$~

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

% *Judgment delivered on: 21.09.2020*

\+ **FAO 92/2020**

THE DELHI & DISTRICT CRICKET ASSOCIATION ..... Appellant

Through: Mr. Kapil Sibal, Senior Advocate with Mr. Ankur Chawla, Advocate and Mr. Gautam Dutta, Standing Counsel.
Ms. Aishwarya Bhati, ASG with Mr. Lalitaksh Joshi and Mr Saurabh Chadha, Advocates.
Mr. Sandep Sethi, Sr. Adv. with Mr. Lalitaksh Joshi, Adv.

Versus

SUDHIR KUMAR AGGARWAL & ORS. .....Respondents

Through: Mr. Kirti Uppal, Sr. Adv. with Mr Vishal Singh, Advocate for R-1 & R-2.
Mr Jayant Mohan & Ms Meenakshi Chatterjee, Advocates for R-3.
Mr. Akshay Ringe, Advocate for R-4.
Mr. Rajiv Nayar, Sr. Adv. with Mr Jayant Mehta and Mr Nishant Rao, Advocates for R-6.
Mr. Dayan Krishnan, Senior Advocate, with Mr Khowaja Siddiqui, Mr Ashwini Kumar and Mr Arup Sinha, Advocates for R-8.
Mr Ripudaman Bhardwaj, CGSC for R14/UOI.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

FAO 92/2020, Review Petition No. 102/2020, CM Nos. 7342/2020, 7344/2020, 8624/2020, 8797/2020, 10450/2020, 10564/2020, 10565/2020, 11299/2020, 11300/2020, 11356/2020, 11357/2020, 11803/2020, 11804/2020, 20277/2020, 20278/2020, 22676/2020 & 22677/2020

1. The issue to be considered in this appeal is: whether elections to the Board of Directors (APEX Council) of a company; allegations of oppression and mismanagement; wrongful appointment of an Ombudsman in violation of Articles of Association, could be adjudicated by a civil court or whether jurisdiction vests exclusively with the National Company Law Tribunal (NCLT).
2. This appeal under sections 104 and 151 read with Order XLIII Rule 1 CPC, impugns an order of the learned ADJ, Tis Hazari Courts, New Delhi in CS No.85/2020 dated 29.02.2020, whereby the appellant's two applications were dismissed and the interim injunction sought by the plaintiff/R-1 was granted. The appellant is supported by R-3, R-4 and R-8. The first application, under Order VII Rule 10, sought return of the plaint as notice under Section 80 of the Civil Procedure Code was not served. The second application, under Order VII Rule 11, sought rejection of the plaint on account of a lack of jurisdiction, in view of the unequivocal bar placed on civil courts by section 430 of the Companies Act, 2013. The appellant contends that the suit is not maintainable before a civil court because of the said statutory bar. Instead by simultaneous conferment of jurisdiction to deal with such issues in favour of the National Company Law Tribunal (NCLT), the *lis* and the grievances raised in the suit can be adjudicated only by the NCLT.
3. In this regard, the impugned order has reasoned as under:

"…. 7.11 The next limb of arguments regarding exclusion of jurisdiction of civil court is pertaining to Section 430 and other relevant provisions of Companies Act, 2013. It was argued on behalf of the defendants that the NCLT & NCALT have all the powers to deal with the kind of issues raised by the plaintiffs. In this regard reliance is placed upon the Judgment "T.P Daver Vs. Lodge Victoria No. 363, S.C. Belgaum 1963 AIR II44. In reply, the plaintiffs relied upon the Judgment "Jai Kumar Arya & Ors. Vs. Chhaya Devi & Anr." 2017 SCC Online Delhi 11436 FAQ (OS) 253/17, wherein it was held that where the provisions of statute are violated, the parties can approach the civil courts. It was argued on behalf of the plaintiff that as per Section 156 (6) (a) of the Companies Act, 2013, 2/3rd of the Directors were to retire by the rotation. Whereas Articles of Association provide for retirement of only l/3rd Directors, This was in violation of statute. In para no. 5 of the plaint, it is stated that defendant no. 1 is guilty of offence under Section 118 (12) of the Companies Act. The notice dated 13.12.2019 was in violation of 101 of Companies Act and Article 10 (6) of Articles of Association of DDCA. It was also argued that for deciding the matter under Order 7 Rule 11 CPC only the plaint and accompanying documents are to be seen. At this stage, it cannot be decided whether any statutory provisions have actually been violated or not…"

(emphasis supplied)

4. The suit sought, *inter alia*, that the notice dated 13.12.2019, for the Annual General Meeting (AGM) held on 29.12.2019, be declared illegal, and consequently the AGM itself, where amendments were made to the Articles of Association and a new Ombudsman was appointed. The reliefs sought in the suit have been analysed by the appellant as being

maintainable only before the NCLT, in exercise of the relevant sections of the Companies Act, 2013. The table of comparative analysis is as under:

(i) pass a decree of declaration, declaring that the impugned notice dated 13.12.2019, being in violation of Article 10(6) of the Article of Association, Section 101 of the Companies Act, 2013 and Rule 18(rx) of the Companies (Management & Administration) Rules, 2014 is unauthorized, illegal null and void.	241. (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 242. (4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable. 245 (1) (b) (*b*) to restrain the company from committing breach of any provision of the company's memorandum or articles;
(ii) Pass a decree of declaration declaring that the agenda item no. 3 in the impugned notice dated 13.12.2019, reappointing the unnamed Director retiring by rotation as being beyond the scope and authority of the Defendants and being in violation of Article 17(2), (3) of the Article of Association and Section 152(6) of the Companies Act is unauthorized, illegal null and void.	242(2)(a) the regulation of conduct of affairs of the company in future; 245. (*1*) Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (*2*) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the

	following orders, namely:— (*a*) to restrain the company from committing an act which is *ultra vires* the articles or memorandum of the company; (*b*) to restrain the company from committing breach of any provision of the company's memorandum or articles; (*c*) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors; (*d*) to restrain the company and its directors from acting on such resolution;
(iii) pass a decree of declaration declaring that the impugned agenda item in the impugned notice dated 13.12.2019 for alteration and adoption of new Article of Association, being in violation of Article 10(6), 11, 12 and 46 of the Article of Association, Rule 18(ix) of the Companies (Management & Administration) Rules, 2014 and Section 8(4), 101 and 114 of the Companies Act, 2013, is unauthorized, illegal, ineffective and void.	245 (1) (b) (c) (*b*) to restrain the company from committing breach of any provision of the company's memorandum or articles; (*c*) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;
(iv) pass a decree of declaration declaring that the impugned AGM held on 29,12.2019 was unauthorized, illegal and void and further declare- that all consequential acts, actions, deeds, representations and claims made by the Defendant No. 1 and 2 in pursuance of the impugned AGM held on 29.12.2019 including the proposed new Article of Association of the DDCA, the letter dated 29.12.2019 issued to the former	241(1)(a)(b) (*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

and new Ombudsman as being illegal, unauthorized and void.	(*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. **242 (4)** (4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable. **245 (1) (b)(c)(d)** (*b*) to restrain the company from committing breach of any provision of the company's memorandum or articles; (*c*) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors; (*d*) to restrain the company and its directors

	from acting on such resolution; **243 (1)(A)** The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision: Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.
(v) pass a decree of declaration declaring that the Defendant No.1 stands disqualified under Article 8(5)(g) and 17(4) (g) of the Article of Association and further injunction injunct him by a decree of permanent and perpetual injunction from representing himself in any manner as the Office Bearer or Director of the Apex Council of the DDCA and from acting in any manner whatsoever as an Office Bearer or Director of the Apex Council of the DDCA.	**242 (4)(A)** 1[(4A) At the conclusion of the hearing of the case in respect of sub-section (3) of section 241, the Tribunal shall record its decision stating therein specifically as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.] **243 (1)(A)** The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision: Provided that the Central Government may, with the leave of the Tribunal, permit such

	person to hold any such office before the expiry of the said period of five years.
(vi) pass a decree of mandatory injunction directing the Defendants to comply with and execute the order and directions of the Hon'ble High Court of Delhi passed in FAO no. 62/2019 in its order and judgment dated 02.07.2019 and to place the issue of Membership/ Secretaryship of the Defendant No. 2 before the AGM alongwith the decision of the Hon'ble Ombudsman agenda of the termination of the Membership/ Secretaryship of the Defendant No.2 before the AGM alongwith the decision of the Hon'ble Ombudsman dated 05.12.2018.	**242 (4)(A)** 1[(4A) At the conclusion of the hearing of the case in respect of sub-section (3) of section 241, the Tribunal shall record its decision stating therein specifically as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.] **243 (1)(A)** The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision: Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.
(vii) Pass a decree of mandatory injunction directing the Defendants to immediately held the election for the post of President, Vice President and two directors as compulsorily required under Article 17(9)(a) of the Article of Association strictly in compliance with the Constitution of the DDCA and the provisions of the Companies Act, 2013.	**245. (*1*)** Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (*2*) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the

	following orders, namely:— (*a*) to restrain the company from committing an act which is *ultra vires* the articles or memorandum of the company; (*b*) to restrain the company from committing breach of any provision of the company's memorandum or articles; (*c*) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors; (*d*) to restrain the company and its directors from acting on such resolution;
(viii) pass a decree of mandatory injunction directing holding of elections for the post of President, Vice President and two Directors compulsorily required under article 17(9) A of the Article of Association and provisions of the Companies Act.	**242(2)(a)** (a) the regulation of conduct of affairs of the company in future; **245. (*1*)** Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (*2*) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:— (*a*) to restrain the company from committing an act which is *ultra vires* the articles or memorandum of the company; (*b*) to restrain the company from committing breach of any provision of the company's memorandum or articles; (*c*) to declare a resolution altering the

	memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors; (*d*) to restrain the company and its directors from acting on such resolution;

5. The appellant further contends that in a similar matter between the Directors of the appellant/DDCA, this Court had declined to entertain the relief sought therein and dismissed the two writ petitions, W.P.(C) Nos. 1878/2020 and 3221/2020. On 28.02.2020 W.P.(C) 1878/2020, was dismissed as withdrawn with liberty to the parties to put their grievances before the NCLT instead. Those petitioners have filed their petitions before the NCLT where the identical issues and grievances -- regarding the aforesaid AGM, elections, etc. are pending adjudication.
6. The appellant contends that sections 430, 241, 242, and 244 of the Companies Act are the relevant provision which cover the lis. They are as under:

> ***"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." The effect of the aforesaid provision is that in matters in respect*

of which power has been conferred on the NCLT, the jurisdiction of the civil court is completely barred.

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.

242. Powers of Tribunal

(1) If, on any application made under section 241, the Tribunal is of the opinion—

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

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

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

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

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

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

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

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

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e):

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

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

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

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

(j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);

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

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

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

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

(4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

(5) Where an order of the Tribunal under sub-section (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(6) Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

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

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

244. Right to apply under section 241

(1) The following members of a company shall have the right to apply under

section 241, namely:—

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members:

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

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

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

(1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them…."

7. The decision of the Supreme Court in ***Shashi Prakash Khemka vs NEPC Micon & Ors.*** 2019 SCC Online SC 223 is relied upon. It held *inter alia* as under:

"The submission of the learned counsel is that the subsequent legal developments to the impugned order have a direct effect on the present case as the Companies Act, 2013 has been amended which provides for the power of rectification of the Register under Section 59 of the said Act. Learned counsel has also drawn our attention to Section 430 of the Act, which reads as under:

> *"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." The effect of the aforesaid provision is that in matters in respect of which power has been conferred on the NCLT, the jurisdiction of the civil court is completely barred.*

It is not in dispute that were a dispute to arise today, the civil suit remedy would be completely barred and the power would be vested with the National Company Law Tribunal (NCLT) under Section 39 of the said Act. We are conscious of the fact that in the present case, the cause of action has arisen at a stage prior to this enactment. However, we are of the view that relegating the parties to civil suit now would not be the appropriate remedy, especially considering the manner in which Section 430 of the Act is widely worded.

We are thus of the opinion that in view of the subsequent developments, the appropriate course of action would be to relegate the appellants to remedy before the NCLT under the Companies Act, 2013. In view of the lapse of time, we permit the appellants to file a fresh petition within a maximum period of two months from today."

8. The appellant also relies upon the judgment in ***SAS Hospitality Pvt. Ltd. Vs Surya Constructions Pvt. Ltd.*** 2018 SCC Online Del 11909:

"…. 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…….

…… 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)"

> *..... 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..."* .

9. Therefore, the appellant submits that the relief sought in the suit is barred from being adjudicated before a civil court, in view of the sweeping ambit of Section 430 of the Companies Act, 2013, it should have been dismissed as not maintainable.

10. Mr. Sandeep Sethi, the learned Senior Advocate representing six Directors/Members of the Apex Council, submits that the *lis* is primarily between the two sets of directors. He seeks to distinguish ***Shashi Prakash Khemka*** (supra). He argues that the suit would lie before the trial court, because there is nothing in the Companies Act which bars a suit seeking the reliefs as sought; that the omnibus section 430 would not be applicable. Referring to the aforementioned comparative chart prepared by the appellant, he submits that each of those sections are in the context of a winding-up proceedings of a company, which is not the case in the present suit. He contends that the suit simply challenged the notice of the holding of the Annual General Meeting and other agenda mentioned therein as being violative of the extant procedure. In support of his contentions, he relies upon the judgment in ***Jai Kumar Arya vs. Chhaya Devi*** 2017 SCC OnLine Del 11436. He submits that in ***Shashi***

Prakash Khemka, albeit the Supreme Court found that the NCLT had jurisdiction in the matter, it allowed the suit to continue before the civil court. This contention is ex facie untenable because the Supreme Court did so as it was of the view, that it would have been disadvantageous to the parties to send them to the NCLT, because of the amount of time which had already lapsed in the suit. However, the definitive ruling apropos the NCLT having wide powers is the real fruit of the ***Khemka*** judgment.

11. Mr Sethi further submits that while in ***SAS Hospitality Pvt. Ltd. vs. Surya Constructions Pvt. Ltd***. (supra), this Court had referred to ***Jai Kumar Arya*** was distinguished, the latter was a case of calling for the meeting of Board of Directors and appointment of a director, whereas ***SAS Hospitality Pvt. Ltd***. dealt with allotment of shares. Therefore, he submits that the suit is maintainable.

12. Mr. Kirti Uppal, the learned Advocate, submits that Section 463 grants power to civil courts to grant relief in certain cases. He submits that some of the parties now supporting the appellant, were supporting the plaintiffs before the learned trial court; their bonafides are suspect; their locus standi to be parties in this appeal is questionable. He contends that there is an issue of forgery regarding the declaration form of one of 'elected' directors, and this issue should be determined first. He further submits that under Article 17(9)(a) of the Articles of Association, 45 days' notice was necessary before the BOD/Apex Council elections could have been conducted. He contends that the President of the appellant resigned on 26.11.2019, the elections were held earlier than the said expiry of 45 days i.e. after mere 16 days notice, hence the process

was *ex facie* vitiated. Therefore, the persons representing the appellant pursuant to the said 'disputed election results', have no locus standi to file the appeal.

13. Mr. Vishal Singh, the learned counsel for R-1 and R-2, submits that the approval of agenda items at the AGM in question was erroneous from the very outset, because the notice dated 13.12.2019 calling for the AGM clearly stated that voting would be by casting paper ballots. However, no paper ballots were cast. No resolution was passed at any stage of the AGM for approval of the agenda items through a voice vote. He further contends that the appointment of the ombudsman too was not by majority. The plaintiff has videography of the entire event which was not considered at any stage; the said appointment is illegal as it did not have the approval of the majority of the members. Therefore, voting for the appointment of the Ombudsman, by paper ballot, should have been called for. It is argued that indeed, R-6 has filed an application (CM APPL. No. 22676/2020), questioning the appointment of the ombudsman on 29.12.2019 and his functioning beyond the scope of his jurisdiction. It seeks the following reliefs:

> " *a) Stay the appointment of the Ld. Ombudsman dated 29.12.2019 in view of the illegal orders passed by the Ld. Ombudsman beyond the scope of his jurisdiction prescribed under the Articles of Associations of the Appellant as approved by the Hon'ble Supreme Court pursuant to 'Board of Control for Cricket in India & Ors. Vs. Cricket Association of Bihar & Ors. (2018) 9 SCC 624 and stay the operation of letters dated 29.12.2019 and 03.01.2020 issued to the learned Ombudsman; and*

b) Direct removal/replacement of the Ld. Ombudsman of the Appellant and in the meanwhile stay the illegal orders passed by the Ld. Ombudsman qua the affairs of the Appellant Association; and

c) Direct the Ld. Ombudsman to not pass further orders qua the affairs of the Appellant Association except on the complaints referred to the Ld. Ombudsman by the Apex Council as per the Articles of Association of the Appellant as approved by the Hon'ble Supreme Court; and

d) Appoint an independent observer to monitor the process of elections being conducted by the present Electoral Officer."

14. Evidently, the contentions of Mr Uppal and Mr Singh pertain to the merits of the case. The issue to be determined is: whether the NCLT has the exclusive jurisdiction to adjudicate upon them. The preliminary question of jurisdiction of the civil court to entertain the suit may is to be determined. Therefore, at this stage, would not like to comment on the said application and the relief sought therein.

15. The appellant contends that: i) the trial court erred in not determining first, its jurisdiction to entertain the suit, ii) sections 241, 242 and 244 of the Companies Act, deal with all grievances raised in the suit, iii) the powers of the Tribunal under those provisions are sufficient, and iv) section 430 specifically ousts the jurisdiction of the civil courts apropos the matter with respect to such cases for which powers have been specifically conferred upon the Tribunal. The appellant has relied upon the decision of the Madras High Court in ***Viji Joseph v. P. Chander*** 2019 SCC OnLine Mad 10424, which was examining an election

dispute under Section 20 of the Companies (Management and Administration) Rules, 2014, involving the maintainability of the election of the Board of Directors through electronic means. After analyzing section 242 and other circumstances pertaining to the case, it concluded that only the Tribunal had powers to deal with the issue raised in the suit and the civil court had no jurisdiction to entertain the suit.

16. An identical issue has been raised in the present case, challenging matters relating to the AGM, the Board of Directors of the appellant company, the appointment of an ombudsman, and other related issues. Sections 242(1), 242(2), and 242(4) confer ample powers upon the Tribunal to deal with the issue raised in the civil suit. ***Viji Joseph*** held, *inter alia*, as under:

> *"**14.** Section 242 deals with the powers of the Tribunal. This provision has to be seen contextually and co-existing with Section 241. On a complaint, power is to be exercised towards redressal. Prejudice may either to a member, group of the company or the public at large.*
>
> ***15**. A complaint touching upon the election conducted to the management of the company would go to the root. Such a challenge is to the very right to manage the affairs. A wrong election would certainly have a cascading effect on the affairs in the form of decisions and functioning of a company. Thus, it cannot be said that Section 241 of the Act would only involve a complaint touching upon the other affairs as against the process of election. As discussed above, the challenge is to the very election itself and therefore, there is no authority available to the office bearers to act and decide on behalf of the company if held bad. Certainly such a challenge would*

come within purview of oppression and mismanagement. A technical view contrary to that will make the entire object behind Section 241 of the Act as redundant.

16. *Section 242(h) of the Act also provides for removal of Managing Director, Manager or any other Directors of the Company. As discussed above, to understand Section 241 of the Act, a little peep into Section 242 of the Act would be necessary. To put it differently, it can never be accepted that on a complaint involving an act of oppressiveness and mismanagement, a Managing Director, Manager or any other Directors of the company can be removed as against their alleged wrongful entry to function in the said capacity. Can it ever be said that an election dispute of a company would never come within the purview of Section 241 of the Act and therefore, no power can be exercised under Section 242 of the Act. In our considered view, the answer will have to be in the negative. Section 242(h) of the Act cannot be read in isolation. When a power is given to exercise to act, it has to be related to the core of the section, which provided for such an exercise. In our considered view, the learned single Judge has not considered the scope and object behind Sections 241 and 243 of the Act.*

17*. We may also note that Section 242(k) of the Act also gives a larger power to the tribunal in appointing such number of persons as Directors. Therefore, the power of the Tribunal in giving effect to an order passed on a complaint under Section 241 of the Act is quite exhaustive, keeping in mind the interest of the company. After all, every provision of a statute has to be given its meaning and therefore, can never be ignored.*

*….. "**23**. Section 430 of the Act provides for an absolute bar to a Civil Court to entertain any suit or proceedings, which the Tribunal is empowered to do so under the Act. This provision*

starts with a negative covenant and thus, makes the intention of the legislature very clear. The object is to decide the disputes of the company. This section gives power to the Tribunal to determine, enforce law qua the company for any violation. Law includes any other law also. Therefore, it is certainly a peremptory provision. This provision has to be read along with other provisions in Sections, 241, 242 and 424 to 429.

*"**24.** The powers of the Tribunal cannot be termed as summary* per se. *A summary proceedings would come into place when a Court acts upon a common law principle as against a different procedure authorised by law. However, a proceeding cannot be termed as a summary when further procedural strengthening was done by the enactment along with the common law principles. As discussed above, common law principles are not given a go-by in the proceedings of the Tribunal, but it can go beyond. Once this position is made clear, then it is very easy to understand the scope and ambit of Section 241. The intendment of the legislature is to redress the disputes, more particularly, internal ones of a company within the four walls of the Tribunal. Therefore, the contention that complex or disputed issues to be adjudicated upon only through the Civil Court would never arise at all. Though, summary proceeding may be required by the Tribunal in a given case, the Tribunal is not meant to follow it in all cases. Such a leverage and flexibility is conferred on the Tribunal either act as a regular or a special Court depending on the nature of the complaint behind it….*

*……. **32**. Reliance has been made on the Division Bench judgement of the Delhi High Court in* Jai Kumar Arya v. Chhaya Devi *(FAO (OS) 253/2017 & CM No. 33724/2017 dated 07/11/2017), we have already discussed the application*

of principle of Ejusdem Generis. In the light of Section 430 of the Act, which has been dealt with by the Apex Court in Shanti Prasad Jain v. Kalinga Tubes Ltd., *((1965) 2 SCR 720 dated 14.01.1963) coupled with the fact that there also the appeal is filed as against the order made in interlocutory application filed under Order XXXIX Rules 1 and 3 of the Code of Civil Procedure, we accordingly hold that the said decision will not help the case of respondents….*

*…..**37.** On the effect of Section 430 of the Act, the Apex Court in* Shashi Prakash Khemka v. NEPC Micon Ltd., *(2007 SCC OnLine SC 17), after having noted all the earlier decisions, held as follows:*

> *"5. The effect of the aforesaid provision is that in matters in respect of which power has been conferred on the NCLT, the jurisdiction of the civil court is completely barred.*
>
> *6. It is not in dispute that were a dispute to arise today, the civil suit remedy would be completely barred and CA 1965-66/20143, the power would be vested with the National Company Law Tribunal (NCLT) under Section 39 of the said Act. We are conscious of the fact that in the present case, the cause of action has arisen at a stage prior to this enactment. However, we are of the view that relegating the parties to civil suit now would not be the appropriate remedy, especially considering the manner in which Section 430 of the Act is widely worded.*
>
> *7. We are thus of the opinion that in view of the subsequent developments, the appropriate course of action would be to relegate the appellants to remedy before the NCLT under the Companies Act, 2013. In*

view of the lapse of time, we permit the appellants to file a fresh petition within a maximum period of two months from today.

***38**. The decision of the Apex Court referred above clearly spells out the scope of Section 430…"*

(emphasis supplied)

17. ***Viji Joseph,*** discusses the expanse of s.430, while relying on ***Shashi Prakash Khemka***. It also mentions ***Jai Kumar Arya***, as relied upon by R-1 and R-2 in the present case, but finds it inapplicable. It has also dealt with the expression 'oppression' regarding company affairs, as under:

"... 12. In this connection, it is appropriate to refer the celebrated judgment of the Apex Court in Shanti Prasad Jain Vs. Kalinga Tubes Ltd., (1965) 2 SCR 720 dated 14,01.1965 wherein it has been held as under.

15. It gives a right to members of a company who comply with the conditions of S. 399 to apply to the court for relief under s. 402 of the Act or such other reliefs as may be suitable in the circumstances of the case, if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The court then has power to make such orders under s. 397 read with s. 402 as it thinks fit, if it comes to the conclusion that the affairs of the company are being conducted in a manner oppressive to any member or members and that wind up the company would unfairly prejudice such member or members, but that otherwise the facts might 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 law however has not defined what is

oppression for purposes of this section, and it is left to courts to decide on the facts of each case whether there is such oppression. as calls for action under this section.

16. We may in this connection refer to four cases where the new s. 210 of the English Act came up for consideration, namely, (1) Elder v. Elder and Watson,(1), (2) George Meyer v. Scottish Cooperative Wholesale Society Ltd.(2), (3) Scottish Co-operative Wholesale Society Ltd. v. Meyer and another(3), which was an appeal from Meyer's case(2), and (4) Re. H. R. Harmer Limited. Among the important considerations which have to be kept in view in determining the scope of s. 210, the following matters were stressed in Elder's case(1) as summarised at p. 394 in Meyer's case(2) :-

"(1) The oppression of which a petitioner complains must relate to the manner in which the affairs of the company concerned are being conducted; and the conduct complained of must be such as to oppress a minority of the members (including the petitioners) qua shareholders.

(2) It follows that the oppression complained of must be shown to be brought about by a majority of members exercising as shareholders a predominant voting power in the conduct of the company's affairs.

(3) Although the facts relied on by the petitioner may appear to furnish grounds for the making of a winding up order under the 'just and equitable' rules, those facts must be relevant-to disclose also that the making of a winding up order would unfairly prejudice the minority members qua shareholders.

(4) Although the word 'oppressive' is not defined, it is possible, by way of illustration, to figure a situation in which majority shareholders, by an abuse of their predominant voting power, are 'treating the company and its affairs as if they were their own property' to the prejudice of the minority shareholders-and in which just and equitable grounds would exist for the making of a winding up order.... but in which the 'alternative' remedy provided by S. 210 by way of an appropriate order might well be open to the minority shareholders with a view to bringing to an end the oppressive conduct of the majority.

(5) The power conferred on the Court to grant a remedy in an appropriate case appears to envisage a reasonably wide discretion vested in the Court in relation to be order sought by a complainer as the appropriate equitable alternative to a winding-up order.

19. In Harmer's case(1), it was held that "the word 'oppressive' meant burdensome, harsh and wrongful". It was also held that "the section does not purport to apply to every case in which the facts would justify the making of a winding up order under the 'just and equitable' rule, but only to those cases of that character which have in them the requisite element of oppression". It was also held that "the result of applications under s. 210 in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision". The circumstances must be such as to warrant the inference that "there had been, at least, an unfair abuse of powers and an impairment of confidence in the _probity with which the company's affairs are being conducted, as distinguished from mere resentment on the

part of a minority at being outvoted on some issue of domestic policy". The phrase "oppressive to some part of the members" suggests that the conduct complained of "should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. ... But, apart from this, the question of absence of mutual confidence per se between partners or between two sets of shareholders, however relevant to a winding up seems to have no direct relevance to the remedy granted by S. 210. It is oppression of some part of the shareholders by the manner in which the affairs of the company are being conducted that must be averred and proved. Mere loss of confidence or pure deadlock does not come within s. 210. It is not lack of confidence between shareholders per se that brings s. 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involves at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

20. These observations from the four cases referred to above apply to s. 397 also which is almost in the same words as s. 210 of the English Act, and the question in each case is http://www.judis.nic.in whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of s. 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were

being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to s. 397…"

18. The learned Senior Advocate for the appellant submits that the Companies Act and the National Company Law Tribunal Rules, 2016, are together a complete code. Ample power has been provided to the NCLT – akin to a civil court – to deal with all issues for which powers have been conferred upon the Tribunal. For instance Rule 11 deals with inherent powers of the NCLT to conduct a full trial, in order to prevent abuse of justice; Rule 34 specifically allows for determination of procedure not provided for already in accordance with the principles of natural justice; Rules 39 and 40 provide for production of evidence; Rule 43 empowers the Tribunal to call for further information or evidence; Rule 47 provides for administration of oath to witnesses; Rule 51 gives power to regulate procedure; Rules 56 and 57 deals with the execution of orders passed by the Tribunal; Rule 58 provides for the effect of non-compliance with orders. ***Viji Joseph***, as mentioned above in paragraph 24, also states that the powers of the Tribunal cannot be termed as 'summary'. As discussed hereinabove, complete jurisdiction has been given to the NCLT to deal with all aspects of issues, as agitated in the

suit.

19. The appellant contends that the dicta of the Supreme Court in ***Aruna Oswal v. Pankaj Oswal & Ors.*** Civil Appeal No. 9340/2019, would not be applicable as that dealt with the *locus standi* of the petitioner whose infinitesimal shareholding was yet to be determined. Whereas in the present case, the process of election to the Board of Directors/Members of the Apex Council, has been challenged because of it being allegedly contrary to the procedure laid down in the AoA and the notice calling for the AGM, and that the elections were held on the basis of a voice vote instead of paper ballot, contrary to what was mentioned in the AGM notice.

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

21. As has been held in ***Viji Joseph***, the issue of election to the Board of Directors would be amenable to jurisdiction of the NCLT. The issue is the same in the present suit. Likewise, the *lis* and grievances raised in the suit can be agitated only before the NCLT. A civil court would have

no jurisdiction. As far as the specific allegation apropos the manner in which the Ombudsman was appointed are concerned, it too, is an issue which will come within the ambit of Tribunal i.e. appointment of people who would conduct the affairs of the company/the management. The video recording of the manner of appointments at the AGM in question, could well be examined by the NCLT. That being the position, the issue of maintainability ought to have been determined first by the trial court. It did not have jurisdiction to entertain the suit. Accordingly, the impugned order is set aside. The appeal is allowed.

NAJMI WAZIRI, J.

SEPTEMBER 21, 2020/kk