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Did The NCLT Want A Trial Before The Trial In The Tata-Mistry Case?

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Cyrus Mistry's battle against Tata Sons seems to have run into the classic chicken and egg conundrum. At the end of a blistering four month battle in the National Company Law Tribunal, it turns out that Mistry should have done more to prove his case of oppression and mismanagement against Tata Sons before seeking a waiver to ....well prove his case.

According to company law, a shareholder can bring an oppression and mismanagement case before the NCLT if it holds not less than one-tenth of the issued share capital of the company or 100 shareholders can together file such a suit. The NCLT can waive this threshold requirement but the law doesn't specify the grounds for it.

Though the Mistry family is the only non-Tata shareholder in Tata Sons, its 18 percent equity shareholding did not meet the necessary threshold to bring a case of oppression and mismanagement against the flagship company, according to an NCLT decision.

Soon after, the NCLT denied them a waiver as well.

It's the grounds for denying the waiver that have set an onerous precedent for future such cases, lawyers told BloombergQuint.

Mistry's Misfortune: Cause Of Action Test Not Met

Oppressive Articles of Association, bad business decisions such as acquisition of Corus by Tata Steel and continuation of Nano car project, illegal removal of Cyrus Mistry as chairman of Tata Sons' board, his forced removal as director on group companies' boards, breach of insider trading regulations, leaks of board meeting discussions to outsiders, abuse of position by Ratan Tata – the NCLT said none of these allegations made by the Mistry companies qualify as a cause of action to bring an oppression and mismanagement case under Section 241 of the Companies Act, 2013. And for a petition to progress, the cause of action test must be passed, the NCLT order held.

The entire order proceeds as if it's not about granting a waiver but about merits, MR Prasanna, former group

general counsel of the Aditya Birla Group and now an independent lawyer, told BloombergQuint. In doing so, he added, the NCLT has in effect granted the Mistry side a waiver.

> *By going into the aspects of merits and examining the allegations, the NCLT has in some manner granted the waiver. The classic waiver discussion is around if the petitioners represent the same constituency, if they have commonality of interest. But the NCLT talks about cause of action under Section 241, it talks about prima facie case, but there is hardly any discussion on the waiver Section i.e. Section 244. Section 244 does not mandate that a prima-facie case must be made out.*
>
> **MR Prasanna, Independent Lawyer**

The court did not really go into the question of waiver but went on to give some other findings on merit, but you can't fault the NCLT for it; the petitioner itself took the court down that path, he added.

Are The Grounds For A Waiver Clear?

The NCLT held that a waiver application must seek shareholder action in relation to their economic interest and it's not enough to have a substantial interest. A harm to the economic interest must be shown, its order said. The second condition for a waiver application to pass muster is there must be a likelihood of the case to succeed and the application must be supported by fairly strong and compelling reasons.

> *No issue raised on this case is related to personal action of shareholders; directorial complaint in a company like this will not fall within the ambit of shareholder action. It could not even be said that actions impugned in this case will have an impact upon public…*
>
> **NCLT Order**

Rajat Sethi, a partner at law firm S&R Associates, said that the NCLT has not focussed on the relevant factors in deciding the waiver application and has perhaps erred in focusing instead on whether the petition discloses a case that is likely to succeed.

> *A waiver application may first need to be considered in the context of the share capital structure of the relevant company and the shareholding of the petitioner. Further, the objective in specifying a qualifying percentage is to discourage frivolous litigation by persons who have no real stake in the company. This should be an important and relevant factor in considering an application for waiver.*
>
> **Rajat Sethi, Partner, S&R Associates**

Karthik Seshadri, a senior partner at law firm Iyer & Thomas, disagreed and said no hard and fast rule can be laid down for a waiver application to succeed.

> *In fact, that itself is the rule, i.e. not to lay any hard and fast rule. Since whether a matter is oppressive or not is essentially a question of fact and perception, the rule ought to be no rule should be laid down. Grounds will depend entirely on facts of each case, nature of the company, nature of relationship between the shareholders, the articles of association, structure of business and how it has been carried on over the years of mutual existence.*

Karthik Seshadri, Senior Partner, Iyer & Thomas

The Winding-Up Requirement: Putting The Cart Before The Horse?

The Companies Act, 2013 lays down that to find oppression and mismanagement a tribunal must judge the case on two grounds -

- The company's affairs have been or are being conducted in a manner that is prejudicial/oppressive to any member, public interest or the company, and
- That winding up the company would unfairly prejudice such member or members.

In this case, the Tribunal's order suggests these two tests also apply to whether a waiver must be granted.

> *The petitioners have to prove that affairs of the company have been or (are) being conducted in a manner prejudicial or oppressive to the interest of the members or the company or the public interest and also to prove such act is just and equitable to wind up the company, then on seeing just and equitable ground for winding up, if such winding up would unfairly prejudice such member or members, then only this Tribunal can pass orders as it think fit.*
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> **NCLT Order**

Seshadri agreed with the NCLT's approach.

He said, "the purpose is to ensure that the company against whom the action is brought is not unnecessarily dragged through the litigation process. So at the stage of considering a waiver application, the NCLT is saying if I'm going to give you the gate pass to enter the hall, I would request you to show that what is it that you're so aggrieved about or are you simply trying to bring disrepute to the company?"

But Sethi said at the stage of granting a waiver, fulfilling the winding-up requirement is premature.

> *The NCLT shouldn't have got to this stage when the merits have not even been argued. The effect of this order would be that you will have to argue oppression and mismanagement and if you're successful, you may get a waiver too. But this is not the way waiver provision should be interpreted as this should be decided at the outset.*
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> **Rajat Sethi, Partner, S&R Associates**

Vyapak Desai, head of litigation and dispute resolution practice at Nishith Desai Associates, interepreted the order differently.

> *It does not seem to be the ratio or the rationale of the judgment that at the stage of waiver application, you have to make a case for winding up as prescribed under Section 242 as well in addition to the cause of action test for oppression and mismanagement under section 241. There are references about issues related to Section 242 but that's not the basis of this judgment.*
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> **Vyapak Desai, Head-Litigation & Dispute Resolution, Nishith Desai Associates**

But if it is interpreted that such a test under Section 242 has to be met to win a waiver, it may be going beyond the

provisions of law, he added.

This precedent will become clear once the National Company Law Appellate Tribunal rules on Cyrus Mistry's appeal against the NCLT order.

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