NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeals (AT) No.133 and 139 of 2017

(Arising out of Order dated 17th April 2017 passed by the National Company Law Tribunal, Mumbai Bench, Mumbai in C.P. No. 82/241,242,244/NCLT/MAH/2016)

IN THE MATTER OF:

Cyrus Investments Pvt Ltd & Anr. ...Appellant

Versus

Tata Sons Ltd & Ors ...Respondents

Present: **Mr. C.A. Sundaram and Mr. Arun Kathpalia, Senior Advocates with Shri Somasekhar Sundaresn, Ms Rohini Musa, Shri Manik Dogra, Mr. Rohan Jaitley, Mrs Sonali Jaitley Bakhshi, Mr. Jaiyesh Bakhshi, Mr. Apurva Diwanji, Mr. Ruzbeh Mistry, Mr. Ravi Tyagi, Mr. Shubhanshu Gupta, Ms. Sanya Kapoor, Mr. Gunjan Shah, Mr. Parag Sawant and Mr. Akshay Doctor, Advocates for the Appellant.**

Dr. Abhishek Manu Singhvi, Mr. Rajiv Nayar, Mr. Amit Sibal and Mr. Darpan Wadhwa, Senior Advocates with Mr. R.N. Karanjawala, Ms. Ruby Singh Ahuja, Mr. Gaurav Mitra, Ms. Tahira Karanjawala, Mr. Anupn Prakash, Ms. Eesha Mohapatra, Mr. Avishkar Singhvi, Mr. Sameer Rohatgi, Mr. Aditya Shankar, Mr. Arjun Sharma, Mr. Arvind Chari, Mr. Sidharth Sharma, Mr. Siddharta Kalita and Mr. Prateek Seksaria, Advocates for Respondent No.1.

Mr. Mukul Rohatgi, Senior Advocate with Mr. Dhruv Dewan, Mr. Nitesh Jain, Mr. Sayak Maity, Mr Rohan Batra, Mr Arjun Sharma, Ms. Reena Choudhary and Mr. Kostubh Devnani, Advocates for Respondent No.2.

Mr. S.N. Mookherjee, Senior Advocate with Mr. Dhruv Dewan, Mr. Nitesh Jain, Mr. Sayak Maity, Mr Arjun Sharma, Mr. Rohan Batra, Mr. Kostubh Devnani and Ms. Reena Choudhary, Advocates for Respondent No.3.

Mr. Sandeep Sethi, Senior Advocate with Mr. Nikhil Rohatgi and Mr. Rajiv Kumar, Advocates for Respondent No.11.

Mr. Mohan Parasaran, Senior Advocate with Mr. Saswat Patnaik, Mr. Aditya Panda, Mr. Ashwin Kumar D.S. and Ms. Aditi Dani, Advocates for Respondent Nos. 6, 14,17,18, 20 to 22.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This common judgement disposes of two appeals against two different orders, passed in one Company Petition.

2. The appellants Cyrus Investments Pvt. Ltd. and Sterling Investment Corporate Pvt. Ltd., both shareholders of 1st Respondent Company – Tata Sons Limited, preferred Company Petition No. 82 of 2016 before the National Company Law Tribunal, Mumbai (hereinafter referred to as 'Tribunal') under Sections 241, 242 and 244 of the Companies Act, 2013 alleging continuing act of 'Oppression & Mismanagement' of members of 1st Respondent along with an application seeking Interim Relief.

3. On 22nd December 2016, the Tribunal passed a consent order. During the pendency of the same, the 1st Respondent issued notice on 5th January 2017 calling for Extra Ordinary General Meeting of the 1st Respondent Company on 6th February 2017 with subject of business being removal of 11th Respondent – Cyrus Pallonji Mistry as Director of the 1st Respondent Company. The Contempt Petition alleging violation of Tribunal's Order was filed by appellants with an additional affidavit including the action of the 1st,

14th, 17th and 20th Respondents. During the pendency of the said petition, an application under proviso to Section 244 being I.A.No. 26 of 2017 was filed by the appellants seeking waiver of condition for filing application under Sections 241 and 242 of the Companies Act, 2013. Learned Tribunal, by its order dated 31st January 2017 inter alia stated that Interim Relief had already been rejected in the previous orders but had not decided the issue of maintainability, which was raised on behalf of the contending respondents.

4. On an appeal before this Appellate Tribunal, by Order dated 3rd February 2017, the Appellate Tribunal while rejected the Interim Relief application of the appellants and observed that if the appellants succeed in proving 'Oppression & Mismanagement', the Tribunal may restore the position of 11th Respondent. This Appellate Tribunal also held during final hearing, the Tribunal should decide the question of maintainability first and if answer is in negative against the appellants, then to decide the question of waiver and thereafter if waived, to decide the merit.

5. Again during the pendency of the petition, an Extra Ordinary General Meeting was convened by 1st Respondent on 6th February 2017 and removed the 11th Respondent from the Board of Directors. The aforesaid act was also challenged by appellants by Amendment Petition as carried out on 10th February 2017.

6. The Tribunal heard the matter on the issue of maintainability and then passed impugned order dated 6th March 2017 holding that the Company Petition at the instance of appellants is not maintainable. The Tribunal held that the appellants do not have qualification under Section 244, as they hold less than 1/10th of the 'Issued Share Capital' of the Company. The Tribunal

then decided to proceed on the question of waiver in terms of proviso to Section 244.

7. After hearing the Learned counsel for the parties on the question of waiver, Learned Tribunal by second impugned order dated 17th April 2017 dismissed the application for waiver preferred by appellants and, thereby dismissed the Company Petition. Against the orders dated 6th March 2017 and 17th April 2017, these respective appeals have been preferred.

8. The question for determination in these appeals are:-

(a) whether the petition preferred by appellants under Sections 241 and 242 of the Companies Act is maintainable? In other words, whether the appellants qualify the condition of holding minimum 1/10th of the 'Issued Share Capital' of the 1st Respondent Company, and

(b) In case the 1st question is decided in negative against the appellants, then whether the appellants have made out a case of waiver of all or any or the requirements specified in Clause 1(a) of Section 244 so as to enable the appellants (the members) to apply under Section 241.

Proposition on behalf of the appellants on the issue of maintainability:-

9. According to Mr. Sundaram Learned Senior Counsel for the Appellant, the Companies Act, 2013, itself has created and recognises classes of members. It has in this regard also made significant departures from the Companies Act, 1956. The relevant Sections that clearly recognize classes of members are: -

(a) Section 2(55): - In the definition of "members" three categories have been envisaged, viz., (i) those who are members at the incorporation of the company and subscribe to the Memorandum of Association of the company; (ii) those who hold beneficial interest in shares held by and with a depository; and (iii) those who agree in writing to become members of the company as a result of a transfer or transmission of shares.

(b) Chapter IV dealing with Share Capital of a company. (Sections 43, 47, 48 and 49)

(c) Section 87: - recognises different rights of classes of shareholders.

(d) Section 88: - Every company is required to maintain a Register of its members. However, unlike the Companies Act, 1956, which prescribed one Register being maintained by the Company containing details of its shareholders, the Companies Act, 2013 has made a significant departure through Section 88 which now requires every Company to maintain a Register of Members separately indicating for each class of equity and preference shares held by each member.

(e) Section 241 – recognizing the necessity to protect a class of members

10. It was also submitted that the Scheme of Sections 241-244 is that Section 242 is a remedial mechanism that comes into play when the events contemplated by Section 241 arises qua persons specified in the said Section and Section 244 stipulates the entitlement of such persons to approach the Tribunal. Therefore, these Sections are a self- contained code dealing with the subject of "Oppression and Mismanagement."

11. In support of the contention, it was contended that the applications are for the separate classes of members to Section 244.

Section 241(a) specifically mandates the protection of the rights and interests of the following: -

a. Public interest;

b. A member (being the Petitioner before the Tribunal);

c. Another member or members; and

d. The company itself.

12. On the other hand, according to him, Section 241(b) mandates the protection of the interests of the following, as a result of a material change in management/control of the company, an alteration in the Board of Directors or in the ownership of the Company's shares: -

a. The Company;

b. The members of the Company; or

c. Any class of members of the Company.

Section 244, on the other hand, while providing for the right to apply under section 241, creates a different set of class of members, as enumerated herein below: -

a. Not less than one hundred members of the company;

b. Not less than one- tenth of the total number of members; and

c. Any member or members holding not less than one-tenth of the issued share capital of the company.

13. Therefore, according to Learned Counsel for the appellants, the words "share capital" as found in Section 244, would have to be read in conjunction

with Section 241, and thus the reference to "share capital" in Section 244 ought to be read qua the "class of members" sought to be protected by the Statute, under section 241. Moreso, when different classes of members are recognized by the Companies Act, 2013, inter alia in Chapter IV which deals with share capital.

Therefore, (a) and (b) looks are the member(s) or the holder of the share but for (c) the relevance is the nature of the holding.

14. According to Learned Senior counsel, the reference to "Issued share capital" in Section 244 has to only refer to the "relevant share capital" otherwise it would lead to an absurdity that holder of shares who are completely disinterested in an action, or even have a conflicting interest to a Petitioner qua such action would necessarily have to join in with the aggrieved party and their percentage of shareholding would also be taken into account for the resolution of such a dispute. This would lead to an absurdity apart from rendering the relief contemplated in Section 241 nugatory.

15. Much stress was given on the meaning of "Issued Share Capital" which according to Learned Senior Counsel for the appellants, the term "Issued share capital" as found in Section 244, could mean either "preference share capital", or 'equity share capital' or 'total share capital'(i.e., 'equity' and 'preference' share capital collectively) since share capital includes mutually exclusive kinds of capital.

16. It was submitted that the instant case does not deal with the interpretation of Section 43 alone since the said Section expressly highlight that there are different kinds of share capital. Moreover, even the Explanation

to the Section begins with the phrase “for the purpose of this section”. And has necessarily to be restricted only to the said provision and Section 244 ought to be interpreted on its own terms.

17. It was further contended that if the intention of the Legislature by the use of the term “issued share capital” was an aggregate of the equity and preference share capital of a company, the Legislature would have provided some kind of an indicator with respect to this. This is more so, when in just the preceding words, while referring to the strength of members to qualify as being eligible, the Legislature thought it fit to use “total”, while dealing with “not less than one-tenth of the total number of its members.”. therefore, it has to be presumed that the Legislature, being conscious of the different kinds of share capital, chose to not describe the “issued share capital” as being, the “total”, the “sum” or even the “whole” of the issued share capital of the company. If it was the intention of the Legislature to make the terms “issued share capital” as used in Section 43 applicable to Section 244, in the absence of a definition to the said terms, the Legislature would have given some indication in this regard. Such drafting cannot be referred to as simply an omission on the part of the Legislature, owing to the fact, that the very same Legislature makes use of the very same term, where it thought fit to do so.

18. Referring to Section 43 which relates to ‘Kinds of Share Capital’ with Equity and Preference, Section 47 which deals with voting rights of two classes of shareholders, Section 48 which relates to variation of shareholders’ rights and Section 49 ‘Calls on shares of same class too be made on uniform basis”, it was submitted that unlike Section 87 of the Companies Act 1956, which restrained the voting rights of equity shareholders to equity share

capital and a preference shareholders to preference share capital. It was contended that Section 47 of the Act 2013, grants the right to vote on every resolution placed before the company. The voting rights of a preference shareholders continued to be restrained to those resolutions placed before the company which directly affect the rights attached to such preference shares, except in the case of default by the company in payment of dividends as enumerated in second proviso.

19. In support of the contention that different meaning of same expression expressed in different sections cannot be given, Learned Senior Counsel for the appellants relied on decision of Hon'ble Supreme Court in ***"Kaviraj Pandit Durga Dutt Shyarma Vs. Navaratna Pharmacaeutical Laboratories AIR (1965) SC 980"*** wherein the Hon'ble Supreme Court interpreted the word "Navratna" taking into consideration Etymological and in combination of other words while deciding a case of Trade Mark. We find no relevancy of the said case in context of the present case and the submission as made above.

Reliance was also placed in Hon'ble Supreme Court decision in ***Printers (Mysore) Ltd. and Anr. Versus Asstt. Commercial Tax Officer and Ors, (1994) 2 SCC 434***. In the said case the Hon'ble Court observed:-

> ***"18.*** *…… "it is well settled that where the context does not permit or where it would lead to absurd or unintended result, the definition of an expression need not be mechanically applied. [Vide T.M. Kanniyanv. ITO [(1968) 2 SCR 103 : AIR 1968 SC 637 : 68 ITR 244] , Pushpa Devi v. Milkhi Ram [(1990) 2 SCC 134, 140] (para 14)*

and CIT v. J.H. Gotla [(1985) 4 SCC 343 : 1985 SCC (Tax) 670] .]"

20. It was submitted that the interpretation sought to be given by the Respondents to the term "Issued Share Capital" in Section 244 would render equating the two kinds of shareholders, when in point of fact, equity shareholders have been treated as a separate class not only with respect to identity in the Company (as contained in the Register of Members as also Section 48, pertaining to the variation of shareholders' rights) but also with respect to the actual running of the operations of the Company (as contained in Section 47). Such treatment of unequal's as equals would as well offend the doctrine of equality as enshrined in Article 14 of the Constitution. An interpretation that would run against such principles of equality by treating unlikes as likes ought to be eschewed.

21. It was also submitted that preference and Equity shares are mutually exclusive classes. Preference being "debt" not intended to be part of "issued share capital" in Section 244 when a class has to be restricted, the principle has to be founded on homogeneity and commonality of interest. It must be seen that dissimilar classes with conflicting interests are not put in one compartment to avoid any kind of injustice.

22. Reliance was also placed on decision of Hon'ble Supreme Court in ***"Infrastructure Leasing and Financial Services Limited Vs. BPL Limited"- 2015(3) SCC 363,*** wherein Hon'ble Supreme Court noticed the concept of class as:-

"30. *delineating with the concept of class, referred to Palmer's Treties on Company Law, observed: -*

"What constitutes a class

The court does not itself consider at this point what classes of creditors or members should be made parties to the Scheme. This is for the company to decide, in accordance with what the Scheme purports to achieve. The application for an order for meetings is a preliminary step, the applicant taking the risk that the classes which are fixed by the Judge, usually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, and we emphasise the words 'in the result', they reveal inadequacies, the Scheme will not be approved. If e.g. rights of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to be treated differently under the Scheme, such groups must be treated as separate class for the purpose of the Scheme. Moreover, when the company has decided what classes are necessary parties to the Scheme, it may happen that one class will consist of a small number of persons who will all be willing to be bound by the Scheme. In that case it is not the practice to hold a meeting of that class, but to make the class a party to the Scheme and to obtain the consent of all its members to be bound. It is, however, necessary for at

least one class meeting to be held in order to give the court jurisdiction under the section."

32. The purpose of the classification of creditors has its significance. It is with this object that when a class has to be restricted, the principle has to be founded on homogeneity and commonality of interest. It is to be seen that dissimilar classes with conflicting interest are not put in one compartment to avoid any kind of injustice. For example, an unsecured creditor who has filed a suit and obtained a decree would not become a secured creditor. He has to be put in the same class as other unsecured creditors. (See Halsbury's Laws of India, 2007, Vol. 27.)"

23. It was submitted that class of members being recognized as a separate category is fortified by the use of the term in others provisions of the Statute:-

i. Section 43-share capital

ii. Section 49-Call on shares of same class to be made on uniform basis

iii. Section 92- Annual Return

iv. Section 117- Resolutions and Agreements to be filed

v. Section 230-234-Power to compromise and make arrangements.

24. According to learned counsel for the appellants there will be a position of absurdity if the Tribunals' interpretation of "issued share capital" used in Section 244 is accepted, it would lead to an absurd situation, in as much as, if such yardstick is used for the Respondent No.1 Company it would require

a holding of at least 81% in the equity of a company to be eligible to maintain an action under Section 241. When the very section is to protect against oppression and/or mismanagement of a minority and as per the amended Section 241(1) (b), "class of members" has been specifically included the intent would clearly be to protect even such class and a meaning cannot be attributed to Section 244 which would militate totally there against. In the instant case, even the majority equity shareholders who holds 66% of the equity would not be eligible to maintain such an action.

25. It was also contended that the purpose of Section 244 being to ensure that speculative actions of an insignificant percentage of shareholders are discouraged and thereby stop mischievous litigation, it is relevant that in the Respondent No.1 company, the valuation of the company being in the region of at least 6 lakh crores, the interest of the Petitioners in the overall value of the Company would be over 1 lac crores. The value of the preference shareholding would only be Rs. 291 cores and not to carry voting rights other than in the exceptional circumstances found in Section 47(2), of the 2013 Act.

26. According to appellants, a construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the Statute purports to regulate has to be rejected and preference should be given to that constructions which avoids such results.

27. In support of the contention, reliance was placed in ***"Surjit Singh Kalra Versus Union of India and Another – (1991) 2 SCC 87"*** wherein Hon'ble Supreme Court held :-

"19. For the above reasons, we hold that the expression "goods" occurring in the words "for use by him in the manufacture or processing of goods for sale" in Section 8(3)(b) of the Central Sales Tax Act, 1956 does take in, i.e., does not exclude newspapers. We agree with the view taken by the Madras and Kerala High Courts. In our view, the view taken by the Karnataka High Court is unsustainable."

28. Reliance was also placed on the decision of Hon'ble Supreme Court in "***Municipal Corporation of the City of Ahmedabad Versus Ben Hiraben Manilal, (1983) 2 SCC 422"***, wherein the Hon'ble Apex Court, dealing with building regulation, held: -

"7. Chapter XV of the Bombay Provincial Municipal Corporation Act, 1949 as applicable to the area concerned, deals with the building regulations and includes Section 260 of the Act. These provisions are to regulate the building construction for the safety, health and wellbeing of the inhabitants of the particular Municipality or Corporation. Therefore, the provisions should be read broadly which will effectuate the intention of the legislature and prevent the mischief which was intended to be remedied or avoided by the provisions. It is well settled that when a problem of construction comes before a court, the intention of the legislature must be given effect to as expressed in the language of the provisions. Where the language is explicit,

no problem arises. Even where the usual meaning of a language falls short of the whole object of the legislature, a more extended meaning may be given to the words if they are fairly susceptible of it. The construction must not, however, be strained to include cases plainly omitted from the natural meaning of the words. It has been said very often that it is the duty of a judge to make such construction of a statute as shall suppress the mischief and advance the remedy (see in this connection the observations of Maxwell on The Interpretation of Statutes, 10th Edn., p. 68, under the heading "Beneficial Construction"). If we keep in mind the purpose of these regulations and the object of these regulations, i.e. regulating the building construction in a municipal statute, it appears that it will be anomalous result if it be said that if a building is constructed illegally or in an unauthorised manner, action can only be taken against the person who is doing the unauthorised act or illegal act but after the construction of the building is passed over to others, the construction of the building enjoys immunity from any action in respect of the same. That it appears, could not be a proper construction particularly in this case in view of the specific language used in the latter part of sub-section (1) of Section 478 of the Act set out hereinbefore. Keeping in background the facts of this case and the said provisions, in our opinion, the action taken by the

Corporation was warranted by the provisions of the Act. Therefore it cannot be said that the notice issued by the Municipal Corporation was unauthorised or illegal. In that view of the matter, the judgment and order of the High Court of Gujarat impugned in this case must be set aside on this aspect of the matter and the appeal is thus allowed and the respondent's suit dismissed. We express no opinion on the other point of delegation. The parties will bear, in the facts and circumstances of the case, their own costs throughout."

29. Hon'ble Supreme Court decision in ***"Krishan Kumar Versus State of Rajasthan and Others, (1991) 4 SCC 258"*** was referred to suggest that new scheme by reference to clause as brought into section 241 cannot be ignored as an insignificant change.

30. For the purpose of interpretation of the intention of the legislature, reliance was placed on decision of Hon'ble Supreme Court in ***"Indian Performing Rights Society Limited versus Sanjay Dalia and Another, (2015) 10 SCC 161"***. In the said case, for the purpose of interpretation of statute, the Hon'ble Supreme Court referred to Justice G.P. Singh's "Principles of Statutory Interpretation" 12th Edition, wherein it is observed that regard be had to the subject and object of the Act, the court's effort is to harmonize the words of the statute with the subject of enactment and object the legislature has in view. When two interpretations are feasible, the Court will prefer the one which advances the remedy and suppress the mischief, inconvenience, injustice, absurdity or anomaly. The Hon'ble Supreme Court referred to the Principle of Interpretation:-

"34. *The learned author Justice G.P. Singh in Interpretation of Statutes, 12th Edn. has also observed that it is the court's duty to avoid hardship, inconvenience, injustice, absurdity and anomaly while selecting out of different interpretations. The doctrine must be applied with great care and in case absurd inconvenience is to be caused that interpretation has to be avoided. Cases of individual hardship or injustice have no bearing for enacting the natural construction. The relevant discussion at pp. 132-33 and 140-42 is extracted hereunder:*

> *"(a) Hardship, inconvenience, injustice, absurdity and anomaly to be avoided*

In selecting out of different interpretations 'the court will adopt that which is just, reasonable and sensible rather than that which is none of those things' (Holmes v. Bradfield Rural District Council [(1949) 2 KB 1: (1949) 1 All ER 381 (DC)] , All ER p. 384) as it may be presumed 'that the legislature should have used the word in that interpretation which least offends our sense of justice'. (Simms v. Registrar of Probates [1900 AC 323 (PC)] , AC p. 335.) If the grammatical construction leads to some absurdity or some repugnance or inconsistency with the rest of the instrument, it may be departed from so as to avoid that absurdity and inconsistency.

(Grey v. Pearson [(1857) LR 6 HL Cas 61 : (1843-60) All ER Rep 21] , HLC p. 106.) Similarly, a construction giving rise to anomalies should be avoided……..xxx".

31. In the said case, the Hon'ble Supreme Court noticed that while constructing an enactment, court will avoid construction which is unworkable or impracticable, inconvenient, anomalous or illogical, as noticed below :

"35.*Bennion on Statutory Interpretation has mentioned law to the same effect under Section 312 and has observed that there is a presumption that absurd result is not intended and in Section 314 it has been observed that the court has to avoid an inconvenient result while interpreting a provision. It was stated that it can be presumed that Parliament intends that while construing an enactment the court will avoid a construction that is unworkable or impracticable, inconvenient, anomalous or illogical as the same is unlikely to be intended by Parliament. In Rosali V. v. TAICO Bank [(2009) 17 SCC 690 : (2011) 2 SCC (Civ) 626] , this Court referring to Halsbury's common sense construction rule held that it is a well-settled principle of law that common sense construction rule should be taken recourse in certain cases."*

32. Therefore, according to Learned counsel for the appellants for harmonious construction of Sections 241 and 244 will need to be read

together and are not mutually exclusive inasmuch as though conditions and parameters as contained in Section 244 from the jurisdictional basis for Section 241, in the same manner, the grievances mentioned in Section 241 can only be maintained "*provided such member has a right to apply under Section 244"* has been stated in Section 241. This is moreso, in the light of Section 245, while dealing with a Class Action contains the very same parameters as contained in Section 244 and such Section also specifically deals with a "*class of members"*

33. Learned Senior counsel further contended that "Class of Members" was recognized as a separate category under some sections of the Companies Act, 1956 viz., Sections 17(6), 42(3), 170(2) and Section 391. Sections 397-398 of the 1956 Act dealing with Oppression and Mismanagement did not contain this category. However, the 2013 Act has introduced the same in Section 241(2) and therefore, it is inconceivable that though the company's affairs being conducted in a manner prejudicial to the interests of any class of members is a ground for interference by the Tribunal, such class of members cannot maintain an action. This is moreso, in light of the fact that the 2013 Act recognizes a Class of members as being a separate category.

34. According to the Learned Senior Counsel for the Appellants, Section 241 is a beneficial provision included in the interest equity, justice and good conscience in order to protect the minority shareholders of a company. It is imperative that such beneficial provision be given a liberal construction and not be restricted to eliminate a class that would otherwise fall with the category of classes to be protected under such beneficial legislation/provision.

35. It was further contended that the decision of ***'Northern Projects Limited. Vs. Blue Coast Hotels and Resorts Ltd. and Others'*** relied upon by Tribunal have to be read in conjunction with the earlier Act (Companies Act 1956) and its Sections bearing in mind that new Act (Companies Act 2013) including Section 244, has not been considered. Even if the plain meaning of "Issued Share Capital" in Section 244 is accepted to be inclusive both classes of share capital and interpretation ought to be given that would render statute workable and would not frustrate the very provision. Learned counsel also distinguished the judgement relied upon by the Tribunal while passing the impugned order.

Proposition on behalf of the Respondents (except 11th Respondent)

36. On behalf of the respondents, the main argument was advanced by Mr. Abhishekh Manu Singhvi, Senior Advocate on behalf of the 1st Respondent Company – Tata Sons Limited.

37. Referring to Section 241 of Companies Act 2013, Learned Senior Counsel submitted that in the case of a company having share capital, the following three categories of members have the right to approach the NCLT for the purpose of making an application under Section 241 of the 2013 Act.

(i) Not less than 100 members of the company or,

(ii) 1/10th of the total number of members; or

(iii) Member(s) holding not less than 1/10th of the issued share capital of the company.

38. In a manner of speaking, the aforesaid three categories are akin to three types of entry passes for entering the portals of Tribunal for the purposes of

making an application under Section 241 of the 2013 Act. If any petitioning member (or members, where there are more than one) possess any of the entry pass, it will have a right to make an application under Section 241 of the 2013 Act. Conversely, member(s) not satisfying any of the eligibility criterion does not have the right to make an application under Section 241 of the 2013 Act, but can apply under the proviso to Section 244(1) of the 2013 Act to the Tribunal for waiver of the eligibility requirements "so as to enable the members to apply under Section 241".

39. Viewed in this light, Section 244 embodies a clear legislative policy of allowing, as a matter of right, only members holding specified numerical or shareholding numbers, to avail the remedy under Section 241 of the 2013 Act. Clearly, the Parliament did not want all members of the company to be armed with the right to make an application under Section 241 against the company in which they are members.

40. It was contended that the Appellants do not meet any of the eligibility qualifications in as much as:

(i) The Appellants are two (2) members

(ii) They collectively represent less than 1/10th of the total 51 members of Respondent No. 1; and

(iii) As on the date of filing of the Petition, the total issued equity share capital of Respondent No. 1 was Rs. 40.41 crores and the total issued preference share capital was Rs. 294 crores. Out of the total issued share capital (equity plus preference) with an aggregate face value of Rs. 335 crores, the Appellants collectively hold only equity shares with an aggregate value of Rs. 7.44

crores, which translates into only 2.17% of the total issued share capital.

Thus, according to Respondents, ex-facie, the Appellants do not meet any of the threshold requirements under Section 244(1) of the 2013.

41. Mr. Abhishek Manu Singhvi, Learned Senior Counsel for the 1st Respondent contended that the Appellants made a bold and misleading assertion that they were fully entitled to maintain the Company Petition since they held 18.37% equity shares of the 1st Respondent Company. This was averred despite the fact that the Appellants held only 2.17% of the issued share capital of the 1st Respondent Company. According to him, the argument now being made that the express "class of members" occurring in Section 244(1) was not even urged in the Petition.

42. It was also submitted that the respondents in their replies pointed out that appellants were holding much less than 1/10th of the issued share capital of the 1st Respondent Company. Faced with this quandary, the Appellants called upon the Tribunal to "construe" Section 244 of the 2013 Act in a way that the expression "issued share capital" occurring therein is read/treated as "relevant issued share capital" on the basis that the concept of "class of members" occurring in Section 241(1)(b) is liable to be imported into Section 244(1) of the 2013 Act. In other words, the argument taken both before the Tribunal and this Appellate Tribunal is that 1/10th of the issued share capital of a company must be reckoned separately for equity and preference shareholders, such that it will be sufficient for section 244(1) if – petitioning members holding only equity shares hold 1/10th of the issued equity share

capital and conversely petitioning members holding only preference shares hold 1/10th of the issued preference share capital.

43. According to Learned Senior Counsel for the 1st Respondent it is not clear from the construction of Section 244(1) propounded by the Appellants how "relevant issued share capital" is to be computed in cases where petitioning member(s) hold both equity and preference shares. However, leaving that aside for the present, the central issue in the present appeal is whether, in computing the criteria of "one-tenth of the issued share capital of the company", the cumulative of equity and preference share capital is to be looked at or only the relevant equity/preference share capital, as the case may be, needs to be seen.

44. While it was submitted that "Issued Share Capital" includes both 'equity share capital', 'preference share capital', it was contended that a survey of the following provisions of the 2013 Act makes it clear that the expression "issued share capital" includes both 'issued equity share capital' and 'issued preference share capital'.

45. According to Learned Senior Counsel for the 1st Respondent, Section 244(1) of the Act 2013 being pari materia to Section 399(1) of the Act 1956, the interpretation of "Issued Share Capital" as given and held by High Court of Bombay in ***"Northern Projects Ltd. V. Blue Coast Hotels and Resorts Ltd., (2009) 149 Company Cases 279",*** *is to be applied which was affirmed by Hon'ble Supreme Court.*

46. Reliance was also placed on a decision of Hon'ble Supreme Court in ***"J.P.Srivastava & Sons (P) Ltd. Vs. Gwalior Sugar Co. Ltd. (2005) 1 SCC***

172" in support of the plea that the word "issued Share Capital" includes both equity and preference share capital.

47. According to Learned Senior Counsel for the 1st Respondent, the stand of the appellants that the phrase "class of members" in Section 241(1)(b) should be read into Section 244(1) of Act 2013 is fully untenable.

48. It was also submitted that wherever the parliament thought it fit to refer to "class" or "issued equity share capital", it has done so expressly. For instance, Section 236 of Act 2013 which uses the phrase "issued equity share capital" in the context of purchase of minority shareholding. Another example is Section 48 of the 2013 Act which pertains to variation of rights of different classes of shareholders and employs the expression "issued shares of that class".

49. Reliance was placed on the decision of Hon'ble Supreme Court in ***"Employees State Insurance Corporation Vs. TELCO, (1975) 2 SCC 835".***

50. Learned Senior Counsel also contended that if appellants' interpretation is accepted, it would wreak havoc and would be akin to driving a coach.

51. According to respondents' language of Section 244 being clear and unambiguous, the rule of literal interpretation should be applicable to its interpretation.

52. Reliance was also placed on the decision of Hon'ble Supreme Court in ***"Nasiruddin Vs. Sita Ram Agarwal (2003) 2 SCC 577; Commissioner of Sales Tax, U.P. Lucknow V. Parson Tools and Plants (1975) 4 SCC 22; V.L.S. Finance Ltd. V. Union of India (2013) 6 SCC 278 and Raghunath Rai Bareja V. Punjab National Bank (2007) 2 SCC 230.***

53. Mr. Mukul Rohtagi, Learned Senior Counsel who appeared on behalf of the 2nd Respondent while taken similar plea further submitted that the language of Section 244(1) of the Companies Act, 2013 is clear and explicit. It is therefore, liable to be construed literally. Right from Companies Act 1956, it is well settled that the term '*Issued Share Capital'* used in Section 399 of the said act comprised both the issued equity and preference share capital. ***[Ref. Northern Projects Ltd. V. Blue Coast Hotels and Resorts Ltd., (2009) 148 Comp Case 279; M/s. Northern Projects Ltd. V. Blue Coast Hotels & Resorts Ltd. & Ors. SLP No. 12753/2008; J.P. Srivastava & Sons (P) Ltd. V. Gwalior Sugar Co. Ltd.' (2005) 1 SCC 172].***

54. According to him, Section 244(1) of the Companies Act, 2013 employs the same expression "issued share capital" which was appearing in Section 399 of the old act. Hence, the legislative intention to retain the meaning of "issued share capital" as comprising both issued equity and preference share capital is self-explicit and clear.

In view of the above, there is no scope to read 'issued share capital" in any manner different than how the Hon'ble Supreme Court construed the same in Northern Projects (supra).

55. Mr. S.N. Mukherjee, Learned Senior Counsel appeared on behalf of 3rd Respondent also took similar plea and submitted that such contention is liable to be rejected as:

(a) The words of Section 244 of the 2013 Act are clear, plain and unambiguous;

(b) In such a case, the Courts are bound to give effect to that meaning, irrespective of the consequences involved;

(c) To construe Section 244 of the 2013 Act in the manner suggested by the Appellants would make the provisions unworkable. This is because of the following: -

(i) In proceeding under Section 241 of the 2013 Act, the subject matter of a petition can be an act prejudicial to public interest only or an act prejudicial to the interests of the company only or prejudicial to a member of the company other than the petitioner of oppressive to a member other than the petitioner, who may belong to a class of a member, to which the petitioner does not belong; The Appellants have not indicated what the relevant issued share capital will be in each of these cases. Indeed, they cannot as the intention of the legislature and the words of Section 244 of the 2013 Act does not suggest that issued share capital would vary on a case to case basis.

(ii) The inspiration on the part of the Appellants to suggest such a construction is based on the expression "*any class of members"* appearing in the latter half of Section 241 (1)(b) of the 2013 Act. This argument fails to take note of the fact that Section 241 (1)(a) of the 2013 Act does not contain the expression *"any class of members".* Both under Section 241(1) (a) & (b), the <u>eligibility criteria is the same i.e., the criteria prescribed under Section 244 of the 2013 Act.</u> That being the case, the expression *"class of members"* cannot have any effect on the construction of the

expression "*issued share capital"* occurring in Section 244(1) of the 2013 Act.

56. According to him Section 241 of the 2013 Act gives locus to a member make a complaint to the National Company Law Tribunal in respect of matters specified in Section 24(1)(a)&(b) of the said Act. This locus is subject to the specified in Section 244 of the 2013 Act. Neither the locus provisions nor the eligibility provisions make any reference to "class of membership". That being the case, no question arises of reading the expression *"issued share capital" as "relevant share capital",* depending on the class of member applying for the relief.

Instead the legislature where it thought fit to give a particular class of members a right, it has expressly provided for the same. *(See Sections 48(2) & 236 (1) of the 2013 Act)*

57. Similar was the arguments advanced by Mr. Mohan Parasaran, Learned Senior Counsel on behalf of the 6th Respondent and the other respondents.

Relevant Provisions of the Companies Act, 2013.

58. To decide the issue, it is desirable to refer Section 241 and Section 244 of the Companies Act, 2013, Chapter XVI of the Act relates to "oppression and mismanagement', Section 241 deals with application to Tribunal for relief in cases of oppression etc., which reads 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 manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

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

59. From sub-section (1) of Section 241 it is clear that any member of a company who complains of 'Oppression and Mismanagement' may apply to

the Tribunal, provided such member has a right to apply under Section 244, for an order under the said Chapter, which reads as follows: -

> "**Section 244--***(1) The following members of a company shall have the right to apply under section 241, namely: —*
>
> *(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;*
>
> *(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members:*
>
> *Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.*
>
> *Explanation. —For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.*

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

60. Bare perusal of Section 244 makes it clear that in this case the Company having a share capital, only following categories of Members can apply: -

(i) Minimum one hundred members of the company or one-tenth of the total number of its members, whichever is less and

(ii) Any member or members (jointly) holding not less than one-tenth of the 'issued share capital' of the company.

61. It is also obvious on a bare reading of Sections 241 and 244 of the 2013 Act, that while clause (a) and (b) of subsection (1) of Section 241 deal with the **subject matter** of the grievances which can be raised in a petition, Section 244(1) deals with **locus/eligibility** of the member who can raise such grievances. The subject matter of the complaint bears no connection with the eligibility of the member applying to the Tribunal except that a member seeking to make a grievance of the subject matter contained in Section 241 is required to first satisfy the eligibility of Section 244 of the 2013 Act.

62. This explains why, after stating the nature of complaint in clauses (a) and (b) of subsection (1) of Section 241, it is immediately provided that "*provided such member has a right to apply under section 244…".* Equally, Section 244 reciprocates by stating that the "*following members…shall have the right to apply under Section 241, namely".* Viewed in this light, there is

perfect reciprocal harmony between Section 241 and Section 244 of the 2013 Act.

63. No doubt, the parliament while re-enacting Section 398(2) of the Companies Act, 1956 as Section 241(1)(b) has added the expression "…*any class of members"* at the end of Section 241(1)(b) but this only enlarges **the subject matter of the complaint** which may be brought before Tribunal and does not alter the **locus/eligibility** of a member who can bring such compliant. The latter continues to be governed by Section 244(1), a provision identical to the erstwhile Section 399(1).

64. This can be seen from a different perspective as well- breaking section 241(1)(b) in two parts. In the first part, *"class of shareholders"* has been used to denote the entities by whom or in whose interest, the change in management or control is being effected. This bears no connection with the eligibility test in Section 244(1) of the 2013 Act. The second reference to the expression *"class of members"* is found in the latter part fo the provision in the context of the entity which is likely to be affected or prejudiced by such change. The use of word 'class' here is to denote the group or commonality of shareholders who are being affected because of certain acts of mismanagement and oppression. Again, no causal link is drawn with the eligibility criteria. Consequently, it is clear that there is no correlation between the use of the expression "class" in Section 241(1)(b) and the eligibility requirements in Section 244(1) of the 2013 Act.

65. Even the core premise of Appellants' contention i.e if there is oppression against only one class of shareholders (preference or equity) shareholders of that class ought to be entitled to ventilate that particular class' grievance and

for this purpose eligibility must be reckoned *intra class* is entirely without any merit.

66. In respect of a complaint of oppression, both under the 1956 Act as also under the 2013 Act, **any member can make a complaint that any other member is being oppressed.** In other words, it is not necessary that only member who is the object/target of oppression has the locus to maintain a complaint; any other member(s) can so do on this behalf.

67. Apart from all the above, **it is important to point out that wherever the parliament though it fit to refer to "*class*" or "*issued equity share capital*",** it has done so expressly. For instance, Section 236 of the 2013 Act, which uses the phrase *"issued equity share capital"* in the context of purchase of minority shareholding. Yet another example is Section 48 of the 2013 Act which pertains to variation of rights of different classes of shareholders and employs the expression *"issued shares of that class"*

68. On the other end Section 245 of the 2013 Act, which is next to Section 244. While Section 245 provides the remedy of class action, it lays down the same threshold of the number of members as Section 244 and that too, without making any reference to the "class of members" seeking the remedy under Section 245 of the 2013 Act. The consistency as well as the distinction created by the draftsman in the provisions of the 2013 Act ought to be given effect to. Since the legislature has consciously chosen to insert the class aspect in certain provisions and decided not to do so in Section 244(1), such intention must be respected.

69. In '***Forest Range Officer and others vs. P. Mohammed Ali and others – 1993 Supp. (3) SCC 627'***, Hon'ble Supreme Court noticed its earlier

decision in '***Babu Manmohan Das Shah v. Bishun Das [(1967) 1 SCR 836 : AIR 1967 SC 643]'*** : adopting the ordinary rule of construction stated that "the provisions of a statute must be construed in accordance with the language used therein unless there are compelling reasons such as where the literal construction would reduce the Act to absurdity or prevent manifest legislative purpose from being carried out".

70. A larger bench of Hon'ble Supreme Court in ***"Nasiruddin and others Vs. Sita Ram Agarwal"*** – (2003) 2 SCC 577, while held that literal or strict construction/plain meaning to be given, further held that an interpretation cannot be avoided because it may result in harsh consequences. It is only in case of ambiguity, the court may interpret the provision and held :

> ***"35.*** *In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom. In E. Palanisamy v. Palanisamy [(2003) 1 SCC 123] a Division Bench of this Court observed: (SCC p. 127, para 5)*
>
> *"The rent legislation is normally intended for the benefit of the tenants. At the same time, it is well settled that the benefits conferred on the tenants through the relevant statutes can be enjoyed only on the basis of strict compliance with the statutory provisions. Equitable consideration has no place in such matters.*
>
> *xxx xxx*

> ***37.*** *The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression "shall or may" is not decisive for arriving at a finding as to whether the statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character."*

71. Hon'ble Apex Court in ***"Raghnath Rai Bareja and Another Vs. Punjab National Bank and Others" – 2007(2) SCC 230"***, held that equity cannot prevail over the law and observed:

"43. *In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn., pp. 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection."*

"51. *The learned counsel for the respondent submitted that we have to see the legislative intent when we interpret Section 31. In our opinion, resort can be had to the legislative intent for the purpose of interpreting a provision of law when the language employed by the legislature is doubtful or ambiguous or leads to some absurdity. However, when the language is plain and explicit and does not admit of any doubt, the court cannot by reference to an assumed legislative intent expand or alter the plain meaning of an expression employed by the legislature vide Ombalika Das v. Hulisa Shaw* [(2002) 4 SCC 539]."

72. In '***Commissioner of Sales Tax, UP, Lucknow Vs. Parson Tools and Plans, Kanpur- 1975(4) SCC 22'***, Hon'ble Apex Court noticed the rule of literal interpretation and held :

> *"**16.** If the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so "would be entrenching upon the preserves of legislature" [At p. 65 in Prem Nath L. Ganesh v. Prem Nath L. Ram Nath, AIR 1963 Punj 62, Per Tek Chand, J.], the primary function of a Court of law being jus dicere and not jus dare."*
>
> ***"23.** We have said enough and we may say it again that where the legislature clearly declares its intent in the scheme and language of a statute, it is the duty of the Court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not congenial to or consistent with such expressed intent of the law-giver; more so if the*

statute is a taxing statute. We will close the discussion by recalling what Lord Hailsham [At p. 11, Pearl Berg v. Varty, (1972) 2 All ER 6] has said recently, in regard to importation of the principles of natural justice into a statute which is a clear and complete Code, by itself:

> *"It is true of course that the courts will lean heavily against any construction of a statute which would be manifestly fair. But they have no power to amend or supplement the language of a statute merely because in one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than a statute accords him. Still less is it the functioning of the courts to form first a judgment on the fairness of an Act of Parliament and then to amend or supplement it with new provisions so as to make it conform to that judgment."*

78. Section 399(1) of the Companies Act, 1956 which related to right to apply under Sections 397 and 398 of the said Act is *pari materia* similar to Section 244(1), as quoted below :

"399. Right to apply under sections 397 and 398. — (1) The following members of a company shall have the right to apply under section 397 or 398 :

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

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

79. From the aforesaid provision, it is clear that the legislature neither omitted nor incorporated something in the analogous law in the subsequent statute (Section 244(1) of the Companies Act, 2013 herein) and, therefore, the literal interpretation which continued for last 57 years since 1956, cannot be avoided on the premises that in the subject-matter "grievance as mentioned in sub-section(1) of Section 241", the expression any "class of members" has been added at the end of Section 241(1)(b) as it only constitute the change in the subject-matter of the complaint. The qualifying provision, as was prescribed under Section 399(1), remain static without any change while pari materia similar qualifying condition incorporated in Section 244(1). The locus/eligibility of the members who can raise such grievances, having

remained constant since last 57 years, the mere change of subject matter of such complaint cannot give rise to a different interpretation of the provision.

80. If the argument advanced on behalf of the appellants that "Issued Share Capital" should be read as "relevant issued and subscribed capital", it can be interpreted in different way, leading to ambiguity and absurdity, which interpretation is not permissible as it will cause mischief.

81. It is to be noticed that "Issued Share Capital" automatically means the "Issued and Subscribed Share Capital". The provision of Section 244 also makes it clear that it should be a paid up share capital as applicants have to show that they have paid all calls and other sums due on their shares. If different meaning of "Relevant Issued Share Capital" given, then in that case, the persons having only equity shares will claim that it should be read as "Issued Equity Share Capital" and those who have only "Preference Share Capital", they will claim to read it as "Issued Preference Share Capital" and third group having both Equity and Share Capital will claim that it should be read as "Issued Equity and Preference Share Capital". As the submission as made on behalf of the Appellants will only cause ambiguity to the provision of Section 244 causing anomaly and absurdity, it will also change the normal interpretation as given to Section 399(1) of Companies Act, 1956, which is para materia same to Section 244(1) of the Companies Act, 2013.

82. It is well settled that where legislative intent is clear, it is the duty of the courts to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not consistent with the legislative intent. In a given case, the court can only iron out the fabric but it cannot change the texture of the fabric. (See ***Nasiruddin v. Sita***

Ram Agarwal (2003) 2 SCC 577 (Para 35, 37); Commissioner of Sales Tax, U.P. Lucknow v. Parson Tools and Plants (1975) 4 SCC 22; V.L.S. Finance Ltd. v. Union of India (2013) 6 SCC 278 (Pare 18) and Raghunath Rai Bareja v. Punjab National Bank (2007) 2 SCC 230 (para29).

83. In view of decisions of Hon'ble Supreme Court, the arguments advanced by the Appellants cannot be accepted as it would be unjust, and unfair to interpret Section 244 in any other manner than the literal rule of interpretation, as otherwise it would be nullity.

84. In this regard, it is desirable to refer the decision of Hon'ble Bombay High Court in ***M/s. Northern Projects Ltd. Vs. Blue Coast Hotels and Resorts Ltd. and others – 2009 (148) Company Cases 279***, wherein Hon'ble Bombay High Court held that "Issued Share Capital", includes both "Equity and Preference Share Capital", the relevant paragraphs of the decision directly on the point are quoted below :

> "24. That apart, I am also unable to accept the contention raised on behalf of the appellant that there is no explicit intrinsic clue to suggest that the issued share capital would be total of the two kinds of share capital. Such clue can be now found in section 86 of the Act which with effect from December 13, 2000, provides that the share capital of a company, limited by shares shall be of two kinds only, namely (a) equity share capital and (b) preference share capital. Preference shares, as their name implies, carry some preferential rights in relation to other class of

shares, namely, equity shares. There must be two kinds of shares for one to be preference. This class is given preferential treatment over the other. Section 85 of the Act deals with kinds of share capital and sub-section (1) of section 85 defines preference share capital and sub-section (2) defines equity share capital. Sub-section (1)(a) of section 87 of the Act deals with voting rights of equity shareholders and sub-section (2)(b) deals with voting rights of preference shareholders. Having regard to the provisions of sections 85, 86 and 87 of the Act, the expression "issued share capital" in section 399(1) of the Act can only refer to and refer only to the share capital which could be issued, i.e., both equity and preference share capital and therefore the expression "issued share capital" refers to both preference and equity share capital of the company. In other words, these sections can be used as tools of interpretation of the said expression.

25. The expression "issued share capital" can have no doubt about it when considered in relation to other provisions of the Act. Inserting the word "equity" after the word "issued" and before the words "share capital" will be adding a word which the Legislature clearly did not intend and to interpret it further as "legally valid issued share capital" would be doing violence to the section. The court cannot read anything into a statutory provision which is

plain and unambiguous. Interpreting the expression in a manner suggested on behalf of the appellant will amount to creating a mischief rather than preventing it and thereby leave out a class of shareholders who have subscribed to the capital of the company, i.e., by way of preference shares. It is to be noted that a statute is an edict of the Legislature and the language employed in a statute is the determinate factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself. The question is not what must be supposed and has been intended but what has been said. It is again to be noted that while interpreting a provision the court only interprets the law and cannot legislate it. Doing what is suggested on behalf of the appellant would not only be doing violence to the section but will amount to legislating a provision in a manner not at all intended by the Legislature.

29. From the aforesaid discussion, and from whatever angle one looks at the expression "issued share capital" of the company it is very clear that the expression can only refer to the preference share capital as well as equity share capital of the company and the appellant was required to hold one-tenth of the total of this issued share capital before he became eligible to maintain a petition under section 397/398 of the Act. The appellant at no time held more than

2.01 per cent. of issued share capital. It did not have it when it became a member or shareholder. It did not have the requisite percentage on the date of filing of the petition. The appellant might be having 14.8 per cent. of equity shares, but that is not the criterion to make an application. The petition was therefore rightly dismissed."

85. The aforesaid decision of the Hon'ble Bombay High Court was affirmed by Hon'ble Supreme Court by reasoned order dated 30th September 2013 in S.L.P. No. 12753/2008- '***M/s. Northern Projects Ltd. Vs. Blue Coast Hotels and Resorts Ltd. and others'***, as quoted below: -

"The appeal filed by the petitioner was dismissed by the learned Single Judge by recording the following observations: -

"The appellant's contention that only persons holding equity shares can be members of the Company in terms of Section 41(3) of the Act needs to be considered only to be rejected. As rightly pointed out on behalf of the Company Originally Section 41 of the Act provided for two categories of members, namely a person who is a subscriber to the memorandum of association in terms of sub-section (1) of Section 41 and secondly a person whose name is entered in the register of members in terms of Section 4192) of the Act. As rightly pointed out on behalf of the Company it appears that sub-section (3) was brought on the Statute book w.e.f.

20.9.1995 to meet the requirements of the equity shareholders holding shares in the electronic form and thereby a third category was added by the introduction of the Depositors Act, 1996. As rightly pointed out on behalf of the Company sub-section (3) of Section 41 of the Act specifically mentions shares in the electronic form and therefore any reliance placed on the said sub-section to buttress the case of the Appellant appears to be erroneous, misleading and legally incorrect. As rightly pointed out on behalf or the Company, the Depositors Act 1996 was enacted for the purpose of facilitating the transactions of shares in dermat form thereby introducing the paperless transaction in the market and thus it covers the third category of equity shareholders who are neither subscribers as contemplated by sub-section (1) nor whose names are entered in the register of members as contemplated under sub-section (2) of Section 41. Sub-section (3) of Section 41 is therefore only in addition to section 41(1) and Section 41(2) and not in derogation or substitution of the first two sub-sections, it appears that the word 'shareholder' and 'member' is used in the same connotation under the Act, as rightly submitted on behalf of the Company.

From the aforesaid discussion, and from whatever angle one looks at the expression "issued share capital" of the Company it is very clear that the expression "issued share capital" can only refer to the preference share capital as well as equity share capital of the Company and the appellant was required to hold one-tenth of the total of this issued share capital before he became eligible to maintain a petition under Section 397/398 of the Act. The appellant at no time held more than 2.01% of issued share capital. It did not have it when it became a member or shareholder. It did not have the requisite percentage on the date of filing of the petition. the appellant might be having 14.8% of equity shares, but that is not the criterion to make an application. The petition was therefore rightly dismissed.

Since the appellant did not qualify to maintain the petition in terms of Section 399 of the Act, the petition was rightly rejected. Admittedly, the issue of the preference shares as being violative to the proviso to Section 11 of the SEBI (substantial Acquisition of Shares and takeovers) Regulations, 1997 has not been gone into by the learned CLB on the ground that past and concluded transactions

cannot be impugned in a petition under Section 397/398 of the Act."

We have heard learned counsel for the petitioner and perused the record.

In our view, the reasons recorded by the Company Law Board and the learned Single Judge of the High Court for holding that the application filed by the petitioner under Sections 397 and 398 of the Companies Act was not maintainable are correct and the order under challenge does not call for interference under Article 136 of the Constitution.

The special leave petition is accordingly dismissed."

86. The reasons assigned by Hon'ble Supreme Court, not only constitute the declaration of law under Article 141 of the Constitution of India but is also binding on all courts, including this Appellate Tribunal.

87. From the aforesaid discussion, while we hold that the expression "Issued Share Capital" as mentioned in Section 244(1) of the Companies Act, 2013 only refer to both 'Equity Share' and "Preferential Share Capital" of the company and similar finding having given by the Tribunal, we uphold the order dated 16th March, 2017.

88. As admittedly, the Appellants have less than 1/10th of the "Issued Share Capital of the company" (2.17%), we hold that the Appellants do not qualify under Section 244(1) to file a petition under Section 241 of the Companies Act, 2013 and the petition without waiver, at their instance is not maintainable.

89. In absence of any merit, we dismiss Company Appeal (AT) No. 133 and affirm the decision of the Tribunal, in so far as it relates to maintainability of the petition under Sections 241 and 242.

WAIVER

90. The next question arises for consideration as to whether the application preferred by Appellants merits waiver under proviso to sub-section (1) of Section 244 of the Companies Act 2013 ?

Proposition on behalf of the appellants

91. Mr. C.A. Sundaram, Learned Senior Counsel for the appellants submitted that the following factors should be taken into consideration while considering an application for waiver: -

a. What is the interest of the appellants in the company? Is it insignificant or substantial ?

b. What are the issues raised in the Petition and whether Section 241 is the most appropriate jurisdiction to deal with the same ?

c. Is the cause raised of substantial importance to the appellants or to any class of members or to the company itself or in public interest ?

92. According to him if it is found that the Appellants' interest in the company is substantial; the Tribunal is the most appropriate forum to deal with the issues raised; if the issues raised are substantial in nature substantially affecting the interests of the member, class of members, the company or the public, then waiver ought to be granted and the aim would be to further a remedy rather than prevent it since the object of clothing the Tribunal with the power of waiver is to sub-serve such purpose.

93. It was also submitted that the affairs of the 1st Respondent company is at the apex of the Tata Group of Companies and the Tata Group itself is involved in manifold activities affecting every member of the public and has become a household name. Hence, *a fortiori* any issue as regards the 1st Respondent company has widespread ramifications and consequences and such issues would therefore be widespread in their effect.

94. Learned counsel for the appellants highlighted the strange shareholding of the 1st Respondent company to suggest that a disproportionate number of the entire shareholding is in preference shares. Yet, the preference shareholders have limited and negligible rights in the management of the 1st Respondent company and do not have voting rights to elect their Board, amend Articles or to even decide how the affairs of the Company, including vital issues like the transferability of shares as found in Section 47, clearly and distinctly create a separate class of members qua the equity shareholders with completely different rights and obligations from the preference shareholders. While so, the substantial interest of the Appellants in this distinct class of members, which class is vitally interested in the subject litigation, whose issues may not be of any relevance to the separate class of preference shareholders, would be the most relevant consideration. The Appellants holding 18.37% of the equity shareholding having a present market value of more than Rs. 1 lakh crores would have a substantial interest in the Company and not an insignificant one.

95. It was further submitted that it is not for the Tribunal to go into the relative merits and demerits since to do so would be a decision on the merits of the case whereas the Tribunal is at present, is only considering the question

as to whether the case ought to be heard at the behest of the Appellants. If the decision of the Tribunal amounts to deciding the merits of the case, then the merits ought to be gone into in detail.

96. According to appellants, if the waiver application is sought to be rejected on the ground that it does not make out a case under Section 241, then the only test to be applied for rejection at this stage would be those found in Order VII Rule 11, CPC, and what is to be looked into is only as to whether the Petition on the fact of it, if taken as absolutely correct makes out a cause of action to maintain the suit. (Refer:-***Saleem Bhai and Others versus State of Maharashtra and Others*** *– 2003 (1) SCC 557).*

97. Learned counsel for the appellants relied on Hon'ble Supreme Court decision in **"*Ali M.K. and Others versus State of Kerala and Others*" – *2003 (11) SCC 632*** , wherein Hon'ble Supreme Court held that "*The normal function of a proviso is to accept something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment."*

Stand taken by Respondents, except Respondent no.11.

98. Mr. Abhishek Manu Singhvi, Learned Senior Counsel for the 1st Respondent company highlighting the background of sub-section (1) of Section 244 of the Act and submitted that the eligibility requirements can be waived by the Tribunal under a *proviso* to sub-section (1) of Section 244. Waiver under the Proviso is an extraordinary statutory exemption which allows an otherwise ineligible member(s) access to remedies under Section 241 read with Section 242 of the Act.

99. According to Learned Senior Counsel for the 1st Respondent company waiver proviso cannot be interpreted to supersede the substantive provision of sub-section (1) of Section 241.

Reference in this regard was made to the following judgements:

(a) ***"Santosh Ekoba Sonavane v. State of Maharashtra", 2010 SCC OnLine Bom 917*** to suggest that a proviso cannot regulate a substantive provision and

(b) ***"Director of Education (Secondary) and Anr. v. Pushpendra Kumar & others," (1998) 5 SCC 192*** wherein Apex Court while considering the question of compassionate appointment observed that departure from a main provision can be made only in exceptional circumstances.

100. According to Learned Senior Counsel for the 1st Respondent, what would constitute an exceptional and compelling case which merits the grant of waiver can be summarised as follows: -

i) An exceptional and compelling case would be one which apart from disclosing a prima facie credible case on facts, satisfies the following conditions on a meaningful reading of the petition:

a) The allegations in the petition make out a case under Section 241 of the Act. This can be done on the basis of some negative prescriptions to evaluate if, in light of settled law, the allegations in the petition disclose a cause of action falling within the scope of Section 241. For convenience, these tests can be referred to as *'**exclusionary tests**' or **'cause of action'***

tests as they would exclude cases which do not disclose a cause of action.

b) Apart from not being hit by any exclusionary tests, the petition should also meet certain positive prescriptions, or ***inclusionary tests***, which merit the grant of the special privilege of waiver to the petitioners.

101. *Exclusionary Tests, a*ccording to Learned Senior Counsel for the 1st Respondent company are as follows: -

The first enquiry should be to see if the case made out in the petition falls within the contours of Section 241. A case which does not ex facie disclose a cause of action under Section 241 cannot merit the grant of waiver. For this purpose, the Tribunal should examine whether the allegations in the petition:

a) pertain to the affairs of the company with respect to which the petition has been filed?

b) do not concern continuing acts of oppression but instead call into question 'past and concluded' transactions or transactions which are ex facie time barred under Section 433 of the Act?

c) are not directorial complaints or complaints for the loss of office which are not related to the rights of the petitioners as shareholders?

In addition, in view of the settled legal position that exercise of jurisdiction by the Tribunal under Section 241 is equitable in nature, conduct of the petitioners who approach the Tribunal

seeking waiver should always be above board. Consequently, petitioners should be disentitled to waiver under the Waiver Proviso if:

d) the petitioner(s) have approached the Tribunal with 'unclean hands', for instance by deliberately suppressing material facts; or, if it appears that the litigation is not a bona fide shareholder dispute but is actuated by malice and/or intended to achieve an oblique purpose; or initiated by a publicity driven petitioner.

e) The petitioners are ex facie estopped from raising the allegations raised in the petition, say for instance, on account of acquiescence to the matters complained of in the petition.

The Tribunal may also determine that it is not a fit case to grant waiver if the matters complained of in the petition cannot be brought before the Tribunal on account of a statutory bar, such as when the dispute is covered by an arbitration agreement or fall within the jurisdiction of a specific statutory authority (such as the Securities and Exchange Board of India) which excludes such matters to be entertained and adjudicating by the Tribunal.

Lastly, the Tribunal may be justified in refusing waiver in cases where the allegations set out in the petition and the reliefs claimed, in the overall context of the company in question, lead to the formation of an honest and reasonable belief in the mind

of the Tribunal that the remedy sought (i.e. the grant of reliefs sought in the petition) would be worse than the disease itself.

102. The Inclusionary test was also highlighted on behalf of the 1st Respondent company as follows: -

(a) where the petition makes out a case of supervening national interest or public interest; or

(b) where the lack of maintainability under Section 244(1) is itself attributable to an alleged act of oppression, the shareholding of the complaining shareholder is brought below 10% of the issued share capital of the company concerned.

(c) When the complaining shareholder would be entirely remediless if waiver is not granted. In other words, the complaining shareholder(s) has no forum before which he could agitate his grievances apart from the Tribunal by way of a petition under Section 241. In particular, this would be in cases where it is only the Tribunal which can grant the effective remedy to the petitioners such as reduction of share capital consequent to a buy-back of securities by the company.

103. It was submitted that a plain reading of Section 430 shows that it only bars the jurisdiction of civil courts in respect of suits or other proceedings that the Tribunal or this Hon'ble Appellate Tribunal are *"empowered to determine by or under"* the Act. There is nothing in the language of Section

430 which is even remotely suggestive of the fact that a litigant who does not meet the qualifying eligibility criteria under Section 244(1) or a member whose application for waiver has been rejected is altogether precluded from agitating his grievance before ordinary civil courts.

104. According to Learned Senior Counsel, the legislative intent seems to be precisely to the contrary, i.e. members satisfying the eligibility criteria of Section 244(1) have an exclusive forum in the form of the Tribunal for matters under Section 241 and members who don't satisfy such criteria (except members who are given waiver under the Waiver Proviso) have to approach ordinary civil courts. In essence, Section 430 operates as a bar on the jurisdiction of civil courts only against members who satisfy Section 244(1) and not with respect to other members who do not. In this regard the decision of the High Court of Calcutta in ***The Asansol Electric Supply Co. Ltd. v. Chunnilal Daw*** *(1970) 75 CWN 704* was relied upon.

105. Learned counsel for the 1st Respondent submitted that the application preferred by the appellants are hit by several of the exclusionary tests. The following facts were highlighted: -

(i) **<u>Allegations do not pertain to the affairs of Tata Sons</u>**

It was submitted that majority of the allegations in the Petition do not pertain to affairs of Tata Sons and instead relate to affairs of five companies in which Tata Sons holds shares i.e. Tata Steel Limited, Tata Motors Limited, Tata Teleservices Limited ("**TTCL**"),. The Tata Power Company Limited and AirAsia (India) Limited (hereinafter collectively referred to as "**the Other Companies**"). According to 1st Respondent some other relevant facts regarding

the other companies and allegations have been made by the appellants who are legal entities different from Tata Sons, who have their own Board of Director(s).

(ii) <u>The allegations pertain to past and concluded transactions and are patently time barred.</u>

It was also submitted that the bulk of allegations not comprising the affairs of Tata Sons, several of the allegations set out in the Petition date back several years and have been raised only after 11th Respondent was replaced as the Chairman of Tata Sons. The allegations in the Petition which pertain to past and concluded transactions and are patently time barred. According to appellants by virtue of Section 433 of the Act, the provisions of the Limitation Act, 1963 have been expressly made applicable to proceedings before the Tribunal. Reliance has been placed on decision of Appellate Tribunal in ***"Esquire Electronics Inc. v. Netherlands India Communications Enterprises Ltd."*** (Company Appeal (AT) No. 26 of 2016).

(iii) <u>Allegations are in the nature of directorial complaints</u>

Learned Senior counsel for the 1st Respondent submitted that the Petition makes substantive allegations around the purported illegal removal of 11th Respondent as the Chairman of Tata sons and thereafter as a director. It is a settled principle of law that directorial complaints cannot constitute a cause of action under under Section 241 of the Act. Reliance was also placed on the decision of Hon'ble Supreme Court in ***"S.P.Jain v. Kalinga***

Tubes", (1965) 2 SCR 720 and ***"Hanuman Prasad Bagri v. Bagri Cereals Private Limited,"*** (2001) 4 SCC 420.

(iv) <u>The Appellants' conduct disentitles them from seeking relief under the equitable jurisdiction of Section 241</u>

It was submitted that the Appellants are companies which are controlled by 11th Respondent and his family. The timing of the filing of the Petition after 11th Respondent's removal as Executive Chairman of Tata sons and his resignation as a director from certain other companies in which Tata Sons is a shareholder, leaves no iota of doubt that the Petition is not a genuine shareholder action. In fact, the Petition is a vindictive action filed to espouse 11th Respondent's cause after he was removed as Executive Chairman. This action has been filed to get even with the Tata Trusts and the board of directors of Tata Sons by 11th Respondent as a former disgruntled employee. In particular, the tone and tenure of the allegations in the Petition make it clear that the same is targeted against 2nd Respondent and 14th Respondent. Other facts have also been highlighted.

(v) <u>Acquiescence/Waiver/Estoppel</u>

Learned Senior Counsel for the 1st Respondent submitted that the petition is barred by acquiescence/waiver/estoppel. In view of the fact that though the Petition alleges certain articles of association of Tata Sons have been used as tools of oppression and a license to interfere by the trustees of the Tata Trusts, the Appellants have suppressed the fact that they or 11th Respondent

had voted in favour of the amendments to the articles which they now challenge. There is not a single document/correspondence on record from the Appellants which demonstrates that the Appellants have at any point of time raised any grievances with respect to the matters complained of in the Petition before the Petition was filed. Yet, there is no record in any minutes of board and shareholder meetings of 11th Respondent ever objecting to or dissenting from any decision taken at the board of directors or general meeting. However, even the minutes of the board/shareholder meeting during this time (most of which were chaired by 11th Respondent) do not record any dissent/objection expressed by 11th Respondent to the matters complained of in the Petition.

(vi) ***Remedy worse than the disease-not just and equitable to wind up Tata Sons.***

According to Appellants, Tata Sons is a company of sizeable value which holds a stake in several other listed as well as unlisted companies which operate in a variety of sectors. Tata Sons also owns the 'TATA' brand which is licensed by it to these operating companies. The present Petition seeks sweeping and far reaching reliefs against Tata Sons (such as the supersession of the existing board of directors, the appointment of an administrator, investigation, appointment of independent auditors, striking off certain article of association etc.) which will disproportionately

affect the operations and affairs of Tata Sons and destabilize its affairs.

106. It was further contended that the application is not only hit by the 'exclusionary tests' in the manner set out above, it does not meet any of the positive prescriptions or the 'inclusionary tests' which would merit the grant of waiver. From bare averments, there is nothing to show even remotely that the Petition concerns a supervening national or larger public interest. The gravity of the consequences which have been explicitly explained to invoke it as a ground for waiver, except a mere bald pleading, nothing has been pleaded and pleading is simply inadequate.

107. Learned Senior Counsel for the 1st Respondent while submitted that Section 241(1)(b) does not form the subject matter of the Petition. It was also contended that the impugned order in so far it relates to waiver is a discretionary order and ought not to be set aside unless perverse, arbitrary or capricious. Reliance was placed on decision of Hon'ble Supreme Court in ***"Wander Limited and Anr. v. Sntox India Private Limited"*** *(1990) Supp. SCC 727.* ***"Skyline Education Institute India (Private) Limited v. S.L.Vasani"*** *(2010) 2, SCC 142*, ***"Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan"*** (2013) 9 SCC 221 and ***"Bed Raj v. State of Uttar Pradesh"*** AIR 1955 SC 778.

108. Mr. Mukul Rohtagi, Learned Senior Counsel for the 2nd Respondent submitted that a bare reading of the petition preferred by Appellants before the Tribunal demonstrates that the present Petition is malafide and an afterthought filed at the behest of 11th Respondent, who chose not to become the petitioner before Tribunal. The real trigger for filing the Petition is the

removal of 11th Respondent from the position of Chairman of 1st Respondent on 24.10.2016. The *mala fide* nature of the Petition is evident from the fact that it raised allegations which are stale, belated and several decades old. Pertinently, 11th Respondent was a director of 1st Respondent Company since 2006 and thereafter, was the Chairman of 1st Respondent Company since 2012. Nothing prevented 11th Respondent from taking steps to put the affairs of 1st Respondent Company in order if the same were being conducted prejudicially to the interests of the 1st Respondent or in a manner allegedly oppressive to the Appellants. However, the Petition is completely silent on any steps taken by 11th Respondent to this effect.

109. It was also submitted that stale and belated nature of the allegations raised in the Petition which cannot be entertained are as follows:

(i) **Allegations of the year 1993:** Appellants allege that Mehli Mistry helped 2nd Respondent acquire an agricultural land and 2nd Respondent returned the favour by awarding contracts of various Tata Companies to Mehli Mistry.

(ii) **Allegation of the year 2000:** Appellants allege 2nd Respondent unjustly enriched himself by Rs.3 crores by sale of Colaba flat.

(iii) **Allegation of the year 2006-2008:** Appellants allege that Tata Motors slipped into losses due to the Tata Nano project which is loss making and requires to be shut down, however 2nd Respondent has not permitted the same.

(iv) **Allegation of the year 2008:** Appellants allege that the 2nd Respondent abused the powers vested in him as the erstwhile Chairman of the Tata Group in proceeding to acquire Corus for

heavily inflated price, which resulted in huge strain on the resources of Tata Steel Limited.

110. It was further submitted that the Allegations raised are barred by principles of waiver, acquiescence and laches. Most of the allegations raised in the Petition relate to past and concluded transactions.

111. Further, according to Learned Senior Counsel for the 2nd Respondent, Remedy of Section 241 cannot be used to settle private grudges: A bare perusal of the allegations made in the Petition would demonstrate that the same are essentially in the nature of a personal onslaught only against 2nd Respondent. According to him, shareholders of a company cannot be permitted to initiate proceedings for feeding private grudges of warring groups. Reliance was made to the judgement of Hon'ble Orissa High Court in ***"N.K.Mohapatra v. State of Orissa"*, AIR 1994 Ori 301.**

112. It was also contended that Appellants have not come to the court with clean hands. The only real cause of action for filing the Petition is the removal of 11th Respondent as the Chairman of 1st Respondent Company. The Petition is nothing but a proxy litigation at the behest of 11th Respondent to agitate his own personal grievance against 2nd Respondent and to malign the reputation of 1st Respondent, where 11th Respondent chose not to become the Petitioner. Instead, the Appellant companies are being used as a front solely for and on behalf of 11th Respondent.

113. It was further submitted that the allegations not pertaining to the Corus acquisition, the Nano Project, removal of 11th Respondent as director from various operating companies, transactions with Mr. Sivasankaran, award of contracts to Mr. Mehli Mistry and alleged misappropriation of funds in Air

Asia, are all allegations which are made in respect of other operating companies and are not related to the affairs of 1st Respondent Company. Pertinently, none of the companies (Tata Motors Ltd., Tata Steel Ltd. etc.) in relation to whose affairs, the allegation of mismanagement has been raised have been made parties to the Petition.

114. It was also contended that Vague and unsubstantiated allegations has been made pertaining to the sharing of information with 2nd and 14th Respondents, the sale of the Colaba flat, the award of contracts to Mr. Mehli Mistry, the alleged misappropriation of funds in Air Asia and the alleged use of the Articles of Association of 1st Respondent Company as tools of oppression are all vague allegations which have simply been made in the Petition without furnishing any material particulars.

115. Similar plea was taken by the Learned Counsel for the rest of the respondents except 11th Respondent.

116. Mr. S.N.Mukerjee, Learned Senior Counsel appearing on behalf of the 3rd Respondent while dealing with the Exclusionary factors (Disqualification) contended that the meaningful reading of the application and/or the petition would ipso facto disentitle the applicants from grant of waiver or result in the tribunal refusing to exercise its discretion inter alia include:

(a) The allegations of oppression/mismanagement being ex-facie barred by limitation (Section 433);

(b) The allegations of oppression/mismanagement not being in relation to the affairs or the company of which the applicant is a member;

(c) The allegations of oppression/mismanagement being directorial disputes;

(d) The allegations of oppression/mismanagement being ex-facie in relation to past and concluded transactions;

(e) The allegations of oppression/mismanagement being such that ex-facie the applicant is barred from urging the same on account of principles of waiver, acquiescence or estoppel;

(f) The applicant having approached with unclean hands viz. suppression vari or suggestion falsi;

(g) The applicant having approached seeking to urge personal grievances or a proxy litigation;

(h) The petition being a dressed up application though the subject matter is covered by arbitration;

(i) The disputes raised being ex-facie barred by res-judicata or principles analogous thereto;

(j) The disputes raised and the subject matter thereof are ex-facie barred by some other law and falls within the exclusive domain of some other court/tribunal or forum;

117. In so far as Inclusionary factors (Qualification) is concerned, it was contended that the Onus being on the Applicants to show from their application and/or the petition that the same makes out strong grounds/a compelling/strong prima facie case which entitle them to a waiver. While exercising its discretion, the Tribunal may, inter alia, keep the following considerations in mind: -

a) The allegations made in the application/petition disclose:

I. that it is not merely a personal dispute of a shareholder but the acts complained of are prejudicial to the interest of the company and interest of the public; and

II. that it in the interest of the company and all its members to pursue the petition; and

III. that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winging-up order on the ground that it was just and equitable that the company should be wound up.

b) That the Applicant has no other remedy in common law to redress or vent his grievances.

118. Similar argument was advanced by Mr. Mohan Parasan, Learned Senior Counsel for the Respondent Nos. 6, 14,17,18, 20 to 22.

Case of 11th Respondent

119. Learned Counsel for the 11th Respondent while supported the case of the appellants, highlighted some of the acts of 'oppression and mismanagement' on the part of the 1st Respondent Company giving three examples.

120. In regard to allegation of Mr. C.Sivasankaran, it was stated that Siva Group owes a sum of Rs. 694 crores, pursuant to the Inter-Se Agreement between Siva, 1st Respondent and Tata Teleservices Ltd. This is towards the shares of Tata Teleservices Ltd. that DoCoMo had acquired from the Siva Group with a put option on 1st Respondent.

121. Other shareholders too were obligors such as 'Tata Power' (Rs. 790 crores), 'Tata Communications' (Rs. 1,058 crores), 'Tata Steel' (Rs. 152 crores) and Tata Industries (Rs. 543 crores). When 1st Respondent was forced to deposit Rs. 8,450 crores towards payment to DoCoMo in July 2016, the Siva Group refused to pay its proportionate share to 1st Respondent Company.

122. 11th Respondent pursued recovery of dues from Siva in right earnest on behalf of 1st Respondent. On September 15, 2016, the Board of 1st Respondent Company approved initiating legal action against Siva for recovery of the said amount, when 11th Respondent brought up the subject as a residual item on the agenda under the prerogative of Chairman. It is pertinent to note that this had not been pre-vetted and pre-cleared with 2nd Respondent or the other trustees.

123. In regard to Air Asia, according to 11th Respondent, Air Asia India Private Ltd. ("Air Asia") is a company in which 1st Respondent holds a substantial stake of 49% and of which 1st Respondent is the promoter. The other joint venture partners were one Mr. Arun Bhatia and Air Asia Berhard, a Malaysian aviation company. 20th Respondent is also personally a shareholder of Air Asia.

124. The case of Corporate Governance Framework was also highlighted and Learned Senior Counsel contended that Article 121 provides for the requirement of a majority of the directors nominated by the Tata Trusts to approve of every single decision of 1st Respondent. Article 121 A lists out matters that necessarily have to be taken to the Board of Directors of 1st Respondent. Thereby, the Trustees have complete control of affairs of 1st Respondent and thereby affairs of all other Tata Group Companies.

125. According to Learned Senior Counsel for the 11th Respondent, the removal of 11th Respondent as Executive Chairman is in direct conflict with Article 118, which requires a committee to be formed. This removal cannot be seen as some isolated act of oppression but is to be seen in the context of and attendant with the various other evidently oppressive action that are evident from the pleadings.

126. Therefore, this is not a "directorial dispute" about removal of a director, but an oppressive act involving a material change effect by way of removal of the Executive Chairman who was remedying and acting in the interests of 1st Respondent.

127. Further according to 11th Respondent, the Company Secretary of 1st Respondent (23rd Respondent) has admitted that no committee was formed for the removal of the Executive Chairman in terms of Article 118, vide his email dated November 12, 2016. This email also confirms that the Board of Directors of 1st Respondent neither sought nor were guided by any legal opinion on the validity of removal in violation of Article 118.

128. According to 11th Respondent, all the purported reasons for his removal have been proffered only after the removal and in these proceedings, and not prior to the removal, even while the Respondents seek to argue that the Petitioners did not find the acts complained of as being oppressive before the removal of 11th Respondent, which argument stands belied by the record referred to above.

129. Directorship linked to shareholding was also highlighted. The directorship of 11th Respondent came to an end on February 6, 2017, when 1st Respondent removed him from the Board of Directors. This is an office

held by 11th Respondent's family since 1980. In 2006, 11th Respondent, then aged 39, was inducted as a non-executive director, just two years after his father retired from directorship.

130. 11th Respondent's selection as Executive Chairman in 2012 was through a selection process, done on merits for an executive position whereas his appointment in 2006 as non-executive director was to succeed to his family's representation on the Board.

131. To decide the issue, it is desirable to notice Chapter XVI of the Companies Act, 2013 which relates to 'Prevention of Oppression and Mismanagement'.

132. A member of the company, who otherwise is eligible under Section 244, has a right to apply and complains of 'oppression and mismanagement' under section 241, which is as follows :

"Chapter – XVI"

"Prevention of Oppression and Mismanagement"

"241. Application to Tribunal for relief in cases of oppression, etc.

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

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

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including

debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter."

133. Sub-Section (2) of Section 241 empowers Central Government to apply, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, which is as follows:

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

134. Under sub-section (1) of Section 242, the Tribunal is empowered to pass order on any application made under section 241, as it thinks fit, with a view to bringing to an end the matters complained of, if it forms opinion in terms of clause (a) and (b) therein, and quoted below: -

*"**242. Powers of Tribunal.** —(1) If, on any application made under section 241, the Tribunal is of the opinion--*

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

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit."

135. Sub-section (2) of Section 242 are inclusive Power of Tribunal to pass specific order and direction without prejudice to the generality of the powers under sub-section (1).

136. From the aforesaid provisions (Sections 241 and 242), it is clear that the Tribunal can pass order on an application under Section 241 as it thinks fit with a view to bringing to an end the matters complained of and if it is of the opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and 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.

137. Aforesaid provision makes it clear that where member(s) who are eligible as per sub-section (1) of Section 244 if apply under Section 241, the Tribunal can decide the case on merit after hearing the parties.

138. Sections 243 relates to the "consequences of termination or modification of certain agreements" made under Section 242. As per proviso to Section 243, the Tribunal cannot grant leave unless notice of the intention to apply for leave is served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter, the relevant of which reads as follows: -

> ***"243. Consequence of termination or modification of certain agreement.*** *----(1) Where an order made under section 242 terminates, sets aside or modifies an agreement such as is referred to in sub-section (2) of that section,---*
>
> ***xxx xxx xxx***
>
> *Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter."*

139. From the proviso to sub-section (1) of Section 243, it is clear that there is a provision to 'grant of Leave', as distinct from 'grant of waiver', as provided under proviso to sub-section (1) of Section 244, which reads as follows: -

"244. Right to apply under section 241. *----(1) The following members of a company shall have the right to apply under Section 241, namely: -*

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

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

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

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

140. From plain reading of sub-section (1) of Section 244, the following facts emerges.

In the case of a company having a share capital, the following member(s) have right to apply under Section 241:

(i) not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less; and

(ii) any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares.

141. Apart from two categories of members who have right to apply under Section 241, under proviso to sub-Section (1) of Section 244, the Tribunal on an application made to it in this behalf by any member, i.e. those who are otherwise not eligible, may waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the member to apply under Section 241.

142. From the proviso to sub-section (1) of Section 244, it is clear that till the Tribunal waive all or any of the requirements specified in clause (a) or clause (b) of sub-section (1), so as to enable the member(s) to apply under Section 241, no application under Section 241 can be entertained.

143. Therefore, before grant of waiver, the question of forming opinion by Tribunal on an application made under Section 241 and to pass any order as it thinks fit does not arise. If the Tribunal intends to decide the application under Section 241 on merit, it is required to waive the requirement as prescribed under sub-section (1) of Section 244.

144. For the reasons aforesaid, we hold that the Tribunal cannot deliberate on the merit of a (proposed) application under Section 241, while deciding an application for 'waiver' under proviso to sub-section (1) of Section 244.

The factors dependent on merit

(i) Prima facie case:

Whether a prima facie case is made out or not is dependent on merit of the case as may pleaded in the (proposed) application under Section 241. As it is dependent on merit of the case, we are of the view that the Tribunal cannot decide the question as to whether a prima facie case has been made out or not while deciding an application for 'waiver'.

(ii) Limitation:

The question whether an application under Section 241 is barred by limitation is a mixed question of law and facts. The same is also dependent on the cause of action and continuous cause of action, if any. As the merit of the case cannot be deliberated in an application for 'waiver' the Tribunal cannot decide the question whether (proposed) application under Section 241 is barred by limitation or not while deciding the application for 'waiver'.

(iii) Allegation pertains to affairs of another Company

This is a complicated issue dependent on facts of each case. The allegation of 'oppression and mismanagement' pertains to the related company or a third company is dependent on the facts of the case.

For example, on bare perusal of the application, if it appears that the allegation relates to a third company then it is a different issue,

but in some cases even third company's issue may have direct relation to the company of which 'oppression and mismanagement' has been alleged. For example, Company 'A' which has substantial shareholding say 50% in another Company 'B', as shareholder and the Company 'A' takes part in the Board's meeting or Extraordinary General Meeting of Company 'B' and takes decisions, which is against the interest of Company 'A'. In such case, any aggrieved member of the Company 'A' can allege 'oppression and mismanagement' qua Company 'A', if its interest is compromised in favour of another Company 'B'. In such case, it cannot be stated that the matter pertains to another Company 'B' and therefore, member(s) of Company 'A' have no right to allege 'oppression and mismanagement'. In fact, it is a case of 'oppression and mismanagement' qua Company 'A', if the right of the Company 'A' is compromised. As the aforesaid disputed question is dependent on facts and merit of a case, it cannot be decided nor can be taken into consideration while deciding an application for 'waiver'.

(iv) **<u>Arbitration:</u>**

The question of referring a matter under Section 8 or 45 of the Arbitration and Conciliation Act, 1996 does not arise during the stage of decision of an application for 'waiver'. If the Tribunal, after perusal of proposed application under Section 241, without deciding the merit of the case forms opinion that the allegation relates to 'oppression and mismanagement' of the company, the question of referring the matter to the arbitrator does not arise.

Similarly, if the Tribunal refuse to grant 'waiver' on the ground the (proposed) application do not merit waiver, the question of referring the case to arbitrator does not arise.

(v) Directorial Complaint

Whether the allegation is in the nature of Directorial Complaint or not can be decided by the Tribunal only at the stage of deciding merit of an application under Section 241 after taking into consideration the reply, if any, and hearing the parties. As it is dependent on merit, we hold that the question as to whether the allegation pertains to Directorial Complaint or not, cannot be decided by Tribunal while deciding an application for 'waiver'

(vi) Conduct of Applicant:

The question of deciding the conduct of an applicants to disentitle them from seeking a relief is also based on merit of each case. Therefore, we hold that such issue cannot be decided by the Tribunal while deciding an application for 'waiver'.

(vii) Acquiescence/Waiver/Estoppel

The question whether (proposed) application under Section 241 is barred by acquiescence or waiver or estoppel is question of fact which can be decided only at the stage of hearing of application under Section 241. Therefore, we are of the view that such question cannot be decided by Tribunal while considering an application for 'waiver'.

145. For the aforesaid reasons we hold that the Tribunal while deciding an application for 'waiver' under proviso to sub-section (1) of Section 244 to

enable the members to apply under Section 241 cannot decide the following issues: -

(i) Merit of the case

(ii) Issues dependent on merit based on claim and counter claim, such as:

a. Whether a prima facie case has been made or not

b. Whether the petition is barred by limitation,

c. Whether it is a case of arbitration,

d. Whether allegation relates to/pertains to another company (Third party).

e. Whether the allegations are in the nature of directorial complaint.

f. Whether the applicants' conduct disentitled them from seeking relief.

g. Whether the proposed application under Section 241 is barred by acquiescence or waiver or estoppel.

146. Section 244 of the Companies Act 2013 came into force from 1st June 2016. Prior to the same, eligibility clause was laid down under Section 399(1) of the Companies Act 1956, which is para-materia same that of sub-section (1) of Section 244.

147. In the Companies Act, 1956 there was no provision of 'waiver', but under sub-section (4) of Section 399, on an application filed by any member i.e. ineligible member or members of a company, the Central Government was empowered to form opinion whether circumstances exist which make it just and equitable to do so, authorise the member(s) of a company to apply before

the Company Law Board under Sections 397-398 (now Section 241), notwithstanding that the requirements of clause (a) or (b), as the case may be of sub-section (1) of Section 399 are not fulfilled. The said provision reads as follows :-

399. Right to apply under section 397 and 398 *-*

(1) The following members of a company shall have the right to apply under section 397 or 398:-

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

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

(2) xxx

(3) xxx

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to, [the Company Law Board] under section 397 or 398, notwithstanding that the requirements of clause (a) or (b), as the case may be, of sub- section (1) are not fulfilled."

148. Now there is a clear departure from earlier provision i.e. sub-section (4) of Section 399 whereunder the Central Government was empowered to permit the ineligible member(s) to file an application for 'oppression and mismanagement' by its executive power. Under proviso to sub-section (1) of Section 244 now the Tribunal is required to decide the question whether application merits 'waiver' of all or any of the requirements as specified in clauses (a) and (b) of sub-section (1) of Section 244 to enable such member(s) to file application under Section 241. Such order of 'waiver' being judicial in nature, cannot be passed by Tribunal, in a capricious or arbitrary manner and can be passed only by a speaking and reasoned order after notice to the (proposed) respondent(s). The basic principle of justice delivery system is that a court or a Tribunal while passing an order is not only required to give good reason based on record/evidence but also required to show that after being satisfied itself the Court/Tribunal has passed such order. To form an opinion as to whether the application merits waiver, the Tribunal is not only required to form its opinion objectively, but also required to satisfy itself on the basis of pleadings/evidence on record as to whether the proposed application under Section 241 merits consideration.

149. The Tribunal is required to take into consideration the relevant facts and evidence, as pleaded in the application for waiver and (proposed) application under Section 241 and required to record reasons reflecting its satisfaction.

150. The Tribunal is not required to decide merit of (proposed) application under Section 241, but required to record grounds to suggest that the applicants have made out some exceptional case for waiver of all or of any of

the requirements specified in clauses (a) and (b) of sub-section (1) of Section 244. Such opinion required to be formed on the basis of the (proposed) application under Section 241 and to form opinion whether allegation pertains to 'oppression and mismanagement' of the company or its members. The merit cannot be decided till the Tribunal waives the requirement and enable the members to file application under Section 241.

151. Normally, the following factors are required to be noticed by the Tribunal before forming its opinion as to whether the application merits 'waiver' of all or one or other requirement as specified in clauses (a) and (b) of sub-section (1) Section 244:-

(i) Whether the applicants are member(s) of the company in question ? If the answer is in negative i.e. the applicant(s) are not member(s), the application is to be rejected outright. Otherwise, the Tribunal will look into the next factor.

(ii) Whether (proposed) application under Section 241 pertains to 'oppression and mismanagement' ? If the Tribunal on perusal of proposed application under Section 241 forms opinion that the application does not relate to 'oppression and mismanagement' of the company or its members and/or is frivolous, it will reject the application for 'waiver'. Otherwise, the Tribunal will proceed to notice the other factors.

(iii) Whether similar allegation of 'oppression and mismanagement', was earlier made by any other member and stand decided and concluded ?

(iv) Whether there is an exceptional circumstance made out to grant 'waiver', so as to enable members to file application under Section 241 etc. ?

152. The aforesaid factors are not exhaustive. There may be other factors unrelated to the merit of the case which can be taken into consideration by the Tribunal for forming opinion as to whether application merits 'waiver'.

ALTERNATIVE REMEDY – SECTION 430

153. One of the question arises as to whether the appellants can avail a remedy in a suit before a Civil Court for alleged act of 'oppression and mismanagement' levelled against the respondents.

154. Section 430 bars Civil Court to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine under the Companies Act or any other law for time being in force. The provision reads as follows:

> ***"430. Civil court not to have jurisdiction.—***
> *No Civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the*

time being in force, by the Tribunal or the Appellate Tribunal"

155. Section 241 empowers the Tribunal to entertain the application relating to alleged act of 'oppression and mismanagement', if any member complaint of the same. The Tribunal can grant relief as it thinks fit and proper in the case of oppression and mismanagement under Section 242. The plain reading of the aforesaid provision makes it clear that Civil Court has no jurisdiction to entertain any suit or proceeding in respect of alleged act of 'oppression and mismanagement', if preferred by any member of a company.

156. The fact that one or other member is ineligible to apply under Section 241 relating to allegation of 'oppression and mismanagement' will not empower the Civil Court to grant such relief, as can be granted by the Tribunal under Section 242. No such power can be vested with the Civil Court on the ground that the member is ineligible to apply before the Tribunal for alleged act of 'oppression and mismanagement'.

157. For the aforesaid reasons, we hold that Civil Court is not the forum for an ineligible member to sought relief as may be granted under section 242, if a case of 'oppression and mismanagement' is made out.

Appellants' claim

158. Now the question arises whether the application for 'waiver' preferred by appellants along with (proposed) application under Section 241 merits 'waiver' of all or any one of the requirements specified in clause (a) or clause (b) so as to enable the appellants to apply under Section 241. To decide the same, it will be desirable to notice the relevant facts, without going into the merit of the (proposed) application.

159. There are 51 shareholders of 'Tata Sons Limited', whose shareholding, both equity and preferential as on 21st December 2016 are as follows (as pleaded and admitted): -

TATA SONS LIMITED
SUMMARY OF SHAREHOLDING – EQUITY & PREFERENCE SHARES-21.12.2016

		Eq. Sh. (FV Rs. 1000/sh)		**Pref. Sh (FV Rs. 1,000/sh)**	**Total Capital Equity + Pref.**	
	TRUSTS :	**Shares (A)**	**% of Eq. Cap (B)**	**Shares % of Pref. Cap (C) (D)**	**Shares (E)**	**% OF TOTAL CAPITAL (F)**
1.	Sir Dorabji Tata Trust	1,13,067	27.98%	- 0.00%	1,13,067	3.37%
2.	Sir Ratan Tata Trust	95,211	23.56%	- 0.00%	95,211	2.84%
3.	JRD Tata Trust	16,200	4.01%	- 0.00%	16,200	0.48%
4.	Tata Education Trust	15,075	3.73%	- 0.00%	15,075	0.45%
5.	Tata Social Welfare Trust	15,075	3.73%	- 0.00%	15,075	0.45%
6.	R D Tata Trust	8,838	2.19%	- 0.00%	8,838	0.26%
7.	M.K. Tata Trust	2,421	0.60%	- 0.00%	2,421	0.07%
8.	Sarvajanik Seva Trust	396	0.10%	- 0.00%	396	0.01%
		2,66,283	**65.89%**		**2,66,283**	**7.95%**
	T COMPANIES					
9.	T Motors	12,375	3.06%	- 0.00%	12,375	0.37%
10.	T Steel	12,375	3.06%	- 0.00%	12,375	0.37%
11.	T Chemicals	10,237	2.53%	- 0.00%	10,237	0.31%
12.	T Power	6,673	1.65%	- 0.00%	6,673	0.20%
13.	IHCL	4500	1.11%	- 0.00%	4500	0.13%
14.	T Industries	2,295	0.57%	- 0.00%	2,295	0.07%
15.	T Global	1,755	0.43%	- 0.00%	1,755	0.05%
16.	T International	1,477	0.37%	- 0.00%	1,477	0.04%
17.	T Investment	326	0.08%	- 0.00%	326	0.01%
		52,013	**12.87%**	**- 0.00%**	**52,013**	**1.55%**
	P. MISTRY					

18.	Sterling Investment Corp Ltd.	37,122	9.19%	- 0.00%	37,122	1.11%
19.	Cyrus Investment Pvt. Ltd.	37,122	9.19%	- 0.00%	37,122	1.11%
20.	Mr. Pallonji Shapoorji Mistry	108	0.03%	- 0.00%	108	0.00%
21.	Mr. Cyrus Pallonji Mistry		0.00%	20,000 0.68%	20,000	0.60%
		74,352	**18.40%**	**20,000 0.68%**	**94,352**	**2.82%**

		Eq. Sh. (FV Rs. 1000/sh)		**Pref. Sh (FV Rs. 1,000/sh)**		**Total Capital Equity + Pref.**	
	INDIVIDUALS	**Shares (A)**	**% of Eq. Cap (B)**	**Shares (C)**	**% of Pref. Cap. (D)**	**Shares (E)**	**% OF TOTAL CAPITAL (F)**
22.	Mr. Ratan Naval Tata	3,368	0.83%	10,50,000	35.63%	10,53,368	31.43%
23.	Mr. Jimmy Naval Tata	3,262	0.81%	-	0.00%	3,262	0.10%
24.	Mr. Noel Naval Tata	2,055	0.51%	-	0.00%	2,055	0.06%
25.	Mr. Simone Naval Tata	2011	0.60%	-	0.00%	2011	0.06%
26.	Ms. Pilloo Minocher Tata	487	0.12%	-	0.00%	487	0.01%
27.	Mr. Jimmy Minocher Tata	157	0.04%	-	0.00%	157	0.00%
28.	Ms. Vera Farhad Choksey	157	0.04%	-	0.00%	157	0.00%
29.	H.H. M V Chauhan	1	0.00%	-	0.00%	1	0.00%
30.	Mr. Noshir Adi Soonawala	-	0.00%	2,60,000	8.82%	2,60,000	7.76%
31.	Mrs. Simone N Tata & Mr. Naval N Tata	-	0.00%	35,000	1.19%	35,000	1.04%
32.	Dr. Jamshed J. Irani & Ors.	-	0.00%	50,000	1.70%	50,000	1.49%
33.	Mr. Praveen P. Kadle & Anr.	-	0.00%	10,000	0.34%	10,000	0.30%
34.	Mr. Farokh K Kavarana	-	0.00%	30,000	1.02%	30,000	0.90%
35.	Mr. R. Gopalakrishnan & Anr.	-	0.00%	1,30,000	4.41%	1,30,000	3.88%
36.	Mr. Ishaat Hussain & Anr.	-	0.00%	75,000	2.55%	75,000	2.24%
37.	Mrs. Aloo Noel Tata & Anr.	-	0.00%	1,50,000	5.09%	1,50,000	4.48%
38.	Mr. S Ramadorai	-	0.00%	30,000	1.02%	30,000	0.90%
39.	Mr. Syamal Gupta & Anr.	-	0.00%	35,000	1.19%	35,000	1.04%

40.	Mr. Ashok Soni	-	0.00%	25,000	0.85%	25,000	0.75%
41.	Mr. Farokh N. Subedar & Anr.	-	0.00%	41,600	1.4%	41,600	1.24%
42.	Mr. Arunkumar R Gandhi & Anr.	-	0.00%	30,000	1.02%	30,000	0.90%
43.	Mr. Ravi Kant & Anr.	-	0.00%	1,30,000	4.41%	1,30,000	3.66%
44.	Mr. Narotam S Sekhsaria	-	0.00%	5,70,000	19.34%	5,70,000	17.01%
45.	Mr. Kishor A Chaukar & Anr.	-	0.00%	5,000	0.17%	5,000	0.15%
46.	Mr. Seturaman Mahalingam & Anr.	-	0.00%	10,000	3.34%	10,000	0.30%
47.	Mrs. F J Seina & Mr. J K Sethna	-	0.00%	40,000	1.36%	40,000	1.19%
48.	Mr. Bharat Damodar Vasani & Anr.	-	0.00%	5,000	0.17%	5,000	0.15%
49.	Mr. N S Rajan	-	0.00%	15,000	0.51%	15,000	0.45%
50.	Mr. Jamshed Khurshed Sethna & Anr.	-	0.00%	60,000	2.04%	60,000	1.79%
51.	Trent Limited	-	0.00%	1,40,200	4.76%	1,40,000	4.18%
TOTAL INDIVIDUALS		11,498	2.85%	29,26,800	99.32%	29,38,298	87.69%
TOTAL		**4,04,146**	**100.00%**	**29,46,800**	**100.00%**	**33,50,946**	**100.00%**

160. From the aforesaid summary of shareholding we find that except Mr. Ratan Naval Tata (at serial no. 22) having issued shareholding of 31.43% and Mr. Narotam S. Sekhsaria (at serial no. 44), having 17.01% shareholding capital of the company, none of the 49 member(s) are eligible to file an application under Section 241, individually having less than 10% of the shareholding.

161. That means in the context of present case, except that the minority shareholders join together, i.e. either six in numbers or such numbers of members whose joint shareholding will come up to 10% of the issued share capital of the Company, which will be also not less than 3 to 4 members, none of the 49 shareholders can file an application under Section 241 alleging

'oppression and mismanagement'. It will remain only in the hands of major shareholders, namely Mr. Ratan Naval Tata or Mr. Narotam S. Sekhsaria, who only have right and their prerogative to file such application.

162. One or the other minority shareholder cannot be asked or directed to form a group of 10% of the member(s) that means six person(s) in the present case, as it will be dependent on the prerogative of the other member(s).

163. We are of the view that this is one of the exceptional and compelling circumstances, which merit the application for 'waiver' subject to the question whether (proposed) application under Section 241 relates to 'oppression and mismanagement'.

164. Appellants have pleaded and not disputed by respondents is that the valuation of the company being in the region of at least 'Six lakhs Crores'. The interest of the appellants in the overall value of the company would be over 'one lakh crore'. Therefore, the interest of the appellants in the overall value of the company is 1/6th of the total value of the company. On the other hand, the value of the preference share holding would be only Rs. 291 crores, who do not carry voting rights other than in the exceptional circumstances found in Section 47(2) of the Companies Act 2013. The interest of the appellants to the extent of 'one lakh crores' of the overall value of the company whose valuation being in the region is about six lakhs crores, is another factor, which we have kept in our mind to answer the application for 'waiver' in favour of the appellants.

165. Article 121 of Articles of Association provides for requirement of a majority of Directors nominated by Tata Trust to approve of every simple decision of 1st respondent company – Tata Sons Limited and reads as follows:-

"121. MATTERS HOW DECIDED

Matters before any meeting of the Board which are required to be decided by a majority of the Directors shall require the affirmative vote of a majority of the Directors appointed pursuant to Article 104B present at the meeting and in the case of an equality of vote the Chairman shall have a casting vote."

166. Article 121-A lists out matters that have to be taken to the Board of Directors of the 1st respondent company – 'Tata Sons Limited' which includes all Tata Group Companies, as named below. Thereby, the 1st respondent company has complete control over the decision making and affairs of all the Tata Group Companies, as apparent from the Article 121-A and quoted below:-

"121-A. The following matters shall be resolved upon by the Board of Directors:

xxx xxx xxx

(g) Any matter affecting the shareholding of the Tata Trusts in the Company or the rights conferred upon the Tata Trusts by the Articles of the Company or the shareholding of the Company in any Tata Company if not already approved as part of the annual business plan;

(h) Exercise of the voting rights of the Company at the general meetings of any Tata Company, including the

appointment of a representative of the Company under Section 113 (1) (a) of the Companies Act, 2013 in respect of a general meeting of any Tata Company and, in any matter concerning the raising of capital, incurring of debt and divesting or acquisition of any undertaking or business of such Tata Company, instructions to such representative on how to exercise the Company's voting rights.

Explanation: The term "Tata Company" used in this Article shall, as the context requires, mean each or any of the following companies:

Tata Consultancy Services Limited, Tata Steel Limited, Tata Motors Limited, Tata Capital Limited, Tata Chemicals Ltd., The Tata Power Company Limited, Tata Global Beverages Limited, The Indian Hotels Company Limited, Trent Limited, Tata Teleservices (Maharashtra) Limited, Tata Industries Limited, Tata Teleservices Limited, Tata Communications Limited, Titan Company Limited and Infinity Retail Limited and any other company in which the Company (or its subsidiaries) holds twenty percent or more of the paid up share capital and whose name is notified in writing to the Company by the Directors nominated under Article 104B."

167. Thus, *prima facie,* it appears that with regard to affairs of the other Tata Group Companies, namely Tata Steel Limited, Tata Motors Limited, Tata Teleservices Limited, The Tata Power Company Limited, Air Asia (India) etc., the 1st respondent company has some control and therefore, at the stage of 'waiver' it cannot be held that the matter relates to other companies or third company.

168. This is another exceptional factor, we have noticed in this case, which merit 'waiver' in favour of appellants to file an application under Section 241.

169. In so far as (proposed) petition under Section 241 is concerned, the plain reading of the same will show that the allegations relate to 'oppression and mismanagement'; it cannot be stated to be a frivolous application. We find that some of the allegations as made by appellants and highlighted by the learned counsel for the 11th respondent as noticed in the preceding paragraphs, are of recent year 2016. We are not expressing any opinion with regard to merit of such allegation, but have only noticed the allegations.

170. Taking into consideration the aforesaid facts and exceptional circumstances of the case as apparent from plain reading of the (proposed) application and as some of them relate to 'oppression and mismanagement', qua 1st respondent company and its member(s), we are of the view that the appellants have made out a case for 'waiver' to enable them to apply under Section 241.

171. The Tribunal by impugned judgement dated 17th April 2017 having failed to notice the aforesaid facts and factors, as discussed above and as it decided the application for 'waiver' taking into consideration the *prima* facie case / merit of the case, the said order cannot be upheld. We, accordingly,

set aside the impugned order dated 17th April 2017 passed by the Tribunal in C.P.No. 82/241, 242, 244/NCLT/MAH/2016 and grant 'waiver' to appellants to enable them to file application under Section 241.

172. The case is remitted to the Tribunal to register the (proposed) application under Section 241, admit the same and after notice to the parties decide the application on merit uninfluenced by impugned orders preferably within three months.

173. In the result Company Appeals(AT) No. 133 is dismissed and Company Appeals (AT) No. 139 of 2017 is allowed with the aforesaid observations and directions.

However, in the facts and circumstances of the case, the parties will bear their own costs.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
21st September 2017

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