

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) No. 162 of 2018**

[Arising out of Order dated 14<sup>th</sup> March, 2018 passed by National Company Law Tribunal, Single Bench, Chennai in CA/122/2017]

**IN THE MATTER OF:**

**S. Ahamed Meeran**

Managing Director,  
Residing at Door No.18,  
R.A. Puram, 3<sup>rd</sup> Main Road,  
Chennai – 600 018  
Tamil Nadu.

**...Appellant**

**Vs**

**1. Ronny George**

Son of Late Mr. V. R. George,  
Residing at No. 32/2586,  
Yathri Nivas Lane, Mamagalam,  
Palarivattom, P.O. Kochi – 682 025.

**2. Professional International Couriers Private Limited**

A Company incorporated under the Companies Act, 1956  
Having its Registered Office at  
New No.9, 3<sup>rd</sup> Main Road,  
C.I.T. Nagar (East), Nandanam,  
Chennai – 600 035.

**3. Mr. Abraham Parayil Mathew**

Residing at 121, Nandanvan Co-operative  
Housing Society Ltd., Sector – 17  
Nerul, Navi Mumbai, 400 706  
Maharashtra.

**4. Mr. Oomen Chackalayil Chacko**

Residing at Diamond Apartments,  
D. No. 101, New Link Road, Anand Nagar,  
Jogeshwari-W, Mumbai – 400 102  
Maharashtra.

**5. Mr. Thomas John,**

Residing at Plot No. 27, Rudra Nagar Lothukunta,  
Secunderabad, 500 015, Telengana.

**6. Mr. Suresh Bharathan**

Residing at 35/141 A, Madkavil,  
Ernakulam – 682 025, Kerala.

**7. Mr. Vadesseri Srinath,**

Residing at Sri Nilayam, Old No. 49,  
New No.189, Margosa Road  
Malteswaram,  
Bangalore – 560 055.

**...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.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

This appeal has been preferred by Appellant against order dated 14<sup>th</sup> March, 2018 passed by National Company Law Tribunal, Single Bench Chennai in CA/122/2017, whereby and whereunder the Tribunal granted waiver in favour of 1<sup>st</sup> Respondent – ‘Ronny George’ under Proviso to Sub-section (1) of Section 244 of the Companies Act, 2013 for entertaining a petition alleging oppression and mismanagement in the company.

2. Learned counsel appearing on behalf of the Appellant submitted that the 1<sup>st</sup> Respondent is a minority shareholder of 2<sup>nd</sup> Respondent Company holding 8.99% shares. According to him the 1<sup>st</sup> Respondent failed to make out a case of any 'exceptional circumstances' to get the application for waiver allowed in its favour. Further according to him, the impugned order is against the decision of this Appellate Tribunal in '**Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.**, 2017 SCC OnLine NCLAT 261.

3. Learned counsel appearing on behalf of the 1<sup>st</sup> Respondent submitted that the Appellant is reagitating the issue on wholly irrelevant ground. According to him, the Tribunal has considered critical facts laid down by this Appellate Tribunal in '**Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.**' and after careful consideration and taken into consideration the fact that 1<sup>st</sup> Respondent is the member of the company and the matter of complaint pertains to oppression and no similar allegations of oppression were made earlier, the waiver was allowed.

4. On hearing the counsel for the parties and perusal of records, we find that the Tribunal earlier passed an order on 14<sup>th</sup> July, 2017 granting waiver in favour of the 1<sup>st</sup> Respondent. This Appellate Tribunal by its common order dated 5<sup>th</sup> October, 2017 having noticed that the said order was passed in a mechanical manner without considering any exceptional circumstances set aside the matter and remanded the matter to the Tribunal with following observations:

“7. For the reasons aforesaid and as the impugned order(s) are a non-speaking order, we have no option but to set aside the impugned orders both dated 14<sup>th</sup> July, 2017 passed in CA No.121/2017 and CA No.122/2017 and they are set aside. Both the cases are remitted to the Tribunal for its decision on the question whether the application for ‘waiver’ merits consideration after notice and hearing the parties.

8. Both the appeals are allowed with aforesaid observation. No costs.

9. In view of the fact that there is no ‘waiver’ in favour of the respondents, the question of granting interim relief does not arise.”

It is after the aforesaid remand, the impugned order has been passed by the Tribunal granting waiver merely referring to the decision of this Appellate Tribunal in ‘**Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.**’.

5. In ‘**Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.**’ this Appellate Tribunal having noticed different factors 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 as far as 51, the Tribunal held that the shareholders holding less than 10% of the shareholding capital, taking into consideration the fact that except the minority shareholders joint together cannot file an application under Section 241. Further, 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. In the present case, the 1<sup>st</sup> Respondent tried to argue that he is also a less than 10% shareholder but that cannot be held to be an exceptional ground to grant waiver. The shareholding pattern in the 2<sup>nd</sup> Respondent Company - **‘Professional International Couriers Private Limited’** as on 31.03.2018 is as follows:-

**Shareholding Pattern**

<b>S. No.</b>	<b>Shareholder's Name</b>	<b>No. of Shares as at 31.03.2018</b>	<b>% of total shares of the company</b>
1.	Ahamed Meeran (Appellant)	60,000	13.08
2.	Ronny George (R-1)	41,250	8.99
3.	P M Abraham (R-3)	51,250	11.17
4.	Oomen Chackalayil Chacko (R-4)	51,250	11.17
5.	Thomas John (R-5)	51,250	11.17
6.	Suresh Bharatan (R-6)	21,250	4.63
7.	Vadesseri Srinath (R-7)	62,500	13.62
8.	Relatives	1,20,000	26.16

9. From the aforesaid shareholding pattern it is clear that except two members all the member are individually eligible to maintain application under Section 241-242 having more than 10% of the share of the company. It is not necessary that they will have to join with one or other member to maintain their petition.

10. In '**Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.**' (Supra), this Appellate Tribunal noticed the shareholding pattern and taking into consideration the fact that majority of the shareholder having less than 10% of the shareholding, except 2 got more than 10% and that the Appellant 'Cyrus Investment Pvt. Ltd.' has invested about Rs.1,00,000 Crore in 'Tata Sons Ltd.' out of the total investment of Rs.6,00,000 Crore, held that the Appellant of the said case namely 'Cyrus Investment Pvt. Ltd.' has made out an exceptional case to maintain a petition for waiver under Proviso to Sub-section (1) of Section 244 of the Companies Act, 2013.

11. In Another Case 'S. Ahamed Meeran Vs. Ronny George & Ors.', Company Appeal (AT) No. 161 of 2018 (CA/121/2017), which relates to another Group Company, this Appellate Tribunal by judgment dated 2<sup>nd</sup> November, 2018 having noticed the shareholding pattern that majority of them had less than 10% shares held that justified waiver has been granted by the Tribunal and refused to interfere with the impugned order.

12. The present case of the 1<sup>st</sup> Respondent 'Ronny George' is not only different but a reversal case where majority of the shareholder have more than 10% of shareholding except two who are less than 10% shareholding. Therefore, it cannot be held that the 1<sup>st</sup> Respondent has made out a case of exceptional circumstances for grant of waiver to maintain an application under Section 241-242 on such ground. This apart, no exceptional circumstance has been shown

by the Tribunal to grant waiver. The factors recorded by NCLT in Para 17 of the impugned order are no grounds to treat them as exceptional circumstances keeping in view our Judgment in the matter of '**Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.**' (Supra).

13. In view of the aforesaid fact, the impugned order of Tribunal dated 14<sup>th</sup> March, 2018 passed in CA/122/2017 being based on wrong presumptions of fact and law and as the 1<sup>st</sup> Respondent has failed to make out a case for waiver, the said order is set aside. We hold that the petition under Section 241 and 242 preferred by 1<sup>st</sup> Respondent (Petitioner) before the Tribunal in respect to 2<sup>nd</sup> Respondent Company – 'Professional International Couriers Private Limited' is not maintainable and to be dismissed. The appeal is allowed with aforesaid observations. No Costs.

[Justice S. J. Mukhopadhaya]  
Chairperson

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

**NEW DELHI**

**14<sup>th</sup> November, 2018**

*am*