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UNPACKING THE SCOPE OF OPPRESSION, PREJUDICE AND MISMANAGEMENT UNDER COMPANY LAW IN INDIA

Umakanth Varottil[*]

Abstract

The goal of this paper is to unpack the shareholder remedies of oppression, prejudice and mismanagement under sections 241 and 242 of the Companies Act, 2013 Act (the "2013 Act"). While this legislation substantially tracks its predecessor in the form of sections 397 and 398 of the Companies Act, 1956 (the "1956 Act"), it has also deviated, and that too in material fashion, on some counts. The 2013 Act has the effect of both expanding as well as contracting the shareholder remedies. The upshot of this paper is that section 241 of the 2013 Act considerably expands the scope of the remedy, thereby ensnaring within it conduct that was previously excluded. By introducing the concept of "prejudice" caused to a member as objectionable conduct apart from "oppressive" behaviour, Parliament has arguably lowered the standard of conduct that a petitioning shareholder must satisfy before it can revoke the remedy. However, by remaining steadfast in its insistence that petitioners must satisfy the requirement that there must exist grounds for "just and equitable" winding up of a company, no matter what the nature of the conduct of the offending shareholders, section 242 of the 2013 Act retains a considerable burden on petitioning shareholders. The 2013 Act, therefore, offers a mixed bag.

Key words: Oppression, prejudice, mismanagement, just and equitable winding up, company law, India

I. INTRODUCTION

Much like sovereign democracy, corporate democracy plays to the will of the majority. The majority rule enforces a contractual bargain among shareholders that puts collective decision-making ahead of individual interests. By placing business decisions in the hands of the board of directors, it introduces an element of efficiency. However, what is to prevent a tyranny of the majority that steamrolls minority shareholders? Here, company law intervenes to moderate the behaviour of dominant shareholders to ensure they do not adversely affect the interests of the minority. Minority shareholders can resort to various remedies under company law, such as oppression, prejudice and mismanagement, to restore the balance of power.

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While Indian company law has incorporated versions of shareholder remedies since the mid-20th century, the design of the remedies as they currently operate finds place in sections 241 and 242 of the Companies Act, 2013 (the "2013 Act"). No sooner than these provisions took effect,[1] they faced a litmus test in one of India's fiercest corporate battles in recent times. On 24 October 2016, the board of Tata Sons Limited, the holding company of the revered Tata group of companies, ousted its executive chairman, Mr. Cyrus Mistry, from the position. The Shapoorji Pallonji group, of which Mr. Mistry is a part, is a minority shareholder in Tata Sons. The group promptly initiated action under sections 241 and 242 of the 2013 Act against Tata Sons and its controlling shareholders, being two Tata trusts.

The Shapoorji Pallonji group challenged various decisions taken by Tata Sons. These included several business decisions taken in various Tata group companies (referred to as "legacy issues"), the amendments to the articles of association of the holding company Tata Sons to enhance the powers of the Tata shareholders and ultimately the removal of Mr. Mistry as the executive chairman and thereafter as a director of Tata Sons. While the dispute was pending adjudication, Tata Sons converted itself from a public company into a private one, a matter also contested legally. After marathon hearings, the Mumbai Bench of the National Company Law Tribunal ("NCLT") issued a 368-page ruling declining to grant any relief to the minority shareholders.[2]

Understandably dissatisfied with the NCLT's ruling, the minority shareholders of Tata Sons preferred an appeal before the National Company Law Appellate Tribunal ("NCLAT"). In a significant ruling, the NCLAT held that the removal of Mr. Cyrus Mistry as executive chairman by the board of Tata Sons was illegal, and called for his reinstatement to that position.[3] It also decided that consequential actions taken in the interim, including the appointment of a new executive chairman were illegal. In doing so, the NCLAT overturned the NCLT decision, which had not found any case of oppression in the conduct of the board and majority shareholders of the company, or the need to grant the minority shareholders of Tata Sons any remedy. The NCLAT also declared as illegal the conversion of Tata Sons from a public limited company to a private limited company.

Aggrieved by this, Tata Sons preferred an appeal to the Supreme Court, which stayed the operation of the NCLAT ruling.[4] The matter is pending hearing before the Supreme Court at the time of this writing. The Tata Sons dispute is noteworthy, as it is the first significant dispute under sections 241 and 242 of the 2013 Act to receive attention of the higher

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[1] Ministry of Corporate Affairs, Government of India, Notification S.O. 1934(E) dated 1 June 2016 (being also the effective date).

[2] *Cyrus Investment Pvt. Ltd. v. Tata Sons Ltd.*, C.P. No. 82(MB)/2016 dated 12 July 2018 (hereinafter the "*NCLT Ruling*").

[3] *Cyrus Investment Pvt. Ltd. v. Tata Sons*, [2020] 154 CLA 47 (hereinafter the "*NCLAT Ruling*").

[4] *Tata Sons Private Limited (formerly Tata Sons Limited) v. Cyrus Investment Pvt. Ltd.*, Civil Appeal No(s). 263-264/2020 (order dated 24 January 2020).

judiciary. In testing the mettle of these provisions, it presents an opportunity for the Supreme Court to elucidate the scope of the oppression, prejudice and mismanagement provisions in India, especially under the 2013 Act. This is also because the NCLAT, in its ruling, missed the occasion to clarify the legal position relating to minority shareholders' remedies, as it did not address the law in the requisite depth. This stands in stark contrast with the ruling of the NCLT wherein the adjudicatory body took great pains to chalk out the evolution of the law and set out the jurisprudence. Given this scenario, apart from the broader ramifications of a ruling in *Tata Sons* to corporate India, it is reasonable to anticipate from the Supreme Court a clearer delineation of the contours of the oppression, prejudice and mismanagement remedies in India.

A conspectus of sections 241 and 242 of the 2013 Act leads us to their analysis through the lens of two principal questions, as the NCLAT outlined in *Tata Sons*:[5]

> "(i) Whether the company's affairs have been or are being conducted in a manner 'prejudicial' or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and
>
> (ii) If that be so, whether to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up."

For ease of reference, this paper refers to the first paragraph above as the "substantive limb" and the second as the "conditional limb". In order for a shareholder to obtain remedies under the previously mentioned statutory provisions, it must demonstrate the satisfaction of both the limbs cumulatively. If so, the petitioning shareholder[6] is entitled to relief from the court[7] "with a view to bringing to an end the matters complained of".[8]

In this background, the goal of this paper is to unpack the shareholder remedies of oppression, prejudice and mismanagement under the 2013 Act. While this legislation substantially tracks its predecessor in the form of sections 397 and 398 of the Companies Act, 1956 (the "1956 Act"), it has also deviated, and that too in material fashion, on some counts. The 2013 Act has the effect of both expanding as well as contracting the shareholder remedies. The upshot of this paper is that section 241 of the 2013 Act considerably expands the scope of the substantive limb, thereby ensnaring within it conduct that was previously excluded. By introducing the concept of "prejudice" caused to a member as objectionable conduct apart from "oppressive" behaviour, Parliament has arguably lowered the standard of

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[5] *NCLAT Ruling*, *supra* note 3, at para. 105.

[6] Since these remedies are not necessarily confined to minority shareholders, and are available to majority shareholders as well, this paper uses the expression "petitioning shareholder".

[7] Unless otherwise specified, references to "courts" in this paper also include the NCLT and the NCLAT, as appropriate.

[8] Companies Act, 2013, s. 242(1).

conduct that a petitioning shareholder must satisfy before it can revoke the remedy. However, by remaining steadfast in its insistence that petitioners must satisfy the conditional limb no matter what the nature of the conduct of the offending shareholders,[9] the 2013 Act retains a considerable burden on petitioning shareholders. Moreover, while conduct involving mismanagement was not subject to the conditional limb under the 1956 Act, the 2013 Act alters the position and introduces the cumulative nature of the two limbs even for mismanagement, thereby narrowing the scope of the remedies. The 2013 Act, therefore, offers a mixed bag.

Part II of this paper focuses on the substantive limb enshrined in section 241 of the 2013 Act, and Part III on the conditional limb enshrined in section 242(1). Both Parts track evolution of the law, how the Indian courts have interpreted the two limbs, including with reference to English law, and identify areas that call for courts to fill the interpretative gaps. Part IV analyzes the remedies that adjudicatory bodies can award in such cases, whether or not the petitioning shareholder can discharge the burden of establishing the substantive and conditional limbs. Part V concludes. While the introduction to this paper is set in the background of the *Tata Sons* rulings merely to provide a context, this paper confines itself to an analysis of the legal issues. Given that the matter is presently *sub judice*, it is clearly the intention to avoid any application to the specific dispute at hand therein.

II. CONDUCT AND EFFECT: THE SUBSTANTIVE LIMB

Section 241(1) of the 2013 Act governs the substantive limb, and provides:

> **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 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 … for an order …

[9] Since not only majority shareholders can be the target of the remedies, but also minority shareholders, depending upon the circumstances, this paper uses the expression "offending shareholder".

Viewed from the point of view of offending conduct perpetrated against the petitioning shareholder, sub-section (a) deals with the concepts of "oppression" and "prejudice", while sub-section (b) "mismanagement".[10] Note that section 241 uses the three expressions disjunctively such that, in order for a petitioning shareholder to be successful, only one of the three offending types of conduct needs to be established. Hence, it is appropriate to consider each one of them separately.

A. Oppression

1. Origins of the Remedy

The very first antecedent of section 241 of the 2013 Act can be found in section 153C(1)(a) of the Companies Act, 1913 (the "1913 Act"), which the Parliament introduced by way of amendment in 1951.[11] Its substantive limb encompassed conduct that is "oppressive to some part of the members". This aspect found its way onto Indian shores through section 210 of the English Companies Act, 1948. Historically, in case of irresolvable disputes between shareholders and the company or among shareholders themselves, the only remedy available was winding up the company.[12] However, given the inefficiencies in winding up the company in such circumstances,[13] the Cohen Committee in England recommended the introduction of an alternative remedy that took the form of oppression in section 210 of the English legislation, which rationale applies to Indian company law as well. The oppression remedy received attention during the enactment of the 1956 Act,[14] and found its place in section 397 of that legislation as conduct of affairs of the company "in a manner oppressive to any member or members (including any one or more of themselves)".[15]

Oppression under section 397 of the 1956 Act has constituted the mainstay of shareholder remedies in India for over half a century. Courts have developed substantial jurisprudence on the oppression remedy, and have consistently cross-referred to the principles emanating from the English courts under the statutory counterpart in section 210 of the English Companies Act, 1948. Since the language on this specific count in section 241 of the 2013 Act is *in pari materia* with that of section 397 of the 1956, this paper takes the position that the said jurisprudence is entirely applicable to the present dispensation as well.

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[10] For simplicity of analysis, this paper focuses on oppression, prejudice or mismanagement caused to the shareholders (including the petitioning shareholders), but excludes from its ambit conduct that causes prejudice relatedly to the "interests of the company" or to "public interest".

[11] The Indian Companies (Amendment) Act, 1951, s. 7.

[12] Report of the Committee on Company Law Amendment (Cohen Report 1945) (hereinafter the "Cohen Report"), at para. 60.

[13] For a detailed discussion on this count, see Part III.A below.

[14] Government of India, Report of the Company Law Committee (1952) (hereinafter the "Bhabha Report"), at paras. 199-202.

[15] Companies Act, 1956, s. 397(1).

Moreover, courts have interpreted the oppression remedy quite narrowly, thereby imposing a high burden on petitioning shareholders to be able to enjoy the fruits of that remedy.

2. The (Restrictive) Scope of "Oppression"

Since the statute does not define oppression, courts have taken on the role of expounding the principles for determining the concept, and that too contextually, based on the facts and circumstances of each case.[16] Given the proximity with the English statute, it is not surprising that the initial guidance emanated from English courts.[17] In *Elder v. Elder & Watson*,[18] the court stated that "the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely"[19] and that "[m]ere loss of confidence or pure deadlock does not" come within the purview of oppression.[20] In *Scottish Co-operative Wholesale Society Ltd. v. Meyer*,[21] the House of Lords adopted the dictionary meaning of the word to mean "burdensome, harsh, and wrongful" conduct.[22]

Indian courts have had to address a number of specific issues pertaining to the scope of oppression. *First*, a question arose whether a petitioning shareholder has the burden to prove illegality of the offending shareholder's conduct before it can succeed in an oppression action. Here, the courts have been categorical that illegality is not a *sine qua non* for oppression. As the Gujarat High Court clarified in an early case under section 397 of the 1956 Act:[23]

> A particular action of the directors or controlling shareholders may be in violation of any provisions of law in the sense that some particular provision of law may not have been complied with before taking such action and yet such action may be very much in the interests of the company and the shareholders. On the other hand another action of the directors or controlling shareholders may be wholly within the limits of the law and yet it may be oppressive to the minority shareholder or prejudicial to the interests of the company."

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16 *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, (1965) 35 Comp. Cas. 351 (SC), at para. 15; *Yashovardhan Saboo v. Groz-Beckert Saboo Ltd.*, (1995) 83 Comp. Cas. 371 (CLB), at para. 68.

17 *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.*, (1981) 3 SCC 333 at para. 46; *M. Ethiraj v. Sheetala Credit Holdings Pvt. Ltd.*, (2017) 204 Comp. Cas. 325 (Mad) at para. 25; *Shanti Prasad*, *supra* note 16 at para. 16.

18 1952 S.C. 49.

19 Ibid at 55, *per* Lord President Cooper.

20 Ibid at 59, *per* Lord Keith. See also, *In re H.R. Harmer Ltd.*, [1951] 1 W.L.R. 62 at 75.

21 [1959] AC 324.

22 Ibid at 342.

23 *Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd.*, (1964) 34 Comp. Cas. 777 (Guj) at para. 25.

Second, in terms of timing and frequency, courts have clarified that in determining oppression the "events have to be considered not in isolation but as a part of a consecutive story".[24] Further, there is a need to establish "continuous acts on the part of the majority shareholders, continuing up to the date of the petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members."[25] Hence, petitioning shareholders carry an onerous burden of demonstrating a series of acts on the part of the offending shareholders that have not only occurred in the past, but also continue to occur at the time of the oppression petition.

Interestingly, a seemingly innocuous change in the text of section 241 of the 2013 Act (as compared to section 397 of the 1956 Act) has attracted some attention. The position enumerated above arose because section 397 used, with reference to the offending conduct, the language "are being conducted". However, section 241 uses the expression "have been or are being conducted". Some commentators take this to mean that past isolated acts, which are neither serial in nature nor are ongoing, could also be subsumed within the purview of oppression, thereby expanding the scope of the substantive provision.[26] However, the NCLAT has supplied a somewhat narrow interpretation in *Power Finance Corporation Limited v. Shree Maheshwar Hydel Power Corporation Limited*,[27] where it noted that the expression "'have been' relates to present perfect tense. It relates to action that began sometime in the past and is still in progress."[28] Further supplementing the position, it stated: "[t]here is a difference between 'have been' and 'had been'. 'Had been' would be past perfect tense indicating acts which were committed in the past and which came to an end in the past."[29] Such a semantic approach arguably sets at naught the deliberate deviation from the previous language in the oppression remedy, as now contained in section 241 of the Companies Act.

Third, courts have been called upon to consider whether the oppression remedy is available only when petitioners seek it in their capacity as shareholders, *i.e. qua* member, or whether they can exercise it when they suffer oppression in other capacities such as directors of the company.[30] Here, courts have generally been insistent that the "'oppression' complained of must be suffered by the petitioners in their character as members, and not, for

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[24] *Shanti Prasad*, *supra* note 16 at para. 20; *Needle Industries*, *supra* note 17 at para. 51; *Hanuman Prasad Bagri v. Bagress Cereals Pvt. Ltd.*, (2001) 4 SCC 420.

[25] Ibid. See also, *Sangramsingh P. Gaekwad v. Shantadevi P. Gaekwad (Dead)*, (2005) 11 SCC 314 at para. 189; *Vikram Bakshi v. Connaught Plaza Restaurants Limited*, (2017) 140 CLA 142 (NCLT) at para. 25.

[26] A. Ramaiya, *Guide to the Companies Act* (18th edn, LexisNexis, 2015) at p. 4007.

[27] (2019) 213 Comp. Cas. 560.

[28] Ibid at para. 43.

[29] Ibid.

[30] *H.R. Harmer*, *supra* note 20 at 87.

example, in their character as directors."[31] By circumscribing the scope of the remedy, it imposes additional challenges on petitioner shareholders making an oppression claim.

Despite the fact that the Indian courts have encountered several questions of interpretation over the years, they have induced a great deal of clarity that is now pervasive on the matter.[32] This is epitomised by the set of principles the Supreme Court, after analysing a number of judgments, laid down in *V.S. Krishnan v. Westfort Hi-tech Hospital Ltd.*:[33]

> From the above decisions, it is clear that oppression would be made out:
>
> (a) Where the conduct is harsh, burdensome and wrong.
>
> (b) Where the conduct is *mala fide* and is for a collateral purpose where although the ultimate objective may be in the interest of the company, the immediate purpose would result in an advantage for some shareholders vis-à-vis the others.
>
> (c) The action is against probity and good conduct.
>
> (d) The oppressive act complained of may be *fully permissible under law but may yet be oppressive* and, therefore, the test as to whether an action is oppressive or not is not based on whether it is legally permissible or not since even if legally permissible, if the action is otherwise against probity, good conduct or is burdensome, harsh or wrong or is *mala fide* or for a collateral purpose, it would amount to oppression under Sections 397 and 398.
>
> (e) Once conduct is found to be oppressive under Sections 397 and 398, the discretionary power given to the Company Law Board under Section 402 to set right, remedy or put an end to such oppression is very wide.
>
> (f) As to what are the facts which would give rise to or constitute oppression is *basically a question of fact* and, therefore, whether an act is oppressive or not is fundamentally/basically a question of fact.

The popularity of these guidelines is evident in that subsequent courts have wholeheartedly embraced them verbatim.[34] Admittedly, some level of subjectivity is inevitable, as oppression is a fact-based determination. Subject to this constraint, the evolution of the jurisprudence in India illuminates two themes. The first is that, for a term that is devoid of a statutory

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[31] *K.R.S. Narayana Iyengar v. T.A. Mani*, AIR 1960 Mad 338 at para. 13; *Needle Industries*, *supra* note 17 at para. 75. But see, *Vikram Bakshi*, *supra* note 25 at para. 25 (where, under a joint venture, the removal of a petitioner as a managing director would result in a sale of his shares in the company, and this was found to go "to the roots of proprietary rights of the petitioners as shareholders"). For the position under English law, see *O'Neill v. Phillips*, [1999] 1 WLR 1092 at 1105, per Hoffmann, LJ.

[32] See *Sangramsingh P. Gaekwad*, *supra* note 25 at para. 183.

[33] (2008) 3 SCC 363 at para. 10 [emphasis in original].

[34] See e.g., *Ram Parshottam Mittal v. Hotel Queen Road Pvt. Ltd.*, (2019) 215 Comp. Cas. 163 (SC) at para. 70; *Suresh Kumar Jalan v. Eastcoast Steel Limited*, (2019) 6 MLJ 676 (Mad) at para. 12.

definition, "oppression" has received a great deal of lucidity over the years. Any dispute or controversy regarding its scope as a matter of law is limited to a very narrow sphere. The second is that, in order to invoke the oppression remedy, the petitioning shareholder must satisfy the court that the offending conduct meets the high bar set by the courts.[35] That leads to the next element of the remedy, i.e., "prejudice", which exhibits the converse features: its novelty in the jurisprudence of shareholder remedy in India introduces considerable uncertainty in its interpretation and implementation but, by imposing a comparatively lower burden, it fathomably mitigates, at least to some extent, the challenges that petitioner shareholders face in India.

B. Prejudice

Section 241 of the 2013 Act introduced additional language to suggest that a petitioning shareholder can initiate legal action if the offending shareholders conduct the company's affairs in a manner "prejudicial … to him or any other member or members". Such a remedy that refers to prejudice suffered by shareholders was absent from section 397 of the 1956 Act.[36] Hence, by a legislative sleight of hand, section 241(1)(a) of the 2013 Act supplements the pre-existing oppression remedy with the newly introduced remedy of prejudice.

Given the novelty of this language, it is necessary at the outset to determine whether one ought to read the concept of "prejudice" to clarify or explicate the oppression remedy, or whether the prejudice remedy operates on a standalone basis *de hors* oppression. Judging by the language of section 241(1)(a), it is evident that the prejudice remedy stands on its own footing, and aside from the oppression remedy. This is because the plain text of section 241(1)(a) uses the expressions "prejudicial *or* oppressive" disjunctively, which must be given its ordinary meaning.[37] Hence, under the 2013 Act, a petitioner shareholder has the option of demonstrating to the court the existence of oppression, prejudice, or both. In such a background, it is necessary to consider the genesis of the prejudice remedy and its scope (including in comparison with the oppression remedy).

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[35] See e.g., *Needle Industries*, *supra* note 17 at para. 54 (noting that "an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief"). See also, *V.S. Krishnan*, *supra* note 33 at para. 23 (finding that "mere unfairness does not constitute oppression"); *Sangramsingh P. Gaekwad*, *supra* note 25 at para. 191 (cautioning that it is necessary that "… the conduct of the majority shareholders is pleaded and proved with sufficient clarity and precision. If the pleadings and/or the evidence adduced in the proceedings remains unsatisfactory to arrive at a definite conclusion of oppression or mis-management the petition must be rejected").

[36] Section 241(1)(a) of the 2013 Act also grants remedy in case of conduct that is "prejudicial to the interests of the company". See also, Ministry of Corporate Affairs, *Twenty-First Report- Companies Bill 2009*, Fifteenth Lok Sabha, Standing Committee on Finance (August 2010) at paras. 16.1-16.4. However, this is outside the scope of this paper. See *supra* note 10.

[37] *Life Insurance Corporation of India v. D.J. Bahadur*, (1981) 1 SCC 315 at para. 144. Furthermore, the heading in section 241 of the 2013 Act uses the words "oppression, etc." in an open-ended manner, suggesting the existence of more than one cause of action, while the erstwhile provisions in the 1956 Act referred to "oppression" (in section 397) and "mismanagement" (in section 398).

1. Genesis of the Prejudice Remedy

The precise legislative intention behind the introduction of the prejudice language in section 241 is shrouded in mystery. The concept first appeared in the Companies Bill, 2008,[38] without any analysis or even mention in the lead up to the draft legislation. In fact, the report of the J.J. Irani committee that shaped design the 2013 Act felt that there were "adequate provisions in the existing [1956] Act to prevent Oppression and Mismanagement".[39] The report only refers to the two existing remedies in the 1956 Act and makes no mention of prejudicial conduct towards shareholders. Similarly, the two reports of the Parliament's Standing Committee on Finance are silent on this count.[40] The concept has also not received any attention in the follow up to the enactment of the 2013 Act.[41]

In the absence of adequate guidance as to the legislative intention behind the prejudice remedy, it becomes imperative to survey parallel developments under English law. After all, the evolution of the oppression remedy under section 397 of the 1956 Act is attributable not only to the express language of section 210 of the English Companies Act of 1948, but also to the jurisprudence developed therein.[42] The Jenkins Committee[43] unearthed the inefficiencies of the oppression remedy and recommended that a newly devised "unfair prejudice" remedy substitute it. The Committee observed that the oppression remedy does not appear "to have produced the results expected of it"[44] and that "'oppressive' is too strong a word to be appropriate in all the cases in which applicants ought to be held entitled to relief under the section".[45] It concluded: "it should be made clear that section 210 extends to cases where the affairs of the company are being conducted in a manner unfairly prejudicial to the interests of some part of the members and not merely in an 'oppressive' manner".[46] The Jenkins Committee's labour was belatedly realised by the enactment of section 459 of the English Companies Act of 1985 that has now found a place in section 994 of the English Companies Act of 2006 currently in force.[47]

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[38] Clause 212.

[39] Expert Committee on Company Law, *Report on Company Law* (31 May 2005).

[40] Twenty-First Report-Companies Bill 2009, *supra* note 36. The report, though, recommended the introduction of the words "or in a manner prejudicial to the interests of the company", with which this paper is not concerned. See *supra* note 10. See also, Ministry of Corporate Affairs, *Fifty-Seventh Report-Companies Bill 2011*, Fifteenth Lok Sabha, Standing Committee on Finance (June 2012).

[41] See e.g., Ministry of Corporate Affairs, The Government of India, *Report of the Companies Law Committee* (February 2016) (noting in para. 16.1 that "[t]he Committee did not recommend any changes to Chapter XVI of the Act" that relates to the prevention of oppression and mismanagement).

[42] See *supra* Part II.A.1.

[43] Board of Trade, *Report of the Company Law Committee* (June 1962).

[44] Ibid at para. 200.

[45] Ibid at para. 202.

[46] Ibid at para. 212.

[47] Paul L. Davies & Sarah Worthington, *Gower's Principles of Modern Company Law*(10th edn, Sweet & Maxwell, 2016) at p. 661 (observing that "[s. 994 of the English Companies Act of 2006] repeats rather than reforms the provision previously found in s. 459 of the Companies Act 1985").

While the emergence of the equivalent remedy under English law will aid an appreciation of the rationale for the prejudice remedy in India, it is necessary to be conscious of two material differences between the legislative designs in the two jurisdictions. *First*, the unfair prejudice remedy under English company law substituted the erstwhile oppression remedy, a term the English statute obliterated. In India, however, oppression and prejudice coexist. The Indian Parliament found it apposite to supplement the oppression remedy with the prejudice remedy rather than to replace it. This arguably enhances the options available to petitioning shareholders in Indian companies. *Second*, by way of the "unfair prejudice" remedy, English law combines the concept of unfairness with prejudice: courts ought to consider both elements. On the other hand, the 2013 Act in India refers only to "prejudice" without any mention whatsoever to unfairness. It appears at a superficial level that the petitioning shareholders bear a lower burden to meet the threshold required to invoke the remedy. If the findings emanating from the Jenkins Committee are anything to go by, this is not altogether surprising because the inadequacy of the oppression (due to its stringent requirements) motivated an expansion of the remedy to accommodate petitioning shareholder concerns.[48] The introduction of the "prejudice" remedy into section 241(1)(a) of 2013 Act with limited (if no) legislative guidance would call upon the Indian courts to lay down the guiding principles to interpret the term.

2. Possible Jurisprudence in Relation to "Prejudice"

Beginning with a lexicographical survey, the Black's Law Dictionary defines "prejudice" to mean "[d]amage or detriment to one's legal rights or claims" and "prejudicial" as "[t]ending to harm, injure or impair; damaging or hurtful".[49] Superimposing this on to a corporate structure, under this relatively liberal dispensation, all that petitioning shareholders need to demonstrate is that the conduct of the company of the offending shareholders adversely affects them. In other words, the test focuses on the effect on the petitioning shareholder rather than whether or not such conduct is itself within the bounds of acceptability. Such a meaning conferred upon "prejudice" in section 241(1)(a) will enable petitioning shareholders to bring and succeed in claims with relative ease. Interestingly, Black's Law Dictionary also provides for a stricter definition of "prejudicial" as "[u]nfairly disadvantageous; inequitably detrimental".[50] By interspersing prerequisites such as "unfairly" and "inequitably", the focus is not solely on the effect on the victim, but also on the nature of the conduct of the alleged offender.

In this background, a question arises whether Indian courts must supply an effect-oriented (arguably liberal) interpretation of prejudice by solely examining the impact on the

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48 See *Re Saul D. Harrison & Sons plc*, [1994] BCC 475 at 488, *per* Hoffman, LJ. See also, Prateek Kumar Singh, "Indian Company Law Making Way for Unfair Prejudice Remedy?" *RGNUL Financial and Mercantile Law Review* (11 January 2020).

49 Bryan A. Garner (editor in chief), *Black's Law Dictionary* (11th edn., 2019).

50 Ibid.

petitioning shareholders, or whether they must go by a conduct- and effect-oriented (arguably strict) approach and impose a requirement that the offending shareholders' conduct must also be unfair or inequitable. Before seeking an answer to this question, it would be apt to take a brief sojourn into the manner in which English law has developed that could help enlighten one's understanding of section 241 of the 2013 Act.

By utilizing the expression "unfair prejudice", the English Companies Act per force adopts the strict approach to prejudice as enshrined in the statute itself. As the editors of the Gowers's Principles of Modern Company Law note:[51] "In a number of cases the courts have stressed that the section itself requires prejudice to the minority which is unfair, and not just prejudice per se." More specifically, Neill, LJ expounded in *Re Saul D Harrison & Sons plc*:[52]

> "The conduct must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests …"

Interestingly, it is the "unfairness" requirement that has been at play before the English courts, which "is simply another way of putting the point that only legitimate expectations are protected by the section, not every factual expectation which the petitioner may entertain."[53] Courts have embarked upon considering whether the offending shareholders' conduct amounts to "commercial unfairness".[54] In order to constitute commercial unfairness, it is necessary to consider whether the petitioning shareholders are entitled to "something more"[55] than the legal rights they enjoyed under company law as well as the memorandum and articles of association of the company. While English courts initially treated these additional factors as "legitimate expectations" of the petitioner shareholders, a term borrowed from public law, the more recent jurisprudence treats them as "equitable considerations", thereby drawing from private law instead.[56] The existence of these factors would enable the petitioner shareholders to succeed in invoking the unfair prejudice remedy. The jurisprudence developed in England focuses cumulatively on both the conduct of the offending shareholders and its effect on the petitioning shareholders.

In this light, at least three methods are available to the Indian courts in interpreting the scope of the prejudice remedy. *First*, courts may adopt a literal interpretation of prejudice

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[51] Davies & Worthington, *supra* note 47 at p. 672.

[52] *Supra* note 48 at 499.

[53] Davies & Worthington, *supra* note 47 at p. 673.

[54] *Re Saul D Harrison & Sons plc*, *supra* note 48 at 488.

[55] Ibid 490.

[56] *O'Neill*, *supra* note 31 at 1102; Davies & Worthington, *supra* note 47 at p. 665. Such equitable considerations are discussed in detail in Part III below in the context of the conditional limb in section 242 of the 2013 Act.

using the liberal dispensation, whereby they only consider the effect of possible corporate conduct on the petitioning shareholders, i.e., whether they have suffered any harm, injury or impairment, regardless of the nature and acceptability of the conduct.[57] Attractive as this may be for petitioning shareholders, such interpretation fails to fit within the legislative scheme of section 241(1)(a). From the statutory perspective, such an interpretation will lower the bar so significantly for petitioning shareholders that it will likely render the oppression remedy under the very same statutory provision otiose. After all, why would any petitioning shareholder even attempt to discharge the higher burden of establishing oppression (which requires the elements of both conduct of the offending shareholder and effect on the petitioning shareholder) when it can simply grab the low hanging fruit by displaying effect? This is bound not only to open the floodgates for prejudice litigation, but also disrupt the conduct of the business enterprise of the company if all corporate decisions, even those that are taken in the broader interest of the company and its shareholders as a whole, are liable to questioning by petitioning shareholders whose specific interests may be adversely affected. This paper advocates against the liberal effect-oriented approach, which then leads to other plausible methods.

Second, and in order to address the concerns arising from the previous method, courts may adopt the more stringent definition of prejudice that takes into account both the nature of the offending conduct as well as its impact on the petitioning shareholders.[58] This will necessitate the incorporation of principles of fairness as well as equitable considerations, an approach that make this similar to that prevailing under English law. Another way of looking at this method is as if the courts were to read in the concept "unfairness" into the prejudice remedy to treat it as "unfair prejudice", which then leads courts to examine whether the acts of the offending shareholders amount to "commercial unfairness".[59] Under such a dispensation, Indian courts may well rely upon English case law for inspiration.[60] Given the legislative history under the English Companies Act, the fact that the unfair prejudice remedy sought to mitigate the rigidity of the oppression remedy would suggest that the bar for petitioning shareholders would be lower than that of oppression, but not as low as in the case of the first method above.

Third, and a method that will produce nearly the same result as the second above, is for courts to apply the rule of construction of *noscitur a sociis* in interpreting the term "prejudicial" in section 241(1)(a) of the 2013 Act. Black's Law Dictionary refers to it as a "cannon of construction holding that the meaning of an unclear word or phrase … should be

[57] See *supra* note 48 and accompanying text.

[58] See *supra* note 50 and accompanying text.

[59] Interestingly, Indian courts have not been averse to alluding to the expression "unfair prejudice" in the context of affected shareholders even in the pre-2013 Act era. See e.g., *V.S. Krishnan*, *supra* note 33 at para. 25.

[60] See also, Shreyas Jayasimha & Rohan Tigadi, "Arbitrability of Oppression, Mismanagement and Prejudice Claims in India: Need for a Re-think?", 11 *NUJS Law Review* 4 (2018).

determined by the words immediately surrounding it".[61] The Supreme Court noted that "where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the said Rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful".[62] The Court went on to note that "noscitur a sociis is a legitimate Rule of construction to construe the words of an Act of Parliament with reference to the words found in immediate connection with them".[63] It also clarified that the rule is most useful "when the intention of the legislature in associating wider words with words of narrowest significance is doubtful or otherwise not clear".[64] Given the lack of any indication regarding Parliamentary intention in the introduction of the concept of prejudice (wider in terms) alongside that of the previously well-established concept of oppression (narrower in scope), there is sufficient reason to interpret prejudice in a more stringent manner in light of the concept of oppression.

No matter which methods the courts adopt, and similar to the context of oppression, the incidence of prejudice will have to be determined based on the facts and circumstances of each case. As Hoffmann, LJ noted, albeit in the context of unfair prejudice under English law, the "concept of fairness must be applied judicially and the context which it is given by the courts must be based upon rational principles", and that the court "has a very wide discretion, but it does not sit under a palm tree".[65] Given the novelty surrounding the prejudice remedy and the lack of guidance regarding the legislative intention behind its introduction, one cannot but await rationalisation of the principles by the judiciary.

C. Mismanagement

The mismanagement remedy, contained in section 241(1)(b) of the 2013 Act, knows of no English parallel.[66] It first took the form of section 398 of the 1956 Act at the instance of the Bhabha Report which, after reviewing the oppression provision in the English Companies Act 1948, noted that "its scope may be appropriately enlarged to cover not only the cases of oppression to a minority of shareholders but also of gross mismanagement of the affairs of a company which cannot be otherwise suitably dealt with under the other provisions of the Act".[67] In some ways, the mismanagement remedy seeks to mitigate the rigour of the oppression remedy.

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[61] Garner, *supra* note 49.

[62] *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221 at para. 71, citing *State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC 610.

[63] *Subramanian Swamy*, *supra* note 62 at para. 74, citing *Ahmedabad (P) Primary Teachers' Assn v. Administrative Officer*, (2004) 1 SCC 755.

[64] *Subramanian Swamy*, *supra* note 62 at para. 74.

[65] *O'Neill*, *supra* note 31 at 1098.

[66] Jayasimha & Tigadi, *supra* note 60; Ramaiya, *supra* note 26 at p. 4079.

[67] *Supra* note 14 at 149.

The mismanagement remedy applies when two conditions are fulfilled.[68] *First*, there must be a material change in the management or control of the company, which could occur in various ways including alteration of the board, manager or ownership of the company (the cause). *Second*, such change must be the reason that the company conducts its affairs in a manner that is prejudicial to the interests of the company or its shareholders (the effect). Courts have observed that the mismanagement remedy is wider than the oppression remedy.[69] This is not only evident from the language of section 241(1)(b), but also the rationale for the introduction of mismanagement as a distinct remedy. In comparison with section 398 of the 1956 Act, which applied only if the change was prejudicial to the interest of the company, section 241(1)(b) of the 2013 Act expands the effect to include a change that is prejudicial to the shareholders or any class thereof.

Apart from having to recognise the statutory change described above, the jurisprudence developed under section 398 of the 1956 continues to hold good under the new legislation as well.[70] However, unlike the 1956 Act, under which mismanagement was a standalone remedy, the 2013 Act incorporates a material change by which cases involving mismanagement are subject to the conditional limb by which, in order for petitioning shareholders to successfully invoke the remedy, they must also establish the existence of the grounds for just and equitable winding up. It is to the conditional limb, and its impact on the exercise of shareholder remedies, that the next Part turns.

III. "JUST AND EQUITABLE" GROUNDS: THE CONDITIONAL LIMB

Section 242(1) of the 2013 Act governs the conditional limb, and provides:

> **Powers of Tribunal**.—(1) If, on any application made under section 241, the Tribunal is of the opinion—
>
> (a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and
>
> (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,
>
> the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

[68] See Ramaiya, *supra* note 26 at p. 4079.

[69] See e.g., *Mohanlal Ganpatram*, *supra* note 23 at para 28.

[70] Hence, this remedy does not require further elaboration.

The conditional limb contained in clause (b) above makes amply clear that oppression, prejudice and mismanagement are alternative remedies to winding up, not independent ones.

A. Rationale and Evolution

Historically, the only remedy available to shareholders victimized by offending conduct of the company or its dominant shareholders was a winding up of the company on "just and equitable" grounds, something that modern day vocabulary would refer to as a "nuclear option". As P.N. Bhagwati, J noted:[71]

> That remedy was however totally inadequate for it meant killing the company for the purpose of putting an end to the oppression and mismanagement. But killing the company would be a singularly clumsy method of ending oppression and mismanagement and such a course might well turn out to be against the interests of the minority shareholders. The liquidation of the company may result in the sale of its asset at break-up value, which may be small and the minority who, urged by the oppression of the majority, petitions for a winding up order may in effect play its opponent's game, for the only available purchaser of the assets of the company may be the very majority whose oppression has driven the minority to seek redress.[72]

Based on similar reasoning, the Cohen Committee in England recommended the oppression remedy as an alternative to winding up.[73] This not only found its way into section 210 of the English Companies Act 1948, but also into sections 153C and 153D of the Indian Companies Act, 1913.[74] Interestingly, the 1956 Act introduced a material difference. It imposed the conditional limb only for oppression,[75] but not for mismanagement (which took the shape of an independent remedy)[76]. Hence, under that legislation, petitioning shareholders bringing a case for oppression had to demonstrate the satisfaction of the conditional limb, but those asserting mismanagement were free of that burden. The rationale behind such a dichotomous approach is yet unclear.[77]

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[71] *Mohanlal Ganpatram*, *supra* note 23 at para 29.

[72] See also, *Elder*, *supra* note 18 at 54, *per* Lord President (Cooper) (observing: "In many cases, moreover, the cure would have been worse than the disease owing to the prejudice likely to be inflicted upon the applicants for relief as a result of a compulsory liquidation of the company").

[73] *Supra* note 12 at para. 60.

[74] *Mohanlal Ganpatram*, *supra* note 23 at para 29; *K.R.S. Narayana Iyengar*, *supra* note 31 at para. 10.

[75] Companies Act, 1956, s. 397(2)(b).

[76] Companies Act, 1956, s. 398.

[77] The Bhabha Committee, which spearheaded the effort leading to the 1956 Act, had stated that "under our proposals we do not contemplate that shareholders who complain that the affairs of their company are being managed in a manner prejudicial to the interests of the company should be required also to prove that the facts disclose such a state of affairs as would justify the making of a winding-up order". See *supra* note 14 at para. 202. The draftspersons of the 1956 Act appear to have shut their eyes partly to these recommendations, as the legislation accepts them for mismanagement, but not for oppression.

Rumblings of discontent with the conditional limb soon began developing. The Jenkins Committee in England noted "that a case for winding up under the just and equitable rule at the instance of a contributory is difficult to establish and it is suggested that there is no sufficient reason for making the establishment of such a case an essential condition of intervention by the Court."[78] A committee in India headed by Rajinder Sachar, J echoed similar sentiments: "We are also of the opinion that [the conditional limb] impose[s] as an essential condition of intervention by the Court a state of facts often difficult to establish. We see no sufficient reason for making out a case of oppression that the facts should also justify the making of a winding up order."[79]

Despite the commonality of the critique surrounding the conditional limb, the law reform process in England and India have proceeded in diametrically opposite ways. In transforming the oppression remedy into one of unfair prejudice, section 459 of the English Companies Act 1985 also eliminated the conditional limb, thereby making it an independent remedy rather than an alternative one.[80] Hence, petitioning shareholders under English law bringing an unfair prejudice claim need not demonstrate the existence of grounds for just and equitable winding up, and that to wind up the company would be unfairly prejudicial to the shareholders. However, in India, the conditional limb has continued to hold sway even in the 2013 Act, and that too without any deliberations whatsoever regarding its continued utility.[81] Even more, it is now applicable to the mismanagement remedy as well. By making the conditional limb a prerequisite for oppression, prejudice as well as mismanagement, the 2013 Act unifies the earlier dichotomous approach. Accordingly, petitioning shareholders claiming mismanagement now have to establish the conditional limb, an onus they did not carry under the 1956 Act, thereby making the remedy more stringent under the current legislation. Courts too have constantly reiterated that without establishing the conditional limb, petitioning shareholders are not entitled to relief under the substantive limb (previously oppression, and now prejudice as well as mismanagement).[82]

B. Equitable Considerations: "Quasi Partnership"

The concept of "just and equitable" winding up precedes that of remedies such as oppression, prejudice and mismanagement. Hence, the jurisprudence developed thereunder is relevant for determining whether the conditional limb is satisfied. The statutory manifestation is

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[78] *Supra* note 43 at para. 201.

[79] Ministry of Law, Justice & Company Affairs, Government of India, *Report of the High-Powered Expert Committee in Companies and MRTP Acts* (August 1978), para. 7.11

[80] Such a regime finds a mirror image in section 994 of the Companies Act 2006, which is currently in force.

[81] See *supra* note 39 and accompanying text (not paying heed to the exhortations of the Sachar Committee).

[82] See, *Hanuman Prasad Bagri*, *supra* note 24 at para. 3 (noting that petitioning shareholders "have to make out a case for winding up of the company on just and equitable grounds. If the facts fall short of the case set out for winding up on just and equitable grounds no relief can be granted"); *Rajahmundry Electric Supply Corporation Ltd. v. A. Nageswara Rao*, (1956) 26 Comp. Cas. 91 (SC) at para. 6 (observing that where "the facts proved do not make out a case for winding up … no order could be passed [for the substantive remedy]")

contained in section 271(e) of the 2013 Act, which provides that a company may be wound up by a court if it is "of the opinion that it is just and equitable that the company should be wound up".[83] Courts have retained for themselves considerable discretion in defining the boundaries of this ground.[84] Having been statutorily conferred the explicit licence to do so, courts have embraced equitable considerations in arriving at a finding whether a company is to be wound up on just and equitable grounds.

More than a century ago, courts for this purpose began to analogize small and closely held companies to partnerships, and draw upon principles relating to dissolution of partnerships. In *Yenidje Tobacco*, an English court held that it is necessary to apply partnership principles to a company "where in substance it is a partnership in the form or the guise of a private company".[85] Accordingly, considerations pertaining to the dissolution of a partnership pervade the space of liquidation of a company on just and equitable grounds.[86] The House of Lords developed these principles in the *locus classicus* of *Ebrahimi v. Westbourne Galleries Ltd.*,[87] where it reemphasised that the words "just and equitable" enabled courts to look beyond simply the legal rights of the parties:[88]

> The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

Treating such companies as "quasi-partnerships", it enables courts to look past the formal legal structure of a company, the memorandum and articles of association and other agreements to the substantive nature of the relationships between the parties to apply equitable considerations. In doing so, the House of Lords laid down its precise tests that are now renowned in the common law world for when a company becomes a quasi-partnership for this purpose:[89]

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[83] Its predecessor can be found in section 433(f) of the 1956 Act. Since this remedy is based on equitable consideration, petitioning shareholders are required to come with clean hands. *Atmaram Modi v. ECL Agrotech Ltd.*, (1999) 98 Comp. Cas. 463 (CLB) at para. 18; *CR Datta on Company Law* (7th edn., LexisNexis, 2017) at p. 3.311.

[84] For instance, courts have been unanimous in holding that, even though the "just and equitable" ground appears in the statute after several more specific grounds, the principle of *ejusdem generis* is inapplicable in interpreting it. See, *In re Yenidje Tobacco Company, Limited*, [1916] 2 Ch. 426 at 432. See also, *Rajahmundry Electric*, *supra* note 82 at para. 10.

[85] *Yenidje Tobacco*, *supra* note 84 at 432.

[86] See also, *Loch v. John Blackwood, Limited*, [1924] A.C. 783.

[87] [1973] A.C. 360.

[88] Ibid at 379, *per* Lord Wilberforce.

[89] Ibid.

> The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

Despite sounding a note of caution that Indian courts will have to "adjust, adapt, limit or extend"[90] principles from English decisions to suit the local circumstances, they have lent credence to the broader principles without upending them.[91] In *Hind Overseas*, the Supreme Court aptly observed:[92]

> … In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership. …
>
> The principle of 'just and equitable' clause baffles a precise definition. It must rest with the judicial discretion of the court depending upon the facts and circumstances of each case. These are necessarily equitable considerations and may, in a given case, be superimposed on law. Whether it would be so done in a particular case cannot be put in the strait-jacket of an inflexible formula.[93]

The last observation above gains prominence because the existence of a quasi-partnership is ultimately a fact-based determination. This is because, as the Supreme Court has noted, "Parliament, while enacting a statute, cannot think of all situations which may emerge in giving effect to the statutory provision" and hence courts need to adopt "a holistic approach of the matter".[94] Given that "the just and equitable clause could kick-in in myriad situations",[95] courts have adopted varying approaches to the application of the quasi-partnership principle. At one end of the spectrum, courts have been unwilling to recognise quasi-partnership unless the business was first set up as a partnership that the partners then converted into a company, of which they became shareholders and directors.[96] At the other

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[90] *Hind Overseas Private Limited v. Raghunath Prasad Jhunjhunwala*, (1976) 3 SCC 259 at para. 31.

[91] See also, *Needle Industries*, *supra* note 17 at para. 48; *Sangramsingh P. Gaekwad*, *supra* note 25 at para. 238 (noting: "It is now well-known that principles of quasi-partnership is not foreign to the concept of Companies Act"); *M. Ethiraj*, *supra* note 17 at para. 30; *Kilpest Pvt. Ltd. v. Shekhar Mehra*, (1996) 10 SCC 696 at paras. 11-12; *M.S.D.C. Radharamanan v. M.S.D. Chandrasekhara Raja*, (2008) 6 SCC 750 at para. 32.

[92] *Hind Overseas*, *supra* note 90 at paras. 32-33.

[93] See also, *Sangramsingh P. Gaekwad*, *supra* note 25 at para. 237 (observing: "The true character of the company, the business realities of the situation should not be confined to a narrow legalistic view").

[94] *M.S.D.C. Radharamanan*, *supra* note 91 at para. 30.

[95] *M. Ethiraj*, *supra* note 17 at para. 41.5.

[96] *Cyrus Investment Pvt. Ltd.*, *NCLT Ruling*, *supra* note 2 at para. 532.

end, they have been open to conferring the status of quasi-partnership even to a public listed company.[97]

Although courts have recognised the lack of limitations in ascribing the character of a quasi-partnership to a company, they adopt such measures usually in the case of a deadlock, which cannot be resolved through means stipulated in its articles of association.[98] A common feature in these cases of stalemate arises when the ownership of the company is distributed equally among the shareholders and where one of them is ousted from management of the company that also adversely affects their position as shareholder.[99] Judged by the broader guidance emanating from the case law, it becomes clear that the notion of a quasi-partnership is capable of invocation only if the petitioning shareholder can establish an arrangement based on mutual trust and confidence, which exists over and above the legal agreements between the shareholders and directors and the constitutional documents pertaining to the company. While it is imprudent to rule out the existence of such equitable considerations in a large, professionally managed company, the circumstances of a small company or one that a group of friends or family members own and manage render it more feasible to attribute the character of a quasi-partnership to such companies.

Notwithstanding the wide nature of the discretion available to courts, they have sounded a note of restraint in that they must desist from invoking the principle of quasi-partnership other than in exceptional circumstances. In the leading case of *Hind Overseas*, the Supreme Court noted: “When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked”.[100] The Court has also counselled that the “submission that a limited company should be treated as a quasi-partnership should, therefore, not be easily accepted”.[101] Hence, the burden on petitioning shareholders to establish the existence of grounds for just and equitable winding-up is relatively high.

C. Winding-up and Unfair Prejudice

Even if just and equitable grounds exist, courts are required to determine whether to wind up the company would unfairly prejudice such member or members.[102] This is an essential requirement because the oppression, prejudice and mismanagement remedies continue in

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[97] *M. Ethiraj*, *supra* note 17 at para. 41.5 (supporting the conclusion with the reasoning that a public company controlled by a group of shareholders could also be run like a family-owned company).

[98] *Yashovardhan Saboo*, *supra* note 16 at para. 59.

[99] *Abnash Kaur v. Lord Krishna Sugar Mills*, (1974) Comp. Cas. 390 (Del) at para. 84; *Atmaram Modi*, *supra* note 83 at para. 12.

[100] *Hind Overseas*, *supra* note 90 at para. 32, followed in *Sangramsingh P. Gaekwad*, *supra* note 25 at para. 239.

[101] *Kilpest Pvt. Ltd.*, *supra* note 91. See also, Ramaiya, *supra* note 26 at p. 4599.

[102] Companies Act, 2013, s. 242(1)(b).

India to be alternatives to winding-up and a means to preserve the business of the company and protect the interest of various stakeholders. This requirement is satisfied if petitioning shareholders can show that, although just and equitable grounds exist, the winding up will unfairly prejudice either the petitioning shareholders themselves or the other shareholders.[103]

If the petitioning shareholders are able to prove either oppression, prejudice or mismanagement in terms of section 241(1)(a) of the 2013 Act and also that there exist grounds for just and equitable winding up, it would be unfairly prejudicial to the petitioning shareholders if they are likely to suffer upon winding up. This would occur when the company's business is proceeding as a going concern, or when the petitioning shareholders hold a significant shareholding in the company for which they are only likely to retrieve a break-up value upon winding up. In such circumstances, it would be unfairly prejudicial to wind up the company.[104]

Even where a winding up may be in the interest of the petitioning shareholders, courts must weigh that against the unfair prejudice the winding up may cause to the remaining shareholders of the company. In that sense, the effort is to balance the somewhat divergent interests of the various shareholders, and even other stakeholders. For instance, the Supreme Court noted in *Hind Overseas*:[105] "The interest of the applicant alone is not of predominant consideration. The interests of the shareholders of the company as a whole apart from those of other interests have to be kept in mind at the time of consideration as to whether the application should be admitted". The question surrounding whether the just and equitable winding up is likely to be unfairly prejudicial to the shareholders of the company has been somewhat straightforward in its application and has been devoid of legal controversy.

To conclude the discussion on the conditional limb, it is clear that it is insufficient for petitioning shareholders to establish the substantive element of oppression, prejudice or mismanagement. In order to be successful in obtaining a suitable remedy, they must also demonstrate the conditional limb, which draws upon equitable considerations (such as the legal fiction of quasi-partnership). As seen above, the petitioning shareholders bear a rather undue burden in proving the conditional limb. From a macro perspective, the legal regime comprising the statute and as well as the considerable discretion the courts possess (and exercise) continues to rely upon the corporate democratic principle of recognising majority decisions in a company, and permitting the invocation of shareholder remedies only in extraordinary circumstances.

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103 Note that in contrast to the concept of "unfair prejudice" discussed in Part II.B, which related to the conduct of the offending shareholders, the unfair prejudice in the present scenario relates to the act of winding up the company.

104 See, e.g., *Vikram Bakshi*, *supra* note 25 at para. 24, where the NCLT found that it would be unfairly prejudicial to the petitioning shareholder to wind up the company, as he held 50% shareholding in the company.

105 *Supra* note 90 at para. 34.

IV. ORDER AND RELIEF

Once a court decides the question of whether the petitioning shareholder is entitled to relief for oppression, prejudice or mismanagement, it has wide powers to grant relief. The general power to grant relief under section 242(1) of the 2013 Act stipulates that the court may use it "with a view to bringing to an end the matters complained of". This objective guides the nature of relief granted. Moreover, section 242(2) provides for various types of specific relief that the court may grant, including regulating the future conduct of affairs of the company, purchase of shares by a shareholder or the company and termination or modification of agreements, among others. Given the wide nature of the power that courts may exercise in light of specific illustrative situations, they have sought to lay down guiding principles to the grant of relief in shareholder remedy cases.

At the outset, the Supreme Court has found that "the jurisdiction of the Court to grant appropriate relief … indisputably is of wide amplitude",[106] and that "[r]eliefs must be granted having regard to the exigencies of the situation".[107] However, these seemingly wide powers are circumscribed by the objective of granting relief, which is to put an end to the matters in dispute.[108] In *Mohanlal Ganpatram*, Bhagwati, J observed:[109]

> The language of sections 397 and 398 leaves no doubt as to the true intendment of the legislature and it is transparent that the remedy provided by these sections is of a preventive nature so as to bring to an end oppression or mismanagement on the part of the controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders or the company. The remedy is not intend[ed] to enable the aggrieved shareholders to set at naught what has already been done by the controlling shareholders in the management of the affairs of the company

By this, it is clear that the design of the relief must be such that it breaks a stalemate, and prevents it from perpetuating. The quintessential way of achieving this outcome is to provide for an exit of either the petitioning shareholder or the offending shareholder. Hence, such an exit mechanism would naturally be at the forefront of the types of the relief a court may order, and that too even though a wide array of relief options are available to the court under section 242(2). Such a rationale is evident from an early House of Lords decision:[110]

> One of the most useful orders mentioned in the section—which will enable the court to do justice to the injured shareholders—is to order the oppressor to buy their shares at a fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression. Once the

[106] *Sangramsingh P. Gaekwad*, *supra* note 25 at para. 185.

[107] Ibid at para. 186.

[108] *K.R.S. Narayana Iyengar*, *supra* note 31 at para. 14.

[109] *Mohanlal Ganpatram*, *supra* note 23 at para 30.

[110] *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 at 369, *per* Denning, LJ.

> oppressor has bought the shares, the company can survive. It can continue to operate. It is, no doubt, true that an order of this kind give to the oppressed shareholders what is in effect money compensation for the injury done to them: but I see no objection to this.

Such an exit mechanism is the only solution when there is a deadlock and loss of trust and confidence among the parties, as it not only puts the dispute to an end, but it also enables the continuation of the business of the company without adversely affecting the interests of the other stakeholders such as employees.[111] In certain cases, and contrary to popular wisdom, courts may even order the minority shareholders to acquire the shares of the controlling shareholders.[112]

While the exit mechanism is the most natural technique to put an end to matters complained of, courts have granted other forms of relief as well. These include reinstating the managing director of the company,[113] and setting aside the issue of shares to a shareholder that was carried out through questionable means.[114] These are arguably exceptional scenarios, and such reliefs would call upon the existence of special factors such as the nature of the oppression, prejudice or mismanagement perpetrated, the effect on the petitioning shareholder, the relative shareholding and management position of the parties and, in case of a deadlock, whether the relief will resolve the same. Ordinarily, reinstating a petitioning shareholder whom the company wrongly removed from a management position would only perpetuate a stalemate that could be adverse to the interest of the company without bringing to an end the matters complained of. In that sense, exit ought to be the default option, unless there are compelling reasons to choose others.

Interestingly, the law has developed such that courts can grant relief even where they do not find a valid claim of oppression, prejudice or remedy. In *Needle Industries*,[115] the Supreme Court, despite finding no evidence of oppression, called upon the respondent shareholders (in this case, the minority) to acquire the shares of the petitioning shareholders (majority). The Court also noted that, having rejected the plea of oppression, it did not ask the minority to pay a premium to the petitioning shareholders "as a price of oppression", and that "the course which [it adopted] is intended primarily to set right the course of justice".[116] In doing so, the Court drew upon its general powers to do justice in the facts and circumstances of the case.

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[111] *Yashovardhan Saboo*, *supra* note 16 at para. 73.

[112] *Needle Industries*, *supra* note 17 at para. 175; M. Rishi Kumar Dugar, "Minority Shareholders Buying Out Majority Shareholders – An Analysis", (2010) 22 *National Law School of India Review* 105.

[113] *Vikram Bakshi*, *supra* note 25 at para. 40.

[114] *Dale and Carrington Invt. (P) Ltd. v. P.K. Prathapan*, (2005) 1 SCC 212 at para. 38.

[115] *Supra* note 17.

[116] Ibid at para. 175.

The law that courts may grant relief without a finding of oppression or, for that matter, prejudice or mismanagement has received general acceptance. In *M. Ethiraj*, the Madras High Court noted that "even where a petitioner fails to make out a case of oppression, the Court is not powerless to do substantial justice between contesting parties, and thus, if, the situation so demands order purchase of shares of the minority group."[117] Even in these circumstances devoid of a finding of the substantive remedy, courts are at liberty to pass orders to "put an end to matters complained of", taking into consideration the interest of the company and the shareholders. Even though the exit option is available both in circumstances where there is a finding of oppression, prejudice or mismanagement or not, courts are required to mould the precise terms of the relief to align with the nature of the substantive outcome.

V. CONCLUSION

The oppression, prejudice and mismanagement provisions in sections 241 and 242 continue to form the mainstay of shareholders remedies under Indian company law. Anecdotal evidence suggests that reliance by petitioning shareholders on these remedies far exceed other shareholder remedies such as derivative actions and class actions.[118] Despite nearly 70 years of legislative and judicial activity seeking to shape the contours of the oppression, prejudice and mismanagement remedies, a number of concerns remain. English law has witnessed reforms to mitigate the harshness of the oppression remedy by transitioning to the concept of unfair prejudice and jettisoning the conditional limb to make it a standalone remedy. However, while Indian law has sought to expand the remedies by retaining the concept of mismanagement and introducing the notion of prejudice, the fact that as a species they cohabit with the continued existence of the oppression remedy may have the effect of muddying the waters. More importantly, the conditional limb necessitates that the petitioning shareholders establish the grounds for just and equitable winding up, which limits the scope of the remedy substantially.

As evident from the Appendix to this paper, the analysis of whether to grant relief in an action by petitioning shareholders represents a somewhat complex one in the Indian scenario. It requires petitioning shareholders to pass through several hoops before arriving at an outcome. Matters are even more complicated given that several steps involve a fact-based determination, which is bound to generate greater uncertainty for the corporate sector. Given the trends thus far, it would be imprudent to expect any significant changes from the legislature to address outstanding matters, such as whether there is a need for a triumvirate of remedies – oppression, prejudice and mismanagement – which is likely to cause considerable overlap, or whether there is a need for consolidation, as has occurred in England. Moreover,

[117] *M. Ethiraj*, *supra* note 17 at para. 34.1.

[118] For an earlier account on this point, see Vikramaditya Khanna & Umakanth Varottil, "The Rarity of Derivative Actions in India: Reasons and Consequences, in Dan W. Puchniak, et al. (eds.), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) at pp. 386-388.

an existential question for these remedies is whether their evolution as an alternative remedy rather than a standalone one still holds today. Possibly bereft of legislative attention, courts will bear the burden of interpreting the statutory provisions to delineate conduct that deserves reproach, a role they have been performing actively for more than half a century. In doing so, the key is to evaluate issues against the touchstone of the balance between paying obeisance to the principle of corporate democracy and protecting vulnerable shareholders against conduct that is worthy of intervention by the courts.

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APPENDIX