

# Dispute Resolution Hotline

May 03, 2017

## CYRUS MISTRY-TATA SONS LEGAL BATTLE: NCLT LAYS DOWN THE PRINCIPLES FOR OPPRESSION AND MIS-MANAGEMENT CLAIMS

### The National Company Law Tribunal:-

- Dismissed company petition and rejected plea of Cyrus Mistry seeking waiver from the eligibility criteria of holding atleast 10% shareholding in Tata Sons to maintain a case of oppression and mis-management;
- No requisite qualification to maintain petition and waiver should be granted only in rare, compelling and exceptional circumstances;
- Failure to fulfill the cause of action test to maintain oppression and mis-management allegations.

### INTRODUCTION

The National Company Law Tribunal ("NCLT") in the recent case of *Cyrus Investments & Anr. ("Petitioners") v. Tata Sons & Ors. ("Respondents")*<sup>1</sup> dismissed both the waiver plea and the company petition alleging oppression and mis-management against Tata Sons. The Petitioners sought waiver from the requirement of holding at least one-tenth of 'issued share capital' of the company or representing at least one-tenth of the company's minority shareholders under Section 244<sup>2</sup> of the Companies Act, 2013. The Petitioners failed to establish any cause of action under Section 241<sup>3</sup> of the Companies Act, 2013 ("Act"). The Petitioners have appealed against this decision and the matter is currently pending before the National Company Law Appellate Tribunal ("NCLAT") for adjudication.

### BACKGROUND FACTS

The Petitioners (companies controlled by Cyrus Mistry's family) collectively held 18.37% equity shareholding in Tata Sons ("Company"). After considering the preference shareholding, the Petitioners holding drops below the minimum threshold prescribed under Section 244 of the Act for maintaining an oppression and mis-management claim. Post removal of Mr. Cyrus Mistry as the Chairman of the Tata Group, the Petitioners filed this proceedings alleging that affairs of the Company were conducted in a manner not only prejudicial and oppressive to them but also to the company and public at large. The Respondents contended that company petition was not maintainable as they failed to fulfill the conditions under Section 244 of the Act. We have analyzed below all the allegations in the company petition and waiver application.

### Arguments - Allowing Waiver Application

- The Petitioners hold 18.37% equity in the Company and if preference shareholding is considered none of the groups would have the requisite 10% issued and paid up share capital and would lead to an absurdity as none of them would be able to maintain an application.
- NCLT is the appropriate forum to deal with issues under Section 241 of the Act if they affect the interest of member, class of members, company or the general public. The waiver should be granted to further a remedy rather than preventing it.
- No other court would have jurisdiction except NCLT as envisaged under Section 430 of the Act<sup>4</sup>. The power of waiver should be applied to sub-serve such purpose. Section 244 (1) is an enabling provision. In the absence of waiver being granted, minority will always be deprived of approaching NCLT under Section 241 and 242<sup>5</sup> of the Act.
- The issues should be considered on face value basis and NCLT need not get into the merits of such cases at this stage. If averments are correct and cause of action is established as per threshold under Order VII Rule 11 of the Code of Civil Procedure, waiver application should be allowed.

### Allegations and NCLT Ruling

1. *Articles of Association of the Company ("Articles") are per se oppressive as they ensure that Sir Ratan Tata Trust and Sir Dorabji Tata Trust control the affairs of the Company. Further the Articles have been abused and misused by Ratan Tata.*

The Petitioners alleged that the powers vested under certain Articles were not exercised in a judicious manner and should be struck off in entirety.<sup>6</sup> However the Petitioners failed to disclose in their pleadings whether at the time of making amendments to the specific Articles- they did not attend the meeting, contested and voted against the resolution.

The NCLT held that in the absence of disclosure, it would be construed that by voting they acquiesced to the

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amendment to the Articles. The parties having acquiesced to an action, at a later stage cannot raise complaints on the same issue. Further, due to the Petitioner's failure to provide details on the dates, actions and their effect causing prejudice or oppression no cause of action was established under Section 241 of the Act.

1. *Investment of USD 12 billion by Tata Steel Limited ("TSL") at a substantial premium in Cora Group Plc. in 2007 and usage of powers in relation to investment*

The NCLT found no cause of action in this issue. The transaction in question took place almost 9 years back and was not in relation to the affairs of the Company. TSL and its Directors were not made party to the proceedings nor was the Company a subsidiary of TSL and held only 31.35% shareholding. Ratan Tata himself was not either a Director or Chairman of the Company and no objections were raised on the transaction for the last ten years. The NCLT held that it would not intervene in case of business decisions taken by a Company.

1. *Continuation of business of Nano Car Project undertaken by Tata Motors upon insistence of Ratan Tata*

The NCLT held the transaction referred was in relation to the proposal of manufacture of cars in 2007-08. There was no disclosure with respect to shareholding of the Company in Tata Steel or it being a subsidiary therefore it did not fall within the parameters of Section 241. The courts would not interfere in business decisions unless actions are "unconscionable, unjust and laced with fraud" to cause oppression to the complaining party.

1. *Illegal removal of Cyrus Mistry as the Chairman of the Company was in violation of law, principles of governance, fairness, transparency and probity.*

The Petitioners alleged that Cyrus Mistry was removed as the Chairman of the Company contrary to the Articles and resolution for his appointment under the dictate of Ratan Tata. It is an admitted position that Selection Committee is constituted for appointment and removal of Chairman, however no Section Committee was set up for Cyrus Mistry's removal but done by Board of Directors itself due to loss of confidence in his leadership.

NCLT held that directorial complaint does not give rise to a grievance under Section 241 of the Act. Cyrus Mistry was not appointed Chairman based on shareholding of Petitioners in Tata Sons but done on selection and taken on employment. Section 241 only addresses shareholder grievances and directorial issues cannot be taken up as a cause of action.

1. *Use of Tata Sons shareholding in certain Tata Group Companies to requisition EGM for removal of Cyrus Mistry as Director from Group Companies.*
2. *Actions of Tata Sons undermined the position and status of independent Directors in listed Tata Group companies and taking steps to remove Nasli Wadia as he expressed support towards Cyrus Mistry*

The group companies were not made party to the proceedings and therefore actions in those entities cannot be considered to constitute affairs of the Company. The NCLT therefore concluded that no cause of action arose under Section 241 of the Act.

1. *Actions of Ratan Tata constitute breach of SEBI Regulations on prohibition of Insider Trading*

The NCLT held that allegations of insider trading were raised at a pre-mature stage and should be dealt with only by the Securities Exchange Board of India ("SEBI"). In the event of any violation/irregularity detected by SEBI, it could then be considered as a probable ground under Section 241 of the Act.

1. *Close relationship of Ratan Tata with Shiva leading to leakage of Board meeting discussions*

The NCLT held that actions alleged dated ten years back and in relation to Tata Teleservices Limited ("TTSL"). TTSL is not made party to the proceedings and the allegations do not relate to affairs of the Company. Further, the allegations have been raised only post removal of Cyrus Mistry and Ratan Tata himself having retired five years back no cause of action has been established under Section 241 of the Act.

1. *Actions in relation to sale of immovable property of Tata Sons and awarding contracts of Tata Power to benefit persons close to him*

Since no details of the transaction were provided or how Ratan Tata abused his position in awarding contracts, the allegation was dismissed for being without any cause of action.

1. *Bestowing contracts upon Mr. Mehli Mistry and enriching him at the cost of Tata companies;*
2. *Joint Venture between Air Asia Limited and Telstra Trade Place Private Limited entering the aviation sector including possible fraudulent, hawala transactions as indicated in the Deloitte Forensic Report*

NCLT held with respect to both allegations that no details were provided in relation to the transaction or any documentation submitted. Mr. Cyrus Mistry was on the Board for five years and raised these issues only post his removal, therefore no cause of action was made out under Section 241 of the Act. The allegations was dismissed as they were vague and did not contain any details and were not in relation to the affairs of the Company.

## JUDGMENT AND ANALYSIS

NCLT considered the following factors to consider the issue of waiver:-

- a. *What is the interest of Petitioner in Company-is it significant or substantial?*
- b. *What are the issues raised and whether Section 241 is the most appropriate jurisdiction to deal with same?*
- c. *Is this cause raised up substantial importance to Petitioner or to any class of member or to the company itself or public interest?*

The NCLT concluded that no cause of action was established in any of the allegations raised by the Petitioners. Further, there is no rule that the Bench cannot get into merits at the time when waiver application is decided. The Bench does have the discretion to find out whether cause of action exists to file the case and three tests are required

to be applied:-

- Cause of action test;
- Prima facie case test;
- Merits (proof) test

NCLT rejected the waiver application as Petitioners did not have the requisite qualification to maintain the application. Consequently, NCLT also dismissed the main petition itself. However, the NCLT did not merely reject the petition on the ground of non-maintainability but appears to have rejected the allegations of the Petitioners on the ground that they failed to disclose cause of action or satisfy the NCLT on merits test.

The NCLT held that Petitioners failed to establish any cause of action in all the allegations, therefore the petition should be rejected at the threshold itself. Further, the Petitioners even failed to establish how acts complained of caused harm or injury to their economic interest as substantial interest is not sufficient and cannot claim that all actions are thrust on minority as fait accompli.

Waiver applications should be allowed entirely on the basis of facts of each case, nature of the company, nature of relationship between the shareholders, existing structure amongst others. The interpretation and application of the relevant provisions is critical to understand the law for maintainability of oppression and mis-management cases before NCLT. In the absence of there being a case of shareholder action and affecting economic interests, waiver applications may not be maintainable. NCLT has adopted a technical approach to ensure that frivolous litigation is prevented and adopted the basic principles for granting relief in interim applications.

– Payel Chatterjee & Vyapak Desai

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<sup>1</sup> C.A. No. 82/241, 242,244/NCLT/MAH/2016

<sup>2</sup> **Section 244 Right to apply under Section 241**

(1) The following members of a company shall have the right to apply under section 241, namely:—

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

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

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

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

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

<sup>3</sup> **Section 241 Application to Tribunal for relief in cases of oppression, etc.**

(1) Any member of a company who complains that—

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

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

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

<sup>4</sup> **Section 430- Civil court not to have jurisdiction**

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

<sup>5</sup> **Section 242 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.

(2).....”

<sup>6</sup> All decisions of the Board of Directors required affirmative consent of majority of Trust nominated Directors (Article 121);

Certain decisions to be raised only at the Board level to ensure that majority of Trust nominated Directors could take decisions (Article 121 (a));

No quorum shall be constituted in the General Meeting of the Company as long as Tata Trusts collectively hold atleast 40% of the paid up capital of the Company unless at least one authorized representative jointly nominated by the Tata Trusts is present (Article 186); Tata Trusts have the right to jointly nominate one third of the nominated Directors on the Board so that they can appoint and remove persons and constitute Selection Committee to recommend Chairman of the Board (Article 104-B and 118).

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