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

% *Judgment pronounced on: 27th January, 2016*

\+ **I.A. No.17545/2015 in CS(OS) No.2528/2015**

RAJEEV SAUMITRA ..... Plaintiff
Through Mr.P.V.Kapur, Sr. Adv. with Mr.Rahul Kumar, Ms.Divyya Kapur, Mr.Sidhant Kapur & Mr.V.K.Nagrath, Advs.

versus

NEETU SINGH & ORS ..... Defendants
Through Mr.Sandeep Sethi, Sr.Adv. and Ms.Geeta Luthra, Sr. Adv. with Mr.Kumar Sushobhan, Mr.Vikram Khanna & Ms.Shreya, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. Rajeev Saumitra, plaintiff has filed the present suit for, *inter alia*, declaration, rendition of account, damages, permanent and mandatory injunctions against the three defendants namely, (i) Ms.Neetu Singh (ii) M/s. K.D.Campus Pvt. Ltd. (iii) M/s. Paramount Coaching Centre Pvt. Ltd.

2. By way of this order, I propose to decide the pending application being I.A. No.17545/2015, under Order XXXIX Rules 1 and 2 CPC filed by the plaintiff.

3. The defendant No.3 is a private limited company incorporated under the Companies Act, 1956 vide certificate of incorporation dated 8th December, 2009. The plaintiff and his wife, defendant No.1 are

holding 50% share each of defendant No.3 who is involved in the business of imparting education, training and preparation for various national competitive examinations.

4. There is a dispute between the plaintiff and defendant No.1 as to who adopted the mark PARAMOUNT prior in times. However, it is not in dispute that in 2009, the said mark became the property of defendant No.3-Company on its incorporation.

5. It is the case of the plaintiff that he began the business of imparting education under the banner of Paramount Coaching Centre in January, 2005 as a sole proprietor. The plaintiff has pointed out few documents in order to show that prior to incorporation of defendant No.3 in the year 2005, the plaintiff opened a bank account with the Bank of Maharashtra as the sole proprietor of Paramount Coaching Centre. On the other hand, defendant No.1 in support of her claim for ownership of the name PARAMOUNT has relied upon a document in order to show the use of the name Paramount prior to 2005 of her reply to the plaintiff's injunction application. The plaintiff submits that the said document is purporting to be a self-serving advertisement; the same is neither dated nor does it demonstrate as to where this advertisement appeared and it also does not prove that defendant No.1 is the owner of the mark PARAMOUNT. In the month of July, 2005, the defendant No.1 came in contact with plaintiff looking for a job and requested the plaintiff to allow her to teach English subject in his coaching institute as she was in dire need of financial assistance to carry on her livelihood. The plaintiff allowed the defendant No.1 to take English Classes in his coaching centre. He was a bachelor and earning handsome amount at that time.

After expiry of approximately 8-9 months, defendant No.1 expressed her willingness to get married with the plaintiff. She

confirmed that she was spinster and unmarried; her father had expired and there was an old widow mother having six daughters and one brother. Believing upon her statement, the plaintiff got married with defendant No.1 on 12th March, 2006. After the marriage, as alleged by the plaintiff, she started hatching a conspiracy to get inducted her sisters and family members in Coaching Centre of the plaintiff and on her insistence, the proprietorship concern, namely, Paramount Coaching Centre was converted into a Private Limited Company, i.e. defendant No.3. She was inducted as a Director of defendant No.3 and thus, both the husband and wife have shareholding to the extent of 50:50. The plaintiff prior to incorporation of defendant No.3 also formed an educational society in 2007 under the name 'Paramount Zenith Society'.

6. The main reason for the present litigation is that defendant No.1 who is the wife of the plaintiff incorporated another company being the Director of defendant No.3-Company under the name of K.D. Campus Pvt. Ltd. (defendant No.2). She is the founder and director of the company for the purposes of competing with defendant No.3. The said company of defendant No.2 was incorporated by defendant No.1 in February, 2015 for the purposes of competing with and diverting the business, staff, students and monies of defendant No.3. It is also involved in imparting education, training and preparation for various national examinations.

7. The plaintiff alleges that in November 2014, the plaintiff learned of the subsistence of her first marriage and initiated proceedings under the Hindu Marriage Act for annulment of his marriage on 10th April, 2015. Upon having known her game, she along with her relatives including her sisters (i.e. Maya Chaudhary as CEO of defendant No.3 and Director of defendant No.2) and brother-in-laws hatched a conspiracy to

set up a competing business with defendant No.3 while still working as Director/ employees of defendant No.3 to divert the business, future business opportunities, staff and students to their own private companies.

8. She holds 99.99% shares and her sister Maya Chaudhary's daughter holds 0.01% share for the purposes of carrying on competing business of coaching centres of defendant No.2 as alleged by the plaintiff. Another company, namely, Paramount Reader Publication Pvt. Ltd. (a one person Company under Section 2(62) of the Companies Act, 2013, in which she holds 100% shares) for carrying on the competing business of printing, publishing and distributing reading material by using the property (Reading Material) of defendant No.3, which is the subject matter of the suit pending in Rohini Court.

9. As mentioned above, defendant No.3 has been printing, publishing, selling and providing the books, Journals and other study material in the name of defendant No.3 for various competitive and other examinations on various subjects like Reasoning, physics, Chemistry, English, Maths, etc. Defendant No.1 has been indulging in causing wrongful loss to the defendant No.3 and wrongful gain for her individual one-person company namely M/s. Paramount Reader Publication OPC Pvt. Ltd. The plaintiff on behalf of the defendant No.3 as well as for himself being share-holder has filed a civil suit bearing No.217/2015 which is pending before the Court of Sh.Satish Kumar, ADJ, Rohini, Delhi.

10. The District Court granted an injunction in favour of the plaintiff and the defendant No.1 appealed before this Court and a technical defect was discovered in the suit and the plaintiff withdrew the suit with leave to file a fresh suit in the District Court which was duly filed

and on 15th September, 2015 in CS No.217 of 2015, the Rohini District Court granted an injunction restraining *inter-alia* defendant No.1 from using the name PARAMOUNT for her personal and individual benefit or in any of her publications, or in any soft copy or in online material and further from indulging in competing business.

11. The plaintiff submits that defendant No.1 is creating confusion and deception in the minds of ordinary persons to believe that KD Campus is a part of defendant No.3 or somehow it is associated with defendant No.3 or it is doing business with the consent of the plaintiff which, in fact, is untrue.

12. It is also alleged in the plaint that defendant No.1 in her capacity as a Director of defendant No.3 is bound and obliged to act for the benefit of the company and must not allow herself to be placed in a position of conflict with the defendant No.3-Company. But defendant No.1 has incorporated a competing business under the banner of K.D. Campus Pvt. Ltd. and has placed her personal pecuniary interest above than that of defendant No.3. The plaintiff has and is continuing to use her position as Director to usurp business of defendant No.3's business.

13. The plaintiff says that after incorporating defendant No.2, which in itself is a breach of fiduciary duty owed to defendant No.3, defendant No.1 made all efforts to capitalise on the goodwill generated by defendant No.3 and mislead the public to believe that defendant No.2 is a part of defendant No.3 so as to divert all its business to herself and defendant No.2. In doing so, one of the key techniques she used is to use the phrase '*A new venture by Neetu Singh, founder/director of Paramount Coaching Centre*' – defendant No.3's resources, such as Facebook and Twitter using this phrase. She

marketed K.D. Campus Pvt. Ltd. as a *New venture by 'Neetu Singh, founder/director of Paramount Coaching Centre'* over the radio, Metro trains as well as in her personal publication i.e. Paramount Reader Publication, a magazine run by defendant No.1 using the name of defendant No.3 in violation of the Companies Act, 2013.

14. In order to restrain defendant No.1 from indulging in the aforesaid wrongful actions, the plaintiff on 26th May 2015 had instituted a suit being CS(OS) No.1592 of 2015 along with an application under Order XXXIX Rules 1 and 2 CPC. By an order dated 26th May, 2015, the learned Single Judge issued notice. For completion of service and pleadings, the matter was listed before Joint Registrar on 7th October, 2015.

Being aggrieved by the said order, the plaintiff preferred an appeal being FAO(OS) No.301/2015. By an order dated 10th August, 2015, the Division Bench was pleased to direct the learned Single Judge that the plaintiff's application under Order XXXIX Rules 1 & 2 CPC be heard on 24th August, 2015. The plaintiff earlier also filed the Suit No.78/2015 before the ADJ, Rohini Courts, Delhi restraining the defendants from using the mark Paramount in the publication of books. The same was withdrawn on 17th August, 2015 with liberty to file the fresh one.

As far as litigation in this Court is concerned, it is submitted that though the plaintiff initially instituted the suits in his personal name, owing to technical defects, both the suits were withdrawn with leave to file fresh suits, which was granted. Accordingly, fresh derivative suits were instituted. The earlier suit being CS(OS) No.1592/2015 was withdrawn by order dated 9th September, 2015 which was already filed. He was allowed to withdraw the said suit. In order to save time and

avoid needless confusion, as alleged, the plaintiff has been advised to withdraw the said suit filed in this Court and institute a fresh action, which the plaintiff is hereby doing. The plaintiff has accordingly also filed an application under Order XXIII Rule 1(3) CPC for withdrawal of the said suit and has sought leave of this Court to institute the present action.

15. Written statement and reply on behalf of defendants No.1 and 2 have been filed. The defendant No.1 has also made various personal allegations against the plaintiff. The same would be referred at a later stage. The main defences, on merit, raised reads as under:-

(i) The plaintiff has no right or authority to file such an action. The company has not authorized the plaintiff to file any such action. The derivative action filed by him is not maintainable.

(ii) The suit of the plaintiff is without any cause of action, as he has filed the suit as shareholder to the extent of 50% in the shareholding of defendant No.3-Company for violation of his individual membership rights. The remedy for the plaintiff, if any, is a petition under Section 397/398 of the Companies Act, 1956 before Company Law Board.

(iii) The suit is impliedly barred by the provisions of Companies Act read with Section 9 of CPC. The defendant No.1 has already filed a petition before the Company Law Board for relief against oppression and mismanagement by the plaintiff herein in respect of business and affairs of defendant No.3-company. The CLB is already seized with the acts of omission and commission of the plaintiff. The parallel proceedings before the two different forums

cannot continue as it may result in conflicting orders. The present suit and the present application are also barred by Section 41(h) & (i) of Specific Relief Act.

(iv) It is not open for the plaintiff to allege that the defendant No.1 is disentitled to do business in defendant No.2-Company. The plaintiff has concealed from this Court that the plaintiff has prevented, obstructed and interfered with the defendant No.1 acting as Director of defendant No.3-Company. The plaintiff has not allowed holding of any meeting of Board of Directors or of the shareholders. No meeting of the Board of Directors was ever held. The plaintiff has failed to convene or attend any board meetings or general meetings in as much as there are only two directors and shareholders i.e. plaintiff and defendant No.1. There can be no meeting without either the plaintiff or defendant No.1. He has taken physical control over the business, affairs and belongings of defendant No.3-Company and is now seeking to prevent the defendant No.1 from carrying on her lawful business in defendant No.2-Company. He has no right or interest in defendant No.2-Company. He is jealous that the defendant No.1 has been able to set up the defendant No.2-Company and provides good service in the market. Unable to deal with the defendant No.1 in the market, the plaintiff has filed the present suit to abuse its process to bring wrongful pressure upon the defendant No.1.

(v) Defendant No.2-Company does not use the mark or name "Paramount" for its business. The defendant No.1 has

neither diverted any business of defendant No.3 to defendant No.2 nor utilized any goodwill of defendant No.3 nor misled any member of the public to believe the defendant No.2 is part of defendant No.3.

(vi) The suit of the plaintiff is liable to be rejected under Order VII Rule 11(d) CPC as the suit is barred under Order 2 Rule 2 CPC, as mere a comparison of the contents of the plaint of three suits would show that all the paras of all the plaints are identical. The foundation facts of all the suits are substantially identical. The cause of action is the same. The plaintiff is indulging in multiple litigations. Thus, the suit of the plaintiff is barred under Order II Rule 2 CPC and is liable to be rejected under Order VII Rule 11(d) of CPC.

(vii) The suit of the plaintiff is without cause of action as the plaintiff has no exclusive rights over the word "Paramount". As the word is a common, dictionary one and is also descriptive or generic.

(viii) The plaintiff is not the originator of word "Paramount", rather the defendant No.1 is the prior user of word "Paramount" as the "Paramount Coaching Centre" was initially started by the defendant No.1 in the year 1992 and when the plaintiff and defendant No.1 met, at that time, the plaintiff was running the IAS Academy in the name and style of "Arohan" and he offered the defendant No.1 to start her "Paramount Coaching Centre" from his space of "Arohan" and the offer was accepted by the defendant No.1 and as such the defendant No.1 ran her "Paramount Coaching Centre" at the place of plaintiff where he was running his IAS Academy "Arohan".

(ix) The plaintiff has shown himself to be the "Proprietor" of "Arohan" in the Profit & Loss Account and Balance Sheet filed by him under his signature as "Proprietor of "Arohan" with income tax return for the assessment year 2005-2006 as well as in his profile uploaded on Jeevansathi.com. It is further reflected in joint advertisement published in "Bharat-2006" published by Ministry of Broadcasting, Govt. of India wherein "Arohan" has been shown to be running by plaintiff from one place and "Paramount Coaching Centre" has been shown to be running by the defendant No.1 from the same place.

(x) The share of the defendant No.1 was reduced by 9% in the financial year 2013-14 by the plaintiff by forging the signatures of the defendant No.1 in collusion with the previous account care-taker Mritunjay Singh who had impersonified himself as C.A. The Form-II was filed for this purpose bears his signatures both digital as well as normal. The returns of the year 2012-13 was filed using the forged signatures of the defendant No.1 and to this effect, a complaint was made by the defendant No.1 to the Police Station, Mukherjee Nagar vide DD No.66 dated 18th January, 2015 and after that he has restored the share of the defendant No.1 to 50%.

(xi) The Magazine namely "Paramount Readers" which is edited by the defendant No.1 and popular amongst the students and the same is appreciated by the students, the distribution of the same has been abruptly stopped by the plaintiff in the centres and at its place, he has published a

deceptively similar magazine "Paramount Current Affairs" and the students are being compelled to take the magazine edited and published by the plaintiff and despite the demands made by the students, the plaintiff is not allowing distribution of Magazine "Paramount Readers" which is against the interest and welfare of the students in general and against the interest of the company in particular.

16. Apart from the merit of the case, both parties have made personal allegations and counter-allegations against each other in their pleadings. There are many other litigations pending between the parties of civil and criminal nature. Though it is not necessary to discuss and decide all the issues raised by them which are beyond the scope of the present suit and the issues which are subject matter of the present suit. However, the same are being mentioned to know their other grievances. The plaintiff has made the following allegations against defendant No.1:-

(I) Prior to his marriage with defendant No.1, it appears from her resume on Jeevansaathi.com that she was "awaiting divorce". At the time of marriage, she represented to the plaintiff that she was a spinster and in fact, swore an affidavit stating the same but later on, the plaintiff learned that she was still married to one Capt. Bachchan Singh Chauhan at the time of her marriage with the plaintiff and she had with a pre-planned motive to usurp the plaintiff's business and money misrepresented to him that she was single. Defendant No.1 is a lawyer by profession. She could not enter into marriage with the plaintiff during subsistence of her first marriage but she along with her family hatched a conspiracy to usurp the

business and wealth of the plaintiff and she was able to misrepresent the plaintiff to the effect that she was a spinster and legally eligible to enter into marriage with him. When on 12th March, 2006, the marriage of the plaintiff was solemnized with defendant No.1, at that time, the temple authority specifically asked the plaintiff as well as the defendant No.1 to furnish their respective affidavits on oath stating their age, marital status, religion, intention etc. The defendant No.1 had wrongly deposed on oath that she was spinster at the time of marriage with the plaintiff. Although, the brother, sister and brother-in-law of defendant No.1 used to visit the plaintiff even before the marriage. They were aware that defendant No.1 was already married with one Bachhan Singh Chauhan and despite they never disclosed this material fact to the plaintiff rather helped the defendant No.1 in getting married with the plaintiff despite of the brother of defendant No.1 even stood as a witness before Hindu Marriage Registrar, C.M.C. area, Calcutta at the time of registration of marriage of defendant No.1 with her first husband Bachhan Kumar Singh Chauhan.

(II) The plaintiff, in good faith, believed defendant No.1's untruths and married her in March, 12, 2006 and having been appointed Director of the defendant No.3-Company, defendant No.1 started appointing her family members to key positions in defendant No.3, with intent to be go gain assistance and control in the process of diverting the plaintiff's business. The defendant No.1 appointed her sister and brother in law, Maya Chaudhary and R.K. Chaudhary as

CEO's of defendant No.3, her nephews for looking after books and magazine section of defendant No.2 and her other sister Manju Singh, in another key position at defendant No.3.

(III) Prior to the incorporation of defendant No.3, the parties had mutually agreed that they would not carry out any separate business in this field or use the name 'Paramount' in the same business for their individual gain unless mutually consented to. In any event, there exists a statutory injunction in Section 166 of the Companies Act, 2013 against the defendant No.1 being a Director from *inter alia* (a) placing himself in a position where his interests conflict with that of the Company: (b) gaining an unfair advantage by breaching duties owed to the Company, (c) failing to act in the best interest of the company. The defendant No.1 failed to inform or obtain the plaintiff's consent prior to incorporating defendant No.2. Further, defendant No.1 is still a Director in defendant No.3. She has used this position as Director of defendant No.3 to divert defendant No.3's business to defendant No.2 and confuse the public to believe that defendant No.2 is part of defendant No.3. Defendant No.1 only became part of the Paramount banner in 2009, i.e. 4 years after the plaintiff had started his business and three years after the parties were married. She cannot be allowed to reap benefits by first, deceiving the plaintiff into marriage, and then, usurping his and/or defendant No.3's property and goodwill and that too against the statutory injunction contained, *inter-alia*, in Section 166 of the Companies Act, 2013.

(IV) In addition to diverting the business of defendant No.3 to defendant No.2 by misleading the public into believing that the two companies are associated, defendant No.1 has been soliciting students that approach defendant No.3 to take admission in defendant No.2. To lure them into abandoning defendant No.3, she has been providing a concessional special fee rate for Paramount students to join defendant No.2. The sisters of defendant No.1, Manju Singh and Maya Chaudhary and brother in law, R.K. Chaudhary are assisting the defendant No.1 in the process. Even defendant No.1 has instructed staff members of defendant No.3 to lure new students of defendant No.3 to join defendant No.2.

In addition, defendant No.1 has given her nephews key positions in Paramount Reader Publication OPC Pvt. Ltd. so as to solicit more students and innovate new techniques of plundering defendant No.3 and to use the books and other study materials of defendant No.3 for coaching in various subjects for the benefits of defendant No.1 and causing wrongful gain to the defendant No.3 and the plaintiff.

17. The defendants No.1 and 2 have denied all the allegations made by the plaintiff, rather the counter-allegations are made by defendant No.1 who stated that the plaintiff has started taking unilateral decisions of defendant No.3-Company regarding appointment, termination, enhancing salaries of the employees and without calling any board meetings. He had hired the musclemen and lady bouncers in order to prevent the defendant No.1 in the affairs of the defendant No.3-Company and also the ingress and outgress of the company premises, which is evident from the CCTV footage and

photographs of incident occurred on 5th August, 2015 in the Munirka Branch of deferent No.3, when the defendant No.1 was mercilessly beaten and brutally assaulted by the goons hired by the plaintiff in order to kill the defendant No.1. Due to unilaterally decision of his own choice in the Company, the management of the defendant company is deadlocked. Recently, he appointed one lady namely Swaraj Gupta of his own choice and sent her to the Uttam Nagar Centre of the company in order to create chaos in the said centre and when the defendant No.1 interfered, a false and fabricated case was got registered by the Police of Bindapur Police Station at the instance of plaintiff but later on, on preliminary enquiry of the police, it was found that the said lady has been illegally trespassed in the premises of the company and upon the complaint of the defendant No.1, FIR No.1063 dated 27th July, 2015, under Sections 323/379/452/506 IPC was registered in Police Station Binda Pur.

It is also submitted on behalf of defendants No.1 and 2 that the plaintiff had embezzled a sum of Rs.47 Lac from the collection of January, 2015 of defendant No.3 for his personal use, as the said amount was not submitted with the accounts section of the Head Office of the company. The plaintiff is a mountaineer and is fulfilling his desires of this extremely expensive passion by illegally draining and embezzling the funds and collections of Paramount Coaching Centre Pvt. Ltd. (defendant No.3), of which he is a Director. While earning Rs.5 lac and then after increment Rs.7 lac per month, it was highly impossible to go for mountaineering expedition with a friend to all the continents of the world, each costing not less than Rs.30-40 lac per person and bearing the entire cost of the friend. He has failed in his three expeditions and successful in five and with

this, he has spent around Rs.5,00,00,000/- since 2011 when he first started his training in mountaineering. This money of course does not belong to him and in no way he was entitled to this amount which belonged to the company. He went to all the expeditions with his friend Amit Singh, a resident of Pune or with Varun Upadhyay.

It is alleged that the defendant No.1 is the author of many books and sought after books extremely beneficial for the aspirants of the competitive examination. She is also an Editor of a Magazine 'Paramount Reader' which is extremely famous among the aspirants. Not only this, even the other institutes and business houses have great regards for the plaintiff and he is known as Neetu's husband.

18. It is also submitted on behalf of defendant No.1 that in the present case, both the plaintiff and defendant No.1 had equal shareholdings of 50% and were equally responsible for the affairs of the Company for all purposes. The plaintiff chose to ignore any sort of contribution to the day-to-day functioning of the Company. The shareholding is equally divided between the groups/shareholders, thus, it can be presumed that the same is of the nature of a partnership and not a company.

19. In reply, Ms.Geeta Luthra, learned Senior counsel on behalf of defendant No.1 argued that Section 166 of the Companies Act or Section 88 of the Indian Trusts Act or Section 16 of the Partnership Act do not debar defendant No.1 in entering into a similar business as she has been ousted from defendant No.3 as per averments made in the written statement. It is argued that defendant No.1 has started the independent business under the compelling circumstances and the reasons as explained in the written statement. She has placed reliance on the following judgments:-

(i) ***Heena Dutt v. Chavi Designs Pvt. Ltd. & another***, (2008) 141 Comp Cas 172 (CLB)

(ii) ***Foster v. Bryant****,* 2007 EWCA Civ. 200

20. The next submission is that there are numerous pending litigations between the two shareholders and the plaintiff has been resorting to assault and battery on the defendant No.1 to prevent her from entering the premises of the defendant No.3. Plaintiff's vendetta against defendant No.1 has surpassed civil methods and the plaintiff has been:

1) Withdrawing huge amounts from the Company accounts,
2) Drawing overdrafts,
3) Making appointments,
4) Overall making a plethora of extremely harmful financial decisions,
5) Siphoning off funds, and
6) Increasing the debt on the Company.

21. It is also submitted on behalf of defendants No.1 and 2 that the plaintiff has disregard to the financial condition and future of the company, defendant No.3. The proceedings for oppression and mismanagement, under Section 397 and 398 of the Companies Act, 1956, were the efficacious remedy enacted under the Special Act, in the Company Law Board. The said proceedings have not progressed due to the dilatory tactics adopted by the plaintiff. Defendant No.1 is constrained to file the winding-up proceedings due to the recalcitrant attitude of the plaintiff. The plaintiff has been continuously inducting his relatives, family and friends in defendant No.3-Company, making it easier for him to oust defendant No.1 from the company. Plaintiff has

taken help of muscle power and anti-social elements and has been bribing staff into committing acts against defendants No.1, with a motive to take control of the company for personal gain. The submission of learned Senior counsel for the plaintiff that there has been no ousting of the defendant No.1, is without any substance and false. By relying upon the judgment in ***Heena Dutt v. Chavi Designs Pvt. Ltd.,*** 2008 (141), Comp.Cas 172 CLB, Ms.Luthra submits that the said decision directly applies to the facts of the present case, as in the present case, the plaintiff has been taking unilateral decisions for more than 2 years and has already taken over the control of the company by his strong arm tactics. The plaintiff has removed the name and photographs of the defendant No.1 – Neetu Singh from the prospectus, and has displayed the hoardings of his photographs along with staff in all advertisements pertaining to Paramount Coaching Centre Pvt. Ltd. He has also unilaterally withdrawn Rs.6.5 crores from the overdraft facilities in the guise of expansion without the consent of the defendant No.1 which shows that he has already ousted the defendant No.1 from the said company and taken control over the company affairs. The defendant No.1 is not even getting her salary from Paramount Coaching Centre Pvt. Ltd for the last 2/3 months. She has been denied access to the account books. The whole Account Section of Paramount Coaching Centre Pvt. Ltd has been shifted to some unknown destination, the address of which is unknown to the defendant No.1.

22. It is stated that one of the petitions filed by defendant No.1 against the plaintiff is already pending before the Company Law Board, thus, the present suit is not maintainable. The plaintiff has filed the present suit against the defendant No.1 and her relative which is not

maintainable. Even a third party can be made a party before the Company Law Board as per Section 405 of the Companies Act, 1956. Ms. Luthra has referred para 23 of ***Henna Dutt*** (supra) decided by the Company Law Board in support of her submissions that there should be bids between them and highest bidder should purchase the shares of the other party. The said para reads as under:-

> "23. Objects and purpose of Sections 397, 398, 402 and 408 of the Act is twofold – to set right the wrongs and take remedial action to prevent occurrence of wrongs in future. Thus both preventive and curative action can be taken by the Company Law Board to regulate the conduct of the Company's affairs in future and to bring to an end the matters complained of. To do substantial justice between the parties, I hereby direct the respondent No.2 to restore the sale consideration received in respect of the discounted sales and other amounts siphoned off from the respondent No.1 company's accounts forthwith. Since there is a deadlock in the respondent No.1, and since both the parties know the worth of the company, I hereby direct the parties to arrive at an amount to be paid to the petitioner for her going out of the company which would be acceptable to the petitioner. In case no such acceptable consideration is arrived and paid to the petitioner within a month of receipt of this order, I consider it appropriate to direct that both the parties to be present in the CLB Court Room along with their counsels on August 23, 2007, at 11.30 a.m., to bid for the shares and the party which bids the higher price for the shares, should purchase the shares of the other party at that price."

23. Let me now deal with the submissions of the parties. It is undisputed fact, that is, a material placed on the record that the defendant No.1 has made many statements publically by way of advertisements and messages on mobile phone to the students and other modern media in order to harm the business of defendant No.3 and its goodwill and reputation as well as against the plaintiff. On

whatsapp groups, the defendant No.1 has made statements such as "*2 months me dho dala h. 2 saal me naam mita dungi. Aag lagi h Rajeev Saumitra. Tumko sadak par utaar ke hi bujhegi. Tab tak me teej ka vrat bhi karungi. Tujhe jinda rakhna bhi jaruri h*" and "*Kutto ke sath wah appa ne toh Kutiya bhi paal rakhi h. great going*". In addition, on Facebook, she has made statements such as "*Congratulations to all well wishers cases against K.D. Pvt. Ltd. and Paramount Reader Publication have been decided in favour*". The defendant No.1 has also used the name PARAMOUNT along with the name of defendant No.2 K.D. Campus Pvt. Ltd. in order to make promotion of her own Company. The conclusive and cogent evidence has been produced by the plaintiff in the shape of photographs of sign-boards having the name of PARAMOUNT with the advertisement of K.D. Campus. In some of the sign-boards, it is mentioned as Neetu Singh – Ex-Director of Paramount.

24. Section 166 of the Companies Act, 2013 which came into force with effect from 1st April, 2014, the object of the said provision is to give the fiduciary duty to the Director otherwise the features, consequences and incorporation in the said provision which is in consonance of Section 88 of the Indian Trusts Act, 1882 as well as Section 16 of the Partnership Act, 1932.

The said provisions of these Acts reads as under:-

Section 166 of the Companies Act, 2013

"(1) Subject to the provisions of this Act, a director of a company shall act in accordance with the articles of the company.

(2) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best

interests of the company, its employees, the shareholders, the community and for the protection of environment.

(3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

(4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

(5) A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

(6) A director of a company shall not assign his office and any assignment so made shall be void.

(7) If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees."

Section 88 of the Indian Trusts Act

"88. Advantage gained by fiduciary.— Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

Section 16 of the Partnership Act

> "16. Personal profits earned by partners.—Subject to contract between the partners,— (a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm; (b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business."

25. Section 88 of the Indian Trusts Act provides that a Director/ Partner who in violation of his fiduciary character gains for himself any pecuniary advantage or enters into any dealing in which his own interest is adverse to the interest of the Company and thereby gains a pecuniary advantage to himself, he will hold such advantage gained for the benefit of the company. Similarly, Section 16 of the Indian Partnership Act is also relevant on this aspect.

26. With regard to the argument of the plaintiff about violation of Section 166 of the Companies Act, 2013 and Section 88 of the Trusts Act, 1882 by defendant No.1, it is urged on behalf of defendant No.1 that the same is without any substance. It is submitted that Section 166(5) of the Companies Act, 2013 provides for relief that is more of a personal remedy, whereas Section 88 of the Trusts Act, 1882 provides for the "pecuniary advantage" to be held in benefit of such other person, to whom the other person is bound under a fiduciary duty. The remedy under Section 88 of the Trusts Act, 1882 is provided as a part of the no-conflict rule. The incorporation of defendant No.2 was not in conflict with the interests of defendant No.3 but out of necessity. The creation of defendant No.2 is not an act of breach of trust against defendant No.3 but in order to survive her life. The ousting of

defendant No.1 who being one of the Directors has 50% shareholding and has created defendant No.3 is the biggest act of deceit. There cannot be a breach in fiduciary duty, when it exists on paper and not in reality, as she had already been ousted as a Director No.3 and for the sole reason of survival, she laid the foundation of defendant No.2 Company.

The remedy provided under Section 166(7) of the Companies Act, 2013 is a fine not less than that of Rs.1 lakh and the legislative intent could not have been to introduce the remedy of the magnitude provided under Section 88 of the Trusts Act, 1882 or that of an injunction on defendant No.2. The remedy provided under Section 166(7) is the maximum that can be imposed for the breach of the duties by a Director under Section 166.

27. As far as the opening of independent business by defendant No.1 under the name of defendant No.3 is concerned, Ms.Luthra, learned Senior counsel argues that there is no harm, as two names are different; she has started independent business of similar nature due to vast experience and in view of the conduct of the plaintiff, she has no other option but to do some business in order to survive and being an expert in the line, therefore, the plaintiff cannot suffer any harm. In support, she has referred the judgment of ***Darius Rutto Kavasmaneck v. Gharda Chemicals Ltd***. (2015) 191 CompCas 52(Bom), wherein the principle as laid down is as simple as under:-

> "Derivative action is subject to the doctrine of clean hands, it is an equitable invention and cannot be used to do injustice",
>
> Palmer's Company Law, 24th Edition, page 978.

A plaintiff whose conduct is tainted is barred from pursuing a derivative action, which can be found at para 50 of the judgment. In para 55, point(a) of the above mentioned judgment of Darius(supra).

> "…In the present case, defendant No.2 did not make the inventions in the course of employment with the defendant No.1. Defendant No.2 was not engaged or instructed to create the inventions during the course of his employment or during working hours…"

In para 63 of the said judgment, it was observed that "*The Courts should be alert in dealing with such speculative suits and shoot down such bogus litigations at an early stage and the action of the plaintiff, it is quite obvious is inspired by vexatious motives…..*" It is stated that the said direction of the Bombay High Court is a guideline for all such frivolous suits, instituted to create pressure and strong arm innocent citizens.

28. It is argued by Ms.Luthra that the injunction is an equitable relief and the party invoking the jurisdiction of the Court has to show that he himself was not a wrongdoer or at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. The same has been directed in the case of ***Gujrat Bottling Co. Ltd. and Ors. v. Coca Cola Co. and Ors.***, (1995) 5 SCC 545, para 47.

29. Mr.P.V.Kapur, learned Senior counsel appearing on behalf of the plaintiff has refuted the argument of defendant No.1 to the effect that under the compelling circumstances, defendant No.1 started her own independent business as she was ousted from the company of defendant No.3 by the plaintiff and his persons. He says that the facts

of the present case are dissimilar to the case of ***Heena Dutt*** (supra). Thus, the question of bid of shares does not arise, as the defendant No.1 has already established very well handsome parallel business of similar nature, thus, now at this juncture, the said suggestion of bid *inter se* between the parties is not feasible as the defendant No.1 has refused to transfer the undue profits made by her in the Company of defendant No.2. The defendant No.1 is making huge profit by doing the competing business hence, she is liable to pay all the profit to the defendant No.3 and the defendant No.2 is also to be restrained. It is also argued that the plea of ousting is wholly after-thought. Defendant No.1 under no circumstances could have started competing business, as she was never ousted from the business of defendant No.3. It is the admitted fact in the first written statement filed by defendant No.1 in the suit being CS(OS) No.1592/2015 (which was withdrawn by plaintiff to file fresh present suit), it was never her stand that she had been ousted from the business of defendant No.3. However, in the written statement filed in the present suit, she has taken a different stand about ouster. Mr.Kapur submits that when she came across the decision in the case of ***Heena Dutt*** (supra), she has changed her stand on that basis, as it is inspired from the said case. Mr.Kapur referred a para from the said case and says that the same is apparent from the use of verbatim expression "indispensible director" (*see Paragraph 19 of said judgment)* in paragraph 11E at page 12 in the present written statement.

30. Mr.Kapur is correct in his submission in this regard, as in the written statement filed in CS(OS) No.1592/2015, her assertion was otherwise, it was rather stated that she is only the "Active Director" and "Active Member" of defendant No.3. However, in the written

statement filed in the present case, she has pleaded 'ouster' and is trying to withdraw an admission already made.

31. Mr.Kapur, learned Senior counsel has referred documents in order to show that she was not ousted as the defendant No.1 has been visiting and involved in the running business of defendant No.3, as on 24th September 2015, defendant No.1 in her capacity as a Director of defendant No.3, appointed two persons namely, Mr.Rupesh Kumar Pandey as 'Batch Checker' at Rs.12,000/- per month and Mr.Ram Babu at Rs.7,000/- per month. In the month of August 2015, defendant No.1 as Director of defendant No.3 withdrew sums amounting to Rs.1,56,38,338/-. The plaintiff has taken no steps to remove defendant No.1 as a Director even though she has vacated her office as a Director of defendant No.3. (*See* Sections 184 read with Section 167 of the Companies Act, 2013). She is also enjoying the cheque-signing authority as appeared from the document filed along with I.A. No.23408/2015.

32. It fortifies from the fact that in the present suit, the defendant No.1 has pleaded 'ouster' in the written statement, but at the same time in the Company Law Board, she is alleging plaintiff's removal as a Director of defendant No.2 as the plaintiff is taking decisions unilaterally; he should be restrained from using funds of the company; and she has been asserting that she alone has the right to take all the decisions of defendant No.3's company. Counsel for the plaintiff has referred the petition filed before the Company Law Board by defendant No.1.

33. Therefore, it is clear that she has taking contrary stands in different proceedings. Even otherwise, ***Heena Dutt's*** case (supra) is a 2008 Judgment when Section 166 of the Companies Act, 2013

had not yet been enacted. In the said judgment, the provisions of Section 88 of the Indian Trusts Act and Section 166 of the Companies Act, 2013 have not been discussed or dealt with. From the material placed on the record, it appears that the ouster pleaded by her is after-thought and the plea is contrary to the written statement filed in CS(OS) No.1592/2015. Therefore, *prima-facie,* the defence raised by defendant No.1 cannot be allowed at this stage.

34. With regard to reliance on ***Foster Bryant***'s case (supra), in paragraph 8 of the judgment the Court has discussed about the Director's Fiduciary Duties and it was held that a Director has a Fiduciary Duty towards the Company and must deal with loyalty and good faith and avoidance of conflict of duty and self-interest. He is precluded from obtaining any property or business advantage that is in conflict with the business of the Company. A mere exception is carved out that while the employment as a director subsists, a director can take steps *'preparatory to competition'.* However, it has never laid down that under the similar circumstances as in the present case, a director can start a competing business while remaining a Director. In fact, if overall judgment is read, the said judgment supports the case of the plaintiff. The findings and observations do not help the case of defendant No.1.

35. Even otherwise, if the plea raised by defendant No.1 is taken on its face value, it is settled law that equity cannot overrule the law, but on the contrary, the law would prevail. Therefore, it is not possible to carve out an exception to Section 166. *Reliance is placed on the following judgments:-*

(i) ***Vijay Narayan Thatte and Ors. v. State of Maharashtra & Ors.*** - 2009 (9) SCC 92 - at pg. 98, para 22

"22. In our opinion, when the language of the statute is plain and clear then the literal rule of interpretation has to be applied and there is ordinarily no scope for consideration of equity, public interest or seeking the intention of the legislature. It is only when the language of the statute is not clear or ambiguous or there is some conflict, etc. or the plain language leads to some absurdity that one can depart from the literal rule of interpretation. A perusal of the proviso to Section 6 shows that the language of the proviso is clear. Hence the literal rule of interpretation must be applied to it. When there is a conflict between the law and equity it is the law which must prevail. As stated in the Latin maxim *dura lex sed lex* which means "the law is hard but it is the law."

(ii) ***Dr. T.A. Qureshi v. Commissioner of Income Tax, Bhopal,*** 2007 (2) SCC 759 - at pg. 763, para 16

"16. In our opinion, the High Court has adopted an emotional and moral approach rather than a legal approach. We fully agree with the High Court that the assessee was committing a highly immoral act in illegally manufacturing and selling heroin. However, cases are to be decided by the court on legal principles and not on one's own moral views. Law is different from morality, as the positivist jurists Bentham and Austin pointed out."

(iii) ***Abdul Basit v. Abdul Kadir Choudhary,*** 2014 (10) SCC 754 - at pg. 766, para 25

"25. It is a well-settled proposition of law that "what cannot be done directly, cannot be done indirectly". While exercising a statutory power a court is bound to act within the four corners of the statute. The statutory exercise of the power stands

> on a different pedestal than the power of judicial review vested in a court. The same has been upheld by this Court in *Bay Berry Apartments (P) Ltd.* v. *Shobha* [(2006) 13 SCC 737] , *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey* [(2006) 1 SCC 479 : 2006 SCC (L&S) 250] and *Rashmi Rekha Thatoi* v. *State of Orissa* [(2012) 5 SCC 690 : (2012) 2 SCC (Cri) 721] . It is the duty of the superior courts to follow the command of the statutory provisions and be guided by the precedents and issue directions which are permissible in law."

36. In the present case, the plaintiff has filed clear evidence on record to show that defendant No.1 had tried to divert the business of defendant No.3 by setting up competing businesses despite of remaining a Director of defendant No.3. The same is even apparent from the messages sent by defendant No.1 which does not demonstrate any ouster, rather the said messages would give indication about competing with the business of defendant No.3-Company – "*Tumko sadak par utar ke zinda rakhna bhi zaroori hai*". She is luring defendant No.3 students by offering a 20% discount in the fee or a special fee to solicit Paramount's existing students, for them to join her competing business of KD Campus Pvt. Ltd. – defendant No.2. In the first written statement, it was stated that "*Those students who have paid their fee... would be given discount*." She has been providing a special rate for Paramount students to join KD Campus.

37. Further, not only has defendant No.1 advertised defendant No.2 as part of defendant No.3, defendant No.1 has set up office of defendant No.2 adjacent to defendant No.3 with hoardings that state `*A new venture by Neetu Singh, founder/director of Paramount*

Coaching Centre'. "Excellent Quality at Less Fees" and special discounts are given to Paramount (defendant No.3) students so that they should leave defendant No.3 and join promotional material of defendant No.2 such as Hindi and English pamphlets, brochures, and the banner message on official website of defendant No.2 advertising it with the same phrase.

38. Also, defendant No.1 has advertised brilliant students of defendant No.3 as those of defendant No.2 on the official website of defendant No.2. Defendant No.1 has also advertised faculty defendant No.3 as that of defendant No.2. Further, the courses offered by defendant No.2 are identical to those offered by defendant No.3. Even the Director's message on both the websites is identical, in order to usurp goodwill and business of defendant No.3.

39. It shows that the said actions of defendant No.1, *inter-alia,* in violation of her fiduciary duty as a Director and also as 50% majority shareholder of defendant No.3 and also being violative of Section 166 of the Companies Act, 2013 and Section 88 of the Indian Trusts Act, 1882.

40. In the CLB Petition filed by defendant No.1, it is mentioned that she started a new venture for setting up a coaching institute. She has also filed the complaint filed by employee of defendant No.3 against defendant No.1 who is alleging regarding that she is trying to poach and threaten the employees.

41. Being a Director of defendant No.3, in her business of defendant No.2, i.e., K.D. Campus Pvt. Ltd., she has given advertisements that K.D. Campus is a new venture by Neetu Singh, Founder and Director of Paramount Coaching Centre. The

other following details filed by the plaintiff would speak for themselves:

a) Advertisements on Paramount official website, Multiple photographs of hoardings with the statement 'new venture by Neetu Singh', 'founder/director of Paramount Coaching Centre', Receipts of books sold in the last two years (till 15th December 2015) under the banner of Paramount Reader, by Neetu Singh.

b) Magazine cover says 'a new venture by Neetu Singh, founder/director of Paramount Coaching Centre'.

c) The defendant No.3 continues to pay the rent for two premises which are in the possession and are being used by defendant No.1 for running/promoting her competing business

d) Hindi pamphlets saying 'a new venture by Neetu Singh', founder/ director of Paramount Coaching Centre'.

e) Official website of KD Campus says 'a new venture by Neetu Singh', founder/ director of Paramount Coaching Centre', Director message on KD Campus's official website is identical to the director message written on Paramount's official website, Projecting Paramount Reader as part of Paramount Coaching Centre on Facebook and Twitter.

f) FAQ on D2's website. Identical courses offered by defendant No.2 Courses offered by the said Company are the same as those of the defendant No.3-Company.

42. The proximity of the defendant No.3-Company's existing centres with those subsequently opened by the defendant No.2-Company is a matter of fact as the same is not disputed by defendant No.1. Even new centres are opened by defendant No.1 during the pendency of the litigation, which are also in close proximity to the centres of defendant No.3-Company. The defendant No.1 had appointed various relatives at key managerial positions in the defendant No.3-Company.

Admittedly, she being the Director, subsequently upon incorporation of defendant No.2, is in violation of Section 166 of the Companies Act 2013, Section 88 of the Indian Trusts Act and Section 16 of the Indian Partnership Act.

A mere reading of the above said provisions as well as the conduct of defendant No.1 and the material placed on the record would show as even in the written statement, it was admitted that she has started similar business and the plaintiff is envious; the defendant No.2 was admittedly incorporated on 21st February, 2015, it appears to the Court that defendant No.1 being the Director of the Company has not acted in good faith. It is obvious done by her in order to promote the object of the Company, in the best interest of the Company, its employees and for protection of environment; she has not exercised her duty with due and reasonable care, diligence and she was involved in the situation in which there was a direct interest that conflicted with the interest of the Company, in order to gain advantage by herself and her relatives. In normal course, she was obliged by the statutory provisions. Being a Director, defendant No.1 is guilty of making undue gain and she is also guilty of carrying out competing business of defendant No.3. There is no force in the arguments of Ms.Geeta Luthra on this point. The plea of prior user of the mark PARAMOUNT is wholly irrelevant when once the mark PARAMOUNT was invested in the company by any of the parties, the same became the property of the company unless there is an agreement in writing to the effect that the other party/Director shall not claim any right to the same name. Such agreement or consent has not been pleaded by defendant No.1.

43. Now, I shall deal with the next submissions addressed on behalf of defendants No.1 and 2 that the suit filed by the plaintiff as derivative action is not maintainable. It is submitted on behalf of the plaintiff that the plaintiff has instituted the present action for and on behalf of defendant No.3 as derivative action because defendant No.3 is unable to from instituting the present action in its own name. It is alleged in the plaint by the plaintiff that the inability has attached to defendant No.3 as plaintiff and defendant No.1 are equal share-holders in defendant No.3 and since disputes have arisen between them, defendant No.3 is prevented from passing any resolution to institute any suit in its own name. The plaintiff has also instituted the present suit in his own capacity as a shore-holder having 50% share-holding in defendant No.3, for violation of his individual membership rights that arises from a contract between himself and defendant No.3 by virtue of its Memorandum of Association (MOA) as also under the common law.

(i) 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, paras 30 to 34 & 39, it was observed as under:-

> "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.

31. In a derivative action, the company would be the only party entitled to sue for redressal of any wrong done to it. However, since a company is an artificial person, it must act through its directors. Where the wrong is being done to the company by the directors in control, the company obviously cannot take action on its own behalf. It is in these circumstances that the derivative action by some shareholders (even if they are in a minority) becomes necessary to protect the interest of the company. The minority shareholders sue on behalf of themselves and all other shareholders except those who are defendants, and may join the company as a defendant. The directors are usually defendants. This action is brought instead of an action in the name of the company. The form of the action is always: 'A.B. (a minority shareholder) on behalf of himself and all other shareholders of the company against the wrongdoing directors and the company: (per Lord Denning M.R. in Wallersteiner v. Moir (No. 2), (1975) QB 373 at 390 (CA). It is a "procedural device for enabling the Court to do justice to a company controlled by miscreant directors or shareholders." (Per Lawton in Nurcomba v. Nurcomba; 1985 (1) WLR 370 at Page 376).

32. As a general rule, the courts will not interfere in matters of internal administration. It is for the majority of shareholders to decide the manner in which the affairs of the company are to be conducted. This principle was laid down in the celebrated case of Foss v. Harbottle. The court held that in the case of an injury to the corporation, it is for the corporation to sue in its own name and

individual shareholders cannot assume to themselves the right of suing in the name of corporation. The effect of the rule is that the majority shareholders cannot complain of any irregular act which the majority are entitled to do regularly. The circumstances in which minority shareholders' actions are allowable constitute the exceptions to the rule in Foss v. Harbottle. Such an action is filed by the shareholder in his own name but is for the benefit and advantage of the company. The person filing a derivative claim has to show that the company has a right to sue but being indulgent in the matter is not likely to sue and, therefore, he gets a derivative authority to sue. (Birch v. Sullivan; 1958 (1) All ER 56] 33. This type of action is a derivative action, i.e. the right to sue and enforce the right are derived from the company. The shareholders as such have no such right. If their own personal rights are being infringed they may bring a representative action. The reliefs in such an actions would be essentially, primarily and solely for the benefit of the company as opposed to vindication and enforcement of the personal rights of the named plaintiffs though there could be a thin dividing line between the two, namely, personal rights and corporate rights. Satya Charan Law (supra) brings out the essence of such an action in the following words:-

> "17. The correct position seems to us to be that ordinarily the directors of a company are the only persons who can conduct litigation in the name of the company, but when they are themselves the wrongdoers against the company and have acted mala fide or beyond their powers, and their personal interest is in conflict with their duty in such a way that they cannot or will not take steps to seek redress for the wrong done to the company, the majority of the share-holders must in such a case be entitled to take steps to redress the wrong. There is no provision in the articles of association to meet the contingency, and therefore the rule which has been laid down in a long line of

cases that in such circumstances the majority of the share-holders can sue in the name of the company must apply. In MacDougall v. Gardiner, (1875) 1 Ch. D. 13: (45 L.J. Ch. 27) and Pender v. Lushington, (1877) 6 Ch. D. 70: (46 L.J. Ch. 317), specific reference was made to the fact that the directors, being the custodians of the seal of the company, were the persons who should normally sue in the name of the company, but nevertheless it was held that the majority of the share-holders were entitled to sue in the name of the company when relief was sought against the directors themselves. Even in Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cunninghame, (1906) 2 Ch. 34: (75 L.J. Ch. 437), it was recognised that "misconduct" on the part of the director provided an exception to the rule laid down in that case."

34. In Jhajharia Bros. (supra) the form of a derivative actions was discussed and it was held that if a wrong is done to the company a special form of suit can be adopted as a matter of machinery to obtain relief under special and peculiar circumstances. It states:-

"I propose, as shortly as I can without going into the case in detail, to explain my understanding of the matter. There can of course be suits by shareholders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts ultra vires. There is no question of ultra vires in this case and I propose to confine the discussion to suits other than those based upon complaints of acts ultra vires, although I am not suggesting that there is any fundamental difference in principle. Suit to restrain acts ultra vires and suits to restrain certain acts about to be discussed notwithstanding that the acts have the support of the majority of shareholders, are both exceptions to the rule that the Court will not interfere in the affairs of the company or with the decision of the majority. The

Court interferes in cases of an ultra vires act, because it is not an act within the constitution. In the other class of cases the Court interferes upon a different basis. They have been referred to generally as cases of "fraud upon the minority." These cases of "fraud upon the minority" however are, in my opinion, only special examples of an action by the company for what is in theory regarded as a wrong done to the company, a special form of the suit being adopted as a matter of machinery to obtain relief under special and peculiar circumstances. If the wrongdoer has the balance of power, and, therefore, the company does not take action, there are two courses open. The minority may take the risk and boldly use the company's name. The other course, and what has been thought to be the better course, where the wrongful act is supported by the majority, is for the minority shareholders to sue in their own name or, as a matter of convenience, for a shareholder to sue on behalf of himself and all the other share-holders. If, however, as generally happens and must happen logically, the wrong-doers are also shareholders, these shareholders as a matter of course must be excluded from the category of the plaintiffs; hence the phrase "except those who are defendants."

In a suit so brought, the complaint is said to be a "fraud on the minority." If by this it is understood that the minority in a company have some natural right to sue a majority which is oppressing it, if it is suggested that there is any such thing legally as a wrong done by a bigger group to a smaller group within the company and, therefore, there is a class of action by a minority qua minority against a majority qua majority, I disagree. There can be no such thing as a legal war of parties. Brown v. British Abrasive Wheel Co. is in my opinion not an authority for such a theory nor did Mr. Sanyal cite it as such. In that case, if I remember rightly, the Court would not allow an alteration of articles so

that the majority could appropriate a small minority. It was not allowed as being contrary to justice. The real significance of it, in my opinion, is that it was a violation of the constitution, so to speak, the rights in other words of all shareholders who are all citizens. Although this is a matter of theory its results on matters of practice are unusually important. The primary wrong is the wrong done to the company; in other words all the shareholders. There is, it is true, a secondary wrong in the suppression of the opposition of the minority, the overwhelming of the minority. In the normal case the distinction is purely theoretical, the wrong-doers are themselves the majority. I can conceive, however, of cases where the distinction may become apparent, in other words, where the primary wrong-doers, those committing the fraud or the wrongful act, are not themselves the majority but get the support of the majority."

39. The pleadings in the suit if taken, as a whole, would clearly indicate that the plaintiffs are seeking to enforce their personal cause of action as opposed to derivative action. The same would be further clear from Paragraph 41 of the Plaint where the plaintiffs have specifically stated that the defendants in collusion and conspiracy with each other have perpetrated fraud on the plaintiffs through the proforma defendant. This sentence clearly indicates that it is a wrong done to the plaintiffs. It makes it very clear that the plaintiffs are espousing their personal cause of action. A party to a contract with the company is no way concerned with the inter se disputes between the directors. In case of a dispute with regard to the internal management of the Company and as to who would represent the company and/or authorize to represent the company, the proper course is to file a suit for declaration and injunction and to seek appropriate remedy against the miscreant directors and for persons asserting their right as directors. In the instant case, it appears that there are disputes with regard to the

internal management of the proforma defendant company. The orders disclosed in this proceeding would not show that the defendant Nos. 3 to 5 were not authorized to represent the said company in the arbitration proceeding. This observation, however, is not an expression of opinion with regard to the claim of the plaintiffs against the said defendant Nos. 3 to 5, that the said defendants have ceased to become directors. The said defendant No. 1 is no way concerned with the inter se disputes between the plaintiffs and the defendant Nos. 3 to 5. Although, the plaintiffs have asserted that the said defendants for long years have ceased to become directors and since 2009 the said defendants were not entitled to hold themselves as directors but the plaintiffs did not take recourse to any legal proceeding to prevent the said defendants from asserting their rights as directors since even thereafter the said defendants continued to assert their right as directors that had resulted in various litigation. Even if it is assumed that the defendant No. 1 is aware of the inter se disputes between the plaintiffs and the defendant Nos. 3 to 5, the defendant No. 1 is under no obligation to disclose such dispute before the arbitrator since the claim of the defendant No. 1 is against the proforma defendant. The defendant No. 1 appears to have been roped in by clever drafting, in order to avoid the award passed against the proforma defendant. The reliefs claimed in the plaint so far as it seeks a declaration that the award against the defendant No. 1 is non est, illegal and not enforceable and the said award is required to be set aside, in my view, having regard to the frame of the suit is not maintainable and barred by law. The challenge to the award has now become barred by limitation. It is settled law that what cannot be done directly cannot be permitted to be done indirectly. It is not been alleged that the proforma defendant was prevented by the said defendants Nos. 3 to 5 to challenge the award."

44. Ms.Geeta Luthra, learned Senior counsel has also strongly relied upon another decision in the case of ***Darius Rutton Kavasmaneck v. Gharda Chemicals Limited***, (2015) 191 CompCas 52 (Bom), para 45, wherein it was held as under:-

> "45. A derivative action is not maintainable if the Plaintiff has an ulterior motive in bringing the action as then it cannot be regarded as bona-fide in the interest of the company. This is the principle followed in common law as is evident from the decision of the Court of Appeal in England in Barrett Vs. Duckett and Others [1995] 1 BCLC 243 where at page 250, paragraph 6 it was held:
>
> > "6. *The shareholder will be allowed to sue on behalf of the Company if he is bringing the action bona fide for the benefit of the Company for wrongs to the Company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed*.
> > .....
> >
> > *First on the necessity for the absence of an ulterior purpose, the words of Lawton LJ in Nurcombe v. Nurcombe* [1984] BCLC 557 at 562, [1985] I WLR 370 at 376 are apposite:
> >
> > > '*It is pertinent to remember, however, that a minority shareholder's action in form is nothing more than a procedural device for enabling the court to do justice to a Company controlled by miscreant directors or shareholders. Since the procedural device has evolved so that justice can be done for the benefit of the company, whoever comes forward to start the proceedings must be doing so for the benefit of the Company and not for some other purpose. It follows that the court has to satisfy itself that the person coming forward is a proper person to do so*'."
>
> Further at page 256 it was held:

"*I can well understand that Mrs. Barrett is upset at what has occurred between Christopher and Carol and that she is indignant at the supplanting of Carol by Janet. But her partiality shows through all her evidence, and it is by her behaviour in relation to the claims against Carol, in contrast to the claims against Christopher and Janet, that I have become convinced that she is not pursuing this action bona fide on behalf of the company. If she had been, she would have had to sue Carol no less than Christopher in respect of diverted moneys. She claims that she did not sue Carol because Carol does not have any assets. But when Mr. Guy was asked what assets Christopher had to make him worth suing, the first two items listed by Mr. Guy were the jointly owned former matrimonial home in Gerrards Cross and the proceeds of The Noakes in each of which Carol retains her interest. Mr. Guy sought to assure us that now that the decision had been made to sue Carol, the action would proceed against her. I am afraid that I simply do not believe that Mrs. Barrett would pursue any claim against her daughter to the point of enforcing judgment: to my mind it is improbable in the extreme that she would force her daughter and grandchildren out of their home and I quite understand why she would not. Her failure to take the order making Carol a Defendant any further speaks volumes. On the other hand I do not doubt that she would pursue the other Defendants as far as she could, regardless of whether there is any real likelihood of recovery. This is not a satisfactory basis for an action on behalf of the company*". (emphasis supplied)

The abovementioned decision does not help the case of defendant No.1. The referred case was decided as per its own merits. The facts and circumstances in the present case are materially different. Hence, the decision is not applicable to the facts of the present case as already mentioned in earlier part of my order. In the

case in hand, the defendant No.1 was not ousted from defendant No.3 and there was no such situation as in ***Darius Rutton Kavasmaneck*** (supra) case, rather in the present case, the defendant No.1 being a director in running the business in which she was participating in all activities still chose to start her independent business in competing the business of her own company. The act of the defendant No.1 was prima facie not bonafide as it was done for monetary purposes.

45. As per settled law, the Director is not permitted to retain secret profits which he makes by using information or property or opportunities which belong to his/her company. Consequences have to be followed if director places himself/herself in a position where his/her personal interest or duty is liable to conflict with the duties to the Company of which he is Director unless the Company gives its consent in writing. Even if his/her company may or may not be benefitted from the same, the said party is under a duty to pay over to the company which he or she has betrayed by disloyalty. Without the need of any proven breach, the Court may set-aside a transaction entered into in the shadow of such a conflict. In an appropriate case, it may also restrain entry into such a transaction or restrain the Director from involving in a conflict conduct.

As per "Corpus Juris Secundum – Volume 18", a corporate fiduciary may not appropriate to his or her own use a business opportunity which in equity and fairness belongs to the corporation. The corporation may bring an action for an accounting of the secret profits of a promoter, or, in a proper case, it may bring an action for damages for fraud, or it may rescind the transaction. An action may be brought by the corporation, its receiver or stockholders, depending on the circumstances of the case, and the promoter has the burden to

prove that he or she has been true to his or her fiduciary duties. Subscribers to stock may, in the case of fraud or breach of trust resulting in injury to them individually, maintain an action against the promoters to compel them to return or to account for any funds which they have received and misappropriated, and for a proper share of any secret profits.

46. In the case of ***Dr. Satya Charan Law and others v. Rameshwar Prasad Bajoria and others,*** AIR (37) 1950 Federal Court 133, para 42, wherein it was held as under:-

> "18. The correct position seems to us to be that ordinarily the directors of a company are the only persons who can conduct litigation in the name of the company, but when they are themselves the wrongdoers, against the company and have acted mala fide or beyond their powers, and their personal interest is in conflict with their duty in such a way that they cannot or will not take steps to seek redress for the wrong done to the company, the majority of the shareholders must in such a ease be entitled to take steps to redress the wrong. There is no provision in the articles of association to meet the contingency, and therefore the rule which has been laid down in a long line of cases that in such circumstances the majority of the shareholders can sue in the name of the company must apply. In *MacDougall v. Gardiner*, (1875) 1 Ch D. 13 and *Pender v. Lushington*, (1877) 6 Ch. D. 70 , specific reference was made to the fact that the directors, being the custodians of the seal of the company, were the persons who should normally sue in the name of the company, but nevertheless it was held that the majority of the shareholders were entitled to sue in the name of the company when relief was sought against the directors themselves. Even in *Automatic Self-Cleansing Filter Syndicate Company Ltd. v. Cunninghame*, (1906) 2 Ch. 34 , it was recognized that "misconduct" on the part of the director provided an exception to the rule laid down in that case."

47. The Kerala High Court in the case of ***Joseph v. Jos***, AIR 1965 Ker 68, observed as under:-

> ".....The only point argued before me was that the suit was not maintainable, since the matter related to and was entirely concerned with the internal management of an incorporated company. In order to decide the question whether the ruling of the chairman that the plaintiff has no right to stand as a candidate for election to the post of a Director raised a justiciable issue, one has to look into the nature of the right which the plaintiff was asserting in the case. There are two kinds of rights for a member of the company, one the individual membership right, and the other the corporate membership right. So far as the corporate membership rights are concerned, a shareholder can assert those rights only in conformity with the decision of the majority of the shareholders. An individual membership right is a right to maintain himself in full membership with all the rights and privileges appertaining to that status. This right implies that the individual shareholder can insist on the strict observance of the legal rules, statutory provisions and provisions in the memorandum and articles which cannot be waived by a bare majority of shareholders."

48. In case the above said decisions are read in a meaningful manner, the circumstances would clearly go in favour of the plaintiff and against the submission of defendant No.1 and 2 that the suit filed by the plaintiff as derivative action is not maintainable. The facts in the present case would speak for themselves as defendant No.1 has stated her business obviously in order to harm the business of defendant No.3-Company. There is sufficient material on record in this regard.

49. Thus, *prima-facie*, this Court is of the view that derivative action filed by the plaintiff against defendants No.1 and 2 and on behalf of defendant No.3 is maintainable. The plaint cannot be rejected as alleged by defendants No.1 and 2.

50. Next objection of the defendants No.1 and 2 is that the company has not authorized the plaintiff to file any such action. The suit of the plaintiff is without any cause of action, as he has filed the suit as shareholder to the extent of 50% in the shareholding of defendant No.3-Company for violation of his individual membership rights. The remedy for the plaintiff, if any, is a petition under Section 397/398 of the Companies Act, 1956 before Company Law Board.

51. There is no provision in the Companies Acts that enables a company to approach the Company Law Board for a wrong done to the Company in view of competing business started by the defendant No.1 being the Director of defendant No.3. Defendant No.1 has not denied the fact that she has incorporated the company K.D. Campus – defendant No.2 who is doing the similar business. She has also not denied the fact that defendant No.2 was advertising the name Paramount which gives the impression that somehow, the defendant No.2 is associated with the defendant No.3 or a branch of it or the same is authorized by defendant No.3. The relatives of defendant No.1 are also the Directors and working in the company of defendant No.2, at the same time, her real sister is employed with defendant No.3. Whether the civil common remedy is maintainable in view of earlier discussion in the matter? The common law remedy is one of the facets of tort.

52. Let the issue mentioned above be examined. The language of Section 399 (1956 Act) is similar as Section 241 (2013 Act). Both provisions reads as under:-

Section 399 (1956 Act)

"**399. Right to apply under Sections 397 and 398**.— (1) The following members of a company shall have the right to apply under Section 397 or 398:

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

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

(2) For the purposes of sub-section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the [Tribunal] under Section 397 or 398, notwithstanding that the requirements of clause (*a*) or clause (*b*) as the case may be, of sub-section (1) are not fulfilled.

(5) The Central Government may, before authorising any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the [Tribunal] dealing with the application may

order such member or members to pay to any other person or persons who are parties to the application."

Section 241 (2013 Act)

241. Application to Tribunal for relief in cases of oppression, etc.—(1) Any member of a company who complains that—

(*a*) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(*b*) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture-holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,

may apply to the Tribunal, provided such member has a right to apply under Section 244, for an order under this Chapter.

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter."

53. After going through the documents placed on record, it appears that the present suit is filed on behalf of the Company. If the Company was in a position to pass a resolution to institute a suit against a Director indulging in competing business, the suit would have been filed on behalf of the Company itself. As the Company is

prevented from passing a resolution, the suit has been instituted in the name of the plaintiff on behalf of the Company. The Company in the present circumstances itself is not in a position to file the suit or any petition before the Company Law Board. Therefore, the Court is to read the plaintiff to be the company and not Mr.Rajeev Saumitra in view of peculiar facts and circumstances in the present case.

The language of Sections 397 and 398 of 1956 Act is quite similar to Sections 241 and 242 of the 2013 Act. The said Sections do not exclude the jurisdiction of the Civil Court.

54. In the case of ***N.P.Ponnuswami v. The Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. And others,*** AIR 1952 SC 64, the Supreme Court held as under:-

> "12. It is now well-recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes J. in *Wolverhampton New Water Works Co. v. Hawkesford*, 6 C.B. (N.S.) 336, 356 in the following passage :-
>
> > "There are three classes of cases in which a liability may be established founded upon statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. <u>But there is a third class viz., where a liability not existing at common law is created by a statute which at the same time gives a</u>

special and particular remedy for enforcing it..... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express News Paper Limited (1919) A.C. 368 and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordons Grant & Co. (1935) A.C. 532 and Secretary of State v. Mask & Co (1940) 44 C.W.N. 709; and it has also been held to be equally applicable to enforcement of rights : see Hurdutrai v. Official Assignee of Calcutta (1948) 52 C.W.N. 343, 349. That being so, I think it will be a fair inference from the provisions of the Representation of the people Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

55. During the course of hearing, Ms.Luthra has argued that there is bar to Civil Court under Sections 291 (1956 Act) and 430 (2013 Act). Section 291 stipulates the general powers of the Board. As regards Section 430, the same has not been notified, which fact is not denied by the counsel.

i) In the case of ***K. Saravanan and another v. Cosmopolis Properties (P) Ltd. and others***, (2013) 1 Comp LJ 343 (Mad), in para 27, it was observed as under:-

"27. As stated supra, in the decision reported in MANU/SC/0375/2010 : (2010) 11 SCC 1, the Honourable Supreme Court dealt with the scope of section 10GB of the Companies Act, and declared that Parts I-B and I-C of the Act viz., section 10FD to 10GF as presently structured are unconstitutional and they can be made operational by making suitable amendments, in that judgment. Admittedly,

the amendments or suggestions laid down in that judgment are not carried out as on date and therefore, as per the judgment of the Honourable Supreme Court, section 10GB of the Companies Act, as on date is unconstitutional and therefore, the contention of the learned Senior Counsel for the petitioners that the civil court has no jurisdiction as per the provisions of section 10GB cannot be accepted."

ii) Yet in other case titled as ***Ravindra Veer Singh v. TBH Breweries India Private Limited***, MFA No.475/2015 and others, decided on 20th February, 2015, in para 15, it was held as under:-

"15. On a plain reading of Section 430 of the Companies Act, it is clear that the civil court's jurisdiction is not ousted insofar as the relief of injunction against persons from interfering with the smooth management of the company and its affairs by the directors of the said company is concerned. The defendants have already been removed in the meeting. The very grievance aired by the defendants before the Board has not been taken into consideration, and it is held that the civil court is seized of the matter. Thus a simple suit for injunction seeking the equitable relief of permanent injunction about the day-to-day management of the company and its affairs is maintainable."

iii) In another case titled as ***Avanthi Explosives P. Ltd. v. Principal Subordinate Judge, Tirupathi, and another***, [1987] 62 CompCas 301 (AP), it was observed as under:-

"It may be seen that there are various provisions in the Act which refer to "the court", such as sections 107, 155, 163(6), 237, 391, 394, 395 and 397 to 407, 425, etc. The Central Government is empowered, however, to confer jurisdiction on the District Court powers only in respect of some these sections but not all.

In my view, section 10 of the Act only proceeds to enumerate or specify "the court having jurisdiction under this Act ", wherever such jurisdiction is conferred on "the court" by the other provisions of the Act. Powers are conferred by the act not only on courts but also on other authorities like the Central Government, the Company Law Board and the Registrar; and where a power is vested in a court, that court has to be specified. Beyond so specifying the court competent to deal with a matter arising under the Act, section 10 does not purport to invest the company court with jurisdiction over every matter arising under the Act. It may be that, in view of the elaborate provisions contained in the 1956 Act in regard to the management and the conduct of a company's affairs including important internal matters of administration, the court's interference by civil court has become more limited, but the power has not at all been taken away. Every suit for redress of individual wrongs cannot be considered as merely concerned with matters of internal management. (M. P. Menon J. in *R. Prakasam v. Sree Narayana Dharma Paripalana Yogam*, [1980] 50 Comp Cas 611 (Ker)).

In *Foss v. Horbottle*, [1843] 2 Hare 461, the minority shareholders alleged that the company had a claim in damages against some of the directors by reason of the fraudulent acts of those directors, but at the general meeting, the majority resolved that no action should be taken against them. Two of the minority shareholders took legal proceedings against the directors and others to compel them to make good the losses to the company. The court dismissed the action on the ground that, as the acts of the directors were capable of confirmation by the majority of members, the court should not interfere. it was thus left to the majority to decide what was for the benefit of the company. This rule has been applied in several cases later, vide MacDougall v. Gardiner [1875] 1 Ch 13.

The procedural character of the rule in Foss v. Harbottle [1843] 2 Hare 461, was explained by Jenkins L. J. in the Edwards v. Halliwell [1950] 2 All ER 1064, 1066 (CA).

Palmer in his *Company law*, 21st edition (1968), points out that in English company law, while the substantive aspects of the rule of the majority are not neglected, the emphasis is on the procedural character of that rule. The reasoning on which the rule is founded is that in these cases, it is for the company to complain. by suing the alleged wrongdoer. The company is thus the proper plaintiff and the company is ruled by the majority.

However, the following exceptions to the rule in *Foss v. Harbottle*, [1843] 2 Hare 461, are admitted as pointed out by Jenkins L. J. in Edwards v. Halliwell [1950] 1 All ER 1064, namely, the majority cannot confirm –

(1) an act which is ultra vires the company or illegal;

(2) an act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company; or

(3) a resolution which requires a qualified majority but has been passed by a simple majority.

In other words, the rule in *Foss v. Harbottle* [1843] 2 Hare 461 does not apply to such acts as referred to above inasmuch as the majority cannot sanction those acts. 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 in the civil court. The reason for this is that if the minority were denied that right, their grievance could never reach the court because the wrongdoers themselves being in control, do not allow the company to sue. In

some cases, it has been held that further exceptions to the rule in *Foss v. Harbottl,* [1843] 2 Hare 461, are permissible in cases in which "justice requires that the courts should intervene" to assist an otherwise minority shareholder. In *Heyting v. Dupont*, [1964] 1 WLR 843, Harman L. J. said (at page 854) :

"....there are cases which suggest that the rule (in Foss v. Harbottle [1843] 2 Hare 461) is not a rigid one and that exception will be made where the justice of the case demands it."

The above rule in *Foss v. Harbottle*, [1843] 2 Hare 461, has come up for consideration in several High Courts in our country.

K.K. Mathew J. (as he then was) was dealing in *Joseph v. Jos*, [1964] 34 Comp Cas 931 (Ker), with a suit for a declaration that the proceedings of the meeting regarding the election of certain directors was null and void and for a permanent injunction restraining defendants Nos. 3 to 5 therein from functioning as director and for directing the defendant-company to hold a meeting for re-electing three directors. After referring to the rule in *Foss v. Harbottle*, [1843] 2 hare 461. and the exceptions thereto, the learned judge made a distinction between "individual membership right' and the "corporate membership right" of a shareholder. It was held that the rule against interference by court with the internal management of companies, was not applicable to cases of infringement of the individual membership right. The learned judge quoted from Palmer's Company Law, 20th edition, page 492:

"By contract with the company (and the other members; c.f.s. 20) the shareholder undertakes with respect to some - and , in fact, most rights which his membership carries, to accept as binding upon him, the decision of the majority of shareholders, if arrived at in accordance with the law and the

articles; these membership rights are known as corporate membership rights. Other rights of the shareholder, according to his contract with the company, cannot be taken away from him unless he consents ; if such rights is in question, a single shareholder can, on principle, defy a majority consisting of all the other shareholders. Rights of this type are known as individual membership rights." (emphasis supplied)

56. In the case of ***Norma (India) Ltd. v. Sameer Khandelwal and Ors.***, reported in 2007(93) DRJ 318, in paras 14 and 24, it was held as under:-

> "14. It is settled law that jurisdiction of the company law board under the Companies Act in relation to Section 397 of the said Act is a concurrent jurisdiction which may be exercised by civil courts where allegations pertaining to oppression and mismanagement partake the character of a civil dispute. Thus, it was the duty of the plaintiff to have made averments in the plaint or in the injunction application, giving material particulars of the dispute pending before the company law board. In particular, plaintiff ought to have disclosed about CA No. 39/2006 filed under signatures of Shri Gautam Khandelwal."

57. In another case titled as ***CDS Financial Services (Mauritius) Limited v. BPL Communications Limited and Others***, (2004) 121 CC 374 (Bom) (DB), it was held as under:-

> "Under section 9 of the Code of Civil Procedure, civil courts have jurisdiction to try all suits of civil nature except those of which cognizance by the civil court is either expressly or impliedly excluded. Such exclusion is not to be readily inferred, the rule of construction being that every presumption should be made in favour of the existence rather than exclusion of jurisdiction of the civil courts. In *Dhulabhai vs. State of Madhya Pradesh*: [1968] 3 SCR 662 a five-judge Bench of the Supreme Court considered the earlier decisions on this aspect and laid down the following propositions:

"(1). Where the statute gives finality to the orders of the special tribunals, the civil courts jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of jurisdiction of the court an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil Court. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary if the statute creates a special right or liability and provides for the determination of the right or liability and further lays downs that all questions about the said right or liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with action in civil courts are prescribed by the said statute or not...

An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set out apply."

In *Raja Ram Kumar Bhargava vs. Union of India*, [1988] 171 ITR 254, the principle regarding implied exclusion of jurisdiction has been explained as follows (page 261 of 171 ITR):

"Generally speaking, the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created uno

> flatus and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil courts jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil courts jurisdiction, then both the common law and the statutory remedies might become a concurrent remedies leaving open an element of election to the persons of inherence."
>
> From the above two decisions of the Supreme Court it is clear that when there is no express provision excluding jurisdiction of the civil courts, such exclusion can be implied only in cases where a right itself is created and the machinery for enforcement of such right is also provided by the statute. If the right is traceable to general law of contract or it is a common law right, it can be enforced through civil court, even though the forum under the statute also will have jurisdiction to enforce that right."

57.1 In the case of ***Ganga Ram Hospital Trust v. Municipal Corporation of Delhi***, 2001(60) DRJ 549, para 16, it was held as under:-

> "16. Section 169 provides for a remedy of appeal against levy or assessment of any tax under the Act while section 170 lays down conditions subject to which the right of appeal conferred by section 169 can be exercised. Neither of these two sections contain any provision barring a civil suit to challenge levy and assessment of tax under the Act. At best it may be argued that in view of the remedy of appeal provided under section 169 of the Act a party should have recourse to the said remedy. But a party filing a civil suit to challenge the levy and assessment of tax under the Act may like to urge that the levy and assessment of tax is not in accordance with the Act or is violative of the provisions of the Act. In other words it may be the case of a plaintiff that the authorities under the Act have not acted in accordance with the provisions of the Act while levying and assessing tax and, therefore, it is entitled to exercise its inherent right to challenge such a levy and

> assessment by way of a civil suit. Availability of an alternative remedy may be treated as a bar by the court while exercising its writ jurisdiction because writ jurisdiction under Article 226 of the Constitution of India is a matter of exercise of discretionary jurisdiction of the court but it is not the same case while entertaining a civil suit. Exercise of jurisdiction to entertain civil suit is not a discretionary matter before the civil court. A civil court may reject the plaint as per law or dismiss a civil suit on merits. It cannot refuse to entertain the suit unless barred by law. The DMC Act does not contain any such bar to a civil suit in matters of levy and assessment of tax."

58. Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of defendants No.1 and 2 has also addressed his submissions by stating that even the suit is barred under Section 166 of the 2013 Act. He says that the common law remedy is not available. The plaintiff has no privity with K.D. Campus Pvt. Ltd. He referred the decision of the Court in the case of ***HB Stockholding Ltd. v. DCM Shriram Industries Ltd. and Ors.***, decided on 25th August, 2009.

59. Section 166 stipulates 'Duties of a Director to a Company' and not 'Rights of Shareholders'. In case a Director violates the duties prescribed in Section 166, the cause of action accrues in favour of the company. The said section is akin to the common law right. It is merely repository to the Director's fiduciary duties. It does not apply to the shareholder. The defendant No.1 is still a Director of defendant No.3. The argument is that the restraint of entering into competing business does not apply to a shareholder. Therefore, there is no force in the submission of Mr.Sethi in view of the facts of the present case. The common law does not prevent the plaintiff to take protection of common law rights, even if the statute excludes it specifically. Reliance

is placed on ***Avanthi*** (supra). The decision referred by Mr.Sethi does not help the case of defendants No.1 and 2.

i) In the case of ***Sangramsinh P. Gaekwad and others v. Shantadevi P. Gaekwad (Dead) through LRs. And others,*** (2005) 11 SCC 314, in para 39, it was held as under:-

> "39. By reason of Section 88 of the Indian Trusts Act, a person bound in fiduciary character is required to protect the interests of other persons but the heart and soul thereof is that as between two persons if one is bound to protect the interests of the other and if the former availing of that relationship makes a pecuniary gain for himself, Section 88 would be attracted. What is sought to be prevented by a person holding such fiduciary benefit is unjust enrichment or unjust benefit derived from another, which is against conscience that he should keep. When a person makes a pecuniary gain by reason of a transaction, the cestui qui trust created thereunder must be restored back."

In any case, even promoter/majority shareholders are fiduciaries to the company as well as the other shareholders because they control the assets of the other shareholders who cannot play a fraud on the minority.

ii) ***Kossoy and Filco v. Bank Feuchtwanger Ltd.***, CA 817/79, P.D., vol. 38(3) 253, paras 55-58 whereof reads as under:-

> "Filco: Shareholder's Liability.
>
> 55. Filco and Kossoy are not one and the same. The latter was a director of the Bank, who by his actions breached the fiduciary duty he owed the Bank as one of its directors. Filco was not a director of the Bank, nor was it bound by any duty of a director. Filco was, however, a shareholder in the Bank. It

belongs to the Appelbaum-Kossoy group, which controlled the Bank. As a shareholder, and a member of the controlling group, is it bound by any duty towards the Bank? Is a shareholder in general, and a controlling shareholder in particular, bound by any duty towards the company? The starting point of the principle of English common law is that a shareholder is entitled to do whatever he wishes with his shares, and is not bound by any duty, neither to the company nor to the other shareholders. A share is property, and the shareholder is entitled to do whatever he wishes with his property (see Gower, supra, at 615). This approach has never been absolute, since English common law recognized the duty of a shareholder not to commit a fraud on the minority. Within this framework, the duty of the shareholder to act in good faith and for the good of the company has been recognized (see Allen v. Gold Reefs of West Africa Limited (1900) [16], at 671) as has the duty to act honestly towards it (see Scottish Co-operative Wholesale Society Ltd. v. Meyer (1959) [17]). Unlike the narrow English approach, a different approach has been developed in the United States, where a controlling shareholder is under a duty of loyalty both in wielding control within the company and in the sale of his shares, and this duty is incumbent upon him towards the company and towards the minority shareholders (see H.G. Henn and J.R. Alexander, Laws of Corporations (St. Paul, 3rd ed., 1983) at 653). Israeli case law has yet to deal with this matter at length, although it has been ruled that in a private company, which is similar to a partnership in this regard, a shareholder may owe a duty of trust towards the other shareholders (C A. 283/ 62 [9]), this in parallel to the recognition by Israeli case law that shareholders owe a duty not to act in a manner resulting in a "fraud on the minority" (see A. Felman, Applied Israeli Corporate Law (Karni, 3rd ed., 1981) vol. II, at 594).

56. Within the scope of this appeal, we have no need to discuss at length whether a shareholder is

under any general duty of loyalty towards the company and towards the other shareholders. We are dealing with a new matter, with extensive practical and theoretical implications, and we will therefore do well if we act cautiously in developing this matter, answering any concrete questions arising and aiming to formulate an over-all approach on the basis of past experience. For the purpose of the appeal before us, the following proposition will suffice: a controlling shareholder who wishes to sell his shares owes a duty of loyalty to the company with respect to the sale, and must act in good faith and honesty toward it, and he will be in breach of his duty if he sells his shares to a buyer who to the best of his knowledge will strip the company of its assets and lead to its insolvency. This duty has been recognized in the United States for many years (see Insuranshares Corporation v. Northern Fiscal Finance Corp. (1940) [22]; Levy v. Feinberg (1941) [23]; Dale v. Thomas H. Temple Co. (1948) [24]). In this regard, where the transaction takes place in a number of stages, which in commercial terms could be viewed as a series, its entirety can also be viewed as a single entity in legal terms. Accordingly, a breach of loyalty can also be attributed to a shareholder with regard to actions which are to take place in the future, provided that they are foreseeable and constitute a part of the entire scheme, or series of actions (see Pepper v. Litton (1939) [25]). The basis of this duty rests on the fundamental principle discussed earlier: the controlling shareholder wields power in the company. He controls the property of others. The source of this power is the controlling shares, which entitle him to vote at the shareholders' general meeting and to appoint directors. Upon transferring this power to the purchaser, these rights are accorded to the latter. This power is likely to be abused. Accordingly, the law imposes a duty of trust upon the shareholder, so as to prevent him from abusing the power (see F.H. Easterbrook and D.R. Fichel, "Corporate Control Transactions" 91 Yale L.J. 698; A.A. Berle, "Corporate Powers as Powers in

Trust" 44 Harv. L. Rev. 1049 (1930-31); D.C. Bayne, "A Philosophy of Corporate Control" 112 U. Pa. L. Rev. (1963-64) 22). It is true that a share is property, which its owner may treat in any way he desires. These options, however, are not unlimited. Shares may not be used to create a disposition which will, to the vendor's knowledge, lead to the company being stripped. The shareholder may not act with the attitude of "apres moi le deluge."He must consider the company he controls. He may not sell his shares to a purchaser with the knowledge that by the sale the purchaser will gain control of the company, exploit it, and cause its demise.

57. One may well ask what is the source in our law of this duty of loyalty of shareholders? We have already provided the answer. It is a known, recognized principle in our law that a holder of the controlling interest is subject to a series of duties of loyalty, which are designed to limit the one in control from abusing his power. This principle is expressed in many branches of the law, and is also expressed in corporate law. Accordingly, the duty of loyalty is incumbent upon the promoter and upon the director. By virtue of the self-same principle, the duty of loyalty also rests upon the holder of the controlling shares with regard to their sale. The promoter, director and controlling shareholder wield power, which they hold in trust, as Professor Berle said more than fifty years ago, "corporate powers as powers in trust" (see Berle, supra, and Pepper v. Litton (1939) [25], at 306). Indeed no formal specific recognition of this duty of loyalty on the part of a shareholder has yet been made in our legal system, but the fundamental principle upon which it is based has been part of our system for years. On the basis of this well-known, recognized fundamental principle, we are fully entitled to deduce new secondary duties, to suit our needs. An example of another field in which there has been a similar development is the field of negligence in torts, in which from time to time this court recognizes new duties of care in

regard to negligence - this on the basis of the general principle of negligence as recognized by our system. This being so, we are no longer required to examine whether the very same result could be arrived at on the basis of the application of the principle of good faith specified in Section 39 of the Contracts Law (General Part), 5733-1973.

58. I have already stated that the duty of loyalty requires concretization, within which the unique legal relationship upon which the duty of loyalty is based must be expressed. The content of this duty of loyalty is not identical in all legal relationships in which it lies. The duty of loyalty of a director is not the same as the duty of loyalty of a shareholder. It must not be forgotten that a shareholder is an owner of property, and according to the general law of title, he is entitled to do whatever he pleases with his property. This freedom is not unrestricted, since one of the restrictions derives from the fact that the holding of the share gives him control of the company and this control requires him to act honestly, in good faith and for the good of the company. This conduct - which is part of the general regime of the duty of loyalty - is the result of a suitable balance of the right of ownership on the one hand, and control of the company on the other. The need for this balance is unique to a shareholder, and is not present in other relationships. A director is not permitted to sell his position, and there is no need to balance any such "freedom of sale" with his status as a director. Therefore, one cannot say that the duty of loyalty of a controlling shareholder is the same as the duty of loyalty of a director. Each duty of loyalty has its own content, since every power has its own extent. What balance is appropriate in the case of a controlling shareholder? This question has many facets, and we are interested in the balance appropriate to the sale of shares. In the matter at hand, it may be said that the controlling shareholder is free to sell his shares to any purchaser. unless he knows that the purchaser is about to acquire control

of the company and strip it of its assets. This provides the appropriate balance between the prerogative of ownership on the one hand, and the protection of the good of the company on the other. This law is similar to another principle present in our system, whereby ownership does not justify the carrying out of an act which harms someone else (which is equivalent to section 14 of the Lands Law, 5729-1969). This principle protects the freedom of property and the shareholder's right to do whatever he pleases with his shares on the one hand, and assures protection of the interests of the company on the other. This principle is common in the United States both in the literature (see A. Hill, "The Sale of Controlling Shares," 70 Harv. L. Rev. 986 (1956-57); A.A. Berle, " 'Control' in Corporate Law," 58 Colum. L. Rev. (1958) 1212; Comment, "Sales of Corporate Control and the Theory of Overkill," 31 U. Chi. L. Rev. (1963-64) 725) and in case law (see Insuranshares [22]; Levy v. American Beverage Corporation (1942) [26]; Gerdes v. Reynolds (1941) [27]; Dale [24]). Note: I do not mean to say that we must adopt the balance extant in the United States between the ownership of a share and the power of control granted by the share, or that we must follow their approach in everything related to controlling shares. The matter before us raises a specific question, involving the breach of loyalty in the sale of controlling shares and liability to indemnify the company for the loss it suffered. Here we can learn from the balance present in the United States. Should other problems arise in the future - such as the "price" of control; whether the consideration for the sale of control belongs to the company itself, and whether a basis for the formation of the duty is the vendor's actual knowledge of the purchaser's intentions, or whether it suffices that he did not know in a case where a reasonable shareholder should have known; and other similar questions which have been raised in the United States - we will deal with them when, as and if they arise."

60. The defendant No.1 in the present case has failed to cross the hurdle of the mandatory provision of Section 166 which is incorporated in April 2014 in the new Act. The plaintiff has filed solid evidence which is unimpeachable, thus common remedy is available to the plaintiff against the act of defendant No.1. Therefore, in view of the above said facts and circumstances, the civil suit is not barred under Sections 397 and 398 of the Companies Act, 1956 and Section 166 of the 2013 Act.

61. With regard to other arguments addressed on behalf of defendants No.1 and 2 about the reduction of shareholding, Mr.P.V.Kapur submits that the allegation of defendant No.1 that her equity was reduced by 9%, is incorrect and in any event very belated. The incident occurred in 2013 and she knew about it. It happened because she had less balance on the company account and it was restored. Hence, there is no much relevance in deciding the issue in hand.

As far as the allegations of embezzlement are concerned, Mr.Kapur has mentioned that she too was paid the similar amount, i.e. Rs.47 lacs and the account was settled. In any case, the issue regarding reduction of her equity and even otherwise, Rs.47 lac is the subject matter of the Section 397, 398 petition filed by her before the Company Law Board. Thus, it is not necessary at this stage to decide this disputed fact. Even otherwise, the alleged reduction and Rs.47 lac allegation cannot justify her setting up competing businesses in violation of her common law/statutory duty.

62. The next submission of Ms.Luthra is that the facts of this nature of the case would establish that it should be treated as quasi-partnership dispute. The Supreme Court in the case of ***Kilpest Pvt.***

Ltd. and others v. Shekhar Mehra, (1996) 10 Supreme Court Cases 696, in para 11 has held as under:-

> "11. The promoters of a company, whether or not they were hitherto partners elect to avail of the advantages of forming a limited company. They voluntarily and knowingly bind themselves by the provisions of the Companies Act. The submission that a limited company should be treated as a quasi-partnership should, therefore, not be easily accepted. Having regard to the wide powers under Section 402, very rarely would it be necessary to wind up any company in a petition filed under Sections 397 and 398."

Without prejudice to the rights of both the parties, even this Court is of the considered view that the plaintiff and defendant No.1 should resolve their disputes. They are husband and wife and they have only one child. For the purpose of settlement, the matter was discussed many times in Chamber as well as in open Court, but it could not be resolved despite final proposed settlement of terms handed over to the defendant No.1 who although agreed to many major terms. Copy of the same and the comments and modification made by the defendant No.1 has been placed on record. As it could not finally materialize, both the parties submit that let the interim application be decided on merit.

63. Lastly, it is argued by Ms.Luthra that the suit is barred under Order II Rule 2 CPC. She submits that despite of pendency of the first suit being CS(OS) No.1592/2015, the plaintiff has filed another suit before this Court without the first withdrawal of the suit and sought liberty. In addition it is also submitted that the relief in the present suit and prayer in Rohini Court is the same. If not at least, it could have been incorporated in the earlier suit filed in Rohini court. As the

prayer in the present suit was not made earlier, the present suit is barred under Order II Rule 2 CPC.

64. As far as Rohini suits are concerned, admittedly, earlier the plaintiff filed the Civil Suit No.78/2015 titled as *Rajiv Saumitra v. Neetu Singh*, seeking *inter-alia* the relief restraining the defendant from using the initial name of PARAMOUNT from M/s Paramount Coaching Centre Pvt. Ltd., for her personal and individual benefits in publication of books, journals including Paramount Reader Publication books in the name of PARAMOUNT Test Series and other books, such as, English, Arithmetic, SSC Tier I, SSC Tier II, SSC CGL, Biology, Chemistry, Banking, Interview and in all printed and online material and other material either in the form of books, journals or in the form of "Soft" copy or in "On-line material". The said suit thereafter was withdrawn on 17th August, 2015 from the Court of Sh.Satish Kumar, ADJ, Rohini Courts, Delhi, with liberty to file the fresh suit. Subsequently on the same cause of action, the plaintiff filed another suit being Civil Suit No.217/2015 titled as *Rajeev Saumitra v. Neetu Singh & Ors.*, which is pending in the Court of Sh.Satish Kumar, ADJ, Rohini Courts, New Delhi. The interim order has been passed on 15th September, 2015 restraining *inter-alia*, defendant No.1 from using the name PARAMOUNT for her personal and individual benefit or in any of her publications, or in any soft copy, or in online material and further from indulging in competing business. An appeal was filed by the defendant No.1 against the plaintiff which is pending. An application under Order XXXIX Rule 2A CPC has also been filed by the plaintiff.

65. Later on, the plaintiff filed the suit being CS(OS) No.1592/2015 titled as *Rajeev Saumitra v. Neetu Singh* in this Court which was also

withdrawn on 24th September, 2015. The relevant paras 14 to 18 reads as under:

> "14. In case, the provisions of Order XXIII Rule 1(3) (a) & (b) CPC are read in a meaningful manner, it is clear that if the Court is satisfied that it is a formal defect and there are sufficient grounds for allowing the application to institute a fresh suit for the subject-matter of a suit or part of a claim, the plaintiff can be permitted to withdraw his claim as a whole or part, but he cannot be precluded from suing again on the same cause of action by filing a fresh suit after obtaining leave from the Court.
>
> 15. In the present case, it is apparent from the statement made by the plaintiff in the second suit that it is a formal defect and the cause of action and the relief of the subject-matter of the second suit are on the same terms. In case, the contents of para 19-23 and 25 of fresh suit are read, there is no force in the submission of the learned counsel for the defendants that the second suit is not maintainable when the first suit was still pending. It is a matter of fact that the plaintiff has filed the second suit in a transparent manner, nothing has been concealed by the plaintiff from the Courts. *Prima facie* valid reasons have been given to file the fresh suit. The interim order was neither passed in the first suit nor in the second suit, the plaintiff has pressed for an *ex parte* order without withdrawing the first suit filed by the plaintiff. In the second suit, even the summons and notice were not issued. On the first date itself, when the suit was listed, the learned counsel for the plaintiff had informed the Court that the first suit was listed before Hon'ble the Judge Incharge (Original Side), on mentioning, the said suit was transferred to this Court. Counsel for the plaintiff has alleged that as there is defect in the first suit, in order to avoid delay for the purpose of filing the amendment application in the first suit, rather the plaintiff has chosen to file fresh suit as the plaintiff is seeking urgent interim orders. There is a force in the submissions of the learned Senior counsel for the plaintiff.

16. As far as the objections raised by the defendants that there is no bonafide on the part of the plaintiff to file the second suit in order to enhance the pecuniary jurisdiction and the second suit is hit by Order II Rule 2 CPC are concerned, the said submissions cannot be considered while deciding the present application. However, the defendants are granted liberty to raise the said objections in the second suit filed by the plaintiff. Therefore, at the present moment the bonafide of the plaintiff cannot be doubted. As far as the objection of pecuniary jurisdiction is concerned, so far no matter has been ordered to be transferred. In view of enhancement of pecuniary jurisdiction, merely a notification has been issued. Thus, no malafide is found at present.

17. In view of the above, the prayer made in the application is allowed. Consequently, the plaintiff is permitted to withdraw the first suit being CS (OS) No.1592/2015, with liberty to file the fresh suit which is already filed by the plaintiff. The said suit is accordingly dismissed as withdrawn. Pending applications also stand disposed of.

18. I.A. No.17610/2015 is disposed of."

66. As mentioned above, it is the admitted position that the present suit was filed before any order was passed in the application filed by the plaintiff under Order 23 Rule 1 CPC for withdrawal on formal defect as alleged by the plaintiff.

67. In the present application under Order XXXIX Rules 1 & 2 CPC, the temporary injunctions and directions as prayed for be granted for the following reasons:

a. By virtue of Section 166 of the Companies Act 2013, which came into effect from 1st April 2014, a hitherto prohibition in common law was translated into a statutory prohibition providing, inter-alia, that a Director could not and cannot

enter into a competing business with the Company of which he is a Director or gain any advantage either to himself or to his relatives and further that if he is found guilty of violating the said provision, he shall be liable to pay an amount equal to that gain to the company. Additionally, Section 88 of the Indian Trusts Act also provides that a Director/Partner who in violation of his fiduciary character gains for himself any pecuniary advantage or enters into any dealing in which his own interest is adverse to the interest of the Company and thereby gains a pecuniary advantage to himself, he will hold such advantage gained for the benefit of the Company.

It appears that the prayer sought in the present suit and in the Rohini suit is not the same. The mark Paramount in Rohini Court was used by the defendant No.1 in relation to publication materials. However, the main relief sought in the present suit against the defendant No.1 and 2 to compete the business of defendant No.3, as the defendant No.1 has failed to do her fiduciary duties as a Director and she is in violation of the mandatory provision of Section 166 of the Act, 2013.

b. In the case of ***M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another***, reported in AIR 1997 SC 1398**,** it was held as under:

> "20……..It is now well settled that an action for passing off is a common law remedy being an action in substance of deceit under the Law of Torts. Wherever and whenever fresh deceitful act is committed the person deceived would naturally have a fresh cause of action in his favour. Thus every time when a person passes off his goods as those of another he commits the act of such deceit. Similarly whenever and wherever a person commits breach of a registered trade mark of another he commits a recurring

act of breach or infringement of such trade mark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved. It is difficult to agree how in such a case when in historical past earlier suit was disposed of as technically not maintainable in absence of proper relief, for all times to come in future defendant of such a suit should be armed with a license to go on committing fresh acts of infringement and passing off with impunity without being subjected to any legal action against such future acts."

68. The said order dated 24th September, 2015 has not been challenged by the defendant No.1 and 2 as alleged. Reliance is placed upon the case titled as ***K.S. Bhoopathy and Others v. Kokila and Others***, (2000) 5 Supreme Court Cases 458, paras 12 & 13, wherein it was held as under:-

"12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts:

(a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the court; in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and

(b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC.

13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on a par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for

> concession from the court after satisfying the court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (*b*) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action."

69. In case the order already passed on 24th September, 2015 is read, it is apparent that Suit No.1592/2015 filed by the plaintiff had a formal defect, as the same was not a derivative action. The plaintiff during the pendency of first suit became aware that the said action may not be maintainable. Even no doubt, the application for amendment could have been filed by amending the plaint. There is a force in the submission of Mr.Kapur that in order to avoid delay, the present suit was filed disclosing about the pendency of the earlier suit and application under Order XXIII Rule 1 CPC.

70. Thus, *prima facie*, at this stage, this Court felt that the present suit is not barred under Order II Rule 2 CPC, as it was merely a formal defect in the suit. Nothing on merit was abandoned or decided on merit. Full disclosure was made by the plaintiff who has not taken any advantage of interim order or concealed any fact from the Court. Thus, the objection at this stage is not sustainable and the same is rejected. All the relevant pleas raised by the defendant No.1 and 2

have been considered by this Court and the same is accordingly dealt with.

71. Therefore, seeing the overall situation, one can easily draw conclusion that the way the defendants No.1 and 2 had been carrying on business since February, 2015, it amounts to completely competing the business. The defendant No.1 is in violation of the provisions of Section 166 of Companies Act, 2013. She has failed to assign any valid reason or justification as to why she being the Director of defendant No.3 has started parallel business of defendant No.2. If she had any grievances or the plaintiff is trying to control the business of defendant No.3 or she was ousted as alleged by her, she had the remedy and rightly so, she was availing the remedy, but there is hardly any justification to start parallel/similar to the business of defendant No.3. Normally, the injunction should have been followed, however, the facts in the present case are peculiar. Therefore, it is to be examined, as to what type of order is required to be passed under the circumstances available in the case.

72. No doubt, defendant No.1 has raised allegations against the plaintiff. Certain documents by way of photographs are also filed. It is alleged by the defendant No.1 that the plaintiff has appointed lady bouncers just to create terror in the mind of the defendant No.1 and in order to take over the defendant No.3-Company like his proprietorship. In the month of June, 2015 the plaintiff had appointed CEO & Chief Advisor of the defendant No.3-Company which was against the memorandum and articles of association of the company which was objected to by the defendant No.1 and upon the interference of the police the CEO and Chief Advisor were asked to leave the office. Recently keeping aside the memorandum and

articles of association of the company, the plaintiff has appointed many staffs and bouncers which act of the plaintiff is adverse to the interest of the company.

73. The defendant No.1 has also pleaded that the plaintiff in connivance with the accountants has started siphoning the money of the company straightaway to his own account instead of depositing the same in the company account, which act of the plaintiff is again adverse to the interest of the company. Recently in the month of August, 2015, without the consent of the defendant No.1, the plaintiff had purchased two Bolero Cars and one Car by using the funds of the company which is also against the company norms. The Counsellor, namely, Rashmi of Bindapur Centre of the company was forced to resign as she was threatened by two lady bouncers sent by the plaintiff and she had no option than to resign because the defendant No.1 being director of the company was brutally assaulted by the same lady bouncer. The plaintiff is having no respect for lady staffs of the company as he is harassing the centre head of Uttam Nagar namely Manju Singh by sending his goons and bouncers, to this effect, she has reported the matter to the Police Station Binda Pur. Not only that without the knowledge and consent of the defendant No.1, he has opened a new office in Uttam Nagar and has appointed many new staffs just in order to harass the centre head Manju Singh and to teach her lesson and compelling her to resign from the Post of Centre Head of Uttam Nagar Centre of the company. The negative attitude of the plaintiff towards the lady staff of the company has compelled so many lady staffs namely Firdous, Sweta, Ritika, Poonam, Jessica etc. to resign from

the company, which attitude of the plaintiff is not in the interest of the company.

74. It is also stated that the lady bouncer namely Kiran who had brutally assaulted the defendant No.1 at Munirka Branch has been promoted and awarded by the plaintiff along with two more bouncers and she has been functioning as a security head in the head office of the company because she has succeeded in brutally assaulting the defendant No.1 at the behest of the plaintiff and mercilessly thrashing her at Munirka Branch which is reflected in the photographs already on record. The name of the defendant No.1 has been removed from the display board of the company by the plaintiff as he is showing himself to be the sole proprietor of the company.

75. It is pertinent to mention here that Mr.Sandeep Sethi, learned Senior counsel in the presence of defendant No.1 and after obtaining instructions at the end of his arguments has made the fair statement on her behalf that defendant No.1 is now determined to remove the mark PARAMOUNT from all the promotional material and sign-boards and she will not use the said mark directly or indirectly in any manner in relation of imparting education and training. She shall not approach any student, staff member, teacher or any person of defendant No.3 in this regard or to pouch the business of defendant No.3. She is also agreeable if a Local Commissioner is appointed to verify the position in all centers in Delhi and outside and if any signboard or advertisement pointed out by the plaintiff through Local Commissioner of the PARAMOUNT, the defendant No.1 shall remove the same without loss of time though she has already taken all necessary steps to remove the same. Mr.Sethi, learned Senior counsel, also suggested that in order to know the goodwill of the

mark PARAMOUNT and business of defendant No.3, let a Chartered Accountant be appointed who after having gone through the business of all centers owned by defendant No.3 and after assessing the value of the goodwill of name of Paramount business within a period of 12 months would give the report and thereafter, both parties should agree for bidding and the highest bidder should purchase the shares of another party. Mr.P.V.Kapur, learned Senior counsel for the plaintiff did not agree for appointment of Chartered Accountant. He says that why his client should suffer because of the fault of defendant No.1 who has earned undue gain by filching the goodwill and name of defendant No.3 by competing the business, rather the defendants No.1 and 2 be directed to deposit all profits earned with the defendant No.3.

76. The injunction being an equitable remedy, the court has to exercise its discretion from various facets which arise in particular set of circumstances in each matter. There may be cases in which grant of an injunction will only meet the ends of justice and an alternative safeguard for the preservation of rights of the challenging party cannot at all be thought of.

77. The grant or non-grant of injunction has to be measured within the parameters of three tests laid down by this court. However, the court must weigh the comparative hardship of one party as against the another and has to decide whether the injunctory relief is warranted or whether interim directions would suffice. Injunctions should not result in extreme prejudice to the defendant. The balance of convenience doctrine is of essence in cases for consideration of the issue of grant of injunction.

78. Now, I shall deal with the principles of grant of an interim injunction i.e. prima facie case, balance of convenience and injury. In view original documents peculiar facts and circumstances, it is to be decided as to what extent the interim order can be granted. It is the admitted position that both plaintiff and defendant No.1 are husband and wife. Even, as of today, they have 50% shareholding of defendant No.3-Company. Both are still Directors. They have a small child.

79. Both companies, i.e. defendant No.3 and defendant No.2 have hundreds of centres where the large number of students are studying. They have paid their fees. Careers of teachers and staff members are also involved. Many centres of defendant No.2-Company are on rent. Lease deeds are executed. Advance amount has been paid. Thus, there are many stakeholders.

80. From the allegations made by the defendant No.1 and counter allegations referred by the plaintiff's counsel, it appears to the Court *prima-facie* that until both parties resolve the dispute in hand or till the decision of suit, some interim arrangement between them is to be carved out, otherwise there would be no end to litigation and internal-fight between them.

81. Considering the entire gamut of the matter and peculiar facts and circumstances of the case, I am of the view that there can be three scenarios in order to decide the dispute in hand:

Scenario 1:

That the defendants No.1 and 2 accept the terms and conditions for the purpose of settlement of matter in hand suggested by the plaintiff. Under such a situation, the

defendant No.1 not only to continue with the business of defendant no.2 subject to disclaimer as suggested by Mr.Sethi as mentioned para 71 of my order and at the same time, she would also get Rs.25 crores from the plaintiff within the period of four years as per details mentioned in the proposed settlement. The defendant No.1 wanted certain modifications/ changes in the proposal of settlement; the same are not acceptable to the plaintiff though main terms are agreed to by both parties. However, this Court felt that still they should resolve the dispute. The counter proposal given by defendant No.1 to the plaintiff is also not agreeable to the plaintiff.

Scenario 2:

As suggested by Mr.Kapur that all centres of defendant No.2 are merged with defendant No.3 and let the defendant No.3 may run under the name of Paramount in a peaceful manner for which the plaintiff has no objection. The said offer is not acceptable to the defendant No.1 who stated that it is she who has not only been able to establish the defendant No.3 but also acquired a name and goodwill in the defendant No.2 and there is no guarantee or safety if centers are merged with defendant No.3, the plaintiff may not harass her. She is not sure that she can continue with any active business with the plaintiff anymore in the way as earlier she was doing.

82. As Scenarios 1 and 2 are not agreeable to the parties, I am of the view that third scenario is only the solution at this stage but the same is subject to the conditions in order to strike the balance.

83. The principle of law relating to temporary injunction during pendency of the suit is well recognized in the decision of the Supreme

Court in the case of ***Dalpat Kumar v. Prahlad Singh***, AIR 1993 SC 276. The relevant portion of the observations of the Supreme Court in the said case states as under:-

> "…..It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the Court satisfying that;
>
> (1) There is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant.
>
> (2) The court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and
>
> (3) The comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it."

The Supreme Court further held:

> "……Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in 'irreparable injury' to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequence of apprehended injury or dispossession of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely on that cannot be adequately compensated by way of damages. The third condition also is that 'the balance of convenience' must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound

judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibility or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

84. In ***M/s. Gujarat Bottling Co. Ltd. and others v. Coca Cola Company and Others,*** AIR 1995 SC 2372**,** it was observed as under:-

"46……. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies....."

85. This Court is conscious about the fact that defendant No.1 being the Director of defendant No.3 is entitled to 50% net-profit of the Company but at the same time, as she has violated her fiduciary duties and is guilty of breach of Section 166 of the Companies Act, 2013, the undue gain already made by her is liable to be paid to the Company under sub-Section 5 of Section 166 of the Act and the Director of the company is not to assign his office unless the breach is stopped. But under no circumstances, the Director can be allowed to compete the business of the Company, in which he/she is already a

Director, to exploit the mark in order to give the impression to the public at large that he/she has any association or affiliation of the Company in which he/she is still a Director.

86. As mentioned earlier, Mr.Sandeep Sethi at the end of arguments has suggested that the defendant No.1 has decided not to exploit the name Paramount in any manner and/or to do anything which may harm the continuous business of defendant No.3. However, it is also directed that the defendant No.3 shall keep the share of net profit of defendant No.1 in a separate non-lien account and the same shall be withdrawn by any party without the permission or order of the Court.

87. Under these circumstances, the interim application is disposed of with the following directions:-

(a) Subject to the condition and by filing of an affidavit of undertaking that (i) the defendants No.1 and 2 shall not use the mark PARAMOUNT, its goodwill in any manner in its Company – defendant No.2 and shall not poach teachers, students or staff members of defendant No.3 and within two weeks shall remove the word PARAMOUNT from all hoardings, advertisements, brochures and other materials and shall not open any new centre within the range of 100 meters where the centre of defendant No.3 already exists; (ii) she shall furnish the true account from February, 2015 till December, 2015 and every quarterly till the decision of the suit; the first statement would be filed by 15th February, 2016; (iii) she will not create any hurdle in smoothly going of defendant No.3 and she shall perform her fiduciary duties under the Act and sign all the requisite papers of the defendant No.3 and shall not create any hindrance of running business of defendant No.3 directly or indirectly.

In case of above said compliance and undertaking, the defendants No.1 and 2 are allowed to continue with the business of defendant No.2. In case of any breach, the plaintiff is entitled to move before Court for modification of order and then the Court may pass any appropriate orders.

88. Mr.Abhimanyu Mahajan, Advocate (Mobile No.9811103447) is appointed as a Local Commissioner to oversee the entire situation as per direction passed by this Court. In case the defendant No.1 wishes to inspect the record of defendant No.3 or attend the meeting or to visit office of the Company for any purposes, she will inform the Local Commissioner so that smooth atmosphere is created in order to avoid any untoward incident as earlier happened.

The defendant No.3 and plaintiff shall also maintain the correct accounts and to file before this Court from the date of filing of suit till December, 2015 and continue to file the same every quarterly so that actual figures of profits of defendant No.2 and defendant No.3 be ascertained after trial for adjustment purposes. The fee of the Local Commissioner is fixed at Rs.60,000/- per visit at this stage which shall be paid by both the parties in equal proportion from the account of defendant No.3, subject to final adjustment.

89. The present application is disposed of with these directions. The findings are tentative in nature. The suit after trial be decided as per its own merit and without any influence of this order passed in the interim application.

90. No costs.

91. *Dasti*, under the signatures of the Court Master.

CS(OS) No.2528/2015

List the matter before Roster Bench on 22nd February, 2016.

(MANMOHAN SINGH)
JUDGE

JANUARY 27, 2016