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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION (L) NO. 22525 OF 2021
IN
SUIT (L) NO. 22522 OF 2021

ZEE ENTERTAINMENT ENTERPRISES LTD.,
A listed public company incorporated under the provisions of the Companies Act, 1956, having its registered office at 18th Floor, 'A' Wing, Marathon Futurex, NM Joshi Marg, Lower Parel, Mumbai 400 013

… **Plaintiff (Applicant)**

~ VERSUS ~

1. **INVESCO DEVELOPING MARKETS FUND,**
Through its Investment Adviser, Invesco Advisers, Inc., 2 Peachtree Pointe, 1555 Peachtree Street, NE, Suite 18 Atlanta, GA 30309, United States

2. **OFI GLOBAL CHINA FUND LLC,**
Through its Managing Director, Oppenheimer Funds, Inc., 225 Liberty St., New York, NY, 10281

1005, United States

3. **PUNIT GOENKA**,
Adult, Indian inhabitant, Managing Director and Chief Executive Officer of Zee Entertainment Enterprises Ltd., residing at 6th & 7th Floor, Vasant Sagar Properties Pvt Ltd., A Road, Opp. Jay Hind College, Churchgate, Mumbai 400 020

...Defendants

APPEARANCES

For the Plaintiff/Applicant ("Zee")
Mr Gopal Subramaniam, *Senior Advocate*,
With Mr Aspi Chinoy, Mr Navroz Seervai, Mr Pesi Modi & Dr Birendra Saraf, Senior Advocates, & Mr Prateek Seksaria, Mr Nitesh Jain, Ms Nisha Uberoi, Mr Gautam Chawla, Mr Atul Jain, Mr Adrish Majumder, Ms Vatsala Kumar, Ms Ritika Ajitsaria, Mr Brihad Ralhan, Mr Hitesh Saini & Mrs Radhika Seth, Advocates, i/b Trilegal

For Defendants Nos. 1 & 2 ("Invesco")
Mr Janak Dwarkadas, *Senior Advocate*,
With Mr Ravi Kadam & Mr Sharan Jagtiani, Senior Advocates, & Mr Gaurav Mehta, Ms Rishika Harish, Mr Kingshuk Banerjee, Mr Bhavik Mehta, Mr Zacarias Joseph, Ms Sonali Aggarwal, Mr Ritvik Kulkarni, & Ms Prakruti Joshi, i/b Dhruve Liladhar & Co

For Defendant No. 3 ("Goenka")
Mr Kapil Sibal, *Senior Advocate*,
With Mr Zal Andhyarujina, Senior Advocate & Mr Suhail Nathani, Ms Mumtaz Bhalla, Mr Manendra Singh, Mr C Keswani & Mr Neeraj Malik, Advocates, i/b Economic Laws Practice

CORAM : G.S. Patel, J.

JUDGMENT RESERVED ON : 22nd October 2021

JUDGMENT PRONOUNCED ON : 26th October 2021

JUDGMENT:

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A. PARTIES

1. The Plaintiff ("**Zee**") is a well-known media enterprise. It is a public limited and listed company. Defendants Nos.1 and 2 (collectively, "**Invesco**") are investors in Zee and among its shareholders. Invesco holds about 17.88% of Zee's equity. Zee's promoter and promoter group hold or control about 3.99% of its

equity shareholding. The remainder is held by the public, including Invesco. Defendant No.3 ("**Goenka**") is Zee's Managing Director and Chief Executive Officer.

B. FRAME OF THE SUIT

2. In this suit, Zee asks, *first*, for a declaration that a Requisition Notice dated 11th September 2021 issued by Defendants Nos.1 and 2 (collectively, "**Invesco**") is illegal, ultra vires, invalid, bad in law and incapable of implementation. *Second*, Zee seeks a declaration that its refusal to act on the Requisition Notice is in accordance with law, valid and justified. *Third*, it seeks an injunction against Invesco from acting in furtherance of the Requisition Notice in question. The Interim Application follows the third prayer. I am considering the Interim Application. Given that the matter has been argued at considerable length, this order is the final order on the Interim Application.

C. THE QUESTIONS FOR DETERMINATION

3. Zee contends that Invesco's Requisition Notice contravenes various provisions of the Companies Act, 2013; the Securities & Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**the SEBI Listing Regulations**"); the Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

("**the SEBI Takeover Regulations**"); various guidelines by the Ministry of Information & Broadcasting ("**MIB**"); and the Competition Act, 2002. It says that the resolutions proposed by Invesco in the Requisition Notice are all illegal, ultra vires and invalid. If passed, they would put Zee afoul of a raft of controlling statutes and regulations. Shareholders' rights, including the right to requisition an Extraordinary General Meeting ("**EGM**"), do not extend to allowing shareholders to demand acts of illegality and non-compliance with statutes. Therefore, Zee says, it is entitled to the two declarations mentioned earlier: that the Requisition Notice is illegal, invalid, ultra vires and bad in law; and that Zee's action, through its Board of Directors, in refusing to call the requisitioned meeting was valid. Therefore, Zee claims, it is entitled to the consequential injunctions, both permanent and temporary.

4. Section 100 of the Companies Act lies at the heart of this controversy. The Board of Directors may call an EGM at any time. But shareholders who hold the qualifying equity (at least 10%) of a company that has a share capital may also requisition an EGM. The section says the Board 'shall' call an EGM within the specified time, 45 days from the date of receipt of the requisition. The requisition must set out the matters to be considered at the EGM. The requisition must be signed by the requisitionists, and it must be sent to the registered office of the company. The Board has 21 days to call the requisitioned EGM. Time runs from the date a 'valid' requisition is received. Should the Board not do so, i.e. should it not call the meeting within 21 days, the requisitionists may call and hold the meeting themselves within three months of the date of the requisition.

5. The response from Invesco is that it is not for the Board or the company to decide whether or not a particular proposed resolution — or all the proposed resolutions — are, according to the Board or the company, illegal or valid. The general body of shareholders will decide in general meeting whether or not to pass a particular proposed resolution, or any of the proposed resolutions. The shareholders' rights to call an EGM cannot be curtailed by the company or its Board. If a resolution is 'ineffective', it will simply be 'still-born' and will not be put into effect. But that does not mean that the EGM should be interdicted. Principles of corporate governance and indoor management militate against the grant of any such injunction. Therefore, Invesco argues, the entire suit is premature and speculative: it *assumes* that the resolutions proposed at the requisitioned meeting will be passed by the necessary majority. This is by no means certain today. The word 'valid' in Section 100 merely requires compliance with the qualifying criteria in that section itself — the minimum percentage shareholding, whether the Requisition Notice is signed, and whether it has been delivered to the company's registered office. The word used in the section in relation to the Board's obligations is 'shall', and there is no call to read it permissively as 'may'.

6. On this last point, it seems to me that there is a fundamental disconnect in Invesco's construct. The section itself contemplates a refusal or failure by the Board to convene a requisitioned meeting; and the section then provides for what is to happen if the Board does *not* act. The Board has 21 days from date of receipt of the Requisition Notice to call a meeting within 45 days of that date. If it does not do so, the section says, the requisitionists *may* then call and

hold the meeting themselves. That is to say, the requisitionists may accept the Board's failure or refusal and do nothing, in which case the Requisition Notice simply lapses. Or the requisitionists may, at their option, call and hold the meeting. I have ventured this at the forefront as it seems to me too trivial a matter to warrant further attention.

7. More accurately, the question is, I think, this: can the *Court* — not the Board — be asked to assess the validity of the resolutions proposed at the requisitioned EGM? Even before the EGM is called and held, can the Court be asked to hold that one or more of the proposed resolutions are invalid, illegal, or likely to be ineffective (or, as it was put to me, 'still-born')? If the Court does believe that the proposed resolutions are invalid, illegal or, if passed, likely to be ineffective, should the Court refuse to step in, and, instead, allow the EGM to go ahead — sometimes at quite considerable costs, direct and indirect — even if, should the proposed resolutions be passed, the result is a foregone conclusion of 'ineffectiveness'?

8. Addressing this, Invesco raises a point of this Court's jurisdiction. It says it is ousted by Section 430 of the Companies Act. But Zee says that the dedicated tribunal, the National Company Law Tribunal or NCLT, does not have the power or authority to decide any such questions. It simply cannot be, Zee argues, that *no* court or tribunal can decide the question — even if the end-result is going to be, at a minimum, an ineffectiveness and, very possibly, an illegality that might well sink the entire enterprise.

D. SUMMARY OF FINDINGS

9. I have heard Mr Subramaniam and Mr Chinoy for Zee, Mr Sibal for Goenka and Mr Dwarkadas for Invesco. I have considered their rival submissions and, with their assistance, the statutes and authorities cited. The matter is not, I believe, quite as simple or innocuous as Mr Dwarkadas would have it. There is some authority from law in England that points to the authority of a court to intervene in precisely this scenario. Decisions of courts in England forced a change in the law there. Here, we are at a stage just before the statutory amendments in the UK. There is also some authority in India, and from this court itself, to indicate that it is not in every case that a court is entirely powerless.

10. Mr Subramaniam's case that Zee is caught between the Scylla of Section 100 to call an EGM to consider certain resolutions and the Charybdis of those resolutions, if passed, causing Zee to be potentially non-compliant and severely damaged in its business is, in my considered view, a compelling argument. I find it difficult to countenance a situation where, once it is shown, as I believe it is, that the proposed resolutions are in the teeth of statutory and regulatory requirements, a court of law is entirely effete. It seems to me even more egregious to be forced to conclude that no court or tribunal can ever or in any circumstances intercede.

11. There is one fundamental flaw in Invesco's construct. It assumes that resolutions at an EGM requisitioned by shareholders are somehow special or more sacrosanct than resolutions proposed

by the Board itself. There is no warrant for this. If the Board itself proposes an EGM to consider these very resolutions, or ones equally vulnerable, it is entirely possible for anyone with sufficient legal standing, even a shareholder in a derivative action, to ask of a Court precisely that which Zee does today. The source or provenance of the resolutions is entirely immaterial. Shareholders have no greater immunity. If the Board cannot propose resolutions that are infirm or ineffective, neither can shareholders.

12. I have held that this Court's jurisdiction is not ousted. It can, and must, when presented with a case like this, perhaps an outlier, consider whether the resolutions proposed would be ineffective, that is to say, not merely undesirable or sub-optimal, but ones that cannot in law be given effect to. In that scenario, a court is not forbidden, either expressly or by necessary implication, from intervening.

13. I have granted the injunction. My reasons follow.

E. FACTUAL BACKGROUND

14. The facts are few. Invesco issued the Requisition Notice on 11th September 2021. It meets the necessary requirements: signed by shareholders with more than 10% of Zee's equity and delivered to Zee's registered office.

15. The Requisition Notice has nine items. Of these, item 1 seeks the removal of Goenka as a director. Items 2 and 3 sought the removal of two other directors, Mr Manish Chokhani and Mr Ashok Kurien. They have since resigned, so those two proposed resolutions are redundant. The next six resolutions sought the appointment of six named individuals as 'independent directors'. These were said to be 'subject to MIB approval'. No such precondition is found in the first three resolutions.

16. Zee held its Annual General Meeting on 14th September 2021. Chokhani and Kurien resigned for personal reasons unconnected with the Requisition Notice. Zee informed the Bombay Stock Exchange and the National Stock Exchange.

17. With the resignation of Chokhani and Kurien, Zee's board had Goenka as the Managing Director and CEO, and six other existing independent directors. Zee's Articles of Association provide for a 12-director Board. This meant that unless the resolution removing Goenka was carried, the resolutions for all six of the names proposed by Invesco could not be carried: the Board strength would have gone to 13 directors.

18. On 15th September 2021, Invesco asked Zee if it had sought MIB approval for the appointment of the six independent directors proposed in the Requisition Notice. Later that day, Invesco sent further documents relating to the profiles and experience of some of the directors it proposed be appointed. On 20th September 2021, Invesco sent in revised forms, annexures and additional documents.

19. Paragraphs 23 to 28 of the Plaint contain a narrative of a preliminary non-binding term sheet Zee executed with Sony Pictures Networks India Pvt Ltd ("**Sony India**") on 22nd September 2021. This has no relevance to the discussion at hand and I have chosen to ignore it entirely. Both sides may have quite a lot to say about it; I do not see the need to hear any of it. The Requisition Notice preceded the term sheet and the Sony India negotiations by a good ten days. The Requisition Notice was not triggered by anything Zee did vis-à-vis Sony.

20. Under the statute, Zee's board would have had 21 days from 11th September 2021 (until 3rd October 2021) to call the requisitioned EGM. On 29th September 2021, Invesco filed Company Petition No. 322 of 2021 before the NCLT under Sections 98(1) and 100 of the Companies Act against Zee, Goenka, all existing independent directors and Zee's registrar and share transfer agent. Invesco sought an order from the NCLT to call and hold an EGM of Zee on or before 28th October 2021. That matter before the NCLT is pending following an order of the NCLAT.

21. Zee's independent directors met on 30th September 2021 and its Board met on 1st October 2021. Goenka recused himself from the Board meeting and did not vote on any resolution regarding the Requisition Notice. The Board considered legal opinions received and concluded that the Requisition Notice was invalid. It expressed its inability to convene the EGM, and felt that not calling the requisitioned EGM was in the best interests of Zee and its shareholders. The Board decided that Zee should approach this court on the question of validity of the Requisition Notice.

22. On 1st October, Zee emailed Invesco conveying the Board's decision, providing reasons and its justification. Specifically, the Board said the resolutions proposed in the Requisition Notice would:

(a) Contravene Regulation 17 of the SEBI Listing Regulations;

(b) Violate Section 203 of the Companies Act;

(c) Be non-compliant with the MIB Guidelines and contrary to Zee's Articles of Association;

(d) Amount to a bypassing or jettisoning of the mandatory statutory provisions regarding a Nomination and Remuneration Committee as also the approval and opinion of the Board, all of which were pre-requisites to the appointment or removal of any director; and

(e) Violate the SEBI Takeover Regulations and the Competition Act.

23. Zee brought suit on 1st October 2021. It was circulated and listed before me on 13th October 2021. I directed the filings of replies and rejoinders, and posted the matter to Friday, 21st October 2021. On that day, I heard both sides fully. As time did not then permit this judgment to be delivered in open court, I directed it to be placed on Tuesday, 26th October 2021, today, for orders.

F. RIVAL SUBMISSIONS: INEFFECTIVENESS OR INVALIDTY OF THE PROPOSED RESOLUTIONS

24. Mr Subramaniam opens his case with the submission that the proposed resolutions in the Requisition Notice are directly contrary to the Companies Act's provisions regarding directorships.

25. Chapter XI of the Companies Act deals with the appointment and qualifications of directors. Section 149 requires every company to have a Board of Directors. It provides a minimum and a maximum. Section 149(4) is specific to listed public companies. At least one-third of the total number of directors of such companies are to be independent directors. An independent director is defined in Section 149(6) as one who is not a Managing Director or a whole-time director or a nominee director. He or she must, *in the opinion of the Board*, be a person of integrity and must possess the relevant experience and expertise. There are requirements from sub-sub-sections (a) to (f), many with their subsidiary clauses, in regard to independent directors. Sub-sections (7) to (13) also all apply to independent directors. Then Section 150 prescribes the manner in which independent directors are selected. They are to be drawn from a data bank. Under Section 150(2), the appointment of independent directors is to be *approved* by the company in general meeting as provided in Section 152(2). The explanatory statement annexed to the notice of the general meeting called to consider "*the said appointment*" must show the justification for the appointment as an independent director. Under Section 178, the Board of Directors of every public listed company must constitute a Nominations and

Remuneration Committee or NRC of three or more non-executive directors, of which at least half are independent directors. The NRC is to identify persons who are qualified to be directors, to recommend their appointment (or removal). The NRC specifies the manner of effective evaluation of the performance of the Board, its committees and individual directors to be carried out either by the Board, the NRC or by an independent external agency. Under Section 178(3), it is the NRC that formulates criteria for determining qualifications, attributes and independence of a director and recommends to the Board a policy for determining remuneration etc.

26. Finally, Mr Subramaniam points to Section 203 of the Companies Act. This requires every company to have a Managing Director or Chief Executive Officer or manager, and failing any of those, a whole-time director.

27. His submission is that the resolutions proposed by the requisitionists run contrary to every one of these governing statutory provisions. We are, he says, not dealing with just a company. We are dealing with a company that falls in a special class of companies, that is say public limited companies. For these companies — typically with large shareholder bases and expansive operations — there are a set of 'watchdog laws' designed to ensure the transparent and regulated management and control of such companies. Consequently, it is not open for anyone to suggest a management change or restructuring outside the statutory and regulatory framework. There is no concept of direct appointment of independent directors by shareholders. They are to be drawn from a

databank, the NRC must recommend their appointment, the Board must be satisfied of their integrity and expertise, and their appointments are then subject to *approval* by the general body.

28. There is, he goes on, a marked difference between a shareholder of a public listed company demanding that the company should do whatever is necessary to appoint independent directors and a shareholder demanding that this or that particular individual should be foisted on the company as an allegedly independent director. The former course of action may conform to the statute; the latter never can. The entire set of proposals to place six persons hand-picked and chosen by the requisitionists to the board is not one that the law contemplates, even if every single one of those six is supremely qualified. He makes no allegations against any of the six; he simply says that whoever they are, however qualified or capable, the law does not permit their being directly seated on the Board.

29. Conceptually and philosophically, he maintains, there is a difference between an independent director appointed according to the Companies Act and following its provisions, and six named individuals being put there at the instance of one group of shareholders. That nomination of identified individuals speaks — and not well — of their 'independence'. It is impossible not to see these as 'nominees' of the requisitionists, and there is little achieved by protestations of the excellence of the Chosen. In the scheme of the Companies Act, shareholders do not get to choose individual independent directors. They may only demand that there be independent directors.

30. Section 203, in contrast, applies to every company of a prescribed class. Such a company must have a Managing Director or a Chief Executive Officer or manager or, in their absence, a whole-time director. Goenka is the Managing Director and the Chief Executive Officer. The requisition demands his ouster — but without proposing a replacement. This puts Zee into a statutory black hole, for it would then be totally in violation of Section 203(1); and it, and its directors, would have to face the liabilities, including fines, set out in Section 203(5). No shareholder can be permitted, he submits, to drive his company into a state of non-compliance and penalty.

31. But the Companies Act is not the only regulatory provision for directors of a public listed company. Also applicable are the SEBI Listing Regulations. Regulation 17(8)[1] has provisions for the Board of Directors of a listed company. It speaks of an 'optimum' combination of executive and non-executive directors. At least half must be non-executive, and at least one must be a woman. Then there are provisions for independent directors. Regulation 16(1)(b) broadly follows Section 149(6) of the Companies Act regarding independent directorships.[2] Regulation 19[3] requires an NRC and specifies its composition: at least three directors, all to be non-executive, and at least two-thirds to be independent. A failure to comply invites severe consequences under Regulation 98,[4] including

1 Statutes compilation, *pp.* 378–380.
2 Statutes compilation, *p.* 377.
3 Statutes compilation, *p.* 381.
4 Statutes compilation, *p.* 409.

fines, a suspension of trading, a freezing of promoter/promoter group holding of designated securities and any other action.

32. Read together, Mr Subramaniam submits, independent directors' nomination, appointment and approval of appointment are tightly controlled by these provisions. They all hinge on the NRC identifying persons suitable for the task. Once there is a recommendation by the NRC, the Board must satisfy itself on that NRC recommendation. If the Board accepts the NRC recommendation, then shareholder approval is to be sought in general meeting. There is simply no way in law to leapfrog steps one and two and fuse them into the third, where the shareholders directly *nominate, appoint and approve the appointment of* independent directors. Read with the resolution proposing Goenka's removal, Mr Subramaniam submits, the result will be one wholly alien to law — a Board with *only* independent directors.

33. But it does not end there, Mr Subramaniam says. Clause 5.10 of the MIB Guidelines[5] requires a company under those guidelines to seek prior permission from MIB before effecting any change to the CEO or Board of Directors. The change cannot be effected in advance of permission. A default invites penalties, including the suspension of the license and a 30-day ban on broadcasting[6] (90 days for a second violation).[7] In the Requisition Notice, only the resolutions for the appointment of the six new independent directors are said to be 'subject to MIB approval'. The removal of

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5 Statutes compilation, *p.* 497.

6 Clause 8.2.1, Statutes compilation, *p.* 500.

7 Clause 8.2.2, Statutes compilation, *p.* 500.

Goenka is not. But even that requires *prior* MIB permission, as does any change in the constitution of the Board. Mr Subramaniam submits that there is no situation in which 'prior permission' equates to 'subject to approval'. The latter is, by definition, ex post facto; the former is clearly not. Therefore, he contends, the entire resolution structure is not merely flawed; it drives through a demonstrable illegality and infirmity, one that will jeopardize the functioning of the company and threatens the interests of all shareholders.

34. Finally, there are the SEBI Takeover Regulations.[8] Regulation 2(1)(e) defines 'control'.[9] It includes the right to appoint a majority of directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, *including by virtue of their shareholding rights*. Regulation 2(1)(a) defines an 'acquirer' to mean inter alia a person who acquires control over a 'target company'. Regulation 4 says that irrespective of any acquisition or holding of shares or voting rights, no acquirer may acquire control unless the acquirer makes a public announcement of an open offer for acquiring the shares of the target company in accordance with the Takeover Regulations.

35. The upshot of all this taken together, Mr Subramaniam says, is that the proposed resolutions are all misbegotten — illicit in conception, illegal in form and iniquitous in result.

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8 Statutes compilation, *pp.* 447–488.

9 Statutes compilation, *p.* 447.

36. I am inclined to agree with Mr Subramaniam on all counts. I do not see how Goenka can be removed at all, leaving a managerial void only to be *possibly* later filled. His removal causes an immediate vacancy and non-compliance. How this is to be done without prior permission of the MIB is also unclear. I see no method of circumventing the NRC or directly proposing named persons as 'independent directors'.

37. The answer I have from Mr Dwarkadas to all this is, frankly, less than compelling. Indeed, I have no direct answer to the argument Mr Subramaniam so sedulously constructs. His only answers seem to be three: *one*, that shareholders have an unfettered right to propose any resolution they choose at an EGM, the only requirement being having the necessary numbers and complying with the procedure of Section 100. *Two*, that if the proposed resolutions are indeed found to be — in his words — 'unworkable', they will be 'still-born', and no effect will be given to them. *Three*, that the outcome of the EGM is by no means a foregone conclusion, and the suit is, therefore, premature.

38. Each of these seem to me to be inherently doubtful. The first proceeds on the footing that shareholders have some superior right to propose resolutions to the general body, ones that stand on a higher pedestal than resolutions proposed to the general body by the Board itself. I find nothing to support a proposition that is so overbroad.

39. The second submission draws a distinction between the procedure for requisitioning an EGM and the subject of that EGM, i.e. the proposed resolutions. Taken to its logical extreme, this means that a group of qualified shareholders can propose any sort of resolution, regardless of its legality, and force this to be considered by the general body at an EGM. I specifically asked Mr Dwarkadas if this meant that a group of qualified shareholders could propose that the company take up the business of online gambling. His response was that this is too extreme or outlandish. Indeed it is; and that is precisely the point. A proposition — like any hypothesis in philosophy — has to be tested for falsification or failure. Based on the work in philosophy of Sir Karl Popper, this is called null hypothesis testing: using deductive reasoning to ensure that the truth of conclusions is irrefutable. Any hypothesis has to be tested, repeatedly, for failure; including testing at the margins or extremities. It is no use saying that a hypothesis fits a median situation. The question is whether the hypothesis survives a test or collision against a polarity? If it does, then it is sound; if not, it must fail throughout and considered unsound. This has a direct application to the case at hand. If the resolutions proposed are not such as can even be countenanced in law, then how does the question of putting them to vote at an EGM even arise? I am leaving aside for now the very serious considerations of the costs and logistics of calling an EGM with such a wide shareholding base.

40. The third answer also does not commend itself. Indeed, it seems to me to provide its own answer from the result of the second submission. If the inevitable consequence is going to be something effete — incapable of effective action — why compel the meeting at

all? Or, more accurately, why not interdict something that is shown well in advance to end in an utterly useless and sterile result?

41. But this is not really the focus of Mr Dwarkadas's attention. His argument is centred around Section 100 of the Companies Act, to say that under its structure, there is no concept of judicial interference with a requisitioned EGM, once the necessary numerical and procedural requirements are met. In the law as it stands in India, it is the notice that matters, not what it says or attempts to do. The subject of the notice is totally immaterial. If he is correct in that submission, then no matter how strong a case Mr Subramaniam makes on the invalidity or ineffectiveness of the proposed resolutions, I must refuse the injunction.

G. SECTION 100 OF THE COMPANIES ACT

42. Section 100 reads:

> **100. Calling of extraordinary general meeting.—**
>
> (1) **The Board may, whenever it deems fit, call an extraordinary general meeting of the company.**
>
> Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India.
>
> (2) **The Board shall, at the requisition made by,—**
>
> **(a) in the case of a company having a share capital, such number of members who hold, on the date of the receipt of the requisition, not less**

than one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting;

(b) in the case of a company not having a share capital, such number of members who have, on the date of receipt of the requisition, not less than one-tenth of the total voting power of all the members having on the said date a right to vote,

call an extraordinary general meeting of the company within the period specified in sub-section (4).

(3) The requisition made under sub-section (2) shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company.

(4) If the Board does not, within twenty-one days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than forty-five days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves within a period of three months from the date of the requisition.

(5) A meeting under sub-section (4) by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.

(6) Any reasonable expenses incurred by the requisitionists in calling a meeting under sub-section (4) shall be reimbursed to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration under section 197 payable to such of the **directors who were in default in calling the meeting**.

(*Emphasis added*)

43. The structure of this is straightforward. The Board may call an EGM at any time. In addition, so may shareholders. For a company with a share capital, only shareholders who, between them, hold at least 10% of the equity can requisition a meeting. The Section does not constrain the purpose of the requisition. It only requires this numerical strength to be met, and that the Requisition Notice must contain the matters to be considered, must be signed and must be sent to the registered office of the company. It cannot be correct to say that the Board is to rubber stamp every requisition. The section itself contemplates a situation where the Board fails (or refuses) to call a requisitioned meeting — Sections 100(4) and 100(6) make this clear. If the Board is in default, the requisitionists can themselves call a meeting. So far so good.

44. But there is equally nothing in this Section that says that a resolution proposed by either the Board or a set of requisitionists cannot ever be called into question before the meeting is held. As I noted earlier, the source or origin of the resolution in question is immaterial.

45. Mr Subramaniam says that the word 'valid' in Section 100(4) must mean a requisition that is valid in law, i.e. one whose objects are legally feasible and effective.

46. Mr Dwarkadas refutes this and says nothing in Section 100 support this interpretation. A 'valid' requisition is merely one that meets the necessary criteria of shareholding, setting out of the

matters to be considered, being signed and being delivered to the registered office. That is the whole of it.

47. He takes me to the decision of a SK Desai J of this Court in *Cricket Club of India Ltd & Ors v Madhav L Apte & Ors*.[10] That was a special case for the opinion of the Court under Order 36 of the Code of Civil Procedure, 1908. This was under the Companies Act, 1956. The 1st plaintiff, the CCI, is a company limited by guarantee, with no share capital. It received a requisition essentially seeking to amend the articles to restrict how long a member could serve on the executive committee. The plaintiffs believed that the proposed resolution and the consequential amendment would be contrary to certain provisions of the 1956 Act and would be invalid.

> Further, according to the executive committee, section 169(6) only comes into operation on the deposit of *a valid requisition* and the requisition proposing for consideration a resolution which would be illegal and invalid if carried, would not be a valid requisition within the contemplation of the said sub-section. According to them, therefore, the executive committee is not bound to call an extraordinary general meeting, which has been described by the plaintiffs as an "exercise in futility".

48. One of the questions was whether the requisition was 'valid'. The Court held:

> 25. Under the Indian Companies Act, 1913, the provisions as regards calling of extraordinary general meetings on requisition were to be found contained in section 78 of the said Act. Under those provisions the directors of a company

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10 1974 SCC OnLine Bom 40 : (1975) 45 Comp Cas 574.

which has a share capital were enjoined on the requisition of the holders of not less than one-tenth of the issued share capital of the company, upon which all calls had been paid, to call an extraordinary general meeting of the company. The scheme was substantially similar to the scheme of section 169 of the Companies Act, 1956. Sub-section (2) of section 78 provided for the contents of the requisition and the mode of its deposit; and sub-sections (3) to (5) provided for calling of a meeting by the requisitionists on failure by the directors to cause a meeting to be called for after deposit of a requisition. In sub-section (3) of section 78, however, the words used were "date of the requisition being so deposited". Under section 169(6) of the Companies Act, 1956, one finds a change in the terminology, the provision being that the requisitionists may themselves call a meeting (subject to other provisions, with which we are not concerned) if the board does not call a meeting "within twenty-one days from the date of deposit of a *valid* requisition" (underlining supplied). **Now, it was urged by learned counsel for the plaintiffs that the additional word "valid" indicated clearly that the requisition which was made must be valid and lawful; in other words, that a requisition which was for consideration of something which would be illegal or invalid could not per se be considered to be a valid requisition, and if such requisition was deposited with the directors of a company the directors were not required to call a general meeting although the numerical requirement provided for in the earlier part of the said section was satisfied.** Now, it may be pointed out that whereas under section 78 of the Indian Companies Act, 1913, the power to call an extraordinary general meeting was restricted to companies having a share capital, under section 169 of the Companies Act, 1956, such power can be exercised by the members of the company having a share capital as also by

members of a company not having a share capital, and the requirements in the latter case are to be found in clause (b) of sub-section (4). Other requirements of a proper requisition have also been spelt out in greater detail in section 169; **and, in my opinion, it would be proper to understand the word "valid" used in sub-section (6) of section 169 as having reference to the provisions of the earlier five sub-sections of that section rather than indicating compliance with any other requirements or provisions of the Companies Act. In other words, to put it shortly, all that is required to be seen before the provisions of sub-section (6) of section 169 become applicable would be to consider whether the requisition deposited was in accordance with the provisions of section 169 as to its contents, the number of signatories and similar matters, and it would not be open to the board of directors of a company to refuse to act on a requisition on the ground that, although such requisition was in accordance with the requirements of section 169, it was otherwise invalid.** This conclusion receives support when one peruses sub-section (5) of section 169, where also the use of the word "valid" is perceived. **The learned counsel for the plaintiffs emphasised the mischief that in his opinion would be caused by an otherwise invalid requisition being made which would put the company to considerable financial loss for what he called would be an exercise in futility. On the other hand, the question to be considered would be whether the board of directors of a company can be allowed to ignore a requisition which complies with all the requirements laid down in section 169 of the Companies Act, 1956, on the ground that the object of the requisition was illegal or otherwise invalid and, therefore, the requisition was not a valid requisition which ground may ultimately be found to be unsustainable. In my view, the word or the adjective**

> **"valid" in section 169 has no reference to the object of the requisition but rather to the requirements in that section itself. If these requirements indicated in the earlier part of the section are satisfied, then the requisition deposited with the company must be regarded as a valid requisition on which the directors of a company must act. If the directors fail to act within the period specified by sub-section (6), then, in my opinion, the requisitionists would be entitled to proceed under the later provisions of that sub-section and the other sub-sections of section 169.**
>
> (*Emphasis added*)

49. The Court held that the Board was bound to call the requisitioned meeting even though proposed amendment to the Articles would be invalid.

50. But this seems to me to rather beg the question. The *Cricket Club of India* court was not presented with a question as to the power or remit of a *Court*, whether or not to grant an injunction. In any case, this decision was considered by another learned single Judge of this Court, Mrs Justice Sujata Manohar in *Centron Industrial Alliance Ltd v Pravin Kantilal Vakil & Anr*.[11] This, I think, is nearer home. It arose in the context of a scheme of amalgamation. There, too, was a requisition that was otherwise numerically 'valid'. It sought a resolution—

> that the company renegotiate with the Brooke Bond India Ltd. and/or examine alternate scheme(s) in the interest of the company and for the purpose, resolved further that the company should withdraw Company Petition No. 84 of

11 1982 SCC OnLine Bom 318 : (1985) Comp Cas 12.

> 1981 filed in the High Court in Bombay from the date of this resolution."

51. The Board did convene an EGM as requisitioned. A shareholder filed a suit in the City Civil Court for an injunction restraining the company from holding the EGM. That was refused. Another shareholder filed a Judge's Summons for an order that pending the final disposal of the company petition, the requisitionists should be restrained from holding or proceeding with the EGM. The court examined the nature of the requisition itself. In paragraph 6, it posed this question:

> 6. Can the shareholders thereafter requisition a meeting for the purpose of compelling the company to withdraw the petition for sanctioning the scheme? In other words, is it open to the shareholders to compel the company to resile from its legal obligation to present a petition for confirmation of the scheme?

52. Paragraphs 19 to 21 of *Centron* are important:

> 19. The opponents, in the present case, have strongly relied on the provisions of s. 169 of the Companies Act and have submitted that no injunction should be granted restraining the holding of a requisitioned meeting of the company. Under the provisions of s. 169 of the Companies Act, the board of directors of a company shall, on the requisition of such number of members of the company as is specified in sub-s. (4) forthwith proceed duly to call an extraordinary general meeting of the company. Thus, if the board of directors receive a valid requisition signed by the requisite number of members, they are bound to call a requisitioned meeting of the company. In this connection, the opponents rely upon a decision in the case of *Isle of Wight Railway Co. v. Tahourdin*, [1884] 25 Ch D 320 (CA).

The court, in that case, held that it would not interfere with the internal working of the company and that when the shareholders had requisitioned a meeting, the board of directors is bound to call such a meeting and it cannot refuse to call such a meeting on the ground that some of the resolutions, if passed at such a meeting, would be irregular. Lord Justice Lindley observed in that case as follows (at p. 333):

> "We must bear in mind the decisions in *Foss v. Harbottle*, [1843] 2 Hare 461 and the line of cases following it, in which this court has constantly and consistently refused to interfere on behalf of shareholders, until they have done the best they can to set right the matters of which they complain, by calling general meetings. Bearing in mind that line of decisions, what would be the position of the shareholders if there were to be another line of decisions, prohibiting meetings of the shareholders to consider their own affairs? It appears to me that it must be a very strong case indeed which would justify this court in restraining a meeting of shareholders. I do not mean to say of course that there could not be a case in which it would be necessary and proper to exercise such a power. I can conceive a case in which a meeting might be called under such a notice that nothing legal could be done under it. Possibly in that case an injunction to restrain the meeting might be granted."

20. In the case of *Cricket Club of India Ltd. v. Madhav L. Apte*, [1975] 45 Comp Cas 574 (Bom), a special case was taken before a learned single judge of this court to consider the question whether the board of directors of a public

limited company was bound to call a meeting requisitioned by its members when the resolution which was purported to be passed in such a meeting was contrary to the provisions of s. 274 of the Companies Act. The learned single judge, who answered this question, held that the board of directors were bound to call a meeting which was so requisitioned, even though the resolution which would be passed at such a meeting would be contrary to the provisions of s. 274 of the Companies Act. Now, these cases pertain to the shareholders calling a requisitioned meeting of the company for considering matters relating to the internal management of the company. In neither of these cases, there was any question of a requisitioned meeting being called to consider matters which affected persons other than the members and the company or to compel the company to resile from its statutory obligations or to interfere with the exercise of the court's jurisdiction under s. 391 of the Companies Act.

21. **One of the main reasons why injunctions are not normally granted to restrain the holding of a requisitioned meeting is that the shareholders ought to be allowed to regulate and set right the affairs of the company by calling general meetings. The court, has, therefore, been reluctant to interfere in the internal management of the company.** Secondly, such injunctions were sought in the cases cited before me by the board of directors of the company. The courts have not normally permitted the board of directors of the company to sit in judgment over the requisition received by them to call a meeting of the shareholders. **Normally, such a meeting would be required to be requisitioned by the shareholders in order to pass resolutions which are not supported by the board of directors or the management of the company. The board of directors would, therefore, be expected to thwart the calling of such requisitioned meeting. It is thus undesirable that the**

board of directors should be allowed to refuse to call a requisitioned meeting, because the board considers the resolutions which were proposed to be passed at such a meeting, undesirable or not in the interest of the company. Courts have, therefore, consistently held that if the requisition is called for the purpose of passing a resolution which can be implemented in a legal manner, although the form in which the resolution has been proposed is *irregular* on the face of it, nevertheless, such a meeting must be called because ultimately a decision taken at the meeting can be implemented in a legal manner. Lord Justice Lindley has, in the case of *Isle of Wight Railway Co. v. Tahourdin*, [1884] 25 Ch D 320 (CA), in his guarded language, expressed a view that **if the resolution proposed to be passed at the requisitioned meeting were wholly illegal, then the board of directors would be under no obligation to call a meeting requisitioned for the purpose of passing such an illegal resolution. Left to myself, I would rather lend my humble support to the weighty pronouncement of Lord Justice Lindley rather than to the stand taken by learned brother, Desai J. when he stated that the requisitioned meeting must be called, even if the resolution proposed at the requisitioned meeting was illegal**. To my mind, there can be no point in calling a meeting for passing a resolution which would be wholly illegal. In any event, in the present case, it is not necessary to decide one way or the other on this aspect, because there are various reasons why the meeting sought to be requisitioned in the present case is not covered by any of the considerations which have led the courts in the past to refuse to injunct such meetings.

(*Emphasis added*)

53. That, I believe, is the correct distinction to be drawn in regard to resolutions proposed at a requisitioned EGM: between resolutions that are irregular, undesirable or unpalatable to the Board and those that are *illegal*. The question is not of interpretation of the word 'valid' in Section 100 at all, but whether what is sought to be done is plainly an illegality.

54. Mr Dwarkadas attempts to brush aside *Centron* saying that it was before *LIC of India v Escorts Ltd & Ors*.[12] There, too, *Isle of Wight* was considered — but for an entirely different reason (see paragraph 97). Mr Dwarkadas emphasizes paragraph 100 of *LIC v Escorts*:

> 100. Thus, we see that every shareholder of a company has the right, subject to statutorily prescribed procedural and numerical requirements, to call an extraordinary general meeting in accordance with the provisions of the Companies Act. He cannot be restrained from calling a meeting and he is not bound to disclose the reasons for the resolutions proposed to be moved at the meeting. Nor are the reasons for the resolutions subject to judicial review. It is true that under Section 173(2) of the Companies Act, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each item of business to be transacted at the meeting including, in particular, the nature of the concern or the interest, if any, therein of every director, the managing agent if any, the secretaries and treasurers, if any, and the manager, if any. This is a duty cast on the management to disclose, in an explanatory note, all material facts relating to the resolution coming up before the general meeting to enable the

12 (1986) 1 SCC 264.

> shareholders to form a judgment on the business before them. It does not require the shareholders calling a meeting to disclose the reasons for the resolutions which they propose to move at the meeting. The Life Insurance Corporation of India, as a shareholder of Escorts Ltd., has the same right as every shareholder to call an extraordinary general meeting of the company for the purpose of moving a resolution to remove some Directors and appoint others in their place. The Life Insurance Corporation of India cannot be restrained from doing so nor is it bound to disclose its reasons for moving the resolutions.

55. But the question with which I am concerned never arose in *LIC v Escorts*. It was under the 1956 Act, which did not separate listed companies as the 2013 Act does. In any case, as Mr Chinoy points out, the *LIC v Escorts* debate was about mala fides, not about the legality or legal effectiveness of resolutions proposed at an EGM.

56. There are three illuminating decisions from overseas. Each speaks to a general principle common to company law everywhere. I do not believe any of these can be discarded out of hand only because they are in another jurisdiction. I will not delay over the *Isle of Wight* decision[13] simply because it appears frequently in the other decisions Mr Subramaniam cites and to which I will now turn.

57. The first is *Queensland Press Ltd v Academy Investments No 3 Pty Ltd & Anr*, an unreported decision of 15th January 1987 by

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13 *Isle of Wight Railway Co v Tahourdin*, [1884] 25 Ch D 320 (CA).

Justice Ryan of the Supreme Court of Queensland.[14] This was very shortly after the decision of our Supreme Court in *LIC v Escorts*. There were two actions before the Queensland Supreme Court, both relating to a requisition by the two defendants. The first was an application by the defendants for a declaration that their requisition was valid, and a second declaration that the directors of the plaintiff company were obliged by reason of the requisition to convene an EGM. Alternatively, they sought a declaration that the defendants were entitled to convene the EGM. The plaintiff company sought a counter-declaration and injunction and filed a motion for (i) a declaration that the defendants' requisition did not set out 'a valid or effective requisition' either under the company's Articles or the local companies statute; and (ii) an injunction restraining the defendants from convening an EGM pursuant to the requisition. Three propositions were canvassed. The second was this:

> (2) Where a requisition for a meeting has as a sole object one which cannot lawfully be effectuated at such a meeting the directors are entitled to decline to act on the requisition.

This exactly mirrors the present case.

58. On this, Mr Justice Ryan first referenced the decision of Fry LJ in *Isle of Wight*:

> "If the object of a requisition to call a meeting were such that in no manner and by no machinery could it be legally carried into effect the directors would be justified in refusing to act upon it."

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14 [1987] QC 3. Available online at: https://www.queenslandjudgments.com.au/caselaw/qsc/1987/3.

Evidently, the issue is not new by any means: *Isle of Wight* is from 1884.

59. The *Queensland Press* court then held that the weight of authority

> establishes the proposition that if an object of the requisition cannot be lawfully effectuated at the meeting, then the directors are at least entitled to omit that object from the notice of meeting. It seems to me to follow that if the sole object of a requisition is to do something which cannot be lawfully effectuated at a meeting, the directors are entitled to refuse to convene the meeting.

60. The argument that the wording of a proposed resolution in a Requisition Notice is a matter of form, not substance, the latter being 'adjustable' at the meeting was repelled, and rightly so. This would be an EGM, and not an AGM — and the resolutions would have to be considered as placed and proposed, not in some variant that was never propounded. The Queensland Court rejected the argument before it (which ran to this effect: that the code only required the matters or objects of the meeting to be set out, the actual form not being specified). It held:

> if the only objects stated are such that the general meeting is invited to do something which at law it has no power to do, the directors are entitled to refuse to convene the meeting.

61. Next is the decision of Neuberger J[15] of 5th and 8th June 1998 in the Chancery Division in *Rose v McGivern & Ors*.[16] Before the Court was a motion that certain requisitions were valid, and for an order (evidently in the form of a mandatory injunction) to the directors of the company in question, Royal Automobile Club Ltd or RACL, to call an EGM. One of the proposed EGM resolutions was to elect a new board. Another was to authorise and instruct this new board to proceed with a scheme of demerger. Neuberger J summarised the issues like this:

> As was said by Mr David Oliver QC, who appears with Mr Matthew Collings for Mr Rose, there appears to be something of a power struggle between Mr Rose and his principal supporters within RAC and RACL, and the present board of directors of RACL together with their principal supporters. **Accordingly, Mr Rose still wants an extraordinary general meeting called pursuant to the requisitions he obtained following the March letter, and of which he lodged notice on 11 May. The board does not wish to convene such a meeting and are not prepared to put his proposals to the extraordinary general meeting that they called on 19 May**.
>
> (*Emphasis added*)

62. A distinct argument canvassed was precisely the one that Mr Subramaniam, Mr Sibal and Mr Chinoy make before me: that the proposals allegedly would be ineffective. Under this part of the

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15 As he then was. Later Lord Neuberger of Abbotsbury, and President of the Supreme Court of the United Kingdom from 2012 to 2017.

16 [1998] 2 BCLC 593 (Ch D).

judgment, four propositions were presented.[17] The third and fourth were worded like this:

> 3. Proposals (a) and (b) would be invalid resolutions if they were put and passed.
>
> 4. The extraordinary general meeting would therefore be a waste of time and money and the directors need not call it.

63. Again, this is precisely the frame of the submissions by Mr Subramaniam and his colleagues. On the fourth proposition, Neuberger J returned to *Isle of Wight*, and also noticed *Queensland Press*. He wrote:[18]

> I turn then to the fourth proposition. **It seems to me that if the extraordinary general meeting called pursuant to the requisitions could only be for the purposes of passing ineffective resolutions, then, as a matter of commercial common sense, the directors need not call such an extraordinary general meeting.** Such a proposition is supported by an observation of Fry LJ in *Isle of Wight Rly Co v Tahourdin* (1883) 25 Ch D 320 at 334 where he said:
>
> > 'If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it.'
>
> That proposition has been cited with approval and followed in three Australian cases, namely by Needham J in *Turner v Berner* [1978] 1 NSW LR 66, by Mclelland J in *NRMA v Parker* (1986) 11 ACLR 1 at 5 and by Ryan J in *Queensland*

17 Page 603 of the report, Section B.

18 Page 605 of the report.

> *Press Ltd v Academy Instruments (No 3) Pty Ltd* (1987) 11 ACLR 419 at 422.
>
> (*Emphasis added*)

64. Going on to analyse *Isle of Wight*, Neuberger J concluded, on this proposition:

> In the *Isle of Wight Rly Co* case that is particularly clear from the observations at the start of the second passage which I quoted from Lindley LJ. **It also appears from the contradistinction between objects and resolutions in the second passage I quoted from Cotton LJ, and it also seems to me to appear from the second of the three passages I cited from Fry LJ.** … The distinction between objects and resolutions in notices requisitioning meetings has been identified and discussed more recently by Mclelland J in *NRMA v Parker*, to which I have referred, especially at 11 ACLR 1 at 6.

65. In *Rose v McGivern*, there was clearly a question of a shareholders' resolution proposing the replacement of an entire Board of Directors. Neuberger J found there to be a conceptual and practical difference between the competing viewpoints of shareholders and the board. Finally, he concluded that there should be no confusion between the duty of the director to convene a meeting and the default provisions (permitting the requisitionists to convene a meeting), which happened (there as here) after 21 days. The third broad head discussed was that any resolution would be ineffective anyway. If the proposals themselves were the objects, then, following *Isle of Wight* and other cases, that directors would be in breach of their duty if they failed to call an EGM after being served with a sufficient requisition. But, Neuberger J held, the

directors would still have been entitled to refuse to convene a meeting even if the matter to be transacted was an object (i.e. a purpose) rather than a resolution, because the result would be something *that could not be implemented*. He said:

> In those circumstances it appears to me the directors would still have been entitled to refuse to convene a meeting in relation to proposal (a), even if it was an object rather than a resolution, because if they had complied with their duty under s 368(1) a meeting would have been convened to elect a new board of directors which could not have been implemented.

66. Mr Chinoy cites *Kaye & Anr v Oxford House (Wimbledon) Management & Ors*,[19] which refers extensively to *Rose v McGivern*. The decision is important for another dimension — the frame of the present action before me. In paragraph 96, the *Oxford House* court said:

> 96. If the requisitioner is dissatisfied with the decision of the directors not to call the meeting or not to put a particular resolution to the meeting, he/she can challenge that decision by bringing an application under section 306 CA 2006 **asking the Court to order that a meeting be called and held. At that stage the Court would consider whether the particular resolution was intended to be moved at a meeting and whether it may be properly moved. The Court would not, in my judgment, be restricted to considering the directors' reasons for not calling the meeting, but would be deciding the issue itself.**
>
> (*Emphasis added*)

19 [2019] EWHC 2181 (Ch).

67. This analysis, in my view, puts the matter in the correct perspective. For the necessary — and ineluctable — implication of Mr Dwarkadas's argument is that *the Court is altogether precluded from itself looking at the legality of the proposed resolutions*. The question of whether or not a certain resolution is *legal* must be left to the general body. None can question it, or, at any rate, not until after the resolution in question is carried, when an action to restrain implementation may well be brought and may equally well succeed. As Mr Seksaria pointed out with a very timely interjection, even a sole shareholder can assail a resolution, even before it is passed, on these very grounds.

68. But Invesco's submission that the Court cannot even examine the legality seems to me to be entirely an exercise in futility. It advances a general theory that even what I can only describe as a 'madcap resolution' must always and in all circumstances be put before the general body. I do not suggest that the present resolutions fit that description, only that this is the inevitable destination of Mr Dwarkadas's argument. Indeed, it finds some echo in paragraph 94 of *Oxford House*:

> 94. The learned editors of *Kosmin & Roberts: Company Meetings and Resolutions (2nd edition)* state (at paragraph 5.15), the purpose of section 303(5) is to offer some protection to companies from activities of what might be described as "the lunatic fringe", that is to say those individuals whether alone or in concert with others, who **wish to abuse the requisition process as a means of causing trouble, or making themselves a nuisance or trying to obtain the oxygen of publicity for causes that are only indirectly associated with the business and affairs of the company. In my judgment, that states**

> **correctly the purpose of section 303(5). In such circumstances, the directors would not be required to call a general meeting.**
>
> (*Emphasis added*)

69. The reference here is to the Companies Act 2006 in England as amended. Section 303(5) now says inter alia that a resolution may be properly moved at a requisitioned meeting unless it would, if passed, be ineffective.

70. We do not have such a provision. But it does not have to be made explicit, and Section 303(5) only makes explicit that which judicial pronouncements from *Isle of Wight* in 1883 onwards said was always part of companies law. I see no reason to hold that Indian company law should be in departure from a general, and evidently salutary provision, merely because it has not made this aspect a part of the code. Sometimes, it happens that a company must be saved from its own shareholders, however well-intentioned. If a shareholder resolution is bound to cause a corporate enterprise to run aground on the always treacherous shoals of statutory compliance, there is no conceivable or logical reason to allow such a resolution even to be considered. Shareholder primacy or dominion does not extend to permitting shareholder-driven illegality. A perfectly legal resolution, if carried, may well result in the diminution of the company's profits or business. That is not a court's concern. But the resolution must be legal. The interpretative question is therefore not over the word 'valid' at all but about the matters proposed to be considered at a requisitioned EGM. And the Court is never foreclosed from considering this.

71. *Cricket Club of India* came at a time well before the slew of regulatory provisions we see today. In particular, there was no distinction or special provisioning for a public *listed* company. These companies today, with wide shareholder basis, operating in tightly regulated fields must receive distinct considerations. Compliance is not only with the Companies Act. Parallels to the Companies Act controls are to be found elsewhere too. All demand compliance. "It is invalid or illegal; what of it?" is not and cannot be a sound answer, because the illegality might, as it does in this case, result in a wholesale disruption of the company's essential business purely for the reason of non-compliance. These regulatory statutes are often binary: a company is either compliant or it is not. If it is not, the juggernaut of offences and penalties rolls. No shareholder can, I think, be permitted to force his own company under that juggernaut's crushing wheels.

72. I must clarify some aspects. This is not merely a question of form or substance, or one versus the other. This is a case where the form must follow the substance. If the substance is illegal, the form is illegal. The substance of the proposed resolution will dictate its form.

73. I also do not suggest that shareholders' rights are curtailed or abrogated, or that they cannot seek what they now do. But the manner in which they go about doing it must be legally compliant.

74. There is also no call to examine the motivations of either side. That is certainly for the general body to take into account. For this

reason, I find Mr Sibal's endeavour to take me through a compilation of past communications between the two sides to be somewhat distracting, even possibly dangerous. I do not question the bona fides of either side; I cannot and I am not called on to do so. Each may have his own perspective — and to that extent, and that extent only — Mr Sibal may be right in saying that views on company management were sharply divided, and there were antipodal viewpoints. There is a distinction, however, to be made between the 'object' of a resolution (unseating a director, for instance) and *why* a particular group of shareholders thinks this is necessary. Very possibly, what Invesco seeks today might be perfectly attainable if the substance — and therefore the form — of the proposed resolutions is correctly done. I am only assessing the current form and substance, not the underlying motivations or purposes, nor suggesting that Invesco can never, under any circumstances and no matter what the substance or the form, properly exercise its shareholders' rights.

H. SECTION 430: JURISDICTION

75. Mr Dwarkadas says this Court has no jurisdiction. Section 430 of the Companies Act bars any civil court from entertaining any suit or proceeding in respect of any matter which the NCLT or the NCLAT is empowered to determine. But the NCLT Rules that set out the list of provisions over which the NCLT/NCLAT have jurisdiction does *not* include Sections 100, 149, 150 or 168.

76. Mr Dwarkadas argues that no injunction can issue against the NCLT, which is already seized of Invesco's petition under Section 98. I am not asked to issue any such injunction against a court. The injunction is against Invesco. Indeed, in any anti-suit injunction proceeding, the frame is precisely against the party prosecuting a rival action in another forum, not the forum itself (unless the other forum is hierarchically subordinate).

I. FINAL ORDER

77. In view of this discussion, there will be an injunction in terms of prayer clause (a) of the Interim Application, restraining Defendants Nos. 1 and 2 (including their employees, agents and anyone acting by, through or under them) from taking any action or step in furtherance of the Requisition Notice dated 11th September 2021, including calling and holding an EGM under Section 100(4) of the Companies Act, 2013.

78. In the facts of this case, there will be no order of costs.

(G.S. PATEL, J.)