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## NATIONAL COMPANY LAW TRIBUNAL ORDERS



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circulated the special notice giving a brief backdrop of the material, the provisions of section 499 cannot be attracted in any case. He has also relied upon the judgment of the hon'ble apex court in the case of *S. Khushboo* v. *Kanniammal* [2010] 5 SCC 600.

Shri Sanghvi also placed reliance on the judgment of the Punjab and Haryana High Court in the case of *Mohinder Singh Dhillon* v. *Ganga Dhar Sharma* [1975] 2 SLR 603 which relates to the entry taken in annual confidential remarks of an employee and as to whether adverse entry would attract the offence of defamation.

Apart from the said submission, Shri Sanghvi has also submitted that 9
the Magistrate has fallen into a great error in not considering an important aspect of matter, namely, the aspect of jurisdiction. He would invite our attention to section 202 of the Cr.P.C. and submit that the Magistrate has failed to appreciate that as per mandate of section 202, he was duty bound to inquire into the case before passing the impugned order and admittedly no inquiry/investigation under section 202 was conducted. He would further submit that petitioners Nos. 5 to 9 reside beyond the jurisdiction of the learned Magistrate and therefore, the Magistrate could not have issued process to the said respondents who were located beyond his jurisdiction. He would place reliance upon the judgment of the apex court in the case of *Abhijit Pawar* v. *Hemant Madhukar Nimbalkar* [2017] 3 SCC 528 where the requirement of the amended section 202 is reiterated.

The submission of Shri Sanghvi is to the effect that the said approach of the Magistrate in not following the provisions of section 202 itself discloses the non-application of mind on the part of the Magistrate. He would also place heavy reliance on the judgment of the apex court in the case of *Udai Shaker Awasthi* v. *State of Uttar Pradesh* [2013] 2 SCC 435 and a judgment in the case of *Vijay Dhanuka* v. *Najma Mamtaj* [2014] 14 SCC 638 wherein it is held that the requirement to conduct an inquiry and direct investigation before issuing process against the accused beyond the territorial jurisdiction of the Magistrate concerned is held to be mandatory, the object, being to protect innocent persons residing at far off places from being harassed. Apart from the said two points, Shri Sanghvi would also submit that the complainant was not entitled to approach the Magistrate since he has failed to seek efficacious remedy provided under section 111(3) of the Companies Act. He submits that sub-section (3) of section 111 would impose a fetter on the company to circulate any statement, if on the application either of the company or any other person who claims to be aggrieved, the Central Government has declared that the right conferred by the section are being abused to secure needless publicity for defamatory

matter. Shri Sanghvi submits that there is no explanation offered by respondent No. 2 as to why he did not invoke the remedy under section 111(3). He would also invite our attention to the illustrative guidelines by the hon'ble apex court in the case of *State of Haryana* v. *Bhajan Lal* [1992] Supp (1) SCC 335 and specifically place reliance on clause (6) of paragraph No. 102 where there is an expressed legal bar engrafted in any of the provisions of the Code or the concerned Act to the institution and continuation of the proceedings where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

Shri Sanghvi would thus submit that since the contents of the special notice are not per se defamatory as what is sought by respondent No. 2 and since they have been circulated in exercise of the statutory power and are in form of a duty cast upon the company, the issuance of the process by the Magistrate is nothing but abuse of process of law and this court in exercise of its inherent power should intervene by quashing and setting aside the impugned order.

**10** We have also heard learned senior counsel Shri Amit Desai for the petitioners. Learned senior counsel would adopt the arguments advanced by Shri Sanghvi. Apart from the said arguments, he placed reliance on the judgment of the apex court in the case of *Birla Corporation Ltd.* v. *Adventz Investments and Holdings Ltd.* [2019] 216 Comp Cas 1 (SC) decided by the apex court on May 9, 2019 and he would submit that the said judgment exhaustively deal with the issue of exercise of jurisdiction of this court under section 482 of the Cr.P.C. as against an order passed by the Magistrate on a complaint filed under section 200/202 of the Cr.P.C.

**11** In support of the impugned order justifying issuance of the process against the present petitioners, we have heard learned counsel Shri Abad Ponda. According to Shri Ponda the statements contained in the special notices to which he has exhaustively referred to, are per se defamatory in nature and he would further submit that having regard to respondent No. 2's eminent stature and reputation it was incumbent upon the petitioners before levelling any allegation to ascertain the truthfulness of the same and there ought to have been some care shown on their part to find out whether the allegations are true or false. He would submit that when an independent director is alleged to be acting in consonance with another, it is a direct affront on his independence and this is no short of questioning his integrity as any independent director. He would place reliance on the judgment of the hon'ble apex court in the case of *Shivnarayan Laxminaryan Joshi* v. *State of Maharashtra* [1980] 2 SCC 465 to submit that a

conclusion derived by the petitioners that on account of the act of respondent No. 2 as the company is in jeopardy and this has desired effect of harming and tarnishing his reputation. Shri Ponda is therefore extremely critical about the phraseology used in the special notices including the word "Galvanizing independent directors" and according to him this projects a picture in the eyes of the right thinking persons that the conduct of respondent No. 2 is deplorable. Further, the allegation in the special notices that the action of respondent No. 2 makes his continuation on the board untenable and that the principal shareholder have lost confidence in his independence, suitability and bona fides are also nothing but statements attempting to lower his reputation. He would emphasize on the fact that respondent No. 2 was acting as an independent director and would submit that at no point of time, prior to November 10, 2016 respondent No. 2's independence and integrity has been questioned and doubted. He would further submit that the allegation that he was acting in concert with Mr. Cyrus Mistry is not only per se defamatory but palpably false. He would also invite our attention that in the explanatory statement to the notice convening the extraordinary general meeting, it is recorded that "The board has been informed by the independent directors individually that they have not been approached by Mr. Nusli Wadia that may be considered as influencing their independence in the company". He would also rely upon the minutes of meeting of the independent directors of the Tata Motors Ltd., held on November 14, 2016 whereas unanimous decision of the independent director was recorded in the following effect :

> "The independent director confirm that all decisions taken by the board with regard to statutory, operation and business of the company have been unanimous and executed by the chairman and management accordingly.
>
> The independent directors further affirm that the company continues to be governed, supervised and managed under the guidance and direction of the Board. The management of the company and its subsidiaries have the full confidence and support of the independent directors".

Further, he also makes a reference to the meeting of the board of directors of Tata Sons Ltd., held on November 11, 2016 where the board has resolved to the following effect :

> "All decisions taken by the board with regard to strategy, operations and business of the company have been unanimous and executed accordingly."

Further, he also invite attention to the resolution passed in the meeting of the independent directors of the Tata Chemicals on November 10, 2016 which reads thus :

> "On the basis of the above criteria, the independent directors concluded that in their view the board, management and chairman had been acting in a manner consistent with law and prudence in the best interest of the company and that nothing adverse (covert or avert) had come to their notice which necessitated a revision of their assessment which had been made by them on March 22, 2016.
>
> Considering the above the independent directors unanimously affirmed their confidence in the board, its chairman and the management in the conduct of the company's business.
>
> Independent directors also reaffirmed that all the decisions taken with regard to the operations and business of the company had been taken by the board unanimously and executed by the chairman and management as per the directions of the board."

**12** Based on the aforesaid statements and the resolution, Mr. Ponda has vehemently submitted that the material available on record disclose otherwise and in fact there is no basis for making the defamatory allegation by the petitioners against a responsible independent director who was enjoying longstanding association with them and he submits that is how the allegation "become per se defamatory".

He would place reliance on the judgment of the apex court in the case of *John Thomas* v. *Dr. K. Jagadeesan* [2001] 106 Comp Cas 619 (SC) ; [2001] 6 SCC 30 where it is categorically held that the only effect of an imputation being per se defamatory is that it would relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the right thinking members of the public. However, even if the imputation is not per se defamatory, that by itself would not go to the advantage of the publisher, for, the complaining person can establish on evidence that the publication has in fact amounted to defamation even in spite of the apparent deficiency, so the appellant cannot contend, at this stage, that he is entitled to be discharged on the ground that the imputations in the extracted publications were not per se defamatory.

**13** Shri Ponda has also further emphasized on the fact that the special notices were circulated inter alia, to the board of directors of the operating companies comprising almost entirely or totally different sets of directors, when the law do not require any reason to be ascribed. He would submit that except the common director, namely, Mr. Ishaaat Hussain, who is also a director of the Tata Steel and Tata Sons Ltd., Dr. Ralf Speth, director in

Tata Motors and Tata Sons Ltd., and Mr. Cyrus Mistry, the entire board of directors in the operating companies was different from that of Tata Sons Ltd. He also alleges that special notices were deliberately lent to the print media for this purpose. He has placed reliance on the articles published in *Business Standards*, *Economic Times*, etc. He would also allege that during the deliberation by the board of directors of Tata Motors at its meeting held on November 14, 2016 regarding the requisition of Tata Sons Ltd., to convene an extraordinary general meeting, stories were immediately reported by the media agencies and this reflect the nexus between the Tata Sons Ltd., personnels and the media and that this formed a part of large conspiracy to disrepute respondent No. 2. Shri Ponda also deal with the submissions of Shri Sanghvi to the effect that respondent No. 2 never objected to the circulation of the defamatory material and he submits that the said allegation misleading. Shri Ponda submit that respondent No. 2 has addressed a letter dated November 21, 2016 to the board of directors and the company secretary of Tata Steel and had asserted that the allegations in the special notice are absolutely false and baseless and he had clarified that the draft notice and the explanatory statement circulated by the company secretary reproduces the highly defamatory statement made by the Tata Sons Ltd., in the special notices and this letter was received by the Tata Sons Ltd., before the board meeting dated November 21, 2016 where such letter was discussed at length. Shri Ponda would submit that the petitioners had responded to respondent No. 2's letter and denied the allegation and had reiterated that the special notice was confidential communication. He would also invite our attention to the fact that pursuant to the decision of the board in its meeting held on November 21, 2016 a board meeting of Tata Steel Ltd., was held on November 25, 2016 to consider and approve the notice convening an extraordinary general meeting and prior to it, legal opinion was also sought and circulated to the members of the board which was duly considered and discussed in the meeting. He would submit that the petitioners had circulated the notices and the defamatory contents thereof in spite of serious efforts on part of respondent No. 2 to stall its publication and circulation, and not only this though there was no legal obligation to ascribe reasons for respondent No. 2's removal, that formed part and parcel of the special notice and the requisition. Shri Ponda would thus submit that respondent No. 2 had continuously objected to per se defamatory publication of the special notices but no heed was paid to his request. He would also deny the contention of the petitioners that the special notices were issued under the provisions of section 102 of the Companies Act. Shri Ponda has further submitted that

special notices are reflective of the mens rea and malice on the part of the petitioners and therefore section 499 of the Indian Penal Code is clearly attracted.

He would place strong reliance on the judgment of the hon'ble apex court in the case of *Subramanian Swamy* v. *Union of India* [2016] 7 SCC 221 and also the judgment of the apex court in the case of *Jeffery J. Diermeier* v. *State of West Bengal* [2010] 6 SCC 243, where it has been categorically held that the constitute "Defamation" under section 499 of the IPC, there must be an imputation and such imputation must have been made with the intention of harming or knowing or having reason to believe that it will harm the reputation of a person about whom it is made and according to Shri Ponda it has been held that it would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant, irrespective of whether the complainant actually suffered directly or indirectly from the imputation as alleged.

Shri Ponda has also extensively dealt with the submission of the petitioners in relation to the bar under section 202 of the Criminal Procedure Code. In conclusion he would submit that in any case at present this court is only confronted with a limited issue as to whether the Magistrate who had issued the process was justified in doing so. He would submit that this would not involve passing of a detailed order but only a prima facie satisfaction on part of the Magistrate that a case has been made out and when the Magistrate was satisfied that there is sufficient material against the accused persons, he has issued the process. He would further submit that there is absolutely no reason for this court to resort to its extraordinary jurisdiction to interfere in such a matter since there are several triable issues and under the inherent power of this court, a just prosecution cannot be stultified.

**14** The writ petition has been filed before us under article 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure and relief is sought to the effect of quashing and setting aside the order passed by the Additional Chief Metropolitan Magistrate, Mumbai, on December 15, 2018.

The present petition was initially listed before the learned single judge, however, in light of the judgment in case of *Abdul Pal Abdul Rahim* v. *State of Maharashtra* [2012] All. MR (Criminal) 131, the learned single judge was pleased to issue direction for listing of the matter before the Division Bench in light of the power sought to be invoked and, that is how, the matter came to be listed before us.

It is trite position of law that the power conferred on this court under section 482 of the Cr.P.C. is the inherent power and the said power is to be exercised with great circumspection and in rarest of rare case where the complaint does not disclose any offence. It is settled position of law that if the complaint itself discloses an offences, then it is not permissible for this court to embark upon an inquiry as to genuineness of the allegation made in the complaint or whether those allegations are likely to be established on evidence or not. It is not permissible for the court to verify the authenticity or truthfulness of the allegations made in a complaint and if an offence prima facie falls under the provisions of the Penal Code, the launching of prosecution cannot be thwarted by the High Court under section 482 of the Cr.P.C.

**15** The principles enveloping the discharge of this power by the High Court have been well-settled as early as in the year 1992 in the case of *State of Haryana* v. *Bhajanlal* [1992] Supp. (1) SCC 335 where the hon'ble apex court has enumerated several categories of cases by way of illustration wherein the extraordinary power under article 226 or the inherent power under section 482 of the Cr.P.C. can be exercised by the High Court either to prevent the abuse of the process of the court or otherwise to secure the ends of justice. Though the guidelines laid down by the apex court have been declared to be not clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae, the parameters by this time are more or less well-settled. Where the allegations made in the complaint even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or no case is made out against the accused then the courts exercising the power under section 482 are justified in exercise of its power.

We have examined the case before us by keeping in mind this well-settled principles in exercise of the inherent powers of this court under section 482 of the Cr.P.C.

**16** Since we have already averred to the necessary facts, we would straightway refer to the contents of the special notice which have been alleged to be defamatory. It is to be noted that the statements/imputations which are alleged to be defamatory are contained in a special notice/requisition by the promoter company, namely, the Tata Sons Ltd., for convening the extraordinary general meeting of the shareholders of the Tata Chemicals, Tata Motors and Tata Steels and to issue special notices to propose resolution for removal of respondent No. 2 as director of the relevant Tata companies. The special notice and requisition under the provisions of the Companies Act came to be issued by the Tata Sons Ltd., and was

addressed to the board of directors of the three holding companies, for convening an extraordinary general meeting of the shareholders of the respective companies. The separate notices came to be issued to the board of directors of all the three holding companies on November 10, 2016. The special notice proceed to state that Tata Sons is a shareholder of the three companies and hold equity shares in the respective companies. After making reference to the provisions of section 100(2)(a) and other applicable provisions of the Companies Act, 2013, the notice proceed to state that Tata Sons Ltd., submit the requisition to the holding companies for convening an extraordinary general meeting of their shareholders in the prescribed manner to pass two resolutions on following subjects :

Item No. 1 : Removal of Mr. Cyrus Mistry as director.

Item No. 2 : Removal of Mr. Nusli Wadia as director.

Since we are not concerned with item No. 1 of the special notice, we would refer to item No. 2 which pertains to the removal of respondent No. 2. The special notice issued to the holding companies on November 10, 2016 read thus :

"Item No. 2

Removal of Mr. Nusli N. Wadia as director

To pass the following resolution as an ordinary resolution :

Resolved that pursuant to the provisions of section 169 and other applicable provisions of the Companies Act, 2013 and the Rules framed thereunder, Mr. Nusli N. Wadia (Director Identification Number 00015731) be and is hereby removed from the office of director of the company with effect from the date of this meeting.

Although there is no requirement, legally or otherwise, for the benefit of the shareholders, the following may be noted :

(i) Post the development of October 24, 2016 Mr. Nusli Wadia acting in concert with Mr. Cyrus Mistry has been acting against the interests of Tata Chemicals and its principal shareholder by galvanising independent directors and mobilising opinion, forcing disruptions, and issuing a statement that in our view is contrary to the interests of the company. By such an act, it has put the company in jeopardy with respect to its further expansion plans, capital raising by virtue of equity or debt, queries from rating agencies and impact on the overall morale of the workers, employees and management who have joined Tata Chemicals, a Tata Company. Moreover, he has been a director since several decades and considering all these factors, his continuance on the board is untenable. The principal shareholders

have lost confidence in the independence, suitability or bona fides of Mr. Wadia and seek his removal.

(ii) Consequently, the board of directors of Tata Sons Ltd., by its resolution dated November 10, 2016 has resolved to propose the removal of Mr. Nusli Wadia as director of Tata Chemicals.

3. Please also treat the above as special notice under section 169(2), read with section 115 and other applicable provisions of the Companies Act, 2013 and the Rules framed thereunder for the aforesaid purpose.

Yours faithfully,

Tata Sons Ltd.,

(F. N. Subedar)

Chief Operating Officer and Company Secretary

Copy to : Company Secretary, Tata Chemicals Ltd."

The contents of the special notices issued to all the holding companies 17
contain a similar averment. Based on this special notice issued under section 169(2) read with section 102 of the Companies Act, the respective holding companies forwarded the copy of the special notice and requisition dated November 10, 2016 to respondent No. 2 and drawn his attention to section 169(4) of the Companies Act and intimated him that in case he intends to make any representation to the members of the company in resolution for his removal as a director, the same should be forwarded for circulation to the members. Similar communications were addressed by all the three companies to respondent No. 2. On November 21, 2016 respondent No. 2 addressed a letter to the board of directors of the three holding companies as well as their respective company secretaries and he responded that the statement contained in the special notice issued by Tata Sons Ltd., was without any evidence or proof and that the allegations were absolutely baseless, false, defamatory and libelous and with an intention to harm his reputation. He also makes a mention that he had an opportunity to read the draft notice and the explanatory statement circulated by the company secretary of the companies and the draft reproduces the highly defamatory statement made by the Tata Sons Ltd., in the special notice. A request is therefore made by respondent No. 2 to the board of the respective holding companies, to the effect that if the board convened a shareholder meeting under section 169 he must be extended an opportunity to make a written and oral representation to the shareholders. The said communication also contained a following categorical statement :

"In any event, if the board convenes a shareholders' meeting under section 169, I must be extended the opportunity to make a written and oral representation to the shareholders. I would like to confirm that I will make a representation in writing to the shareholders of the company as provided under section 169 of the Companies Act and would expect the company to circulate the same to all shareholders. I would also make a representation at the shareholders' meeting. I request that the company to notify the shareholders accordingly".

Pursuant to the requisition, the holding companies issued notice of holding of an extraordinary general meeting, on the requisition of the Tata Sons Ltd., on different dates. The said notice briefly referred to the business to be transacted in the said extraordinary general meeting including removal of Mr. Nusli Wadia as director and was accompanied with notes. It is also mentioned in the said notice that the board of directors in its meeting held on November 23, 2016 had approved the convening of the extraordinary general meeting and issue of the notice of the said meeting. The related explanatory statement pursuant to section 102 of the Companies Act, 2013 in respect of the business as set out in the notices was also accompanied. The explanatory statement accompanying the said notice was signed by the company secretary, by order of the board of directors. It contained the explanatory statement pursuant to section 102 setting out the material facts relating to the special business mentioned at item Nos. 1 and 2 as an accompaniment to the notice dated November 23, 2016 and as far as item No. 2 is concerned it contained the following statement :

"Item No. 2

Tata Sons Ltd. (the requisitionist) is the promoter of the company and holds 77,89,70,378 ordinary shares aggregating 26.51 per cent. of the company's voting capital : Tata Sons Ltd., has pursuant to the requisition and special notice dated November 10, 2016 and in recognition of the legal rights vested in them as a shareholder, decided to convene an extraordinary general meeting, to consider and if through fit, pass an ordinary resolution for removal of Mr. Cyrus P. Mistry and Mr. Nusli Wadia as directors of the company.

Mr. Nusli Wadia is an independent director of the company. He was appointed as a non-executive director of the company by the board on December 22, 1998 and by the shareholders at the annual general meeting held on August 12, 1999. Being a director liable to entire by rotation, Mr. Wadi's reappointment was approved at various, annual general meeting's held on July 26, 2002, July 11, 2005, August 25, 2009, August 12, 2011 and August 21, 2013 in terms of the

provisions of the Companies Act, as applicable from time-to-time. As required under the listing agreement, Mr. Wadia has been an independent director of the company since March, 2001. As required under section 149 of the Companies Act, 2013, Mr. Wadia was appointed as an independent director of the company with effect from July 31, 2014. Mr. Wadia is the chairman of the NRC and a Member of the Eco's.

The board has been informed by the independent directors individually that they have not been approached by Mr. Wadia that could be considered as influencing their independence in the company.

Mr. Wadia, vide his letter dated November 23, 2016 addressed to the board of directors and the company secretary has stated as under :

Letter No. 1 : Mr. Wadia has, inter alia, termed the reasons provided by the requisitionist, in the special notice for his removal as baseless, false, defamatory and libelous and have been made with the intention of harming his reputation. Further, Mr. Wadia has questioned the ability of the requisitionist to requisition a general meeting and vote to removal him as a director (he being an independent director) from the board of the company.

Letter No. 2 : Mr. Wadia has requested the board of directors to forthwith institute an independent investigation upon the allegations as set out in the special notice issued by Tata Sons Ltd., dated November 10, 2016 or state otherwise on the allegations.

The said letters were tabled at the board of directors meeting held on November 23, 2016 and are also open for inspection.

Under section 169(4) of the Companies Act, 2013, the director being sought to be removed has a right to make a representation to the members in the manner stated therein. We have been informed that Mr. Wadia intends to provide a separate representation to be sent to the members of the company.

The board of directors of the company would like to clarify that a copy of the special notice issued by the requisitionist is being sent along with this notice with a view to provide the relevant background concerning item No. 2 of special business to be transacted at the extraordinary general meeting. A copy of this special notice and requisition is annexed hereto (annexure). Consequently, the company, the board of directors of the company and its officers do not take any responsibility for the same."

Similar notices came to be issued by the other two holding companies which were accompanied with the statement pursuant to section 102 of the Companies Act, 2013.

18 The letter dated November 21, 2016 addressed by respondent No. 2 to the directors of the Tata Sons Ltd., and the Chief Operating Officer of Tata Sons Ltd., and the subsequent letter dated November 22, 2016 addressed to all the directors of the Tata Sons Ltd., was responded to by the Chief Legal and Group General counsel of Tata Sons Ltd. In the said response, it was highlighted that as a shareholder of the Tata Steel, Tata Motors and Tata Chemicals, Tata Sons Ltd., had certain rights, duties, obligations, legal and otherwise towards Tata Sons Ltd., as well as various stake holders and Tata Sons Ltd., has exercised these rights as shareholder of the holding company and issued a special notice to the board of directors on November 10, 2016 pursuant to section 100, section 115 and section 169 of the Companies Act calling upon the board of directors to convene an extraordinary general meeting of shareholders of the companies to pass the two resolutions. It was also clarified that it was a fairly well-settled position that there was no requirement, legally or otherwise as a shareholder to provide any reason while seeking the removal of a director in terms of section 169 of the Act. The special notice was therefore sought to be justified and respondent No. 2 was called upon to consider withdrawal of the notices issued by him. It is a specific case of the petitioners that respondent No. 2 by e-mail has categorically approved the final draft notice and the explanatory statement of the extraordinary general meeting of Tata Motors as well as Tata Chemicals and these e-mails have been suppressed in the complaint during verification. The issue as to whether the subsequent circulation of the explanatory statement was with the consent of respondent No. 2 would be referred to by us at a little later. At this stage, it is suffice to note that there was exchange of correspondence between the petitioners and respondent No. 2 in form of rejoinders/sur-rejoinders but it is important to note that respondent No. 2 preferred a representation by availing of the opportunity under section 169(4) of the Companies Act.

We have carefully perused the said representation where respondent No. 2 has averred to the following effect :

> "To,
> M/s. Tata Motors Ltd.,
> Bombay House, 24 Homi Mody Street,
> Mumbai-400 001, India.

Kind attention : Board of directors and company secretary Mr. Hoshang K. Sethna.

Subject : Representation under section 169 of the Companies Act, 2013

Dear Sir/Madam,

I refer to the special notice ('special notice') moved by Tata Sons Ltd. ('Tata Sons'), seeking my removal as an independent director levelling allegations against me, which are unsubstantiated, baseless, false, motivated, defamatory and libelous and have been made with the intention of harming my reputation.

Further to my letter dated November 23, 2016 and my statutory rights under section 169(4) of the Companies Act, I am exercising my right to make a written representation to the shareholders. The representation is attached herewith ('representation').

The company is obliged to send the representations to the shareholders so that they are able to take an informed decision. You have reasonable time to circulate this representation to the shareholders in physical as well as electronic form.

Kindly note that documents referred to in the attached representation letter are also available for inspection/perusal at my office. The shareholders requiring any further information/clarification may write to me on my e-mail address-*nusliwadia@independentdirectortml.com* and same would be provided promptly.

Kindly note that this letter is without prejudice to my rights."

The said communication is accompanied with a detailed representation addressed to the shareholders where respondent No. 2 has attempted to relent the imputation against him as contained in the resolution proposing to remove him as an independent director. In conclusion, he had urged the shareholders to decide his fate as an independent director and also cautioned that the fate of the very institution of independent director needs to be protected by the shareholders. He also clarified that the representation preferred by him keeping in mind the spirit of section 169 of the Companies Act and with no other intention. At the bottom of the said representation, a note similar to the one appended to the letter which we have reproduced above is also added, permitting the shareholder to seek any other clarification on an e-mail address of respondent No. 2. Such representations have been addressed to the shareholders of all the three respective companies. In the said representation, respondent No. 2 has deciphered the allegations levelled against him and in great detail has

highlighted his role on the board of directors and has also levelled certain allegations about the inappropriate behaviour of the interim chairman of Tata Sons Ltd., Shri Ratan Tata.

It can thus be seen that in the entire representation, Shri Nusli Wadia had offered an explanation and requested the shareholder to take a conscious decision by taking into consideration the information put forth by him in the representation and as to how his removal was an attempt to undermine the entire institution of independent director itself. It is also to be noted that on December 22, 2016 respondent No. 2 directly addressed a letter to all the shareholders of respective holding companies and the said letter is placed by the petitioner on record as annexure "T". In the said letter, Shri Nusli Wadia has made reference to his earlier detailed letter setting out his response to the resolution proposed by the Tata Sons Ltd., for his removal as director and once again he reiterated his stand by highlighting his achievement in the field of corporate governance. He also invited attention of the shareholders as to what actually transpired in the meeting of the board of directors of the company held on November 10, 2016 and asserted that the actions of the Tata Sons of trying to involve the management in the process of removal of director is against the interest of the company, its stake holders and shareholders and has slammed the action as inappropriate and illegal. In conclusion he intimated the shareholders that he had chosen not to attend the meeting as he was unhappy with the manner in which the meetings have been held inappropriately and therefore he had chosen to forward the letter to the company secretary to be read out to the shareholders. It is the allegation of the petitioners that this letter has been suppressed by respondent No. 2 in the complaint and also during his verification. It is in this background we are required to examine the allegation as to whether the contents of the resolution passed by the petitioners directing the holding companies to requisition the extraordinary general meeting are defamatory.

**19** We have already reproduced the statement which is referred to as defamatory as contained in the special notice dated November 10, 2016. We must make it clear that we are not here to judge the truthfulness of the said statement and to ascertain as to whether the statements were made after due verification or whether they are baseless, not being backed without any supporting material. The alleged statement is contained as an accompaniment giving the brief background of the subject to be discussed, namely, removal of Mr. Nusli Wadia as a director by taking recourse to the provisions of section 169 and other applicable provisions of the Companies Act, 2013. The argument of learned senior counsel for the petitioners is to

the effect that the said statement is a part of statutory action which the petitioners proposed under the provisions of the Companies Act and it is contained in the special notices which were issued by the Tata Sons Ltd., under section 169(2) read with section 115 of the Companies Act, in its capacity as a shareholder of the relevant Tata Companies, inter alia, seeking removal of respondent No. 2 as the director of the relevant Tata Companies. It is also sought to be justified that the issuance of special notices by Tata Sons Ltd., was necessitated by conduct of respondent No. 2, a matter in which the Tata Sons Ltd., had material interest (being promoter and controlling shareholder of relevant Tata Companies) and aimed at protecting its interest. It is thus sought to be submitted that the special notices were issued in exercise of the statutory power conferred upon the Tata Sons Ltd., under the Companies Act and a subject wherein a Tata Sons Ltd., had a legitimate, legal interest and duty to do so.

At this stage, it would be apposite to refer to section 169 of the Companies Act, 2013 which deals with "Removal of Directors". The relevant section 169 of the Companies Act reads as under :

> "(1) A company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard :
>
> Provided that an independent director reappointed for second term under sub-section (10) of section 149 shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard :
>
> Provided further that nothing contained in this sub-section shall apply where the company has availed itself of the option given to it under section 163 to appoint not less than two-thirds of the total number of directors according to the principle of proportional representation.
>
> (2) A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.
>
> (3) On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.
>
> (4) Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect

thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so,—

(a) in any notice of the resolution given to members of the company, state the fact of the representation having been made ; and

(b) send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company),

and if a copy of the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting :

Provided that copy of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter ; and the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it."

**20** The Companies Act also contain a provision in form of section 115 which provides for resolution requiring a special notices which stipulate that where, by any provision contained in the Companies Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent. of total voting power or holding shares on which such aggregate sum not exceeding Rs. 5 lakhs rupees, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed.

At this juncture, reference would also be necessary to section 101 and section 102 of the Companies Act. Section 101 prescribes for the manner in which a meeting of a company can be called, where as section 102 prescribed that a statement setting out the material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting and section 102 enlist the material facts to the following effect :

"(a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of—

(i) every director and the manager, if any ;

(ii) every other key managerial personnel ; and

(iii) relatives of the persons mentioned in sub-clauses (i) and (ii) ;

(b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon."

A conjoint reading of all the said provisions would thus disclose that **21** whereas any special notice is required of any resolution, then it would be imperative to give to the company, a notice of the intention to move such requisition. Section 102 of the Companies Act prescribe that if a special business is to be transacted in any meeting, it should be accompanied with a statement setting out the material facts in form of information and such facts that may enable the members to understand the meaning, scope and implication of the items of the business and to take decision thereon.

In the frame work of this statutory provision, we would deal with the power conferred on the company for removal of its director. Section 169 of the Companies Act, 2013 empower the company to remove a director by an ordinary resolution before expiry of the period of notice after giving reasonable opportunity of being heard. Sub-section (2) of section 169 contemplates a special notice of any resolution to remove a director and sub-section (3) contemplates the company to send forthwith a copy thereof of the resolution to the director concerned, and the director who is entitled to be heard on the resolution at the meeting. Sub-section (4) contemplates a further opportunity to the director who is sought to be removed and it is open to the director concerned to make a representation to the company in writing and he can request its notification to the members of the company and then the company is duty bound, if the time permits to issue notice of the resolution to the members of the company stating the fact that the representation has been made and send a copy of the representation to every member of the company to whom notice of meeting is send. But for if any reason the representation could not be sent due to insufficient time or of the company's default, the director may without prejudice to this right to be heard orally require that the representation shall be read out at the meeting. The only exception carved out to the said procedure, is proviso appended to sub-section (4) which set out that the copy of representation need not be sent out and the representation need not be read out in the meeting if, on the application either of the company or of any person who claims to be aggrieved had approached the Tribunal and the Tribunal is satisfied that the rights of such person are being affected then it may not be permit publicity of the said representation.

22 It is in light of this statutory scheme we are called upon to examine whether the publication of the imputation against respondent No. 2 in the special notice is defamatory.

Section 499 of the Indian Penal Code defines defamation in the following manner :

> "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

The section is succeeded by 10 exceptions which would take out the words either spoken or intended to be read, or by signs or by visible representations, making or publishing any imputation concerning any person out of the preview of defamation. Mr. Ponda has invited our attention to the case set out by the petitioner in their petition by setting out a case that the petitioners have claimed to be covered by Exception Nos. 8 and 9 and he would invite our attention to paragraph Nos. 94 and 95 of the petition where the petitioner contends that the bona fides of the petitioners are evident from the fact that the special notices were issued in accordance with law in favour of the said companies and they are based on true and correct facts. A further statement is made that the special notices issued by the Tata Sons Ltd., in good faith and by taking appropriate care and protection and to protect its interest and therefore the special notices are protected and safeguarded under 9th exception to section 499 of the Indian Penal Code. However, learned senior counsel during the course of the argument has categorically stated that the petitioners do not wish to take recourse to 8 and 9 exceptions appended to the said section but the petitioners have a more stronger case though it may not strictly fall within the two exceptions and that being the exercise of the statutory powers which is available under the relevant statute.

The offence of defamation under the Indian Penal Code, inter alia, consisting of three initial ingredients namely :

> "(a) Making or publishing any imputation concerning a person.
>
> (b) Such imputation must have been made either by words either spoken or intended to be read or by sign or by visible representation.
>
> (c) The said imputation must have been read with the intention of harming or with the knowledge or having reason to believe that it will harm the reputation of the person concerned."

We have perused the imputations contained in the special notice. It 23
undisputedly makes a reference to certain acts of respondent No. 2 in reference to the erstwhile chairman Mr. Cyrus Mistry. The special notices contain certain statement in respect of respondent No. 2 and his conduct, but this imputation will have to be read in reference to the purpose for which it find place in the special notice. The special notice issued by the Tata Sons Ltd., as a promoter is in form of requisition to the holding companies to call for an extraordinary general meeting for removal of their independent director in whom "principal shareholder" (Tata Sons) have lost confidence. The special notice is thus issued for the purpose of seeking removal of an independent director of the company since the principal shareholders are of the opinion that respondent No. 2 is acting in a manner that is designed to harm the "Tata group" and his conduct reflect that he is not conducting himself independently and instead has been, inter alia, galvanizing independent directors and acting prejudicial and as such, the principal shareholder are apprehensive that in future his action may put the company and its future in great jeopardy and impact the overall morals of the works, employees and management who have joined Tata Company. The imputation contained forms part of the resolution passed by the board of directors of Tata Sons Ltd., i. e., the present petitioners and it is contained in a requisition/special notice proposing resolutions for removal of respondent No. 2 as director of the relevant Tata Companies seeking vote in favour of such resolution. It is not to be construed as an independent statement but will have to be referred to in the background in which it is made, namely, an act or conduct of the independent director who is sought to be removed by the company who is empowered to remove its director after following the procedure prescribed under section 169 of the Companies Act, 2013. The entire argument of respondent No. 2 as canvassed by Mr. Ponda is that the statement of imputation has been made without any verification and reflects of an irresponsible behaviour on the part of the petitioners. Section 169 of the Companies Act vest a power in the company to remove a director before expiry of the period of his office the grounds of removal though not mentioned in section 169, section 166 of the Companies Act set out the duties of the director and expects the director of the company to act in good faith in order to promote the objects of the company for the benefit of the members as a whole, and in the best interests of the company, its employees, shareholders, community and for the protection of environment. It also contemplate that the director of a company shall exercise his duties with due diligence and care and shall exercise independent judgment and he shall not involve in a situation in which he may have a direct or indirect interest that conflicts or possibly

may conflict, with the interest of the company. If these are the duties of a director of a company and if a company which has appointed a person as a director is of the opinion that he has failed to live up to its exceptions and has acted in a manner where he has failed to exercise his independent judgment and ceased to act in an independent manner and has issued a statement which is contrary to the interest of the company and if this conduct of a director is adjudged by the promoter as design to cause harm to the Tata group, which is put forth as a ground for his removal, we are of the view that the action of the petitioners in exercise of its powers conferred under section 169 of the Companies Act. It is not necessary for us to assess or judge the truthfulness of the imputation/allegation since ultimately the allegations levelled against respondent No. 2 has caused his removal by the board of directors of the respective companies. The imputation contained in the special notice cannot be viewed independent of the purpose for which it is included in the special notice and if the petitioners have adopted a legal course permissible to be adopted under the frame work of the statute governing it, we do not think the allegations can be termed as "per se defamatory". The special notices though categorically have mentioned that there was no legal requirement, legal or otherwise and is discretion of the relevant Tata Companies that the special notices were circulated to the shareholders of the relevant Tata Companies, they cannot be held liable since the statutory scheme itself contemplates that the notice should be accompanied by a brief statement of information and facts that would enable the members to understand the meaning, scope and implication of the items and business to be transacted in the meeting and to take decision thereof. If removal of respondent No. 2 was one of the agenda of the notice and it is accompanied by a brief statement why such action of removal is initiated, we are not ready to accept the submission of Shri Ponda and examine the bona fides or otherwise of the said action since, we are of the clear opinion that the imputations are contained in a special notice which is statutory in nature and it had ultimately resulted into removal of respondent No. 2 as independent director from the three Tata Companies by requisite majority.

Moreover, we also do not agree with the submission of Mr. Ponda who has asseverated before us the mala fides and malice in the imputation. If the petitioners in exercise of the statutory obligation have included the statement, which is challenged to be defamatory, we do not perceive any mens rea to the petitioner which is a condition precedent to constitute a particular offence. The petitioners can, by no imagination said to have an intention to cause harm to the reputation of respondent No. 2 but its action

was only directed towards removal of respondent No. 2 as an independent director of the three holding companies and it succeeded in the said exercise. The special notices were prepared and submitted in the name of Tata Sons and the petitioners being the directors/officers of Tata Sons Ltd., cannot be held to be vicariously liable and no malice can be attributed to the petitioners, since the power under section 169 has been exercised by the Tata Sons Ltd., a corporate entity. We therefore do not find any justification in the Metropolitan Magistrate issuing process to the present petitioners and holding that the imputation contained in the special notice is per se defamatory.

The facts placed before us do disclose that the requisition by the Tata **24**
Sons Ltd., to its three holding companies for convening extraordinary general meeting for removal of respondent No. 2 was acted upon by the holding companies and the holding companies have issued the notices of extraordinary general meeting to its shareholders and scheduled the holding of the meeting which was accompanied with the copy of special notice and also the explanatory statement. We do not intend to precipitate the issue as to whether the circulation was by respondent No. 2's consent as the subsequent conduct of respondent No. 2 reflect that he had submitted a detailed representation under section 169(4) availing of the opportunity to rebut the imputations and while addressing the representation to the respective companies, he has reminded the companies, that they are obliged to circulate the representation to shareholders so that they are able to take an informed decision. He also made it clear that company has reasonable time to circulate the representation to the shareholders in visible as well as electronic form. He also clarified that the documents referred to in the representation are also available for inspection/perusal and supplied his e-mail address from where this information can be sought. In the detailed representation, respondent No. 2 himself has referred to the allegation and rebutted them one by one and offered his explanation. Not only this, he independently addressed a letter to the shareholders on December 21, 2016 and requested the shareholders to take conscious decision in the interest of the entire institution of independent directors. In the backdrop of this fact, we express that respondent No. 2 has also chosen to avail statutory right available to him under sub-section (4) of section 169 and has responded to the resolution of removal and availed the opportunity of appealing to the shareholder to take a conscious decision after going through the response submitted by him through his representation to the allegation/imputations levelled in the special notice. Therefore, it is not that the imputations have been first time contained in the special notice but in

the representation, respondent No. 2 repeated then and offered an explanation as to how they are not true and rather levelled allegation against petitioner No. 1 as to how he has manipulated the action of his removal and therefore when respondent No. 2 has also availed the statutory remedy and offered his explanation in form of a representation and addressed an independent letter to the shareholder, we fail to understand how the offence of defamation is made out and if it is not made out whether the Magistrate is justified in issuing process to the petitioners by the impugned order.

25 As far as the conduct of respondent No. 2 in the meeting dated November 10, 2016 which forms the basis of Tata Sons Ltd., losing their confidence in him as an independent director, it is reflected in the affidavit of Mr. Rajiv Chandan, company secretary and general counsel of Tata Chemicals as well as affidavit of Shri. R. Mukundan, managing director of Tata Chemicals and one Mr. Bhaskar Bhat, director of Tata Chemicals. The said affidavits are subsequently filed in a Suit No. 50 of 2017 filed by few public shareholders in relation to the removal of respondent No. 2. In any contingency, it is informed that the said suit came to be withdrawn unconditionally on February 6, 2019. We do not intend to go into the veracity or truthfulness of the alleged conduct of respondent No. 2 in the meeting dated November 10, 2016 since we have already observed that the Tata Sons Ltd., was exercising its statutory power of removal of its director in whom they had lost confidence and it is to be noted that respondent No. 2 has never challenged his removal before any court of law meaning hereby he has accepted his removal as an independent director from the holding companies of Tata Group and do not question the power of Tata Sons Ltd., to remove him.

26 The learned Magistrate who has passed the impugned order had before him the complaint instituted on December 23, 2016 when respondent No. 2 was already removed as an independent director from the company. The Magistrate recorded the verification statement of respondent No. 2 on December 14, 2018.

We have carefully perused the said statement. The statement revolves around the special notice dated November 10, 2016 and the alleged defamatory imputation contained in the said notices. Respondent No. 2 proceeded to state before the Magistrate the allegations in the notices were published which were per se defamatory and damaged his reputation. He has also proceeded to state that he has requested the accused person to withdraw the defamatory allegations. It is pertinent to note that even in 2018, he does not make any statement as to the culmination of the said

proceedings into his removal as director of the company. The Magistrate therefore proceeds only on the basis of the special notice dated November 10, 2016 and even fail to take into account the subsequent replies, counter replies or even the representation preferred by respondent No. 2 and he himself reminding the companies of its imperative duty to circulate the same and an independent letter addressed by him to the shareholders. The learned Magistrate while exercising his power under section 200 of the Cr.P.C. refers to "Perusal of the documents as per list of documents". He makes a reference to the record of minutes of independent directors of Tata Chemicals dated November 10, 2016 outcome of the meeting, the special notice dated November 10, 2016 copy of articles (news papers, etc.) and also the notices issued by respondent No. 2 to the accused persons rebutting the allegations contained in the special notice. The Magistrate applied his mind and deem it expedient not to issue to M/s. Tata Sons Ltd. (accused No. 1) before him, being a juristic person and cannot be held liable for defamation, mens rea and essential ingredients. However, he refers to the statement made in the notices in the news items as defamatory and concludes that accused persons have failed to offer any satisfactory explanation on what basis the statements have been made and therefore, he concludes thus : "From the above document it appears that the meant item and allegations in the news papers and statements of special notice mentioned in the aforesaid documents, i. e., exhibits 'A' to 'Z' and 'Aa' to 'GG' might come within the meaning of the defamation as per section 499 of the Indian Penal Code. It appears that the complainant made out his case against accused Nos. 2 to 22 but there is no such case made out against petitioner No. 1 for the offence under section 500 read with section 34 of the Indian Penal Code". The impugned order is a clear reflection of non-application of mind on the part of the learned Additional Chief Metropolitan Magistrate apart from the fact that he only relied on the statement of the complainant whom he examined under section 200 and failed to examine any other witness. The Magistrate has committed a haste in issuing the process without conducting an inquiry into the allegation of the complainant considering other relevant material to satisfy himself whether there was sufficient ground for initiating the proceedings against the accused as contemplated under section 202 of the Cr.P.C.

We are satisfied that there is no prima facie case of defamation in the **27** present case as there was no intent on the part of the petitioners to cause harm to the reputation of the respondent as contemplated by section 499 of the IPC nor can we discern any actual harm caused to his reputation, since the element of mens rea being absent and since the publication was

only limited to the board of directors of the holding company and the respective shareholders of these companies, it could not be said that it was circulated widely over a section of general public. Publication of the news about a resolution being passed by a well acclaimed business house happened to be a business news for the media and both petitioner No. 1 and respondent No. 2 being well-known business personalities, they drew the attention of the media and the allegations/imputations and the story of removal of respondent No. 2, no wonder, happened to be a hot topic for media. However, it is not conclusively established as to it is the petitioners who have leaked the information to the media and particularly when we have noted that respondent No. 2 himself had addressed the communication to the shareholders independent of his representation in terms of sub-section (4) of section 169 and which he requested for being circulated to the shareholders. The allegations of respondent No. 2 in respect of disparaging remarks/comments being widely circulated is also not correct since it was only circulated to the shareholders and they had a right to know the background of the resolution on which they were supposed to vote. In light of the decision of the apex court in the case of *S. Khushboo* v. *Kanniammal* [2010] 5 SCC 600, since there was no intention to malign the image of respondent No. 2 by making his conduct known to the public and particularly when the petitioners were exercising their statutory power, we record that there is no prima facie case of defamation in the present case which the Magistrate has failed to consider.

**28** The Magistrate before issuing the process, has failed to take into consideration the conspectus of the matter and though it is the duty cast upon him to be satisfied before issuance of a process, he had concluded without any material being placed before him that the statement is defamatory. Learned senior counsel Shri Singhvi is justified in relying upon the observations of the Bombay High Court in the case of *Ramchandra Venkataramanan* v. *Shapoorji Pallonji and Co. Ltd.* [2019] SCC Online Bom 524, where it has set out the test to be applied to determine whether a statement is defamatory and it is held that the statement must be understood as defamatory by right thinking or reasonable minded persons and certain yardsticks were laid down to enable the court to have an objective assessment of a subjective crime, i. e., defamation. He would also invite our attention to the relevant observations of the hon'ble apex court in the case of *Subramanian Swamy* v. *Union of India* [2016] 7 SCC 221 where the apex court has cast a responsibility on the Magistrate in the following words :

> "207. Another aspect required to be addressed pertains to issue of summons. Section 199 of the Cr.P.C envisages filing of a complaint in

court. In case of criminal defamation, neither can FIR be filed nor can any direction be issued under section 156(3) of the Cr.P.C. The offence has its own gravity and hence, responsibility of the Magistrate is more. In a way, it is immense at the time of issue of process. Issue of process as has been held in *Rajindra Nath Mahato* v. *T. Ganguly* [1972] 1 SCC 450 is a matter of judicial determination and before issuing a process, the Magistrate has to examine the complainant. In *Punjab National Bank* v. *Surendra Prasad Sinha* [1992] 75 Comp Cas 699 (SC) ; [1993] Supp (1) SCC 499 ; [1993] SCC (Cri) 149, it has been held that judicial process should not be an instrument of oppression or needless harassment. The court, though in a different context, has observed that there lies responsibility and duty on the Magistracy to find whether the accused concerned should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded, then only process would be issued. At that stage, the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the person needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. In *Pepsi Foods Ltd.* v. *Special Judicial Magistrate* [1998] 5 SCC 749, a two-judge Bench has held that summoning of an accused in a criminal case is investigating agency serious matter and criminal law cannot be set into motion as a matter of course."

Further reliance placed by learned counsel for the petitioner in the latest **29** judgment of the apex court in the case of *Birla Corporation Ltd.* v. *Adventz Investments and Holdings Ltd.* [2019] 216 Comp Cas 1 (SC) ; [2019] SCC Online 682 (SC), where the apex court has elaborated and clarified the scope of enquiry in the following words (page 28 of 216 Comp Cas) :

"As held in *Chandra Deo Singh* v. *Prokash Chandra Bose*, AIR 1963 SC 1430 and in a series of judgments of the Supreme Court, the object of an enquiry under section 202 of the Cr.P.C. is for the Magistrate to scrutinize the material produced by the complainant to satisfy himself that the complaint is not frivolous and that there is evidence/material which forms sufficient ground for the Magistrate to proceed to issue process under section 204 of the Cr.P.C. It is the duty of the

Magistrate to elicit every fact that would establish the bona fides of the complaint and the complainant . . .

The object of investigation under section 202 of the Cr.P.C. is 'for the purpose of deciding whether or not there is sufficient ground for proceeding'. The enquiry under section 202 of the Cr.P.C. is to ascertain the fact whether the complaint has any valid foundation calling for issuance of process to the person complained against or whether it is a baseless one on which no action need be taken. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding against the accused."

Mr. Singhvi has also vehemently argued that the non-application of mind on the part of the Magistrate is reflected in the wake of the fact that the place of residence of petitioners Nos. 5 to 11 is beyond the jurisdiction of the learned Magistrate but still the learned Magistrate had issued the process. To demonstrate that this is reflective of non-application of mind, he would place heavy reliance on the judgment of the apex court in the case of *Vijay Dhanuka* v. *Najma Mamtaj* [2014] 14 SCC 638, where it has been held that the requirement to conduct an enquiry or direct investigation before issuing process where accused residing beyond territorial jurisdiction of Magistrate is mandatory and the purpose is to protect innocent persons residing at far off places from being harassed. The apex court had construed the word "shall" applied in the said section and after taking into consideration the intention of Legislature in bringing out an amendment by Central Act No. 25 of 2005 held that the object of amendment is to prevent innocent persons from harassment. Therefore, the expression "shall" would contemplate an enquiry or investigation, as the case may be, being mandatory before issuance of summons against the accused persons living beyond the territorial jurisdiction of the Magistrate. Further, it is no doubt true that the enquiry contemplated under section 202 contemplate an expression of the complainant and the witnesses and then the Magistrate has to satisfy himself that there are sufficient grounds for proceedings against the accused and the entire purpose of the enquiry is to determine whether a prima facie case is made out. In the judgment in *Birla Corporation Ltd.* v. *Adventz Investments and Holdings Ltd.* [2019] 216 Comp Cas 1 (SC) ; [2019] SCC Online 682 (SC), the hon'ble apex court after making reference to the earlier precedents observed thus (page 18 of 216 Comp Cas) :

"Reiterating the mandatory requirement of application of mind in the process of taking cognizance, in *Bhushan Kumar* v. *State (NCT of Delhi)* [2012] 5 SCC 424, 428, it was held as under :

'In *S. K. Sinha, Chief Enforcement Officer* v. *Videocon International Ltd.* [2008] 2 SCC 492 (SCC page 499, paragraph 19) the expression "cognizance" was explained by this court as "it merely means 'become aware of' and when used with reference to a court or a judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the judge. Cognizance is taken of cases and not of persons. Under section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under section 204 of the Code.'

Under the amended sub-section (1) of section 202 of the Cr.P.C., it is obligatory upon the Magistrate that before summoning the accused residing beyond its jurisdiction, he shall enquire into the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the accused.

By the Cr.P.C. (Amendment) Act, 2005, in section 202 of the Cr.P.C. of the Principal Act with effect from June 23, 2006 in sub-section (1), the words '. . . and shall, in a case where accused is residing at a place beyond the area in which he exercises jurisdiction . . .' were inserted by section 19 of the Criminal Procedure Code (Amendment) Act, 2005. In the opinion of the Legislature, such amendment was necessary as false complaints are filed against persons residing at far off places in order to harass them. The object of the amendment is to ensure that persons residing at far off places are not harassed by filing false complaints making it obligatory for the Magistrate to enquire. Notes on Clause 19 reads as under :

'False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of section 202 to make it obligatory upon the

Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.' . . .

The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint."

**30** The apex court, therefore, held that since summoning of an accused is a serious matter affecting ones dignity and reputation in the society, there has to be application of mind before proceeding against the accused persons and though it may not contemplate a detail order but the Magistrate has to be prima facie satisfied that there are sufficient grounds for proceeding against the accused.

Shri Ponda has made a submission that the Code of Criminal Procedure do not specify any mode or manner of enquiry under section 202 though the apex court in the case of *Birla Corporation Ltd.* v. *Adventz Investments and Holdings Ltd.* [2019] 216 Comp Cas 1 (SC) ; [2019] SCC Online 682 (SC) has laid down the guidelines revolving around the exercise of the said power. He would rely upon the same judgment relied upon by learned senior counsel for the petitioners and invite our attention to the specific paragraphs. He would canvass that the Magistrate had two options before considering the issuance of process and the Magistrate passed an order issuing of process instead of postponing the same. We do not find the said submission to be tenable since we have already held that there is no compliance of the provisions of section 202 in letter and spirit and by this, we do not mean that it could have called for a detailed enquiry but we surely intend to convey that the Magistrate has failed to apply his mind before issuing the process against the accused.

**31** Though Mr. Singhvi has observed that one of the aspect of non-application of mind is the fact that the place of residence of petitioners Nos. 5 to 11 is beyond the jurisdiction of the learned Magistrate, since, the process was issued, we would not deliberate on the said issue in detail as we are clearly of the view that the Magistrate has failed to take into consideration the very basis of exercise of his power and did not satisfy himself about the

issuance of process. The Magistrate has in a mechanical manner referred to the list of documents and we really wonder whether these documents are really perused by the Magistrate before issuance of the process and before recording his satisfaction that the petitioners are guilty of offence of defamation. In any contingency, since, we have recorded that the petitioners cannot be held liable for defamation, and the Magistrate who has failed to conduct an inquiry, the impugned order cannot be sustained and deserves to be dismissed.

We are of the specific view that the impugned order passed by the 32
Magistrate looked at from this angle also suffers from non-application of mind but we would not deliberate on the issue further since we have already formed an opinion that the Magistrate has failed to take into consideration the very genesis of exercise of his power about being satisfied that the allegations in the complaint constitute an offence of defamation and there is no indication in the impugned order demonstrating his satisfaction based on the material placed before him. For the aforesaid reasons, we conclude that the order passed by the Magistrate is without application of mind and cannot be sustained and resultantly, we quash and set aside the impugned order. The writ petition is allowed in terms of prayer clause (b). No order as to costs.

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**[2020] 221 Comp Cas 221 (NCLT)**

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — GUWAHATI BENCH]

## BALENDRA CHOUDHURY AND ANOTHER

*v.*

## ASSAM MEDICAL CORPORATION P. LTD. AND OTHERS

HARI VENKATA SUBBA RAO *(Judicial Member)*

June 3, 2020.

**HF ▸ Petitioner/Respondent**

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—TRANSFER OF SHARES HELD BY TRUST—PROPER PROCEDURE NOT FOLLOWED—TRANSFER TO BE SET ASIDE—COMPANIES ACT, 2013, SS. 59, 213, 241, 242, 243, 244.

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—APPOINTMENT OF DIRECTORS AND AUDITORS—BOARD TO DECIDE—TRIBUNAL NOT TO INTERFERE UNLESS SERIOUS PREJUDICE TO PUBLIC INTEREST OR TO

AFFAIRS OF COMPANY SHOWN—COMPANIES ACT, 2013, SS. 59, 213, 241, 242, 243, 244.

*On a petition filed under sections 59, 213, 241, 242, 243 and 244 of the Companies Act, 2013 against the respondents, inter alia, contending that the transfer of 117 shares of the trust in the board meeting held on January 24, 2018 was illegal :*

Held, *(i) that those 117 shares were held by the trust and they could not be transferred in a routine manner like transfer of shares of other members, as those shares belonged to a trust created by the founder member of the company. Article 15 of the articles of association provided a procedure for transfer of shares. The burden of proof with regard to the legal and valid mode of transfer of those shares was upon the respondents and they had failed to discharge their burden. Taking advantage of the majority in the board those shares were transferred in a routine manner. The mere undertaking of the transferees not to transfer their shares would not cure the illegality. Since the petitioners were questioning the actions of the company, non-joinder of the trust or its trustees as parties was not fatal and the Tribunal had every power to conduct legal scrutiny. Even otherwise, the provisions of the Code of Civil Procedure, 1908 were not applicable except to the extent provided under the Act to the proceedings before the Tribunal. The transfer of 117 shares of the trust in the board meeting dated January 24, 2018 was to be set aside and consequently, the company was directed to undo the transfer in all the relevant registers and also communicate to the concerned statutory authorities.*

*(ii) That in respect of the transfer of shares of other members in the board meeting dated January 3, 2018, these other individual members had every right to deal in their own right and, therefore, the Tribunal was not to interfere.*

*(iii) That the appointment of directors and auditors was the exclusive domain of the board and the Tribunal would not interfere unless serious prejudice to the public interest or to the affairs of the company was shown.*

**C. P. No. 16/59/213/241/244/GB/2018.**

## ORDER

1 HARI VENKATA SUBBA RAO ***(Judicial Member)***.—This company petition has been filed by the petitioners under sections 59, 213, 241, 242, 243 and 244 of the Companies Act, 2013 against the respondents herein, alleging that the affairs of respondent No. 1-company are being conducted in a manner causing oppression to the petitioners which also resulted in mismanagement of the affairs of respondent No. 1-company and also seeking

various reliefs, both interim and permanent, which are incorporated in the company petition itself.

The brief facts pleaded in this petition are as follows : 2

That respondent No. 1-company, i. e., Assam Medical Corporation P. Ltd., was the brainchild of late Dr. Kalicharan Das (hereinafter referred as "Dr. Das"), a renowned medical practitioner and philanthropist. It is pertinent to mention here that in 1950s, there was widespread epidemic of cholera and malaria in Guwahati and its surrounding areas and other parts of Assam. A large number of people suffered and died of such diseases mainly due to a dearth of proper medical facilities and the brother of Dr. Das was also one of such victims. He, therefore, decided to create certain medical facilities in Guwahati for the benefit of the people of Guwahati and its surrounding areas in particular and State of Assam in general. Accordingly, Dr. Das started a small nursing home in his house in the year 1953, on an experimental basis.

Subsequently, on July 13, 1960 respondent No. 1-company was incorporated under the name and style of Assam Medical Corporation P. Ltd., as a public limited company with the aim and objects which were being stated in the memorandum of association and articles of association. Respondent No. 1-company was incorporated in 1960 with a paid-up share capital of Rs. 5,00,000 (rupees five lakhs only) divided into 50,000 equity shares of Rs. 10 each. Subsequently, respondent No. 1-company was converted into a private limited company and the value of shares of respondent No. 1-company was changed from Rs. 10 each to Rs. 1,000 each. Consequently, the number of equity shares of respondent No. 1-company was reduced from 50,000 to 500 of Rs. 1,000 each. 3

It is stated here that the number of shares owned by Dr. Das in respondent No. 1-company was 117 and number of shares owned by his wife, Divya Prabha Das was 55. Some like-minded humanitarian persons, namely, Dr. Susil Ranjan Roy, Dr. Shailendranath Sengupta, Dr. Ataur Rahman, Dr. Ramani Kanta Talukdar and Mr. Sukumar Dutta, a pharmacist and Mr. Jogendra Narayan Baruah, a businessman too got associated with such project established to address some important health issues of the people and the downtrodden section of the society in particular. 4

After incorporation of respondent No. 1-company, Dr. Das approached the Government of Assam and on his request and continuous pursuit, the Government of Assam was pleased to allot about eleven bighas of land in the Kalapahar area of Guwahati for establishment of a full-fledged nursing home and in due course, the dream of Dr. Das was materialized as it became the hub of the people of all walks of lives who were afflicted 5

different kind of bodily sufferings. During his life time, the nursing home was basically managed by Dr. Das and his wife, Smt. Divya Prabha Das although the other persons associated with the nursing home extended necessary help and co-operation.

6 Subsequently, a trust, under the name and style of "Kalicharan Das Trust" (hereinafter referred as "the trust") was created by Dr. Das by transferring all the shares to such trust. The said trust was created basically for the all round development of the nursing home and also for maintenance of self as well as his wife and his adopted daughter Smt. Bijuli Das after his death. According to the petitioner, the said trust was one of the shareholders of respondent No. 1-company.

7 Dr. Das expired on March 3, 1983 and on his death, his wife managed the entire nursing home with the help of her nephew. Mr. Balendra Choudhury, petitioner No. 1 and as before the other members in the board of directors of respondent No. 1-company also rendered necessary help as and when required.

8 After the death of Smt. Divya Prabha Das on July 4, 1985, 55 number of shares held by her in respondent No. 1-company was transferred to her legal heir, Smt. Kiran Bala Choudhury, who was the sister of Dr. Das. Smt. Kiran Bala Choudhury expired on March 29, 2001 and the shares owned by her were transferred to Mr. Balendra Choudhury, petitioner No. 1 herein. Over a long period of time, the affairs of respondent No. 1-company was conducted strictly in accordance with the aims and objectives stated in the memorandum of association and articles of association of respondent No. 1-company, which were sought to be reinforced further by creation of the trust aforesaid.

9 However, in course of time, respondent No. 1-company faced experiencing several difficulties in running its affairs. This was basically because of the reason that over the years, the area where the nursing home is situated today has become the hub of enormous commercial activities and, therefore, many unscrupulous people, more particularly the people having connections with the real estate business have been eyeing the sprawling plot of land which houses the said nursing home. The fact that such a plot of land itself would fetch a huge amount of money if the same is disposed of today, makes such a position very clear.

10 In course of time, petitioner No. 1 herein also came to know that there were some transactions in the name of respondent No. 1-company which had been done in total disregard of the rules and procedures holding the field and such transactions were done not at all to further the great charitable ideas and purposes for which respondent No. 1-company was incorporated by the founder members of respondent No. 1-company almost

seven decades before, but to cater the very selfish ends of some persons who wanted to exploit the land in question for some entirely commercial purposes.

**11** In that connection, it has also been stated that in January, 2017, petitioner No. 1 came to know that some unaccounted cash transactions and illegal book entries were made in the accounts of respondent No. 1-company. Since such transactions were done quite illegally the proceeds therefrom had landed in the pockets of some unscrupulous persons instead of same being channelled to the coffer of respondent No. 1-company.

**12** It is contended that though the board of directors had always been adorned by great people like Dr. Kalicharan Das, etc., who were imbibed with the objects of serving humanity in the best possible way for which they established the said nursing home to lessen and remove the pain in human being, a new set of additional directors were appointed to the Board who were, in fact, real estate developers and their sole and lone objective was to use the land and other properties of the said nursing home only for commercial purpose.

**13** It has also been contended that since petitioner No. 1 has seen the rise of the said institution and had also seen the great hardships and labour undertaken by the founder members of the said project, he could not tolerate such mismanagement of enormous proportion and as such, he, being as one of the directors of respondent No. 1-company strongly objected such conduct resorted to by the management of respondent No. 1-company. For such objection by petitioner No. 1, he was threatened to be thrown out of respondent No. 1-company by the persons who were only interested in using the land and other assets of respondent No. 1-company for the purposes which never co-exist with the purposes enshrined in the charters of respondent No. 1-company.

**14** Towards the end of December, 2017, petitioner No. 1 received a copy of purported notice dated December 29, 2017 of a board meeting of respondent No. 1-company which was scheduled to be held on January 3, 2018 and such a meeting was convened to consider and approve the transfer of shares and appointment of Mr. Sunil Agarwal, chartered accountant, Mr. Bal Kishan Bansal and Mr. Anup Kumar Khemani as additional directors, who are accredited real estate developers.

**15** The board meeting was convened in total disregard of the various arrangements made in the articles of association of respondent No. 1-company. It has been submitted in that connection that the bringing on board some real estate developers does not go hand-in-hand with various objects, specified in the memorandum of association since such induction

of aforesaid persons as additional directors respondent No. 1-company was likely to dilute the aims and objectives, specified in the charters of respondent No. 1-company. Petitioner No. 1, therefore, vehemently objected to the above design of the board of directors of respondent No. 1-company, but his objections were neither considered nor recorded in the board meeting held on January 3, 2018.

16 In the meantime, another board meeting was also convened on January 24, 2018 but petitioner No. 1 was not served with a valid notice. Petitioner No. 1 came to know that in the said meeting, about 169 numbers of equity shares of Rs. 1,000 each in respondent No. 1-company comprising 33.8 per cent. of total share capital of respondent No. 1-company were purportedly transferred to some real estate companies as well as to some individual real estate developers.

17 In the said board meeting convened on January 24, 2018 the entire shares of Dr. Das held in the trust, had also been transferred to some outsiders including some real estate companies. Quite importantly, in the said meeting, 50 numbers of shares held by Mr. R. P. Hansaria, one of the trustees of the aforesaid trust and directors of respondent No. 1-company were also transferred to some real estate companies. Mr. Hansaria, in the meantime, has resigned with the object of creating an opening for induction of more real estate developers to the board in total disregard to the arrangements made in the articles of association and memorandum of association of respondent No. 1-company. Petitioner No. 1 again opposed such conduct but without any success. In the board meeting held on January 24, 2018 the transfer of equity shares in/of respondent No. 1-company to real estate companies and developers were approved.

18 Interestingly, on the same day, i. e., on January 24, 2018 at 11.00 a.m., an extraordinary general meeting was also conducted and in that extraordinary general meeting, the members who allotted shares in respondent No. 1-company in the board meeting held on January 24, 2018 at about 10.00 a.m. had also participated through proxies. Thus, the extraordinary general meeting, which was attended to by those new shareholders of the company, approved the appointment of 3 (three) additional directors appointed at the board meeting at 10.00 a.m. on the same day.

19 It has been further submitted that participation of the new members of the company was illegal for many reasons. In that connection, it has been pointed out that the articles of association of respondent No. 1-company requires that outsiders cannot be made members of respondent No. 1-company unless the shares, offered to them, are first made available to the existing shareholders. Petitioner No. 2, being one of the existing members

of the company had expressed his intention to acquire such shares, which were offered to the outsiders but such request of petitioner No. 2 was turned down without there being any valid reason and in that process, one of the fundamental requirements in the articles of association of respondent No. 1-company was callously violated.

In regard to appointment of three additional directors on January 3, 2018 **20** they being Mr. Sunil Agarwal, CA, Mr. Bal Kishan Bansal and Mr. Anup Kumar Khemani, it has been stated that such appointment of those persons as additional directors of respondent No. 1-company was illegal and bad in law. In that connection, it has been pointed out that the articles of association of respondent No. 1-company did not confer on the board of directors any power to appoint any additional director and since such power was not conferred on the board, it was beyond the competence of the Board to appoint the aforesaid three persons as additional directors on January 3, 2018.

It has been further submitted that section 105(4) of the Companies Act, **21** 2013 and the Secretarial Standard 2, paragraph 6.6 state that proxies shall be deposited with the company either in person or through post not less than forty-eight hours before the commencement of the meeting in relation to which they are deposited. Most interestingly, the articles of association of respondent No. 1-company has increased such period to 72 hours. It is already found that some members of respondent No. 1-company, who purportedly gained entry into the company in the board meeting held on January 24, 2018 at 10.00 a.m. participated in the extraordinary general meeting held on the same day at 11.00 a.m. through proxies.

It has been submitted that therefore, one would be hard-pressed to com- **22** prehend as to how a member who gained entry in to the company at 10.00 a.m. could participate in the extraordinary general meeting at 11.00 a.m. on the same day and that too through proxy although the aforesaid provisions of law as well as articles of association require such a member to deposit the proxy with the company either in person or through post not less than seventy-two hours and such episodes show the enormity of illegalities in conducting extraordinary general meeting on January 24, 2018 at 11.00 a.m.

In this regard, for ready reference section 105(4) of the Companies Act, **23** 2013 and the Secretarial Standard 2, paragraph 6.6 have been referred to which is also reproduced below :

> "105. (4) Any provision contained in the articles of a company which specifies or requires a longer period than forty-eight hours before a meeting of the company, for depositing with the company or any other person any instrument appointing a proxy or any other

document necessary to show the validity or otherwise relating to the appointment of a proxy in order that the appointment may be effective at such meeting, shall have effect as if a period of forty-eight hours had been specified in or required by such provision for such deposit."

Secretarial Standard 2 paragraph 6.6

"6.6. Deposit of proxies and authorizations

6.6.1. Proxies shall be deposited with the company either in person or through post not later than forty-eight hours before the commencement of the meeting in relation to which they are deposited and a proxy shall be accepted even on a holiday if the last date by which it could be accepted is a holiday."

**24** The petitioners were trying hard to prevent and stop discontinuation of the philanthropy based medical services being rendered by respondent No. 1-company and also to stop the proposed conversion of respondent No. 1-company into a real estate company, in spite of the threat and warning to throw petitioner No. 1 out of the management. Petitioner No. 1 received a notice dated April 14, 2018 of the board meeting scheduled to be held on April 19, 2018. Petitioner No. 1 objected to the process of calling of the meeting without following the process of law. The said board meeting was again called vide notice dated April 23, 2018 scheduled to be held on May 3, 2018. The only two agenda in the aforesaid meeting were (a) to consider and approve proposal for appointment of CA Saloni Bansal as director in the company in place of Dr. R. P. Hansaria and (b) to convene an extraordinary general meeting of the company for removal of petitioner No. 1. Mr. Balendra Choudhury from the directorship of the company and confirmation of appointment of new directors.

**25** The aforesaid meeting scheduled to be convened on May 3, 2018 was not concluded and was adjourned to May 5, 2018 at 11 a.m. Petitioner No. 1 was present on May 5, 2018 at 11 a.m. to attend the postponed board meeting of May 3, 2018 but nobody turned up and the said meeting was subsequently adjourned to May 17, 2018 in the meantime respondent No. 1-company issued notice of extraordinary general meeting to be held on June 1, 2018. Petitioner No. 1 requested for a copy of the minutes of the aforesaid board meeting dated May 3, 2018 but he has not been provided with it till date. Petitioner No. 1 also raised objections regarding the process of issuance of the notice of extraordinary general meeting to be held on June 1, 2018.

**26** Petitioner No. 1 received another notice dated May 17, 2018 of extraordinary general meeting to be held on June 11, 2018 to transact the same

business which was to be transacted at the aforesaid proposed extraordinary general meeting to be held on June 1, 2018. In the extraordinary general meeting proposed to be held on June 11, 2018 (which was earlier proposed to be held on June 1, 2018), the respondents were seeking appointment of two directors, namely, Ms. Saloni Bansal and Mr. Shanky Agarwal, who are engaged in real estate development business and also seeking removal of petitioner No. 1 from directorship.

**27** As stated above, according to the petitioners, the ultimate object of the new board of directors, so constituted, was to transfer the assets of the company including the land which houses the nursing home aforesaid over a long period of time to some real estate developers, which would completely nullify the purposes for which respondent No. 1-company was set up and as such, the same cannot be allowed to happen.

**28** The respondents in their written submission submitted that petitioner No. 1 became a member and shareholder of the company in the year 2004 by way of transfer of 55 numbers of shares which were in the name of late Divya Prabha Das to his name. The transfer was done after petitioner No. 1 had submitted a succession certificate declaring him as the successor of the estate of his late mother Smt. Kiran Bala Choudhury. But, there is nothing on record of the company to show that Smt. Kiran Bala Choudhury was the legal heir of Smt. Divya Prabha Das, who was her brother's wife. The name of Smt. Kiran Bala Choudhury was never entered into the register of shares of the company. The shares of Smt. Divya Prabha Das continued to be in the name of Mrs. Das until the same was transferred to the name of petitioner No. 1 and they were never transferred to the name of Smt. Kiran Bala Choudhury. Further, it is pertinent to bring to notice that the succession certificate mentioned by petitioner No. 1, copy of which was annexed with the petition was not granted by the hon'ble Gauhati High Court but was granted by the court of learned Additional District Judge, Kamrup in case No. S/c 492 and not in case No. SC 98/92, which is non est and legally invalid inasmuch as the said certificate was applied for by petitioner No. 1 in respect of the estate of late Kiran Bala Choudhury, but in effect the succession was granted for 55 shares which were in the name of Divya Prabha Das and not Kiran Bala Choudhury. However, due to oversight the said discrepancy was not noticed by respondent No. 1-company and the shares of Smt. Divya Prabha Das were transferred in the name of petitioner No. 1. However, the succession certificate being non est and void, the said transfer of share to petitioner No. 1 is also invalid, void and non est and therefore, petitioner No. 1 cannot file the present petition on

the strength of such invalid shareholding and on this ground itself the present petition needs to be dismissed as not maintainable.

29 It has been submitted that in 2009, petitioner No. 1 was named as a director of respondent No. 1-company. However, his appointment as director was never approved in any subsequent meeting of the board.

30 That respondent No. 1-company was on July 13, 1960 incorporated under the name and style of Assam Medical Corporation Ltd., as a public limited company with a capital of Rs. 5 lakhs divided into 50,000 shares of Rs. 10 each. At the time of inception the company had 3 directors, namely, Dr. S. R. Roy. Dr. Kalicharan Das and Jogendra Narayan Dutta and subsequently, on December 18, 1961 respondent No. 1-company was converted into a private limited company with an authorised share capital of Rs. 5 lakhs divided into 500 equity shares of Rs. 1,000 each.

31 That respondent No. 1-company was incorporated with intention of providing proper medical services and to run the medical services with sound economic principles. However, taking into consideration of future needs and purpose, the founders of the company had cautiously incorporated objects in the memorandum of association permitting and enabling the company to undertake other allied activities, works and businesses which are not inconsistent with the objects and which may be profitable for respondent No. 1-company and respondent No. 1-company can only engage in businesses and activities in the manner as permitted by its memorandum and articles of association and which are not de hors the prevailing law. That besides the concern or suspicions of the petitioner that since the shares have been transferred to persons or entities engaged in real estate business, the respondents would change the character of the company is unfounded as not only respondent No. 1-company bound by its own articles and memorandum of association but also new shareholders through respondent No. 3, had given undertaking (which has been annexed by the petitioner himself at page 216) that they, their partners, group members and affiliate companies would continue with the objects of respondent No. 1-company, i. e., providing medical facilities and they would also no change the name of the Dr. Kalicharan Das Nursing Home.

32 Further, the respondents submitted that the petitioners have made false allegations regarding financial irregularities without any substantial materials and therefore, the petitioners be put to strict proof thereof. It has further been submitted that the period during which the petitioners have alleged financial irregularities, petitioner No. 1 himself was an active director overlooking various facets of respondent No. 1-company. The balance-sheet of the company was in fact discussed in the board meeting on May

12, 2017 and subsequently, the balance-sheet for the year ending March 31, 2017 was presented and approved by all the directors present including petitioner No. 1 in the board meeting held on August 12, 2017. The same was also placed before the annual general meeting held on September 23, 2017 which was approved without any objection and petitioner No. 1 is now for making false and malicious allegations caused to prejudice to the respondents has referred to the meeting dated August 25, 2017 which had never taken place.

33 It is also the submission of the respondents that respondent No. 1-company and the nursing home and polyclinic has been running for the past more than 50 years. However, in the recent times the company has been facing financial recession due to lesser footfalls of patients and rising maintenance cost. To overcome the situation the company attempted renovation and modernization of the nursing home. But due to coming up several big private hospitals and nursing home in the Gauhati City, the business of respondent No. 1-company has affected severely and this was discussed in various board meetings. Further, problems were created due to the fact that Dr. Rajendra Prasad Hansaria, who has been associated with the company as a director since 1970 had shifted to Mumbai and due to his advanced age he found it difficult to come to Guwahati for managing the affairs of the company and Dr. Deepali Dutta, a long-term director also passed away on November 11, 2017. As a result, respondent No. 1-company was under severe constraint. Therefore, it was necessitated to induct new people for revival of the situation so as to save its existence and smooth functioning.

34 That keeping in mind the above situation, for the best interest of the company new shareholders were brought into the company after the existing shareholders transferred their shares in a valid and legal manner. Further, Dr. Rajendra Prasad Hansaria, Shri Vinod Hansaria and Dr. Madhav Prasad Bajaj voluntarily stepped down as directors and Mr. Sunil Agarwal, CA Bal Kishan Bansal and Mr. Anup Kumar Khemani were appointed as directors and their appointment was approved in extraordinary general meeting held on January 24, 2018 by all present and voting including petitioner No. 1. CA Saloni Bansal was appointed as additional director in place of Dr. Rajendra Prasad Hansaria after he stepped down on May 3, 2018.

35 That though petitioner No. 1, as a full time paid director of the company and also as a shareholder was fully aware of all these activities of respondent No. 1-company, but he never expressed his desire to buy the shares nor he provided any suggestions to overcome the problems faced by respondent No. 1-company and even after the matter of share transfer was

formally put to the notice of petitioner No. 1 vide notice dated December 29, 2017 he neither conveyed his willingness to buy the said shares nor did he object to the transfer of shares or appointment of new directors in the meeting held on January 3, 2018. In the meeting held on January 3, 2018 all the resolutions were unanimously passed by all the present directors including petitioner No. 1. Petitioner No. 1 on January 24, 2018 had objected only on the issue of validity and legality of transfer of 117 shares held by Dr. Kalicharan Das Trust to respondents Nos. 4, 6, 12, 13 and 14 in the board meeting held on January 24, 2018. The resolution for transfer of shares was thereafter passed with majority vote. Petitioner No. 1 even did not object to the resolutions passed for appointment of Mr. Sunil Agarwal, CA Bal Kishan Bansal and Mr. Anup Kumar Khemani as directors of respondent No. 1-company in the said meeting held on January 24, 2018.

**36** Petitioner No. 1 subsequently, for the reasons best known to him objected to transfer of shares to the new shareholders and appointment of new directors and on April 12, 2018 he wrote a letter to respondent No. 15 stating his objections. However, he failed to provide any valid reasons for objecting to transfer of shares and appointment of new directors.

**37** The respondents further submit that on March 16, 2018 the petitioners most illegally acting against respondent No. 1-company with male fide intention against respondent No. 1-company complained to the DC, Kamrup (Metro) and Sub-Registrar, Kamrup (Metro) without any material evidence that there are various anomalies in the affairs of respondent No. 1-company and requested them not to register any document with regard to the company and due to such actions of petitioner No. 1, respondent No. 1-company received notices from three members requesting for holding extraordinary general meeting for removal of petitioner No. 1 from the directorship of the company. Therefore, respondent No. 1-company was compelled to issue a notice on April 23, 2018 for convening a meeting on May 3, 2018 proposing an agenda for removal of petitioner No. 1 from directorship of respondent No. 1-company. The said meeting was adjourned and on May 3, 2018 another notice was issued for convening extraordinary general meeting with agenda for confirmation of appointment of CA Saloni Bansal as director of the company and removal of petitioner No. 1 from directorship. However, in the meantime, petitioner No. 1 filed the present company petition before the Tribunal against the respondents and obtained ex parte interim order due to which respondent No. 1-company could not give effect to the aforesaid resolutions.

**38** The respondents further submitted that though the petitioners raise objections regarding transfer of shares of Dr. Kalicharan Das Trust, the

petitioners have not made the said Trust a party in the present proceedings and as such the present petition is bad in law for non-joinder of necessary party.

39 It is further submitted that the objections raised by the petitioners are regarding transfer of shares of Dr. Kalicharan Das Trust. The said transfer of shares was duly recorded and approved by all other directors by majority vote and because of the fact that petitioner No. 1 had reservation regarding the same, the validity of the action does not get vitiated. The respondents further stated that 50 numbers of shares of Dr. R. P. Hansaria were held by him in his individual capacity and not as a trustee of Dr. Kalicharan Das Trust as has been wrongly represented in the petition.

40 Respondent No. 16-Dr. R. P. Hansaria in his written submissions affirmed the submission of the other respondents. However, it has been submitted by him that besides he being a shareholder of respondent No. 1-company and past director, he is also one of the two trustees of the Kali Charan Das Trust, which is also a shareholder of respondent No. 1-company. He further submits that since the aforesaid Kali Charan Das has not been impleaded as a necessary party in the present company petition, the present petition is not maintainable in law due to non-joinder of necessary party and the same is liable to be dismissed on this ground.

41 Petitioner No. 1, Mr. Balendra Choudhury and petitioner No. 2, Sobhan Malia Buzar Baruah claim to have 11.60 per cent. of the issued, subscribed and paid-up share capital in respondent No. 1-company.

42 Respondent No. 1 is Assam Medical Corporation P. Ltd., a private limited company. Respondent No. 2, Sunil Agarwal is director and shareholder of respondent No. 1-company holding 1 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

43 Respondent No. 3-CA Bal Kishan Bansal is also director and shareholder of respondent No. 1-company holding 1 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

44 Respondent No. 4, Mr. Anup Kumar Khemani is director and shareholder of respondent No. 1-company holding 16.66 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

45 Respondent No. 5, Mr. Shanky Agarwal is shareholder of respondent No. 1-company holding 2 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

46 Respondent No. 6, Ms. Sangita Khemani, is director and shareholder of respondent No. 1-company holding 2 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company. Respondent

No. 7, Mr. Anil Agarwal, is shareholder of respondent No. 1-company holding 2 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company. Respondent No. 8, Ms. Kabita Agarwal, is also a shareholder of respondent No. 1-company holding 2 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

47 Respondent No. 9, Ms. Nina Agarwal is a shareholder of respondent No. 1-company holding 1 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

48 Respondent No. 10, Ms. Ekta Agarwal is a shareholder of respondent No. 1-company holding 0.4 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

49 Respondent No. 11, CA Saloni Bansal is director of respondent No. 1-company. Respondent No. 12, M/s. Landspaces Developers P. Ltd., is a private company limited by shares, having authorized share capital of Rs. 1,10,00,000 and issued, subscribed and fully paid-up capital of Rs. 94,00,000.

50 Respondent No. 13, Ved Promoters P. Ltd., is a private company limited by shares, having authorized share capital of Rs. 2,00,00,000 and issued, subscribed and fully paid-up capital of Rs. 1,40,58,000.

51 Respondent No. 14, Venkatesh Associates P. Ltd., is a private company limited by shares having authorized share capital of Rs. 4,50,00,000 and issued, subscribed and fully paid-up capital of Rs. 4.50,00,000.

52 Respondent No. 15, Mr. Sachin Chandra Kumar is managing director and shareholder holding 1 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

53 Respondent No. 16, Mr. Rajendra Prasad Hansaria is a director and shareholder of respondent No. 1-company holding 11 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

54 Respondent No. 17, Mr. Abhijit Neog is a director and shareholder of respondent No. 1-company holding 2 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

55 Respondent No. 18 Ms. Aruna Bansal is shareholder of respondent No. 1-company holding 1 per cent. of the issued, subscribed and fully paid-up share capital of respondent No. 1-company.

56 Heard all the concerned parties and perused the record. Respondents Nos. 1, 15 and 16 apart from addressing oral arguments also filed synopsis of their written arguments.

The petitioners claimed interim reliefs covered by prayer clauses (A)-(I) to (XXXIX) and final reliefs covered by prayer clauses (B)-(I) to (XXXIII) of paragraph (V) in the petition. **57**

In so far as the relief of an order declaring the extraordinary general meeting scheduled to be held on June 1, 2018 and the decisions taken therein are illegal and void covered by prayer clause III is concerned, the learned advocate appearing for respondent No. 1-company clearly pleaded in their reply and also confirmed during the course of arguments that no such extraordinary general meeting was held on June 1, 2018 and, therefore, the said relief has become infructuous and no order needs to be passed in this regard. **58**

The main grievance of the petitioners in the pleadings as well as at the time of argument is that respondent No. 1-company has illegally transferred its shares of the promoter trust M/s. Kalicharan Das Trust to respondents Nos. 4, 6, 12, 13 and 14 in the minutes of meeting dated January 24, 2018 without considering his objections only with an intention to convert the land of respondent No. 1 for construction of real estate project against the aims and objects of respondent No. 1-company. It is the contention of the petitioners that the transfer of 117 shares of M/s. Kalicharan Das Trust is contrary to article 15 of the articles of association of respondent No. 1-company. **59**

It is the submission of the petitioners that respondent No. 1-company was initially started as a small nursing home by his late uncle Mr. Kalicharan Das with an object of providing free medical services to the poor and needy people of the city of Guwahati and subsequently, the same was converted into a limited company with the help of other like-minded professionals of his uncle late Dr. Kalicharan Das. Petitioner No. 1 further submits that his uncle late Dr. Kalicharan Das transferred his shares in respondent No. 1-company to M/s. Kalicharan Das Trust by executing a deed of trust and also appointed trustees and therefore those shares cannot be transferred to other than the people in Health Care Sector, especially not to real estate companies. Except the grievance of transfer of shares M/s. Kalicharan Das Trust, the advocate appearing for the petitioners did not press for any other reliefs.

The other grievance of the petitioners is that the respondents being directors are conducting the day-to-day affairs of respondent No. 1-company detrimental to the interests of the petitioners as well as to the aims and objects of the company by committing certain financial irregularities.

All the respondents, in one voice, seriously objected to the maintainability of the above petition contending that neither M/s. Kalicharan Das **60**

Trust nor its trustees are parties to the present petition and, therefore, the present petition is not maintainable for non-joinder of necessary parties. The advocate appearing for respondents Nos. 1 and 15 invited attention of this Tribunal to several reliefs claimed by the petitioners in the above petition and contended that all the above reliefs claimed by the petitioners are basing on mere suspicion without any evidence whatsoever placed before this Tribunal and if all the reliefs claimed by the petitioners are granted, it will virtually stop functioning of respondent No. 1-company and its directors and will also prejudice respondent No. 1-company and its directors in taking any decisions with regard to running of respondent No. 1-company. The advocate appearing for the transferees adopted the arguments of respondents Nos. 15 and 16. Thus counsels appearing for all the parties made very brief submissions. In the light of the above background, the issues that fall for consideration are :

(1) Whether the transfer of 117 shares of M/s. Kalicharan Das Trust in board meeting held on January 24, 2018 is legal and in accordance with the articles of association ?

(2) Whether the petitioners are entitled to numerous reliefs claimed in the petition ?

(3) To what relief ?

**61** In order to answer the above issue No. 1, it is important to read article 15 of the articles of association and also the minutes of the meeting dated January 24, 2018 which are extracted hereunder for ready reference as follows :

> "15. *Notice of transfer*.—Every member or the legal representative of a deceased member who intends to transfer shares (hereinafter called 'the vendor') shall give in writing to the Board notice of his intention. That notice shall constitute the Board his agent for the sale of the said shares, in one or more lots at the discretion of the Board, to members of the company at a price to be agreed upon by the vendor and the Board or in default of agreement at a price which the auditor of the company for the time being shall certify by writing under his hand to be in his opinion, the fair selling value thereof as between a willing vendor and a willing purchaser."

The minutes of the meeting of the board meeting held on January 24, 2018 reads as follows :

> *"Minutes of the board of directors meeting held on January 24, 2018 at the registered office of Assam Medical Corporation P. Ltd., Guwahati-16*

*Directors present :*

(1) Dr. R. P. Hansaria

(2) Dr. S. C. Kumar

(3) Dr. A. Neog

(4) Sri Balendra Choudhury

(5) Mr. Bal Kishan Bansal

(6) Mr. Anup Kumar Khemani

(7) Mr. Sunil Agarwal

*Special invitee :*

(1) Mrs. Neelam Hansaria

Dr. R. P. Hansaria proposed the name of Dr. S. C. Kumar to preside over the meeting. Sri Balendra Choudhury seconded the proposal.

Dr. S. C. Kumar accepted and took the chair.

Dr. R. P. Hansaria read out the minutes of the last board meeting held on January 3, 2018 and the same was approved.

The Board received the share transfer deeds lodged with the company, Sri Balendra Choudhury raised an objection on the transfer of shares of Kali Charan Das Trust, after explanation to him, the following resolutions were adopted by the Board.

Resolved that the transfer of following shares are be and hereby approved by the board of directors :

| *Sl. No.* | *Transferor* | *No. of shares* | *Transferee* |
|---|---|---|---|
| 1. | Dr. Rajendra Prasad Hansaria | 10 | Mr. Anil Agarwal |
| 2. | Dr. Rajendra Prasad Hansaria | 10 | Mrs. Kabita Agarwal |
| 3. | Dr. Rajendra Prasad Hansaria | 05 | Mrs. Nima Agarwal |
| 4. | Dr. Rajendra Prasad Hansaria | 20 | Ved Promoters P. Ltd. |
| 5. | Dr. Rajendra Prasad Hansaria | 05 | Mrs. Sangita Khemani |
| 6. | Kali Charan Das Trust | 40 | Venkatesh Associates P. Ltd. |
| 7. | Kali Charan Das Trust | 17 | Landspaces Developers P. Ltd. |
| 8. | Kali Charan Das Trust | 20 | Ved Promoters P. Ltd. |
| 9. | Kali Charan Das Trust | 30 | Mr. Anup Kumar Khemani |
| 10. | Kali Charan Das Trust | 10 | Mrs. Sangeeta Khemani |
| 11. | Sankar Hazarika | 02 | Mrs. Ekta Agarwal |

The meeting ended with a vote of thanks to the chair."

62 In order to decide the above issue No. 1, it is important to look at the reply filed by respondent No. 1-company. Respondent No. 1-company in their reply stated that the shares were transferred in a valid and legal manner and Dr. R. P. Hansaria, Sri Binod Hansaria and Dr. Madhab Prasad Bajaj voluntarily stepped down as directors and Mr. Sunil Agarwal, CA Bal Kishan Bansal and Mr. Anup Kumar Khemani were appointed as directors in the board meeting held on January 24, 2018. It is very clear from article 15 of the articles of association that a procedure for transfer of shares is provided under the articles of association. Respondent No. 1-company except making the above statement in their reply did not place any evidence before this Tribunal regarding the procedure adopted by them in transferring the shares of the Trust. It is interesting to note that in the minutes dated January 24, 2018 respondent No. 1-company having recorded the objections of the petitioners with regard to transfer of 117 shares of the Trust, miserably failed to record the explanation under which the petitioner was satisfied about his objections. It is very hard to believe that the petitioners having satisfied, filed the present petition in the absence of the recording of the explanations in the minutes nor evidence to that effect.

As rightly contended by the petitioners those 117 shares were held by M/s. Kalicharan Das Trust and they cannot be transferred in a routine manner like transfer of shares of other members, as the said shares belongs to a Trust created by the founder member of respondent No. 1-company late Dr. Kali Charan Das. The burden of proof with regard to the legal and valid mode of transfer of those shares is upon the respondents and they have miserably failed to discharge their burden. As rightly contended by the petitioners, respondent No. 1-company has to observe all the legal formalities for transfer of shares of a trust, be it private or public.

Therefore, it is very clear from the conduct of the respondents that those shares were transferred in a routine manner, taking advantage of the majority in the Board. The mere undertaking of the transferees not to transfer their shares will not cure the illegality. Since, the petitioners are questioning the actions of respondent No. 1-company, non-joinder of the Trust nor its Trustees as parties is not fatal and this Tribunal has every power to conduct legal scrutiny. Even otherwise, the provisions of the Code of Civil Procedure, 1908 are not applicable except to the extent provided under the Companies Act to the proceedings before this Tribunal. Therefore, the objection of the respondents with regard to non-joinder of parties is not legally sustainable and is rejected.

So far as the transfer of shares of other members in the board meeting dated January 3, 2018 is concerned, those shares were held by other individual members who have every right to deal in their own right and, therefore, this Tribunal is not inclined to interfere. 63

Next issue is with regard to appointment of Mr. Sunil Agarwal, CA Bal Kishan Bansal, Mr. Anup Kumar Khemani and CA Saloni Bansal. Since Mr. Anup Kumar Khemani purchased the shares of M/s. Kalicharan Das Trust, his directorship automatically gets cancelled in view of setting aside the transfer of shares of M/s. Kalicharan Das Trust by this Tribunal unless he possesses some other shares other than the shares of M/s. Kalicharan Das Trust. 64

In so far as appointment of Mr. Sunil Agarwal, CA Bal Kishan Bansal and CA Saloni Bansal is concerned, the appointment of directors and auditors is the exclusive domain of the Board and this Tribunal shall not interfere unless serious prejudice to the public interest or to the affairs of the company is shown.

As rightly contended by the respondents, the petitioners claimed numerous reliefs and all the reliefs, if granted, will virtually halt up the smooth functioning of respondent No. 1-company and cannot be granted. Even otherwise, the petitioners have not placed any substantial evidence before this Tribunal warranting grant of those reliefs nor pressed those reliefs at the time of submissions. 65

In the light of the above facts and circumstances and observations, this Tribunal is of the considered opinion that the petitioners are not entitled to all the reliefs claimed in the petition except to the extent of setting aside the transfer of 117 shares of M/s. Kalicharan Das Trust and accordingly, this Tribunal pass the following orders : 66

(i) it is hereby declared that the transfer of 117 shares of M/s. Kalicharan Das Trust in the board meeting dated January 24, 2018 is not in accordance with law and is hereby set aside and consequently, respondent No. 1-company is directed to undo the said transfer in all the relevant registers and shall also communicate the same to the concerned statutory authorities.

(ii) Mr. Anup Kumar Khemani is ceased to be the director of respondent No. 1-company from the date of communication of this order unless he possess some other shares other than the 30 shares of M/s. Kalicharan Das Trust.

(iii) The appointment of Mr. Sunil Agarwal, CA Bal Kishan Bansal and CA Saloni Bansal as directors is hereby confirmed.

(iv) The rest of the reliefs claimed by the petitioners are rejected.

(v) Both the parties shall bear their own cost.

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**[2020] 221 Comp Cas 240 (NCLT)**

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — HYDERABAD BENCH]

## QUINN LOGISTICS INDIA P. LTD. AND OTHERS[1], *In re*

(and connected applications)

**K. ANANTHA PADMANABHA SWAMY *(Judicial Member)***

July 19, 2019.

**HF ▸ Applicant**

OFFENCES AND PROSECUTION—COMPOUNDING OF OFFENCES—FAILURE TO COMPLY WITH PROVISIONS OF COMPANIES ACT, 1956 DUE TO CHANGE IN MANAGEMENT OF COMPANY—FIRST TIME OFFENCE BY COMPANY—APPLICATION FILED UNDER DIRECTIONS OF NATIONAL COMPANY LAW TRIBUNAL—COMPOUNDING APPLICATION ALLOWED ON PAYMENT OF FINE IMPOSED—COMPANIES ACT, 1956, SS. 166, 621A—COMPANIES ACT, 2013, SS. 96, 441.

*The applicants filed applications before the Registrar of Companies for compounding of the offence under section 166 read with section 621A of the Companies Act, 1956 (section 96 read with section 441 of the Companies Act, 2013) for the years 2012, 2013, 2014 and 2015. These provisions were brought into force on April 1, 2014. The Registrar of Companies, along with his report dated December 18, 2018 forwarded the applications filed by the company and its director to the National Company Law Tribunal. The applicants contended that the receiver of its holding company which was undergoing liquidation had caused a change in management of the board of the petitioner, and the shareholders in the extraordinary general meeting held on February 18, 2012 removed all the existing directors and appointed new directors being applicants Nos. 2 to 4, that the new directors could not file their form 32 with the Registrar of Companies, as their names were not added in the "view signatory details" tab of the company on the website, that the management of the applicant-company was taken up the matter with the Authorities for adding the names of the new directors on the portal for enabling them to file the necessary forms with the Registrar of Companies and*

1. This order has been affirmed in National Company Law Appellate Tribunal : see [2020] 221 Comp Cas 248 (NCLAT) *infra*.—Ed.

*other authorities, that the management was unable to proceed with the compliances as the names of the new directors were not on the website and further the directors were unable to get the bank statement for preparing accounts as they were not the signatories for the bank accounts, so the bank account of the company was placed as "inactive" by the banks, that by the time the company prepared documents for compliance with the applicable provisions, the company was shown as struck off and the company was unable to file any documents with the Registrar of Companies, that after several requests and follow-ups the status of the company was put to active on September 1, 2017 enabling it to file required forms with the Ministry of Corporate Affairs portal and the company filed all the required forms on the same day and that the delay was neither intentional nor due to ignorance of the management of the company, but due to circumstances beyond its control :*

Held, *allowing the applications, that the National Company Law Tribunal had directed that the applicant-company and its directors to file compounding applications before the Registrar of Companies for various non-compliances and delayed compliances with regard to various provisions of the Companies Act, 1956. Subsequently, the applicants had filed the compounding applications. The applicants had pleaded for taking lenient view on the ground that this was the first offence committed by the company. The Registrar of Companies' report also confirmed that this was the first offence. Therefore, the company applications were to be allowed but fine was to be imposed for compounding the alleged violation.*

MACK SOFT TECH P. LTD. *v.* QUINN LOGISTICS INDIA LTD. [2018] 3 Comp Cas-OL 9 (NCLAT) (para 4) *referred to*.

**C. A. Nos. 118, 114, 120 and 116/441/HDB/2019.**

*Ajay Suman Shrivastava* with *Shilpi Jain*, Practising Company Secretaries, for the applicants.

*Sujan Kumar Reddy*, Central Government Standing Counsel, with *Ms. Suma* for the Registrar of Companies.

**ORDER**

K. ANANTHA PADMANABHA SWAMY ***(Judicial Member)***.—Under consideration is the company applications which have been filed by the applicants before the Registrar of Companies, Hyderabad for the State of Telangana, for compounding of the offence committed under section 166 read with section 621A of the Companies Act, 1956 (presently section 96 read with section 441 of the Companies Act, 2013) for the years 2012, 2013, 2014 and 2015. These provisions were brought into force on April 1, 2014. 1

The Registrar of Companies, along with his report dated December 18, 2018 has forwarded the above applications filed by the company and its director to the registry of this Bench, which has been numbered as C. A. No. 118/441/HDB/2019 (for the year 2012) ; C. A. No. 114/441/HDB/2019 (for the year 2013) ; C. A. No. 120/441/HDB/2019 (for the year 2014) ; and C. A. No. 116/441/HDB/2019 (for the year 2015).

2 Brief averments of the applications are that the company is a private limited company incorporated on March 15, 2007 under the Companies Act, 1956, having its registered office at 2nd Floor, SVSKL Mansion, H. No. 3-6-369/A/18, tree No. 1, Himayath Nagar, Hyderabad-500 029. The authorised share capital of the company is Rs. 5,00,000 divided into 50,000 equity shares of Rs. 10 each. The issued, subscribed and paid-up capital of the company is Rs. 5,00,000 (divided into 40,000 equity shares of Rs. 10 each and 10,000 preference shares of Rs. 10 each). The main objects of the company are to hold, acquire by purchase, lease, exchange, licence or otherwise, manage, improve, develop, invest in, sell, alienate, dispose off and deal in lands, estates, buildings, easements, hereditaments, flats, houses, halls, godowns, mills tenements, factories, dwelling houses or other landed properties of any description or tenure and any estate or interest therein or rights connected therewith, etc.

3 Counsel for the applicants submitted that the holding company of the applicant-company is Quinn Logistics Sweden AB ("the holding company") and the same was placed into liquidation and a receiver was appointed for the same on July 6, 2011 by the court in Sweden. The receiver caused a change in the management of the board of the petitioner, removing all the directors of the former management and appointing new directors in their place. Accordingly, the shareholders in the extraordinary general meeting held on February 18, 2012 removed all the existing directors and appointed new directors being applicants Nos. 2 to 4 herein. For filing of Form 32 on the MCA website the digital signature of the existing directors were required. However, as all the existing directors have been removed by the receiver, the new directors could not file their Form 32 with the Registrar of Companies, as their names were not added in the "view signatory details" tab of the company on the MCA website. The management of the applicant-company was taken up the matter with the MCA/RD/Registrar of Companies for adding the names of the new directors on the MCA portal for enabling them to file the necessary forms with the Registrar of Companies/other authorities. On January 27, 2017 the name of one director was added on the MCA portal by filing Form DIR-12 and thereafter Form DIR-12 was filed on February 8, 2017 for giving effect

to other directors' appointment with effect from February 18, 2012 and the names of the other new directors got added to the MCA website. The management was unable to proceed with the compliances as the names of the new directors were not on the MCA website and further the directors were unable to get the bank statement for preparing accounts as they were not the signatories for the bank accounts, so they were not the authorised persons to ask the bank for providing the bank statement. The company was inoperative till the previous management handover the records and data, maintained till that date to the new management. Therefore, the books of account and other relevant data could not be prepared and completed in time and consequently, the company could not comply with the applicable compliances under the Companies Act, including holding its annual general meetings. It is further submitted that as there were no transactions since 2012, so the bank account of the company was placed as "inactive" by the banks. Applicants Nos. 2 and 3 herein visited to the bank personally several times since February, 2017, and got the bank account operational and active and obtained bank statement. Thereafter, the company prepared the accounts and got the same audited and then conducted the annual general meeting on July 10, 2017. By the time the company prepared documents for compliance with the applicable provisions, the company was shown as strike off and became inactive for e-filing on the MCA portal and the company was unable to file any documents with the Registrar of Companies and after several requests and follow-ups the status of the company was put to active on September 1, 2017 enabling it to file required forms with the MCA portal and the company filed all the required forms on the same day. The delay was neither intentional nor due to ignorance of the management of the company, but due to circumstances beyond its control.

It is further submitted that in Company Petition No. C. P. (IB) No. 97/7/ **4**
HDB/2017, filed by the company under section 7 of the Insolvency and Bankruptcy Code, 2016 seeking initiation of corporate insolvency resolution process against M/s. Macksoft Tech P. Ltd., the hon'ble Hyderabad Bench of the National Company Law Tribunal, vide its order dated August 11, 2017, inter alia, directed the company to apply for compounding of the non-compliance/delay in making compliances. In compliance of the directions of the National Company Law Tribunal, the company filed Form GNL-1 on September 4, 2017 along with the petitions and necessary documents with Registrar of Companies. In the meanwhile, an appeal was filed by M/s. Macksoft Tech P. Ltd., before the hon'ble National Company Law Appellate Tribunal for challenging the admission order dated August 11, 2017 to the extent that it initiated CIRP against Macksoft Tech P. Ltd.,

under section 7 of the IBC, 2016 and the same appeal did not impact the compounding applications. The hon'ble National Company Law Appellate Tribunal vide its order dated May 21, 2018—(*Mack Soft Tech P. Ltd.* v. *Quinn Logistics India Ltd.* [2018] 3 Comp Cas-OL 9 (NCLAT)) dismissed the appeals filed against hon'ble National Company Law Tribunal order dated August 11, 2017 and held in favour of the company. Form GNL-1 was rejected by the Registrar of Companies on June 22, 2018 with a remark "Appeal pending. Hence rejected". The applicants were not given an opportunity of hearing by the Registrar of Companies before rejection of GNL-1, the hon'ble National Company Law Appellate Tribunal's order dated May 21, 2018 dismissing the appeals could not be brought to the attention of the Registrar of Companies. Hence, the applicants filed the present applications for compounding the violation of the provisions of section 166 read with section 621A of the Companies Act, 1956 (presently section 96 read with section 441 of the Companies Act, 2013). The offence occurred/violated when the company and its officers have failed to convene the annual general meeting as detailed below :

<table>
<tr><th colspan="5">Nature of the offence</th><th>Penal provision</th></tr>
<tr><td colspan="5">The company defaulted in holding the annual general meeting for the year as detailed below within the due date as stipulated under section 96(1) of the Act and thus violated the provisions of the said section of the Act :</td><td rowspan="5">168 of the Companies Act, 1956 and section 99 of the Companies Act, 2013</td></tr>
<tr><td>C. A. No.</td><td>Year</td><td>Due date</td><td>Annual general meeting held on</td><td>Delay in days</td></tr>
<tr><td>118/441/HDB/2019</td><td>31-3-2012</td><td>30-9-2012</td><td>10-7-2017</td><td>1,744</td></tr>
<tr><td>114/441/HDB/2019</td><td>31-3-2013</td><td>30-9-2013</td><td>10-7-2017</td><td>1,378</td></tr>
<tr><td>120/441/HDB/2019</td><td>31-3-2014</td><td>30-9-2014</td><td>10-7-2017</td><td>1,013</td></tr>
<tr><td>116/441/HDB/2019</td><td>31-3-2015</td><td>30-9-2015</td><td>10-7-2017</td><td>648</td></tr>
</table>

Hence, the company has violated the provisions of section 166 of the Companies Act, 1956 (presently section 96 of the Companies Act, 2013).

5 The Registrar of Companies vide his report dated December 3, 2018 has referred to the provisions of section 166 of the Companies Act, 1956 submitted that as per section 168 of the Companies Act, 1956, the company and every officer in default shall be punishable with fine, which may extend to Rs. 50,000 and with a fine of Rs. 2,500 for every day during which default continues. Similarly, the Registrar of Companies referred section 96(1) of the Companies Act, 2013 submitted that as per section 99 of the

Companies Act, 2013, the company and every officer of the company who is in default shall be punishable with fine which may extend to Rs. 1,00,000 and in the case of a continuing default, with a further fine which may extend to Rs. 5,000 for every day during which such default continues. In the report the Registrar of Companies has specified the calculated total amount of fine to be imposed on the company and its directors as detailed below :

| *Sl. No.* | *Defaulter* | *Violation section* | *Period of violation* | *Fine amount* |
|---|---|---|---|---|
| 118/441/HDB/2019 (for the year 2012) | 1. The company<br>2. Mr. Robert Philip Dix, director<br>3. Mr. Paul McGowan, director<br>4. Mr. Bryan O' Neill, director | 166 | From 1-10-2012 to 31-3-2014 (548 days) | Rs. 50,000 + (2,500 × 548 days = 13,70,000) = Rs. 14,20,000 each |
| | | 96 | From 1-4-2014 to 9-7-2017 (1,196 days) | Rs. 1,00,000 + (5,000 × 1,196 days = 59,80,000) = Rs. 60,80,000 each |
| 114/441/HDB/2019 (for the year 2013) | 1. The company<br>2. Mr. Robert Philip Dix, director<br>3. Mr. Paul McGowan, director<br>4. Mr. Bryan O' Neill, director | 166 | From 1-10-2012 to 31-3-2014 (182 days) | Rs. 50,000 + (2,500 × 182 days = 4,55,000) = Rs. 5,05,000 each |
| | | 96 | From 1-4-2014 to 9-7-2017 (1,196 days) | Rs. 1,00,000 + (5,000 × 1,196 days = 59,80,000) = Rs. 60,80,000 each |
| 120/441/HDB/2019 (for the year 2014) | 1. The company<br>2. Mr. Robert Philip Dix, director<br>3. Mr. Paul McGowan, director<br>4. Mr. Bryan O' Neill, director | 96 | From 1-10-2014 to 9-7-2017 (1,013 days) | Rs. 1,00,000 + (5,000 × 1,013 days = 50,65,000) = Rs. 61,65,000 each |
| 116/441/HDB/2019 (for the year 2015) | 1. The company<br>2. Mr. Robert Philip Dix, director<br>3. Mr. Paul McGowan, director<br>4. Mr. Bryan O' Neill, director | 96 | From 1-10-2015 to 9-7-2017 (648 days) | Rs. 1,00,000 + (5,000 × 648 days = 32,40,000) = Rs. 33,40,000 each |

6 Further, the Registrar of Companies stated, in his report that the applicants filed the compounding application pursuant to the directions of the hon'ble National Company Law Tribunal, Hyderabad vide order dated August 11, 2017 in C. P. (I. B.) No. 97/7/HDB/2017. It is also stated that it is the first offence that has come for compounding under this penal section and hence the application may be considered on the merits and appropriate orders may be passed as deem fit and proper under the circumstances of the case.

7 In the light of the above, it is held that the applicant-company and its director as per report of the Registrar of Companies is liable to be penalized under section 168 of the Companies Act, 1956 for the violation of section 166 of the Companies Act, 1956 for the violation continued up to March 31, 2014. Thereafter, liable to be penalized under section 99 for violation of the provisions of sub-section (1) of section 96 of the Companies Act, 2013 from April 1, 2014, i. e., the date Companies Act, 2013 came into force.

8 Heard, the learned PCS representing the applicants. Perused the documents, report of the Registrar of Companies and the order dated August 11, 2017 passed by the hon'ble National Company Law Tribunal in C. P. (I. B.) No. 97/7/HDB/2017. It is seen from the order at paragraph (i) in page No. 40, it was directed that the present applicant-company and its directors to file compounding applications before the Registrar of Companies, Hyderabad for various non-compliances/delayed compliances with regard to various provisions of the Companies Act. Subsequently, the applicants herein have filed the present compounding applications. The PCS representing the applicants pleaded for taking lenient view on the ground that this is the first offence committed by the company. The Registrar of Companies report also confirms the same being the first offence. Therefore, the company applications are allowed, accordingly this Bench is inclined to impose the fine for compounding the alleged violation as under :

| *Sl. No.* | *Defaulter* | *Violation section* | *Period of violation* | *Fine amount* |
|---|---|---|---|---|
| 118/441/HDB/2019 (for the year 2012) | 1. The company 2. Mr. Robert Philip Dix, director 3. Mr. Paul McGowan, director 4. Mr. Bryan O' Neill, director | 166 | From 1-10-2012 to 31-3-2014 (548 days) | Rs. 1,87,000 each applicant |
| | | 96 | From 1-4-2014 to 9-7-2017 (1,196 days) | Rs. 6,98,000 each applicant |
| 114/441/HDB/2019 (for the year 2013) | 1. The company 2. Mr. Robert Philip Dix, director 3. Mr. Paul McGowan, director 4. Mr. Bryan O' Neill, director | 166 | From 1-10-2013 to 31-3-2014 (182 days) | Rs. 95,500 each applicant |
| | | 96 | From 1-4-2014 to 9-7-2017 (1,196 days) | Rs. 6,98,000 each applicant |
| 120/441/HDB/2019 (for the year 2014) | 1. The company 2. Mr. Robert Philip Dix, director 3. Mr. Paul McGowan, director 4. Mr. Bryan O' Neill, director | 96 | From 1-10-2014 to 9-7-2017 (1,013 days) | Rs. 6,06,500 each applicant |
| 116/441/HDB/2019 (for the year 2015) | 1. The company 2. Mr. Robert Philip Dix, director 3. Mr. Paul McGowan, director 4. Mr. Bryan O' Neill, director | 96 | From 1-10-2015 to 9-7-2017 (648 days) | Rs. 4,24,000 each applicant |

The company is directed to remit the penalty from its accounts. The officers-in-default shall pay the penalty from their own resources. The applicants shall comply with the order within three weeks from the date on which the order is uploaded on the website of the National Company Law Tribunal. The company is directed to file a copy of this order along with the required form with the Registrar of Companies, Hyderabad, within the time prescribed. **9**

Accordingly, the company applications, i. e., C. A. Nos. 118, 114, 120 and 116/441/HDB/2019 are stands disposed of. The certified copy of the order is permitted to be issued to the applicants only after deposit of the amount of fine, as per the procedure prescribed. **10**

**[2020] 221 Comp Cas 248 (NCLAT)**

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

# QUINN LOGISTICS INDIA P. LTD. AND OTHERS

***v.***

# REGISTRAR OF COMPANIES, HYDERABAD

**JARAT KUMAR JAIN** J. ***(Judicial Member)*, BALVINDER SINGH** and **DR. ASHOK KUMAR MISHRA** ***(Technical Members)***

June 12, 2020.

**HF ▸ Respondent**

OFFENCES AND PROSECUTION—COMPOUNDING OF OFFENCE—IMPOSITION OF FINE—QUANTUM OF FINE—TRIBUNAL IMPOSING LESS THAN ONE-FIFTH OF MAXIMUM AMOUNT—LENIENT VIEW TAKEN BY TRIBUNAL IN IMPOSING PENALTY—NO GROUND TO INTERFERE WITH ORDER—COMPANIES ACT, 1956, ss. 166, 621A—COMPANIES ACT, 2013, ss. 96, 441.

*The appellants' applications for compounding of offences committed under section 166 read with section 621A of the Companies Act, 1956 (section 96 read with section 441 of the Companies Act, 2013) were subject to payment of penalty of Rs. 27,09,000 by each appellant, aggregating to a total Rs. 1,08,36,000. On an appeal seeking reduction of penalty :*

Held, *dismissing the appeal, that the Tribunal had imposed penalty Rs. 27,09,000 which was less than one-fifth of the maximum amount. The Tribunal had undertaken a lenient view in imposing penalty. There was no ground to interfere with the order.*

*Order of the National Company Law Tribunal in* QUINN LOGISTICS INDIA P. LTD., *In re* [2020] 221 Comp Cas 240 (NCLT) *affirmed*.

QUINN LOGISTICS INDIA P. LTD., *In re* [2020] 221 Comp Cas 240 (NCLT) (para 1) *and* VIAVI SOLUTIONS INDIA P. LTD. *v.* REGISTRAR OF COMPANIES, NCT OF DELHI AND HARYANA [2017] 203 Comp Cas 165 (NCLAT) (para 12) *referred to*.

**Company Appeal (A. T.) No. 238 of 2019.**

*Krishnendu Datta, Swapnil Gupta* and *Ms. Shivaamika Sinha*, Advocates, for the appellant.

*Sanjib K. Mohanty*, Senior Panel Central Government Counsel, with *Amit Acharya,* Advocates, for the respondent.

**JUDGMENT**

The judgment of the Appellate Tribunal was delivered by

JARAT KUMAR JAIN J. ***(Judicial Member)***.—The appellant-Quinn Logis- 1
tics India P. Ltd., and its three directors filed this appeal against the order dated July 19, 2019—(*Quinn Logistics India P. Ltd., In re* [2020] 221 Comp Cas 240 (NCLT)) whereby National Company Law Tribunal, Hyderabad allowed the compounding application subject to payment of the penalty of Rs. 27,09,000 by each appellant total Rs. 1,08,36,000.

The appellant-company was incorporated on March 15, 2007 as a pri- 2
vate limited company under the provisions of the Companies Act, 1956 in the State of Telangana (formerly State of Andhra Pradesh). Appellant No. 1-company is a subsidiary of Quinn Logistics Sweden AB. The Sweden Quinn Logistics Company was placed in bankruptcy due to debts owed to the Irish Government owned Irish Bank Resolution Corporation on July 6, 2011. Pursuant to the appointment of the receiver Mr. Leif Baecklund on July 6, 2011, Quinn Logistics Sweden AB took steps to requisition an extraordinary general meeting of the appellant-company on February 18, 2012 in which the receiver replaced the board and appointed his nominees on the board being appellants Nos. 2 to 4. The appellant-company could not comply the applicable compliances under the Companies Act for the years 2012, 2013, 2014 and 2015 including holding its annual general meetings. After taking bank account statements, the company prepared the accounts and got the same audited and then conducted the annual general meeting on July 10, 2017. The National Company Law Tribunal, Hyderabad Bench vide its order dated August 11, 2017, inter alia, directed the company to apply for compounding of the non-compliances/delay in making compliances. In compliance of the directions, the appellants filed compounding applications under section 166 read with section 621A of the Companies Act, 1956 (presently section 96 read with section 441 of the Companies Act, 2013). These applications have been numbered C. A. No. 118/441/HDB/2019 (for the year 2012), C. A. No. 114/441/HDB/2019 (for the year 2013), C. A. No. 120/441/HDB/2019 (for the year 2014) and C. A. No. 116/441/HDB/2019 (for the year 2015). The Registrar of Companies along with his report dated December 3, 2018 has forwarded these applications to the registry of the National Company Law Tribunal, Hyderabad Bench.

The learned Tribunal held that the appellant-company and its directors 3
are liable to be penalized under section 168 of the Companies Act, 1956 for the violation of section 166 of the Companies Act, 1956 the violation continued up to March 31, 2014 thereafter, they are liable to be penalized

under section 99 of the Companies Act, 2013 for violation of the sub-section (1) section 96 of the Companies Act, 2013 with effect from April 1, 2014. The learned Tribunal after hearing the parties allowed the compounding applications subject to pay the penalty as indicated above. Being aggrieved with this order, the appellants filed this appeal.

4 Learned counsel for the appellants submitted that appellants Nos. 2 to 4 appointed as directors at the instance of bankruptcy receiver. Therefore, the erstwhile directors who were all removed by the receiver did not co-operate with the new directors, i. e., appellants Nos. 2 to 4 and they took active steps to prevent the appellants from getting control of the appellant-company. The appointment of appellants Nos. 2 to 4 has been challenged in a civil suit and civil court has granted injunction against the appointment of appellants as directors. However, subsequently the injunction vacated in appeal by the High Court of Delhi. The appellants wrote to the Registrar of Companies on November 8, 2012 explaining that due to requirement of signature of an ex-director, the appellants could not register their appointment with the Registrar of Companies. Hence, they are unable to take further steps necessary to comply the compliances of the appellant-company.

5 It is further submitted by learned counsel for the appellants that in December, 2012 R. N. Marwaha and Co., filed a company petition against appellant No. 1 for winding up. However, subsequently the hon'ble High Court of Andhra Pradesh was pleased to recall the order of winding up on August 13, 2013. The receiver and the new management wrote letters dated November 29, 2012, July 25, 2016 November 7, 2016 and December 1, 2016 to the Registrar of Companies, Hyderabad on the basis of representation and persistent follow ups on January 27, 2017. The Registrar of Companies, Hyderabad (respondent No. 1) finally permitted the registration of the name of one director with MCA portal. Then, the appellant-company filed Form DIR-12 on February 8, 2017.

6 The name of new directors were not on the MCA Website, therefore, directors were not able to get the bank statement to prepare the accounts as they were not signatory of the bank accounts. In these circumstances, the appellants could not comply the compliances under the Companies Act including holding its annual general meeting.

7 Learned counsel for the appellant submits that, it is evident that the delay in compliances was neither intentional nor due to any ignorance of the management of the company but due to factors beyond its control.

8 It is further submitted that appellants Nos. 2 to 4 are professional, have no personal interest in the appellant-company, they are appointed as nominees of the Swedish receiver. Learned counsel for the appellant further

submits that while imposing the exorbitant fine on the directors, the National Company Law Tribunal failed to consider the mitigating factors due to which it was impossible for the directors to comply with the mandate of law in relevant period. The learned National Company Law Tribunal has imposed the penalty on the appellants total Rs. 1,08,36,000 which is unreasonable and disproportionate to the default. Particularly, when the default has already been made good. Hence, considering the extreme circumstances that existed in the present case, penalty amount may be reduced.

On the other hand, learned Senior Panel Counsel, Central Government **9** submits that as per the calculation, every appellant is liable to pay penalty total Rs. 2,35,90,000 whereas the Tribunal has taken a very lenient view and imposed only penalty of Rs. 27,09,000 on each appellant. In such circumstances, it cannot be said that the Tribunal has not considered the mitigating circumstances and imposed an exorbitant fine.

After hearing learned counsel for the parties, we have gone through the **10** record.

Admittedly, appellants Nos. 2 to 4 did not hold annual general meeting **11** of the company for the years 2012, 2013, 2014 and 2015 and thus violated the provisions under section 166 of the Companies Act which is punishable under section 168 of the Companies Act, 1956 till March 31, 2014. Thereafter, violated the provisions under sub-section (1) of section 96 of the Companies Act, 2013 which is punishable under section 99 of the Companies Act, 2013. The Act came into force on April 1, 2014. Hence, the period of violation is April 1, 2014 to July 9, 2017. The Registrar of Companies in his report has mentioned the total amount of penalty to be imposed on each appellant which is 2,35,90,000 however, the learned Tribunal has imposed penalty on each appellant 27,09,000.

This Tribunal in the case of Company Appeal (A. T.) Nos. 49, 50, 51, 52 **12** and 53 of 2016 decided on February 28, 2017 (*Viavi Solutions India P. Ltd.* v. *Registrar of Companies, NCT of Delhi and Haryana* [2017] 203 Comp Cas 165 (NCLAT)) held as under (page 173 of 203 Comp Cas) :

> "We agree with the submissions made on behalf of the appellant(s) that while compounding any offence the Tribunal is required to notice different factors, such as grounds taken by the applications, nature of offence, etc. There should be consistence in compounding similar offence, if the defaulters are similarly situated and the grounds taken are similar. Lesser amount cannot be imposed in one case and higher amount in another, for same offence, if similar ground is taken. Different Benches of the Tribunal are required to be consistent in passing

order compounding any offence and are required to notice the precedence, i. e., earlier order if any passed in one or other case for similar offence.

Depending on nature of offence and its gravity and if it is pleaded by the applicant or reported by Registrar of Companies, the Tribunal is required to notice the relevant factors while compounding any offence, such as :

(i) The gravity of offence.

(ii) The act is intentional or unintentional.

(iii) The maximum punishment prescribed for such offence, such as fine or imprisonment or both fine and imprisonment.

(iv) The report of the Registrar of Companies.

(v) The period of default.

(vi) Whether petition for compounding is suo motu before or after notice from the Registrar of Companies or after imposition of the punishment or during the pendency of a proceeding.

(vii) The defaulter has made good of the default.

(viii) Financial condition of the company and other defaulters.

(ix) Offence is continuous or one time.

(x) Similar offence earlier committed or not.

(xi) The act of defaulters is prejudicial to the interest of the member(s) or company of public interest or not.

(xii) Share value of the company, etc.

*Company Appeal No. 49 of 2016 . . .*

*Company Appeal No. 50 of 2016*

In this appeal the allegation relates to contravention of section 166 of the Act 1956. The annual general meetings of the company were not held regularly. The maximum fine for the period from January 1, 2011 to November 30, 2015 was calculated as per section 168 of the Act 1956 which stipulates Rs. 2,500 per day fine rate and fixed fine of Rs. 50,000. The total comes to Rs. 54,72,500 to be paid by each three defaulters.

In this case the Tribunal has deemed it sufficient to impose a fine of Rs. 10 lakhs on each of the defaulting parties which is less than one-fifth of maximum amount.

In this appeal, as we find that the appellants have only taken plea that the violation occurred due to inadvertence and without intention and not prejudicial to the interest of any member or creditors or

others dealing with the company and nor did affect public interest, we are of the view that the Tribunal rightly brought down the penalty which is less than one-fifth of the maximum amount. In this background no interference is called for against the impugned order."

In this appeal, the same grounds are taken for reducing the amount 13
which were taken in Company Appeal No. 50 of 2016.

The learned Tribunal to maintain the consistency has to impose penalty 14
which is as per calculation maximum fine Rs. 2,35,90,000. One-fifth of the maximum amount is Rs. 47,18,000. However, the learned Tribunal has imposed penalty Rs. 27,09,000 which is less than one-fifth of the maximum amount. Therefore, we are of the view that the learned Tribunal has undertaken a lenient view in imposing penalty.

We found no ground to interfere in the impugned order. Hence, the 15
appeal is hereby dismissed. No costs.

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**[2020] 221 Comp Cas 253 (NCLAT)**

[Before the National Company Law Appellate Tribunal — New Delhi]

## ARPIT AGARWAL

*v.*

## SKYTECH CONSTRUCTIONS P. LTD. AND OTHERS

**Jarat Kumar Jain J.** ***(Judicial Member)*****, Balvinder Singh** and **Dr. Ashok Kumar Mishra** ***(Technical Members)***

June 24, 2020.

**HF ▸ Remanded**

Repayment of deposits—Deposit—Definition—Advance paid against purchase of flat whether "deposit"—Tribunal not considering issue—Matter remanded—Companies Act, 2013, s. 2(31)—Companies (Acceptance of Deposits) Rules, 2014, r. 2(c)(xii).

*The petition filed by the appellant to consider the advance deposited by the petitioner with respondent No. 1-company as falling under the definition of "deposit" as under section 2(31) of the Companies Act, 2013 read with rule 2(c)(xii) of the Companies (Acceptance of Deposits) Rules, 2014, was dismissed by the Tribunal observing that there were numerous proceedings pending as against the parties initiated by each other and consideration by Tribunal would result only in multiplicity of proceedings. On appeal :*

Held, *that determination of the issue of "deposit" would require looking into the facts and the nature of the transactions which would call for more submissions to be examined to arrive at a conclusion. Therefore, the matter was to be remitted to decide whether the advance received by the company against allotment of a flat was "deposit" in terms of section 2(31) of the Act read with rule 2(c)(xii) of the Companies (Acceptance and Deposits) Rules, 2014 and whether the Tribunal had the jurisdiction under the Act.*

STEEL AUTHORITY OF INDIA LTD., BHILAI STEEL PLANT, BHILAI *v.* CERC [2014] SCC Online APTEL (para 13) *referred to.*

**Company Appeal (AT) No. 37 of 2019.**

*Arpit Agarwal*, appellant-in-person.

*B. P. Singh* and *Ms. Geetanjali Tyagi*, for the respondents.

**JUDGMENT**

The judgment of the Appellate Tribunal was delivered by

1 BALVINDER SINGH ***(Technical Member)***.—The present appeal has been filed by the appellant under section 421 of the Companies Act, 2013 against the judgment dated November 20, 2018 passed by the National Company Law Tribunal, New Delhi in C. P. No. 234(ND) of 2017. The appellant has sought the following relief :

1. Allow the appeal and set aside the order dated November 20, 2018 passed by the National Company Law Tribunal in C. P. No. 234(ND) of 2017.

2. Direct the National Company Law Tribunal

Either

(a) To pass a detailed/reasoned order on merit on all issues raised in the company petition and to adjudicate the matter by giving a reasonable hearing opportunity to the appellant based on written submissions made by the appellant (in company petition, rejoinder, additional evidences and arguments) ; and

(b) To deliberate and dispose the interim application of the appellant on merit, filed for cross examination of respondents Nos. 2 to 4 under section 424(2) of the Companies Act, 2013 in the interest of justice.

OR

(c) To forward the company petition file (petition, rejoinder, additional evidences, cross/summon application and written arguments) to the special court to adjudicate whether offense is established against respondents under sections 74(3), 75 and 447 of the Companies Act, 2013 and further decision on punishment as the special court may thinks fit.

3. To pass an order that observations of the National Company Law Tribunal in paragraph 8 of the final order that several proceedings are pending and property was constructed when advance was made are invalid and devoid of merit.

4. To pass any other order(s) deem fit by this hon'ble Appellate Tribunal.

2 The facts of the case are that the appellant booked a flat with respondent No. 1 and gave Rs. 48.99 lakhs in June and July, 2012 against booking of Unit No. G-402 on fourth floor in Skytech Matrott Project, Sector 76, Noida. The receipts of the said amount were duly given by the first respondent. The appellant stated that substantial amount being 95 per cent. of the cost of the property had been deposited, however, by virtue of the clauses of BBA, the developer retained the authority over the property and they did not give any lien of the property or interest of the property. The appellant stated that he tried to contact the first respondent many times in relation to the progress of the property, the respondent did not contact him but started threatening him with the sole objective that the appellant to stop asking the status of the funds deposited by him.

3 The appellant stated that the respondents have played a fraud with him and taken the deposit and filed company petition before the National Company Law Tribunal, New Delhi on September 1, 2017 and sought the following relief :

(i) To admit the application and pass an order that the advance deposited by the petitioner to respondent No. 1-company comes under the definition of "deposit" as stated in section 2(31) of the Companies Act, 2013 read with the rule 2(c)(xii) of the Companies (Acceptance of Deposits) Rules, 2014.

(ii) To impose fine on respondent No. 1 for an amount of ten crore rupees and punish the defaulting directors (respondents Nos. 2 and 3) with imprisonment of seven years along with the fine of two crore rupees on each director in accordance with section 74(3) of the Companies Act, 2013.

(iii) To pass an order that deposits had been accepted by respondent No. 1 with the intent to defraud the depositor and for fraudulent purposes and hence, to pass orders against respondents Nos. 2, 3 and 4 as the Tribunal deem fit in the circumstances of the case in accordance with section 75(1) of the Companies Act, 2013 read with section 447 of the Act.

(iv) To pass order that the status of the petitioner is a "depositor" as defined in rule 2(d) of the Companies (Acceptance of Deposits) Rules, 2014 and to pass an order to allow the petitioner to file any further suit,

proceedings or other action under section 75(2) including but not limited to further approach competent authorities, i.e., Reserve Bank of India, National Company law Tribunal, SEBI, etc., under the provisions other than those mentioned herein this petition.

(v) To cause a public announcement/advertisement so that other depositors who have paid advance to respondent No. 2 under the definition of deposits in the Companies Act, 2013 can also seek justice against respondent No. 1 and its directors.

(vi) To allow losses and damages for an amount of Rs. 2 crores, to compensate the actual loss and sufferings of the petitioner, to be recovered from the respondents in accordance with section 75(1).

(vii) That such further orders be passed as the Tribunal deem fit in the circumstances of the case.

4 The appellant stated that he also had filed complaint under section 21 of the Consumer Protection Act, 1986 before the National Consumer Disputes Redressal Commission, New Delhi on June 19, 2015.

5 The respondent filed their reply and stated that the money given against a real estate is not included in the term of "deposit" as per rule 2(c)xii) of the Companies (Acceptance of Deposits) Rules, 2014. The respondent stated that the appellant has filed a case before the National Consumer Disputes Redressal Commission and similar relief has been sought. The respondent stated that criminal case has been filed by respondent No. 1 against the appellant and the petition filed by the appellant is counter blast to the said case and other cases. The respondents stated that the appellant was offered possession of the flat vide letter dated August 5, 2015 (annexure 5 of reply) and email dated July 17, 2017 (page 148 of documents filed by respondents) but the appellant did not come forward to take the possession.

6 After hearing the parties the National Company Law Tribunal delivered the judgment dated November 20, 2018. The relevant portion of the judgment is as under :

> "8. Without going into the legal issues raised herein whether the amount advanced against the property which has already been constructed at the time of making advance payment by the petitioner and having been appropriated by respondent No. 1 against the property agreed to be sold and whether the same constitutes a deposit, we find that there are numerous proceedings pending as against the parties initiated by each other consideration by this Tribunal will result only in multiplicity of proceedings as between before various forums

which is required to be eschewed and in the said circumstances this petition is dismissed but without costs."

7 Being aggrieved by the said judgment, the appellant has filed the present appeal.

8 The appellant has stated that he had advanced his hard earned life savings of Rs. 48.99 lakhs to the first respondent in June and July, 2012 for an immovable property. The appellant stated that the second and third respondents had induced the appellant to pay advance with the intent of defrauding the amount and based on fraudulent representation that complete property along with approvals and clearances shall be delivered by March, 2013 and that property is in a pure residential complex. The appellant stated that false property complex layout was shown to him and actual lay out had a large commercial sub-complex also. The appellant stated that respondents had started other project by incorporating the fifth respondent and utilised his funds. The appellant stated that the property was never delivered to him.

9 The appellant stated that the Companies Act, 2013 does not allow a private company to accept or hold deposit from public. The appellant stated that since specific conditions defined in the Deposit Rules for transaction by companies against immovable property are not met, therefore, the appellant's advance is deposit under section 2(31) of the Companies Act, 2013. The appellant stated that allegations under sections 2(31), 74(3), 75 and 447 of the Companies Act, 2013 were duly supported by numerous legal averments, evidences and facts which were not considered by National Company Law Tribunal. The appellant stated that even if few facts in the pendency of the case before NCDRC and company petition at National Company Law Tribunal are common, dismissal of petition is against the principle/law defined by the apex court in various judgments that civil and criminal remedy can be sought separately. The appellant stated that pendency of case at NCDRC has no conflict with company petition as appellant had sought punishment under company law for offense on appellant's deposit in the company petition against the first respondent and accused directors second to third respondents. Lastly the appellant prayed that the appeal may be allowed and judgment dated November 20, 2018 be set aside and detailed/reasoned order on merit on all issues raised in the company petition and to adjudicate the matter by giving a reasonable hearing opportunity to appellant or the company petition file be forwarded to the Special Court to adjudicate whether offense is established against the respondent under sections 74(3), 75 and 447 of the Companies

Act, 2013 and further decision on punishment as the Special Court may think fit, etc.

10 The appellant stated that the observations of the National Company Law Tribunal that numerous cases are pending is invalid and stated that only NCDRC matter is pending. The appellant stated that the observations of the National Company Law Tribunal that National Company Law Tribunal and NCDRC are on same cause of action is legally invalid. The appellant further stated that the remarks of the National Company Law Tribunal at paragraph 8 that property was already constructed when booked and advance adjusted against property are invalid as these remarks made without considering on record material placed by the appellant and against the natural justice.

11 In reply, the respondent has stated that the appellant booked a flat in the project of the first respondent. The respondent stated that is incorrect that the respondents played a fraud with the appellant. The respondent stated that it is wrong that false property complex layout was shown to the appellant and actual lay out had a large commercial sub-complex. The respondent stated that it is wrong that the respondents had started another project by incorporating the fifth respondent. The respondent stated that the instalment of the appellant were paid by bank and the same were used for further construction of the project, in which the appellant had booked the flat. The respondent stated that the construction work was got delayed for about 10 months due to farmers' agitation and intervention of National Green Tribunal. The respondent stated that there was no contention of the appellant before the National Company Law Tribunal that since specific condition defined in the Deposit Rules for transaction by companies against immovable property are not met, appellant's advance is deposit under section 2(31) of the Companies Act, 2013. The respondent stated that the respondent have lawfully complied by all the provisions of the Companies Act, 2013 and the Rules of the Companies (Acceptance of Deposits) Rules, 2014. The respondent stated that the appellant has been asked to take over the possession of the property. The respondent stated that the appellant is in the habit of filing cases against the respondent and the numerous cases are pending between the parties.

12 The respondent stated that the appellant filed a criminal complaint with SHO, sector 71, Noida, on February 28, 2015, against the respondent thereby levelling various charges including not handing over the possession. The police after proper investigation and inquiry found the allegations to be baseless and fabricated and submitted final opinion in all complaints.

Lastly respondent stated that the National Company Law Tribunal has rightly dismissed the petition and stated that the appeal may be dismissed.

13 The respondent stated that the appellant has filed a complaint under section 21 of the Consumer Protection Act, 1956 and the appellant cannot avail another remedy for similar cause of action. The respondent stated that the hon'ble Supreme Court of India in the case of *Steel Authority of India Ltd., Bhilai Steel Plant, Bhilai* v. *CERC* [2014] SCC Online APTEL held that "We hold on principle that the appeal is not maintainable when the review is pending before the Regulatory Commission on the same issues". The respondent stated that when the case is pending before the NCDRC, New Delhi, the appellant cannot be allowed to agitate the same before this Tribunal on the same cause of action. The respondent stated that the National Company Law Tribunal has rightly dismissed the petition.

14 Rejoinder have been filed by the appellant who reiterated the contents of the appeal and the company petition.

15 We have heard the parties and perused the regard.

16 Before we proceed further we may put on record that at the time of hearing firstly both the parties were given an opportunity to settle the matter out of court. But both the parties stated before the Appellate Tribunal that they could not reach to a settlement due to one reason or other.

17 Further we find from the record that the FIR has been lodged by the third respondent on March 26, 2015 with SHO PS Saraswati Vihar and DCP Ashok Vihar. FIR has also been lodged on May 20, 2015 by the third respondent with P. S. Netaji Subhash Chandra Place. We also note that appellant filed a criminal complaint with SHO, Sector 71, Noida on February 28, 2015, against the respondent thereby levelling various charges including not handing over the possession. We have also gone through the order dated September 18, 2017 (page 70 of appeal) passed by the hon'ble Supreme Court of India. In this order the hon'ble Supreme Court has allowed the respondent to move to the National Consumer Disputes Redressal Commission. The relevant portion of the order is as under :

> "The special leave petitions are allowed to be withdrawn without prejudice to the remedy of moving to the National Consumer Disputes Redressal Commission."

A criminal complaint as per Chapter XIV and under section 190/200 of the Code of Criminal Procedure, 1973 has been filed on March 18, 2015 by the first respondent before the hon'ble Court of ACMM, Rohini Court, Delhi against the appellant. We also note that the complaint filed on June 19, 2015, before the NCDRC is still pending. On going through the above records, we find that all these complaints and FIR has been filed by parties

against each other prior to filing of petition before the National Company Law Tribunal on September 1, 2017.

18 The appellant argued and stressed that the respondent had received advance/deposit as per section 2(31) of the Companies Act, 2013 read with rule 2(c)(xii)(b) of the Companies (Acceptance of Deposits) Rules, 2013 in consideration for immovable property (Flat) under an agreement or arrangement, however, it fraudulently not adjusted the advance against the property in terms of the agreement or arrangement. The appellant further argued that the first respondent and its directors failed to secure necessary approvals and permissions in terms of the agreement to deal in the properties for which the money was taken. The appellant further argued that the first respondent is a private limited company, not allowed to undertake any deposit in terms of sections 73 and 74 of the Companies Act, 2013 and the first respondent has breached the law, i.e., sections 73 and 74 of the Companies Act, 2013 by accepting the deposit form the appellant.

19 The respondent argued that there was no contention of the appellant before the National Company Law Tribunal that since specific condition defined in the Deposit Rules for transaction by companies against immovable property are not met, appellant's advance is deposit under section 2(31) of the Companies Act, 2013. The respondent argued that the respondent have lawfully complied by all the provisions of the Companies Act, 2013 and the Rules of the Companies (Acceptance of Deposits) Rules, 2014. The respondent argued that the appellant has been asked to take over the possession of the property. The respondent stated that the appellant is in the habit of filing cases against the respondent and the numerous cases are pending between the parties. The respondent argued that they have obtained necessary approvals and permissions in terms of the agreement to deal in the properties for which the money was taken. The respondent further argued that the appellant had paid the amount against booking of flat and the possession has been offered to him and the amount has been utilized in constructing the flats. The respondent further argued that they have not breached the law, i. e., sections 73 and 74 of the Companies Act, 2013.

20 We have heard the parties on this issue. We note that the appellant had raised this issue in his company petition stating that he had advanced against immovable property is public deposit under section 2(31) of the Companies Act, 2013 and his main contention was that the advance against immovable property is deposit and such deposit was given to the first respondent based on fraudulent representations of the second and third respondent as their sole intent was to defraud the appellant. The

appellant had prayed that the respondents may be punished under section 74(3) under the Companies Act, 2013. Definition of "deposit" is given in section 2(31) of the Companies Act, 2013 which is as follows :

> "(31) 'deposit' includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India."

The appellant had also raised the contention that the respondents may be punished under section 74(3) of the Companies Act, 2013. We also note that the respondent had stated that the money paid towards the allotment of flat does not come under the purview of definition of "deposit" as given under section 2(31) of the Companies Act, 2013 read with sections 74(3), 75(1) and 447 of the Companies Act, 2013 and further as the term defined under rule 2(c)(xii) of the Companies (Acceptance of Deposits) Rules, 2014.

On going through the impugned order we find that the appellant has **21** raised the issue of "deposit" in its company petition. But this issue has not been determined by the National Company Law Tribunal. Such determination will requiring looking into the facts and the nature of the transactions which may call for more submissions to be examined to arrive at a conclusion. In the absence of such exercise having been done by the National Company Law Tribunal, we are unable to express our opinion on this issue. Therefore, we remit the matter back to the National Company Law Tribunal to decide whether the advance received by the respondent against allotment of flat is "deposit" in terms of section 2(31) of the Companies Act, 2013 read with rule 2(c)(xii) of the Companies (Acceptance and Deposits) Rules, 2014 and whether the Tribunal has the jurisdiction under the Companies Act, 2013.

In view of the aforegoing discussions and observations, the appeal is **22** disposed of by directing the National Company Law Tribunal to rehear the matter on the above issue and dispose off the petition as per law.

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**[2020] 221 Comp Cas 262 (NCLAT)**

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

## MRS. ARTI MEENAKSHI MUTHIAH

*v.*

## MCTM GLOBAL INVESTMENTS P. LTD. AND OTHERS

**JARAT KUMAR JAIN** J. ***(Judicial Member)*** and
**BALVINDER SINGH** ***(Technical Member)***

June 11, 2020.

**HF ▶ Respondent**

OPPRESSION AND MISMANAGEMENT—OPPRESSION—PURCHASE OF PROPERTY—COMMERCIAL DECISION OF COMPANY—ADDING ADDITIONAL SIGNATORY TO BANK ACCOUNT NOT OPPRESSION—PETITION DISMISSED BY TRIBUNAL—PROPER—COMPANIES ACT, 1956, SS. 397, 398, 402.

*The petition filed under sections 397 and 398 read with section 402 of the Companies Act, 1956, alleging oppression and mismanagement by the respondents was dismissed by the Tribunal. On appeal :*

Held, *dismissing the appeal, that the purchase of property was a commercial decision of the company which could not be questioned as it might either result in profit or loss and the commercial decision did not require any judicial interference. There was no illegality in appointment of the fourth respondent as independent director. There was no illegally in freezing the account by the second respondent. Merely adding an additional signatory to a bank account could not be claimed to be an act of oppression especially when she continued to be one of the signatories. There was no merit in the appeal.*

**Company Appeal (A. T.) No. 315 of 2018.**

*Nikhil Nayyar*, Senior Advocate, *Ms. Priyadarshini N.* and *Divyanshu Rai*, for the appellant.

*Santhanan Krishnan*, *Ms. Namitha Mathews*, *Jayanth Vishwanathan* and *Pulkit Malhotra*, for the respondents.

### JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 BALVINDER SINGH ***(Technical Member)***.—The present appeal has been filed by the appellant under section 421 of the Companies Act, 2013 for setting aside the impugned order dated September 4, 2018 passed by the National Company Law Tribunal, Chennai in T. C. P. No. 163 of 2016 (C. P. No. 23 of 2015) seeking the following reliefs :

(i) That the impugned order dated September 4, 2018, passed by the hon'ble National Company Law Tribunal, Single Bench, Chennai in T. C. P. No. 163 of 2016 (C. P. No. 23 of 2016).

(ii) Any such other orders as this hon'ble Tribunal may deem fit in the interest of the facts and circumstances of the present case.

**2** The brief facts of the case are that the first respondent-company is a closely held family company. The company was incorporated by Mr. M. Ct. Muthiah in 1988 and the shareholding was equally held by Mr. M. Ct. Muthiah and his wife, the second respondent. The authorised capital of the first respondent-company is Rs. 50,00,000 divided into 5,00,000 equity shares of Rs.10 each and the paid-up share capital of the company is Rs. 6,67,130 divided into 66,713 shares of Rs. 10 each. Mr. M. Ct. Muthiah died in September, 2006 and his shareholding in the first respondent was equally divided into his legal heirs. The details of the shareholding of the appellant, second and third respondent in the first respondent-company, after the death of Mr. M. Ct. Muthiah are asunder :

| | | | |
|---|---|---|---|
| Appellant | 17 per cent. | - | 11,419 shares |
| Second respondent | 66 per cent. | - | 43,875 shares |
| Third respondent | 17 per cent. | - | 11,419 shares |

**3** The appellant (original petitioner) had filed a Company Petition No. 23 of 2015 before the Company Law Board, Chennai against the respondents under sections 397 and 398 read with section 402 of the Companies Act, 1956/2013 alleging oppression and mismanagement by the respondents and after establishment of the National Company Law Tribunal the petition was transferred to the National Company Law Tribunal, Chennai. The original petitioner/appellant had sought the following reliefs :

(i) To declare that the purported board meeting of the company convened on January 6, 2015, is invalid, non est and illegal and to declare the alleged minutes to be fabricated ;

(ii) To declare the appointment of the fourth respondent, Ms. Gomathy Subramaniam, as null and void ;

(iii) To grant a consequent order of permanent injunction restraining the company, its agents, servants, employees from giving effect any of the purported resolutions that were purportedly passed at the alleged board meeting purported to be held on January 6, 2015 ;

(iv) Surcharge the second and third respondents in respect of the amounts of Rs. 1,49,1218 and Rs. 5,08,782 paid to Mr. C. T. Malayandi, without any authority whatsoever, along with the interest from the date of such payment ;

(v) Surcharge the third respondent for the loss caused to the first respondent-company due to the acts of the third respondent and direct the third respondent to pay to the first respondent-company an amount of Rs. 15,35,21,000 being the cost of purchase of property located in Alagappa Road being land and building situated at R. S. No. 11/1(Part) admeasuring 6000.024 sq.ft. in the name of the company and an amount of Rs. 2.47 crores taken from the company for the purchase of the portion of property in Alagappa Road in her personal name along with interest from the date of such withdrawal ;

(vi) To direct the appointment of an independent valuer for determining the fair value of the shares of the first respondent-company and to direct the second and third respondents to either buy the shares held by the petitioner or sell the shares held by the second and third respondents in favour of the petitioners at the fair value to be determined by independent valuer through such process as may be determined by this hon'ble Bench as fair and reasonable ;

(vii) To award costs relating to the present proceedings.

4 The original petitioner had also sought the following interim relief from the National Company Law Tribunal, Chennai :

(i) To direct the appointment of an independent Chartered Accountant for verifying and auditing the accounts of the first respondent-company and direct the chartered accountant as may be appointed by this hon'ble Bench to submit a report before this hon'ble Bench on the financial statements of the first respondent-company for the year ended March 31, 2013 and March 31, 2014, pending disposal of the company petition ;

(ii) To grant an order of temporary injunction restraining the respondents from altering the shareholding pattern of the company and to maintain the shareholding as set out in paragraph 3.7 hereinabove without the leave of this hon'ble Bench pending disposal of the company petition ;

(iii) To grant an order of temporary injunction restraining not to give effect to the board resolution allegedly passed on January 6, 2015 and restraining the fourth respondent, Ms. Gomathy Subramaniam from acting as director ;

(iv) To grant an order of temporary injunction from altering the composition of the board of directors, being the petitioner, the second respondent and third respondent, or induct any other person as director, without the leave of this hon'ble Bench, pending disposal of the company petition ;

(v) To direct that in respect of a quorum for any meeting of the board of directors of the first respondent-company or the meeting of the

shareholders in respect of the first respondent-company, shall require the presence of the petitioner or her nominee, pending disposal of the company petition ;

(vi) To grant an order of temporary injunction restraining the respondents from alienating, disposing off or in any manner encumbering the properties of the company, pending disposal of the company petition ;

(vii) To issue a direction that the operation of Indian Overseas Bank accounts bearing Account No. 010902000970402, Account No. 010902000970911 and Account No. 01090200075561 be frozen pending disposal of the company petition ;

(viii) To direct the appointment of an independent observer (at the cost of the first respondent-company) to conduct the board meeting and the general meetings of the company in a fair and transparent manner in accordance with law, pending disposal of the company petition ; and

(ix) Pass such further or other order as this hon'ble Bench may deem fit and proper in the circumstances of the case and thus render justice.

The respondent did not file the reply but only filed reply to the interim 5
prayers sought by the petitioner. The constraint on the part of the respondents was that the original petitioner is the daughter of the second respondent and sister of the third respondent and some of the allegations against the original petitioner were of such nature, if highlighted in the reply, would have embarrassed the family. The respondent averred that the petitioner cannot restrain any shareholders in transferring their shares and every shareholder has a right to transfer his shares. The respondent stated that the appointment of the fourth respondent as director was properly done at the board meeting held on January 6, 2015 and the same is legal and binding. The respondent stated that the original petitioner/appellant is a minority shareholder and the decision of the board, approved by the majority cannot be questioned by the original petitioner. The respondent stated that they will proceed as per the Companies Act and rules made thereunder to take important decision for the benefit of the first respondent and the important decisions cannot wait for the presence of the original petitioner when the original petitioner does not attend board meetings and the general meetings. The respondent stated that the Act does not provide nominees being appointed for individual directors. The respondent denied that they are disposing the properties of the first respondent-company and it would be the board's decision on any purchase or disposal of properties as per the Act. The respondent stated that the accounts of the first respondent cannot be frozen. The respondent stated that the independent

observer cannot be appointed in the board and the general meetings. The respondent prayed for disposal of the petition.

6 The original petitioner filed its rejoinder and reiterated the contents of petition.

7 The respondent filed sur-rejoinder and denied all the allegations levelled in the rejoinder and has specifically stated that there is no intention to oust the original petitioner from the company.

8 The original petitioner/appellant filed C. A. No. 3 of 2016 seeking the following reliefs :

(i) To direct that the bank accounts of the first respondent ought to be jointly operated by the applicant and by either the second or the third respondent ;

(ii) To direct that an administrator be appointed to take over and oversee the affairs of the first respondent, pending disposal of the company petitioner ;

(iii) Such further order or orders and/or direction or directions as this hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

9 After hearing the parties the National Company Law Tribunal, Chennai dismissed the petition and passed the following order on September 4, 2018 :

> "In the light of the facts and circumstances and the legal position stated above, the petition stands dismissed, and all pending connected company applications are also dismissed. The interim orders passed in the company applications are vacated including the order of status quo passed on March 30, 2015 which was extended on April 22, 2015. However, there is no order as to costs."

10 Being aggrieved by the impugned order the appellant has filed the present appeal. Counter reply has been filed the respondent. Rejoinder has been filed by the appellant.

11 We have heard the parties and perused the record.

12 Before we proceed further we observe that sufficient time was granted to the parties to settle the matter by this Appellate Tribunal. The parties were also directed to file their unaffidavit proposal in sealed cover with the Registrar of this Appellate Tribunal. Later on it was informed to this Appellate Tribunal that the second respondent does not want to settle the dispute amicably at Delhi. Thereafter, we heard the appeal on merits.

13 Learned counsel for the appellant argued that it is not disputed that initially 50 per cent. shareholding each is held by Mr. M. Ct. Muthiah and

second respondent. Learned counsel for the appellant further argued that it is not disputed that after the sad demise of Mr. M. Ct. Muthiah in 2006, 66 per cent. shareholding is held by the second respondent and 17 per cent. shareholding each is held by the appellant and third respondent in the first respondent. Learned counsel for the appellant argued that the appellant discovered at the stage of appeal that the second respondent has transferred her shareholding in 2013 to be jointly held by the second and third respondents. Learned counsel for the appellant argued that the respondents have suppressed this crucial fact and the impugned order is passed.

Learned counsel for the respondents argued that the appellant cannot **14** restrain any shareholders in transferring their shares. Learned counsel for the respondents further argued that every shareholder has a right to transfer its shares and the respondents cannot be restrained from dealing its shares. Learned counsel for the respondents further argued that the appellant has no right to restrain or refrain the respondents from dealing with shares.

We have heard the parties and perused the record. Every shareholder **15** have a right to transfer his right after completing all the formalities, if otherwise the same are in order. We have gone through the document at page No. 117 of I. A. No. 686 of 2019 and noted that the shares are now jointly held by the second and third respondents and the transfer of registration of shares was done on June 28, 2013. We further note that the shares have been registered on June 28, 2013, much before filing of company petition by the appellant before the Company Law Board/National Company Law Tribunal in 2015. We have also noted that the shares relating to the appellant are untouched and she continues to be 17 per cent. shareholder of the first respondent. Learned counsel for the appellant has not informed the Tribunal what harm has been caused to her if the shares are now jointly held. Further the shares have not been transferred to an outsider. Learned counsel for the appellant has also not shown if there is any illegality. Therefore, we find no force in his arguments, therefore, it is rejected.

Learned counsel for the appellant argued that equitable distribution was **16** agreed and manner of distribution was being discussed for both the parties to have as equal division of wealth as possible. Learned counsel for the appellant argued that a demerger scheme was also prepared for trifurcation of the first respondent but the dispute started when the third respondent derailing the settlement talks on one pretext or the other.

We have noted his argument and perused the record. On this issue we **17** have already observed in paragraph 12 above that sufficient time was granted to the parties to settle the matter. The parties were also directed to

file their unaffidavit proposal in sealed cover with the Registrar of this Appellate Tribunal. Later on it was informed to this Appellate Tribunal that the second respondent does not want to settle the dispute amicably at Delhi. Thereafter, this Appellate Tribunal intended to hear the appeal on merits. It is now too late for the appellant to raise this issue now.

**18** Learned counsel for the appellant argued that the appointment of the fourth respondent as independent director or non-family member is illegal. No agenda for appointment was in the notice or e-mail. No such meeting was held as the appellant was present till 10.20 am on January 6, 2015. Learned counsel for the appellant further argued that the minutes of meeting shows that the meeting was held at 2 p.m. on January 6, 2015, whereas the extract states that the meeting was held at 10.30 am.

**19** Learned counsel for the respondent argued that there is no bar for the appointment of additional director of any closely held company and the appointment has been made after making the necessary compliances and approved by the majority of the directors. Learned counsel for the respondent further argued that the appellant never came for any board meeting even on January 6, 2015. Learned counsel for the respondent further argued that if she had attended the meeting she would have written on same date to inform that she had come but meeting was conducted. The respondent argued that the appellant first brought the issue on February 13, 2015, via., e-mail as a clear afterthought and taking advantage of typographical error in minutes of time of meeting.

**20** We have heard the parties and perused the record. We note that the meeting was held on January 6, 2015 and the appellant was well aware that the meeting will be held, therefore, the appellant herself stated that she went at the venue and was present till 10.20 am. We observe that the intention of the appellant was not to attend the meeting otherwise she would have waited there at least some time after 10.30 am and would have written that no meeting was held. Further even if the appellant would have attended the meeting the resolution would have been passed with majority of the directors. As regards the appointment of the fourth respondent as independent director is concerned, we find no illegality in appointment.

**21** Learned counsel for the appellant argued that Alagappa Property was purchased in company's name. There is no authorisation and no commercial value. Architect has confirmed this fact (page No. 379 of appeal paper book). Learned counsel for the appellant argued that the only purpose to purchase this property to get access/passage to the third respondent's residential house. Learned counsel for the appellant further argued that the property was purchased in the third respondent's name with unauthorised

loan of Rs. 2.47 crores from the company and allegedly repaid to the subsidiary of the company by the second respondent.

22 Learned counsel for the respondent argued that the first respondent passed a board resolution dated February 1, 2013 (annexure 3/pages 150-151 of counter affidavit) wherein the board of directors, including the appellant, authorised the second respondent to invest surplus funds of the first respondent. Learned counsel further argued that the second respondent invested the said surplus fund towards purchase of property situated at Alagappa Road in the name of the first respondent vide sale deed dated April 15, 2013. Learned counsel for the respondent refuted the allegation that it was purchased for access to a property is false. Learned counsel further argued that no company will purchase an access way which is valued three times more than the property to which it is to provide access itself. Learned counsel for the respondent further argued that the third respondent also purchased another strip of land adjacent to land of the first respondent on same date vide another sale deed for total consideration of Rs. 15.25 crores out which of the first respondent advanced a sum of Rs. 2.47 crores to third respondent for stamp duty towards the property purchased. Learned counsel for the respondent further argued that the said advance was duly repaid and settled in less than a month. Learned counsel for the respondent argued that the second respondent from liquidating some of her personal investments (redemption of mutual funds and sale of shares) and raised a sum of Rs. 2.30 crores which she paid to the company and settled the loan. Learned counsel for the respondent further argued that the third respondent vide e-mail dated April 15, 2013 had intimated the appellant about the purchase of property and the amount paid by the first respondent (page 266 of appeal). Learned counsel for the respondent further argued that no objection was raised by the appellant about the purchase of properties but after over 19 months, the appellant got an architect and sent e-mail raising certain frivolous objection, without any consultation with the respondent. Learned counsel for the respondent argued that the only purpose to raise objection was to file company petition before the National Company Law Tribunal. Learned counsel for the respondent argued that to purchase the property was a commercial decision for the benefit of the first respondent.

23 We have heard the parties and perused the record. It is not disputed that vide board resolution dated February 1, 2013, second respondent was authorised to invest surplus fund of the first respondent. Accordingly, the second respondent invested the amount in property. It is also not disputed that the third respondent also purchased another property on the same

date for which an advance of Rs. 2.47 was given to the third respondent by the first respondent. We note that the said advance has been repaid by the second respondent by liquidating her personal investments. Learned counsel for the appellant not disputed the same. We are convinced that purchase of the property is a commercial decision which cannot be question as the same may either result in profit or loss and the commercial decision does not require any judicial interference. Further raising objections after 19 months with support of architect is an afterthought to build a case for filing before the National Company Law Tribunal.

**24** Learned counsel for the appellant argued that the appellant had established a Trust "Learning Curve Foundation" to establish a residential school and the same was done with full support and knowledge of second respondent. Learned counsel for the appellant argued that Rs. 25 crores was earmarked to the same and the second respondent gave a donation of Rs. 1 crore. Learned counsel for the appellant argued that account was created in Indian Overseas Bank and amount was transferred to it and the appellant was authorised signatory. The appellant entered into multiple agreements with consultants, architects. Learned counsel for the appellant argued that the third respondent resigned from LCF Trust on January 22, 2014. Learned counsel for the appellant argued that the appellant apprehended that funds allocated to her would be blocked, therefore, the appellant took three pay orders for a total of Rs. 22 crores in company's name to safeguard any amounts from being siphoned for other purposes and the same amount was deposited in the company's account in HDFC Bank. Learned counsel for the appellant argued that the second respondent had given false affidavit to take out the money stating DD was taken by the respondents and they had lost the same and tried to cancel the DD. The appellant mailed the bank for freezing account so it is not wrongly removed. Learned counsel for the appellant argued that now there is an attempt by the respondents to dissociate the company from the project.

**25** Learned counsel for the respondent argued that on the request of the appellant, second respondent provided financial assistance to the appellant for constructing the school at gifted a sum of Rs.6 crores to the appellant (page 29, paragraph 7(j) of the appeal paper book). Learned counsel for the respondent argued that it later came to the knowledge of the respondent that the sole purpose of the appellant and her husband was to grab monies and exclude any involvement of the second respondent, which fact was further substantiated by inducting the parents of Mr. Tarun Ghai (husband of the appellant) as trustees. Learned counsel for the respondent argued that appellant and her husband repeatedly sought donations from the

second respondent under the guise of LCF Trust and later even "other trusts", however, admittedly the expenses sought for were for the personal expenses of the appellant and her husband (pages 300, 358 and 359 of appeal paper book). Learned counsel for the respondent argued that no board resolution was passed for the said expenses (page 472 of appeal paper book). Learned counsel for the respondent argued that first respondent never agreed to fund any school project of LCF Trust (paragraph 15, pages 17 and 18 of counter affidavit). Learned counsel for the respondent argued that the second respondent resigned from the Trust. Learned counsel for the respondent further argued that it is true that in terms of board resolution an amount of Rs. 25 crores was deposited in the said account of Indian Overseas Bank on January 10, 2014. Learned counsel for the respondent argued that shockingly the appellant and her husband started to transfer and siphon off monies and drew DDs of Rs. 22 crores in favour of first respondent and deposited the DD in another HDFC Bank account of the first respondent and got another demand draft made in name of the first respondent. The second respondent immediately issued letter to bank (page 345 of appeal) to cancel the earlier mandate. Learned counsel for the respondent argued that merely adding an additional signatory to a bank account cannot be claimed to be an act of oppression. Learned counsel for the respondent argued that the money in Indian Overseas Bank of the first respondent was only for first respondent use and no authorisation and/or approval was given to allow the appellant to use money for any other purposes. Learned counsel for the respondent argued that LCF Trust has no connection with the first respondent and this cannot be claimed to be an act of oppression and mismanagement.

We have heard the parties and perused the record. We note that the **26** Trust has no connection with the first respondent. It is true that the second respondent has gifted the amount to the appellant. From the statement we find that the appellant has utilised the amount for their personal expenses. We fail to understand when the account was opened with Indian Overseas Bank then why it was shifted to HDFC Bank and huge amounts withdraw. We find no illegally in freezing the account by the second respondent. It is true that merely adding an additional signatory to a bank account cannot be claimed to be an act of oppression especially when she continues to be one of the signatories.

After we reserved the judgment, learned counsel for the appellant filed **27** an I. A. No. 605 of 2020 praying for an order of interim injunction restraining the respondents from conducting the board meeting on February 10, 2020 and passing any resolution on the business mentioned in the notice

dated January 27, 2020 pending disposal of the appeal. After hearing the parties, this Appellate Tribunal on February 6, 2020 ordered that the meeting may not be convened till further orders.

28 To conclude the issues raised in the appeal is reagitation of all the points which were raised before the National Company Law Tribunal. The National Company Law Tribunal also discussed all the issues and disallowed the petition. In view of the discussions above, we have also reached a conclusion that no prima facie case is made out to interfere in the impugned order

29 In view of the aforegoing discussions and observations we find no merit in the appeal. The appeal is dismissed. No order as to costs. Interim order passed on February 6, 2020 is hereby vacated.

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**[2020] 221 Comp Cas 272 (NCLAT)**

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

**1. CYRUS INVESTMENTS P. LTD.**

(Company Appeal (AT) No. 254 of 2018)

**2. CYRUS PALLONJI MISTRY**

(Company Appeal (AT) No. 268 of 2018)

***v.***

**TATA SONS LTD. AND OTHERS**

**SUDHANSU JYOTI MUKHOPADHAYA J.** ***(Chairperson)*** and **BANSI LAL BHAT J.** ***(Judicial Member)***

December 18, 2019.

**HF ▸ Appellant**

OPPRESSION AND MISMANAGEMENT—OPPRESSION—REMOVAL OF EXECUTIVE CHAIRMAN—EXECUTIVE CHAIRMAN PART OF MINORITY GROUP—MAJORITY DECISION OF COMPANY DEPENDENT ON AFFIRMATIVE VOTES OF TRUSTS HOLDING 40 PER CENT. SHARES IN COMPANY—APPRAISAL COMMITTEE WHICH INCLUDED NOMINEE DIRECTOR OF TRUSTS ENDORSING PERFORMANCE OF EXECUTIVE CHAIRMAN FOUR MONTHS PRIOR TO REMOVAL—COMPANY AWARE THAT ACTION WAS PREJUDICIAL AND OPPRESSIVE—REMOVAL OF EXECUTIVE CHAIRMAN OPPRESSIVE AND TO BE SET ASIDE—EXECUTIVE CHAIRMAN TO RESTORED TO HIS POSITION AND ALSO REINSTATED AS DIRECTORS OF GROUP COMPANIES FOR REST OF TENURE—DIRECTION TO MAJORITY GROUP TO CONSULT MINORITY BEFORE

APPOINTMENT OF EXECUTIVE CHAIRMAN OR DIRECTORS IN FUTURE—COMPANIES ACT, 2013, SS. 241, 242.

PUBLIC COMPANY—CONVERSION TO PRIVATE COMPANY—FAILURE TO COMPLY WITH SECTION 14(2) AFTER ALTERING ITS ARTICLES OF ASSOCIATION FOR 13 YEARS—IN ABSENCE OF ORDER FROM TRIBUNAL COMPANY CANNOT BE TREATED AS PRIVATE COMPANY—CERTIFICATE ISSUED BY REGISTRAR OF COMPANIES STRUCK DOWN—COMPANIES ACT, 2013, S. 14.

*The National Company Law Tribunal and the National Company Law Appellate Tribunal have no jurisdiction to hold any of the articles of association of a company illegal or arbitrary, the terms and conditions being agreed upon by the shareholders. However, if any action is taken even in accordance with law which is "prejudicial" or "oppressive" to any member or members or "prejudicial" to the company or "prejudicial" to the public interest, the Tribunal can consider whether the facts would justify the winding up of the company and in such case, if the Tribunal holds that winding up would unfairly prejudice member or members or public interest or interest of the company, may pass an appropriate order in terms of section 242 of the Companies Act, 2013.*

*For the alteration of articles including alteration of the company from a private company to a public company or public company to private company, steps are contemplated to be taken under section 14 of the Act. Under section 14 of the Act, if a company decides to alter its articles having the effect of conversion of a "private company" into a public company or a public company into a private company it is required to pass a special resolution and in terms of section 14(2) of the Act, it requires approval by the Tribunal. Only after the order of approval by the Tribunal, the company can request the Registrar together with a printed copy of the altered articles, to register the company as private company or public company as the case may be.*

*Like section 43A(1A) of the Companies Act, 1956, there is no provision under the Act for automatic conversion of a public company to a private company or a private company to a public company. Therefore, on the basis of the definition of "private company" in section 2(68) of the Act, there cannot be automatic conversion of a public company to a private company. Similarly, on the basis of definition of "public company" in section 2(71) of the Act, there cannot be automatic conversion of a private company to a public company.*

*General Circular No. 15 of 2013 dated September 13, 2013 and Notification dated September 12, 2013 cannot override the substantive provisions of*

*section 14 of the Companies Act, 2013, which is mandatory for conversion of a public company to a private company.*

*The eleventh respondent, the chairman of the first respondent-company, was removed from the position under the head of "any other item", without being given 15 days' prescribed notice. Companies of the P family having above 18 per cent. equity in the company, filed a petition under sections 241 and 242 of the Companies Act, 2013 against the company, its chairman emeritus (the second respondent) and others alleging that the respondents had conducted the affairs of the company in an oppressive manner and prejudicially against the interest of the appellants, the company and the public. It was, inter alia, contended that the two trusts which held 40 per cent. share in the company operated under the control of the second and seventh respondents, that the articles of association had become a device for superintendence and control of the company by the second and seventh respondents, and that though the second respondent had retired as the executive chairman in the year 2012, he tried all along to impose his decisions upon in the board of the company either directly or through its nominee directors, which curtailed the freedom of board of the company and more especially the erstwhile executive chairman from discharging their duties. The National Company Law Tribunal dismissed the petition (see* Cyrus Investments P. Ltd. *v.* Tata Sons Ltd. [2018] 211 Comp Cas 481 (NCLT)*). On appeals :*

Held, *allowing the appeals, (i) that the relevant articles of association of the company made it clear that in the general meeting of the shareholders of the company or the board of directors, the majority decision was fully dependant upon the affirmative vote of the nominated directors of the trusts. Independently, no majority decision could be taken either in the general meeting of the shareholders or by a majority decision of the board of directors. The power of the company to transfer ordinary shares of any shareholders including the appellants' without notice could be exercised through a special resolution in the general meeting of the holders of ordinary shares of the company which required the presence of the nominated directors of the trusts, who had the affirmative vote.*

*(ii) That if the stand taken by the contesting respondents that the removal of the eleventh respondent was directorial in nature, in the interest of company was accepted, there was no occasion to issue a press statement where many across the globe had raised concerns in the manner the eleventh respondent was removed. The company and its board also understood that such removal might lead to a sense of uncertainty of the company and the group companies and result in winding up. The allegations as made in the press*

*statement dated November 10, 2016 appeared to be an afterthought as the matter was not discussed in any of the meetings of the board of directors. No records had been placed by the respondents with regard to the loss nor had any discussion taken place in the board meeting of the company and the eleventh respondent to suggest that it was of serious concern. The allegations in the press statement not supported by record could not be accepted.*

*(iii) That the correspondence between the eleventh respondent, the second respondent, the seventh respondent and the fourteenth respondent showed that the eleventh respondent had been pointing out that some of the companies were suffering loss and if appropriate steps were not taken, this may get aggravated in future. In spite of such communications made between the period of 2013 to 2016, there was nothing on the record to suggest that the board of directors which could take decision only with the affirmative vote of nominee directors of the trusts had taken any decision for the revival or restructuring of the companies which were facing losses. If there was a failure and loss caused to one or other group company which also affected the company, the trusts or the board of directors could not be absolved of their responsibility, particularly when the nominee directors of the trusts had affirmative vote to reverse the majority decision. The suggestions made by the eleventh respondent for good governance by the board and to take care of the company and the group companies were not taken in its letter and spirit by the second respondent and the trusts which resulted in no confidence on the eleventh respondent.*

*(iv) That the record suggested that the removal of the eleventh respondent had nothing to do with any lack of performance. On the other hand, the company under the leadership of the eleventh respondent had performed well which was appraised by the nomination and remuneration committee, a statutory committee under section 178 of the Act, on June 28, 2016, i. e., just few months before he was removed. The members of the nomination and remuneration committee also had stressed the need for clarity on the functioning of the board of the company and the role of the trusts in relation to the company and the group companies. The ninth respondent being a nominee director on behalf of the trust and who was part of the committee was well aware that performance of the eleventh respondent was satisfactory and there was need for a framework for operationalising the articles of association. The annual performance review of the "nomination and remuneration committee" was unanimously approved by the board of directors of the company in its meeting held on the next day, i. e., on June 29, 2016. Besides, at the level of the board of directors of the group companies, the performance of the*

*eleventh respondent had been endorsed and praised by nearly 50 independent directors of the group companies. The three directors who also voted for removal of the eleventh respondent, including the third respondent, who spearheaded the removal proceedings and the fifth respondent and the sixth respondent, had been inducted into the board of the company only on August 8, 2016, i. e., after the appraisal report of the "nomination and remuneration committee". They attended just one board meeting prior to the meeting held on October 24, 2016. The eighth and ninth respondents who voted for the removal of the eleventh respondent were members of the committee which just four months' prior to his removal on June 28, 2016 praised his performance as the executive chairman. Even before decision of the trusts, the second respondent in the presence of the seventh respondent called the eleventh respondent and asked him to resign.*

*(v) That for any policy decision of the companies, including appointment of representatives of the company under section 113(1)(a) of the Act, the affirmative vote of the nominated directors was a must. The affirmative vote of the directors nominated by the trusts had an overriding effect and rendered the majority decision subservient to it. Therefore, it was not open to the respondents to state or allege that loss in different group companies was due to mismanagement by the eleventh respondent. The consecutive chain of events coming to fore from the correspondence amply demonstrated that impairment of confidence with reference to conduct of affairs of company was not attributable to probity qua the eleventh respondent but to unfair abuse of powers on the part of the other respondents.*

*(vi) That it was not in dispute that the SP group were the minority shareholders. They were in business with the trusts for more than four decades. There was mutual understanding and good relationship between them. The father of the eleventh respondent had been appointed executive chairman of the company earlier. The minority shareholders, all the time, had confidence in the decision making power of the board of directors of the company as amity and goodwill prevailed inter se the two groups. However, because of recent actions of the trusts, its nominee directors, the second respondent and the seventh respondent since the year 2013, and sudden and hasty removal of the eleventh respondent on October 24, 2016 without any basis, and without following the normal procedure under article 118 of the articles of association, the minority group and others had raised no confidence and sense of uncertainty which was the reason for the company to issue a press statement". The language of the company in its press statement showed that the company and contesting respondents also knew that the action taken was "prejudicial" and*

*"oppressive" to the interest of the members of the company and a large number of members, investors and interested parties had raised concern. The company had accepted that there was sense of uncertainty at the global level.*

*(vii) That the company having become a public company long ago, for altering its articles as a public company into a private company, it was required to follow section 14(1)(b) read with section 14(2) and (3) of the Act. The company remained silent for more than 13 years and never took any step for conversion in terms of section 43A(4) of the Companies Act, 1956. Even after enactment of the 2013 Act, which came into force since April 1, 2014 for more than three years, it had not taken any step under section 14. Till date, no application had been filed before the Tribunal under section 14(2) of the 2013 Act for its conversion from public company to private company. In absence of any such approval by the Tribunal under section 14 of the 2013 Act, the company could not be treated or converted as a private company on the basis of the definition under section 2(68) of the 2013 Act. The Registrar of Companies in the certificate had struck down the word "public" and shown the company as "private" company even in the absence of any order passed by the Tribunal under section 14 of the 2013 Act. The action on the part of the company, its board of directors to take action to hurriedly change the company from public company to a private company without following the procedure under section 14, with the help of the Registrar of Companies just before filing of the appeal, suggested that the nominated members of the trusts who had affirmative voting right over the majority decision of the board of directors and other directors or members, had acted in a manner prejudicial to the members, including minority members and others as also prejudicial to the company. The decision of the Registrar of Companies changing the company from public company to private company was illegal and to be set aside. The Registrar of Companies was to make a correction in its records showing the company as public company.*

*(viii) That the facts that the company had suffered loss because of prejudicial decisions taken by board of directors, that a number of the group companies incurred loss in spite of the decision making power vested with the board of directors with affirmative power of nominated directors of the Trusts, the action of changing from a public company to a private company, the manner in which the eleventh respondent was suddenly and hastily removed without any reason and in the absence of any discussion in the meeting shown in the board of directors held on October 24, 2016 and his subsequent removal as director of different group companies, coupled with the global effect of such removal, as accepted by the company in its press*

*statement form a consecutive chain of events with cumulative effect justified the finding that the appellants had made out a clear case of "prejudicial" and "oppressive" action by the respondents. The company's affairs had been and were being conducted in a manner "prejudicial" and "oppressive" to its members including the appellants and the eleventh respondent and it was also "prejudicial" to the interests of the company and its group companies and winding up of the company would unfairly prejudice the members, but otherwise the facts justified a winding up order on the ground that it was just and equitable that the company should be wound up. Therefore, this was a fit case to pass orders under section 242 of the 2013 Act.*

*(ix) That the resolution dated October 24, 2016 passed by the board of directors of company removing the eleventh respondent as the executive chairman of the company was illegal along all consequential decisions taken by the group companies for removal of thee eleventh respondent as directors of such companies. The eleventh respondent was restored to his original position as executive chairman of the company and consequently as director of the group companies for rest of the tenure. [The second respondent and the nominee of the trusts was directed to desist from taking any decision in advance which required majority decision of the board of directors or in the annual general meeting.]*

*(x) That in view of prejudicial and oppressive decision taken during last few years, the company, its board of directors and shareholders which had not exercised its power under article 75 of articles of association since inception, were not to exercise power under article 75 against the appellants and other minority member. Such power could be exercised only in exceptional circumstances and in the interest of the company, but before exercising such power, reasons should be recorded in writing and intimated to the concerned shareholders whose rights would be affected.*

*[The Appellate Tribunal deprecated the Tribunal's observation in its opening paragraphs highlighting the products of the company and expression of appreciation of its activities before deciding the case on the merits. It was of the view that such observations or appreciation in favour of one or other party created a wrong impression in the mind of the other party. It held that certain observations made by the Tribunal against the eleventh respondent and appellants were undesirable and based on extraneously sourced material not on record. It was of the view that such observations had impact on the reputation of the appellants and the eleventh respondent and that there were not only disparaging but also wholly unsubstantiated by any document on*

*record. Remarks made against the appellants, the eleventh respondents and others in specified paragraph of the order were expunged.]*

*Order of the National Company Law Tribunal in* CYRUS INVESTMENTS P. LTD. *v.* TATA SONS LTD. [2018] 211 Comp Cas 481 (NCLT) *set aside*.

Cases referred to :

Cyrus Investments P. Ltd. *v.* Tata Sons Ltd. [2018] 211 Comp Cas 481 (NCLT) (para 3)

Ebrahimi *v.* Westbourne Galleries Ltd. [1973] AC 360 (HL) (para 104)

Elder *v.* Elder and Watson [1952] SC 49 (SC) (para 103)

George Meyer *v.* Scottish Co-operative Wholesale Society Ltd. [1954] SC 381 (SC) (para 103)

H. R. Harmer Ltd., *In re* [1959] 29 Comp Cas 305 (CA) (paras 103, 104)

Hanuman Prasad Bagri *v.* Bagress Cereals P. Ltd. [2001] 105 Comp Cas 493 (SC) (para 65)

Jermyn Street Turkish Baths Ltd., *In re* [1971] 41 Comp Cas 999 (CA) (para 104)

Needle Industries (India) Ltd. *v.* Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Cas 743 (SC) (para 104)

O'Neill *v.* Phillips [1999] 97 Comp Cas 807 (HL) (para 101)

Rangaraj (V. B.) *v.* Gopalakrishnan (V. B.) [1992] 73 Comp Cas 201 (SC) (para 58)

Saul D. Harrison and Sons Plc, *In re* [1994] BCC 475 (para 101)

Scottish Co-operative Wholesale Society Ltd. *v.* Meyer [1959] 29 Comp Cas 1 (HL) (paras 103, 104)

Shanti Prasad Jain *v.* Kalinga Tubes Ltd. [1965] 35 Comp Cas 351 (SC) (paras 60, 64, 103, 104)

**Company Appeal (AT) Nos. 254 with 268 of 2018.**

*C. A. Sundaram*, *Arun Kathpalia* and *K. G. Raghavan*, Senior Advocates with *Somashekhar Sundresan*, *Manik Dogra*, *Rohan Jaitley*, *Ms. Rohini Musa*, *Abhishek Venkatraman*, *Mrs. Sonal Jaitley Bakshi*, *Jaiyesh Bakhshi*, *Apurva Diwanji*, *Ravi Tyagi*, *Shubhanshu Gupta*, *Ms. Sanya Kapoor*, *Ms. Rini Badoni*, *Akshay Doctor*, *Devashish*, *Parag Sawant* and *Gunjan Shah*, for the appellant in Company Appeal (AT) No. 254 of 2018.

*Janak Dwarkadas*, Senior Advocate with *Sharan Jagtiani*, *Akshay Makhija* and *Ms. Kriti Awasthi*, for the appellant in Company Appeal (AT) No. 268 of 2018.

*Dr. A. M. Singhvi* and *Rajiv Nayar*, Senior Advocates with *Ms. Ruby Singh Ahuja*, *Prateek Seksaria*, *Ms. Tahira Karanjawala*, *Anupm Prakash*, *Avishkar Singhvi*, *Arjun Sharma*, *Sahil Monga*, *Utkarsh Maria*, *L. Nidhiram Sharma* and *Baij Nath Patel*, for respondent No. 1 in Company Appeal (AT) Nos. 254 and 268 of 2018.

*Harish N. Salve*, Senior Advocate with *Dhruv Dewan*, *Nitesh Jain*, *Rohan Batra*, *Ms. Reena Choudhary*, *Ms. Yashna Mehta* and *Nitesh Jain*, for respondent No. 2 in Company Appeal (AT) Nos. 254 and 268 of 2018.

*Amit Sibal*, Senior Advocate with *Ms. Ruby Singh Ahuja*, *Ms. Tahira Karanjawala*, *Arjun Sharma*, *Sahil Monga* and *Utkarsh Maria*, for respondents Nos. 3, 5 and 7 in Company Appeal (AT) No. 254 of 2018.

*Mohan Parasaran*, Senior Advocate with *Zal Andyarujina*, *J. N. Mistry*, *Ms. Namrata Parikh*, *Ashwin Kumar (D. S.)*, *Sidharth Sharma*, *Saswat Pattnaik*, *Aditya Panda*, *Kartik Anand* and *Ms. Aditi Dani*, for respondents Nos. 6, 16 to 22 in Company Appeal (AT) No. 254 of 2018 and for respondents Nos. 6, 13, 15, 16 to 21 in Company Appeal (AT) No. 268 of 2018.

*Janak Dwarkadas*, Senior Advocate with *Akshay Makhija*, *Sharan Jagtiani* and *Ms. Kriti Awasthi*, for respondent No. 11.

*Sidharth Sharma*, *Saswat Pattnaik*, *Aditya Panda* and *Kartik Anand*, for respondents Nos. 21 and 22 in Company Appeal (AT) No. 254 of 2018.

*S. N. Mookherjee*, Senior Advocate with *Sidharth Sharma*, *Saswat Pattnaik*, *Kartik Anand*, *Ms. Namrata Parikh*, *J. N. Mistry* and *Aditya Panda*, for respondent No. 14 in Company Appeal (AT) No. 254 of 2018.

*C. A. Sundaram*, *Arun Kathpalia* and *K. G. Raghavan*, Senior Advocates with *Somashekhar Sundresan*, *Manik Dogra*, *Rohan Jaitley*, *Ms. Rohini Musa*, *Abhishek Venkatraman*, *Mrs. Sonal Jaitley Bakshi*, *Jaiyesh Bakhshi*, *Apurva Diwanji*, *Ravi Tyagi*, *Shubhanshu Gupta*, *Ms. Sanya Kapoor*, *Ms. Rini Badoni*, *Akshay Doctor* and *Gunjan Shah*, for respondents Nos. 23 and 24 in Company Appeal (AT) No. 268 of 2018.

**JUDGMENT**

The judgment of the Appellate Tribunal was delivered by

1 SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)***.—Pursuant to decision of board of directors' of the "Tata Sons Ltd."-(first respondent-company) dated October 24, 2016, just few months prior to the completion of

the period, Mr. Cyrus Pallonji Mistry-(eleventh respondent) was suddenly removed as "executive chairman" from the "Tata Sons Ltd."-(first respondent-company). Since before his removal for more than one year, a number of correspondentces had taken place between Mr. Cyrus Pallonji Mistry-(eleventh respondent) ("executive chairman") and other members, including Mr. Ratan N. Tata (second respondent) about the performances of different group companies.

2 Because of sudden removal of Mr. Cyrus Pallonji Mistry- (eleventh respondent) from the post of "executive chairman", the appellants-"Cyrus Investments P. Ltd." and "Sterling Investment Corporation P. Ltd.", the minority group of shareholders/"Shapoorji Pallonji group" ("SP group" for short) moved an application under sections 241 and 242 of the Companies Act, 2013 alleging prejudicial and oppressional acts of the majority shareholders (Tata groups).

3 There being a doubt as to whether the appellants had more than 10 per cent. of the equity of shareholding of the company, the appellants-"Cyrus Investments P. Ltd., and another" also filed a petition for waiver under section 244 of the Companies Act, 2013. The National Company Law Tribunal—(*Cyrus Investments P. Ltd.* v. *Tata Sons Ltd.* [2018] 211 Comp Cas 481 (NCLT)) ("Tribunal" for short), Mumbai Bench, initially dismissed the petition under sections 241 and 242 of the Companies Act, 2013 being not maintainable, also dismissed the petition for waiver.

4 On challenge, this Appellate Tribunal by its judgment dated September 21, 2017 taking into consideration the exceptional circumstances including the fact that out of Rs. 6,00,000 crores of total investment in "Tata Sons Ltd.", the appellants-"Cyrus Investments P. Ltd., and another" had invested approximately Rs. 1,00,000 crore held that it was a fit case for waiver and remitted petition under sections 241 and 242 to the Tribunal for decision on the merit.

5 The Tribunal by the impugned judgment dated July 9, 2018 while highlighted the past and products of the "Tata Sons Ltd." observed "The petitioners have petitioned to this Tribunal asking to seasoning of Tata Sons functioning, which keeps seasoning our daily food with Tata Salt. Irony is salt also at times needs salt to be seasoned . . ." and passed stricture and derogatory observations against the appellants and dismissed the petition.

*Case of the appellants*

6 "Tata Sons Ltd." (first respondent-company) is a group company comprising of "Tata Trusts", "Tata Family" and "Tata Group Cos." and other group is the "Shapoorji Pallonji Group" ("SP Group" for short) which for

over five decades jointly conducted the affairs of the first respondent-company in an environment of mutual trust and confidence.

7 According to the appellants, the structure of "Tata Sons Ltd." itself indicates on the very face of it, the nature of relationship between the "Tata group" and the 'SP group". "Tata Sons Ltd." (the first respondent-company) has 51 shareholders, but even a cursory glance at the qualities of shareholders will indicate that "Tata Sons Ltd." (first respondent-company) is in effect is a quasi-partnership-company, a concept well recognised in company law jurisprudence.

8 It is stated that the "Tata Trusts" and "Tata Group Companies" along with "Tata family members" collectively hold over 81 per cent. of total shareholding while the "SP Group" holds over 18 per cent. of the equity share capital of "Tata Sons Ltd." (the first respondent-company).

9 Further, according to learned counsel, the relationship between the two groups though not formally reflected in the articles of association but is based on the mutual trust and confidence which has given rise to a legitimate expectation of being treated in a mutually just, honest and fair manner. After sudden removal of Mr. Cyrus Pallonji Mistry (the eleventh respondent), the mutual trust and confidence has broken down, which according to the appellants is on account of the conduct of the contesting respondents, which lacks in probity, is inequitable, unfair, unjust and against the fundamental notions that govern the relationship between partners.

10 According to the appellants, the "SP Group" entered into the "Tata Group" as business partners based upon the personal relationship that existed between the two families both in business and outside. The relationship was not based purely on commercial considerations but because of factors outside of pure economic factors. In fact, a few members of the "Tata Group" divested their shareholding in the first respondent-company in favour of "SP Group" which transfer was approved at the meeting of board of directors of "Tata Sons Ltd." (first respondent-company) which then comprised of directors of Tata group only.

11 The business relationship between the two groups as shareholders of "Tata Sons Ltd." (the first respondent-company) is culmination of pre-existing relationship between the "SP group" and "Tata family" over the last 50 years. There was no element of a formal business partnership between the two groups as envisaged in law inasmuch as in the matter of regulating the relationship between the "SP group" and the "Tata group", law and the other formalities took a backseat. Till the dispute started the relationship between the two groups has been driven primarily on the basis

of mutual trust and confidence between two groups of friends'/family members.

12 Although a two-group company, "Tata Sons Ltd." (the first respondent-company) has controlling interests in a wide range of companies (the Tata group) which operate in 160 countries across six continents and employs over 660,000 people. "Tata Sons Ltd." (the first respondent-company) controls the destinies of a wide range of companies. The Tata group comprises over a hundred operating companies of which 29 are listed companies with millions of shareholders. Albeit a two group company, in effect, the affairs of "Tata Sons Ltd." (the first respondent-company) entail exercising control over the affairs of over a 100 operating companies which is why it is imperative that "Tata Sons Ltd." (the first respondent-company) should effectively operate as a two group company to provide checks and balances in its conduct of business rather than applying a simple majority rule which would mean that one group can unilaterally determine the destiny of over a 100 operating companies including the 29 listed companies and millions of stakeholders.

13 Further, the case of the appellants is that it is also for this reason there has always been constructive participation and engagement by the nominees of the "SP group" at the board level and active support of the "SP group" as shareholders, in the conduct of the affairs of Tata Sons, including at a time when the voting rights of the Tata Trusts were by law vested in a public trustee. However, in recent times a systematic attempt to squeeze them out of every space in the affairs of Tata Sons has led to the present proceedings.

14 The record is replete with examples of serious consultations and consensus building between the two groups on vital matters. In this environment of mutual inter-dependence, Mr. Cyrus Mistry (eleventh respondent) was selected after subjecting him to a professional selection process as "executive chairman" on merits. When he was appointed, Mr. Cyrus Mistry (eleventh respondent) was expressly referred to as a significant shareholder and both an insider and outsider, pointing to the nexus between his appointment and his status as a significant shareholder and in the same spirit of mutual confidence, Mr. Cyrus Pallonji Mistry (eleventh respondent) availed of advice from time to time on matters of transition and historical legacy hotspots on which vital decisions were to be taken to cut losses or to restructure, in the interests of "Tata Sons Ltd." (first respondent-company) and the Tata Group Companies. Mr. Cyrus Pallonji Mistry (eleventh respondent) displayed due deference and respect to the past leadership of "Tata Sons Ltd." (first respondent-company) and went out of

his way to protect their legacy. Mr. Cyrus Pallonji Mistry (eleventh respondent) addressed these legacy hotspots internally and eleventh respondent and his team did not comment on these issues in the public domain, during eleventh respondent's tenure as "executive chairman".

*Removal of "SP group" from management and eleventh respondent as "executive chairman"*

15 Learned counsel for the appellants submitted that an abiding theme of respondents' conduct is the consistent and steady squeeze-out of the appellants' rights and title to, and interest in, their ownership of the first respondent-company in a manner that is lacking in probity and is unfair.

16 It is submitted that Mr. Cyrus Pallonji Mistry's (eleventh respondent) sudden and hasty removal as "executive chairman" must be seen in the context of : (i) his efforts to remedy past acts of mismanagement inherited from the past management and opening up embarrassing issues ; (ii) yet being respectful in resisting interference from Mr. Ratan N. Tata (second respondent), and Mr. N. A. Soonawala (fourteenth respondent) in the affairs of "Tata Sons Ltd." (first respondent-company) ; and (iii) his instituting a formal governance framework to regulate the role of the Tata Trusts and specify the matters over which prior consultation would be required to prevent interference and mismanagement.

17 The respondents belatedly ascribed disingenuous reasons to justify the removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) by, inter alia, linking it to his alleged lack of performance. However, none of the purported reasons provided for removing the eleventh respondent as "executive chairman" had ever been discussed or deliberated prior to eleventh respondent's illegal removal. In any event, such fictitious reasons are clearly belied from the record.

18 It is alleged that Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) kept interfering in the affairs of "Tata Sons Ltd." (first respondent-company) and demonstrating their insecurity about their legacy being undermined instead of looking to what is in the best interests of first respondent-company. Over a period of time this turned to insisting that it is the will of the majority shareholder, i. e., the "Tata group" that should prevail. This became more pronounced as the eleventh respondent as the "executive chairman" began taking remedial steps in relation to past decisions which turned out to be against the interests of the Tata group, i. e. "legacy hotspots" and sought to effect a turnaround in the affairs of the first respondent-company.

19 Some vital areas included, shutting down the Nano project and cutting losses with expensive decisions in other Tata group companies such as

"Indian Hotels Co. Ltd." ("IHCL"), "Tata Teleservices Ltd." ("TTSL"), etc. These became contentious. Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) justified interference under the guise of their legacy being undermined. However, even on new matters (not just decisions involving legacy hotspots), Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) demanded pre-consultation and pre-approval, undermining the concept of the institution of the board of directors and the consciously laid down retirement policy.

**20** According to the appellants, the scale and depth of the involvement and interference of these two trustees in the affairs of the first respondent-company and Tata group companies is evident from the record which shows a range of topics over which pre-consultation was demanded under the threat of alleging a violation of the articles of association and went far beyond offering solicited advice or guidance. The interference is evident from the numerous presentations and discussions held with Mr. Ratan N. Tata (second respondent) and Mr. Cyrus Pallonji Mistry (eleventh respondent) on a wide range of topics and these extended well beyond even legacy hotspots. Over 550 e-mails were exchanged between the eleventh respondent and the second respondent demonstrating the scale of interference. Such interference fostered a pattern of decision making that led to the board of first respondent-company being undermined including : (i) the second respondent dictating the contents of minutes and directly interacting with officials of the Tata group companies, (ii) nominee directors stepped out of a meeting to take instructions from the second respondent and fourteenth respondent on how to vote in a matter, and (iii) the fourteenth respondent dictating the contents of the note to be placed before the board of the first respondent-company.

**21** Faced with having to deal with a formal institutionalizing of a governance framework involving Tata Trusts, the first respondent and Tata group companies, and indeed matters such as discussion on the Air Asia fraud, recoveries from Siva, etc., an overnight coup coupled with a purge of the entire senior management was effected on October 24, 2016, i. e., an action which as the record shows was surreptitiously planned in advance.

**22** Just three months' prior, the board of directors of the first respondent-company had unanimously endorsed the recommendation of the "Nomination Remuneration Committee" (a statutorily mandated committee under the Companies Act, 2013 to review the performance of directors), to laud the performance of the eleventh respondent and others who were purged and accorded a pay hike for all of them. Not a whisper of a

discussion on any factor warranting such purge took place at any board meeting. This showed that these directors failed to exercise independent judgment and discharge their fiduciary duties.

23 The requisite compliance with article 118 of the articles of the first respondent was also given the go-by. No committee was formed for removal of the incumbent chairman as required under article 118, despite at least the relevant respondents being aware of the need for such committee and were instrumental in adopting article 118 ; self-serving and materially misleading arguments, false to the knowledge of these respondents were made on the absence of any need for a committee on the removal of the chairman. The appellants then produced the board minutes and the explanatory statement to the annual general meeting when article 118 was adopted, which clearly showed such a committee was envisaged by the respondents themselves for the removal of the chairman, which destroys the credibility of these arguments. No legal opinion was taken by the board of directors to determine whether the removal of the "executive chairman" in such a hasty manner was in accordance with the articles. Instead, the directors strangely, purported to act on opinions allegedly taken by the Trust shareholders. Yet, at the board meeting, the eleventh respondent was told that opinions have been taken and it was later stated that the opinions referred to were opinions taken by the Trusts and not by the first respondent-company, and therefore, would not be shared.

24 It was further submitted that as a retribution for these proceedings in an act of vengeance for various Tata group companies' independent directors objecting to the eleventh respondent's ouster, notices were issued by the first respondent-company at the behest of the Trustees of the Tata Trusts to the Tata group companies to remove the eleventh respondent as a director of the Tata group companies. A few independent directors resigned. Others fell in line. Similarly, the eleventh respondent who was the "SP Group's" representative on the board of directors of the first respondent, was also removed as a director by requisitioning a special general meeting of the first respondent as retribution for these proceedings being initiated by the appellants. The purported reasons such as compliance with a summons from the tax authorities being equated with a breach of confidentiality, were supplied later.

25 When these proceedings were sub judice, an attempt to convert the first respondent into a private limited company was made, in a marked departure from a long legacy of its being a public limited company having revenue in excess of USD 100 billion and involving control of over 100 operating companies including 29 listed and public companies. As a public

company the first respondent would be subjected to a higher standard of governance and with a view to dilute these standards, an attempt was made to convert the first respondent into a private limited company leading to an amendment to the company petition in these proceedings. Consistent conduct expropriating the rights and interests of the appellants in every manner and form has given ground to a legitimate apprehension of expropriation of the appellants' shareholding by abuse of article 75.

*Article 121—tool of prejudicial and oppressive interference and breaking down of corporate governance*

26 Learned counsel for the appellants submitted that article 121 and article 121A were introduced in the year 2000 and 2014 respectively in the articles of association of the company to safeguard the interest of the company with regard to vital issues. However, it started being interpreted as a means of requiring prior consent and affirmation even as to whether matters could be brought before the board of directors not only on "Tata Sons Ltd."-(first respondent-company) but also of the "Tata group companies", which was never the intention. The appellants could never have imagined a situation that these articles would be misused, which became apparent since 2014 and completely negated the entire purpose of having a strong board of directors to ensure proper management of "Tata Sons Ltd." which ipso-facto would be required for proper management of the Tata group companies. Therefore, such articles became articles of oppression only recently since they had not been previously misused and in fact had been viewed as nothing more than to ensure that the nominees of the majority shareholders applying their own independent judgement, would be required to affirm significant/important decisions.

27 According to the appellants, article 121 provides a veto on every decision to be taken by the board of "Tata Sons Ltd." to trustee nominee directors—as opposed to conventional affirmative rights provisions being available to the minority on select matters. Article 121 is also repugnant to the scheme of the Companies Act which for the first time requires the Boards of certain large unlisted public companies (such as the first respondent-company), to comprise independent directors who are, inter alia, duty bound to safeguard the interests of minority shareholders.

28 It was submitted that veto power is never meant to be formally used—its existence ensures conduct in line with expectation.

29 It was further submitted that article 121B—with 15 days' notice for a director to introduce a matter is rendered redundant since decisions would be subject to article 121. The effect of all this is that important matters which would rightly benefit from the deliberation by all members of the

board would be deprived of such inputs by not even being brought before the board.

30 Article 121A specifies a list of matters which are to be brought before the board of the first respondent-company. In fact, article 121A would also be a clear indicator that important items ought to be considered by the board which would be wholly negated should article 121 be used in the manner that it was.

31 It was contended that article 121 has been used as a tool of oppression whereby irrespective of the strength of the board and provisions as to the presence of independent directors on the board, just two trustee nominee directors alone can decide what gets approved (even this was brought down from 3 to 2).

32 According to counsel for the appellants, widespread abuse by Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) of article 121 is amply demonstrated from the record. In fact, various instances of its abuse are on record to the extent of even reopening of matters already decided (as allegedly being in the interest of the company) and dictating what the minutes must contain. By vesting frill power of the board to conclude any decision in the hands of two trustee nominee directors the authority and statutory role of board of directors whose composition is regulated by the Companies Act, stands undermined warranting intervention.

*Interference and breakdown of corporate governance*

33 Learned counsel for the appellants submitted that Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) indulged in oppressive interference. Mr. N. A. Soonawala (fourteenth respondent) retired and did not even hold an "Emeritus" office—was to be available as advisor. However, over a period of time rather than advising when his advice was sought for, Mr. N. A. Soonawala (fourteenth respondent) began interfering including by dictating what the note to the board of the first respondent-company should contain. In fact, when this was not done there were repeated threats of the breach of articles as prior consent of the majority shareholder was not obtained.

34 Learned counsel for the appellants highlighted the instances of interference by Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent).

35 It is stated that Mr. Ratan N. Tata (second respondent), the former "executive chairman" at the last board meeting of the first respondent-company chaired in December, 2012 was designated a Chairman Emeritus by Mr. Cyrus Pallonji Mistry (eleventh respondent), an honorary title for

his contributions to the Tata group. However, Mr. Ratan N. Tata (second respondent) clearly and unequivocally stated that he would be available only for advice and there was to be no overhang from his previous role. Pertinently, Mr. N. A. Soonawala (eleventh respondent) thereafter held no official position in "Tata Sons Ltd." (not even of an "Emeritus"). The fourteenth respondent retired at the board meeting of June 15, 2010 even before the second respondent retired in December, 2012. An advisor's role is to provide advice when sought. In contrast, a person seeking to control would do more than provide advice when sought. Mr. Cyrus Pallonji Mistry (eleventh respondent) indeed sought advice from Mr. N. A. Soonawala (fourteenth respondent) on areas where Mr. N. A. Soonawala (fourteenth respondent) could add value as an advisor.

**36** The record demonstrates that far from providing advice when sought, Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) actively interfered in the affairs of the first respondent-company. Contrary to the claims being made now noteworthy feature of these "grievances" and breach of articles are raised not by the Trust nominee directors of the Trustees of the Tata Trusts or other members of the board of directors of the first respondent-company acting independently. These were all issues and grievances raised by Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent).

**37** According to the appellants, article 121A(h) of the articles requires matters relating to how the first respondent-company would vote as a shareholder of the Tata group companies to be decided at a meeting of the board of the first respondent-company. The "Welspun" transaction entailed "Tata Power" acquiring certain business assets of "Welspun". The articles of Tata Power do not confer any special rights on the first respondent-company to pre-approve transactions which were to be entered by the board of Tata Power. The acquisition of "Welspun's" business by Tata Power per se did not require any shareholder approval. Since Tata Power was required to raise debt for the "Welspun" transaction, shareholder approval was required and sought. The first respondent-company like any other shareholder could only have voted for or against the proposal.

**38** According to the appellants, Mr. Cyrus Pallonji Mistry (eleventh respondent) was a director on the board of Tata Power and owed a fiduciary duty to ensure that the board of Tata Power takes decisions in the best interests of Tata Power. An "executive chairman" of the first respondent-company wears two hats—he is a director of the first respondent-company and a director on the board of the Tata group companies as a nominee of first respondent-company. As a director on the board of the Tata

group companies, he owes fiduciary duty to all shareholders and not just "Tata Sons Ltd." to ensure that the board of the Tata group company exercises independent judgment and is not influenced by the views solely of its promoter and principal shareholder. Yet, in the case of Welspun, although the Trustee Nominee Directors had approved the transaction, once Mr. Ratan N. Tata (second respondent) objected, they wanted to change their view, revise the minutes, took instructions on what the minutes may contain, and even left the board meeting of first respondent-company mid-course to take instructions on how to act in the board meeting. The foregoing actions demonstrates how the majority shareholders are a super board and ignore well laid and statutorily recognized principles of law with regard to management of a company. This attitude was made further apparent and the situation was compounded by the stealthy and illegal removal of Mr. Cyrus Pallonji Mistry (eleventh respondent), first as "executive chairman" of the first respondent-company, and then as a director of various Tata group companies and finally as a director of first respondent-company itself. The chronology of events set out in the annexure would show that these exclusionary actions were taken because Mr. Cyrus Pallonji Mistry (eleventh respondent) insisted that the first respondent-company and the Tata group companies are run in a professional manner without interference from shareholders and bringing into place a clear demarcated system of corporate governance.

*Conversion of public limited company to private limited company*

**39** Learned counsel for the appellants submitted that to further ensure that such prejudicial and oppressive acts could proceed unchecked and to further the attempts at complete unilateral control of the company, pendente lite these proceedings, a sudden attempt has been made to convert the company from public limited to private limited, which is also under challenge. The entire background and manner in which such conversion was done would clearly indicate that the overhaul of company law to ensure proper management of public limited companies and to ensure proper protection of minority shareholders, is sought to be undermined and avoided.

**40** According to learned counsel for the appellants, the manner of conversion was also wholly against the law and in fact, against the provisions of the Companies Act itself and contrary to the assurances made to shareholders that the same would be subject to approval by the Tribunal, after hearing all stakeholders. The only motivation of the conversion was not the interest of the company but to marginalise and further oppress the only independent minority shareholder. The first respondent-company also

withheld material facts relating to the conversion from the Registrar of Companies and the Tribunal on its conduct as a public company.

*Potential abuse of article 75*

41 It was submitted by learned counsel for the appellants that although article 75 has remained in the articles for several years, in view of the manner in which the affairs of the company was being conducted as an intrinsically two group company with involvement of both groups working towards a joint effort of mutual benefit to both and the company, the recent events have shown the attempts at oppressing the minority shareholders. Therefore, article 75 which although remaining in the articles, was never viewed by the minority shareholders as a possible tool of oppression (as in fact, article 121 was also not viewed that way), the recent events have created a more than reasonable apprehension that article 75 could be sought to use to marginalise and eliminate the minority shareholders from the company.

42 It was submitted that such apprehension is not unfounded and in fact, even before the Tribunal, it was clearly indicated that if the appellant minority shareholders were unhappy with the affairs of the company they could sell out their shares in the company. Article 75 as it stands (coupled with its propensity for misuse) would be wholly oppressive to the interests of the minority and would therefore, need to be deleted.

*Mismanagement*

43 Learned counsel for the appellants submitted that apart from such prejudicial and oppressive acts, various instances of mismanagement qua numerous decisions with regard to various group companies have also arisen where such acts of mismanagement occurred due to the use of the majority shareholding group of their strength, including the misuse of the articles, hitherto complained of. Such acts of mismanagement not only dealt with the investments by the first respondent-company, but also extended to decisions pertaining to various group companies. Inasmuch as first respondent-company is a core investment company and over 90 per cent. of its income is in the form of dividend from its investments in the various group companies that it controls.

44 It was submitted that the consequences of mismanagement of such group companies directly and substantially visits first respondent-company and its shareholders. In so far as the affairs of such group companies are concerned, decisions of such companies are dependent on the will of the first respondent-company. The first respondent-company as the promoter, the single largest shareholder ; is the owner of the Tata brand ; and by virtue of article 121A, in effect controls the management and policy decisions

of such companies. Therefore, various instances of mismanagement in how decisions relating to such companies are taken against the interests of first respondent-company and consequently its shareholders form part of the record.

45 The appellants have provided "Illustrative instances of the prejudice occasioned by undermining governance", which we have noticed and discussed at appropriate stage.

*Disparaging remarks against the appellants by the Tribunal*

46 While challenging the order, learned counsel for the appellants highlighted the disparaging remarks against the appellants and judicial bias in the impugned order by referring to certain observations made therein. It was submitted that the appellant is aggrieved by certain observations and findings which deeply affect the reputation of Mr. Cyrus Pallonji Mistry (eleventh respondent) (appellant in other case) and attack his integrity both professionally and personally.

47 It was submitted that the disparaging observations and findings, as highlighted and referred below, seen in juxtaposition with the manner in which the "Tata Sons Ltd." (first respondent-company), Mr. Ratan N. Tata (second respondent) and the "Tata Trusts" have been described.

48 An overwhelming awe in favour of, inter alia, "Tata Sons Ltd." (first respondent-company), Mr. Ratan N. Tata (second respondent) and the "Tata Trusts", apparent from the wholly irrelevant but excessively generous tributes and praise heaped by the Tribunal upon them.

49 It was submitted that inherent lack of judicial approach since the latter material, which has been extracted by the Tribunal, nor relied upon by the parties, but is sourced from extraneous materials such as the Tata's own website and Wikipedia.

50 According to counsel for the appellants, a denial of natural justice inasmuch as the parties, particularly the appellants, never had the opportunity of dealing with any of the said extraneously sourced material. Therefore, the appellants have sought expunction of the observations and remarks set out below which deeply impact his reputation and which may affect him in other pending proceedings.

*Stand of contesting respondents*

51 Mr. Harish Salve, learned senior counsel appearing on behalf of Mr. Ratan N. Tata (second respondent) denied the allegations against Mr. Ratan N. Tata and submitted that the allegations pertaining to removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) are in the nature of directorial

complaints which cannot be raised in a petition under section 241 of the Companies Act, 2013.

52 Referring to different articles of the articles of association including article 121, etc., it was submitted that all actions have been taken as per the provisions of the "articles of association", "Companies Act, 2013" and the "Secretarial Standard on Meetings of the Board of Directors (SS-1)", framed under section 118(10) of the Companies Act, 2013, including particularly clause 6.3, as quoted below :

"6.3. *Approval*

6.3.1 The resolution is passed when it is approved by a majority of the directors entitled to vote on the resolution, unless not less than one-third of the total number of directors for the time being require the resolution under circulation to be decided at a meeting.

Every such resolution shall carry a serial number.

If any special majority or the affirmative vote of any particular director or directors is specified in the articles, the resolution shall be passed only with the assent of such special majority or such affirmative vote.

An interested director shall not be entitled to vote. For this purpose, a director shall be treated as interested in a contract or arrangement entered or proposed to be entered into by the company :

(a) with the director himself or his relative ; or

(b) with any body corporate, if such director, along with other directors holds more than two per cent. of the paid-up share capital of that body corporate, or he is a promoter, or manager or chief executive officer of that body corporate ; or

(c) with a firm or other entity, if such director or his relative is a partner, owner or Member, as the case may be, of that firm or other entity."

53 It was submitted that even as per the "Secretarial Standard on Meetings of the Board of Directors", is any special majority or the affirmative vote of any particular director or directors specified in the articles, the resolution shall be passed only with the assent of such special majority or such affirmative vote. Therefore, article 121 if read with article 104A of the articles of association, it cannot be held to be arbitrary.

54 It was further submitted that the appellants cannot claim any "legitimate expectations" as Indian Law do not permit any "legitimate expectations" under section 241 of the Companies Act, 2013.

55 It was submitted that the term "legitimate expectations" is borrowed from public law, as a label for the "correlative right" to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them.

56 It was also submitted that the term "legitimate expectations" from public law cannot be made applicable for the purpose of company law.

57 According to learned counsel for the respondents, the articles of association are the Regulations of the company binding on the company and its shareholders and the shares being a movable property and their transfer is regulated by the articles of association of the company.

58 With respect to the transfer of shares of the company under article 75 of articles of association, reliance has been placed on the decision of the hon'ble Supreme Court in *V. B. Rangaraj* v. *V. B. Gopalakrishnan* [1992] 73 Comp Cas 201 (SC) ; [1992] 1 SCC 160 to suggest that the articles of association are the regulations of the company and binding on the company and its shareholders.

59 For maintaining an appropriation under sections 241 and 242, according to learned counsel, it is important for a party to make out two essential points namely—(i) that the affairs of the company are being conducted in a manner prejudicial or oppressive to any member or members of the company ; and (ii) 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.

60 Mr. Harish Salve, learned senior counsel, also referred to the decision of the hon'ble Supreme Court in *Shanti Prasad Jain* v. *Kalinga Tubes Ltd.* [1965] 35 Comp Cas 351 (SC) ; AIR 1965 SC 1535.

61 In the said case, similar observations have been made that the affairs of the company are being conducted in a manner prejudicial or oppressive to any member or members of the company and 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.

62 Mr. Harish Salve, learned senior counsel referred to the principles of "Unfair Prejudice Remedy", i. e., principle 14 as applicable to English law, but it is not necessary to highlight the same, as two of the decisions have already been referred to above.

63 Dr. Abhishek Singhvi, learned senior counsel submitted that the allegations pertaining to replacement/removal of Mr. Cyrus Pallonji Mistry

(eleventh respondent) are in the nature of directorial complaints which cannot be raised in a petition under section 241 of the Companies Act, 2013.

64 It was submitted that directorial dispute has no nexus with the shareholders' proprietary rights, therefore, the same cannot be agitated or entertained in a petition under sections 241 and 242 of the Companies Act, 2013 (sections 397 and 398 of the Companies Act, 1956). Reliance has also been placed on the decision of the hon'ble Supreme Court in *Shanti Prasad Jain* v. *Kalinga Tubes Ltd.* [1965] 35 Comp Cas 351 (SC) ; AIR 1965 SC 1535 wherein the hon'ble Supreme Court held that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members and the conduct must be burdensome, harsh and wrongful and not mere lack of confidence.

65 Reliance has also been placed on the decision of the hon'ble Supreme Court in *Hanuman Prasad Bagri* v. *Bagress Cereals P. Ltd.* [2001] 105 Comp Cas 493 (SC) ; [2001] 4 SCC 420, wherein the hon'ble Supreme Court held that mere illegal termination of directors cannot bring his grievance as to termination to winding up the company for that single and isolated act, even if it was doing good business and even if the director could obtain each and every adequate relief in a suit in a court.

66 Mr. Cyrus Pallonji Mistry (eleventh respondent) as chairman was a purely professional appointment, where Mr. Cyrus Pallonji Mistry (eleventh respondent) agreed to be a candidate to chair the board of Tata Sons at the request of Mr. Ratan N. Tata (second respondent) and Lord Bhattacharya, and was selected as the chairman after due selection process by the Selection Committee.

67 According to contesting respondents, Mr. Cyrus Pallonji Mistry (eleventh respondent) was appointed as director of "Tata Sons Ltd." (first respondent-company) in the year 2006 was not in the capacity of a nominee of the "Shapoorji Pallonji Group" ("S. P. Group") nor in recognition of any such right of representation of the said "S. P. Group" on the board of "Tata Sons Ltd." (first respondent-company). Therefore, replacement of Mr. Cyrus Pallonji Mistry (eleventh respondent) as chairman and removal as director of "Tata Sons Ltd." (first respondent-company) cannot be canvassed as a case of oppression or prejudice to the proprietary rights of the appellants since Mr. Cyrus Pallonji Mistry's (eleventh respondent)

appointment (either as deputy chairman or executive chairman or as a director of "Tata Sons Ltd.") was never in recognition of any entrenched right of representation/management enjoyed by the appellants as shareholders of "Tata Sons Ltd." (first respondent-company).

68 Further, according to him, Mr. Cyrus Pallonji Mistry's (eleventh respondent) removal would also not impinge on any right enjoyed by the appellants as shareholders of "Tata Sons Ltd." (first respondent-company) which can be protected, executed or enforced in the present proceedings.

69 According to Dr. Abhishek Manu Singhvi, learned senior counsel, there is no provision in the articles of association of "Tata Sons Ltd." (first respondent-company) or any shareholders' agreement which entitles the appellants to participate in the management of "Tata Sons Ltd." (first respondent-company) or nominate any directors to the board of "Tata Sons Ltd." (first respondent-company). "Tata Sons Ltd." (first respondent-company) is not quasi-partnership, by any stretch of imagination. Consequently, the appellants are not permitted to make allegations regarding the removal of Mr. Cyrus Pallonji Mistry's (eleventh respondent) either as chairman or as a director of the "Tata Sons Ltd." (first respondent-company).

70 It was submitted that the appellants cannot allege that the removal of Mr. Cyrus Pallonji Mistry's (eleventh respondent) by the board of directors of "Tata Sons Ltd." (first respondent-company) on October 24, 2016 as the "executive chairman" of "Tata Sons Ltd." (first respondent-company) was contrary to and a blatant breach of article 118 of the articles of association in as much as no selection committee had been constituted for this purpose or the resolution passed by the board of directors of "Tata Sons Ltd." (first respondent-company) on October 24, 2016 usurps the authority of the shareholders to allege ultra vires article 105 "Tata Sons Ltd." articles of association.

71 Learned senior counsel further submitted that the proposal to seek a change of guard at "Tata Sons Ltd." (first respondent-company) was initiated by the majority shareholders of "Tata Sons Ltd." (first respondent-company), i. e., the Tata Trusts, the said proposal was not on account of some personal ill will or animosity against Mr. Cyrus Pallonji Mistry's (eleventh respondent) or as the appellants allege, the need to quell certain reforms that Mr. Cyrus Pallonji Mistry's (eleventh respondent) was purportedly initiating.

72 The fact of the matter was that in a span of around four years as the chairman of "Tata Sons Ltd." (first respondent-company), Mr. Cyrus Pallonji Mistry (eleventh respondent) had completely lost the trust and

confidence of Tata Trusts. It was the view of Tata Trusts that Mr. Cyrus Pallonji Mistry (eleventh respondent) had failed to deliver on the promises that he had made at the time of his selection as the chairman of "Tata Sons Ltd." (first respondent-company), was unable to lead the Tata Group in a cohesive manner and failed in providing proper guidance and support to the group. There was a lack of confidence in Mr. Cyrus Pallonji Mistry's (eleventh respondent) ability to sustain the growth objective of the Tata Group as he was too consumed by the so called legacy issues' rather than working towards resolving them. Furthermore, there were lapses of governance observed during his tenure, including the acquisition of "Welspun Renewable Energy Ltd." by "Tata Power Ltd.". Thus, in short, there was a clear view that Mr. Cyrus Pallonji Mistry (eleventh respondent) lacked the ability and strategy for managing a large and complex group, such as the Tata group. These issues, along with Mr. Cyrus Pallonji Mistry's (eleventh respondent) failure to establish a healthy and constructive governance relationship with Tata Trusts, caused an untenable trust deficit between Mr. Cyrus Pallonji Mistry (eleventh respondent) and the Tata Trusts.

It was submitted that prior to a board meeting on October 24, 2016 Mr. 73
Ratan N. Tata (second respondent) and the seventh respondent met Mr. Cyrus Pallonji Mistry (eleventh respondent) and requested him to step down from the position of the chairman of "Tata Sons Ltd." (first respondent-company). This request was made in the hope that Mr. Cyrus Pallonji Mistry (eleventh respondent) would understand that his continuance as the chairman of Tata Sons had become unacceptable to Tata Trusts and would accordingly, in a dignified manner, step down from the position. However, Mr. Cyrus Pallonji Mistry (eleventh respondent) refused to accede to this request, constraining the directors nominated by the Tata Trust to bring the motion of Mr. Cyrus Pallonji Mistry's (eleventh respondent) replacement in the board meeting held on October 24, 2016. It is important to state that on the said date, the board of "Tata Sons Ltd." (first respondent-company) comprised of 9 directors, including Mr. Cyrus Pallonji Mistry (eleventh respondent). Therefore, the three directors nominated by the Tata Trusts could not, on their own, pass the resolution to replace Mr. Cyrus Pallonji Mistry's (eleventh respondent) as the chairman of "Tata Sons Ltd." (first respondent-company). However, as the record shows, this decision was approved by 7 out of the 9 directors of "Tata Sons Ltd." (first respondent-company) (with one director, Ms. Farida Khambata abstaining and respondent No. 11 being ineligible to vote on this matter by virtue of being interested). Thus, what this clearly shows is that apart from the 3 trust nominated directors, 4 other independent directors saw merit in

the resolution of the trust nominated directors and agreed that Mr. Cyrus Pallonji Mistry (eleventh respondent) should be replaced as the chairman of "Tata Sons Ltd." (first respondent-company). Thus, the replacement of Mr. Cyrus Pallonji Mistry (eleventh respondent) was ultimately brought about, not by the Tata Trusts, but by the board of "Tata Sons Ltd." (first respondent-company), which by voting in support of the resolution, showed that it had collectively lost confidence in Mr. Cyrus Pallonji Mistry's (eleventh respondent) ability to lead the Tata group as its executive chairman. However, as the record reflects the same Board which replaced him as the executive chairman did not resolve to take steps to remove him as a director. In fact, in the board meeting dated October 24, 2016 Mr. Ratan N. Tata (second respondent) mentioned that there was a need to recognize what Mr. Cyrus Pallonji Mistry (eleventh respondent) had done over the last four years and that it was important for the group to move forward in as seamless a manner as one can. The choice of whether Mr. Cyrus Pallonji Mistry (eleventh respondent) would continue as the non-executive director of "Tata Sons Ltd." (first respondent-company) was left to Mr. Cyrus Pallonji Mistry (eleventh respondent), who stated that he would continue on the board of "Tata Sons Ltd." (first respondent-company).

**74** While reiterated that the board resolution replacing Mr. Cyrus Pallonji Mistry (eleventh respondent) as the chairman is not contrary to article 118 of the articles of association of "Tata Sons Ltd." (first respondent-company), it was submitted that article 118 deals with "appointment of chairman" and provides for constitution of a "selection committee" for the purpose of selecting a new chairman of the board of directors of "Tata Sons". The selection committee so constituted has to "recommend the appointment of a person as the chairman of the board of directors". Therefore, according to him, the limited role of the "selection committee" under article 118 is to recommend a candidate for the appointment as the chairman of the board of directors. It is absurd to interpret this article to mean that the "selection" committee would also take decisions regarding the removal of the chairman. Such an interpretation would be inherently contradictory to the purpose behind the constitution of a selection committee and entirely counterintuitive to the express words in the article, which, were consciously chosen to mean that a committee has to be constituted for the purposes of selection of chairman (and not for its removal).

**75** Therefore, article 118 does not otherwise deal with the removal of the incumbent chairman. On the other hand, it provides that the process of obtaining the affirmative vote of all directors appointed under article 104B

(i. e., the trusts nominee directors) in a board meeting, should be followed even in the case of removal of the chairman. It is in that context that the phrase "the same process shall be followed for the removal of the incumbent chairman" appears in article 118.

**76** According to learned counsel, the board's resolution dated October 24, 2016 to remove Mr. Cyrus Pallonji Mistry (eleventh respondent) as chairman is not ultra vires article 105 of articles of association of the "Tata Sons Ltd." (first respondent-company) nor can it be held that the authority of shareholders has been usurped.

**77** It was submitted that the revocation of executive powers of Mr. Cyrus Pallonji Mistry (eleventh respondent) was not in breach of article 105 of the articles of association.

**78** Learned counsel for "Tata Sons Ltd." submitted that Mr. Cyrus Pallonji Mistry (eleventh respondent) was first appointed as the "executive Deputy Chairman on March 16, 2012 with substantial powers of management for a period of 5 years with effect from April 1, 2012 to March 31, 2017 by the board of directors of Tata Sons subject to the approval of the shareholders in a general meeting. The appointment of Mr. Cyrus Pallonji Mistry (eleventh respondent) was made pursuant to article 105 of the articles of association of "Tata Sons Ltd." (first respondent-company). The appointment of Mr. Cyrus Pallonji Mistry (eleventh respondent) as the Executive Deputy Chairman of Tata Sons with substantial powers of management, was then approved by the shareholders of "Tata Sons Ltd." (first respondent-company) at the general meeting held on August 1, 2012 while leaving it to the board of directors of "Tata Sons Ltd." (first respondent-company) to redesignate Mr. Cyrus Pallonji Mistry (eleventh respondent) as the board may deem fit.

**79** In this background, by the board resolution passed on December 18, 2012 Mr. Cyrus Pallonji Mistry (eleventh respondent) was appointed as the chairman by the board of directors of the "Tata Sons Ltd." (first respondent-company) and then designated as the executive chairman with effect from December 29, 2012.

**80** It was submitted that on September 15, 2016 Mr. Cyrus Pallonji Mistry (eleventh respondent) had presented the latest annual business plan to the board of directors of Tata Sons which was found lacking in several respects by his fellow board member. Critical feedback regarding the business plan has been recorded in the minutes of the board meeting. Therefore, it is clear that the concerns of the board of directors of Tata Sons with Mr. Cyrus Pallonji Mistry's (eleventh respondent) performance were communicated to Mr. Cyrus Pallonji Mistry (eleventh respondent) and his

performance was not universally applauded as the appellants are trying to contend.

**81** According to him, all the directors of "Tata Sons Ltd." (first respondent-company) who participated in the board meeting on October 24, 2016 are individuals with great experience and repute in either business or public life, who fully understood the implications and consequences of the vote they were called upon to cast in the matter of replacement of Mr. Cyrus Pallonji Mistry's (eleventh respondent) in the board meeting on October 24, 2016 and thereafter, exercised their best judgment in the interest of "Tata Sons Ltd." (first respondent-company), by voting to replace Mr. Cyrus Pallonji Mistry (eleventh respondent). While some of the reasons which led to a loss of confidence in the stewardship of Mr. Cyrus Pallonji Mistry (eleventh respondent) are detailed in the press statement dated November 10, 2016 issued by "Tata Sons Ltd." (first respondent-company), the past performance is not the only criteria for judging the performance of a leader but the board and shareholders are also entitled to take into account the future prospects and the continued ability to lead the company. In the present case, not only was there a historical lack of performance but there was a complete loss of confidence regarding Mr. Cyrus Pallonji Mistry's (eleventh respondent) ability to lead the company in future.

**82** It is alleged that subsequent to his replacement as the executive chairman of Tata Sons, Mr. Cyrus Pallonji Mistry (eleventh respondent) made certain unsubstantiated allegations which cast aspersions on Tata Sons and other group companies. However, we are not concerned with the same.

**83** So far as removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) as director of operating companies is concerned, learned senior counsel for "Tata Sons Ltd." (first respondent-company) submitted that while not required to do so under law, but the reasons for the removal of Mr. Cyrus Pallonji Mistry (eleventh respondent) as a director were set out in the explanatory statements convening the general meetings of the companies. In a nutshell, Mr. Cyrus Pallonji Mistry's (eleventh respondent) removal was sought to avoid a situation where the operating companies in the Tata Group were led by a director and chairman in whom the board of directors of their promoter and controlling in shareholder had lost confidence and who had already acted in a manner prejudicial to the best interests of the Tata group by making unfounded allegations against Tata Sons and other Tata Companies. Further, after Mr. Cyrus Mistry's employment as the executive chairman ceased on October 24, 2016 it was incumbent upon Mr. Cyrus Mistry to resign from the board of directors of all other companies in

the Tata Group where he served as non-executive director and chairman. However, in yet another demonstration of his disregard for governance and policies which he had approved himself, Mr. Cyrus Mistry failed to resign and therefore, was removed as a director. In this section, the appellants/Mr. Cyrus Pallonji Mistry (eleventh respondent) also makes certain sundry allegations and only those warranting a response are being dealt below.

**84** With regard to conversion of the "Tata Sons" from "public limited company" to "private limited company", it was submitted that the conversion from public limited company to private limited company has been made by the Registrar of Companies in view of the definition of "private company", as defined under section 2(68) of the Companies Act, 2013 and for such changing, according to learned counsel for the respondents, no application is required to be filed under section 14 of the Companies Act, 2013.

**85** Mr. Mohan Parasaran, learned senior counsel appearing on behalf of Mr. Nitin Nohria (seventh respondent), Mr. Venu Srinivasan (sixth respondent), Mr. K. B. Dadiseth (sixteenth respondent), Mr. R. K. Krishna Kumar (seventeenth respondent), Mr. S. K. Bharucha (eighteenth respondent), Mr. N. M. Munjee (ninteenth respondent), Mr. R. Venkataramanan (twentieth respondent), submitted that the nominee director do not prohibit the taking of the views of the nominator so long as the nominee director discharges his or her fiduciary duty to the company as a director of that company.

**86** Reliance has been placed on section 166 of the Companies Act, 2013 which outlines the duties of directors, and include the duty to act in accordance with the articles of association of the company ; act in good faith in order to promote the objects of the company for the benefit of its members, its employees, etc. ; act with due and reasonable care and exercise independent judgment ; avoid conflict of interest.

**87** Section 166 serves as an inbuilt check or a safeguard to ensure that even a nominee director discharges his functions in a manner that best serves the interest of the company and allays the apprehension that a nominee director, will always be only a mouthpiece of his nominator.

**88** According to learned counsel, the appointment of Mr. Cyrus Pallonji Mistry (eleventh respondent) as an executive chairman with substantial powers of management, was akin to that of a managing director. Accordingly, Mr. Cyrus Pallonji Mistry (eleventh respondent) was a key managerial personnel of Tata Sons in terms of section 251 of the Companies Act, 2013 which defines key managerial personnel to include the managing director. Section 179 (Powers of the Board) of the Companies Act, 2013

clearly and expressly provides that the board of directors of a company shall be entitled to exercise all such powers and to do all acts and things as the company is authorised to exercise and do subject to the provisions of the Act or the memorandum or articles, etc.

89 Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014, inter alia, provides that in addition to the powers specified under section 179(3) the board of directors shall have the power to appoint or remove key managerial personal (KMP).

90 Article 121 of the articles of association of "Tata Sons" merely suggests affirmative vote which is permissible under the law, therefore, the right to exercise affirmative vote vests with nominee directors and not the trusts.

91 It was submitted that the affirmative rights/veto rights do not grant any special rights to the holders of such rights to ensure that any particular business is necessarily decided as per their wish and/or that any particular board resolutions are passed.

92 Learned senior counsel for the seventh respondent-(Mr. Nitin Nohria) denied the allegation that the respondents have all been acting as "puppets", "handmaidens", "poodles" and "postmen" for Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent) ("outsiders", "super directors" and "shadow directors") as they have been purportedly acting on the instructions of and in the interest of Mr. Ratan N. Tata (second respondent) and Mr. N. A. Soonawala (fourteenth respondent). It was contended that the allegation is sought to be supported on an entirely distorted narrative of facts.

93 Learned counsel submitted that the seventh respondent had joined the board of "Tata Sons Ltd." in September, 2013 after Mr. Ratan N. Tata (second respondent) retired from the board of the first respondent-company (Tata Sons).

94 It was also informed that Mr. Nitin Nohria (seventh respondent) and Mr. Vijay Singh (ninth respondent) are two trust nominee directors. It is stated that on the particular date of removal of Mr. Cyrus Pallonji Mistry (eleventh respondent), they leave a board meeting to seek instructions from Mr. Ratan N. Tata (second respondent) on specific issues which were being discussed in the meeting.

95 The following lapses of Mr. Cyrus Pallonji Mistry (eleventh respondent) have been pointed out by learned counsel for Mr. Nitin Nohria (seventh respondent) :

> "(a) A serious lapse of governance was witnessed in the context of the acquisition of 'Welspun Renewables Energy Ltd.' by 'Tata Power

Renewable Energy Ltd.', a subsidiary of the 'Tata Power Co. Ltd.' ('Welspun Acquisition'). This was a major acquisition and the purchase consideration for the transaction was estimated to be approximately in excess of USD 1 billion. The concern of first respondent (Tata Sons) arose from the high level of debt in Tata Power of Rs. 40,000 crores and the non-resolution of the tariff issue of its Mundra Project. As a promoter of the 'Tata Power Co. Ltd.' ('Tata Power'), the first respondent (Tata Sons) was practically left in the dark about such a significant transaction which was agreed by Tata Power while Mr. Cryus Pallonji Mistry (eleventh respondent) was the chairman of "Tata Power". On May 31, 2016 a note on the proposed Welspun Acquisition was Circulated to the directors of 'Tata Sons' that 'Tata Power' (through its subsidiary) was in advanced stages of finalization of the Welspun Acquisition and definitive agreements were to be signed imminently. Soon thereafter, on June 12, 2016, 'Tata Power' executed definitive documents and announced the Welspun Acquisition. Mr. Cryus Pallonji Mistry (eleventh respondent) claimed that the note circulated to the directors of the first respondent-company ('Tata Sons'), without any discussions or deliberations on the matter in a board meeting of first respondent-company ('Tata Sons'), 'appropriately fulfilled all requirements under the articles', while being aware that the financing structure of Welspun Acquisition would necessitate 'Tata Power' to raise debt, approval for which would be required from the board of directors of the first respondent-company ('Tata Sons').

(b) In the board meeting of the first respondent-company ('Tata Sons') held on June 29 and 30, 2016 Mr. Nitin Nohria (seventh respondent) and Mr. Vijay Singh (ninth respondent) being trust nominee directors repeatedly reiterated the view that the Welspun Acquisition should have been deliberated at the board meeting of the first respondent-company ('Tata Sons') at a much earlier stage, as opposed to being presented as a fait accompli. Although the trust nominee directors approved the financing structure of the Welspun Acquisition, given that definitive agreements had already been executed and the deal had been announced in the public domain.

(c) This led to a concern that proper process to seek approval for the Welspun transaction was not followed and this incapacitated the board of the first respondent-company ('Tata Sons') including the trust nominee directors from effectively deliberating on this issue. Mr. Vijay Singh (ninth respondent) wanted to formally note this concern

in the minutes of the board meeting which in his view was in breach of the articles of association of the first respondent-company ('Tata Sons'). Since Mr. Cyrus Pallonji Mistry (eleventh respondent) refused to permit such language being entered in the, minutes, Mr. Nitin Nohria (seventh respondent) and Mr. Vijay Singh (ninth respondent) requested for an opportunity to talk to Mr. Ratan N. Tata (second respondent) so that they could find the language acceptable to both Mr. Cyrus Pallonji Mistry (eleventh respondent) and the trusts to be entered into minutes.

(d) Mr. Nitin Nohria (seventh respondent) wanted to bring a consensus rather than act in a manner which would require the chairman of the board, i. e., Mr. Cyrus Pallonji Mistry (eleventh respondent) to record an objection in the minutes. This has been twisted out of context by the appellants for their self-serving ulterior motives. No instructions were sought from Mr. Ratan N. Tata (second respondent). This is, a glaring example of irreparable trust deficit between Mr. Cyrus Pallonji Mistry (eleventh respondent) and the majority shareholders, since even the minutes of meetings became contentious."

**96** Though the aforesaid allegations have been made by the seventh respondent, no supporting document enclosed in support of such allegation or lapse on the part of the eleventh respondent.

**97** Similar plea has been taken by other respondents.

*Analysis of facts and law*

**98** Chapter XVI of the Companies Act, 2013 relates to "Prevention of oppression and mismanagement". Section 241 deals with "Application to Tribunal for relief in cases of oppression", etc. Section 242 is "Powers of Tribunal", as under :

"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