

(2020) 03 DEL CK 0186

In the Delhi High Court

Case No : Civil Suit (OS) No. 226 Of 2016

Jaiveer Singh Virk

APPELLANT

Vs

Sir Sobha Singh & Sons Pvt. Ltd. & Anr

RESPONDENT

Date of Decision : 21-03-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Order 12 Rule 6, Order 11 Rule 12, Order 11 Rule 14
Companies Act, 2013 — Section 206, 207, 208, 209, 210, 241(1), 244, 430, 447, 448, 449

Indian Contract Act, 1872 — Section 7

Specific Relief Act, 1963 — Section 41(h)

Citation : (2020) 268 DLT 209

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Raman Kapur, Piyush Kaushik, P. Shekhar, Aabhas Kshetarpal, Monika Phartyal, Anand Singh

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J

1. The plaintiff has instituted this suit pleading, that (i) the plaintiff is one of the maternal great grandson of Late Sir Sobha Singh who had set up and incorporated defendant no.1 Sir Sobha Singh & Sons Pvt. Ltd.; the defendant no.1 company was incorporated as far back as on 23rd July, 1945 as a Non-Government Company for the benefit of the family members of Sir Sobha Singh and the same is a family owned company which is inter alia engaged in real estate activities with own or leased property which includes buying, selling, renting and operating of self-owned or leased real estate such as apartment buildings and dwellings, non-residential buildings etc.; (ii) all the shareholders of the defendant no.1 company are family members; (iii) Sujan Singh Park is made up of 84 flats, arranged in seven blocks viz. "A" to "G"; (iv) this residential complex was built by Sir Sobha Singh in the year 1945; (v) Sir Sobha Singh divided all his properties among his five children during his lifetime; (vi) Sujan

Singh Park was meant to be shared as family space, in which each of his four sons and one daughter and their children receives a flat; (vii) however in 1947 several non-family members were given accommodation on rent in Sujan Singh Park; (viii) since the family members of Sir Sobha Singh held shares in defendant no.1 company, in order to extend benefit to the shareholders of the defendant no.1 company, it was decided that the flats of defendant no.1 company at Sujan Singh Park be allotted to family members and shareholders of defendant no.1 company in lieu of shares held by them in defendant no.1 company; (ix) as the family expanded, allocation of flats became an issue and which was settled by arriving at an understanding among the family members/descendants that all the properties will be allotted to the family members / descendants up to the fourth generation; (x) a Board Resolution dated 21st July, 1990 recording the aforesaid agreement was passed, which named all descendants of Sir Sobha Singh upto the fourth generation, wherein each member of the family, whether boy or girl were entitled to a flat; (xi) accordingly a family tree was built in order to decide the entitlement; (xii) thereafter whenever a flat fell vacant, the topmost on the waiting list was allotted a flat; this system prevented family squabbles; (xiii) all the shares of defendant no.1 company are held by family members and all the directors in the defendant no.1 company are family members only; (xiv) after the demise of Gurbux Singh son of Sir Sobha Singh, Preminder Singh, grandson of Sir Sobha Singh took charge as head of defendant no.1 company and has been looking after allocation, maintenance and presiding over Annual General Meeting (AGM) of shareholders of defendant no.1 company; (xv) the family tree for allotment of flats included 23 members of Sir Sobha Singh's family; (xvi) out of the said 23 members, all the grandchildren of Mrs. Mohinder Jaspal Singh, one of the daughters of Sir Sobha Singh, were allotted flats leaving only the plaintiff; (xvii) the plaintiff in the list aforesaid is positioned at serial no. 18 and is next in line for allotment of the flat, as the flats were in occupation of tenants and as and when the flats were vacated / tenants evicted, eligible persons from the list were allotted the same; this practice is being followed since the Resolution dated 21st July, 1990; (xviii) one of the flats bearing no. B-15, Sujan Singh park, New Delhi was vacated in early 2014; the plaintiff vide his e-mail dated 25th March, 2014 requested defendant no.1 company to allot the said vacant flat to the plaintiff; (xix) however ignoring the Resolution dated 21st July, 1990, one of the elder family members viz. defendant no.2 Rahul Singh herein, whose name was not figuring in the list, was allotted the said flat which had fallen vacant in 2014, without offering any explanation for not allotting the same to the plaintiff; (xx) on repeated requests of the plaintiff, finally the defendant no.1 company assured that it will offer the plaintiff the next flat falling vacant; (xxi) in view of the said assurance, the plaintiff did not object to allotment of flat no. B-15 in the name of defendant no.2 Rahul Singh and communicated so to the defendant no.1 company on 17th May, 2014; (xxii) another rented flat fell vacant on 31st December, 2014 and the plaintiff, vide e-mail dated 12th January, 2015 requested the defendant no.1 company to allot the said flat bearing No.D-38 to the plaintiff; (xxiii) on receiving no response, the plaintiff zealously followed up

and was given to understand that an AGM / Board Meeting of the defendant no.1 company was likely to take place on 28th August, 2015; (xxiv) the plaintiff got legal notice dated 18th August, 2015 issued to the defendant, seeking status of his allotment in the meeting scheduled on 28th August, 2015; (xxv) on 22nd August, 2015, plaintiff received a copy of the Board Resolution acknowledging receipt of legal notice dated 18th August, 2015 and that the plaintiff was first in the queue and to whom allotment was due and assuring the plaintiff that allotment will be considered after the issue of freehold is resolved; (xxvi) in view of the same, the plaintiff conveyed his willingness to withdraw the legal notice dated 18th August, 2015; (xxvii) however it has come to the notice of the plaintiff that allotment of flat No.D-38 was being considered to a third party, in complete defiance of the Board Resolution dated 21st July, 1990; and, (xxviii) had the plaintiff been allotted the flat in January, 2014, the plaintiff would have generated rental income to the tune of Rs.3,45,000/- per month, being the prevailing letting value of such a flat; thus by allotment of the said flat to the defendant no.2 instead of to the plaintiff, loss of Rs.96,60,000/- had been caused to the plaintiff. On the aforesaid pleas, reliefs of (a) declaration that the plaintiff is entitled to be allotted flat No.B-15 in B-Block Apartments, Sujan Singh Park, New Delhi in terms of Resolution dated 21st July, 1990 and to put the plaintiff into possession thereof and in the alternative of mandatory injunction directing the defendant no.1 company to allot flat No.D-38, D-Block Apartments, Sujan Singh Park, New Delhi in terms of Resolution dated 21st July, 1990 and delivery of possession thereof to the plaintiff; (b) cancellation of allotment of flat no.B-15 in B-Block Apartments, Sujan Singh Park, New Delhi in favour of defendant no.2 Rahul Singh; (c) permanent injunction restraining the defendants from creating any third party rights in favour of any other person with respect to flat no.D-38, D-Block Partments, Sujan Singh Park, New Delhi; and, (d) recovery of damages of Rs.96,60,000/- with interest, are claimed in the suit.

2. The suit came up first for admission before this Court on 10th May, 2016 and thereafter on 12th May, 2016, when summons thereof were ordered to be issued, without going into the aspect of maintainability thereof, though no ex parte relief claimed granted.

3. The defendant no.1 company, on being served with the summons, appeared before this Court on 30th May, 2016 and made a statement that (a) the defendant no.1 company had no intention to sell the flat no.G-81, Sujan Singh Park, New Delhi except to rent out the same for generating revenue and that the prospective tenant would be informed of the present proceedings; and, (b) with respect to flat no.D-38, it was stated that the same had been earmarked for sale and was not available for allotment to any family member.

4. The defendant no.1 company has filed a written submission pleading that, (i) the plaint discloses no cause of action; (ii) no Resolution dated 21st July, 1990 was passed by the Board of Directors of the defendant no.1 company; (iii) the list of prospective allottees of flats filed by the plaintiff is signed by three persons

only but the true typed copy thereof is depicted to be signed by five persons; (iv) the list in any case is not a Board Resolution and has no legal binding; (v) the plaintiff has no vested or enforceable interest for allotment against the defendant no.1 company; (vi) lease to defendant no.2 Rahul Singh of flat no.B-15 was executed in 2012, to the knowledge of the plaintiff and was not challenged by the plaintiff and the claim for cancellation thereof stands waived and / or is barred by time; the family members of Late Sir Sobha Singh had no right to any of the flats of the defendant no.1 company; (vii) the defendant no.1, in the recent past had allotted flat no.A-12 and flat no.G-80 to non-family members; (viii) 47% of the shares of defendant no.1 are owned by Sir Sobha Singh Public Charitable Trust and not by family members; (ix) the plaintiff is not entitled to any relief in equity since he and his family members have been in illegal possession of property No.1A, Janpath owned by Sir Sobha Singh Public Charitable Trust; a civil suit for mandatory injunction has been filed by the Trust against the plaintiff's father namely Shivinder Singh, in 2006 and the plaintiff and his father have been repeatedly informed that no allotment will be made in their favour till they vacate the said property No.1A, Janpath; (x) flat no.B-15 was earmarked for defendant no.2 Rahul Singh, as far back as in 1978, to the knowledge of the plaintiff; (xi) the defendant no.1 company is prioritising its resources towards getting freehold rights for the property at Sujan Singh Park and for which purpose compensation is to be paid and funds therefor are being generated and the plaintiff cannot assert any rights contrary to the interest of defendant no.1 company; (xii) funds are also required by defendant no.1 company for payment of enhanced property tax and for maintenance; (xiii) the defendant no.1 company has not even been distributing dividend to its shareholders; (xiv) flat no.D-38 earmarked for sale for generating revenue for defendant no.1 company is to meet the expenses and is not available for leasing to anyone; (xv) flat no.G-81 was offered to the plaintiff vide Resolution dated 7th May, 2016 of defendant no.1 company on the condition that the plaintiff and his family members will vacate illegally occupied property at 1A, Janpath, New Delhi; the said offer was time bound and the plaintiff did not accept the same; (xvi) denying that Sujan Singh Park was meant to be shared by family members though admitting that many members of the family had been leased out flats in the said Sujan Singh Park; (xvii) denying that it was ever resolved that each child of Sir Sobha Singh and their children will receive a flat in Sujan Singh Park; (xviii) the lease of land underneath Sujan Singh Park is in the name of defendant no.1 company and Sir Sobha Singh did not have any right to divide the properties of defendant no.1 company; (xix) the plaintiff had not even placed before the Court the Resolution dated 21st July, 1990; (xx) an informal understanding was arrived at between some family members that the flats may be leased out to certain family members but not unconditionally and uniformly; no such understanding is binding on the defendant no.1 company and grant of any lease even to a family member is subject to the discretion of defendant no.1 company; (xxi) Preminder Singh is only one of the Directors on the Board of defendant no.1 company and is not the "head" of the defendant no.1 company;

(xxii) though other grandchildren of Mrs. Mohinder Jaspal Singh had been leased out flats in Sujan Singh Park but not on the basis of alleged Board Resolution dated 21st July, 1990 or the alleged seniority list; (xxiii) no assurances were ever meted out to the plaintiff; and, (xxiv) in the meeting dated 22nd August, 2015 it was resolved by the Board of defendant no.1 that allotment of flats be put on hold in view of financial requirements of defendant no.1 company.

5. The defendant no.2 has filed separate written statement, additionally pleading other facts disentitling the plaintiff to the relief claimed with respect to flat no.B-15 and / or against the defendant no.2.

6. The plaintiff has filed replications to both the written statements.

7. Though the parties, vide order dated 14th September, 2017 were referred to the Mediation Cell of this Court but mediation remained unsuccessful.

8. Vide order dated 8th August, 2018, the following issues were framed in the suit:

"1. Whether the suit is not properly instituted by an authorised person, as alleged? OPD-1

2. Whether the suit does not disclose any cause of action, as alleged? OPD-1

3. Whether the suit is barred by limitation, as alleged? OPD-2

4. Whether the plaintiff is entitled to a decree of declaration, as prayed? OPP

5. Whether the plaintiff is entitled to a decree of mandatory injunction, as prayed? OPP

6. Whether the plaintiff is entitled to a decree of cancellation, as prayed? OPP

7. Whether the plaintiff is entitled to a decree of permanent injunctions, as prayed? OPP

8. Whether the plaintiff is entitled to a decree for damages of Rs.96,60,000/-, as prayed? OPP

9. Whether the plaintiff is entitled to interest, if so, at what rate and for what period? OPP

10. Relief, if any."

and the parties relegated to evidence:

9. The suit came up before this Court on 11th July, 2019 on the application of defendant no.2 Rahul Singh for filing additional documents and the application of the plaintiff under Order XI Rules 12 and 14 of the Code of Civil Procedure, 1909 (CPC) and for disposal of the application for interim relief. After noticing the nature of the suit, inter alia the following order was passed:

"9. The counsel for the plaintiff states, (i) that defendant no.1 is a family

company and vide Resolution dated 21st July, 1990, of which discovery is inter alia sought, it was decided that one flat each in the property of the defendant no.1 at Sujan Singh Park, New Delhi will be given to each grandchild of Sir Sobha Singh; and, (ii) that in pursuance thereto, 17 grandchildren have been allotted the flats and the defendant no.1 admitted that the plaintiff is next in the line; however no flat has been allotted.

10. I am still not satisfied as to how the aforesaid can be a legally enforceable right.

11. The counsel for the plaintiff has contended that he has a legally enforceable right because the defendant no.1 made an offer and which has been accepted by the plaintiff and the plaintiff by this suit is enforcing the same.

12. The counsel for the plaintiff in this context has drawn attention to page 46 of Part-IIIA file which is an e-mail dated 8th May, 2016 of Binny Singh to the plaintiff informing the plaintiff that at the Board meeting held on 7th May, 2016, the Board was informed that flat No.G-81 was likely to be vacated for allotment on 31st May, 2016 and the plaintiff being top of the list, will get it.

13. However the aforesaid e-mail dated 8th May, 2016 also contains a "caveat / provision" for allocation of the said flat to the plaintiff viz., that the parents of the plaintiff "must vacate kothi annex".

14. On enquiry, the counsel for the plaintiff states that the parents of the plaintiff have not vacated the "kothi annex".

15. I have enquired from the counsel for the plaintiff, that if the plaintiff bases his case on offer and acceptance, whether not acceptance had to be complete, and without the parents of the plaintiff vacating the "kothi annex", the plaintiff cannot enforce the offer.

16. The counsel for the plaintiff contends that the condition imposed is illegal.

17. In my prima facie view, once the plaintiff bases his claim on offer and acceptance, it is not open to the plaintiff to challenge the condition contained in the offer.

18. The counsel for the plaintiff then states that he is not fully prepared to argue on the aspect of maintainability of the suit.

19. List on 27th September, 2019."

10. Thereafter on 27th September, 2019, the following order was passed:

1. This order is in pursuance to the order dated 11th July, 2019.

2. The senior counsel appearing for the plaintiff, instead of pursuing the line of argument qua which query was raised on 11th July, 2019 and as recorded in the order of that day, has contended that what the plaintiff is enforcing is a Family Settlement and on enquiry, whether a Family Settlement is applicable qua a

company, places reliance on Deepa Anant Bandekar Vs. Rajaram Bandekar (Sirigao) Mines Pvt. Ltd. MANU/MH/0101/1992 against which Special Leave Petition is stated to have been dismissed in limine.

3. On enquiry, whether the plaintiff has based his case on Family Settlement or only on offer of acceptance as was argued on the last date, the senior counsel for the plaintiff though states that there is a plea of Family Settlement in the plaint but admits that the words "Family Settlement" have not been used and contends that the tenor of the plaint is of the defendant being a family company.

4. Deepa Anant Bandekar supra is found to be a judgment of a Hon"ble Single Judge of the High Court of Bombay in a Company Petition. On enquiry, whether an appeal to the Division Bench was preferred thereagainst, it is stated that the same has not been checked.

5. The senior counsel for the plaintiff, during his arguments has also used the words "piercing of the corporate veil".

However, at least at this stage no ground for piercing the corporate veil also has been made out and for piercing a corporate veil, all the directors / shareholders would have to be made party and which has also not been done.

6. I have thus requested the senior counsel for the plaintiff to kindly look up, whether the suit, after the Companies (Second Amendment) Act, 2002 constituting the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) and after coming into force of the Companies Act, 2013, is maintainable before this Court and whether the jurisdiction would be of NCLT or NCLAT and the jurisdiction of this Court would be barred inasmuch as it is felt that the plaintiff, instead of pursuing a wrong remedy for another long period of time merely for the reason of a wrong remedy having been invoked in instituting this suit, should not waste more time and should take appropriate remedies.

7. The senior counsel for the plaintiff states that he will look up the law.

8. The counsel for the defendant to also look up the law in this regard.

9. List on 16th October, 2019."

11. Thereafter the matter was adjourned from time to time on request of the counsel for the plaintiff. Today, the senior counsel for the plaintiff has been heard and has also handed over written submissions on maintainability.

12. It is the contention of the senior counsel for the plaintiff, that (i) Section 430 of the Companies Act, 2013 bars the jurisdiction of the Civil Court to entertain any suit or proceeding only in respect of matters which the National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT) is empowered to determine by or under the said Act or any other law in force; (ii) the bar contained under Section 430 came into operation prospectively, with effect from 1st June, 2016; however the present suit was instituted prior thereto

on 9th May, 2016 - thus at the time of institution of the present suit, there was no bar to the jurisdiction of this Court; (iii) the remedy even if any available to the plaintiff under the Companies Act is to, as a shareholder, complain against acts which are prejudicial or oppressive to the shareholder; (iv) however if the plaintiff was to now approach the NCLT, he would encounter the difficulty of Section 241(1) read with Section 244 of the Companies Act which only permits shareholder/s holding one-tenth of the issued share capital of the company to apply to NCLT for relief in case of oppression etc.; the plaintiff holds only five equity shares of defendant no.1 company and thus cannot agitate his grievance before the NCLT; (v) NCLT even otherwise cannot grant the reliefs claimed in the present suit; (vi) reliance is placed on Jai Kumar Arya Vs. Chhaya Devi 2017 SCC OnLine Del 11436 (DB); (vii) Section 430 of the Companies Act does not create a bar as the plaintiff is deriving his legal right on the basis of Resolution dated 21st July, 1990 which is in the nature of Family Settlement / arrangement; reliance is placed on Dinesh Gupta Vs. Rajesh Gupta 2018 SCC OnLine Del 12387; (viii) the legal right canvassed by the plaintiff in this suit is premised exclusively on the Resolution dated 21st July, 1990 which is a Family Settlement / arrangement; (ix) once the corporate veil is lifted, the whole situation will become crystal clear; (x) the Resolution dated 21st July, 1990 acknowledges and establishes the seniority of grandchildren and the great grandchildren of Sir Sobha Singh family for allotment of apartments; (xi) out of the 23 members whose name have been recorded in the list prepared pursuant to Resolution dated 21st July, 1990, all the children of Mrs. Mohinder Jaspal Singh have been allotted flats except the plaintiff; (xii) the said Resolution has been diligently implemented; (xiii) the defendant no.1 company also in its written statement has admitted the informal understanding between some of the family members; (xiv) the Board of Directors of the defendant no.1 company have ratified the said Resolution; (xv) the said Resolution is binding on the defendant no.1 company as also evident from the Resolution of the Board of Directors meeting dated 8th September, 2012 in which all the current Directors were present as well as from Resolution of the meeting of Board of Directors on 17th December, 2015; reliance is placed on Deepa Anant Bandekar Vs. Rajaram Bandekar (Sirigao) Mines Pvt. Ltd. 1990 SCC OnLine Bom 435; (xvi) the defendant no.1 company, by giving effect to the said Resolution, has consciously allotted flats as per the allotment list and has thus accepted the Resolution dated 21st July, 1990 to be binding on it; (xvii) Family Settlements are governed by a special equity and are to be enforced; reliance is placed on Kale Vs. Deputy Director of Consolidation (1976) 3 SCC 119 and K.K. Modi Vs. K.N. Modi (1998) 3 SCC 573; (xviii) the condition imposed on the plaintiff, of vacating property No.1A, Janpath, New Delhi is illegal, being in repudiation of the Resolution dated 21st July, 1990 / Family Settlement; (xix) the defendant no.1 company and Sir Sobha Singh Public Charitable Trust are separate legal persons and the defendant no.1 company cannot impose conditions for the benefit of Sir Sobha Singh Public Charitable Trust, on the plaintiff; and, (xx) thus on the basis of Resolution dated 21st July, 1990, the plaintiff has an enforceable right.

13. Per contra, the counsel for the defendant no.1 company has (a) drawn attention to the subsequent judgment dated 25th January, 1994 in Deepa Anant Bandekar supra reported as 1994 SCC OnLine Bom 602 and to my judgment in ICP Investments (Mauritius) Ltd. Vs. Uppal Housing Pvt. Ltd. 2019 SCC OnLine Del 10604; (b) handed over the download on 5th February, 2020 from the website of Ministry of Corporate Affairs - MCA service, of the Master data with respect to Rajaram Bandekar (Sirigao) Mines Pvt. Ltd., to show that the said company is still in existence and that the judgment of 1990 in Deepa Anant Bandekar supra cited by the counsel for the plaintiff was not upheld in appeal; and, (c) handed over in the Court, a copy of a petition filed before the NCLT in or about the year 2017 by Gobinder Singh Chopra & Others, impleading the defendant no.1 company and Company Secretary of defendant no.1 company and others as respondents thereto, claiming an enquiry into the affairs of defendant no.1 company herein under Sections 206 to 210 and 447 to 449 of the Companies Act and inter alia to restrain the defendant no.1 company from leasing or selling any of its properties; it is contended that father of the plaintiff is one of the petitioners therein; and, (d) also drawn attention to the additional affidavit filed in the said petition seeking direction to the defendant no.1 company to allocate flats to the remaining six third generation members of the family of Sir Sobha Singh as mandated and enshrined as per Family Settlement dated 21st July, 1990.

14. I have considered the rival contentions with respect to maintainability of the suit.

15. At the outset, it may be stated that though the suit has been pending before this Court for over three years and issues have also been framed therein and the parties relegated to evidence but the same is not a ground to put the said suit to trial, if otherwise it was found to be not maintainable. A perusal of the order sheets shows that the question of maintainability of the suit has never been gone into at any earlier point of time. Once doubts as to the maintainability of the suit have arisen, the suit cannot be permitted to pedantically proceed to trial, taking up resources of this Court which can be better utilized for other deserving cases which cannot be adjudicated without trial. Even otherwise, it is the settled law that framing of issues is not a bar to an application under Order XII Rule 6 of the CPC for decreeing the suit forthwith without any new material coming before the Court and allowed on the same record on which issues were framed. Reference in this regard may be made to Charanjit Lal Mehra Vs. Kamal Saroj Mahajan (2005) 11 SCC 279, Meera Gupta Vs. Dinesh Chand (2001) SCC OnLine Del 830 (DB), State Trading Corporation of India Ltd. Vs. Nirmal Gupta 2012 SCC OnLine Del 3556 (DB), Sanjay Sharma Vs. Madan Mohan Sharma 2013 SCC OnLine Del 2434 and Parivar Seva Sansthan Vs. Dr. Veena Kalra 2000 SCC OnLine Del 469.

16. The plaintiff, along with the plaint, even till now, has not filed the Resolution dated 21st July, 1990 of the Board of Directors of the defendant no.1 company and on which the case of the plaintiff is premised, as contended by the

defendants also. The plaintiff along with the plaint has inter alia filed (i) photocopy of a two page document described as "Appx B" and bearing the title "INTER SE SENIORITY OF ALLOTMENT" bearing the names of Bhagwant Singh, Khushwant Singh, Brig. Gurbux Singh, Mrs. Mohinder Jaspal Singh and Daljit Singh at the bottom but signed only by Bhagwant Singh, Khushwant Singh & Brig. Gurbux Singh and not by Mrs. Mohinder Jaspal Singh and Daljit Singh; the same contains the name of the plaintiff at serial no.18 under the sub-title "2nd Round"; the same on the first page bears a handwritten notation "Decision taken on July 21.90 G.77 given to G.S. Chopra HUF on 1.11.89 Why did Geeta get hers taken? Early 90tees after.... (.....illegible)"; (ii) extract of e-mail dated 30th June, 2015 from jaiveervirk@hotmail.com to pami.singh@theshopindia.com with CC to sirsobhasingh@gmail.com addressed to the Board of Directors (purportedly of defendant no.1 company), stating that his father, a shareholder of defendant no.1 company, had requested for the transfer of his shares in defendant no.1 company to his daughter Anisa Singh and his son Jaiveer Singh i.e. the plaintiff herein, but the Board has still not done so as per the request and asking for the reasons therefor and from which it appears that the plaintiff as on date is not even a shareholder of defendant no.1 company (in the copy of the petition filed by the father of the plaintiff before the NCLT handed over by the counsel for the defendants during the arguments, the father of the plaintiff has claimed to be the holder of 40 shares in the defendant no.1 company; though the plaintiff in the plaint has claimed to be the holder of five shares bearing No.3210 to 3124 issued on 13th August, 1985 but does not plead whether the said shares were originally allotted or have been transferred to the plaintiff by his father; (in the said communication it has not been stated that the plaintiff already holds five shares); (iii) draft Minutes of the Meeting of the Board of Directors purportedly of defendant no.1 company in the meeting held on 22nd August, 2015 to the effect that the request of Kiran Shivinder Singh i.e. the father of the plaintiff, for transfer of his shares to his family be not acceded till he moves out of the property unauthorizedly occupied by him; and, (iv) e-mail dated 8th May, 2016 from Binny Singh <binny234@gmail.com> to jaiveervirk@hotmail.com, "Brig.Gurbux Singh", sirsobhasingh@gmail.com, Raymon Singh <raymonvsingh@gmail.com> with subject "Allocation of flat in SS Park" addressed to the plaintiff informing the plaintiff that at a Board Meeting held on 7th May, 2016, the Board was informed that flat no.D-38 had been earmarked for sale to facilitate payments towards getting freehold rights and therefore was not available for allotment; that flat no.G-81 should be vacated for allotment on 31st May, 2016 and the plaintiff being top of the list will get it; the caveat / provision for the plaintiff being allocated this flat is that the plaintiff's parents must vacate Kothi annex; and, Binny Singh had been asked to inform the plaintiff of the same and asking the plaintiff to urgently respond his acceptance.

17. What is to be considered next is, whether the suit on the pleas in the plaint and the documents aforesaid ought to have been entertained in the first place.

18. Though the senior counsel for the plaintiff, with his ingenuity has now after

more than four years of the institution of the suit sought to create a case for the plaintiff on the basis of Family Settlement but suits are to be tested within the confines of their pleading and engagement of an accomplished senior counsel to argue with all the experience at his command cannot be permitted to change the nature and character of the suit. The senior counsel for the plaintiff also admits that no whisper even of the word "Family Settlement" exists in the plaint filed. Not only so, the counsel for the plaintiff who issued the legal notices preceding the suit and who filed the suit and who on 11th July, 2019 addressed on the aspect of maintainability, also did not argue on the basis of any Family Settlement, as evident from the order of that date reproduced above. The senior counsel arguing today, with his ingenuity has given an entirely different colour and basis to the suit. It further becomes evident from the fact that though an argument of Family Settlement is urged but none of the family members privy to the settlement have been impleaded as parties to the suit. Certainly no enforcement of the Family Settlement can be claimed without impleading the family members.

19. Though the senior counsel for the plaintiff has contended that from the plea existing in the plaint of defendant no.1 company being a family owned company, the plea of Family Settlement is implicit but forgetting that the company as the defendant no.1 is, is a separate legal entity in law from its shareholders and Directors. Thus even if all the shareholders and all the Directors of a company are family member, the company does not become a family member and remains a distinct legal entity. This is the genesis of corporate law and though corporate veil is permitted to be pierced, as again sought by the senior counsel for the plaintiff, but only when foundation therefor is laid in the pleadings. No case of piercing of the corporate veil of the defendant no.1 company is made out in the plaint and no foundation has been laid therefor and again maintainability of a suit cannot be justified by arguing outside the pleaded case. It has been held in *Singer India Ltd. Vs. Chander Mohan Chand* (2004) 7 SCC 1, *Elof Hansson (I) Pvt. Ltd. Vs. Shree Acids & Chemicals Ltd.* 2012 SCC OnLine Del 572 (DB), *Saga Lifestyle Pvt. Ltd. Vs. Bang & Olufsen A/S* 2019 SCC OnLine Del 8412, *Anirban Roy Vs. Ram Kishan Gupta* MANU/DE/3524/2017, *V.K. Uppal Vs. Akshay International* 2010 SCC OnLine Del 538, *R.K. Chaddha Vs. State of U.P.* 2014 SCC OnLine All 6248 (DB), *M.V. Sea Success I Vs. Liverpool and London Steamship Protection and Indemnity Association Ltd.* 2001 SCC OnLine Bom 1019 (DB), *Binatone Computers Pvt. Ltd. Vs. Setech Electronic Ltd.* 2009 SCC OnLine Del 2522, *Kimiya Shipping Inc. Vs. M.V. Western Light* 2014 SCC OnLine Bom 257 and *Gopi Vallabh Solutions Pvt. Ltd. Vs. State of West Bengal* 2018 SCC OnLine Cal 9035 that a corporate veil can be pierced only on the pleas inter alia of fraud, misrepresentation and diversion of funds, by making specific pleading to that effect, as veil piercing is not a rule but an exception which is undertaken only in certain specified circumstances.

20. The basis for the reliefs claimed by the plaintiff in the plaint and also argued on 11th July, 2019 are (i) the Resolution dated 21st July, 1990 of the defendant

no.1 Company (which has been denied by the defendants); (ii) implementation thereof; and, (iii) an offer having been made by the defendant no.1 company to the plaintiff in terms of the Resolution dated 21st July, 1990 and which was accepted by the plaintiff and an enforceable contract having come into existence entitling the plaintiff to seek implementation thereof and the plaintiff being entitled in law to challenge the condition subject to which the offer was made on the ground of the same being legal.

21. Even though the plaintiff has not even filed a copy of the Resolution dated 21st July, 1990 of the Board of Directors on which the reliefs claimed in the suits rests and for the last four years has not taken any steps in proof thereof and filed the application seeking disclosure thereof only now and even though the plaintiff has not even pleaded acceptance of the offer but to test the maintainability of the suit at this stage, I will proceed believing that the plaintiff in trial proves all the three crucial pleas aforesaid without proving which the plaintiff cannot succeed.

22. The first plea is the right of the plaintiff to a flat in terms of the Resolution dated 21st July, 1990 of the Board of Directors of the defendant no.1 Company to the effect that flats in Sujan Singh Park owned by defendant no.1 company will be allotted to all descendants of Sir Sobha Singh upto the fourth generation and in terms thereof a list was prepared detailing the priority of allotment of each of the said descendants.

23. The actions and functioning of a company which is a juristic person, unlike that of a natural person who is free to act on his whims and fancies, is limited by the Memorandum of Association and Articles of Association of company. It has been enshrined in *Ashbury Railway Carriage and Iron Co. Ltd. Vs. Riche* (1875) LR 7 HL 653 (DC) and held in *A. Lakshmanaswami Mudaliar Vs. Life Insurance Corporation of India* AIR 1963 SC 1185, *In re Steel Equipment and Construction Co. (P) Ltd.* 1966 SCC OnLine Cal 44 and *Nellai Metal Rolling Mills (P) Ltd. Vs. Southern Indian Central Benefit Fund (P) Ltd.* MANU/TN/0294/1985 that (a) a corporation created under the company law is not a corporation with inherent common law rights; (b) any act of the company ultra vires its Memorandum and Articles of Association, even if backed by the Resolution of the Board of Directors, is void and not enforceable against the company (save when a case of indoor management is pleaded and which is not the case here); (c) a contract made by the Directors of a company upon a matter not included in the Memorandum of Association is ultra vires of the Directors and is not binding on the company; (d) such a contract does not become binding on the company even though afterwards expressly assented to at a General Meeting of shareholders, being in its inception void as beyond the provisions of the statute, it cannot be ratified even by the assent of whole of the body of shareholders; (e) a company is competent to carry out its objects specified in the Memorandum of Association and cannot travel beyond the objects; (f) where a company does an act which is ultra vires, no legal relationship or effect ensued therefrom - such an act is

absolutely void and cannot be ratified even if all the shareholders agree; (g) an ultra vires contract by a company is analogous to and stands on the same footing as a contract by an infant or a minor and in which case there is total incapacity; (h) a purported contract by a company cannot give birth to any legal obligation and cannot be binding on a company; and, (i) just like a consent decree founded on the incompetency of an infant or minor is void and a nullity, likewise a contract founded on the incompetency of the company is void and a nullity. The plaintiff is enforcing a right under a Board Resolution dated 21st July, 1990 without referring to the Memorandum of Association or Articles of Association of defendant no.1 company and without even pleading that the Resolution dated 21st July, 1990 is in terms of the Articles of Association. The flats in Sujan Singh Park, lease of land underneath which is in the name of defendant no.1 Company and which are owned by the defendant no.1 company, are in the ownership of defendant no.1 company and not in the ownership of its shareholders or directors. The plaintiff forgets that the defendant no.1 company is a distinct legal entity. It has been held in V.B. Rangaraj Vs. V.B. Gopalakrishnan (1992) 1 SCC 160, Vodafone International Holdings BV Vs. Union of India (2012) 6 SCC 613 and World Phone India Pvt. Ltd. Vs. WPI Group Inc. USA (2013) SCC OnLine Del 1098 and HTA Employees Union Vs. Hindustan Thompson Associates Ltd. MANU/DE/3005/2013 than an agreement arrived at even between the shareholders and Directors of a company with respect to management of the affairs of the company, without being incorporated in the Articles of Association of the company is not enforceable against the company. Thus, even if the shares of the defendant no.1 company are held by members of a family and the members of the family arrived at an understanding between them that the flats owned by the defendant no.1 company at Sujan Singh Park will be allotted to each of the descendants of Sir Sobha Singh upto the fourth generation, without the same being incorporated in the Articles of Association of the defendant no.1 company, the plaintiff, even as a member of the family, cannot claim enforcement. The plaintiff, claiming to be a shareholder and a family member, ought to be aware of the contents of the Articles of Association and adverse inference has to be drawn against the plaintiff for not pleading so, to the effect that the Resolution dated 21st July, 1990 is ultra vires the Articles of Association. The Court will not permit a trial to be converted into a wild goose chase and a fishing and roving enquiry and the Court is not required to apprise the plaintiff how to make out a right and the plaintiff has to suffer for its own failures.

24. The defendants as aforesaid have denied the very existence of any Resolution dated 21st July, 1990 and it is obvious therefrom that the Resolution dated 21st July, 1990, even if any, is now being not acceded to by the defendant no.1 company and the defendant no.1 company is fully entitled to, from time to time, change its decisions with respect to its assets and properties.

25. As far as the second crucial plea aforesaid forming the basis of the case of the plaintiff, of the defendant no.1 company having acted in terms of the Resolution dated 21st July, 1990 is concerned, again even if the plaintiff

succeeds in proving the same, the same would still not vest any right in the plaintiff. The right of the plaintiff as a shareholder of the defendant no.1 company would only be to aver mismanagement of the affairs of the defendant no.1 company and the remedy wherefor is not before the Civil Court, neither under the prevalent Companies Act, 2013 nor under the earlier Companies Act, 1956 as in force immediately prior to coming into force of the 2013 Act. Even otherwise, the Courts do not issue any mandatory direction to do any act which is illegal even if such illegality has been practiced in the past.

26. The legislature in its wisdom, while providing for creation of a juristic entity such as a company, incorporated provisions in the company law, of remedies available to the shareholders of a company in the event of oppression and mismanagement. The same was in consonance with the principles that the law having providing for management of affairs of a company by its Board of Directors or as laid down in the Articles of Association of a company, individual shareholders should not be permitted to interfere in the affairs and business of the company by filing civil suits against the company. The words "oppression" and "mismanagement" are of wide amplitude as held in *Jai Kumar Arya supra* and *Viji Joseph Vs. P. Chander* 2019 SCC OnLine Mad 10424 (DB) and would include the grievances as of the plaintiff herein with respect to the management of affairs of defendant no.1 company. Civil action cannot be brought with respect thereto, exclusive jurisdiction having been conferred earlier in the Company Law Board and in appeal in the High Court and now in the NCLT and NCLAT.

27. I may in this regard mention that though in *Ammonia Supplies Corporation (P) Ltd. Vs. Modern Plastic Containers Pvt. Ltd.* (1998) 7 SCC 105 with respect to disputes as to rectification of Share Register, it was held that the Company Law Board could not go into adjudication of disputed issues of title to the shares but recently in *Shashi Prakash Khemka Vs. NEPC Micon* 2019 SCC OnLine SC 223 in the context of 2013 Act, it has been held that the exclusive jurisdiction is of NCLT and NCLAT.

28. That brings me to the third limb of the basis of the claim of the plaintiff i.e. the plaintiff by acceptance of the offer contained in the communication dated 8th May, 2016 has a vested right to allotment of a flat.

29. The said plea is also made forgetting the principles of Contract Law. Section 7 of the Contract Act, 1872 provides that in order to convert a proposal into a promise, the acceptance must be absolute and unqualified and be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. It goes on to further provide that if the proposal prescribes a manner in which it is to be accepted and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated, insist that the proposal be accepted in the prescribed manner and not otherwise but if proposer fails to do so, he accepts the acceptance. The counsel for the plaintiff on 11th July, 2019 admitted that the acceptance was not absolute and unqualified. He however stated that the plaintiff in law was / is

entitled to impugn the condition subject to which the offer was made. However neither during the hearing on that date nor in subsequent hearing any law interpreting Section 7 of the Contract Act in this manner has been shown. I am not aware of any law permitting offer to be accepted in part with right to the acceptor to challenge the other part of the offer. Any such interpretation would be in the teeth of Section 7 of the Contract Act. Thus no contract in pursuance to the offer contained in the communication dated 8th May, 2016 came into existence.

30. I may even otherwise state that such an argument was also sought to be created for the first time during the hearing on 11th July, 2019 and which argument also has been given up in the hearing today. Had that been the case, the suit would not have been for mandatory injunction but for specific performance. Once the relief sought to be claimed by way of injunction can be obtained by any other usual mode of proceeding, Section 41(h) of the Specific Relief Act, 1963 bars the grant of injunction.

31. It is also not the case of the plaintiff that the plaintiff was privy to the Resolution dated 21st July, 1990 for it to be said that the same became a binding agreement between the plaintiff and other family members. The justification today of the suit on the basis of Family Settlement seeks to gloss over the said aspect also of the case.

32. From the 1994 judgment in Deepa Anant Bandekar supra handed over by the counsel for the defendant no.1, it transpires that in an appeal preferred against the 1990 judgment in Deepa Anant Bandekar supra relied upon by the counsel for the plaintiff, a compromise was arrived at and Rajaram Bandekar (Sirigao) Mines Pvt. Ltd., for winding up of which order was passed in 1990, was set aside in terms of the compromise, and ultimately also the company was not ordered to be wound up and exists till date. Thus reliance by the counsel for the plaintiff on the 1990 judgment in Deepa Anant Bandekar supra which was not affirmed in appeal, is not apposite. Dinesh Gupta supra was cited by the senior counsel for the plaintiff to also contend that the remedy of approaching the NCLT is not available to the plaintiff and the Civil Suit is thus not barred. However, it was not controverted that NCLT has indeed been approached by the father of the plaintiff and certain others inter alia on the same facts as urged by the plaintiff i.e. of mismanagement of the affairs of the defendant no.1 company in the context of allotment of flats and which proceedings is pending. Once action for oppression and management is pending in NCLT, the argument, of the plaintiff being not qualified as per the shares held by him to approach the NCLT, is not available to the plaintiff. Rather, the plaintiff is found to have suppressed this material fact from this Court.

33. Not only so, once the Legislature in its wisdom has deemed it appropriate that less than the prescribed number of shareholders or shareholders holding less than the prescribed number of shares should not be permitted to initiate legal proceedings with respect to management and affairs of the company, it

would be travesty of the statute to hold that less than the prescribed number of shareholders or shareholders having less than the prescribed shares, though not entitled to approach the NCLT, can interfere with the management of affairs of the company by approaching the Civil Court. The Legislature having prescribed the minimum for exercising such a right, it has to be held that less than the said minimum have no right to interfere in the management.

34. Mention in this regard may also be made of the proviso to Section 244 of the Companies Act, 2013, which though prescribing the minimum number of shares below which NCLT cannot be approached, empowers the NCLT to waive the said qualification.

35. The counsels for the plaintiff have thus been unable to lift the doubt which had arisen during the hearing on 11th July, 2019 as to the maintainability of the suit. The suit on the basis of pleas in the plaint does not disclose any right in favour of the plaintiff to any of the reliefs claimed.

36. Resultantly, the suit is dismissed with costs of Rs.1 lacs each payable by the plaintiff to each of the two defendants.

Decree sheet be drawn up.