REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.9340 OF 2019

ARUNA OSWAL ... APPELLANT

VS.

PANKAJ OSWAL & ORS. ... RESPONDENTS

WITH

CIVIL APPEAL NO.9399 OF 2019

AND

CIVIL APPEAL NO.9401 OF 2019

J U D G M E N T

ARUN MISHRA, J.

1. These appeals have been preferred against the judgment and order dated 14.11.2019 passed by the National Company Law Appellate Tribunal, New Delhi, (for short 'the NCLAT') in Company Appeal (AT) No.411 of 2018, thereby affirming the order passed by the National Company Law Tribunal (for short 'the NCLT') concerning maintainability of the applications filed under sections 241 and 242 of the Companies Act, 2013 (hereinafter referred to as 'the Act').

2. The case is the outcome of a family tussle. Late Mr. Abhey Kumar Oswal, during his lifetime, held as many as 5,35,3,960 shares in M/s. Oswal Agro Mills Ltd., a listed company. He breathed his last on 29.3.2016 in Russia. On or about 18.6.2015, Mr. Abhey Kumar Oswal filed a nomination according to section 72 of the Act in favour of Mrs. Aruna Oswal, his wife. Two witnesses duly attested the nomination in the prescribed manner. As per the appellant, it was explicitly provided therein that: "This nomination shall supersede any prior nomination made by me/us and any testamentary document executed by me/us." The name of Mrs. Aruna Oswal, the appellant, was registered as a holder on 16.4.2016 as against the shares held by her deceased husband.

3. Mr. Pankaj Oswal, respondent No.1, filed a partition suit being C.S. No.53/2017 claiming entitlement to one-fourth of the estate of Mr. Abhey Kumar Oswal. He claimed one-fourth of the deceased's shareholdings who was holding shares to the extent of 39.88% in Oswal Agro Mills. Ltd., respondent No.2. The deceased also held 11.11% shares in M/s. Oswal Greentech Ltd., respondent No.16. The partition suit was filed on 3.2.2017 by respondent No.1 for 1/4th each of 39.88% shareholding in respondent No.2 company and 11.11% shareholding in respondent No.16 company. Prayer was made for an interim injunction in the civil suit. The High Court vide order dated

8.2.2017 directed the parties to maintain the status quo concerning shares and other immoveable property. As on 8.2.2017, the shares stood registered in the ownership of Mrs. Aruna Oswal, who continues to be the owner of the shares.

4. After the demise of Mr. Abhey Kumar Oswal, respondent No.1 entered into the corporate offices of respondent Nos.2 and 16 along with his wife for which a criminal complaint was lodged. FIR No.54/2016 was registered at Police Station Barakhamba Road, New Delhi. As a counterblast, respondent No.1 also filed a criminal complaint against the appellant as well as the officials of respondent No.2 and respondent No.16 companies, alleging illegal transmission of shares. The application filed by respondent No.1 for registration of the FIR was dismissed vide order dated 13.8.2018, and the revision petition filed against the said dismissal is pending.

5. Mr. Pankaj Oswal, respondent No.1 filed Company Petition No.56/CHD/PB/2018 - *Pankaj Oswal v. Oswal Agro Mills Ltd. & Ors.*, alleging oppression and mismanagement in the affairs of respondent No.2 company. A prayer was also made against M/s. Oswal Greentech. Ltd. Respondent No.1 claimed eligibility to maintain the petition on the ground of being a holder of 0.03% shareholding and claiming entitlement and legitimate expectation to 9.97% shareholding

of M/s. Oswal Agro Mills Ltd. by virtue of his being the son of deceased Abhey Kumar Oswal.

6. An application was filed before NCLT in May 2018 by the appellant challenging maintainability of the petition, inter alia, on the following grounds:

(i) That respondent No.1 only holds 42,900 shares to the extent of 0.03% shares of the total paid-up capital of M/s. Oswal Agro Mills Ltd., which were acquired in June 2017. The claim made by Pankaj Oswal to 9.97% out of 39.88% shareholding held by Late Abhey Kumar Oswal could not be made basis to maintain a petition under sections 241 and 242 read with section 244 of the Act. It was pointed out that the entire shareholding of deceased stood transmitted in ownership of Mrs. Aruna Oswal with effect from 16.4.2016. She is the absolute owner of shares that rest in her under the provisions contained in section 72 of the Act and rules framed thereunder.

(ii) Respondent No.1 failed to indicate the violation of any provisions of the Act. The averments made as to oppression and mismanagement were bald and vague.

(iii) Respondent No.1 indulged in forum shopping, which could not be allowed in view of the availing remedy of filing of the partition suit due to which company petition could not be said to be maintainable.

(iv) The High Court ordered status quo on 8.2.2017, according to which, as the shareholding had been transferred in the name of Mrs. Aruna Oswal, she would continue to be the owner during the pendency of the suit.

(v) Similar prayer has been made in the suit as well as in the company petition concerning the shareholding. The prayer regarding the determination of the ownership of shares in the company petition was the subject-matter of the civil suit, as such the application under sections 241 and 242 of the Act could not be said to be maintainable. The appropriate remedy was to apply under section 59 of the Act.

(vi) The main dispute raised as to the inheritance of the estate of the deceased is a civil dispute and could not be said to be an act of oppression and mismanagement. Such a dispute could not be adjudicated in a company petition filed during the civil suit's pendency. Thus, the company petition deserves to be dismissed.

(vii) Respondent No.1 was not having the requisite shareholding as mandated under section 244(1) to invoke the provisions of section 241 of the Act.

(viii) The parallel proceedings on the same issue could not be termed to be appropriate, and thus, the application could not be said to be maintainable.

7. The NCLT, Chandigarh, directed the appellants and other respondents to file a reply to the company petition sans deciding the question of maintainability, an appeal was preferred before the NCLAT, and the same was disposed of on 29.5.2018 and NCLT was directed to decide the issue of maintainability before proceeding to decide the company petition on merits.

8. The NCLT vide order dated 13.11.2018 dismissed the application, including C.A. No.146/2018 challenging the company petition's maintainability. NCLT held respondent No.1 as legal heir was entitled to one-fourth share of the property/shares. Aggrieved thereby, three appeals were filed before NCLAT, which have been dismissed vide judgment and order dated 14.11.2019. Aggrieved thereby, the appellants are before this Court.

9. Time was granted on 17.2.2020 to the parties to reach an amicable settlement that could not be arrived. Hence, the matter was heard on merits.

10. Dr. A.M. Singhvi, learned senior counsel appearing on behalf of Mrs. Aruna Oswal, wife of the deceased, vehemently argued that the appellant was the sole nominee of shares of erstwhile shareholder Late Abhey Kumar Oswal. In view of the provisions contained in section 71 of the Act, respondent No.1 could not claim any interest in the said shares because of the nomination. After excluding shares in the name of mother Mrs. Aruna Oswal, respondent No.1 Pankaj Oswal would have only 0.03% of the shareholding in M/s. Oswal Agro Industries Ltd. Given the provisions in section 244 of the Act, as respondent no.1 lacked requisite shareholding of 10%, as such, the application was not maintainable under sections 241 and 242 of the Act. Mr. Abhey Kumar Oswal died intestate. Because of the provisions of section 72 of the Act, all the rights vested in Mrs. Aruna Oswal, the appellant. Thus, the shareholding purchased by respondent No.1 to the extent of 0.03% in May, 2017 after filing of civil suit, did not bestow any right upon him to maintain the company petition. Respondent No.1 indisputably has settled in Australia and had nothing to do with the management of the company. He has tried to interfere in the management of M/s. Oswal Agro Mills Ltd illegally. The NCLT and NCLAT ignored and overlooked the rights of the deceased shareholder that would vest in the nominee. The application could not be said to be maintainable. The matter of inheritance is pending

adjudication before this Court in another C.A. No.7107/2017 – *Shakti Yezdani v. Jayanand Jayant*. It would not be appropriate for NCLT to decide a civil dispute. Respondent No.1 did not claim waiver on the rigors of section 244 of the Act and also did not file an application seeking a waiver under the proviso to section 244 of the Act.

11. Mr. Neeraj Kishan Kaul, learned senior counsel appearing for M/s. Oswal Agro Mills Ltd. fervently argued that in the wake of the civil suit's pendency, it was not appropriate for the NCLT to entertain the application. Reliance placed on the decision of this Court in *World Wide Agencies Pvt. Ltd. & Anr. v. Margarat T. Desor & Ors*., (1990) 1 SCC 536 could not be said to be appropriate as the question of nomination was not involved in the said matter. There was no nomination made in the said case. That was a case of inheritance of shares. Thus, the legal representatives were given the right to maintain the application regarding oppression and mismanagement. Given the provisions of section 72 of the Act, and particularly in the absence of requisite shareholding, it was not permissible to Pankaj Oswal, respondent No.1, to maintain the company petition. As a civil suit had been filed earlier in point of time and similar issue as to ownership of shares is also raised therein, further proceedings in the company petition deserve to be stayed, even assuming that the company petition is maintainable.

12. Mr. P.S. Narasimhan learned senior counsel representing M/s. Oswal Green Tech Ltd., respondent No.16, strenuously argued that the deceased was having 11.11% of the shareholding out of which respondent No.1 claimed only one-fourth interest. Thus, given the total shareholding which would be available, even if respondent No.1 is deemed to be the owner to the extent of 2.78%, it would be much less than what is required to maintain an application under sections 241 and 242 in view of the provisions contained in section 244 of the Act. It is a case of a civil dispute. As such, it would not be appropriate to maintain a company petition. It amounts to sheer abuse of the process of law to file successive petitions concerning the same relief. Respondent No.1 has no *locus standi* to maintain the application, and the principle of estoppel comes in the way of maintaining the application.

13. Mr. Siddhartha Dave, learned senior counsel appearing on behalf of respondent No.1, strenuously argued that the application filed under sections 241 and 242 of the Act was maintainable. The nomination was made only to hold the shares for the benefit of legal representatives. It is permissible for a legal representative to maintain the proceedings for oppression and mismanagement in the affairs of the company, though his/her name is not entered as a registered

owner of the shares. He has relied upon *World Wide Agencies Pvt. Ltd.* decision (supra), *Smt. Sarbati Devi & Anr. v. Smt. Usha Devi*, (1984) 1 SCC 424, *Vishin N. Khanchandani & Anr. v. Vidya Lachmandas Khanchandani & Anr.*, (2000) 6 SCC 724; and *Ram Chander Talwar & Anr. v. Devender Kumar Talwar & Ors.*, (2010) 10 SCC 671. He further argued that the waiver requirement to hold 10% shares, had been pleaded in the company petition filed by respondent No.1. The NCLT, as well as the NCLAT rightly held the petition to be maintainable. The civil suit's pendency could not have come in the way of maintaining the application concerning oppression and mismanagement, as only civil rights have to be determined in the civil suit. The company petition is prima facie maintainable because of the verdicts mentioned above of this Court. Hence, no case for interference in the appeals is made out.

14. The first argument advanced by learned counsel for the parties concerns the effect of nomination under section 72 of the Act, the same is extracted hereunder:

> "**72. Power to nominate** (1) Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.
>
> (2) Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any

> person to whom all the rights in the securities shall vest in the event of death of all the joint holders.
>
> (3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint-holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.
>
> (4) Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority."
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> (emphasis supplied)

15. It is quite apparent from a bare reading of the aforesaid provisions of section 72(1), every holder of securities has a right to nominate any person to whom his securities shall "vest" in the event of his death. In the case of joint-holders also, they have a right to nominate any person to whom "all the rights in the securities shall vest" in the event of death of all joint holders. Sub-section (3) of section 72 contains a non-obstante clause in respect of anything contained in any other law for the time being in force or any disposition, whether testamentary or otherwise, where a nomination is

validly made in the prescribed manner, it purports to confer on any person "the right to vest" the securities of the company, all the rights in the securities shall vest in the nominee unless a nomination is varied or cancelled in the prescribed manner. It is prima facie apparent that vesting is absolute, and the provisions supersede by virtue of a non-obstante clause any other law for the time being in force. Prima facie shares vest in a nominee, and he becomes absolute owner of the securities on the strength of nomination. Rule 19(2) of the Companies (Share Capital and Debentures) Rules, 2014 framed under the Act, also indicates to the same effect. Under Rule 19(8), a nominee becomes entitled to receive the dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities; and after becoming a registered holder, he can participate in the meetings of the company. Rule 19(8) is extracted hereunder:

> "19(8). A person, being a nominee, becoming entitled to any securities by reason of the death of the holder shall be entitled to the same dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities except that he shall not, before being registered as a holder in respect of such securities, be entitled in respect of these securities to exercise any right conferred by the membership in relation to meetings of the company:
>
> Provided that the Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the securities and if

> the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends or interests, bonuses or other moneys payable in respect of the securities, as the case may be, until the requirements of the notice have been complied with."

16. In *World Wide Agencies Pvt. Ltd.* (supra), this Court held that a legal representative has a right to maintain an application regarding oppression and mismanagement without being registered as a member against the securities of a company. However, the question of nomination was not involved in the said decision, as such, Court was not required to decide the question of the effect of nomination whether it vests all the rights in the securities in nominee to the exclusion of legal representatives. The Court concerning the right of a legal representative to maintain the petition held thus:

> **"12.** On behalf of the appellants it was contended that the right which is a specific statutory right, is given only to a member of the company and until and unless one is a member of the company, there is no right to maintain application under Section 397 of the Act. Mr Nariman contended that there was no automatic transmission of shares in the case of death of a shareholder to his legal heir and representatives, and the Board has a discretion and can refuse to register the shares. Hence, the legal representatives had no locus standi to maintain an application under Sections 397 and 398 of the Act. Mr Nariman submitted that the rights under Sections 397 and 398 of the Act are statutory rights and must be strictly construed in the terms of the statute. The right, it was submitted, was given to "any member" of a company and it should not be enlarged to include "any one who may be entitled to become a member".

13. In order to decide the question involved, it would be necessary to examine certain provisions of the Act. Section 2(27) of the Act states that "member" in relation to company does not include a bearer of a share-warrant of the company issued in pursuance of Section 114 of the Act. Section 41 of the Act provides as follows:

> "41. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.
>
> (2) Every other person who agreed in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company."

14. Section 26 of the English Companies Act, 1948 is substantially the same.

15. Section 109 of the Act states as follows:

> "A transfer of the share or other interest in a company of a deceased member thereof made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer."

16. In this connection, it would be relevant to refer to Articles 25 to 28 of Table A of the Act, which deal with the transmission of shares and which are in the following terms:

> "25. (1) On the death of a member the survivor where the member was a joint holder, and his legal representatives where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares.
>
> (2) Nothing in clause (1) shall release the estate of a deceased joint holder from any

liability in respect of any share which had been jointly held by him with other persons.

26. (1) Any person becoming entitled to a share in consequence of the death or insolvency of a member may, upon such evidence being produced as may from time to time properly be required by the Board and subject as hereinafter provided, elect, either —

(*a*) to be registered himself as holder of the share; or

(*b*) to make such transfer of the share as the deceased or insolvent member could have made.

(2) The Board shall, in either case, have the same right to decline or suspend registration as it would have had, if the deceased or insolvent member had transferred the share before his death or insolvency.

27. (1) If the person so becoming entitled shall elect to be registered as holder of the share himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects.

(2) If the person aforesaid shall elect to transfer the share, he shall testify his election by executing a transfer of the share.

(3) All the limitations, restrictions and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice or transfer as aforesaid as if the death or insolvency of the member had not occurred and the notice or transfer were a transfer signed by that member.

28. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends or other advantages to which he would be entitled if he

were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company:

Provided that the Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the share, and if the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share, until the requirements of the notice have been complied with."

17. Article 28 is more or less in pari materia to Article 32 of Table A to the English Companies Act. It may also be mentioned, as it has been mentioned by the High Court, that Section 210 of the English Companies Act, before its amendment in 1980, was substantially the same as Section 397 of the Act."

24. We do not agree for the reason mentioned before. It further appears to us the Australian judgment does not reconcile to logic in accepting that legal representative can petition for winding up, which is called the "sledge-hammer remedy", but would refuse the lesser and alternative remedy of seeking relief against oppression and mismanagement though the latter remedy requires establishment of winding up on just and equitable ground as a precondition for its invocation. It would be rather incongruous to hold that the case for winding up on just and equitable ground can be made out by the legal representatives under Section 439(4)(*b*) of the Act but not the other. This does not appear to be logical. It appears to us that to hold that the legal representatives of a deceased shareholder could not be given the same right of a member under Sections 397 and 398 of the Act would be taking a hyper-technical view which does not advance the cause of equity or justice. The High Court in its judgment under appeal proceeded

on the basis that legal representatives of a deceased member represent the estate of that member whose name is on the register of members. When the member dies, his estate is entrusted in the legal representatives. When, therefore, these vestings are illegally or wrongfully affected, the estate through the legal representatives must be enabled to petition in respect of oppression and mismanagement and it is as if the estate stands in the shoes of the deceased member. We are of the opinion that this view is a correct view. It may be mentioned in this connection that succession is not kept in abeyance and the property of the deceased member vests in the legal representatives on the death of the deceased and they should be permitted to act for the deceased member for the purpose of transfer of shares under Section 109 of the Act.

25. In some situations and contingencies, the "member" may be different from a "holder". A "member" may be a "holder" of shares but a "holder" may not be a "member". In that view of the matter, it is not necessary for the present purpose to examine this question from the angle in which the learned Single Judge of the Calcutta High Court analysed the position in the case of *Kedar Nath Agarwal* v. *Jay Engineering Works Ltd.*, (1963) 33 Com Cas 102 (Cal) to which our attention was drawn.

26. Admittedly in the present case, the legal representatives have been more than anxious to get their names put on the register of members in place of deceased member, who was the Managing Director and Chairman of the company and had the controlling interest. It would, therefore, be wrong to insist their names must be first put on the register before they can move an application under Sections 397 and 398 of the Act. This would frustrate the very purpose of the necessity of action. It was contended on behalf of the appellant before the High Court that if legal representatives who were only potential members or persons likely to come on the register of members, are permitted to file an application under

> Sections 397 and 398 of the Act, it would create havoc, as then persons having blank transfer forms signed by members, and as such having a financial interest, could also claim to move an application under Sections 397 and 398 of the Act. The High Court held that this is a fallacy, that in the case of persons having blank transfer forms, signed by members, it is the members themselves who are shown on the register of members and they are different from the persons with the blank transfer forms whereas in the case of legal representatives it is the deceased member who is shown on the register and the legal representatives are in effect exercising his right. A right has devolved on them through the death of the member whose name is still on the register. In our opinion, therefore, the High Court was pre-eminently right in holding that the legal representatives of deceased member whose name is still on the register of members are entitled to petition under Sections 397 and 398 of the Act. In the view we have taken, it is not necessary to consider the contention whether as on the date of petition, they were not members. In that view of the matter, it is not necessary for us to consider the decision of this Court in *Rajahmundry Electric Supply Corpn. Ltd.* v. *A. Mageshwara Rao,* AIR 1956 SC 213. In view of the observations of this Court in *Life Insurance Corporation of India* v. *Escorts Limited*, (1986) 1 SCC 264, it is not necessary, in our opinion, to consider the contention as made on behalf of the appellant before the High Court that the permission of the Reserve Bank of India had been erroneously obtained and consequently amounts to no permission. In the present context, we are of the opinion that the High Court was right in the view it took on the first aspect of the matter."

The effect of nomination did not fall for consideration before this Court in *World Wide Agencies Pvt. Ltd. & Anr.* (supra). There is no doubt that in the absence of nomination, a legal representative cannot

be denied the right to maintain a petition regarding oppression and mismanagement. In the instant case, the nomination had been made, and the nominee is registered as the holder of shares. What is the effect of the same is required to be decided to determine the extent of shareholding of respondent No. 1, concerning which civil suit filed earlier in point of time is pending consideration.

17. Learned senior counsel has also placed reliance on *Smt. Sarbati Devi & Anr. v. Smt. Usha Devi*, (1984) 1 SCC 424 in which question came up for consideration regarding section 39 of the Life Insurance Act, 1938 concerning rights of a nominee in the amount covered under policy when the assured died intestate. It was held that nomination was subject to a claim of the heirs of the assured under the law of succession. The provisions of section 39 of the Life Insurance Act, 1938, are quite different from the provisions contained in section 72 of the Act. The rights of the nominee would depend upon what is provided statutorily. There was no vesting of interest provided in the nominee under section 39 of the Act of 1938. Hence, the decision does not espouse the cause of the appellant.

18. Learned senior counsel also referred to the decision in *Vishin N. Khanchandani & Anr. v. Vidya Lachmandas Khanchandani & Anr.*, (2000) 6 SCC 724, wherein the provisions of sections 6 to 8 of the

Government Savings Certificates Act, 1959 came up for consideration. It was held that the nominee was entitled to receive the sum due on the savings certificates, yet he retained the same for the persons entitled to it under the relevant law of succession. The argument that the non-obstante clause in section 6 entitled the nominee to utilise the sum so received by him, in the manner he likes, was rejected. In the sections mentioned above of Act of 1959, vesting was not provided; thus, the provisions being quite different, the decision is distinguishable.

19. Learned senior counsel representing respondent No.1, lastly referred to *Ram Chander Talwar & Anr. v. Devender Kumar Talwar & Ors.*, (2010) 10 SCC 671, wherein section 45-ZA(2) of the Banking Regulation Act, 1949 was considered by this Court as well as the provisions of the Hindu Succession Act, 1925 and that of 1956. Nomination made under the provisions of section 45-ZA of the said Act was to receive the amount of deposit from the banking company on the death of the sole depositor. There was no similar provision regarding the vesting of rights in nominee in section 45-ZA(2). Hence, the decision is to no avail.

20. Admittedly, respondent No.1 is not holding the shares to the extent of eligibility threshold of 10% as stipulated under section 244 in

order to maintain an application under sections 241 and 242. He has purchased the holding of 0.03% in M/s. Oswal Agro Mills Ltd. in June 2017 after filing civil suit and remaining 9.97% is in dispute, he is claiming on the strength of his being a legal representative. In M/s. Oswal Greentech Ltd., the shareholding of the deceased was 11.11%, out of which one-fourth share is claimed by respondent No.1. Admittedly, in a civil suit for partition, he is also claiming a right in the shares held by the deceased to the extent of one-fourth. The question as to the right of respondent no.1 is required to be adjudicated finally in the civil suit, including what is the effect of nomination in favour of his mother Mrs. Aruna Oswal, whether absolute right, title, and interest vested in the nominee or not, is to be finally determined in the said suit. The decision in a civil suit would be binding between the parties on the question of right, title, or interest. It is the domain of a civil court to determine the right, title, and interest in an estate in a suit for partition.

21. Respondent no.1 had pleaded in paragraph 23 of the petition filed under section 241 of the Companies Act, 2013, as under:

> "23. Late 1990s and early 2000s saw increased liberalization in Indian economic policies. Foreign investors and MNCs had a positive outlook towards doing business in India. Similarly, Indian business houses were looking to increase their exposure in the international arena. In these circumstances, Petitioner father, on or about 2000, desired that the Petitioner

> gain some international exposure to doing business outside India and encouraged him towards that end. On or about 2001, the Petitioner started exploring opportunities in Australia and ultimately moved there to set up his own business Gradually, he increasingly got involved in setting up his business in Australia. Therefore, the Petitioner was not involved in day to day affairs of the Company after making."

It is admitted by respondent no.1 that he was not involved in day to day affairs of the company and had shifted to Australia to set up his independent business w.e.f. 2001. His grievance is that the family had not recognised him as holder of the one-fourth shares. They were registered in the ownership of his mother Mrs. Aruna Oswal; that also he had submitted to be an act of oppression. He acquired 0.03% share capital after filing of the civil suit, otherwise he was not having any shareholding in M/s. Oswal Agro Mills Ltd.

22. In *Sangramsinh P. Gaekwad and Ors. v. Shantadevi P. Gaekwad (Dead) through LRs. and Ors.,* (2005) 11 SCC 314, it was held that the dispute as to inheritance of shares is eminently a civil dispute and cannot be said to be a dispute as regards oppression and/or mismanagement so as to attract Company Court's jurisdiction under sections 397 and 398. Adjudication of the question of ownership of shares is not contemplated under Section 397. The relevant portion is extracted hereunder:

> "**143.** <u>It is also not in dispute that the matter relating to her claim to succeed FRG as his Class I heir is</u>

> pending adjudication in Civil Suit No. 725 of 1991 in the Baroda Civil Court. She claimed title in respect of 8000 shares by inheritance in terms of the Hindu Succession Act. Indisputably, in terms of Section 15 of the said Act she is a Class I heir but the appellants herein contend that the said provision has no application having regard to Section 5(2) thereof as inheritance in the family is governed by the rule of primogeniture. A pure question of title is alien to an application under Section 397 of the Companies Act wherefor the lack of probity is the only test. Furthermore, it is now well settled that the jurisdiction of the civil court is not completely ousted by the provisions of the Companies Act, 1956. (See *Dwarka Prasad Agarwal* v. *Ramesh Chander Agarwal*, (2003) 6 SCC 220)
>
> **144.** A dispute as regards right of inheritance between the parties is eminently a civil dispute and cannot be said to be a dispute as regards oppression of minority shareholders by the majority shareholders and/or mismanagement."
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> (emphasis supplied)

In view of the aforesaid decision, we are of the opinion that the basis of the petition is the claim by way of inheritance of 1/4th shareholding so as to constitute 10% of the holding, which right cannot be decided in proceedings under section 241/242 of the Act. Thus, filing of the petition under sections 241 and 242 seeking waiver is a misconceived exercise, firstly, respondent no.1 has to firmly establish his right of inheritance before a civil court to the extent of the shares he is claiming; more so, in view of the nomination made as per the provisions contained in Section 71 of the Companies Act, 2013.

23. In *M/s. Dale & Carrington Invt. (P) Ltd. and Anr. v. P.K. Prathapan and Ors.*, AIR 2005 SC 1624, the question of locus standi to entertain the petition under sections 397 and 398 of the Companies Act, 1956, which are *pari materia* to sections 241 and 242 of the Companies Act, 2013, was considered. This Court held that in order to maintain the petition, one should have requisite number of shares in the company on the date of filing of the petition. It was observed:

> "**32.** It is to be further noted that the entire scheme regarding purchase of shares in the name of the mother of Prathapan was suggested by Ramanujam himself. He saw to it that the shares were transferred by the company in the name of Prathapan and his wife. The company has recorded the transfer and corrected its Register of Members in this behalf which, in fact, led Ramanujam to file a petition for rectification of the Register of Members as a counterblast to the petition filed by Prathapan under Sections 397/398 of the Companies Act. It is not open to Ramanujam now to raise the question of FERA violation, more particularly in view of his having recorded the transfer of shares in the name of Prathapan and his wife Pushpa in the records of the Company. This also answers the objection regarding locus standi of Prathapan and his wife to file the Sections 397/398 petition before the Company Law Board. Since they were registered as shareholders of the company on the date of filing of the petition and they held the requisite number of shares in the company, they could maintain the petition."
>
> (emphasis supplied)

24. In *J.P. Srivastava & Sons Pvt. Ltd. and Ors. v. M/s. Gwalior Sugar Co. Ltd. and Ors.*, AIR 2005 SC 83, this Court considered the

object of prescribing a qualifying percentage of shares to entertain petition under sections 397 and 398. It was held that the object is to ensure that frivolous litigation is not indulged in by persons, who have no legal stake in the company. If the Court is satisfied that the petitioners represents the body of shareholders holding the requisite percentage, the Court may proceed with the matter. This Court held thus:

> "**47.** The object of prescribing a qualifying percentage of shares in petitioners and their supporters to file petitions under Sections 397 and 398 is clearly to ensure that frivolous litigation is not indulged in by persons who have no real stake in the company. However, it is of interest that the English Companies Act contains no such limitation. What is required in these matters is a broad commonsense approach. If the Court is satisfied that the petitioners represent a body of shareholders holding the requisite percentage, it can assume that the involvement of the company in litigation is not lightly done and that it should pass orders to bring to an end the matters complained of and not reject it on a technical requirement. Substance must take precedence over form. Of course, there are some rules which are vital and go to the root of the matter which cannot be broken. There are others where non-compliance may be condoned or dispensed with. In the latter case, the rule is merely directory provided there is substantial compliance with the rules read as a whole and no prejudice is caused. (See *Pratap Singh* v. *Shri Krishna Gupta*, (AIR 1956 SC 140). In our judgment, Section 399(3) and Regulation 18 have been substantially complied with in this case."
>
> (emphasis supplied)

In the instant case, considering on the anvil of aforesaid decisions, we are satisfied that respondent no.1, as pleaded by him,

had nothing to do with the affairs of the company and he is not a registered owner. The rights in estate/shares, if any, of respondent no.1 are protected in the civil suit. Thus, we are satisfied that respondent no.1 does not represent the body of shareholders holding requisite percentage of shares in the company, necessary in order to maintain such a petition.

25. It is also not disputed that the High Court in the pending civil suit passed an order maintaining the status quo concerning shareholding and other properties. Because of the status quo order, shares have to be held in the name of Mrs. Aruna Oswal until the suit is finally decided. It would not be appropriate given the order passed by the civil Court to treat the shareholding in the name of respondent No.1 by NCLT before ownership rights are finally decided in the civil suit, and propriety also demands it. The question of right, title, and interest is essentially adjudication of civil rights between the parties, as to the effect of the nomination decision in a civil suit is going to govern the parties' rights. It would not be appropriate to entertain these parallel proceedings and give waiver as claimed under section 244 before the civil suit's decision. Respondent No.1 had himself chosen to avail the remedy of civil suit, as such filing of an application under sections 241 and 242 after that is nothing but an afterthought.

26. Learned senior counsel for appellants argued that respondent No.1, a disgruntled son disowned by family, settled in Australia for the last 25-30 years. He admittedly did not have anything to do with the affairs of the company. On the other hand, it was vigorously argued by Mr. Siddhartha Dave, learned senior counsel appearing for the respondent, that owing to the rampant COVID-19 pandemic, respondent No.1 is in Dubai. Be that as it may. Merely disowning a son by late father or by the family, is not going to deprive him of any right in the property to which he may be otherwise entitled in accordance with the law. The pertinent question needs to be tried in a civil suit and adjudicated finally, it cannot be decided by NCLT in proceedings in question. Hence, we refrain from deciding the aforesaid question raised on behalf of the appellants in the present proceedings. In the facts and circumstances, it would not be appropriate to permit respondent No.1 to continue the proceedings for mismanagement initiated under sections 241 and 242, that too in the absence of having 10% shareholding and firmly establishing his rights in civil proceedings to the extent he is claiming in the shareholding of the companies.

27. We refrain to decide the question finally in these proceedings concerning the effect of nomination, as it being a civil dispute, cannot be decided in these proceedings and the decision may jeopardise

parties' rights and interest in the civil suit. With regard to the dispute as to right, title, and interest in the securities, the finding of the civil Court is going to be final and conclusive and binding on parties. The decision of such a question has to be eschewed in instant proceedings. It would not be appropriate, in the facts and circumstances of the case, to grant a waiver to the respondent of the requirement under the proviso to section 244 of the Act, as ordered by the NCLAT.

28. It prima facie does not appear to be a case of oppression and mismanagement. Our attention was drawn by the learned senior counsel appearing for respondent No.1 to certain company transactions. From transactions simpliciter, it cannot be inferred that it is a case of oppression and mismanagement.

29. We are of the opinion that the proceedings before the NCLT filed under sections 241 and 242 of the Act should not be entertained because of the pending civil dispute and considering the minuscule extent of holding of 0.03%, that too, acquired after filing a civil suit in company securities, of respondent no. 1. In the facts and circumstances of the instant case, in order to maintain the proceedings, the respondent should have waited for the decision of the right, title and interest, in the civil suit concerning shares in question. The entitlement of respondent No.1 is under a cloud of pending civil

dispute. We deem it appropriate to direct the dropping of the proceedings filed before the NCLT regarding oppression and mismanagement under sections 241 and 242 of the Act with the liberty to file afresh, on all the questions, in case of necessity, if the suit is decreed in favour of respondent No.1 and shareholding of respondent No.1 increases to the extent of 10% required under section 244. We reiterate that we have left all the questions to be decided in the pending civil suit. Impugned orders passed by the NCLT as well as NCLAT are set aside, and the appeals are allowed to the aforesaid extent. We request that the civil suit be decided as expeditiously as possible, subject to cooperation by respondent No.1. Parties to bear their costs as incurred.

.....J.
(Arun Mishra)

.....J.
(S. Abdul Nazeer)

New Delhi;
July 06, 2020.