

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

% **Date of decision: 30th August, 2019**

+ **CS(COMM) 1079/2018 & IA No.17779/2018 (u/O VII R-11(a)&(d) CPC)**

ICP INVESTMENTS (MAURITIUS) LTD. Plaintiff

Through: Mr. Pranav Vyas with Mr. Parinay T. Vasandani, Advs.

Versus

UPPAL HOUSING PVT. LTD. & ORS Defendants

Through: Mr. Manoj K. Singh with Ms. Nilava Bandyopadhyay, Ms. Vijaya Singh & Mr. Satwik Singh, Advs. for D-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit against defendants no.1 to 5, viz. (i) Uppal Housing Pvt. Ltd., (ii) Mangalmay Holdings Pvt. Ltd., (iii) Manoj Talwar, (iv) Jitendra Singh, and, (v) Umang Realtech Pvt. Ltd., for (A) declaration, that (a) the Agreement dated 27th March, 2009 entered between defendant no.5 Umang Realtech Pvt. Ltd. (Umang) and defendant no.1 Uppal Housing Pvt. Ltd. (Uppal) with respect to property at Paprawat is void, having been brought about by fraudulent misrepresentation by Uppal to Umang; (b) the Agreement, also dated 27th March, 2009 entered between Umang and Uppal with respect to property at Daulatpur is void, having been brought about by fraudulent misrepresentation of Uppal to Umang; (c) the Agreements dated 27th March, 2009 aforesaid with respect to properties at Paprawat and Daulatpur were “impossible from the date of Agreement” and

thus void; (d) the Agreements dated 27th March, 2009 aforesaid with respect to properties at Paprawat and Daulatpur are vague and uncertain and thus void; (e) the defendants no.2 to 4 Mangalmay Holdings Pvt. Ltd. (Mangalmay), Manoj Talwar (Manoj) and Jitender Singh (Jitender) have acted contrary to the interest of Umang; (f) Umang has unreasonably failed to take steps to recover its monies from Uppal and has thus acted to its own detriment; and, (B) consequential direction to Uppal to pay the amount of Rs.288,05,00,000/- to Umang together with interest at 18% per annum.

2. The suit, unaccompanied with any application for urgent relief, came up before the Joint Registrar on 20th August, 2018, when summons thereof were ordered to be issued.

3. Pleadings in the suit have since been completed.

4. Uppal has filed IA No.17779/2018 under Order VII Rule 11 (a) and (d) of the CPC for rejection of the plaint, on the ground of (i) the plaint not disclosing any cause of action; (b) the suit claim being barred by time; and, (c) the plaintiff being not entitled to maintain the suit as a derivative action on behalf of Umang.

5. The aforesaid application of Uppal came up before this Court on 13th February, 2019, when though the counsel for the plaintiff appeared, but sought adjournment.

6. The counsel for the plaintiff and the counsel for Uppal have been heard.

7. None appears for any of the other defendants, all of whom were reported to be served as far back as on 4th September, 2018 and of which, Manoj as well as Jitender and Umang together, have also filed written statements. The right of Mangalmay to file written statement was closed on

23rd January, 2019. Mangalmay, Manoj, Jitender and Umang are proceeded against *ex-parte*.

8. It is the case of the plaintiff in the plaint, that (i) the plaintiff and Uppal are shareholders of Umang, with plaintiff having 52% shareholding of Umang and Uppal having 45% of the shareholding of Umang; (ii) Mangalmay has remaining 3% of the shareholding of Umang; (iii) Manoj and Jitender are the Directors of Umang; (iv) the plaintiff, in its capacity as a shareholder of Umang, is filing this derivative suit to protect the interest of Umang and secure recovery of the amount of Rs.288,05,00,000/- due from Uppal to Umang; (v) the said amount was paid by Umang to Uppal, to “obtain” approximately 44,43,120 sq. ft. Floor Space Index (FSI) of certain land parcels located at Daulatpur and Paprawat area; (vi) the said amount was paid as advance by Umang to Uppal and which monies Umang, in dereliction of its duty, has failed to recover back from Uppal; (vii) Uppal, in the year 2007, misrepresented to Umang that development of residential premises in the Najafgarh area of Delhi had become a permissible activity and that investments in residential projects in the Najafgarh area of Delhi would be a profitable investment for Umang; (viii) Uppal, at that time being a majority shareholder of Umang, insisted that Umang enter into the Agreements dated 27th March, 2009 with Uppal for obtaining FSI aforesaid; (ix) the plaintiff has now come to know that Uppal, being a seasoned developer in Delhi, devised a crooked strategy to obtain huge sums of monies from Umang, by making false promises which made Umang believe that by payment of the money aforesaid, it would acquire FSI; (x) that though Master Plan for Delhi 2021 (MPD 2021) introduced a policy for development as represented by Uppal, but no steps were ever taken by Delhi

Development Authority (DDA) to give effect to the said policy; (xi) as on the 27th March, 2009, i.e. the date of the Agreements, there was no land policy under MPD 2021 and Uppal misguided Umang; (xii) even after introduction of the Chapter on land policy in MPD 2021, other formalities and steps were required to give effect to the said policy; (xiii) Umang has not benefited in any manner whatsoever after being induced by fraud and misrepresentation to advance Rs.288,05,00,000/- to Uppal and Uppal has not taken any step whatsoever to give effect to its obligations under the Agreements dated 27th March, 2009; (xiv) Umang is required to recover Rs.288,05,00,000/- paid to Uppal but has failed to take any action; (xv) that several litigations have been initiated against Umang by numerous homebuyers from whom Umang has received advances for sale of FSI to be delivered by Uppal to Umang under the Agreements aforesaid; (xvi) Uppal, for 9 years preceding the suit, has been the beneficiary of the sum of Rs.288,05,00,000/-; (xvii) the plaintiff sent an email dated 11th June, 2018 to Uppal, suggesting that the Board of Umang should seek a refund of monies advanced by Umang to Uppal but Uppal responded that the monies should be refunded only when certain land was sold; and, (xviii) it thus becomes clear that Umang is not going to make any demand to seek refund of the advance of Rs.288,05,00,000/- paid to Uppal; the plaintiff is thus constrained to file the present suit as a derivative suit.

9. I may record that the plaint, besides the pleas aforesaid, also contains the pleas of fraud and misrepresentation practiced by Uppal in the matter of entering into the Agreements dated 27th March, 2009, but the need to record the same herein for the present purpose is not felt.

10. Uppal seeks rejection of the plaint, contending (i) that the plaintiff, in the plaint having admitted to be the majority shareholder of Umang, holding 52% of the share capital of Umang, is not entitled to maintain a derivative action, which under the English law has been permitted to be initiated by a minority shareholder with respect to the refusal of the management to protect the interest of a company; (ii) before a derivative action can be maintained, the test, whether the company on whose behalf derivative action is initiated was entitled to the relief claimed or not, also has to be satisfied; (iii) the Agreements dated 27th March, 2009 between Uppal and Umang contain an arbitration clause, disentitling Umang from initiating a suit for any relief arising out of the said agreement; once Umang could not have instituted the suit, the plaintiff also is not entitled to institute the suit; (iv) that the plaintiff, in the plaint has admitted that till the year 2016, the nominee of the plaintiff was the Managing Director of Umang; even then Umang did not seek any relief as has been sought by the plaintiff in this suit on behalf of Umang; (v) that proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC) have been initiated against Umang and Interim Resolution Professional (IRP) thereunder appointed with respect to Umang; (vi) that vide Section 238 of the IBC, the provisions thereof have an overriding effect and therefore no derivative action on behalf of Umang can be maintained; and, (vii) that no grievance having been made by Umang with respect to Agreements dated 27th March, 2009, the plaintiff cannot make a grievance on behalf of Umang.

11. Per contra, the counsel for the plaintiff has argued, (a) that the plaintiff became a shareholder of Umang on 1st April, 2009 i.e. after the Agreements dated 27th March, 2009; (b) that as per the Shareholders

Agreement dated 19th February, 2010 between plaintiff, Uppal and Umang, Umang is managed by its Board of Directors comprising of six Directors, with the plaintiff as well as Uppal having right to appoint three Directors each; and, (c) that owing to equal representation of plaintiff and Uppal on the Board of Umang, the plaintiff, in spite of being majority shareholder, was/is not in a position to make Umang take action against the Board of Directors.

12. On enquiry, whether not there is a provision in the Shareholders Agreement for the eventuality of a deadlock between nominees of the plaintiff and Uppal on the Board of Directors of Umang, it is stated that there is no such provision. On further enquiry, whether the Shareholders Agreement to the aforesaid extent had been incorporated in the Articles of Association of Umang, the counsel for the plaintiff replies in the affirmative.

13. The counsel for Uppal, in support of his arguments, has referred to:

(I) *Starlight Real Estate (ASCOT) Mauritius Limited Vs. Jagrati Trade Services Private Limited* AIR 2018 Cal 173 holding that (a) the Courts will not interfere in matters of internal administration of a company; (b) it is for the majority of shareholders to decide the manner in which the affairs of the company are to be conducted; (c) in the case of an injury to the corporation, it is for the corporation to sue in its own name and individual shareholders cannot assume themselves the right of suing in the name of corporation; (d) the majority shareholders cannot complain of any irregular act which the majority are entitled to do regularly; (e) the circumstances in which minority shareholders actions are allowable, constitute exceptions to

the rule; (f) such an action is filed by the shareholder in his own name but is for the benefit and advantage of the company; and, (g) the person filing a derivative claim has to show that the company has a right to sue but being indulgent in the matter is not likely to sue and therefore he gets a derivative authority to sue;

(II) ***Darius Rutton Kavasmaneck Vs. Gharda Chemicals Limited***

2014 SCC OnLine Bom 1851 holding that (a) derivative action is an exception to the rule that only a company can sue on its own behalf; (b) in exceptional circumstances, an individual shareholder is permitted to sue the alleged wrongdoers on behalf of the company because the wrongdoers are themselves in control of the company; and, (c) the requirements to be complied with, to permit an individual shareholder to sue on behalf of the company, are very strict; and,

(III) ***Daniels Vs. Daniels*** [1978] 2 All ER 89, holding that minority shareholders are entitled to bring an action where the majority of the directors, negligently, though without fraud, had benefited themselves at the expense of the company.

14. I have considered the rival contentions.

15. Before taking up the contention of the counsel for Uppal with respect to maintainability of this suit as a derivative action on behalf of Umang, presuming such a derivative action to be maintainable, I will first consider the effect of proceedings under the IBC having been initiated with respect to Umang.

16. Though neither party has filed any document in this regard, but I find that the National Company Law Tribunal (NCLT) vide judgment dated 20th CS(COMM) No.1079/2018

August, 2019 in *Rachna Singh Vs. Umang Realtech Pvt. Ltd.* MANU/NC/3054/2019 has admitted the application under Section 7 of IBC read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiation of corporate insolvency resolution process in respect of Umang and appointed an IRP and declared moratorium in terms of Section 14 of IBC prohibiting institution of suits or continuation of pending suits or proceedings against Umang and restraining Umang from transferring, encumbering, alienating or disposing off any of its assets or legal rights or beneficial interest.

17. Section 17 of the IBC *inter alia* provides for the management of the affairs of the corporate debtor to vest with the IRP from the date of his appointment, and for the powers of the Board of Directors to stand superseded and to be exercised instead by the IRP. Under Section 18 of the IBC, the IRP has the duty *inter alia* to take control and custody of all assets over which the corporate debtor has ownership rights, as recorded in the balance sheet of the corporate debtor, to constitute a Committee of Creditors and to monitor the assets of corporate debtor and manage its operation until a Resolution Professional (RP) is appointed by the Committee of Creditors. Section 19 of the IBC mandates the personnel of the corporate debtors and its promoters and other persons associated with the management of the corporate debtor, to extend all assistance and cooperation to the IRP, as may be required by him in managing the affairs of the corporate debtor. Section 20 of the IBC requires the IRP to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern and to take all such actions as may be necessary to keep the corporate debtor as a going concern.

18. The IRP appointed with respect to Umang, under the law having powers / authorities as aforesaid, I have wondered about the maintainability of a derivative action on behalf of Umang.

19. The essence of a derivative action as captured as far back as in **Dr. Satya Charan Law Vs. Rameshwar Prasad Bajoria** AIR 1950 FC 133, is as under:

*“The correct position seems to us to be that ordinarily the directors of a company are the only persons who can conduct litigation in the name of the company, but when they are themselves the wrongdoers against the company and have acted mala fide or beyond their powers, and their personal interest is in conflict with their duty in such a way that they cannot or will not take steps to seek redress for the wrong done to the company, the majority of the shareholders must in such a case be entitled to take steps to redress the wrong. There is no provision in the articles of association to meet the contingency, and therefore the rule which has been laid down in a long line of cases that in such circumstances the majority of the shareholders can sue in the name of the company must apply. In **MacDougall v. Gardiner** (1875) 1 Ch.D. 13 and **Pender v. Lushington** (1877) 6 Ch.D.70, specific reference was made to the fact that the directors, being the custodians of the seal of the company, were the persons who should normally sue in the name of the company, but nevertheless it was held that the majority of the shareholders were entitled to sue in the name of the company when relief was sought against the directors themselves. Even in **Automatic Self-Cleansing Filter Syndicate Company Ltd. v. Cunningham** [1906] 2 Ch.34, it was recognized that "misconduct" on the part of the director provided an exception to the rule laid down in that case.”*

It is felt that once the affairs of the Umang are taken over by an IRP, the Directors of Umang can no longer be blamed for not taking the requisite

steps to seek redress for the wrong if any done to Umang, and a derivative action by plaintiff, as a majority shareholder, for the benefit of Umang would not be maintainable. The plaintiff now has to approach the IRP for taking action against Uppal and it is the IRP who has to, if finds any merit in the grievance of the plaintiff, take appropriate remedy on behalf of Umang. Moreover, if the plaintiff remains dissatisfied with the decision of IRP, has remedy before the NCLT.

20. I find the question to be not *res integra*, as far as foreign jurisdictions are concerned. Reference in this regard may be made to:

- (i) ***Fargro Vs. Godfroy*** [1986] 3All ER279, which was a case of derivative action on behalf of a “deadlock company” i.e. Articles of Association whereof did not provide a casting vote for the nominee director of either of two shareholders in the company. It was held that once such a company goes into liquidation, the situation is completely changed because there is neither a board nor any shareholders’ meeting which in any sense is in control of the activities of the company let alone its litigation, and it is the liquidator who is the person in whom that right is vested. It was held that there is a vast distinction between the position where the company is a going concern and the minority shareholders’ action can be brought as a derivative action, and a case where a company goes into liquidation, where there is no longer any necessity for bringing a minority shareholders’ action.

- (ii) ***Barrett Vs. Duckett*** [1995] B.C.C. 362 where the Court of Appeal (UK), relying on ***Ferguson Vs. Wallbridge*** [1935] 3 DLR 66, held that as soon as company goes into liquidation, the necessity for any such expediency in procedure (derivative action) disappears; the minority shareholders are then no longer at the mercy of majority and when even if the liquidator, acting at the behest of the majority, refuses when requested to take action in the name of the company, it is open to any contributory to apply to the Court.
- (iii) ***Cinematic Finance Ltd. Vs. Ryder*** [2012] B.C.C. 797, where a Chancery Division of UK held that a derivative action is not maintainable where the company cannot or will not enforce its rights due to malfeasance of the Directors. It was held that if a company is placed into liquidation or administration, then it would be for the liquidator or the administrator to decide whether or not to pursue the claims, and thus derivative action should not normally be brought on behalf of a company in liquidation or administration. It was further held that the controlling shareholder should not seek to circumvent the insolvency regime by starting a derivative action.
- (iv) ***Petroships Investment Pte Ltd. Vs. Wealthplus Pte Ltd.*** [2016] SGCA 17 where the Supreme Court of Singapore also held that a derivative action, enshrined in Section 216A of the Companies Act, 2006 of that country, is one where there exist directors who are capable of taking action to vindicate the

company's right i.e. they remain in active management. It was held that whilst a company is a going concern, it is normally for the Board of Directors to authorize legal proceedings, as the power to manage is usually vested in the Board; however when a company enters into liquidation, the board is effectively *functus officio* and the liquidator is in the driver seat and the directors have no power to react to any notice, whether to prosecute, defend or discontinue an action on the company's behalf.

21. I must however note that the aforesaid cases involved a company which was at the stage of liquidation, as distinct from Umang in the present case, against which only the insolvency process has begun. However considering the duties and role of the IRP under the IBC as discussed hereinabove, the principle in each of the aforesaid cases i.e. of the management of the company, on whose fraud/mismanagement a derivative action becomes maintainable, being no longer in power/control, and consequently a derivative action being no longer maintainable, also applies to the present case.

22. I also find a Single Judge of the High Court of Madras in ***Jai Rajkumar Vs. Stanbic Bank Ghana Ltd.*** 2018 SCC OnLine Mad 10472 to have held a suit by way of a derivative action to be not maintainable when the company, for whose benefit derivative action was initiated, was under insolvency. It was held that it is for the RP to act on behalf of the corporate debtor and to initiate suitable proceedings if any deemed necessary for the benefit of the corporate debtor and its creditors.

23. I respectfully concur.

24. Though this suit is found to have been instituted in or about August, 2018 i.e. nearly one year prior to the NCLT admitting the insolvency proceedings against Umang, but the insolvency proceedings are also found to have been initiated in or about the same year i.e. 2018.

25. Resultantly, this suit as a derivative action, on corporate insolvency proceedings with respect to Umang being admitted and IRP with respect to Umang being appointed, is deadwood and even if maintainable on the date of institution thereof, is now not maintainable, the cause of action for this suit having dissipated.

26. Though the suit is liable to be dismissed on this ground alone, but for the sake of completeness, I also proceed to adjudicate the maintainability of the derivative action *de hors* the aspect of the insolvency proceedings in respect of Umang having been initiated.

27. I have already noticed hereinabove the dicta of the Federal Court in ***Dr. Satya Charan Law*** supra extending the maintainability of a derivative action to India. Recently in ***Ahmed Abdulla Ahmed Al Ghurair Vs. Star Health and Allied Insurance Company Ltd.*** 2018 SCC OnLine SC 2554 also, a derivative action was held to be maintainable, though as an exception to the general principle of locus, and claimable only in a particular situation. A Division Bench of this Court also in ***Globe Motors Ltd. Vs. Mehta Teja Singh*** (1983) 24 DLT 214 held a derivative action to be maintainable against directors who are in control of the company, to compel such directors to account to the company for profits made by appropriating for themselves a business opportunity which the company would otherwise have enjoyed. Again, in ***Rajeev Saumitra Vs. Neetu Singh*** 2016 SCC

OnLine Del 512, a Co-ordinate Bench, referring to several judgments, held the derivative action to be maintainable. Reference in this regard may also be made to *N.V.R. Nagappa Chettiar Vs. The Madras Race Club* AIR 1951 Mad 831, *Anil Madhavdas Ahuja Vs. Marvel Fragrances Pvt. Ltd.* 2011 SCC OnLine Bom 1108, *Narendra Kumar Berlia Vs. Om Prakash Berlia* 2011 SCC OnLine Cal 923, *Darius Rutton Kavasmaneck Vs. Gharda Chemicals Ltd.* 2015 SCC OnLine Bom 5813 (DB) and *Starlight Real Estate (Ascot) Mauritius Ltd.* supra.

28. The trend of judicial opinion thus, is in favour of maintainability of a derivative action under the Indian law also.

29. I may however note a few other developments, both international and national. Internationally, the trend appears to be of codification of the remedy of derivative action, the origin of which is in common law. Countries including Canada, Australia, New Zealand, Ghana, Hong Kong, South Africa, U.K., U.S.A., Malaysia and others, have included the remedy of derivative action in their respective legislations governing company law. South Africa and Australia, in their Companies Act, 2008 and Corporations Act, 2001 respectively, have gone to the extent of expressly abolishing any common law rights for derivative action, so that the statutory regime alone remains applicable. As for the U.K., the birthplace of derivative action, their Parliament for the first time, in the Companies Act, 2006, introduced a statutory mechanism for derivative claims through Sections 260-264. While the U.K. Act did not expressly abolish common law rights for derivative actions, a Chancery Division of the U.K. in *Universal Project Management Services Ltd Vs. Fort Gilkicker* MANU/UKCH/0190/2013 held that the

Parliament, by enacting a comprehensive statutory code relating to derivative actions, had impliedly abolished the common law derivative action to the extent of derivative claims by members of the company.

30. Though the Indian Parliament also, in the year 2013 has re-enacted the law relating to companies earlier enshrined in the Companies Act, 1956, but in its wisdom and notwithstanding the codification of the law relating to derivative action in other countries, including in the U.K., common law principles wherefrom were borrowed to hold derivative action to be maintainable in India, has chosen not to do so. There is however nothing to show whether decision not to do so was deliberate.

31. In India, while there is no express statutory remedy for a derivative action, the Companies Act, 2013, in Section 241 provides for a member of a company to apply to the NCLT for the relief of oppression and mismanagement, and which section is as under-

“241. Application to Tribunal for relief in cases of oppression, etc.— (1) Any member of a company who complains that—

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the

company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

(emphasis added)

32. A perusal of the relevant company law of Canada, Australia and the U.K shows that derivative action and the relief of oppression/mismanagement, or its most similar counterpart, co-exist with each other. The scope of the two reliefs is distinct, though likely to overlap. While the relief of oppression/mismanagement is available to a member for a harm done to him, or another member, the relief of derivative action is for a member to bring a suit on behalf of the company to protect the interest of the company itself. For the sake of comparison, it is deemed apposite to set out herein below Section 459 of Companies Act, 1985 of U.K. as well as Section 994 of Companies Act, 2006 of U.K. providing for the remedy of oppression, to a member/shareholder of a company. While Section 459 was as under:

“PROTECTION OF COMPANY'S MEMBERS AGAINST UNFAIR PREJUDICE

459. Order on application of company member

(1) A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act

or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member or members are to be construed accordingly.”,

the present Section 994 is as under:

“PROTECTION OF MEMBERS AGAINST UNFAIR PREJUDICE

994. Petition by company member

(1) A member of a company may apply to the court by petition for an order under this Part on the ground—

(a) that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, “company” means—

(a) a company within the meaning of this Act, or

(b) a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991.”

As would immediately be noticed, under the English codified law pertaining to companies, now or earlier, a member/shareholder could complain only when the affairs of a company were being conducted in a manner prejudicial to the complaining members/shareholders or other shareholders AND NOT when the affairs of the company were being conducted in a manner prejudicial to the company itself. The Court of Appeal for Ontario in **Rea Vs. Wildboer** 2015 ONCA 373 also considered this distinction, and held, a) that the derivative action and the oppression remedy are not mutually exclusive; b) the legislature created two different remedies, one a corporate remedy and the other a personal remedy; c) the remedy of oppression can be claimed only when the interests of the complainant are impacted personally and gives rise to a personal action; and, d) derivative actions provides aggrieved minority stakeholders with the ability to pursue a cause of action on behalf of the company to redress wrongs done in respect of the corporation.

33. In India, however this distinction disappears. Section 241 as aforesaid, not only provides for a member to approach the NCLT when the affairs of a company are being conducted in a manner prejudicial to the member or any other member or members, but also when the affairs are being conducted in a manner prejudicial to public interest and to the interests of the company itself. It thus appears to me that a derivative action, which is filed to protect the interests of the company, would come within the

ambit of Section 241, and the Parliament, in Section 241 supra of the Companies Act envisaged a remedy that included within its scope oppression, mismanagement and derivative actions. Once it is found that the plaintiff, as a member/shareholder of Umang, for the cause of action of affairs of Umang being conducted in a manner prejudicial to Umang, has statutory remedy available to him, a derivative action for the benefit of Umang, by way of civil suit would not be maintainable.

34. It must also be noted that vide the Companies (Second Amendment) Act, 2002, the Parliament introduced provisions for the constitution of the NCLT and National Company Law Appellate Tribunal (NCLAT), the constitutional validity of which was upheld by a Constitutional Bench of the Supreme Court in *Union of India Vs. R. Gandhi* (2010) 11 SCC 1. One of the driving concerns behind the introduction of NCLT and NCLAT was the multiplicity of fora for company law matters such as the High Court, Company Law Board (CLB), Board for Industrial and Financial Reconstruction (BIFR) etc., and to remedy which the NCLT and NCLAT were envisaged and introduced as a one stop forum which takes over the functions performed by CLB, BIFR, High Courts etc.

35. It is also worth mentioning that while against the order of the erstwhile CLB, appeals were provided to the High Court under Section 10 of the Companies Act, 1956, under the Companies Act, 2013, appeals against the order of NCLT lie to the NCLAT and against the order of NCLAT directly to the Supreme Court, eliminating the subject jurisdiction of the High Court in matters relating to companies.

36. What flows from the above is, that the Parliament having constituted the NCLT and NCLAT and vested them with jurisdiction over all matters arising from Section 241, and having also vide Section 430 expressly barred the jurisdiction of civil courts in respect of any matter that the NCLT or NCLAT are empowered to determine, derivative actions in common law, to the extent the statutory regime for oppression and mismanagement is equipped to deal with, are no longer maintainable in India, and the proper remedy for suits such as the present one would be under Section 241 before the NCLT.

37. I must however hasten to add that while an application under Section 397 of the Companies Act, 1956 for relief in cases of oppression was available to a member of the company, only when the affairs of the company were being conducted in a manner oppressive to such member or other members, but under Section 398 thereof an application for relief in cases of mismanagement could lie even on complaint that affairs of the company were being conducted in a manner prejudicial to the interests of the company itself, just like under Section 241 of the Companies Act, 2013. Therefore the only change which has been brought about by Section 241 of the Companies Act, 2013 is that the separate remedies of oppression and mismanagement under Sections 397 and 398 of the erstwhile Act of 1956 have been combined, though under the 1956 Act also, a petition was mostly filed, both under Sections 397 and 398. However notwithstanding which, derivative actions for the benefit of a company were held to be maintainable in India. However, my research does not reveal the said aspect to have been considered in any of the judgments holding a derivative action to be maintainable in India. I therefore take the liberty of a holding a derivative

action to be *per se* not maintainable, specially claiming a relief of declaration, which under Section 34 of the Specific Relief Act, 1963 is a discretionary relief, and which discretion will not be exercised in favour of the plaintiff when a statutory remedy for a relief is available.

38. There is another reason for which I find a derivative action by the plaintiff for the benefit of Umang to be not available on the pleaded facts. It is not the case of the plaintiff that Umang, under its agreements with Uppal, is entitled to refund. Rather, the relief of a refund against Uppal, in favour of Umang, is premised on relief of declaration of the agreements as void, and which declaration is sought on the ground of misrepresentation amongst others. The grounds on which declaration as null and void of the agreements entered into by Umang with Uppal are sought, are grounds which are personal to the party to a contract. In my view, a non party to the agreement between Umang and Uppal, as the plaintiff in the capacity of a shareholder is, cannot invoke such grounds. It is only Umang itself which can plead having entered into the agreements with Uppal on account of account of misrepresentation by Uppal. Without Umang having taken any such plea, no purpose will be served in proceeding with such suit.

39. Merit is also found in the contention of the counsel for Uppal that the plaintiff holding majority shares of Umang and also having its nominee as Managing Director of Umang was entitled to make Umang make a claim against Uppal as is made by the plaintiff by way of this derivative action, and having not done so, is not entitled to maintain a derivative action.

40. A derivative action for the benefit of a company has always been held to be an exception to the democratic process governing the actions of a

company. The said exception will not be permitted to be invoked in the aforesaid facts. Umang does not qualify as a deadlock company notwithstanding having equal representation of plaintiff and Uppal on its Board of Directors, and notwithstanding having no provision in the Articles of Association for a casting vote for either. The plaintiff, as majority shareholder of Umang could always, in shareholder meeting, take a decision, binding on the Board of Directors.

41. Thus, not only is the present suit as a derivative action for the benefit of Umang, on appointment of IRP with respect to Umang, deadwood and liable to be struck off from the docket of this Court, but for the reasons aforesaid, this suit from the date of institution thereof is also not found to be maintainable.

42. Resultantly, the suit is dismissed with costs in favour of Uppal and against the plaintiff, and with professional fee assessed at Rs.5 lacs.

43. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

AUGUST 30, 2019

‘ak/bs/gsr’

(corrected and released on 28th September, 2019)