

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.362 of 2017

IN THE MATTER OF:

M/s. India Awake for Transparency
Shristi Crescendo
24 Desika Road Mylapore
Chennai – 600 004

...Appellant

Versus

1. M/s. Hasham Investment and Trading Company Pvt. Ltd.
No.134 Next to WIPRO Corporate Office
Doddakannelli
Sarajapur Road,
Bengaluru – 560 035
 2. Azim H Premji
Survey No.75, 133, 135/1 and 136/1
Next to WIPRO Corporate Office
No.574, Doddakannelli
Sarajapur Road,
Bengaluru – 560 035
 3. Yaseem Premji
Survey No.574, Doddakannelli
Sarajapur Road,
Bengaluru – 560 035
 4. P Srinivasan
No.524, 16th Cross Indira Nagar II Stage
Bangalore Karnataka – 560 038
 5. Azim Premji Trust rep by its Trustee
Azim Premji Trustee Company Pvt. Ltd.
No.134 Next to WIPRO Corporate Office
Doddakannelli
Sarajapur Road,
Bengaluru – 560 035
- ...Respondent Nos.1 to 5

Present: Shri S. Subramanian and Shri Arnav Dash, Advocates for the Appellant

Shri P.B. Suresh, Shri Vipin Nair and Shri Abhay P. Singh, Advocates for the Respondents

ORAL JUDGEMENT

07.02.2018

A.I.S. Cheema, J. : This appeal raises the question of law whether a non-member can seek waiver under Section 244 of the Companies Act, 2013 ('Act' in brief).

2. The Appellant – original Petitioner is admittedly a non-member in Respondent No.1 Company. The Appellant filed application, (treated as) Company Petition 15 of 2017 before the National Company Law Tribunal, Bangluru Bench ('NCLT' in short) for waiver under Section 241 read with Section 244 of the Act. Petitioner claimed it was acting to safeguard public interest. It was claimed that Respondent Companies had merged with Respondent No.1 and in the process assets had been transferred for private benefit. Grounds were raised trying to show that the Respondent companies were acting more for private benefit rather than in public interest and committed acts of oppression and mismanagement. NCLT heard the Petitioner in the light of Section 244 of the Act and concluded that as the applicant was not a member, he could not maintain the petition and non-member cannot seek waiver. The petition was thus rejected. Hence the present appeal.

3. We have heard the learned counsel for the Appellant and the learned counsel for the Respondents.

4. The learned counsel for the Appellant has submitted that if the provisions of Section 244 of the Act are perused the proviso permits waiver of all the requirements of sub-clause (a) or sub-clause (b) which refer to numerical strength or voting strength and even a non-member can maintain the petition.

Section 244(1) of the Act reads as under:

“(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 application 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 (1) 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.”

5. Referring to the above section, it is submitted by the counsel that the proviso clearly provides that all or any of the requirements could be waived. Thus, it is claimed requirement of being member also can be waived.

6. It has been submitted that the Appellant – original Petitioner is NGO and Company registered under Section 8 of the Act. The Appellant takes up social causes in corporate world relating to grievances about mismanagement of the Companies as well as Government Departments. According to the learned counsel, as the Appellant found that there was mismanagement in the Respondent Company, petition was filed. The submission is that if Section 241(1)(a) is perused, it lays down that where the affairs of the company are being conducted “in a manner prejudicial to public interest”, that could also be a ground for filing the petition under Section 241. It is submitted that earlier the word “public interest” was not there in the provisions and it was introduced in Section 398 of the Companies Act, 1956 (old Act - in short) by an amendment brought into force with effect from 1st January, 1964. The counsel submitted that under the old Act, the Central Government could permit a member otherwise not eligible to move application under Section 399 by resorting to sub-section 4. It is stated

that when Section 398 was amended, amendment to Section 399(4) remained to be done and this has been corrected when the new Act came into force by giving powers to the NCLT to waive all or any of the conditions.

7. It has been argued that Judgement in the matter of “Cyrus Investments Pvt. Ltd. & Anr. vs. Tata Sons Ltd. & Ors. - 2017 SCC Online NCLAT 261” does not apply to the facts of the present matter as in that matter, the present question was not involved. There, the Petitioner was admittedly a member of the company and thus for him, the question of waiver was considered. The learned counsel referred to para 151 of that Judgement which reads as under:

“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.?”

8. Referring to (i) in the above paragraph, the learned counsel submitted that the observations of this Tribunal that if the person is not a member the application is to be rejected outright should be treated as *obiter* as it was not a question which was necessary to decide

in that matter. The question was neither argued nor deliberated and thus these observations should be treated as *obiter*.

9. It is argued by the learned counsel for the Appellant that provisions of Section 244(1) are quite clear and when the section is clear, it should be applied as it is. According to him the words “all or any” used in the proviso make it clear that the NCLT has wide powers to waive all or any of the requirements mentioned in Clauses (a) and (b) for the purpose of permitting the petition under Section 241.

10. It is submitted that if it is found that the Section is vague then purposive of interpretation should be resorted to in order to see which mischief was sought to be remedied when the amendments were made. According to him, the concept of “public interest” was introduced with effect from 01.01.1964 and which is also covered in Section 241(1)(a), should be kept in view and to safeguard public interest even a non-member should be able to maintain the petition.

11. The learned counsel for the Respondents has opposed the contentions raised by the learned counsel for the Appellant. It is claimed that Section 244(1) clearly refers to only members who would be able to apply and maintain the application/petition and there is no ambiguity. According to the counsel for non-members, there are other options like resorting to Section 210 of the Act and the public interest being referred to can be taken care by the Central Government which

can take necessary actions. It is argued that sub-section (2) of Section 241 also makes it clear that if Central Government is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may apply to the Tribunal for an order under this Chapter. But that would be circuitous route. The learned counsel submitted that the orders of the NCLT rejecting the petition were passed without notice to the Respondents and now he has filed reply to show that there were disputes between the present Appellant and the Respondents and the petition was moved with ulterior motives.

12. Heard counsel for both sides. We find that in spite of adding words relating to “public interest” on 01.01.1964 in the old Act, even when Act of 2013 was enforced Section 241, 242 and 244 continue to refer to Members of the Company to deal with question of oppression and mismanagement. Thus there is no scope to make alleged purposive interpretation as claimed. We have perused Section 241 and read it with Section 244, and kept in view the old provisions of Section 398 and 399. We find that not much is required to be stated as Section 244 of the Act, to us, appears to be quite clear. A mere glance at the Section shows that the Proviso which has been added below Clauses (a) and (b) gives power to waive all or any of the requirements specified in Clauses (a) or (b) so as to “enable the members to apply”. The Proviso does not do away with “members”. Apart from this, the Proviso controls and refers only to Clauses (a) and (b) and does not control what is not part

of Clauses (a) and (b). The opening words of the Section are (i) “The following members of a company shall have the right to apply under Section 241, namely: —” Then clauses as mentioned above are there.

13. The Proviso below Clauses ‘a’ and ‘b’ does not waive or control the opening words of the Section which clearly say that the right would be of the members to apply. The Proviso also gives rights to only “members” to seek waiver of all or any of the requirements specified in Clauses (a) and (b). Even Section 241 says that any “member of company” can complain under the Section.

14. We thus do not find any substance in the arguments which are being raised by the learned counsel for the Appellant. The learned counsel for the Respondents submitted that busy bodies in the name of public interest cannot be allowed to resort to Section 241 and 244 otherwise the companies would not be able to function. There is substance in the submission. There are remedies available to the non-members or public, in case the company was functioning against public interest for which there are provisions in Chapter XIV of the Act, and Section 242(2) of the Act is also there.

15. We thus hold the above question of law in negative.

16. We do not find any substance in the appeal. The impugned order does not call for any interference. The appeal is dismissed with costs

quantified at Rs.2 lakhs to be paid by the Appellant to the Respondent

No.1.

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

[Balvinder Singh]
Member (Technical)

/rs/nn