exercising jurisdiction as a Company Court and not as a Civil Court. Section 434 of the 2013 Act, relating to transfer of the proceedings, is applicable in respect of the Company Court, and not this Court exercising ordinary original civil jurisdiction under Section 9 CPC. Thus, Section 434 of the 2013 Act would not have any application in the present case, and the authorities cited in respect of the said provision would also not be

applicable. The NCLT having being vested with all the trappings of a Civil Court, with the amendments which have now been carried out, the bar under Section 430, however, is definitely triggered.

21. Coming back to the issue of Section 59 and Section 62, the judgment of the Supreme Court, relied upon by the Defendants in *Ammonia Supplies SC (supra)* is categorical. The Supreme Court observed as under:

“25. Now we proceed to examine the power of the court to rectify the Register of Members of a company under Section 155. The question raised for the appellant is that the court under this Act cannot direct an applicant to seek his remedy by way of suit but the court under the Act having exclusive jurisdiction should decide itself.....

26.....

27. In other words, in order to qualify for rectification, every procedure as prescribed under the Companies Act before recording the name in the Register of the Company has to be stated to have been complied with by the applicant – at least that part as required by the Act - and assertion of what has not been complied with under the Act and the Rules by the person or authority of the respondent-Company before the applicant claims for the rectification of such Register. The court has to examine on the facts of each case whether an application is for rectification or something else. So field or peripheral jurisdiction of the court under it would be what comes under rectification, not projected claims under the garb of rectification. So far exercising of power for rectification within its field there could be no doubt the court as referred under S.155 read with Section 2(11) and Section 10, it is the company court alone which has exclusive jurisdiction. Similarly, under Section 446, the “court” refers to the Company Judge which has exclusive jurisdiction to decide matters what is covered under it by itself. But this does not mean by

interpreting such “court” having exclusive jurisdiction to include within it what is not covered under it, merely because it is cloaked under the nomenclature rectification does not mean the court cannot see the substance after removing the cloak.

28.....29.....

30. All the above indicates the limitation and the peripheral jurisdiction with which court has to act. In spite of its exclusiveness, it cannot take within its lap outside this scope of rectification. This is indicated even by Section 155 itself:

"Section 155: Power of Court to rectify Register of Members.-

(1) If -

(a) the name of any person -

(i) is without sufficient cause, entered in the Register of Members of a company, or

(ii) after having been entered in the register, is, without sufficient cause, omitted therefrom; or

(b) default is made, or unnecessary delay takes place, in entering on the Register the fact of any person having become, or ceased to be, a member;

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the Register.

31. Sub-section (1) (a) of Section 155 refers to a case where the name of any person is without sufficient cause entered or omitted in the Register of Members of a company. The word 'sufficient cause' is to be tested in relation to the Act and the Rules. Without sufficient cause entered or omitted to be entered means done or omitted to do in contradiction of the Act and the Rules or what ought to have been done under the Act and the Rules but not done. Reading of this sub-clause spells out the limitation under which the court has to exercise its jurisdiction. It cannot be doubted that in spite of exclusiveness to decide all matters pertaining to the rectification it has to act within the said four corners

and adjudication of such matters cannot be doubted to be summary in nature. So, whenever a question is raised the court has to adjudicate on the facts and circumstances of each case. If it truly is rectification, all matters raised in that connection should be decided by the court under Section 155 and if it finds adjudication of any matter not falling under it, it may direct a party to get his right adjudicated by a civil court. Unless jurisdiction is expressly or implicitly barred under a statute, for violation or redress of any such right the civil court would have jurisdiction. There is nothing under the Companies Act expressly barring the jurisdiction of the civil court, but the jurisdiction of the 'court' as defined under the Act exercising its powers under various sections where it has been invested with exclusive jurisdiction, the jurisdiction of the civil court is impliedly barred. We have already held above the jurisdiction of the 'court' under Section 155, to the extent it has is exclusive, the jurisdiction of the civil court is impliedly barred. For what is not covered as aforesaid the civil court would have jurisdiction. Similarly we find even under Section 446(1), its words itself indicate the jurisdiction of the civil court is not excluded. This sub-section states, '...no suit or legal proceedings shall be commenced...or proceeded with...except by leave of the court'. The words 'except by leave of the court' itself indicate on leave being given the civil court would have jurisdiction to adjudicate one's right. Of course discretion to exercise such power is with the 'court'. Similarly under Section 446(2) 'court' is vested with powers to entertain or dispose of any suit or proceedings by or against the company. Once this discretion is exercised to have it decided by it, it by virtue of the language therein excludes the jurisdiction of the civil court. So we conclude that the principle of law as decided by the High Court that the jurisdiction of the court under Section 155 is summary in nature

cannot be faulted. ”

22. The observations of the Supreme Court in the context of the earlier Act, above make it clear that if the jurisdiction of the Company Court was exclusive, the jurisdiction of the Civil Court was barred in respect of power to rectify the register of members. However, the Court therein was dealing with Section 446(1) of the Companies Act, 1956, in its earlier *avatar*. The provisions have undergone a sea change since then. In fact, in Section 446(1) of the Companies Act, 1956 itself the leave of the ‘*Tribunal*’ was to be taken after the Act was amended in 2013, i.e., the leave of the CLB had to be taken.

23. Learned counsel for the Plaintiff places strong reliance on the judgment of the Full Bench of this Court in ***Ammonia Supplies Corporation Pvt. Ltd. v. Modern Plastic Containers (Pvt.) Ltd. & Ors.*** 52 (1993) DLT 252 (hereinafter, ‘*Ammonia Supplies DHC*’), to argue that this Court has jurisdiction. The reasoning in the said Full Bench judgment was that complex questions cannot be decided by the Tribunal, as the procedure in the Tribunal was of a summary nature. Moreover, the Tribunal was not enjoying the same powers as were exercised by the Civil Court at that time. Thus, disputed and complicated questions could not be raised before the Tribunal. This position no longer remains to be so, owing to the complete change in the scheme of the NCLT and the powers vested in it.

24. The Plaintiff has relied on a judgment of this Court in ***Satish Chandra Sanwalka*** (*supra*), which was also decided prior to the constitution of the NCLT in its present form. The constitution of the NCLT was subject matter of litigation before the Supreme Court of India, and the amended Act came into effect from 22nd August, 2013 and some of the provisions constituting

CS (COMM) 1496/2016 Page 17 of 23

the NCLT came into effect from 30th August, 2013 as corrected on 1st January, 2014. Moreover, the learned Single Judge had applied the ratio of ***Claude-Lila Parulekar v. Sakal Papers (P) Ltd. & Ors. (2005) 11 SCC 73*** (hereinafter, '*Sakal Papers*') and ***Ammonia Supplies SC (supra)***, that disputed questions of fact ought to be decided by the Civil Court. ***Sakal Papers (supra)*** while dealing with ***Ammonia Supplies (supra)*** was decided in a fact situation where the matter had remained pending for 18 years before the Civil Court and the Supreme Court felt it to be grossly inequitable to relegate the parties to an alternate remedy after the lapse of such a long time.

25. In ***Jai Kumar Arya (supra)***, a Division Bench of this Court, dealing with the bar under Section 430 of the 2013 Act, held as under:

“99. While examining the merits of these rival contentions, we are fully aware of the interpretative principle, now trite in law, that provisions which operate to exclude the ordinary jurisdiction of civil courts are to be strictly construed, and exclusion of such jurisdiction is not to be lightly inferred. The principle of exclusion of jurisdiction is, moreover, never absolute.”

26. The bar under Section 430 of the 2013 Act has, therefore, to be strictly construed and there can be no doubt about that. The Division Bench also considered ***Dhulabai v. State of M.P. AIR 1969 SC 78*** (hereinafter, '*Dhulabai*'), and held as under:

“101. 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 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)"

27. The Division Bench in ***Jai Kumar Arya (supra)***, after applying ***Dhulabai (supra)***, lays down the following test:

"102 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.

28. If these two tests are applied i.e., as to whether the Tribunal's order is attributed finality and as to whether the Tribunal would be able to do what a Civil Court could do, it is clear that an order under Section 59 of the 2013 Act has specific consequences for non-compliance. The order is appealable

to the appellate tribunal. The Tribunal has to apply the principles of natural justice. Under Section 242(2)(d) of the 2013 Act, the Tribunal can impose restrictions on the transfer or allotment of the shares of the company. It can also pass an interim order under Section 242(4) of the 2013 Act. Consequences for non-compliance have also been provided under Section 242(4) of the 2013 Act. The Plaintiffs have a right to apply Section 242 of the 2013 Act as they own 99.96% shareholding which has been diluted to 21.44%. Any member with more than 1/10th of the issued share capital can approach the Tribunal. Thus, even as per *Jai Kumar Arya (supra)*, the order being one, which can be passed under Section 242 of the 2013 Act, the NCLT has the jurisdiction. In *Jai Kumar Arya (supra)*, the Court was concerned with the power of removal of directors, which is distinct from the disputes involved in the present case. However, by applying the tests laid down therein, it is clear in the facts of this case that involving issues relating to allotment of share capital, alteration and rectification of the register of members, the NCLT is 'empowered to decide' –leading to the conclusion that this Court has no jurisdiction.

29. The Jammu & Kashmir High Court in *Bakshi Faiz Ahmad v. Bakshi Farooq Ahmad & Ors. [CIMA No.08/2018 and MP No. 01/2018 decision dated 18th April, 2018]* while dealing with an appeal from the Trial Court seeking vacation of an interim order, has observed that if there are issues of fraud and collusion or any other complicated questions, the NCLT would not have the jurisdiction to adjudicate the same. The High Court, however, holds that the Trial Court can examine this issue in an application under Order VII Rule 11 CPC, and under those circumstances rejected the appeal. In the present case, this Court is examining the question of jurisdiction in an

application under Order VII Rule 11.

30. In ***Chiranjeevi Rathnam & Ors. v. Ramesh & Ors*** 2017 (6) CTC 568, an injunction was sought restraining the conduct of the EGM, While interpreting Section 430 of the 2013 Act, the Court held that the Civil Court has no jurisdiction and the suit would be barred under Section 430.

31. In ***N. Ramji v. Ashwath Narayan Ramji & Ors***, [2017] 140 CLA 13 (*Mad.*) a learned Single Judge of Madras High Court has held that if issue of title of shares is raised, the same cannot be decided by the NCLT, but by the Civil Court. Such a question of title has not been raised in the present case.

32. None of the above judgments, would be squarely applicable in the present case, inasmuch as the question here is whether the issues of further share capital, was contrary to the scheme provided under Section 62 of the 2013 Act. Such issuance of share capital to the detriment of an existing member is prejudicial to the said member, as also the interest of the company. Moreover, under Section 242(2) of the 2013 Act, restrictions can be imposed on the transfer or allotment of shares and passing of such orders are within the domain of the NCLT.

33. The Legislative scheme having been changed, with the amendments which have brought about and for all the reasons stated herein above, this Court holds that the present suit is liable to be rejected leaving the Plaintiff to avail its remedies, in accordance with law before the NCLT.

34. Yet another reason for holding that this Court would have no jurisdiction is fact that the matter is also pending before the CLB (now transferred to the NCLT at the instance of one of the directors). The interim order passed by this Court has been in operation since 12th March, 2014. The said interim order would, continue for a further period of 4 weeks in order to

enable the Plaintiff to approach the NCLT.

35. The plaint is rejected with liberty as provided above. All pending I.As. stand disposed of.

PRATHIBA M. SINGH
JUDGE

OCTOBER 16, 2018/dk

