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CHAPTER

Oppression and Mismanagement - Introduction

1.1 CORPORATE GOVERNANCE

The three key constituents of corporate governance are : the board of directors, the shareholders and the management. The pivotal role is performed by the board of directors. It is accountable to the stakeholders and directs and controls the management. The board of directors, as the working organ of the company is entrusted with the management and control of the company by the general body. It is not vested with the shareholders. "Management and control" is a composite expression, implying both management and control, not the management alone of day-to-day business by the executive nor the control alone by shareholders through their voting power. It means highest level of control of the business as a whole. It refers to policy making and policy execution. "Management and control" does not mean controlling the company by means of voting powers, but control in relation to the company's business. The shareholder can, no doubt, compel the directors to do their will. It does not, however, follow that the corporators are managing the corporation. The contrary is the truth. They are not. It is the directors who are managing the affairs of the company (*American Thread Co. v. Joyce (Surveyor of Taxes)* 1913 6 TC 163 (CA)]. The real business is carried where directors exercise their control over the company's affairs (*Egyptian Delta Land & Investment Co. Ltd. v. Todd (Inspector of Taxes)* (1929) AC 1]. A company is managed by the board of directors. Controlling the affairs or management means not the bare possession of powers by the directors, but their taking part in or controlling affairs relating to trading. They must exercise their powers of control in relation to business or activity wherefrom profit is derived (see *Egyptian Hotels Ltd. v. Mitchell* (1915) 6 TC 542 (HL)]

If powers and management are vested in the directors they and they alone can exercise these powers. Greer L.J. said in *John Shaw v. Peter Shaw*

& another 1935-2 KB 113. "The only way in which the general body of the shareholders can control the exercise of the powers vested by the Articles in the directors is by altering the Articles, or, if opportunity arises under the Articles by refusing to re-elect the directors of whose action they disapprove. They cannot themselves usurp the powers which by Articles are vested in the directors, nor the directors can usurp the powers vested by the Articles in the general body of the shareholders". Similarly, in the case of *Scott v. Scott*, 1943-1 All ER 582, it was held that when powers had been delegated to the directors the members at the general meeting could not interfere with their exercise until they were taken, away by the amendment of Articles.

The law is laid down in Halsbury's Laws of England 3rd Edition Vol. VI at page 445 is as follows:

> "As regards litigation by an incorporated company, the directors are, as a rule, the persons who have authority to act for the company; but, in the absence of any contract to the contrary in the Articles of Association, the majority of the members of the company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed."

Supreme Court in *Life Insurance Corporation of India v. Escorts Ltd* AIR 1986 SC 1370) observed on page l42l as under:

> "...the only effective way the members in general meeting can exercise their control over the Directorate in a democratic manner is to alter the articles so as to restrict the powers of the Directors for the future or to dismiss the Directorate and appoint others in their place".

In the case of *Starlite Real Estate (ASCOT) Mauritius Limited and Ors. v. Jagrati Trade Services Private Limited and Ors*., decided on 14th May, 2015 by the High Court of Calcutta in G.A. No.2437/2014 and CS No.284/2014, it was observed:–

> "30. There is a clear distinction between individual and corporate membership rights of shareholders. A member can always sue for wrongs done to himself in his capacity as a member. The individual rights of a member arise in part from the general law. Under the contract emanating from his memberships, he is entitled to have

his name entered and kept on the register of members, to vote at meetings of members, to receive dividends which have been duly declared, to exercise pre-emption rights conferred by the articles, and to have his capital returned in proper order of priority on a winding up or on a properly authorized reduction of capital. Under the general law he is entitled to restrain the company from doing acts which are *ultra vires*, to have a reasonable opportunity to speak at meetings of members and to move amendments to resolutions proposed at such meetings to transfer his shares; not to have his financial obligations to the company increased without his consent; and to exercise the many rights conferred on him by the Companies Act, such as his right to inspect various documents and registers kept by the Company. The dividing line between personal and corporate rights is not always very easy to draw. The Courts, however, incline to treat a provision in the memorandum or articles as conferring a personal right on a member, if he has a special interest in its observance distinct from the general interest which every member has in the company adhering to the terms of its constitution. In an action for violation of personal rights a single shareholder suing alone and not even on behalf of other shareholders may make the company a defendant and obtain his reliefs. Where a wrong has been done to the company and an action is brought to restrain its continuance or to recover the company's property or damages or compensation due to it, it is a derivative action. Here the company is the only true plaintiff. The dispute is not an internal one between those who constitute the membership of the company but one between the company on the one hand and third parties on the other. It makes no difference in principle that the third parties may accidentally happen to be the directors or controlling shareholders of the company. *Foss v. Harbottle* itself is an illustration of such an action. Where such an action is allowed the member is not really suing on his own behalf nor on behalf of the members generally but on behalf of the company itself. In a derivative action, in the framing of the suit for the purpose of compliance of the formalities the plaintiff had to describe himself as a representative suing for and on behalf of all the members other than the wrong-doers. In a true derivative

action the plaintiff shareholder is not acting as a representative of the other shareholders but is really acting as a representative of the company. The expression "derivative action" was basically borrowed from the United States, but has in recent years also been in use in the United Kingdom."

The concept of derivative action has now been given statutory recognition in section 245 of the Companies Act, 2013 with a heading "class action"

In company jurisprudence, company actions are divided into different groups:–

(a) Actions by the Company – for enforcement of Company's rights.

(b) Derivate actions – i.e., actions by shareholders for enforcement of the Company's rights (as distinguished from class rights of shareholders).

(c) Representative actions – i.e., actions by shareholders for enforcement of their class or corporate rights.

(d) Personal actions by shareholders – for enforcement of their personal rights.

1.2 MANAGEMENT OF COMPANY - TWO DOCTRINES

As regards management of companies, the two important doctrines are:

1. doctrine of 'indoor management';
2. doctrine of corporate democracy; supremacy of majority (*Foss v. Harbottle* Rule)

1.3 DOCTRINE OF INDOOR MANAGEMENT

Persons dealing with limited liability companies are not bound to enquire into their indoor management and will not be affected by irregularities of which they have no notice [*Ruben v. Great Fingall Consolidated* (1906) AC 439] Where there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, those so dealing with them externally are not to be affected by any irregularity which might take place in the internal management of the company. According to the doctrine of internal management, persons contracting with

a company and dealing in good faith might assume that the acts within its constitution and the power had been properly and duly performed and were not bound to inquire whether acts of internal management had been regular [see *Royal British Bank v. Turquand* (1856) 25 LJQB 317; 119 ER 886 This rule is well settled rule of company law that an outsider when dealing with the company is entitled to assume that all internal regulations of the company have been complied with, unless of course he has knowledge to the contrary or there are suspicious circumstances putting him on inquiry [see *Sheth Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd.* (1964) 34 Comp Cas 777] The doctrine of indoor management is another name of this rule.

When a person is held out as having authority to act for the corporation which involves the exercise of a particular authority and incurrence of liabilities, a normal presumption in favour of the third party arises that such exercise of authority is lawful; any amount of reservation within the four walls of the indoors of the corporation touching upon such authority cannot be of any avail to the corporation vis-à-vis such strangers [see *Official Liquidator v. Commissioner of Police, Madras* (1968) 38 Comp Cas 884 (Mad).

The doctrine of indoor management requires a person who deals with the company needs only to look to the memorandum and articles of association which are public documents and be aware of the extent of the powers and authority of the directors to act on behalf of the company and whether the transaction accords with the provisions. He is not to be prejudiced by the irregularities of the company's internal working. While dealing with a director he is only required to look into the memorandum and articles to know whether the director has the power which he is purporting to exercise in relation to the proposed transaction.

The doctrine was explained by Lindley L.J. in *Biggerstaff v. Rowlatt's Wharf Ltd.* (1896) 2 Ch 93 (CA) thus: What must persons look to when they deal with directors? They must see whether according to the constitution of the company directors could have the powers which they are purporting to exercise where the articles enable the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes, the persons dealing with him must look to the articles and see that the managing director might have the power to do what he purports to do, and that is enough for a person

dealing with him *bona fide*. Where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power.

Following, the Kerala High Court in *Varkey Souriar v. Keraleeya Banking Co. Ltd.* (1957) 27 Comp Cas 591, explained that the general rule is that a person dealing with a company regulated by articles and memorandum registered in some public office is not bound to do more than read the registered documents and to see that the proposed dealing is not inconsistent therewith, and if there is a managing director and the authority in the articles for the directors to delegate their power to him, then that person may assume that it is within the duties of the managing director to do what he is purported to do.

1.3.1 Doctrine of indoor management - Exception

The rule of indoor management cannot be invoked–

- if the aforesaid condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make might tell him that they were wrongly done. It is the duty of the persons to see that the company acts within its powers and its transactions are regular and orderly;
- where the question is not one as to the scope of the power exercised by an apparent agent but in regard to the very existence of the agency [*Varkey Souriar v. Keraleeya Banking Co. Ltd.* (1957) 27 Comp Cas 591];
- In *Morris v. Kanssen* (1946) 16 Comp Cas 186 (HL), it was observed that although the rule might be invoked to validate the irregular acts of directors, or the acts of the directors irregularly appointed, it was doubtful whether it could be of any help to a person who is himself a director;
- where the outsider has the actual knowledge of irregularity [*Howard v. Patent Ivory Mfg. Co.* (1888) 83 Ch D 156] ;
- where the question is not about irregularities which otherwise might affect the genuine transaction but about forgery. In *Ruben v. Great Fingall Consolidated* (1906) AC 439 (HL) the seal of the company was affixed to a share certificate. The court held that the

company is not precluded from claiming that the certificate was forged and is not responsible for the wrongful act of the secretary.

1.4 DOCTRINE OF CORPORATE DEMOCRACY (SUPREMACY OF MAJORITY) - TWO PRINCIPLES

Corporate governance in India is largely based, as pointed out by Venkataramiah, J in *National Textile Workers v. P.R. Ramkrishnan* AIR 1983 75, 1983 SCR (1) 9, "on the principles laid down of the leading English cases like *Salomon v. Salomon & Co.* [(1897) AC 22] laying down the principle of corporate personality, *Ashbury Railway Carriage & Iron Co. v. Riche* [(1875) 7 AC 653] dealing with the rule of *ultra vires*, *Royal British Bank v. Turguand* [(1856) 25 LJQB 317 (QB)] laying down the rule of 'indoor management', *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* ([1964] AC 465)] which establishes the liability for negligent mis-statements in prospectuses, *Foss v. Harbottle* (1843) 2Hare 461] and *Burland v. Earle* (1902) AC 63 (PC)] dealing with the principle of 'the fraud on a minority' and *Ebrahimi v. Westbourne Galleries* [(1973] AC 360) dealing with the application of the 'just and equitable' principle in ordering the winding-up of a company.".

The two principles were laid down in *Burland v. Earle*, 1902 AC 83 as regards management of the companies:

- first, that the court would not interfere with the internal management of the company acting within their powers; and
- secondly, that in order to redress a wrong done to a company or to recover money or damage alleged to be due to the company, the action would *prima facie* be brought by the company itself. (also see *Satyvart Sidhantalankar v. Arya Samaj* AIR 1946 Bom 516; (1947) 17 Comp Cas 21 (Bom)

The doctrine of supremacy of shareholders would apply provided first it is within their powers and secondly, that the acts of the shareholders are to cure mere informality and irregularity as opposed to the infraction of Articles or Statutes.

In *K.R.S. Mani v. Anugraha Jewellers Ltd.* (2005)126 Comp Cas 878 Mad, 2004 (3) CTC 348, 2004 52 SCL 488 Mad, it was observed, "15. Further, as

per the various decisions rendered by this Court as well as the Supreme Court, it is the duty of the courts to recognize the Corporate Democracy of a Company in managing its affairs. The court should not restrict the powers of the Board of Directors and it shall not interfere with the day to day affairs and management and administration of the company. The principles laid down in the decisions rendered by this court in *Vivek Goenka v. Manoj Sonthalia* [1992] II MLJ 163; *G. Kasturi v. N. Murali* [1992] 74 Comp. Cas. 661 (Mad.); and in *Nurcombe v. Nurcombe* [1983] 3 CLJ. 163 (CA), makes it clear that the appellants/petitioners are not entitled to the relief as claimed for in the company petition."

The two leading cases on the subject are *Foss v. Harbottle* (1843) 2 Hare 461; 67 ER 189 and *Lord v. Governor and Company of Copper Mines* (1848) 2 Ph 740. The rule in *Foss v. Harbottle* is that a court will not interfere with the ordinary management of a company acting within its powers and has no jurisdiction to do so at the instance of the shareholder. The shareholder is entitled to a suit to enforce his individual rights against the company such as his right to vote, or his right to stand as a director of a company at an election. If the shareholder, however, intends to obtain redress in respect of a wrong done to the company or to recover damages alleged to be due to the company, the action would ordinarily be brought by the company itself. In order therefore to enable a shareholder to institute a suit in the name of the company in such a case, there must be sanction of the majority for corporate action. In ordinary cases, this principle implies the supremacy of the will of the majority. It is open to a majority always to set right a thing which was done by a majority either illegally or irregularly, if the thing complained of was the one which the majority of the company was entitled to do legally and was within the powers of the company by calling a fresh meeting. That is why in such cases the court refuses to interfere at the instance of the shareholder even in a representative action brought by him [(see *N.V.R. Nagappa Chettiar v. Madras Race Club* (1949) 19 Comp Cas 175: AIR 1951 Mad 831.]

The approach in *Foss v. Harbottle* that courts could not normally interfere with the internal management of the company at the instance of a minority of members dissatisfied with the conduct of its affairs by the majority, could be justified on various grounds. The first was that the members who had contracted to abide by the decision of the majority could not complain against something to which they had agreed. The second was that the majority alone knew what was good for the association or company, and that the

court's views could not be imposed on them. And the third was that as the company was a separate juristic person, it alone, or at least only a majority of its members, could complain of any injury to it, and not a minority [see *Kerala Kumaranunni v. Mathrubhumi Printing and Publishing Co. Ltd*. [1983] 54 COMP CAS 370 (KER.)] The Kerala High Court further observed, "In *Salomon v. Salomon & Co.* [1897] AC 22, the House of Lords went to the extreme of refusing to discover dummies and nominees behind the veil of incorporation, by placing emphasis on the separate legal personality of the company. In spite of the fact that free transferability of shares is one of the important features of any company, it was held in re Gresham Life Assurance Society : Ex fiarte Penney [1872] 8 Ch App 446, that where the articles of association vested an absolute discretion in the directors of a company to refuse to recognise a transfer of shares, the court would presume that the directors had exercised the power *bona fide*. They could not be compelled to disclose reasons for their refusal, unless want of good faith was affirmatively established by a petitioner. Dishonesty, fraud, bad faith, breach of trust and the like were the minimum to be established by individual shareholders before they could get any equitable relief from the Chancery courts; in all other cases, the contract was supreme."

The Kerala High Court further observed:

> "The various provisions of the Companies Act relating to minority protection have to be examined in the above background if their true content is to be discovered. Chapter VI deals with "oppression and mismanagement". Section 397 (sections 241 and 242 of Companies Act, 2013) enables the minority shareholders to approach the court with a grievance that the company's affairs are being carried on in a manner oppressive to them, and section 398 provides for a like complaint that the affairs of the company are carried on in a manner prejudicial to public interest or to the interests of the company. Oppression or mismanagement, in the context, have been understood as conduct involving lack of probity or *bona fide*s. When the directors of a company with their majority support conduct themselves in a manner inequitable, i.e., when their conduct is tainted with lack of probity or selfish interest (as distinct from the interests of the company and the public), the court can step in and rectify matters. What lies behind the statutory provisions is a breach of the fiduciary duties the majority

is supposed to honour and the basis of the complaint itself is that there is a breach of such duties"

1.4.1 Exception

The Madras High Court in *N.V.R. Nagappa Chettiar v. Madras Race Club* (Supra) observed that if the majority however acts as in an oppressive manner, it is not as if the minority are without a remedy. Shareholders are entitled to bring an action–

- in respect of matters which are *ultra vires* the company and which the majority of shareholders were incapable of sanctioning (see *Burland v. Earle* (1902) AC 83);
- where the act complained of constitutes a fraud on the majority;
- where the action of the majority is illegal; and can be questioned by a separate action by the aggrieved shareholder.

The decisions in *Baillie v. Oriental Telephone and Electric Co. Ltd*. (1951) 1 Ch 503: 85 LJ Ch 409 and *Cotter v. National Union of Seamen* (1929) 2ChD 58: 98 LJ Ch 323 recognized a fourth exception where a special resolution was required by the articles of the company and the company obtained the assent of the majority to such special resolution by a trick, or even where a company authorized to do a particular thing only by a special e-resolution, does it without a special resolution duly passed as in such a case to deny the right of a suit to the shareholders without using the name of the company would, in effect, result, in the company doing the thing by an ordinary resolution (see *N.V.R. Nagappa Chettiar v. Madras Race Club* (1949) 19 Comp Cas 175: AIR 1951 Mad 831)

In other words, the rule in Foss (supra), does not apply to such acts as referred to above inasmuch as the majority cannot sanction those acts. In the light of the subsequent judicial pronouncements, particularly, *Edwards v. Halliwell* reported in [1950] 2 All ER 1064 (CA), exceptions to the general rule as propounded in Foss (supra), are a resolution, which is *ultra vires* or illegal or is a fraud on the minority or is not *bona fide* or for the benefits of the company as a whole or is intended to discriminate between the majority shareholders and the minority shareholders is illegal and can be questioned by a separate action by the aggrieved shareholder. The reason is that if the minority were denied their right, their grievance could never reach the

court, because the wrongdoers, being themselves in control, do not allow the company to sue.

Lord Denning MR said the following in ***Wallersteiner v. Moir (No. 2)*** [1975] QB 373, 389-392:

> "It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v. Harbottle* (1843) 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of the shares - who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress. In *Foss v. Harbottle*, 2 Hare 461, 491-492, Sir James Wigram V.-C. saw the problem and suggested a solution. He thought that the company could sue "in the name of some one whom the law has appointed to be its representative." A suit could be brought by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled...."

The powers of the majority are supreme in matters of internal management of the company "unless there be something illegal, oppressive, or fraudulent-unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company."

see James L. J. in *MacDougall v. Gardiner* (1875) 1 Ch. D. 13:; ." (quoted in *Satyvart Sidhantalankar v. Ary Samaj* AIR 1946 Bom 516: (1947) 17 Comp Cas 21 (Bom)]

In *Raja Narayan Bansilal v. Maneck Phiroz Mistry* AIR 1961 29: 1961 SCR (1) 417: (1960) 30 Comp Cas 644 (SC), the Supreme Court observed:

> "A company is a creature of the statute. There can be no doubt that one of the objects of the Companies Act is to throw open to all citizens the privilege of carrying on business with limited liability. Inevitably the business of the company has to be carried on through human agency, and that sometimes gives rise to irregularities and malpractice in the management of the affairs of the company. If persons in charge of the management of companies abuse their position and make personal profit at the cost of the creditors, contributories and others interested in the company, that raises a problem which is very much different from the problem of ordinary misappropriation or breach of trust. The interest of the company is the interest of several persons who constitute the company, and thus persons in management of the affairs of such companies can be classed by themselves as distinct from other individual citizens. A citizen can and may protect his own interest, but where the financial interest of a large number of citizens is left in charge of persons who manage the affairs of the companies it would be legitimate to treat such companies and their managers as a class by themselves and to provide for necessary safeguards and checks against a possible abuse of power vesting in the managers."

1.5 OPPRESSION AND MISMANAGEMENT – GENESIS

Minority actions were designed to counteract the rule in *Foss v. Harbottle* [1843] 2 Hare 461. That was a case reported in or about 1843 some nine years before the first comprehensive corporate legislation was promulgated in England. While tracing out the history of company legislation in this respect, the Calcutta High in *Bagree Cereals (P) Ltd. v. Hanuman Prasad Bagri* (2001) 105 Comp Cas 465 (Cal) observed:

> "74 A perusal of that case (*Foss v. Harbottle*), which is easily available in the English Reports is very interesting because it shows

the wanton manner in which the company property was dealt with. Yet, the complainant got no relief in that case. The reason was that, the company property was dealt with in accordance with company law; because the complainant was in a minority, none of his complaints would ever stand ground in the corporate forum; an appropriate majority resolution could always be taken to ratify whatever had been done by the managers of the company property.

75. The wanton dealing with company property, therefore, brought no adverse consequence to those who were at the helm of affairs of the company. This was the rule in *Foss v. Harbottle* [1843] 2 Hare 461. Understood in simple terms by us, dictating as we do, these lines a few yards from the flowing Ganges, the rule simply was that if the company wishes to throw its property into the Ganges, the company and the managers of the company are free to do so like any other individual person.

76. This rule held good in England and in India from 1843 until 1948, although many people made many grievances and many judicial minds were clamouring for appropriate exceptions to this strict ancient rule of complete *laissez faire*. We have already mentioned the Cohen Committee Report which, amongst other things brought about Section 210 of the English Companies Act, 1948. It was designed to provide a remedy to minority shareholders for the purpose of relieving them from oppression, and also for relieving them from the grief of the rule in *Foss v. Harbottle* [1843] 2 Hare 461,

77. From 1948 to 1956, when the Companies Act was passed in India, the rule in *Foss v. Harbottle* [1843] 2 Hare 461 prevailed in India but not in England.

78. The report of the Parliamentary Committee of 1952 which resulted in the Companies Act of 1956, was handed up to us by Mr. Nag.

79. He also gave us the Supreme Court case of *Raymond Synthetics Ltd. v. Union of India* [1992] 73 Comp Cas 762 where the court has

ruled as extremely significant, the contemporaneous construction placed upon an ambiguous section by the administrators entrusted with the task of executing the statute, the interpretation of which is in issue. The Report of the Company Law Committee, 1952, adopted, in regard to oppression Section 210 of the English Companies Act. Its remark at page 149 of the Report was as follows:

"We accordingly recommend the enactment of two sections:

(i) to provide for a remedy for the oppression of minorities on the lines of Section 210 of the English Act, 1948; and

(ii) to provide for a remedy in cases of mismanagement of company affairs in a manner prejudicial to the interests of the company."

Thus the English Section 210 was materially adopted almost as such in our Section 397. But we went ahead in our company legislation and we provided also a remedy for mismanagement of companies by way of Section 398 also, which was not there in the English Act of 1948."

80. In England these sections have undergone a radical change now. No longer is there any necessity for minorities to prove the case of just and equitable winding up. No longer need they prove the case of oppression; all that the minority needs to do now is to show a case of unfair prejudice. The minority remedy in England has become flexible and easily available but not so in India. This happened in England in 1980 and continued thereafter. Whenever a case from England is relied upon as to minority rights and that case relates to a decision after 1980, we would say, Indian readers, beware. The case has to be read in the light of English law and we can use only those parts of the judgment which are applicable to our law, the difference in company statutes in the two countries notwithstanding. Mr. Nag, and we say this with respect, unfortunately did not bear this distinction in mind all the time, if at all.

81. Before enactment of the English Act of 1980 there was another command paper which was the Jenkins Report. Mr. Nag again helped us with copies of the relevant portions of this white paper. At page 75 of that paper at the end of paragraph 201, it was noted as follows:

> "It is pointed out that a case for winding up under the just and equitable rule at the instance of a contributory is difficult to establish and it is suggested that there is no sufficient reason for making the establishment of such a case an essential condition of intervention by the court."

82. Then at paragraph 204, the Committee made the following remark with regard to Section 210:

> "The intention underlying Section 210 .... was ..... to cover complaint not only to the effect that the affairs of the company were being conducted in a manner oppressive .... but also to the effect that those affairs were being conducted in a manner unfairly prejudicial to the interest of those members."

83. After the Jenkins Committee Report England got Section 75 of the Companies Act, 1980. Sub-section (1) of Section 75 is as follows :

> "75. Power of court to grant relief against company where members unfairly prejudiced.--(i) Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

Provisions relating to oppression and mismanagement was first introduced in 1951 in the Companies Act, following the enactment of section 210 in the English Companies Act, 1948. The genesis of the

provisions contained, is therefore, to be found in section 210 of the English Companies Act, 1948, as found by the Gujarat High Court Bhagwati, J. in *Sheth Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton* (1964) 34 Comp Cas 777 (Guj): (1964) 0 GLR 804 thus: "The position which obtained prior to the enactment of section 210 of the English Companies Act, 1948, was that even if the affairs of a company were being conducted in a manner oppressive to some part of the shareholders or in a manner prejudicial to the interests of the company, the aggrieved shareholders had no effective remedy to put an end to such conduct, for unless the case fell within any of the three recognized exceptions to the rule in *Foss v. Harbottle* (1) (1843) 2 Hare 461, the court had no jurisdiction to interfere with the internal management of the company and even in a case falling within any of the three recognized exceptions to the rule in *Foss v. Harbottle* (1) (1843) 2 Hare 461, all that the aggrieved shareholders could do was to challenge an act already done by the controlling shareholders as part of such conduct and they could not take any effective steps to prevent the continuance of such conduct. The only remedy which the aggrieved shareholders had was just and equitable to do so. That remedy was however totally inadequate for it meant killing the company for the purpose of putting an end to the oppression and mismanagement. But killing the company would be a singularly clumsy method of ending oppression and mismanagement and such a course might well turn out to be against the interests of the minority shareholders. The liquidation of the company may result in the sale of its asset at break-up value which may be small and the minority who, urged by the oppression of the majority, petitions for a winding up order may in effect play its opponent's game, for the only available purchaser of the assets of the company may be the very majority whose oppression has driven the minority to seek redress.

Hence, the Cohen Committee recommended an alternative and less drastic expedient for bringing to an end oppressive conduct on the part of those in control of the company and this expedient is now embodied in section 210 of the English Companies Act, 1948. Following the enactment of this section the legislature introduced section 153C in the Indian Companies Act, 1913 (predecessor of the Companies Act, 1956 which in turn is predecessor of the Companies Act, 2013), providing an alternative remedy for putting an end to oppression or mismanagement on the part of the controlling shareholders. The remedy given by section 153C was a more effective and less drastic remedy then the remedy of winding up for

if there was oppression or mismanagement, the aggrieved shareholders could, instead of applying for winding up the company in order to put an end to such oppression or mismanagement, apply for relief under the section and the court could make such order as it thought necessary with a view to putting an end to such oppression or mismanagement and preventing its recurrence.

When the Companies Act, 1956, was enacted, what was originally section 153C was split up into sections 397 and 398 and the scope of the remedy was expanded by removing in cases covered by section 398, the requirement that the aggrieved shareholders must make out a case for winding up under the just and equitable clause before they can apply for relief under that section. The object and purpose of the remedy, however, remained the same, namely, to curse the mischief of oppression or mismanagement on the part of controlling shareholders by bringing to an end such oppression or mismanagement so that it does not continue in future. The remedy was intended to put an end to a continuing state of affairs and not to afford compensation to the aggrieved shareholders in respect of acts already done which were no longer continuing wrongs."

The Kerala High Court in *Palghat Exports Private Ltd. v. T.V. Chandran* (1994) 79 Comp Cas 213 (Ker) further observed:

> 'The recommendation of the Babha Committee in 1952 widened the scope and area still further. The remedy was extended by not confining it to cases of minority oppression, but also the cases of mismanagement of company affairs in a manner prejudicial to the interests of the company. In 1963, the provision of the Companies Act, 1956, was amended extending the scope of the provision to include where the affairs of the company were being conducted in a manner prejudicial to the public interest.'

It will, therefore, be noted that whereas under the English Act a single member, no matter what his share-holding is, has a right to complain under Section 210, the right given under the Indian Companies Act, in the case of a company having a share capital, is given to a group of not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or to a member or members holding not less than one-tenth of the issued share capital of the company. In the Indian Act no upper limit is specified but in the heading

of the English Act if Section 210 is to have any effect it is the right of the minorities to apply under the section. The marginal note of Section 210 is "alternative remedy to winding up in case of oppression" whereas Section 397 finds a place in Chapter VI of the Act headed "Prevention of oppression and mismanagement" and has the marginal note "Application to Court for relief in cases of oppression"…… It will be noted that the two conditions are also present in Section 397; but whereas Section 210 with its heading goes to show that the right is available only to the minority shareholders, Section 397 contains no such limitation, the right to apply being circumscribed by Section 399.

After the economy of the country opened up and the national and international economic environment changed, the Government decided to replace the 1956 Act with a new one. Accordingly, the Companies Bill, 2009 was introduced in the Lok Sabha. But this bill was withdrawn and the Companies Bill, 2011 was introduced. This eventually became the Companies Act, 2013. Among the many changes brought about by this Companies Act, 2013, those relating to protection of minority shareholders is what is relevant for our purpose. In fact, paragraph 5(ix) of the Statement of Objects and Reasons for the Companies Act, 2013 deals with the issue of protection of minority shareholders. It reads as follows: "5. (ix) Protection for Minority Shareholders: (a) Exit option to shareholders in case of dissent to change in object for which public issue was made; (b) Specific disclosure regarding effect of merger on creditors, key managerial personnel, promoters and non-promoter shareholders is being provided. The Tribunal is being empowered to provide for exit offer to dissenting shareholders in case of compromise or arrangement; (c) The Board may have a director representing small shareholders who may be elected in such manner as may be prescribed by rules." Chapter XVI of the 2013 Act containing Sections 241 to 246 deals exclusively with "Prevention of Oppression and Mismanagement." [see The Supreme Court in *Tata Consultancy Services Limited v. Cyrus Investments PVT. Ltd* (2021) 227 Comp Cas 1 (SC)

The Supreme Court further observed:

> "15.24 Thus the English legislative history of the provisions relating to oppression, mismanagement and prejudice, show 3 milestones, namely (i) the introduction in the year 1862, of the 'just and equitable clause' for winding up and the conferment of

a limited right on the dissentient member, whenever a transfer or sale took place in the course of winding up proceedings, (ii) the provision of an alternative remedy to winding up, in case of oppression of minority, in the year 1948 and (iii) the shift from oppression to the 'unfair prejudice' quotient in 1980/1985. The journey, in other words, was from "winding up on just and equitable cause" to "oppression" to "unfair prejudice".

15.25 But insofar as India is concerned, what was incorporated in section 210 of the English Companies Act, 1948, inspired the insertion of section 153C of the Indian Companies Act, 1913, by way of an amendment in 1951. Then came sections 397 and 398 of the 1956 Act, with certain modifications. An overhaul of these provisions resulted in Sections 241 and 242 of the 2013 Indian Act, on the model of (and not exact reproduction of) sections 459 to 461 of the English Companies Act, 1985 and sections 994 to 996 of the English Act of 2006.

15.26 The change of language and the consequential change of parameters for an inquiry relating to oppression and mismanagement from 1951 to 1956 and from 1956 to 2013 and thereafter can be best understood, if the anatomy of the statutory provisions are dissected and presented in a table : 1913 Act (After the Amendment Act 52 of 1951) 1956 Act (with the amendment made under Act 53 of 1963) 2013 Act (1) Company's affairs are being conducted in a manner (a) Prejudicial to the company' interest; or (b) Oppressive to some part of the members; and (2) Winding up will unfairly and materially prejudice the interests of the company's or any part of its members:

(1) Company's affairs are being conducted in a manner (a) Prejudicial to public interest; or (b) Oppressive to any member or members; or (c) Prejudicial to the interests of the company; and

(2) Winding up will unfairly prejudice such (1) Company's affairs have been or are being conducted in a manner– (a) Prejudicial to any member or members; (b) Prejudicial to public interest; or (c) Prejudicial to the interests of the

company; or (d) Oppressive to 123 (3) The object should be to bring to an end, the matters complained of member or members, any member or members, (2) Winding up will unfairly prejudice such member or members."

1.6 OPPRESSION AND MISMANAGEMENT – PURPOSE

Prevention of oppression and mismanagement is the heading of the chapter XVI of the Companies Act, 2013 under which section 241 falls. The language of section 241 leaves no doubt as to the true intendment of the legislature and it is transparent that the remedy provided by it is of a preventive nature so as to bring to an end oppression or mismanagement on the part of controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders or the company. The remedy is not intended to enable the aggrieved shareholders to set at naught what has already been done by controlling shareholders in the management of the affairs of the company [see *Sheth Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton* (1964) 34 Comp Cas 777 (Guj): (1964) 0 GLR 804]. The Court also observed: "But it must be remembered that within these confines the remedy is a very potent and effective remedy, since the power it confers on the court is extremely wide and the court can pass such order as it thinks necessary for the purpose of putting an end to oppression or mismanagement on the part of controlling shareholders. The nature of the order would depend on the state of affairs prevailing in the company and the nature of the restrictions required to put an end to such state of affairs. The necessity of interference under the section may arise in an infinite variety of circumstances and the legislature has, therefore, left the discretion of the court unfettered in the matter of making an appropriate order. Such power can, however, be exercised by the court only for the purpose of bringing to an end oppressive or prejudicial conduct in the management of the affairs of the company."

1.7 INTERVENTION TO PROTECT MINORITIES

Lord Macnaghten in *Welton v. Saffery* [1897] AC 324 observed: "These companies are the creature of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the conditions of the memorandum

of association. Shareholders in these companies require protection just as much as creditors—perhaps even more; shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concern. Their security in a great measure depends on the directors adhering to the requirements of the Act."

The Companies Act provides for the protection of minorities in three ways: (i) by giving them a right to complain against oppression, (ii) by permitting them to act on behalf of the company when it is wound up, as in the case of misfeasance proceedings, and (iii) by enabling them to obtain remedies through investigation. Investigation of company's affairs has always been understood as a statutory exception to the rule in *Foss v. Harbottle* (1843) 2 Hare 461, that the internal affairs of a company is a matter for the majority, and dissatisfied minority cannot seek outside interference [see *Premier Plantations Ltd and another v. M.Ebrahimkutty and others,* (2002). 110 Comp Cas 721 (Kerala High Court)]

The Companies (Amendment) Act, 2019 brought in the concept of investigation under "Prevention of Oppression and Management" by introducing sub-section (3) under section 241 for the Tribunal to investigate on a complaint by the Central Government if the circumstances exist suggesting a person guilty of fraud, misfeasance, persistent negligence or default in carrying on the business.

If the act of the majority is oppressive, illegal or is a fraud on the minority or is not *bona fide* or for the benefits of the company as a whole, the court can intervene to provide relief from oppression and mismanagement. This is what Chapter XVI with a heading "Prevention of Oppression and Mismanagement" is about.

1.8 CASES FOR PREVENTION OF OPPRESSION AND MISMANAGEMENT DIFFERENT FROM CIVIL CASES

For prevention of oppression and mismanagement, what is required to be established is the existence of prejudice. It is the conduct, not one action like in a civil case, decides existence of prejudice whether the action of the majority is equitable or unequitable. In a civil case what is seen is whether a specified action is in violation of law or not, no matter whether it is equitable or not. But for prevention of oppression and mismanagement under section 241 of the Companies Act, it does not matter whether actions are lawful or