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SEPTEMBER 2018. Vol. XI, Issue IX

INDIAN LEGAL IMPETUS®

EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

We are pleased to present to our esteemed readers with yet another edition of our monthly newsletter Indian Legal Impetus covering recent developments as well as commentaries on the practice of law. In this September edition, we have covered varied aspects of Indian laws ranging from arbitration, new legislations relating to contractual reliefs, criminal law, company law and constitutional provisions through a study of recent important judgments. Since the Indian law is dynamic and constantly evolving, it is a challenge to cover all legal developments and precedents, but we endeavor to offer a gist of recent developments in the diverse fields of law to our readers.

We begin with a recent landmark judgment of the Hon'ble Supreme Court of India *in M/s. Shriram EPC Limited vs. Rioglass Solar SA* in which, while closing the doors for unnecessary objections to enforcement of foreign arbitral awards, the Hon'ble Supreme Court has held that that payment of stamp duty will not be mandatory for enforcement of foreign arbitral awards in India.

Further in relation to arbitration law, we discuss the Judgment of the Hon'ble Apex Court in *United India Insurance Co. Ltd. & Anr. vs. Hyundai Engineering and Construction Co. Ltd. & Ors*, clarifying that in relation to Section 11(6) of the Arbitration and Conciliation Act, 1996 the mandate of Court is not limited to examine the factum of existence of arbitration agreement only, but goes further to interpret the wordings of the arbitration clause strictly and make sure that the arbitration clause is activated only when the conditions mentioned therein are met.

Next we discuss the salient features of the Specific Relief Amendment Act, 2017 which has been recently passed thereby bringing about significant changes in contractual law by making specific performance of contract a compulsory relief by taking away the discretionary powers of the Court in this regard and also introducing a new alternative relief of Substituted Performance, amongst other amendments.

The next articles discusses the recent notification of the Ministry of Corporate Affairs which makes it mandatory for companies to report compliance with the provisions relating to the constitution of an Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Next we discuss the provisions under Article 123 and 213 of the Constitution relating to Ordinance making powers of the President of India and State Governor respectively while analyzing a judgment of the Constitution bench of the Apex Court in *Krishna Kumar Singh v State of Bihar* which provides for transparency in the ordinance making process by subjecting the powers of the president and Governor to judicial review while stating that re-promulgation of ordinance is a fraud on the Indian Constitution.

Next in line is a crucial Judgment of the Hon'ble High Court of Delhi in *Harsh Mander v. Union of India,* which de-criminalizes begging in light of the inter play between law and human rights while the question of criminalizing forced beggary still remains open.

Moving onto the criminal law practice, the next article summarizes significant Judgments relating to Section 498A of the Indian Penal Code which relates to cruelty against married women by the husband and his family while highlighting a recent Supreme Court judgment in *Manav Adhikar and Another v Union of India Ministry of Law and Justice and Others* which re-examines the directions passed earlier.

The next article discusses the issues relating to representation of minority stakeholders in the affairs of the company with special emphasis on Section 213 of the Companies Act, 2013 relating to oppression and mismanagement in the case of *Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. & Anr. and Ors*.

I sincerely hope that this edition would be an informative and enlightening read. We welcome all suggestions, opinions, queries or comments. You can also send us your valuable insights and thoughts at newsletter@singhassociates.in

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INDIAN LEGAL IMPETUS®
Volume XI, Issue IX

SINGH & ASSOCIATES
ADVOCATES & SOLICITORS

NEW DELHI
E-337, East of Kailash
New Delhi - 110065 INDIA

GURUGRAM
7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk, Gurugram
Haryana-122001 INDIA

MUMBAI
Unit No. 48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai- 400021, INDIA

BENGALURU
N-304, North Block, Manipal Centre,
47, Dickenson Road
Bengaluru - 560042, INDIA

Ph : +91-11-46667000
Fax : +91-11-46667001

Email: india@singhassociates.in
Website: www.singhassociates.in

www.singhassociates.in

SINGH & ASSOCIATES
FOUNDER MANOJ K SINGH
ADVOCATES & SOLICITORS

Managing Editor
Manoj K. Singh

Editor
Rupesh Gupta

Published by
Singh & Associates
Advocates and Solicitors

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PAYMENT OF STAMP DUTY IS NOT NECESSARY FOR ENFORCEMENT OF FOREIGN AWARDS IN INDIA

Palash Taing

The Division Bench of the Hon'ble Supreme Court of India in the matter of *M/s. Shriram EPC Limited vs. Rioglass Solar SA*[1] has uphold that the payment of stamp duty under the Indian Stamp Act, 1899 is not mandatory for the enforcement of foreign arbitration awards in India.

FACTS:

The issue arose out of a judgment of the Hon'ble High Court of Judicature at Madras which dismissed objections to an ICC award delivered in London on 12.02.2015. The appellant had filed its objections under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act of 1996') which were dismissed by the High Court on 27.09.2016 on the ground that the said petition under Section 34 of the Act of 1996 would not be maintainable against the foreign award.

In furtherance, the Respondent filed a petition under Section 47 of Act of 1996 for enforcement of the Award dated 12.02.2015. The Hon'ble Single Bench of High Court rejected the objections vide detailed judgment delivered on 09.02.2017. The said judgment came under challenge before the Hon'ble Supreme Court of India by way of a Special Leave Petition under Article 136 of the Constitution of India.

ISSUE:

Whether the unstamped foreign award can be enforced under Sections 48 and 49 of the Arbitration and Conciliation Act, 1996?

DECISION:

- The Hon'ble Supreme Court held that Section 47 of the Act of 1996 in no manner interdicted the payment of stamp duty if it is otherwise payable in law. Section 47 of the Act of 1996 requires a party approaching the Court for execution of the award to show a) the original award of a copy thereof, duly authenticated in the matter required by the law of the country in which it was made; b) original arbitration agreement or duly certified copy thereof; c) such evidence as may be necessary to be that the award is a foreign award.
- Even if stamp duty is payable on a foreign award, it cannot be held that the same would be contrary to the public policy of India.
- The object of the Act of 1996 is to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court. While the Act of 1996 was enforced, no amendment was made in the definition of award given in the Indian Stamp Act, 1899 and even the Schedule which lays down the stamp duty payable on award was not amended by including the foreign award in it.

ANALYSIS:

With this judgement, the Hon'ble Supreme Court has settled the issue regarding non-payment of stamp duty for enforcement of Foreign Awards in India. The Judgment uplifts the spirit and intent of the Act of 1996 and closes doors for objection to a foreign award on the requirement of payment of any stamp duty. The decision of the Hon'ble Supreme Court comes in a good spirit which is in tune of the best practice for enforcement of Foreign Arbitration awards in India.

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1 *Civil Appeal No. 9515 of 2018 (Decided on September 13, 2018)*

APPLICABILITY OF SECTION 11 (6A) OF THE ARBITRATION AND CONCILIATION ACT, 1996 IN CASE OF AN CONDITIONAL ARBITRATION CLAUSE

Akanksha Tanvi

The Hon'ble Supreme Court of India, recently[1], while setting aside a judgment of the High Court of Judicature at Madras opined that an arbitration clause needs to be interpreted strictly and the matter shall not be referred to arbitration for a claim which the parties did not intent to arbitrate. The Hon'ble Supreme Court evaluated the applicability of sub-section 6A of Section 11 of the Arbitration & Conciliation Act, 1996 ('*Act*'), which was introduced by way of Arbitration and Conciliation (Amendment) Act, 2015 ("Act of 2015"). In brief, the said sub-section states that the Supreme Court or the High Court while considering any application under sub section (4) or sub section (5) or sub section (6) of Section 11, shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

BRIEF FACTS:

The Petitioner No. 1 & 2 constituted a Joint Venture (JV) and the Respondent No. 3 (NHAI) awarded a contract on 29.09.2006 to the JV for design, construction and maintenance of a bridge across the River Chambal, which was to be completed within a period of 40 months and was commenced on 5.12.2007 by the JV after Respondent No. 3 handed over the site to it. After commencement of the work, Contractor All Risk Insurance Policy (CAR policy) dated 5.12.2007 was obtained from the Respondent No. 1, United India Insurance Co. Ltd. (Insurer), covering the entire project valued at INR 213,58,76,000/-.

During the construction of the bridge, there was an accident onsite which resulted in huge losses and the same was intimated to the Insurer by NHAI. The Insurer thereafter proceeded to assess the loss by appointing a Surveyor and Loss Adjuster for the purpose. In addition, a Committee of Experts was set up by the Ministry of Road Transport and Highways, Government of India to enquire into the accident and the committee submitted its report on 07.08.2010. A final report was submitted by the Surveyor on 28.02.2011 concluding that the damage was on account of faulty design and improper execution of the project.

The Insurer took into account both these reports and vide communication dated 21.04.2011, intimated the petitioners that the claim put forth by the JV, was found to be not payable, and accordingly, stood repudiated. The JV nevertheless entered into correspondence with the Respondent No. 1 to reopen and re-assess its decision of repudiation of the claim but the Respondent No. 1 intimated that it was unable to "reconsider" the claim which has already been repudiated.

Thereafter, the JV on 29.05.2017 invoked the arbitration clause under Article 7 in the Insurance policy and nominated Dr. V.K. Agrawal as the Arbitrator and called upon the Insurer to either accept the nomination made by it or nominate its Arbitrator within 30 days from receipt of the letter. The Insurer, quoting Article 7 of the Policy rejected the reference to arbitration and consequent nomination of the Arbitrator and eventually, the Petitioners filed a petition under Sections 11(4) & 11(6) of the Act.

ARTICLE 7 OF THE INSURANCE POLICY:

"The policy contained clause 7, which reads as follows:

a. *If any difference shall arise as to the quantum to be paid under this Policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties in difference. ……..*

b. *It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the Company has dis-*

1 *United India Insurance Co. Ltd. & Anr. vs. Hyundai Engineering and Construction Co. Ltd. & Ors., C.A. No. 8146 of 2018*

puted or not accepted liability under or in respect of this Policy.

c. *It is also hereby further expressly agreed and declared that if the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within 3 calendar months from the date of such disclaimer have been made the subject matter of a suit in a court of law, then the claim shall for all purpose be deemed to have been abandoned and shall not thereafter be recoverable hereunder."*

(emphasis supplied)

IMPUGNED JUDGMENT:

The Hon'ble Madras High Court held that both the invocation of the arbitration clause and the rejection of the same by the Respondent No. 1 are post the changes brought in by the Act of 2015 and thus the Court is obligated to apply the provisions of Section 11(6A). It was held that, by insertion of sub-section 6A in Section 11 of the Act, the limited mandate of the Court is to examine the factum of existence of an arbitration agreement only and since an arbitration clause exists under the Insurance Policy, the Court is obliged to appoint an arbitrator for adjudication of disputes between the parties to the Insurance Policy.

DECISION BY THE SUPREME COURT:

The impugned judgment was challenged by the Insurer before the Hon'ble Supreme Court of India in Civil Appeal No. 8146 of 2018. The question to be considered by the Hon'ble Supreme Court was whether Clause 7 of the Insurance Policy dated 5th September, 2007 posits unequivocal expression of the intention of arbitration or is hedged with a conditionality?

The present case distinguishes the celebrated judgment of the Hon'ble Supreme Court in the case of Duro Felguera, S.A. Vs. Gangavaram Port Limited[2], with respect to meaning and interpretation of Section 11 (6A) of the Act.

While placing its reliance on the latest judgment of the Three Judges Bench in the case of Oriental Insurance Company Limited Vs. Narbheram Power and Steel Private Limited[3], the Hon'ble Supreme Court opined that the arbitration clause has to be interpreted strictly. Since Article 7 is a conditional expression of intent, such an arbitration clause will get activated only if the dispute between the parties is limited to the quantum to be paid under the policy. The liability should be unequivocally admitted by the insurer as that is the pre-condition and *sine qua non* for triggering the arbitration clause. In cases where the insurance company disputes or does not accept the liability under or in respect of the policy, there can be no arbitration as per the wordings of the arbitration clause as referred above. The appeal was thus allowed and the impugned judgment of the Hon'ble High Court of Judicature at Madras was set aside by the Hon'ble Supreme Court.

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2 (2017) 9 SCC 729

3 (2018) 6 SCC 534

SALIENT FEATURES OF THE SPECIFIC RELIEF (AMENDMENT) ACT, 2017

Divya Harchandani

Recently, Specific Relief Act, 1963 ("the Act") underwent valiant changes in order to cater to augmented contractual transactions inter-se parties and disputes arising therein. The Act was enacted to define the law relating to specific performance of contracts and conferred discretionary powers upon the concerned Courts in India to grant a relief of specific performance of a contract. As a result of the discretionary powers, the Courts in majority of cases awarded damages as a general rule and granted specific performance as an exception. Recently, it was felt that the Act is not in tune with the rapid economic growth and expansion of infrastructure activities in the country. Consequently, the Specific Relief (Amendment) Bill, 2017 ("the Amendment") was introduced by the Minister of Law and Justice, on December 22, 2017. The bill was passed by the Lok Sabha on March 15, 2018 and subsequently passed by the Rajya Sabha on July 23, 2018. The significant features of this amendment are listed below:

ADDITIONAL PARTY ENTITLED TO SEEK RECOVERY OF POSSESSION (SECTION 6)

Section 6 of the Act permitted the following persons to file a suit for recovery of possession of immovable property: (i) a person put out of possession (dispossessed person); and (ii) any person claiming through such dispossessed person.

The Amendment now additionally permits a person through whom the dispossessed got the possession of the immovable property, to file a suit for recovery.

SPECIFIC PERFORMANCE: "SHALL BE ENFORCED" REPLACES "IN THE DISCRETION OF THE COURT" (SECTION 10)

As per the previous scheme of the Act, to obtain a decree of specific performance, a party filing a suit had to appeal to the discretionary powers of the Court. The Amendment modifies Section 10 by substituting the words, "the specific performance of any contract may, **in the discretion of the court**, be enforced" with "specific performance of a contract **shall be enforced by the court**".

The effect of the amendment is that the party filing a suit for specific performance of contract will be entitled for the relief of specific performance. Similar discretionary powers of the Court in granting specific performance have been substituted with the word 'shall' in relation to trusts (under Section 11).

POWER OF COURTS TO ENGAGE EXPERTS (SECTION 14A)

The Amendment introduces a new provision i.e. Section 14A which will empower and enable the Court to engage one or more technical experts to assist on any specific issue involved in any suit. The expert may also be called upon for providing evidence, including production of relevant documents related to the issue.

AMALGAMATION OF LLPS, ONE OF WHICH IS PARTY TO THE CONTRACT ENTITLED TO SEEK SPECIFIC PERFORMANCE (SECTION 15)

Sub-clause (g) of Section 15 of the Act provided that when a company had entered into a contract and it subsequently amalgamated with another company, the new company which arose out of the said amalgamation was entitled to seek specific performance of the contract. The Amendment extends similar rights to a limited liability partnership by inserting Clause (fa) which states that when a limited liability partnership has entered into a contract and subsequently amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the said amalgamation is entitled to seek specific performance of the contract.

SUBSTITUTED PERFORMANCE: NEW RELIEF ADDED (SECTION 20)

The Amendment introduces the concept of 'substituted performance' under Section 20. As per the concept, a party who is affected by the breach of contract can

choose to get the contract performed by a third party, or by its own agency, at the cost of the contracting party at default. The affected party has to give prior notice of thirty days to the other party expressing his intention to seek substituted performance. It is also clarified that the party enforcing substituted performance forfeits its right to get specific performance of the contract enforced through Court. Consequently, Section 14 of the Act which enlists contracts which cannot be specifically enforced has also been amended by substituting Clause (a) which earlier read "a contract for the non-performance of which compensation in money is an adequate relief" with "(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20".

RESTRAINT ON GRANT OF INJUNCTIONS IN INFRASTRUCTURE PROJECTS (SECTION 20A)

The Amendment has inserted a new Section, i.e. Section 20A which restrains the Court from granting an injunction in a suit involving contract relating to infrastructure, where granting the injunction would cause impediment or delay in the progress or completion of the infrastructure project. Infrastructure projects have been categorized and listed in the Schedule of the Act as follows: (i) Transport; (ii) Energy (iii) Water and Sanitation (iv) Communication; and (v) Social and Commercial Infrastructure. The Infrastructure Sub-sectors have also been listed under the said respective categories.

SPECIAL COURTS FOR INFRASTRUCTURE PROJECTS (SECTION 20B)

The newly inserted Section 20B provides for the State Government to designate, by notification published in the Official Gazette, one or more Civil Courts as Special Courts, after due consultation with the concerned Chief Justice of the High Court. These Special Courts are empowered to exercise jurisdiction, within the local limits of the area and to try a suit under this Act in respect of contracts relating to infrastructure projects.

COMPENSATION – ADDITIONAL AND NOT SUBSTITUTE RELIEF TO SPECIFIC PERFORMANCE (SECTION 21)

Section 21 (1) of the Act relating to award of compensation earlier allowed a party in a suit for specific performance to seek compensation for the breach "***either in addition to, or in substitution of",*** the performance of the contract. The Amendment strikes off the relief of claiming compensation in substitution and retains only the words "***in addition to***". Therefore, compensation need not be sought as a substitute to the relief of specific performance. The relief for compensation can now be claimed as an additional relief.

CONCLUSION

In view of the enormous commercial activities in India including foreign direct investments, public private partnerships, public utilities infrastructure developments, etc. it was necessary to do away with the discretion of courts to grant specific performance to facilitate speedy enforcement of contracts. The new provisions relating to infrastructure projects compliment the large scale infrastructure work taking place in a developing country like India. The intention is to prevent stalling of the infrastructure projects by the Courts. However, the circumstances that may impediment or delay the progress or completion of the infrastructure projects will be tested by the Courts based on the facts and circumstances of each such case preferred under the Act. Also, after the enactment of the Limited Liability Partnership Act in 2008, the addition of amalgamation of LLPs as a party entitled to seek specific performance was much needed. Further, the provision for substituted performance of contracts from the party who failed to perform its part of contract also constitutes an effective alternative remedy for breach of contracts.

Clearly, the amendments are crucial and take into consideration the important issues being faced while seeking a relief under a contract. With the benevolent changes, more parties are likely to derive the relief of specific performance as well as compensation on account of breach of a contract. Since the specific performance of a contract *shall* be enforced by the Courts now, a party to a contract is more likely to perform its part of the contract with utmost faith and sincerity, and unlikely to commit a breach or refuse the performance of the contract.

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UPDATES ON SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

Harsimran Singh

MANDATORY DISCLOSURE OF COMPLIANCE QUA PREVENTION OF SEXUAL HARASSMENT AT WORKPLACE:

On 31st July 2018, the Ministry of Corporate Affairs notified[1] the Companies (Accounts) Amendment Rules, 2018 ('Rules') under section 134 of the Companies Act, 2013 ('the Act'), thereby amending the Companies (Accounts) Rules, 2014.

The Rules have inter alia amended Rule 8[2] to include Clause (x) which now requires every Company to report compliance with the provisions relating to the constitution of an Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (the 'SH Act'). Clause (x) of Rule 8 (5) of the Rules reads as follows:

> *"A statement that the Company has complied with provisions relating to the constitution of Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013."*

Notably, this amendment has been introduced based on the recommendation of the Ministry of Child and Women Development. The recommendation was made to the Ministry of Corporate Affairs in order to achieve the implementation of the SH Act in its true letter & spirit.

As it can be seen, the introduction of above-stated clause (x) under Rule 8 (5) now mandates all companies to report on compliance of provisions of SH Act relating to the constitution of Internal Complaints Committee. The non-compliance by a Company may result in imposition of a fine on the defaulting company under section 134 of the Act, which shall not be less than INR 50,000/- but which may extend to INR 25,00,000/- and imprisonment for every officer of the Company who is in default for a term which may extend to 3 years or with fine in the range of INR 50,000/- to INR 5,00,000/-.

It has been a matter of concern that while the SH Act and the rules made thereunder was introduction way back in the year 2013, the same has not been practically complied by the companies to the expected extent. With this amendment (which is definitely a positive step), the company/employer will be under a statutory compulsion to be remain compliant with the provisions of both the Act and the SH Act.

STATUS ON LOCAL COMPLAINT COMMITTEES' AND OTHER LATEST DEVELOPMENTS:

So far, 29 States/Union Territories have notified District Officers and constituted Local Complaint Committee[3] (LCC) under the SH Act. It has been reported that all governmental instrumentalities (both at Centre and State levels) have been directed by the Ministry of Women and Child Development (the 'Ministry') to organize workshops and awareness programmes for sensitizing the employees about the provision of the SH Act. Besides, all Government of States/Union Territories have also been requested to advise the Secretary Industries/Commerce to organize similar workshops and awareness programmes each and every industry, business house, private sector entity of the States/Union Territories.

The Ministry issues advisories from time to time to Government of all States/ Union Territories, Ministries/ Departments in Government of India and leading business organization such as ASSOCHAM, FICCI, CII,

1 *http://164.100.117.97/WriteReadData/userfiles/Notification%20Uner%20Companies%20Act.pdf*

2 *'Matters to be included in Board's Report'*

3 *The Act mandates all the workplace having more than 10 workers to constitute Internal Complaint Committee (ICC) for receiving complaints of sexual harassment. Similarly, the Appropriate Government is authorized to constitute Local Complaint Committee (LCC) in every district, which will receive complaints from organizations having less than 10 workers or if the complaint is against the employer himself.*

CCI and NASSCOM to ensure effective implementation of the SH Act.

The Ministry has also launched an online complaint management system titled Sexual Harassment electronic–Box (SHe-Box) for registering complaints related to sexual harassment at workplace of all women employees in the country, including government and private employees.

In addition the Ministry has identified a pool of 223 Resource Institutions to provide capacity building programmes i.e. training, workshops, etc., on the issue of sexual harassment at workplace in order to create wide spread awareness about the Act across the country, both in organized and unorganized sectors.

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RE-PROMULGATION OF ORDINANCE IS A FRAUD ON THE CONSTITUTION – ANALYSIS IN LIGHT OF KRISHNA KUMAR SINGH V. STATE OF BIHAR

Tanuka De

In the case of, **Krishna Kumar Singh v State of Bihar**[1], seven judge constitution bench of the Hon'ble Supreme Court of India had held that re-promulgation of ordinance is a fraud on the Constitution. The Court also held that the satisfaction of the President of India under Article 123 and of the Governor under Article 213 while issuing an Ordinance is not immune from judicial review.[2]

Recently this case has been cited in few Supreme Court and High Courts' cases including the case of *Government of NCT of Delhi vs. Union of India (UOI) and Ors.*[3], *Gunwantlal Godawat vs. Union of India*[4], *Prayar Gopalakrishnan and Ors. vs. State of Kerala and Ors.*[5], *Anand Narayanrao Jammu vs. State of Maharashtra and Ors.*[6], *Hemraj Marotrao Shingne and Ors. vs. Principal Secretary, Department of Cooperation Marketing and Textile and Ors.*[7]

WHAT IS ORDINANCE?

Article 123 of the Constitution of India gives the power and authority to the President of India to issue an ordinance only when both the Houses of Parliament are not in session. In addition, it states that any ordinance can have the same force and effect as a statute of Parliament only if it is laid before both the houses of the Parliament. Further, Ordinance so made will hold good only for a duration of six weeks from the reassembly of Parliament. Article 213 mandates near identical terms with respect to the ordinances on subject of State authority. It is understood that the authority to issue ordinances shall be used only to meet the emergent demands arising out of extraordinary situations.

1 *2017 (2) SCJ 136*
2 *¶ 118, supra, pg. 52*
3 *MANU/SC/0680/2018*
4 *MANU/SC/1476/2017*
5 *MANU/KE/0153/2018*
6 *MANU/MH/2071/2018*
7 *MANU/MH/0056/2018*

ARTICLE 213 OF CONSTITUTION OF INDIA

Governor of an Indian state draws ordinance making power from Article 213 of the Constitution of India. This Article empowers the Governor to promulgate Ordinance, during recess of legislature, if circumstances exist which render it necessary for him to take immediate action. To issue an Ordinance, the Governor must be satisfied with the circumstances that make it necessary for him to take immediate action.

Governor cannot promulgate an ordinance if:

- The Ordinance has the provisions which of embodied in a bill would require President's sanction.
- The Ordinance has the provisions which the governor would reserve as a Bill containing them for the President's sanction.
- If an act of the State Legislature has the same provisions that would be invalid without the assent of the President.

All Ordinances promulgated by the Governor in the State have the same effect and force as an Act of Legislature of the State. The Ordinance must be laid before the State Legislature when it reassembles and it must be upheld by the State legislature, failure to which the Ordinance would be invalid.

ARTICLE 123 OF CONSTITUTION OF INDIA

According to Article 123, The President can promulgate Ordinances during the recess of Parliament if:

- at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require;

- An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and
- may be withdrawn at any time by the President Explanation Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

If and so far as an Ordinance under this Article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.
In the case referred above, the majority of the ruling that was laid by Hon'ble Mr. Justice D. Y. Chandrachud, firmly stated the fact that placing the Ordinance before the legislature is mandatory.

THE SALIENT FEATURES OF THE JUDGMENT DICTATED BY HON'BLE MR. JUSTICE CHANDRACHUD WERE:

- The power which has been conferred is conditional to Article 133 of the Constitution. The power can only be exercised when the legislation is not in session and is subject to the satisfaction of the President.
- An ordinance which is promulgated under Article 123 or Article 213 has the same force and effect as a law enacted by the legislature but it must (i) be laid before the legislature (ii) it will cease to operate six weeks after the legislature has resembled or, even earlier if a resolution disapproving it is passed. Moreover, an ordinance may also be withdrawn.
- The constitutional fiction, attributing to an Ordinance the same force and effect as a law enacted by the legislature comes into being if the Ordinance has been validly promulgated and complies with the requirements of Articles 123 and 213.
- The Ordinance making power does not constitute the President or the Governor into a parallel source of law making or an independent legislative authority.
- Consistent with the principle of legislative supremacy, the power to promulgate ordinances is subject to legislative control. The President or, as the case may be, the Governor acts on the aid and advice of the Council of Ministers which owes collective responsibility to the legislature.
- Laying an Ordinance before the Parliament or State Legislature is a mandatory constitutional obligation. It is mandatory because the legislature has to determine:
  - The need for, validity of and expediency to promulgate an ordinance.
  - Whether the Ordinance ought to be approved or disapproved.
  - Whether an Act incorporating the provisions of the Ordinance should be enacted.
- The failure to comply with the requirement of laying an ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process.
- Re-promulgation of ordinances is a fraud on the Constitution and a sub-version of democratic legislative processes, as laid down in the judgment of the Constitution Bench in *D.C. Wadhwa and Ors. v. State of Bihar and Ors.*[8].
-
- The Constitution has used different expressions such as "repeal" (Articles 252, 254, 357, 372 and 395); "void" (Articles 13, 245, 255 and 276); "cease to have effect" (Articles 358 and 372); and "cease to operate" (Articles 123, 213 and 352). Each of these expressions has a distinct connotation. The expression "cease to operate" in Articles 123 and 213 does not mean that upon the expiry of a period of six weeks of the reassembling of the legislature or upon a resolution of disapproval being passed, the

8 AIR1987SC579

ordinance is rendered void ab initio. Both Articles 123 and 213 contain a distinct provision setting out the circumstances in which an Ordinance shall be void. An Ordinance is void in a situation where it makes a provision which Parliament would not be competent 135 to enact (Article 123(3)) or which makes a provision which would not be a valid if enacted in an act of the legislature of the state assented to by the Governor. The framers having used the expressions "ceased to operate" and "void' separately in the same provision, they cannot convey the same meaning.

- The theory of enduring right that was laid in the judgment in *State of Orissa v. Bhupendra Kumar Bose*[9] and followed in *T. Venkata Reddy and Ors. v. State of Andhra Pradesh*[10] by the Constitution Bench is based on the analogy of a temporary enactment. The judgments are no longer good law in view.

- No express provision has been made in Article 123 and Article 213 for saving of rights, privileges, obligations and liabilities which have arisen under an Ordinance which has ceased to operate. Such provisions are however specifically contained in other articles of the Constitution such as Articles 249(3), 250(2), 357(2), 358 and 359(1A). This is, however, not conclusive and the issue is essentially one of construction; of giving content to the 'force and effect' clause while prescribing legislative supremacy and the rule of law.

- According to Hon'ble Mr. Justice Justice Chandrachud and other judges, the question as to whether rights, privileges, obligations and liabilities would survive an Ordinance which has ceased to operate must be determined as a matter of construction. The appropriate test to be applied is the test of 136 public interests and constitutional necessity. This would include the issue as to whether the consequences which have taken place under the Ordinance has assumed an irreversible character. In a suitable case, it would be open to the court to mould the relief.

- The satisfaction of the President under Article 123 and of the Governor under Article 213 is not immune from judicial review particularly after the amendment brought about by the forty-fourth amendment to the Constitution by the deletion of clause 4 in both the articles. The test is whether the satisfaction is based on some relevant material. The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court will scrutinize whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review in other words would enquire into whether there was no satisfaction at all.

A DISSENTING OPINION WAS GIVEN BY HON'BLE MR. JUSTICE MADAN B. LOKUR

- There is no mandatory requirement that an Ordinance should be laid before the Legislative Assembly.

- The fate of an Ordinance, whether it is laid before the Legislative Assembly or not, is governed entirely by the provisions of Article 213(2) (a) of the Constitution and by the Legislative Assembly.

- The limited control that the Executive has over the fate of an Ordinance after it is promulgated is that of its withdrawal by the Governor of the State under Article 213(2)(b) of the Constitution – the rest of the control is with the State Legislature which is the law making body of the State.

A SHORT ANALYSIS

This judgment widens the scope of judicial review of Ordinances. It basically promotes more transparency in the functioning of the same and the Court can exercise the powers of judicial review and verify the actions undertaken by both President and the Governor so as to arrive at the satisfaction that an Ordinance was necessary or not. It can also be observed that re-promulgation is fundamentally at odds with the principal of parliamentary supremacy. Article 123 of the Constitution spells out requirements before resorting to the extraordinary measure of promulgating

9 AIR 1962 SC 945

10 AIR 1985 SC 724

an ordinance. It quite convincingly appears that the government has converted the emergent power under Article 123 into a source of parallel law-making that is unethical to the scheme of the Constitution. Ordinances are seldom brought before the legislature but are re-issued again and again, violating the spirit of the Constitution. The court's verdict has to be seen as placing a vital check on what has until now been a power rampantly abused by the executive. Therefore, in short, negligence/failure of governments, at the Centre as well as states, to place ordinances before Parliament and State legislatures would in itself be constituted as a fraud on the Constitution and the same cannot be allowed in the good spirit of law and order.

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DECRIMINALIZING BEGGARY: DELHI HC TAKES A LEAP AHEAD

Vageesh Sharma

INTRODUCTION

The interplay approach between law and human rights in the former channelizing a free and secure human life is often reflected in the judicial opinions rendered by the Indian judiciary. The ratio decidendi laid down by the Hon'ble High Court of Delhi in the recent landmark judgment of *Harsh Mander v. Union of India* [1] *(in short 'Judgment'),* settles the legal position that begging shall not be criminalized within a State territory. This article analyses the aforesaid Judgment in light of the constitutional principles and the rational approach towards striking down the provisions violating the human rights.

VERDICT- UPHOLDING CONSTITUTIONAL PRINCIPLES

In its *Judgment*[2]*,* the Hon'ble High Court struck down Sections 4 to 29 except Section 11 of the Bombay Prevention of Begging Act, 1959 (hereinafter referred to as '*Act*') which had been adopted by the State of Delhi in the year 1960. Section 2(1)(d) and section 4(1) of the Act provides a clear picture of the issue at hand:

> *2(1)(d): Begging means no visible means of subsistence and wandering, about or remaining in any public place in such condition or manner, as makes it likely that the person doing so exist soliciting or receiving alms;*
>
> *4. Power of require person found begging to appear before court. - (1) Any police officer, or other person authorized in this behalf in accordance with rules made by the [Chief Commissioner] may arrest without a warrant any person who is found begging.*

A perusal of the aforementioned provisions indicate that the legislative intent does not manifest any reasonable classification in deciding as to what constitutes begging and the power to arrest any person being arbitrary, violates the fundamental rights guaranteed under Article 14 and 19 of the Indian Constitution (hereinafter referred to as '*Constitution*'). Citing the landmark judgment of *Shayara Bano v. Union of India*[3] in which the Hon'ble Supreme Court of India noted that a legislation can be nullified on the grounds of violation of Article 14, if it appears to be manifestly arbitrary. Thus, the Judgment highlights that merely because a person is likely to solicit alms doesn't mean that he shall be classified under the scope of begging. The Judgment also clarifies that the freedom of speech and expression, being the fundamental right guaranteed under Article 19 of the Constitution, gets infringed when there is an unreasonable restriction on the exercise of such right. An unquestionable consequence of this ruling will be grant of right of freedom of expression to the people involved in the begging activity and the subjective reasoning for classification shall not be a reason to classify a person performing the begging activity.

Another aspect of the Constitution, which the Judgment hinges upon moderately is the State's obligation to promote welfare of the people by securing and protecting a social order, thereby maintaining social security within the State. A conjoint reading of Article 38 & 39 of the Constitution of India yields that the State shall put all measures to provide a safe and secure livelihood for people and since these directive principles are regarded as the soul of the constitution, it becomes onerous on the State to ensure its role as a 'welfare state'.[4] Thus, by striking down the aforesaid provisions, the State shall be in a better position to uphold the social security as the arbitrariness in the law stands eradicated as the Judgment in Paragraph 28 & 33 highlights that the State has miserably failed to provide a decent life to its citizens and in fulfilling its directives under the Constitution.

ADOPTING RATIONAL APPROACH- LANDMARK PRECEDENT

The Judgment analysed the root problem of begging, it being poverty, which as per the Hon'ble Court, cannot be solved merely by adopting an artificial

1 *W.P. (C) 10498/2009 and W.P. (C) 1630/2015 (Delivered on August 8, 2018)*
2 *Id.,*
3 *(2017) 9 SCC 1*
4 *Charu Khurana v. Union of India, AIR 2015 SC 839*

means and thus criminalization would be a wrong approach to eradicate such a problem. Though, the Division Bench has left it open for the legislature to think out a clear factual basis in order to criminalize forced beggary.

The Judgement becomes significant in light of the Courts recognising the inter-disciplinary approach between law and human rights. Moreover, the arbitrariness in the legislation gets ruled out through the ruling, which makes sets a precedent for a free and fair abidance of the laws.

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SECTION 498A OF IPC: A WEAPON OR A SHIELD? - SUPREME COURT OF INDIA

Adhip Kumar Ray

The Hon'ble Supreme Court of India in its recent judgment of *Social Action Forum for Manav Adhikar and Another v Union of India Ministry of Law and Justice and Others*[1] revisited the important issue relating to Section 498-A of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC"). Section 498-A was brought into the IPC in the year 1983 to curb the menace of cruelty to married women, which often led to dowry deaths.

In order to protect helpless women who were regularly getting abused and beaten and tortured by their respective husbands and husband's family members, multiple changes were made to IPC. Accordingly, under Section 498A cruelty to a woman by her husband or any relative of her husband was made punishable for with an imprisonment for a term of three years and also with fine. This was further supported by Section 304B where a woman had committed suicide within 7 years of her marriage or died in circumstances raising a reasonable suspicion that some other person has committed an offence, provisions were being made for inquest by Executive Magistrates. Further, the Indian Evidence Act, 1872 was also amended to provide that in cases where the woman had committed suicide within 7 years of marriage and it is shown that her husband or any other relative of her husband had subjected her to cruelty, then the Court may presume that such suicide was abetted by her husband or such relative of the husband.

However, since the Section was subject matter of controversy, the Hon'ble Supreme Court observed that it was often being "used as weapons rather than shield by disgruntled wives."[2] Because of this, various judgments over time have also read down the Section.

In *Social Action Forum for Manav Adhikar and Another,* the judgment of *Rajesh Sharma and others v. State of U.P. and another*[3] passed by the Hon'ble Supreme Court came in question. In the *Rajesh Sharma* judgment, the Hon'ble Supreme Court, in order to prevent misuse of S. 498-A, gave a number of directions such as –

1. One or more Family Welfare Committees were to be constituted by the District Legal Services Authorities in every district. Every complaint under Section 498A received by the police or the Magistrate would then be referred to and looked into by such Committee which would within one month give its report to such committee. Till the report was received, no arrest would be normally effected.

2. The complaints under Section 498A and other connected offences may be investigated only by a designated Investigating Officer of the area.

3. Further, in cases where a settlement is reached, the District and Sessions Judge or any other senior Judicial Officer nominated by him could dispose of the proceedings and close the criminal case if dispute primarily related to matrimonial discord.

4. If a bail application was filed with at least one clear day's notice to the Public Prosecutor/complainant, the same may be decided as far as possible on the same day. Recovery of disputed dowry items may not by itself be a ground for denial of bail if maintenance or other rights of wife/minor children can otherwise be protected.

5. In respect of persons ordinarily residing out of India impounding of passports or issuance of Red Corner Notice should not be a routine.

6. It will be open to the District Judge or a designated senior judicial officer nominated by the District Judge to club all connected cases between the parties arising out of matrimonial disputes so that a holistic view is taken by the Court to whom all such cases are entrusted; and

1 *Writ Petition (Criminal) No. 156 of 2017: Judgment Delivered on 14.09.2018*

2 *Arnesh Kumar v. State of Bihar and another (2014) 8 SCC 273*

3 *AIR 2017 SC 3869*

7. Personal appearance of all family members and particularly outstation members may not be required and the trial court ought to grant exemption from personal appearance or permit appearance by video conferencing without adversely affecting progress of the trial.

In *Social Action Forum for Manav Adhikar and Another,*the Hon'ble Supreme Court examined whether the Court in *Rajesh Sharma* could, by the method of interpretation, have issued above such directions. With due deliberations, the Hon'ble Supreme Court was pleased to modify the directions issued in *Rajesh Sharma* case.

With respect to the constitution of Family Welfare Committee, the Hon'ble Supreme Court has ruled that constitution of the Family Welfare Committees by the District Legal Services Authorities and the prescription of duties of the Committees and further action thereof are beyond the IPC and the same does not really flow from any provision of the IPC and have nothing to do with the IPC. Accordingly, the same was impermissible.

However, the Court issued direction to the officers investigating under S 498-A to be careful and be guided by the principles propounded in the landmark Supreme Court judgments of *Joginder Kumar v. State of U.P and others*[4], *D.K. Basu v. State of W.B*[5], *Lalita Kumari v. Government of Uttar Pradesh and others*[6] and *Arnesh Kumar v. State of Bihar and another*[7].

Further, with respect to the direction regarding disposal of the case by District and Sessions Judge or any other senior Judicial Officer nominated by him in cases where settlement was reached, the Court observed that the same was not a correct expression of law and in a criminal case which was not compoundable, only the concerned High Court has the power to quash proceedings under S. 498-A. Thus the same could not be done by District or the Sessions judge and it was open to the parties to approach the High Court.

The Honble Supreme Court did not interfere with respect to the directions pertaining to Red Corner Notice, clubbing of cases and postulating that recovery of disputed dowry items may not by itself be a ground for denial of bail.

With respect to the directions regarding clubbing of "appearance of all family members and outstation members by video conferencing", the Court directed that an application could be filed either under Section 205 or Section 317 of Criminal Procedure Code depending upon the stage at which the exemption is sought.

The Hon'ble Supreme Court therefore, found that some of the directions given in the *Rajesh Sharma* case had potentially entered into the legislative field. Keeping this in mind, the Hon'ble Supreme Court undertook a re-examination of the directions and only retained the ones that find their bedrock within the Indian Penal Code - and in doing so - propounded a more balanced approach towards the application of section 498A.

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4 (1994) 4 SCC 260
5 (1997) 1 SCC 416
6 (2014) 2 SCC 1
7 (2014) 8 SCC 273

THE BOARDROOM BATTLE

Aishani Das

INTRODUCTION

Oppression and mismanagement are terms often chanced upon when company affairs are put to review. Statutorily dealt within the provisions of the Companies Act, 2013[1], these terms denote a situation of boardroom conflict, a prejudicial approach in conducting the affairs of the company by the directors of the Board and stymieing of the views of minority shareholders.

This article discusses the decision dated 12.07.2018 passed by National Company Law Tribunal ('NCLT') in the case of Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. & Anr. and Ors. (*in short 'NCLT Order'*)[2]. Cyrus Investments Pvt. Ltd. & Anr ('*Petitioners*') in this case were a class of minority shareholders in the Tata Sons company, comprising the companies Cyrus Investments and Sterling Investment Corporation (of the Shapoorji Pallonji Group of Companies) - headed by Mr. Cyrus Mistry, holding over 18% stake in the company.

LEGALITY OF THE OUSTING

Without following due procedure of putting the party to notice, constitution of relevant Committee for validating such removal and pursuance of an unset agenda at the meeting by it being voted upon, on 24th October, 2016, Executive Chairman of the Board of Tata Sons, Mr. Cyrus Mistry, was ousted from such position in the company before completion of his tenure, thereafter re-instituting Mr. Ratan Tata as interim-Chairman.

ALLEGED BREAKDOWN OF CORPORATE GOVERNANCE MACHINERY

Being the single largest shareholder collectively next to the Tata Trusts (which holds over 66% stake in the company), the Petitioners were a minority group with no special rights in the Articles of Association (AoA) of the company. The petition alleged that Mr. Ratan Tata (head of the Tata Trusts) along with his lieutenant trustee, Mr. Soonawala, both acting as 'shadow directors'[3], had created a sort of 'Super Board' or a 'Coup Board' in themselves by instituting controlling clauses in the AoA[4] that limited the right of the Petitioners to control the management and steer the affairs of the company. The Petitioners demanded to have proportional representation on the Board in line with the shares held by them – as is also statutorily directed.[5] Veto powers and unbridled authority to override decisions of the Board along with clauses such as Article (Art.) 118 of the AoA that tend to usher in external influences on the decision of the Board, as contested by the Petitioners, are typical of traits of agents that can cause collapse of corporate democracy. The Petitioners further stated that the recent misconduct of the Respondents in terms of random exits from meetings[6] to seek directions from Mr. Tata and unwarranted interference in the decisions of the Board was stifling of their powers. A challenge thus was made stating the *ultra vires* of such clauses in the AoA.

An ostensible conflict seemed to exist between the concept of Majority Rule[7] and that of corporate governance[8]. In light of the limited powers of the minority to air their grievances against the company, the Petitioners were disgruntled of having their will sidelined by the dominance of the majority.

Grievances before the NCLT

1 *§ 241 - § 244, Companies Act, 2013*

2 *Order in C.P. No. 82 (MB)/2016 before NCLT, Mumbai Bench dated 12.07.2018*

3 *572 of the order; A shadow director is a person in accordance with whose directions or instructions the director(s) of a company are accustomed to act, even though such person may not hold the designated position of being a director in such company.*

4 *Some of these controlling clauses were in the form of the power of Tata Trusts to nominate one-third of the Directors to the Board (Art. 104), decisions of the Board requiring an affirmative vote of the majority of Tata Trusts to come into effect (Art. 121) and non-meeting of quorum in any General Meeting unless an authorized representative from Tata Trusts was present (Art. 86).*

5 *Infra Note 9*

6 *¶ 61 of the order*

7 *Foss v. Harbottle [(1843) 67 ER 189] is a landmark English law case that established the concept of Majority Rule within the corporate structure. It stated that any action against the company must be initiated by the majority of shareholders of the company.*

8 *Corporate governance essentially involves balancing the interests of a company›s many stakeholders, such as shareholders, management, customers, suppliers, financiers, government and the community.*

Having approached the NCLT under a company petition, Petitioners demanded the redressal *inter alia* of the illegal ousting and other related matters. Averments pertaining to failed acquisitions, doomed endeavors such as the Nano project causing substantial losses to the company, breach of insider trading regulations and fraudulent transactions in Tata's aviation undertakings also flooded the pleadings of the Petitioners thereby indicating a general resentment to the manner in which the affairs of the company were being conducted, primarily at the behest of the Tata Trusts. Allegations of loss-causing bargains caused by Mr. Ratan Tata with related parties and preferential treatment being accorded to persons who enjoyed his patronage (sale of shares at "throwaway prices" to a certain Mr. Sivasankaran from Sterling Infotech Limited) in breach of arms length transaction norms were also stated in the petition.[9]

Legacy-rooted conflicts, dynastic power control (oppression and mismanagement), improper constitution of the Board of Directors and the illegal expulsion of Mr. Mistry from the Board were the main contentions of the Petitioners.

DECISION RENDERED BY THE NCLT

On the question of illegal ousting, the Tribunal ruled that such was on account of the loss of confidence in Mr. Mistry continuing as Chairman and irrespective of the mandate of the AoA, the Board of Directors are sufficiently empowered to carry out such a removal.[10] However, the procedure mandated under this provision was not complied with (in terms of giving of notice, providing an importunity of being heard, etc.). Additionally, the Tribunal stressed on the fact that the mere designation of 'Executive Chairman' does not make the title-holder a 'sovereign authority' within the corporate structure.[11]

The Tribunal also declined to hold that the affairs of the company were being conducted in a manner prejudicial to the Petitioners. It, in fact, placed the burden of poor corporate governance on the Petitioners by citing incidences on their part of leaking information of the company to the tax authorities and the media. Even though in negation of the principle embodied in the Companies Act[12], the Tribunal did not find force in the argument of the Petitioners that it must be given proportional representation on the Board.

The Tribunal excluded of purported legacy issues and alleged transactions in violation of arms length requirements from the ambit of oppression and mismanagement and stated the deal to be an independent "commercial negotiation" in line with investor expectations.[13] The allegations of the Petitioners were dismissed as being mere conjectures in the attempt to spin a conspiracy theory.[14]

The precursor to the decision being in favour of Tata becomes evident soon after the first few paragraphs of the 368-page NCLT order are read. In fervent terms, the order bespeaks of the golden historical legacy of the Tatas, their inherent understanding of 'welfarism' and how, being oppressive in the context of corporate management stems from the sense of *"fairness as in a person's mind."*[15]

The decision rightly explained that corporate governance could be considered a species within the genus of corporate democracy.[16] Though democracy survives on the will of the majority, corporate governance is required to be accommodated therein to install an adequate system of checks and balances within the structure of the company. The order emphasized on the duty of collective responsibility of the Board towards the shareholders of the company.

APPEAL BEFORE THE NCLAT

Mistry and his wingmen have approached the National Company Law Appellate Tribunal (NCLAT) in appeal against the NCLT order. ___ Another related issue pertains to the question of conversion of the company to a private one, which hitherto has been a public limited company.[17] Determination of this issue is pivotal since it will have a bearing on the potential of the Petitioners to sell their stake outside the company, if their removal is upheld to be legal.

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9 ¶ 67 of the order
10 § 169, Companies Act, 2013
11 ¶ 561 of the order
12 § 163, Companies Act, 2013
13 ¶ 123 of the order
14 ¶ 125 of the order
15 ¶ 10 of the order
16 ¶ 581 (i) of the order
17 Company Appeal (AT) No. 254/2018 , order of 08.08.2018

SINGH &
ASSOCIATES

FOUNDER MANOJ K SINGH
ADVOCATES & SOLICITORS

NEW DELHI
E-337, East of Kailash
New Delhi-110065, INDIA

GURUGRAM
7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk, Gurugram
Haryana-122001, INDIA

MUMBAI
Unit No. 48 & 49, 4th Floor
Bajaj Bhavan, Nariman Point
Mumbai-400021, INDIA

BENGALURU
N-304, North Block, Manipal Centre
47, Dickenson Road
Bengaluru-560042, INDIA

india@singhassociates.in
www.singhassociates.in