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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY SUMMONS FOR DIRECTION NO. 256 OF 2014

In the matter of the Companies Act, 1956 (1 of 1956);

AND

In the matter of Sections 391 and 394 read of the Companies Act, 1956;

AND

In the matter of Scheme of Amalgamation

OF

Wadala Commodities Limited ("WCL" or "Transferor Company")

With

Godrej Industries Limited ("GIL" or "Transferee Company")

AND

Their respective shareholders

Godrej Industries Limited, a Company incorporated under the provisions of the Companies Act, 1956 and having its registered Office at Pirojshnagar, Eastern Express Highway, Vikhroli, Mumbai – 400 079, Maharashtra ...Applicant Company

APPEARANCES

FOR THE APPLICANT	Mr. Shyam Mehta, Senior Counsel, i/b M/s. Rajesh Shah & Co.,
FOR THE REGIONAL DIRECTOR	Mr. C.J. Joy
AMICUS CURIAE	Mr. Gaurav Joshi, *Senior Advocate*

CORAM : G.S. Patel, J.
DATED : 8th May 2014

JUDGMENT : (Per G.S. Patel, J.)

1. Following the recent extensive amendments to the Companies Act, 1956 and bringing into force of various sections of the Companies Act, 2013, a question has been raised in this Company Summons for Direction, viz., whether in view of the provisions of Section 110 of the Companies Act, 2013 ("the 2013 Act") and SEBI Circular dated 21st May 2013, a resolution for approval of a Scheme of Amalgamation can be passed by a majority of the equity shareholders casting their votes by postal ballot, which includes voting by electronic means, in complete substitution of an actual meeting. In other words, whether the 2013 Act, read with various circulars and notifications, has the effect of altogether eliminating the need for an actual meeting being convened.

2. In the facts peculiar to the present case, an actual meeting may not be necessary. Yet, this order is necessitated because the application as original made in this Company Scheme for Directions sought

precisely such a dispensation. This is an issue that is likely to recur in several matters; hence this order.

3. I have heard Mr. Mehta, learned senior counsel for the petitioners. Mr. Gaurav Joshi, learned senior counsel also assisted the Court as amicus. Mr. Mehta's submission is that the clear legislative mandate of the 2013 Act is to do away altogether with all meetings other than those required in certain limited circumstances. Shareholders must express their views only by voting through postal ballot or electronic voting (electronic voting being included in the new definition of "postal ballot"). It seems to me, on a closer reading of several provisions of the 2013 Act, as also the Companies Act, 1956 ("**the 1956 Act**") and, too, various Rules to which I will presently refer, that this is altogether too extreme a proposition especially if it is sought to be applied to all meetings other than those limited ones where the statute requires a meeting to be held.

4. Before I discuss these provisions, I must note that in principle the apparent legislative intent in providing for postal ballots and electronic voting is not only unexceptionable but entirely salutary: it is clearly directed toward greater inclusiveness and encouraging more shareholders to vote. It would seem, although this is anecdotal and there is no empirical data before me, that in many meetings, where postal ballot or electronic voting have not been provided, the attendance of members of shareholders and members attending is very low. Sometimes, this is because a shareholder has to travel a great distance to attend the meeting or because these meetings are held at inconvenient location. Shareholders are often dispersed throughout the country and find it difficult to attend such meetings in person.

5. At this stage, I must note that in Section 2(65) of the 2013 Act, "postal ballot" is defined to mean "voting by post or through any electronic mode". Therefore, every reference in this judgment to postal ballot includes, where necessary a reference to electronic voting.

6. Section 110 of the 2013 Act reads thus:

> **Postal ballot.**
>
> 110. (1) Notwithstanding anything contained in this Act, a company—
>
> (a) shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and
>
> (b) may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot,
>
> in such manner as may be prescribed, instead of transacting such business at a general meeting.
>
> (2) If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf."

7. This is said to be in substitution of Section 192A of the 1956 Act, which was introduced by the 2001 amendment and reads thus:

> **Passing of resolution by postal ballot.**

192A. (1) Notwithstanding anything contained in the foregoing provisions of this Act, a listed public company may, and in the case of resolutions relating to such business as the Central Government may, by notification, declare to be conducted only by postal ballot, shall, get any resolution passed by means of a postal ballot, instead of transacting the business in general meeting of the company.

(2) Where a company decides to pass any resolution by resorting to postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefor, and requesting them to send their assent or dissent in writing on a postal ballot within a period of thirty days from the date of posting of the letter.

(3) The notice shall be sent by registered post acknowledgement due, or by any other method as may be prescribed by the Central Government in this behalf, and shall include with the notice, a postage pre-paid envelope for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period.

(4) If a resolution is assented to by a requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

(5) If a shareholder sends under sub-section (2) his assent or dissent in writing on a postal ballot and thereafter any person fraudulently defaces or destroys the ballot paper or declaration of identity of the shareholder, such person shall be punishable with imprisonment for a term which may extend to six months or with find or with both.

> (6) If a default is made in complying with sub-sections (1) to (4), the company and every officer of the company, who is in default shall be punishable with fine which may extend to fifty thousand rupees in respect of each such default.
>
> *Explanation*. - For the purposes of this section, "postal ballot" includes voting by electronic mode."

8. It is at once clear from the reading of these two sections that Section 110 is an evolution of old Section 192A. Where old Section 192A contain a *non-obstante* clause relating to the "foregoing" sections of the 1956 Act, i.e., sections before old Section 192A, Section 110 of the 2013 Act contains a broad and omnibus *non-obstante* clause. The frame of Section 110 of the 2013 Act is that for such items of business as the Central Government notifies, a company *must* transact that business only by postal ballot. A clue as to what is intended by this clause, Section 110 (1)(a) of the 2013 Act is to be found in Rule 22 of the Companies (Management and Administration) Rules, 2014. As presently advised, these Rules are yet to be gazetted; this is another matter on which I will comment a little later. Absent evidence of any such gazette notification, they are referred to here only for such interpretive value as they might have. Rule 22(xvi) contains a very long list of ten items of business that, apparently, are intended to be transacted only by means of a postal ballot. These include certain items of business that are far reaching in scope, such as a change in the objects for which a company has raised money from the public through prospectus and still has any unutilized amount out of the money so raised; issues of shares with differential rights as to voting or dividend; variation in the rights attached to a class of shares or debentures or other securities; sale of the whole or substantially the whole of an undertaking of a company; giving of loans or extending

guarantee or providing security in excess of certain specified limits; and so on.

9. The second part of Section 110 is in Section 110(1)(b). This says that for any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, a company *may* transact by means of postal ballot in such a manner as may be prescribed to transact such business in such manner as may be prescribed instead of transacting it at a general meeting. Sub-section (2) of Section 110 contains a deeming fiction which says that if a requisite majority of shareholders has assented to a resolution by postal ballot, it is deemed to have been duly passed at a general meeting convened for that purpose.

10. It is on this basis that Mr. Mehta founds his submission. He also refers to a SEBI circular dated 17th April 2014 relating to Clauses 35B and 49 of the Equity Listing Agreement to say that SEBI has now made voting by postal ballot mandatory. There is some dispute as to whether this circular is yet in effect, for a clarification from the National Stock Exchange of India Limited indicates that the amendments in SEBI circular are deferred till 1st October 2014. In any case, Clause 49(I)(A) of the SEBI circular speaks of the rights of the shareholders. These include the right to "participate in and to be sufficiently informed on decisions concerning fundamental corporate changes"; "the opportunity to participate effectively and vote in general shareholder meetings"; "the opportunity to ask questions to the board, to place items on the agenda of general meetings, and to propose resolutions, subject to reasonable limits"; and more.

11. On Mr. Mehta's formulation, it is not at all immediately apparent how these avowed rights can possibly be properly, validly or

effectively exercised by postal ballot. We must remember that at the heart of corporate governance lies transparency and a well-established principle of indoor democracy that gives shareholders qualified, yet definite and vital rights in matters relating to the functioning of the company in which they hold equity. Principal among these, to my mind, is not merely a right to vote on any particular item of business, so much as the right to use the vote as an expression of an informed decision. That necessarily means that the shareholder has an inalienable right to ask questions, seek clarifications and receive responses before he decides which way he will vote. It may often happen that a shareholder is undecided on any particular item of business. At a meeting of shareholders, he may, on hearing a fellow shareholder who raises a question, or on hearing an explanation from a director, finally make up his mind. In other cases, he may hold strong views and may desire to convince others of his convictions. This may be in relation to matters that are not immediately obvious to the shareholder merely on receipt of written information or a notice. The right to persuade and the right to be persuaded are, as I see it, of vital importance. In an effort for greater inclusiveness, these rights cannot be altogether defenestrated. To say, therefore, that no meeting is required and that the shareholder must cast his vote only on the basis of the information that has been send to him by post or email seems to me to be completely contrary to the legislative intent and spirit to the express terms of the SEBI circular and amended Listing Agreement's Clauses 35B and 49.

12. There are other reasons also why this question of voting exclusively by postal ballot and electronic means is still very much a grey area. Even the new Act contains specific sections regarding quorum for meetings (Section 103). If voting is to be done only by postal ballot, how is that statutory requirement of a quorum to be

met? Mr. Mehta's answer is that the *non-obstante* clause in Section 110 eliminates the need for any such quorum. I find that hard to accept. The edifice of this submission seems to have a uniform glassy façade: it suggests that the information sent to shareholders is fixed, unalterable and immutable. That is seldom so. Agenda items and proposals are frequently amended with suggestions from the floor or even by the Board at the meeting. Often, Schemes of Arrangement or Compromise are amended at a meeting itself; again, these amendments come from the floor or even perhaps from the Board itself. That amendment is then put to vote. In a postal ballot no such amendment is possible. If we were to restrict ourselves to a postal ballot, no shareholder or any director could ever suggest any amendment. The scheme would stand or fall only in its original form. This is contrary to the mandate of Sections 391 and 394 of the 1956 Act. This corresponds to Section 230 and 232 of the 2013 Act, yet to be brought into force. Even so Section 230, as currently framed, still speaks of "the calling of a meeting" and "not merely putting the matter to vote". It has to be remembered that all schemes that are put to the meeting of the shareholders are *proposed* schemes. This is necessarily means that they are subject not only to approval by voting but also, possibly, to an amendment at the meeting itself.

13. As matters stand today, Sections 230 and 232 are not yet in force. This means that Sections 391 and 394 of the 1956 Act will need to be read with Section 110 of the 2013 Act. This is yet another grey area: I am unable to see how the *non-obstante* clause in Section 110 of the 2013 Act can extend to Sections 391 and 394 of the 1956 Act. The words in Section 110 of the 2013 Act are "notwithstanding anything contained in *this* Act", which can only mean the 2013 Act.

14. In every Scheme of Amalgamation and, therefore, necessarily, in all arrangements with shareholders, the consideration clause of the Scheme is of vital importance. The share exchange ratio is finally approved only at the meeting. A report of the auditors is used to recommend a share exchange ratio; but this is only a recommendation. Unless there is a meeting of minds and a consensus this share exchange ratio cannot be decided. Without it, the proposed scheme fails completely.

15. Further: Section 110 speaks of meetings called by *the company*. Meetings for approval of Schemes under sections 391/394 of the 1956 Act and Sections 230/232 of the 2013 are not "called" by the Company. They are ordered by the Court. These are Court-convened meetings. A court may even dispense with such a meeting, irrespective of any provision for a postal ballot – where, for instance, it is shown that all shareholders, or the requisite majority, have consented in writing. *Prima-facie* it appears that the provisions of Section 110 of the 2013 Act cannot and do not extend to any scheme matters. This is true of all companies, whether listed or not. Consequently, any SEBI circulars or guidelines or notifications that make electronic voting or postal ballot the exclusive method of voting on such schemes are clearly unlawful and contrary to the intent of Sections 230/232 of the 2013 Act and of Sections 391/394 of the 1956 Act. There is no question of matters at a Court-convened meeting being decided by postal ballot "instead" of at a general meeting; the postal ballot and electronic voting may be permitted or may even be required in addition to but not in replacement of an actual general meeting.

16. Mr. Joshi is justified in his submission that rather than considering a situation of a complete ouster of all meetings, a more appropriate interpretation would be to hold that the provision for a

postal ballot is an additional facility to be provided, so that there is greater inclusiveness and that a shareholder or member then has an option of voting either by a postal ballot or electronic voting or in person. This would meet the requirements of Section 103 which provide for a quoram of persons personally present. Casting a vote by postal ballot or by electronic voting cannot possibly constitute personal presence, at least not without significant violence to the language. Mr. Mehta's response is, again, that the *non-obstante* clause eliminates all need for any quorum. Section 110 plainly speaks of transacting certain items of business by postal ballot "*instead* of transacting such business at a general meeting". Therefore, Mr. Mehta says, this Section does away with a general meeting altogether. There are rules in place regarding postal ballot since there was a provision under Section 192A of the 1956 Act. These Rules, the Companies (Passing of Resolution by Postal Ballot) Rules, 2001 provide for the manner in which a postal ballot is to be conducted. I am also informed that e-voting is provided on the electronic platform of the National Securities Depository Limited, an agency approved by the Ministry of Corporate Affairs under the Postal Ballot Rules. I must note at this stage that although Postal Ballot Rules 2011 have been referred to any orders passed by other High Court, they do not yet seem to have been notified. If so, this only adds to the overall uncertainty in relation to the issue at hand. The draft Companies (Management & Administration) Rules, 2014, also not formally gazetted, also contain detailed provisions for electronic voting (Rule 20) and postal ballot (Rule 22).

17. Mr. Joshi's submission seems to me to be in the correct direction: finding some golden mean between the need for greater inclusiveness while yet retaining invaluable shareholders' rights. I do not think it is possible to see these two as implacable enemies, forever

antipodal. Discourse, even energetic discourse, is not just permissible; it is desirable. It is a fundamental adjunct of corporate democracy. What Mr. Mehta suggests seems to me to stem from a fear or even an abhorrence of dialogue and discourse. Nothing could be more detrimental to shareholders' rights than stripping them of the right to question, the right to debate, the right to seek clarification; and, above all, the right to choose, and to choose wisely. A vote is an expression of an opinion. That vote must reflect an *informed* decision. Dialogue and discourse are fundamental to the making of every such informed decision. Mr. Mehta's submission seems to me to relegate shareholders, in the guise of greater inclusiveness, to a very distant second place in the scheme of corporate governance, seeing them merely as a necessary evil. Nothing could be further from the mandate of corporate law and governance. We strive today to greater transparency; that means that more should be given the opportunity to speak and to exercise their rights as shareholders. But that cannot come at the price of their right to speak, to be heard, to persuade, even to cajole. What corporate governance demands is the government of the tongue, not the tyranny of a finger pressing a button.

18. Far too many grey areas that still persist – the SEBI circular of 17th April 2014 is apparently differed; the Management & Administration Rules are not yet gazetted; Sections 230 and 232 of the 2013 Act are not yet brought into force; there is an apparent conflict between the requirements for a quorum coram and Section 110; it is doubtful whether Section 110 or any SEBI circular mandating exclusive voting by postal ballot can apply to a court-convened meeting – I do not think it is possible at this stage to grant a kind of order that Mr. Mehta's application, as originally cast, seeks. That would, in my view, simply be unsafe. It would erode to a very large extent the shareholders right to know, their right to be informed,

and their right to take an informed decisions. A shareholder cannot be restricted to this level where all he can do is say aye or nay but not seek any clarifications, express any doubts or reservations, or raise any questions.

19. There is one other matter that needs discussion. Mr. Mehta's understanding of electronic voting was that it would be limited to people using the Internet to vote on the agenda business from remote locations. I disagree. There is nothing to so indicate. Rule 26 of the proposed Management & Administration Rules requires this facility of electronic voting to be made available to every listed company and a company having at least 1000 shareholders. Electronic voting is a method by which the votes cast by a large number of shareholders could be more accurately ascertained. That does not mean that electronic voting cannot be permitted at the meeting itself. A shareholder at a remote location and a shareholder at a meeting will both be required to use the same portal to cast their votes. This necessitates a single integrated electronic system for voting. This is technologically feasible and, indeed, essential. It cannot be that at the meeting that there be no voting or poll, and that electronic votes or postal ballots cast earlier would be determinative. Those who vote by postal ballot or by electronic voting cannot, of course, be permitted to vote again at a meeting. But they also cannot be restrained from attending that meeting. A shareholder may hold strong views. He may vote by postal ballot or electronic means and then attend the meeting to persuade others. Other shareholders may be undecided and may prefer to attend the meeting. Greater inclusiveness demands the provision of greater facilities, not less; and certainly not the apparent giving of one 'facility' while taking away a *right*. There is no reason why members attending a meeting should not be allowed to use a

bank of computers to digitally cast their votes just as they might do if they were voting from a remote location.

20. There is also a question about the determination of electronic votes cast. The rules seem to indicate that electronic voting must stop three days before the meeting. The Chairman of the meeting is to be given a tally of the electronic votes cast and the decision on any item of business is supposed to have been passed or not passed only on the basis of these electronic votes. *Ex-facie*, this is an untenable mechanism. If, as I have said, electronic voting is not limited to voting from a remote location but must also include electronic voting at the meeting in addition to postal ballots received, then it is a sum total of all these votes that must be taken into account.

21. This means that while a meeting must be held, provision must also be made for electronic voting at the meeting by those shareholders who desire it. Every shareholder being given that option of exercising their votes by postal ballot or by electronic voting, the latter being either from a remote location or at the meeting itself.

22. The concepts of electronic voting and postal ballots have been in use in other jurisdictions for several years, where similar concerns have been expressed. There is material to suggest that a very early entirely electronic meeting held in Delaware saw less than satisfactory shareholder participation. The question of not holding a meeting at all never arose. The importance of debate and deliberation is far too high, some have said, for it to be foregone altogether.[1] Comments from Australia, also by Dr. Boros, are to the effect that even in a fully

[1] Boros, Dr. Elizabeth: *Virtual Shareholder Meetings*, Duke Law & Technology Review (2004); accessed on 6 May 2014 from http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1112&context=dltr

electronic meeting, there must be a "reasonable opportunity to participate" at the meeting. Voting is part of this opportunity, indicating that "participation" connotes something more than merely voting. If participation is not possible, then the electronic voting should not be used. These are the express words of the Explanatory Memorandum to the Company Law Review Bill, para 10.43.[2]

23. A final word about the manner in which these rules and sections are purportedly being brought into force. The website of the Ministry of Corporate Affairs[3] has, on its front page, a link to a single scanned PDF file entitled "**COMPANIES ACT 2013 - STATEMENT OF NOTIFICATION OF RULES**".[4] Some 21 rules are listed. They are all said to be effective 1st April 2014. Several of these are not yet gazetted; at least I have not been able to find any gazette. I do not see how any such rules can be made effective on this basis where a ministry simply puts up some scanned document under the signature of one of its officers but sans any publication in the official gazette. That publication is not an idle formality. It has a well-established legal purpose. That purpose is not and cannot be achieved in this *ad-hoc* manner. Therefore, till such time as these rules are gazetted, or there is some provision made for the dispensation of official gazette notification, none of the rules in the Ministry of Corporate Affairs PDF document that are not yet gazetted can be said to be in force.

24. The result of this discussion is:

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2 Boros, Dr. Elizabeth; *Electronic Corporate Communications*; December 1999, Australian Securities & Investments Commission. Downloaded on 6th May 2014 from: https://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/online.pdf/$file/online.pdf

3 http://www.mca.gov.in/MinistryV2/index.html

4 http://www.mca.gov.in/Ministry/pdf/StatementOfNotification.pdf

(a) All provisions for compulsory voting by postal ballot and by electronic voting to the exclusion of an actual meeting cannot and do not apply to court-convened meetings. At such meetings, provision must be made for postal ballots and electronic voting, in addition to an actual meeting. Electronic voting must also be made available at the venue of the meeting. Any shareholder who has cast his vote by postal ballot or by electronic voting from a remote location (other than the venue of the meeting) shall not be entitled to vote at the meeting. He or she may, however, attend the meeting and participate in those proceedings.

(b) The effect, interpretation and implication of the provisions of the Companies Act, 2013 and the relevant SEBI circulars and notifications, to the extent that they mandate a compulsory or even optional conduct of certain items of business by postal ballot (which includes electronic voting) to the exclusion of an actual meeting are matters that require a fuller consideration. The Central Government, through the Additional Solicitor-General, and SEBI will both need to be heard. The Company Registrar shall send an authenticated copy of this order to both the learned Additional Solicitor General and to SEBI requesting them to appear before the Court when this matter is next taken up for a consideration of this issue. On a *prima-facie* view that the elimination of all shareholder participation at an actual meeting is anathema to some of the most vital of shareholders' rights, it is strongly recommended that till this issue is fully heard and decided, no authority or any

company should insist upon such a postal-ballot-only meeting to the exclusion of an actual meeting. Since this is evidently a matter of some importance, the Company Registrar is directed to make a submission and obtain necessary directions on the administrative side to have the matter placed before an appropriate Bench. At such a hearing, further safeguards can also be evolved. For instance, it is entirely possible to have a Company Scheme Petition, one that follows an order on and compliance with a Company Summons for Direction, uploaded to the case status system of this Court. All such Company Scheme Petitions must have appended to them the report of the Chairman of the court-convened meeting and the scrutineers' report. Making the petition available in its full form on a free and publicly accessible website such as the High Court, in addition to reports now being uploaded to the websites of the company and the stock exchanges would go a long way to ensuring the necessary information spread. The Ministry of Corporate Affairs must also immediately examine whether the uploads of these documents along with other statutory corporate filings/uploads can be made compulsory.

25. I heard Mr. Mehta on this issue on 2nd May 2014, and, him and Mr Joshi on 5th and 6th May 2014. The matter was then reserved for orders on Thursday, 8th May 2014. On 7th May 2014, Mr. Shah, learned advocate for the petitioner, made a submission withdrawing the application for dispensing with an actual meeting and having one only by postal ballot and electronic voting. I have, by minutes separately signed, permitted that application. The necessary order has, thus, been made on this Company Summons for Direction.

Nonetheless, this Company Summons for Direction will continue to be shown as pending till a final determination on the issues that I have attempted to outline above.

(G.S. Patel, J.)