

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 161 of 2018

IN THE MATTER OF:

S. Ahamed Meeran

...Appellant

Vs

Ronny George & Ors.

....Respondents

Present:

For Appellant: Mr. Rana Mukherjee, Sr. Advocate with Mr. Goutham Shivshankar and Mr. Shantanu Singh, Advocates.

**For Respondents: Mr. Anirudh Wadhwa and Mr. Bhargav R. Thali, Advocates for R-1.
Mr. Prasanna S., Advocate for R-3 to 7.**

ORDER

02.11.2018: The Appellant has filed this appeal against the order dated 14th March, 2018 passed by National Company Law Tribunal, Single Bench Chennai in CA/121/2017, whereby and whereunder the application for waiver filed by the Respondent under Proviso to Sub-section (1) of Section 244 of the Companies Act, 2013 has been allowed.

2. At this stage, it is desirable to notice that earlier the Tribunal allowed the petition for Waiver but the order being not a reasoned order, the order was set aside by this Appellate Tribunal and matter was remitted back to the Tribunal. It is only thereafter the Tribunal on reconsideration held that the Respondent (Petitioner) made out an exceptional case for waiver.

3. Learned counsel appearing on behalf of the Appellant submit that no exceptional case has been made out by the Respondent (Petitioner) and the Tribunal failed to identify specific exceptional circumstances. Further, according to him the Adjudicating Authority on erroneous factual finding and wrong interpretation of law passed the impugned order.

4. Similar plea has been taken by the learned counsel for Respondent No. 3 to 7. On the other hand, according to learned counsel for Respondent No. 1 and 2, the impugned order is in accordance with law.

5. In the present case we do not want to go into the merit of the claim and counter claim of the parties in view of the decision of this Appellate Tribunal in '**Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.**, 2017 SCC OnLine NCLAT 261. In the said case this Appellate Tribunal held that while considering the application for waiver under Proviso to Sub-section (1) of Section 244 of the Companies Act, 2013, the Tribunal may look into the proposed petition under Section 241 and 242 but cannot take into consideration the merit of the said petition to decide the application for waiver. It is only in application where cases of exceptional circumstances is made out by one of the member having less than 10% of shareholding, the Tribunal may allow petition for waiver. This Appellate Tribunal observed and held as follows:-

“144. 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.

145. 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) Arbitration:

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.”*

6. Thereafter Appellate Tribunal proceeded and made following observations:-

“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’.*”

7. In the said appeal taking into consideration the shareholding pattern and different members the Appellate Tribunal held:-

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’.”*

8. The shareholding pattern in the present appeal is as shown below and is not in dispute.

Shareholding Pattern in PCNL as on 31.03.2018.

S. No.	Shareholder’s Name	No. of Shares as at 31.03.2018	% of total shares of the company
1.	Abraham Parayil Mathew (R-3)	7,41,582	7.85
2.	Thomas John (R-5)	7,28,957	7.72

3.	Ahamed Meeran (Appellant)	7,98,407	8.45
4.	Suresh Bharatan (R-6)	7,29,107	7.72
5.	Oomen Chackalayil Chacko (R-4)	7,36,608	7.80
6.	Ronny George (R-1)	7,35,357	7.79
7.	Vadesseri Srinath (R-7)	7,53,882	7.98
8.	Relatives	13,07,075	13.84
9.	Others / public shareholders	29,12,142	30.84

9. From the aforesaid shareholding pattern we find that all the shareholders have less than 10% of the total shareholding of the company. Their case being covered by this Appellate Tribunal's decision in '**Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.**' (Supra), we are not inclined to interfere with the impugned order, where the Tribunal on factual matrix and evidence allowed application under Section 241-242 of the Companies Act.

10. Counsel for the Appellant submits that not a single person holds dominant stake in the company, as such, the potential for oppressive behavior is greatly diminished in the company, therefore, granting of waiver cannot be accepted at this stage. However, such issue can be looked into by the Tribunal only while discussing the merit in petition under Section 241-242.

11. We find no merit. The appeal is dismissed. No Cost.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice A. I. S. Cheema]
Member (Judicial)

am/sk