

Photon Infotech Pvt. Ltd vs Medici Holdings Ltd on 24 April, 2018

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) No. 375 of 2017

(Arising out of order dated 17.10.2017 passed by the National Company Law Tribunal, Single Bench, Chennai in CA/90/2017).

IN THE MATTER OF:

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|---|---|
| 1. Photon Infotech Pvt. Ltd.
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020 | ...Appellant No. 1
(Original Respondent no.1) |
| 2. Srinivas Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020 | ...Appellant No. 2
(Original Respondent no.2) |
| 3. Mukund Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020 | ...Appellant No. 3
(Original Respondent no.3) |
| 4. Latha Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020 | ...Appellant No. 4
(Original Respondent no.4) |
| 5. Photon Interactive Private Limited
Block No.5, Floor No.2, DLF IT Park,
Shivaji Nagar, Adyar, Chennai- 600020. | ...Appellant No. 5
(Original Respondent no.5) |
| Vs | |
| 1. Medici Holdings Ltd.
St. Louis Business Centre, CnrDesroche
& St.Louis Streets, Port Louis, Mauritius | ...Respondent No. 1
(Original Applicant) |
| 2. Photon BV, Previously North First Capital
Schiphol Boulevard, 399, 1118BJ,
Schiphol, PO Box 75789, 1118ZX
Schiphol, Netherlands | ...Respondent No. 2
(Original Respondent No.6) |
| 3. Amistad Capital Cooperatief U.A.
Schiphol Boulevard 399, 1118BJ Schiphol
Netherlands. | ...Respondent No. 3
(Original Respondent No.7) |
| 4. Amistad Capital Pte Ltd.
Registered office at 1,North Bridge Road,
#19-04/05, High Street Centre | ...Respondent No. 4
(Original Respondent No.8) |
| 5. Ram Charan
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020 | ...Respondent No. 5
(Original Respondent No.9) |

Present:

For Appellant: Mr. C. S. Vaidyanathan, Senior Advocate with Mr. R. Anand Padmanabhan, Mr. Goutham Shivahankar, Mr. Srinath Ra. Iyengar, Ms. Ananya Mukherjee, and Mr. Akshay Ravi, Advocates.

For Respondent: Mr. Sankarnarayanan, Sr. Advocate with Mr. P. Rajkumar Jhabhak, Mr. Anandh K. Shruti Iyer, Mr. Shiv Mangal Sharma and Mr. Adhiraj, Advocates for Respondent No. 1.

With
Company Appeal (AT) No. 395 of 2017

IN THE MATTER OF:

Ram Charan S.R,
Previously working as Chief Financial Officer of
M/s. Photon Infotech Private Limited and
Currently working as Chief Financial officer of
M/s. Photon Interactive Private Limited.
Having his office address at II Floor, block 5
DLF IT SEZ. 1/124 Mount Poonamallee Road,
Manapakkam Chennai TN 600089

...Appellants

Vs

1. Medici Holdings Ltd.
having its registered office
at St. Louis Business Centre, Cnr Desroche
& St. Louis Streets, Port Louis, Mauritius,
Represented by its Authorized Representative
And power of Attorney Holder
Mr. Yashpal Kumar
Having office at No. 101-B,
Mittal Towers, Nariman Point Mumbai-400201
2. Photon Infotech Pvt. Ltd.
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020

Company Appeal (AT) No. 375, 395 & 396 of 2017

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3. Srinivas Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020
4. Mukund Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020
5. Latha Balasubramanian,

No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020

6. Photon Interactive Private Limited
Block No.5, Floor No.2, DLF IT Park,
Shivaji Nagar, Adyar, Chennai- 600020.
7. Photon NV, Previously North First Capital
Schiphol Boulevard, 399, 1118BJ,
Schiphol, PO Box 75789, 1118ZX
Schiphol, Netherlands.
Through its Director
Srinivas Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020
8. Amistad Capital Cooperatief U.A.
Schiphol Boulevard 399, 1118BJ Schiphol
Netherlands.
Srinivas Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020
9. Amistad Capital Pte Ltd.
Registered office at 1, North Bridge Road,
#19-04/05, High Street Centre
Singapore-179094
Srinivas Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020

....Respondents

Present:

For Appellant:

Mr. V. Mahesh, Company Secretary.

For Respondent:

Mr. Sankarnarayanan, Sr. Advocate with Mr. P.
Rajkumar Jhabhak, Mr. Anandh K. Shruti Iyer, Mr.
Shiv Mangal Sharma and Mr. Adhiraj, Advocates for
Respondent No. 1.

Company Appeal (AT) No. 375, 395 & 396 of 2017

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With
Company Appeal (AT) No. 396 of 2017

IN THE MATTER OF:

1. Photon NV, Previously North First Capital & Ors.
Schiphol Boulevard, 399, 1118BJ,
Schiphol, PO Box 75789, 1118ZX
Schiphol, Netherlands.
2. Amistad Capital Cooperatief U.A.
Schiphol Boulevard 399, 1118BJ Schiphol

Netherlands.

3. Amistad Capital Pte Ltd.
Registered office at 1, North Bridge Road,
#19-04/05, High Street Centre
Singapore-179094

...Appellants

Vs

1. Medici Holdings Ltd.
St. Louis Business Centre, CnrDesroche
& St.Louis Streets, Port Louis, Mauritius
2. Photon Infotech Pvt. Ltd.
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020
3. Srinivas Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020
4. Mukund Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020
5. Latha Balasubramanian,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020
6. Photon Interactive Private Limited
Block No.5, Floor No.2, DLF IT Park,
Shivaji Nagar, Adyar, Chennai- 600020.

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7. Ram Charan S.R.,
No.7, 7th Cross Street, Shastri Nagar,
Adyar, Chennai- 600020

....Respondents

Present:

For Appellant: Mr. R. Anand Padmanabhan, Advocate.

For Respondent: Mr. Sankarnarayanan, Sr. Advocate with Mr. P. Rajkumar Jhabhak, Mr. Anandh K. Shruti Iyer, Mr. Shiv Mangal Sharma and Mr. Adhiraj, Advocates for Respondent No. 1.

JUDGEMENT

A.I.S. CHEEMA, J.:

These 3 appeals are arising out of same impugned order passed by the National Company Law Tribunal single Bench Chennai (NCLT in short) in CA 90/ 2017 filed by original applicant "Medici holdings Limited & Ors.". By the impugned order NCLT has found that the original applicant has made out a case for waiver of clause (a) and (b) of section 244 to file petition under section 241 of the Companies Act, 2013 (new Act in short). Aggrieved by the impugned order original respondents 1 to 5 have filed CA 375/ 2017, original respondent nos. 6 to 8 have filed CA 396/2017 and original respondent no. 9 has filed CA 395/2017.

2. We have heard the appeals together. The impugned order is also same and thus we are disposing these appeals by this common judgment and order. We will be referring to documents and page numbers from the record of CA no. 375/2017.

Company Appeal (AT) No. 375, 395 & 396 of 2017

3. The impugned order shows that the learned NCLT considered the CA (copy of which is at page 270 in the appeal). The learned NCLT painstakingly summarized the averments made in the application for waiver, which we need not reproduce. NCLT considered the arguments and counter arguments which were made and referred to rulings cited and in Para 13 of the impugned order considered the question whether the original applicant has made out case to seek waiver of clause (a) and (b) of section 244 of the new Act. Discussing the arguments made, the finding was arrived at that the Legislature has fixed a minimum criteria u/s 244 for making application under section 241 of the new Act but at the same time entrusted the Tribunal with the power to waive the criteria of minimum requirement for doing substantial justice. The Tribunal found that the power has to be used very carefully and on exceptional basis and looking to the concerned matter it was of the opinion that this case is one of the exceptional cases where such power should be used to grant waiver in the interest of justice.

4. Briefly, the case put up by the Respondent no. 1(original applicant) in the application for waiver is that the applicant had acquired 6.62 per cent of paid up equity capital of the respondent company "Photon Interactive Private Limited". The shares were acquired soon after the company had been incorporated. Respondent no. 1 claimed in the application that it is an investment holding company. It has 19,69,000 equity shares of Rs. 1 each representing 6.62 per cent of the paid-up share capital of the first respondent Company (appellant no.1). The application contains particulars regarding the Company Appeal (AT) No. 375, 395 & 396 of 2017 authorized and paid up capital of the appellant no. 1(hereafter referred as respondent company). It is shown that the original respondent no.2 is holding 46.43 per cent of the shares and is also director of original 5th respondent and executive director of original 6th and 7th respondents and is also director in original 8th respondent. It is stated that the original respondent no. 3 is promoter and director of the respondent company having shareholding of 46.43 per cent of the shares. The original respondent no. 3 is also director in 5th respondent and is also director in 8th respondent. As per the application for waiver original respondent no. 4 has 0.03 per cent shares in the respondent company and she is also director of 5th

respondent company. The application gives particulars relating to respondents 5 to 9 also and their connection with the respondent company. The case put up is that it is on 24.11.2010 the company came up with a proposal to allot substantial shares to respondent nos. 2 and 3. The original applicant objected and the proposal was given up. Some offer was made on 25.01.2011 and that was also given up. On 25.11.2010 according to the applicant a right offer was given to all the shareholders but the offer made to the original applicant came to be withdrawn. Similar process was adopted on 10.01.2011 and even that was given up. According to the original applicant on 28.10.2011 8,50,000 shares of face value of Rs. 1 were issued to original respondent no. 9 as Employee Stock Option and on the very day in the same meeting the board of directors passed another resolution approving buy-back of the very same shares from respondent no. 9 by the respondent company at a price of Rs. 66 per share and Company Appeal (AT) No. 375, 395 & 396 of 2017 respondent no.9 was enriched by a sum of Rs.1,08,37,500 as the differential share price.

5. The application for waiver has contents making averments as to how there was effort at demerger scheme and even that was abandoned when objected and as to how the only business of the respondent company which was of software has been sold off to original respondent no. 5, on slump sale basis. According to the original applicant on 15.11.2011 several shareholders were issued just 1 share each so as to ensure that the original applicant is not able to resort to application under section 399 of the companies Act, 1956 (old Act in brief) as then applicable. The applicant claimed in the NCLT, that it had moved the Central Government for permission to file the petition which was granted. The same was challenged by other side in writ petition on the basis that the official who heard the matter had not passed the orders. Subsequently another order was passed by the official concern but even that was challenged in writ petition. According to the applicant Civil Suit no. 887/2013 was filed by the applicant as derivative suit to declare the sale of software business as illegal and for consequent reliefs. Some of the original respondents objected and sought rejection of plaint and the matter is still pending in High Court. After coming into force of the new Act, the applicant has been filed for waiver.

6. The original respondents 1 to 5 in CA 325/ 2017 have challenged the impugned order and it has been argued by the appellants that before the NCLT no special exceptional circumstances were made out for grant of waiver. Company Appeal (AT) No. 375, 395 & 396 of 2017 According to the appellants (original respondents 1 to 5) as held in the matter of Cyrus Investments Pvt. Ltd. & Ors. Vs. Tata Sons Ltd. & Ors., MANU/NL/0100/2017 waiver can be granted only after "special and exceptional circumstances are made out". It has been argued that the NCLT can only deliberate on the merits of a proposed application under section 241 while deciding the application and for granting waiver NCLT can only look into "relevant facts" and record reasons reflecting satisfaction for grant of waiver. The argument is that in paragraph 18 to 20 of the impugned judgment and order of NCLT the NCLT has discussed the merits of the claim of oppression and mismanagement before it and put it on the respondents that they had failed to provide explanation as to why reserves/surplus is not used for expansion; failure to explain subsequent proposals for share allotments when previous allotments were withdrawn; failure to explain buy-back of ESOP shares and that respondents failed to explain why decision of buy back of shares issued and bought back on 28.10.2011 was taken in the same Board meeting. Thus according to the appellants keeping in view the judgment in the matter of Cyrus Investments these findings on merits were not relevant for

considering the waiver. According to the appellants no single "special and exceptional circumstances" has been found by the NCLT. The original applicant had in written submissions before the NCLT claimed that there was enough merit in its application and prima facie case of oppression and mismanagement had been made out.

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7. It has been argued by the appellants that original applicant filed civil suit 887/2013 before Madras High Court which is pending and the averments in the suit are identical to the averments in the application for waiver. The only new ground now made was that accounts of financial year 2013-14 and 2014- 15 had not been filed. According to the appellants the suit has not been withdrawn and the remedy of derivative action civil suit and a claim of oppression are inconsistent and original applicant must be precluded from seeking relief before NCLT.

8. The appellants have further submitted that the Central Government had passed order dated 06.05.2015 permitting original applicant to file petition under section 399(4) which was challenged in writ petition no. 17681 of 2015. The High Court granted interim stay and the writ petition is pending. Thereafter, Ministry of Corporate Affairs passed another order dated 03.07.2015 purportedly correcting a defect which was in the earlier order dated 06.05.2015 and granted permission to the original applicant to file original petition under section 397 and 398 of the Act, 1956. Even this was challenged by the appellants in writ petition 10779 of 2017 before Madras High Court. The second order MCA dated 03.07.2015 has not been stayed by the High Court but the writ petition is pending. As such, nothing prevented the original applicant from filing company petition and only after the new act has come into force present application is filed. Thus the application suffered from delay and latches.

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9. According to the appellants the appellant no. 5 has nothing to do with the affairs of the appellant no. 1 company. Appellant no. 5 is not a shareholder nor involved in management. It is only transferee under a Business Transfer Agreement signed by the first appellant company and is 3rd party purchaser of first appellant's assets at a fair value. Thus, it is claimed that original appellant was bona fide purchaser. Settlement offers were made but the original applicant did not accept and is going on litigating.

10. The appellants of company 396/2017 are supporting the appellants of CA 325/2017 and raising similar contentions. They claim that when the original applicant moved Ministry of Corporate Affairs, they were not made parties. According to them there is no cause of action against them and there is no act of oppression and mismanagement made out against them. According to them they are unnecessary party. There was no exceptional circumstance made out for waiver.

11. The original respondent no. 9, appellant of CA 375/2017 is also supporting the other Appellants. He claims that he is not shareholder nor director of respondent company. He was former employee and resigned in February, 2013. It is claimed that ESOP shares granted to him were based on

evaluation done by SEBI and when option was exercised by this appellant in Compensation Committee held on 30.09.2011 the price was fixed at 54.25, and, on 28.10.2011 the same shares were brought back at Rs. 66. This Company Appeal (AT) No. 375, 395 & 396 of 2017 appellant is trying to show that the acts would not amount to oppression. He also claims that there were no circumstances made out for granting of waiver.

12. Counsel for the original applicant/respondent no. 1 in appeal in his argument referred to the various acts of oppression and mismanagement, which original applicant made out in the application. According to the counsel the judgment in the matter of Cyber Investment came after the arguments were completed in the NCLT but still the same was brought to the notice of NCLT and it has considered the same. According to the counsel it is admitted fact that capital and original applicant/respondent no.1 is having 6.62 per cent of the paid up equity capital. According to the counsel the present appellants made various efforts to oppress the original applicant and even made efforts at demerger of the company and when the original applicant objected to such acts, they withdrew from those acts but by a subsequent act whole business of the company by an agreement dated 27.03.2013 has been handed over to the present appellant no. 5 on slump sale basis which was hugely undervalued and when the substratum of the Company which was the business itself has been transferred, it is an exceptional circumstance and case for grant of waiver. Referring to the judgment of NCLT, it has been argued by learned counsel for respondent no. 1 that NCLT took note of the shareholding position of original applicant and considered that it was a case of oppression and mismanagement and kept in view the judgment in the matter of Cyrus Investment and held exceptional circumstance was made out. The Civil Suit filed has been objected to by the appellants in the High Court claiming that it was a case of oppression Company Appeal (AT) No. 375, 395 & 396 of 2017 and mismanagement and so the Civil Suit was not maintainable and they had sought rejection of plaint. It is argued that the original applicant cannot be left without remedy and earlier on two occasions Central Government granted permission to file Company Petition but the appellants challenged the same in writ petitions and it is settled legal position that in matters relating to members of company for oppression and mismanagement proceeding to NCLT is the only remedy. He submitted that on the principle of "Ibi Jus Ubi Remedium" the applicant cannot be non-suited.

13. We have gone through the application which was filed by the Respondent no. 1 before NCLT, the orders passed by NCLT and the rival claims which are being put up by these parties. The question is whether the Respondent no. 1- original applicant deserves to be granted waiver from the requirements specified in clause (a) and (b) of section 244(1) to enable the respondent no.1 to apply under section 241 of the new Act.

14. This Tribunal has in the matter of "Cyber Investments Private Limited"

(referred supra) (to which one of us was member) dealt with the question of waiver in some details. It would be appropriate to refer to some of the observations and findings.

14.1 Before discussing the judgment in the matter of Cyrus Investments, it would be appropriate to reproduce Section 244 of the new Act which reads as under:

Company Appeal (AT) No. 375, 395 & 396 of 2017 "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.

(2) Where any members of a company are entitled to make an application under sub-section (1) any one or more of them having Company Appeal (AT) No. 375, 395 & 396 of 2017 obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them."

14.2 in the matter of Cyrus Investments, after referring to the provisions of section 241 to 243 it was observed:-

"135. 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.

136. 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.

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137. 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.

138. 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.

139. 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.

Then the judgment considered factors dependent on merit and in Para 140 it was observed as follows:-

"140. 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:-

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(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 estoppels."

14.3. Then reference was made to the old provisions of Section 397, 398 and 399 under the old Act where the Central Government could, if it was of the opinion that "circumstances exist which make it just an equitable so to do,"

authorize any Member or members of the company to apply to the Company Law Board under section 397 or 398. It was observed in Para 143 as under :-

Company Appeal (AT) No. 375, 395 & 396 of 2017 "143. 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." 14.4 It has been then observed in the matter of Cyrus Investments that, the Tribunal is required "to take into consideration the relevant facts and evidence, as pleaded in the application" and "to record reasons reflecting its satisfaction". In Para 145 of the judgment it has been held that the Tribunal is not required to decide merit of the application under section 241 but "required to record grounds to suggest that the applicants have made out some Company Appeal (AT) No. 375, 395 & 396 of 2017 exceptional case for waiver of all or any of the requirements specified in clauses

(a) and (b) of sub-section (1) of Section 244". Para 146 of the judgment reads as under:-

"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?

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

14.5 It has been held that aforesaid factors are not exhaustive. In the said judgment of Cyrus Investments this Tribunal then looked into the shareholding of the parties in that matter and it was observed in Para 155 to 158 as under:-

"155. 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.

156. 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. Company Appeal (AT) No. 375, 395 & 396 of 2017 Sekhsaria, who only have right and their prerogative to file such application.

157. 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).

158. 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'."

The judgment then noted the interest of the appellants in the overall value of the company and for further reasons recorded the waiver was granted.

15. Coming back to the present matter. Annexure A.13 (page 270) is copy of the application for waiver. Para 1 of the same shows original applicant (respondent no.1 in appeal) is minority shareholder holding 19,69,000 equity shares of Rs. 1 each representing 6.62 per cent of paid up share capital of appellant no. 1 company. Paras 3, 4 and 5 show appellants 2 to 4 (original respondent nos. 2 to 4) hold 46.93%, 46.43% and 0.03% shares respectively. It would be appropriate to reproduce one paragraph from the application for waiver which was moved. Para 19 reads as follows:-

Company Appeal (AT) No. 375, 395 & 396 of 2017 "On or around 15th November, 2011, the 4th Respondent transferred 15 shares each of 1st Respondent to 1st Respondent's employees.

Pertinently, this transfer of shares to the 1st Respondent's employees was only to increase the number of members of the 1st Respondent, so as to ensure that the Applicant is not able to meet the statutory requirement of 1/10th of the total number of the members of the company to maintain an action for oppression/ mismanagement under the old Act. The Applicant had always been one of the four shareholders of the 1st Respondent holding 6.62 per cent shareholding in the 1st Respondent; but through this stratagem, the Respondents nos. 2 to 4 attempted to prevent the Applicant from having the capacity (under Section 399 of the Old Act) to initiate proceedings under Section 397-398 of the Old Act against the 1st Respondent and/or Respondent Nos. 2 to 4."

If the above factor is kept in view and the grounds recorded in the judgment of Cyrus Investments which we have been reproduced above are seen, it is apparent that except for appellants 2 and 3 none of the other shareholders can maintain an application of oppression and mismanagement. As per the judgment of Cyrus other minority stake holders cannot be asked or directed to form a group of 10% of the members. This is an exceptional factor and we find substance in the arguments of the learned counsel for Respondent no.1 that the Respondent no.1 (original applicant) has 6.62 per cent shareholding and the appellants 2 to 4 have purposely left a minuscule 0.038 per cent in the Company Appeal (AT) No. 375, 395 & 396 of 2017 hands of others and kept rest of the shares with themselves. The argument is that the number of Members has been increased by transferring 15 shares to employees so that Section 244 could not be satisfied.

16. Going through the application which was filed for waiver by the Respondent no.1 we find that the application pertains to 'oppression and mismanagement'. We keep in view the pleadings of alleged oppression and mismanagement. There is no dispute that the original applicant/ respondent no.1 is member of the company. It cannot be said that the application is frivolous. It is not a case that similar allegations of 'oppression and mismanagement' were earlier made and stood decided or concluded (please see Para 146 of the judgment in the matter of Cyrus Investments). It has already been held in Para 150 of the judgment in the matter of Cyrus Investments that Civil Court has no jurisdiction to entertain any suit or proceeding in respect of alleged acts of 'oppression and mismanagement' if it is preferred by any member of the company. When any member of the

company complaints of 'oppression and mismanagement' in the company, in view of the Companies Act, the issue has to be decided by NCLT. Thus only because the Respondent no. 1 filed suit in the High Court would not be a Bar to present application as the question of oppression and mismanagement has to be decided by NCLT.

17. In the present matter Respondent no.1 earlier moved the Central Government and the permission was granted by orders dated 06.05.2015 (page no. 208) which appear to have been challenged in writ petition. It has been Company Appeal (AT) No. 375, 395 & 396 of 2017 argued that writ petition was filed on the basis that the officer who heard the parties did not pass the concerned orders. It appears that subsequently the concerned officer passed another order on 03.07.2015 (page no. 232) whereby the necessary permission was granted to file petition before Company Law Board under section 397 and 398. No doubt it is stated that even the second order has been challenged in writ petition. We are making reference to these orders for the limited purpose that the Respondent no. 1 is not running from pillar to post without having a substantial matter. It did have an order in its favour under section 399(4) of the Old Act where the Central Government could permit if there were circumstances making it "just an equitable so to do" to authorize a Member to file the application to CLB. In fact the present proviso under section 244 (1) is not even circumscribed by any conditions like "just an equitable" like in section 399(4) and rather it is open ended giving wide discretion to NCLT. Of course all judicial powers and discretions are to be so exercised that it should not be arbitrary or whimsical. Interest of justice has always been the guiding factor.

18. No doubt in the impugned order NCLT, reading the proviso below section 244 as it is, discussed whether prima facie case is made out and observed that the respondents had not shown certain factors, but we are ignoring those observations in view of judgment in the matter of Cyrus. However we on our analysis of the matter find that it is a fit case for grant of waiver. Company Appeal (AT) No. 375, 395 & 396 of 2017

19. In reply to arguments of the Ld. Counsel for respondent no.1 (original appellant) it is argued by Appellants (see brief written submissions on behalf of the appellants filed on 19.03.2018) that appellant no.5 is not a shareholder of the 1st appellant company, nor is it involved in its management; and that appellant no.5 is only the transferee under a Business Transfer Agreement signed by the 1st appellant company; and that " It is a bona fide third party purchaser of the 1st appellant's assets at a fair value". We find that when it is shown that substratum itself of the company has been transferred, it is an exception circumstance, and waiver as sought should be granted.

20. The contentions raised by the appellants in CA 396/2017 and CA 395/2017 that they are not necessary party, relates to factors dependent on the merits of the matter and need not to be decided at the stage of grant of waiver.

21. For above reasons, we do not find any substance in these appeals. All the three appeals are dismissed. No orders as to cost.

(Justice A.I.S. Cheema) Member (Judicial) (Balvinder Singh) Member (Technical) New Delhi 24th April, 2018 sh/nn Company Appeal (AT) No. 375, 395 & 396 of 2017