

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No.368 of 2017

(Arising out of order dated 12.06.2017 passed by the National Company Law Tribunal, Mumbai Bench, Mumbai in M.A. No.99 of 2017 in CP No.28 of 2016).

<u>In the matter of:</u>	Before NCLT	Before NCLAT
1. Nasik Diocesan Trust Assn. Pvt Ltd, Ajinkya Building, Opp HDFC House, Opp Tibetan Market, Sharanpur Road, Nashik, Maharashtra 422005	1st Respondent	Appellant
2. Ajay P. Shrivastava, 480, Suprabha Niwas, Nr. Andriya Church, Sharanpur Road, Nr. Rachana Vidyalaya, Nashik, Maharashtra 422002	2nd Respondent	Appellant
3. Atul Tulshidas Manmode MES D-107, Nr. Shiv Mandir, Pimple Nilakh Aundh Camp, Pune, Maharashtra 411027	3rd Respondent	Appellant
4. Sachin Vitthal Katke, Nr PMC Office, Benergaon, Pune, Maharashtra 411045	5th Respondent	Appellant
5. Jawahar Avinash Uzagare, 38, Pratibha Niwas, Sharanpur Road, Nasik 422002	9th Respondent	Appellant
6. Nilima Pramod Shrivastava, 480, Suprabha Niwas, Nr. Andriya Church Sharanpur Road, Nr. Rachana Vidyalaya, Nashik, Maharashtra 422002	11th Respondent	Appellant

**7. Swati Ajay Shrivastava,
480, Suprabha Niwas,
Nr. Andriya Church,
Sharanpur Road,
Nr. Rachna Vidyalaya,
Nashik, Maharashtra 422002**

12th Respondent Appellant

Versus

**1. Uday Daniel Khare,
St Andreus Church,
House No.26
Near Rachana School
Sharanpur,
Nashik, Maharashtra**

1st Petitioner 1st Respondent

**2. Arvind Gangadhar More
B-3 Gopal Nagar Amrutdham,
Ozar Road
Panchavat, Nashik
Maharashtra 422003**

2nd Petitioner 2nd Respondent

**3. Rt.Rev Pradip Lamuel Kamble
Bishop House,
1 Outroom Road,
Tarakpur, Ahmednagar,
Maharashtra**

4th Respondent 3rd Respondent

**4. Appa Hanumant Waghmare,
Malavani G, Baner,
Taluka Haveli,
Pune, Maharashtra 411045**

6th Respondent 4th Respondent

**5. Dev Kojra Ram,
Riwadi, Rewari, Jaisalmer,
Rajasthan 345027**

7th Respondent 5th Respondent

**6. Girdhari Lal
276, Meghwal Vas, Sonu,
Jaisalmer,
Rajasthan 345001**

8th Respondent 6th Respondent

**7. Kump Alam Singh
221 ZGB BJS Colony,**

Jodhpur,

**Sardarpura, Mohangarh,
Jaisalmer, Rajasthan
345033**

10th Respondent

7th Respondent

**8. Satish Philip Kalshikar,
House No.19/2 Mission Compound
HPT College Road,
Sharanpur Road,
Nashik 422002**

13th Respondent

8th Respondent

**9. Sayaman Anthony Fernandes
Acharya Atre Nagar,
RB-17
S.M. Road, Antop Hill,
Wadala (E),
Mumbai 400 037**

14th Respondent

9th Respondent

**Present: For appellant: Shri Devansh Mohta with Mr. Venkat Poonia,
Advocates.**

**For Respondents: Mr. Rahul Chitnis with Mr. Yogesh K.
Ahirrao, Advocates 1st and 2nd Respondent.**

Mr. Amol Arun Shinde, Advocate for Respondent No.3.

Mr. Abishek Jebaraj, Advocate for Respondent no.8.

JUDGMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

1. The present appeal has been preferred by the appellants against the order passed in M.A. No.99/2017 in C.P. No.28/2016 by the National Company Law Tribunal, Mumbai Bench, Mumbai (hereinafter referred to as the "Tribunal") dated 12th June, 2017 under Section 241, 242 and 244 of the Companies Act, 2013 granting waiver under the proviso to Section 244(1) of the Companies Act, 2013 to Respondent Nos.1 and 2.
2. The brief facts of the case are that the Appellant No.1 was incorporated under the Companies Act, 1913 as a company limited by Guarantee

and is admittedly a Section 8 company under the present Companies Act, 2013. Appellant No.1 is also a registered charitable trust under the provisions of the Bombay Public Trusts Act, 1950. The object of the appellants are to promote Christianity in India and conduct charitable and benevolent activities. 1st and 2nd Respondent filed a Company Petition being CP No.28/2016 before the Tribunal for oppression and mismanagement of the 1st appellant company by and at the hands of 2nd appellant thereby alleging that the 2nd Appellant, one of the director of 1st appellant, with malafide intention convened an invalid, ultra vires, fake and non-existent Extra Ordinary General Manager (EGM) on 30th September, 2015 and removed 19 directors, most of them being Members of the Company, under Sections 164 read with Section 167 of the Companies Act, 2013 without giving any notice to these directors/members of being heard. It was further alleged that Director 12 was digitally signed by 2nd appellant, certified by one Mr. Aashish Kabra and filed with ROC with a fraudulent motive of mismanagement. It is further alleged that 6 new directors/members were inducted on 30th September, 2015 by an invalid, ultra vires, fake and non-existent EGM. It is further alleged that 2nd appellant who had vacated the office on 30th September, 2015 and the appointment of 3 new directors was done on the same day i.e. 30th September, 2015 vide Resolution No.6, but he was authorised to do so on 3rd October, 2015 i.e. 3 days of his vacation from the post of director. Other allegations have also been levelled such as Board Meeting Resolutions are invalid, ultra vires, fake and non-existent. Board Meetings were convened on 18th and 19th

December, 2016 for removal of new directors and appointment of additional new directors. The 1st and 2nd respondent sought the following relief from the Hon'ble Tribunal:

- I) That the Petitioners be granted a permanent order and injunction of this Hon'ble Tribunal restraining the Respondent Nos 2 to 12 from posing as the director of the company.
- II) That the petitioners be granted a permanent order and injunction of this Hon'ble Tribunal restraining the Respondent Nos 2, 11,12 from posing as the members of the Company and cancel MGT-7 (annexure 1) with the Members.
- III) That the Hon'ble Tribunal restraining Respondent No.2 in mismanaging the operations of the company in disguise and behind other respondents.
- IV) That this Hon'ble Bench be pleased to pass an order directing that the Petitioners/Respondent No.13, 14 are entitled to have representation of the Board Meeting and General Meeting of the company.
- V) That this Hon'ble Bench declare the invalid, fake, non-existent and ultra vires Extra Ordinary General Meeting dated 30th September, 2015 and Board Meeting dated December 18, 2015 and December 19, 2015 alleged to be convened by Respondents as null and void and any alleged resolution/documents/e-forms based on above EGM/BM be declared null and void and be set aside.

- VI) That this Hon'ble Bench declare the recent change in the registered office from Ajinkya Building, Opp HDFC House, Opp Tibetan Market, Sharanpur Road, Nashik, Maharashtra, India 422 005 to shop No.8 Snehal Tower, Sawarpada, Borivali (East), Mumbai, Mumbai city, Maharashtra, India 400 066 with effect from 5th November, 2015 as null and void and all alleged meetings/actions/functions at the alleged new registered office as null and void.
- VII) That this Hon'ble Bench declare the change in the Articles of Association as null and void and all alleged connected actions based on alleged new Articles of Association.
- VIII) Such further or any other orders be made as this Hon'ble Tribunal Western Region may deem fit.
- 3.** However, during the pendency of the Company Petition the 1st and 2nd Respondent filed MA No.99/2017 in CP No.28/2016 before the Tribunal stating that they being laymen were not aware about the technicalities and provisions of Section 244 of the Companies Act, 2013 and unfortunately their earlier counsel did not properly brief them about the provision and inadvertently the company petition was filed due to urgency as the 2nd appellant was mismanaging the affairs of the company. The applicants further stated the members of company are scattered in and around Maharashtra and hence the applicants could not call the meeting and could not bring them all together to obtain consent and/or to file the above referred petition alongwith them. The applicants further stated that as an abundant precaution, they are in

process to call for meeting and/or to obtain consent of all other members of the company but it will take some time. The applicants further stated that considering the embargo as provided under Section 244(b) of the Companies Act, 2013 read with Rule 81(2) of the National Company Law tribunal Rules, 2016, as the petition should not be rejected on technical grounds hence the petition filed by the 1st and 2nd respondent may not be considered, and applicants/petitioners are filing the application thereby seeking waiver from requirements as specified under Clause (a) and (b) of the Section 244 of the Companies Act, 2013 to apply under Section 241 of the Companies Act, 2013. Therefore, the applicants prayed for the following:

A) That this Hon'ble Court may kindly be pleased to allow this application thereby waiving the embargo as provided under Section 244(1)(a) and (b) as per proviso clause provided under Section 244(1) of Companies Act, 2013.

4. After hearing both the parties the Tribunal passed the following order:

“I have taken due note of the two case laws cited from the side the Respondent (2): (1) AE AI Ameen and others Vs Bayangudi Muslim Educational Association and Others (C.P. No.35 of 2004) and (2) Prem Nath Gangneja Versus Edwardganj Public Welfare Association and another (C.P.No.72 of 1985). However, noticed that those facts are distinguishable from the facts of this case. A glaring distinction is that if the Petitioner with mala fide intention is creating litigation to hinder the social/charitable activity

then the courts have thought it proper to thwart such attempt. In contrast, the Petitioners in this case are making a bonafide attempt to streamline the social/charitable activity of this Institution. Before I conclude I want to make it clear to both the parties that any of the observation in this Interim Order shall not prejudice in any manner the lawful claim of the litigants and nothing should be prejudged on the merits. The Petitioner under consideration has already been admitted in the past. As a consequence, the Petitioners are entitled to pursue this petition as per law. The application (MA-99 of 2017) is allowed. Petition is listed for hearing on 20th July, 2017.”

5. Being aggrieved by the impugned order dated 12.06.2017 passed in MA-99 of 2017 in Company Petition No.28/2016 the appellant has preferred this appeal. The appellants have prayed for the following reliefs:
- A) That this Hon’ble Appellate Tribunal be pleased to quash and/or set aside the impugned order on the basis that Respondent Nos.1 and 2 were not entitled to file the Company Petition.
- B) Strictly without prejudice, in the alternative and only if this Hon’ble Appellate Tribunal is not pleased to grant prayer (A) above, in the alternative, this Hon’ble Appellate Tribunal be pleased to quash and/or set aside the impugned order and refer the matter to the NCLT Mumbai for determination of whether Respondent Nos1 and 2 are members of Appellant No.1.

- C) That pending the hearing and final disposal of the present appeal, this Hon'ble Appellate Tribunal direct that the Company Petition No.28 of 2016 not be proceeded with before the NCLT Mumbai.
- D) For ad-interim reliefs in terms of prayer clause (C) above;
- E) For costs; and
- F) For any and such other relief as this Hon'ble Appellate Tribunal deem fit and proper in the circumstances;
6. Learned counsel for the appellants stated that at all times there have been only 8 members of the 1st appellant and the respondents are not the members of the appellant and the extract of the Register of Members of 1st appellant had been annexed by 1st and 2nd appellant before the Tribunal. Learned counsel for the appellant further stated that apart from the heavily disputed alleged Minutes, there was no document on record to show that 1st and 2nd respondent were members at all.
7. Learned counsel for the appellant stated that general meetings of appellant No.1 were held on 30th September, 2015 and it was record that various persons including the respondents hereto stood automatically vacated of the office of directors by operation of law on account of, inter alia, non-filing of annual accounts and annual returns and failing to discharge their duties of directors and in terms of Section 167 read with Section 164 of the Companies Act, 2013 certain other persons including appellant Nos 2 to 13 were appointed as directors. It is further stated that this was necessary as the 1st appellant was being mismanaged. Learned counsel for the appellant stated that the 1st and 2nd Respondent have wrongly alleged in the Company Petition that they

were unlawfully removed from the directorship of the company whereas actually the Respondents stood automatically vacated of the office of directors by operation of law on account of non-filing of annual accounts and annual returns and failing to discharge their duties as directors. Learned counsel next stated that they have intimated this fact only to the Registrar of Companies. Learned counsel for the appellants stated that the respondents filed application before the Tribunal and sought waiver from the requirements prescribed in Section 244(I) on the basis that they were members but did not constitute one-fifth of the total members. Learned counsel for the appellants stated that the 1st and 2nd Respondents were not members of the company so they were not entitled to apply for a waiver under Section 244 of the Act. Learned counsel for the appellant submitted that the Tribunal without considering that the 1st and 2nd respondents are members of the company or not, passed the impugned order dated 12.6.2017.

8. Learned counsel for the appellants submitted that since the 1st and 2nd respondents are not member of the 1st appellant, therefore, they are not entitled for waiver under Section 244(1) of the Companies Act, 2013. Learned counsel for the appellants further submitted that even the Tribunal is not entitled to grant the said waiver under the Act without determining whether the 1st and 2nd Respondents are the members of the 1st appellant. Learned counsel for the appellants further submitted that the Appellate Tribunal may decide whether the waiver under

Section 244(1) of the Companies Act, 2013 would apply even to non-members of 1st appellant.

9. Reply on behalf of 1st and 2nd respondent has been filed. Learned counsel for the 1st and 2nd respondent submitted that as per the Articles and Memorandum of Association of the company the appellant No.1 is empowered to hold and manage various properties like churches, institutions, schools and orphanages etc spread over company's jurisdiction. The Articles and Memorandum of Association of the company does not contain any provision regarding removal of directors of the company. It is submitted that as per the Memorandum of association and articles of association of the appellant No.1 the company has jurisdiction and is to function only within the said jurisdiction and the directors of the company should be one who is the member of the company and who is residing within the jurisdiction of the company and should also be christian. Learned counsel submitted that the appellant no.2 was never ever a member of the company nor any director but by misusing the online system, doing forgery with the digital signatures, became a member and director of the appellant No.1. The appellant by misusing the same thing and taking undue advantage added some directors belonging to other religion for his personal gain and also changed the Registered Office from Nashik to Mumbai which is not as per the Memorandum and Articles of Association of the appellant No.1.
10. Learned counsel for the 1st and 2nd respondent submitted that the decision passed by this Appellate Tribunal in **Cyrus Investment Pvt**

Ltd and Anr Vs Tata Sons Ltd & Ors cannot be made applicable and differed with the present case as in the said petition the question was arose in respect of company having share capital, on the contrary in the present case the appellant No.1 is Section 8 of the Companies Act, 2013 having charity functions. Learned counsel submitted that even if it is presumed without admitting that the **Cyrus case** is applicable to the present case, even in that case the issue as raised by the appellants herein in respect of 1st and 2nd respondent of being member or not of appellant No.1, cannot be decided at the time of deciding application as per the provisions of proviso clause enshrined under Section 244 of the Companies Act, 2013.

11. Learned counsel for the 1st and 2nd respondent submitted that they have represented the appellant No.1 in numerous cases which proves that they are members of the appellant No.1. Learned counsel for the 1st and 2nd Respondent submitted that unless and until they being members of the company, they cannot be director of the company and it is an admitting fact that presuming without admitting the alleged resolution passed by the Appellant 2 to 7 removing the respondents from their directorship, itself proves that till that date the 1st and 2nd respondent were the members of the company and even today they are the members as by no act they could be removed from membership of the appellant 1 company.

12. Learned counsel for 1st and 2nd respondent submitted that it is partly correct that the appellant No.1 was incorporated under the provisions of Companies Act, 1913, as a company as per the provisions

of Section 8 and the objects of the company are to promote Christianity in India, conduct charitable and benevolent activities. Learned counsel states that it is incorrect that the company is also a registered charitable trust under the provisions of Bombay Public Trust act, 1950 and the appellant is a company registered as per provisions of the Companies Act. Learned counsel further stated that the appellant is a company registered as per the provisions of Companies Act whereas Nashik Diocesan Council is a public trust registered as per the provisions of Bombay Public Trust Act, both are two different and distinct entities. Learned counsel further submitted that the appellants No.2 to 7 are trying to mislead the Appellate Tribunal by purporting the trust and company being the one and the same entity. Learned counsel for the 1st and 2nd Respondent submitted that the appellants No.2 to 7 may produce the record as to who were the only 8 members of the appellant No.1 since 1943 and to prove the authenticity of the extract of the so called and self prepared Register of Members of the appellant No.1. Learned counsel for the 1st and 2nd respondent submitted that the appellants No.1 and 2 admitted that the 1st and 2nd respondent alongwith several other the then directors have been stood automatically vacated of the office of directors by operation of law on account of non-filing of annual accounts and annual returns and thereby failing to discharge their duties as directors. Therefore, the appellants No.1 and 2 admits that 1st and 2nd respondent and several other members were the directors of the appellant No.1 company. It is

next submitted that unless and until being a member of the company no one could be director of the company.

13. Learned counsel for the 1st and 2nd respondent submitted that the Tribunal has correctly dealt with the application filed by it without going into the merits of the Company Petition. Learned counsel for the 1st and 2nd respondent submitted that they are members of the appellant company and were legally entitled to waiver under the proviso of Section 244(1) of the Companies Act, 2013 and the company petition filed before the Tribunal is maintainable. Learned counsel further submitted that in view of the decision passed by this Hon'ble Appellate Tribunal in **Cyrus Investment Pvt Ltd and Anr Vs Tata Sons Ltd & Ors** the Tribunal has rightly allowed waiver to the 1st and 2nd respondent and the appellants No.2 to 7 were never ever being members or directors of the appellant company. Merely misusing the online system became members and online directors of the appellant company and started mismanaging and their acts of oppression. Learned counsel lastly submitted that the appeal is totally devoid of any substance and the appeal is liable to be dismissed with compensatory costs and the appellants are not entitled to any relief much less the reliefs prayed for by it in the above appeal, not even for any ad interim and/or interim relief as prayed for.

14. Reply on behalf of 3rd respondent has been filed. Learned counsel for 3rd respondent stated that he is presently serving as the Bishop of Nasik Diocese and Chairman of the Nasik Diocesan Council. Learned

counsel further submitted that as per Memorandum of association and Article of Association of the appellant company, the Bishop and other Assistant Bishops and Archdeacons will be the ex-officio members and directors of the company. Learned counsel for 3rd respondent further submitted that the members of the company shall be Christians elected or nominated by a Managing Council known as the Nashik Diocesan Council of which the Bishop is the Chairman. Learned counsel for 3rd respondent submitted that he having been appointed by the Church of North India, as the Bishop of Nashik diocese, he is the first ex-officio member, director and Chairman of the appellant company. Learned counsel for 3rd respondent further submitted that till end of 2015 the company was under his control and of Diocese Council.

15. Learned counsel for the 3rd respondent submitted that 2nd appellant has illegally usurped the management of the company and is steadily destroying its social and charitable purposes. Learned counsel further submitted that 2nd appellant with a view to use the vast properties held by the company for his malafide personal gain has illegally removed several members of the company including removing him. Learned counsel for 3rd respondent submitted that the 2nd appellant convened an illegal meeting on 13.9.2015 and removed several members without any notice or being given the opportunity of being heard. It is also alleged that the 2nd appellant fraudulently signed various company forms for the removal of the original directors and added six new directors and the directors purportedly remaining in the company all are close relatives or friends of 2nd appellant. Learned

counsel for 3rd respondent submitted that the material objects of the company were purported to be changed and the said appellants have illegally procured documents to show shares issued to all the directors. Learned counsel for 3rd respondent further submitted that event he registered office of the appellant company was illegally changed by the 2nd appellant from Nashik to Mumbai in spite of the management being the Nashik Diocese Council.

16. Learned counsel for the 3rd respondent further submitted that it is prima facie made out that the 2nd appellant alongwith other appellants have connived with one builder namely Prakash Pusaram Laddha to usurp the properties of the company and to completely destroy its charitable objectives. Learned counsel submitted that he got registered FIR against the 2nd appellant for his criminal and fraudulent acts and the 2nd appellant was denied anticipatory bail and was taken in police custody for seven days and now he is remanded for judicial custody at Nashik Central Jail on the same charges of corporate and criminal fraud levelled against him. Learned counsel for 3rd respondent further submitted that the 1st and 2nd respondent had moved a Company Petition before the Tribunal under Sections 241 and 242 read with Section 244 of the Companies Act. Learned counsel further submitted that the two members fell below the one fifth of total member's threshold mandated under Section 244(b) of the Companies Act, 1st and 2nd respondent moved a waiver application and the same was allowed and further submitted that he supported the petition as there were prima facie acts of serious oppression.

17. Learned counsel for 3rd respondent submitted the waiver application was filed by the members because the appellants have admitted to issuing notice to the applicants to attend the EGM, therefore, the appellants have admitted them to be members of the Company. Therefore, the appellants cannot take a contrary stand that 1st and 2nd respondents are not members of the company. Learned counsel for 3rd respondent submitted that the appellants have not annexed the original MOA/AOA which forms the very basis for determining members in this company. Learned counsel further submitted that 1st and 2nd respondents are members of the company and were illegally removed as members and the said act have been challenged. Learned counsel for 3rd respondent also pointed out to Page No.54 of the Appeal Paper Book and stated that the appellants had sent notice to the 1st and 2nd respondents for the EGM which prove that they are members of the company.

18. Learned counsel for 3rd respondent has submitted that the appellants have wrongly stated that the company has had only 8 members at relevant times. It is further stated that the appellants have cleverly used the words “at relevant times” which has no meaning in law. It is further submitted that the Trust has been in operation for over a hundred years with several Christian members that have been appointed by the Nashik Diocesan Council. Learned counsel submitted that these eight members have been falsely inducted in the year 2015 for forging and fabricating the documents digitally and against all of them the FIR has been registered and all these 8 members are from the

same family. Learned counsel stated that the all the appellants particular Appellant No.2 are guilty of serious acts of oppression and mismanagement which includes forging documents and illegally removing members both of which have been prima facie observed by the Tribunal. At the end the learned counsel concluded that the appeal filed by the appellants may be dismissed with costs.

19. Rejoinder on behalf of appellant No.1 to the affidavit in reply filed on behalf of 1st and 2nd respondent has been filed. Learned counsel has submitted the submissions what has been stated in the appeal.

20. Rejoinder has been filed by the appellant No.1 to the affidavit in reply filed on behalf of Respondent No.3. Learned counsel for the appellant No.1 stated that the 3rd respondent would not be the ex-officio Chairman-Director-Member of the appellant company in terms of the order passed by Hon'ble High Court of Bombay in the matter of ***Sadanand Shantwan Salvi and Ors Vs The Nasik Diocesan Counsel Reg. Trust and Ors decided on March 13, 1997*** and the consequent amendment of the Memorandum and Articles of Association of the Company in the year 2000. It is next stated that the Hon'ble High Court in the said order observed the manner in which the trust was being mismanaged due to the temporal nature of its administrative structure. The Hon'ble Court observed that the amended Memorandum and Articles of Association of the company did not have any provisions for respondent herein to be the ex-officio Member-Director. Learned counsel further submitted that even as per

the Memorandum and Articles of Association of the Company of 1990, there is no concept of ex-officio chairmanship of the appellant company.

21. We have heard the learned counsel for the parties, perused the entire record and the impugned order.

22. The main issues raised by the appellants in this appeal are as under:-

i) Whether the proviso to Section 244(1) would be applicable to the present case and whether Respondents Nos. 1 and 2 would be entitled to the waiver thereunder.

ii) Whether a person who is not a member is entitled to the waiver under Section 244(1) would also have to be determined.

iii) Whether NCLT is entitled to grant the said waiver under Section 244(1) even without determining whether a petitioner before it is a member or not.

iv) Whether the waiver under the proviso to Section 244(1) could apply even to non-members.

23. 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.

24. 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.

25. 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 capricious or arbitrary manner and can be passed only be a speaking and reasoned order after notice to the (proposed) respondents. 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.

26. Section 241(1) of Companies Act, 2013 provides as under:

“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 interest 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 interest 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.”

27. Counsel for the appellants has argued that the Respondents No.1 and 2 are not member of the company, therefore, they are not entitled to move an application for waiver and the Tribunal has made a mistake

in accepting the same. We observe from the pleadings that the Appellant company is Section 8 company incorporated under the Companies Act for religious and charitable objective such as promoting the Christian faith and social welfare to the public at large. As per Memorandum of Association and the Articles of Association of the company, the Bishop and other Assistant Bishops and Archdeacons will be the ex officio members and directors of the company. Further as per Company Memorandum of Association and Articles of Association, members of the said company shall be Christians elected or nominated by a managing council known as the Nashik Diocesan Councils of which the Bishop is the Chairman. The Appellant No.2 has stated that the appellant company consist of 8 members. Neither of the Respondents are members of the appellant company. Appellant No.2 further stated that general meeting of appellant No.1 was held on 30th September, 2015 and it was recorded that various persons including the Respondents hereto stood automatically vacated the office of directors by operation of law on account of, inter alia, non-filing of annual accounts and annual returns and thereby failing to discharge their duties as directors, in terms of Section 167 read with Section 164 of the Companies Act, 2013. However, we observe that the Respondent No.1 and 2 have attended the Annual General Meeting of Nasik Diocesan Trust Association held on 28th November, 2014 and their signatures are on the attendance Sheet at Sl.No.4 and 5 at Page 66.

28. As per Cyrus Mistry case it is admitted position that if applicant is not member he cannot move an application. In the present case, we

also noted that there are 46 members in the company meeting on 28.11.2014 at Nasik and the appellant is stating that there are only 8 members. Therefore, there has to be some linkage how 46 members have become 8 members. Further the appellant has stated that certain directors stood automatically vacated of the office of directors by operation of law on account of non-filing of annual accounts and annual returns and thereby failing to discharge their duties as directors. However, we are of the opinion that there is provision in the Companies Act that a director can be removed but members are not normally removed. On the other hand, as per the claim of the appellant that respondents are not members and counter claim by the respondents that they are members. There are also some conflicting documents as some documents are showing that they are members of the company at some point of time and some documents are showing that they are not members of the company. Even if there is a provision in the Articles of Association for removal of the members, it may conflict with the provisions of law and if not so, strict compliance with the requirement for removal need to be placed on record so as to deny the membership right to a person who has been a member at one point of time or the other. This issue could be an exceptional circumstances, which may merit "waiver".

29. Learned counsel for the respondents raised the issue that as per Memorandum of Association and Articles of Association of the Company, the company has jurisdiction and is to function only within the districts of Nashik, Aurangabad, Ahmednagar (Local Jurisdiction)

and also the directors of the appellant company should be one who is the member of the company and who is residing within the jurisdiction of the company. It is argued that the registered office of the company has been shifted to Mumbai. Looking to the nature of the company, location of the properties and the charity purpose for which the Association has been formed for the districts of Nashik, Aurangabad, Ahmednagar the shifting of the office from Nashik to Mumbai may be ground for Members of the company to be concerned. This seems to us exceptional circumstances for which waiver could be allowed to Members who have moved the company petition.

30. In view of the above discussions we observe that for above reasons the Tribunal has rightly exercised its discretion and allowed the application for waiver. The appeal is dismissed. No order as to costs. NCLT, Mumbai is directed to dispose of the company petition as per Section 422 of the Companies Act, 2013.

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

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

Dated: 21-05-2018