

DECODING THE TRIBUNAL'S POWER TO GRANT WAIVER UNDER SECTION 244 OF THE COMPANIES ACT, 2013

*Ananya Verma, Kamakshi Puri, & Mehr Sidhu**

*Corporate democracy, like its political counterpart, espouses the will of the majority as a key for the decision-making of a company. At the same time, corporate democracy ensures protections for minority members of a company from unfair prejudice caused to their interests. The need to balance the rights of majority and minority members in order to secure collective interests in the company is recognised under §241 of the Companies Act, 2013. §241 empowers the minority shareholders to seek relief from the Tribunal against acts of oppression and mismanagement committed by the majority while conducting the affairs of the company. This right of the minority shareholders, however, is contingent upon the members satisfying the locus standi – a numerical qualification – provided under §244. However, the Act also reserves to the Tribunal a right to grant a waiver of the locus requirement, enabling members not satisfying the numerical requirement to nonetheless make an application to the Tribunal for oppression and mismanagement. This paper delves into the factors that warrant the grant of such a waiver by the Tribunals with a particular emphasis on *Cyrus Investments v. Tata Sons*, which emerged as pivotal for this jurisprudence.*

TABLE OF CONTENTS

I. Introduction.....	145	Made By Another Member And	
II. Interpretation of §244(1)	147	Stands Concluded	153
III. Factors for Grant of Waiver Under		D. Whether There Is An	
§244.....	148	Exceptional Circumstance	
A. Whether The Applicant/S Are		Made Out For Grant Of Waiver	153
Member(S) of the Company	149	1. Substantial Interest in The	
B. Whether The Application		Company.....	154
Under §241 Makes Out A		2. Fragmented Shareholding	155
Case for Oppression and		3. Act of Oppression Leading to	
Mismanagement	152	Dilution of Member Below Ten	
C. Whether Similar Allegation		Percent Requirement.....	155
of Oppression and		4. Other Miscellaneous	
Mismanagement was Earlier		Extraordinary Circumstances ..	157
		IV. Conclusion.....	158

* The authors are graduates of Jindal Global Law School, BA LLB (2015-2020). The authors would like to thank the editors of NUJS Law Review for their feedback and valuable comments. The authors also welcome all additional feedback and comments, which can be shared at 15jgls-averma@jgu.edu.in, kamakshipuri1177@gmail.com and 15jgls-msidhu@jgu.edu.in.

I. INTRODUCTION

Corporate democracy dictates that every decision taken in a company is made following the majority rule, i.e., all matters decided in a general meeting ensue from majority voting.¹ This includes decisions on the appointment of the Board of Directors of the company, who are responsible for the functioning of the company.² Nonetheless, this majority rule is restricted in cases where decisions of the majority suppress or prejudice the interests of the minority shareholders of the company.³

§241 of the Companies Act, 2013 ('the Act') enunciates a right for every member of a company to apply to the National Company Law Tribunal ('NCLT/Tribunal') for relief on the belief that the company's interests are being conducted in a manner prejudicial to the public interest or oppressive to any member of the company or against the interests of the company itself,⁴ or when a material change is brought in the management and control of the company that is or will likely result in conduct that is prejudicial to the aforementioned.⁵ In other words, §241 provides a protection against oppression and mismanagement for the shareholders of a company.

While entitling members of the company to apply to the Tribunal (appeals to which lie to the National Company Law Appellate Tribunal ('NCLAT')) for relief in cases of oppression and mismanagement, §241 of the Act lays down the eligibility criteria and locus standi which must be satisfied by the minority member(s) seeking such relief. §244(1) of the Act enumerates three classes of members who can apply to the Tribunal for oppression and mismanagement under §241 of the Act:

“244. 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

¹ P.S. Sangal, *Abuse of Authority by a Majority of Shareholders in a Company*, Vol. 6(4), JOURNAL OF THE INDIAN LAW INSTITUTE, 380–381 (1964).

² The Companies Act, 2013, §152.

³ *Id.*, §241.

⁴ *Id.*, §241(1)(a).

⁵ *Id.*, §241(1)(b).

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 subsection

(1), any one or more of them having obtained the consent in writing of the rest,

may make the application on behalf and for the benefit of all of them.”⁶

Notably, the Act reserves for the Tribunal a power to ‘waive’ off this above mentioned locus requirement, enabling an aggrieved member which does not comply with the eligibility criteria under §244 to also seek relief under §241 of the Act. Under the Companies Act, 1956, it was the Central Government which had the authority to grant a waiver of the threshold requirement for oppression and mismanagement applications.⁷ This power was transferred to the Tribunal under the proviso of §244, which was notified in 2016.⁸ Hence, the exercise of the power of waiver by the Tribunal is fairly nascent.

The Tribunal has wide discretion in its exercise of authority for grant of waiver in applications before it.⁹ However, it is undisputed that judicial discretion can never be whimsical or arbitrary and must be exercised within the

⁶ *Id.*, §244.

⁷ Sunjay R Buch, *Maintainability of Petition Seeking Relief in Cases of Oppression and Mismanagement vis a vis Tata-Mistry Dispute*, LAW STREET INDIA, July 12, 2017, available at <http://www.lawstreetindia.com/experts/column?sid=202> (Last visited June 14 2020).

⁸ Ministry of Corporate Affairs, Notification, S.O. 1934(E) (Notified on June 1, 2016).

⁹ *Photon Infotech (P) Ltd. v. Medici Holdings Ltd.* 2018 SCC OnLine NCLAT 632, ¶16.

well-defined channels and established principles of law.¹⁰ In this paper, we shall discuss the approach adopted by the Tribunal while deciding on an application for a waiver under §244(1) of the Act. We aim to decode the factors and principles that the Tribunal follows while deciding on waiver applications and analyse how these factors have been interpreted and applied in the course of adjudication. We will achieve this by mapping the trajectory of the Tribunal's decisions on their power to grant waivers. Beginning with orders given by the Tribunal in 2017, when the first waiver application was decided in *Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd.*¹¹ ('Cyrus Investments'), to the Tribunal's orders to date,¹² we cover most of the decisions given by the Tribunal's under this provision.

In Part II, we will analyse the Tribunal's interpretation of §244(1) of the Act through two essential questions that arose for consideration before it. In Part III, we will first move to flesh out the factors laid down by the Tribunal in *Cyrus Investments* that are to govern the grant of waiver under the proviso to the §244(1) by the Tribunal. On establishing these factors, we will analyse their application using decisions of the Tribunal to further decode its approach while deciding waiver applications before them. In this part, we also discuss the exceptional circumstances that warrant the grant of waiver. Lastly, in Part IV, we provide concluding remarks. Scholars have expressed anxieties about having a numerical barrier (ten percent) for addressing minority grievances. Arguments in favor of a more qualitative (rather than quantitative) threshold based on case-by-case assessment of claims have been made.¹³ In this last part, we also address these concerns by highlighting the effect that Tribunal's interaction with waiver petitions has had on minority shareholder's right to apply against acts of oppression and mismanagement.

II. INTERPRETATION OF §244(1)

As mentioned above, §244(1) lays down the eligibility criteria for filing a case before the Tribunal under §244. Thus, it becomes necessary to see how the Tribunal has read the requirements under §244(1) itself. The Tribunal has dealt with two essential that questions arise for consideration from a bare reading of §244(1). First, whether it was all, or any one of the three criteria under §244(1) (a), that are required to be met by a petitioner under the section, and second, on the interpretation of 'issued share capital' under the section –whether it referred to equity share capital exclusively or is it inclusive of both, equity and preferences share capital.

¹⁰ *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, ¶160.

¹¹ *Cyrus Investments (P). Ltd. v. Tata Sons Ltd.* 2017 SCC OnLine NCLAT 282.

¹² *Oswal Greentech Ltd. v. Pankaj Oswal* 2019 SCC OnLine NCLAT 1526.

¹³ Umakant Varottil, *Minority Shareholder Protection as a Numbers Game*, The Bloomberg Quint, March 18, 2017, available at <https://www.bloombergquint.com/law-and-policy/minority-shareholder-protection-as-a-numbers-game> (Last accessed on June 14, 2020).

In *Rajeev Mishra v. Jwala Engg. (P) Ltd.*,¹⁴ the Tribunal clarified that any petitioner under §241 has to ensure compliance with only one of the criteria under §244(1)(a). So long as any one criterion was fulfilled, the applicant was eligible to file a case of oppression and mismanagement under §241. In this case, since the applicant was one of the three shareholders of the company, he individually constituted one-tenth of the total number of members, even if he did constitute 100 members or did not hold one tenth of the total issued capital.¹⁵ The Tribunal dismissed the waiver application remarking that the petitioner did not need a waiver of eligibility criteria as he fell squarely within the requirement of §244.¹⁶

In *Cyrus Investments*, the NCLAT was faced with the question on whether the ten percent ‘issued share capital’ requirement under §244(1) was limited to equity share capital or whether it included both, equity and preferential share capital. The Tribunal held that since the legislature did not specify that only equity share would be included for this calculation, their intention must be to permit entire share capital (equity and preference) within the phrase ‘issued share capital’.¹⁷ Accordingly, the Tribunal held that *Cyrus Investments*’ of 18.37 percent equity shareholder-ship did not qualify for the threshold under the section. As the total issued share capital to *Cyrus Investments* was 2.17 percent, it fell short of the ten percent requirement under the section.

§241(1)(a) lays down the right of members to apply against acts of oppression and mismanagement under §241 in cases on companies backed by share capital. Similarly, §241(1)(b) provides for a right of members to apply under §241 for companies not backed by share capital, but by guarantee. Under sub clause (b), the right can be exercised where not less than one-fifth of the total members of the company make the application.

It is these requirements under §244(1)– under sub clause (a) and (b) – which may be waived off by application to the Tribunal by operation of proviso under the section.

III. FACTORS FOR GRANT OF WAIVER UNDER §244

Cyrus Investments is pivotal to the jurisprudence of the Tribunal’s authority in granting waivers under the proviso to §244(1). It is also one of the first waiver applications decided by the NCLAT. In 2016, *Cyrus Mistry* was removed as chairman of the *Tata Sons* group.¹⁸ This prompted the *Mistry* family backed

¹⁴ *Rajeev Mishra v. Jwala Engg. (P) Ltd.* 2019 SCC OnLine NCLT 12256.

¹⁵ *Id.*, ¶8.

¹⁶ *Id.*, ¶9.

¹⁷ *Cyrus Investments (P) Ltd. v. Tata Sons Ltd.* 2017 SCC OnLine NCLAT 282, ¶87.

¹⁸ Megha Mandavia, *Cyrus Mistry Removal as Tata Industries Director, No More Chairman*, THE ECONOMIC TIMES, December 13, 2016 available at <https://economictimes.indiatimes.com/news/company/corporate-trends/cyrus-mistry-removed-as-tata-industries-director-no-more-chairman/articleshow/55936797.cms> (Last visited on August 2, 2020).

investments in the Tata Sons to apply to the Tribunal under §241 of the Act, alleging continuing oppression of the minority shareholders and mismanagement of affairs of the company. Along with this, they applied for a waiver of the ten percent requirement under the proviso to §244(1). However, the NCLT dismissed both—the waiver application and consequently the application under §241.¹⁹ On appeal, the NCLAT, in the course of deciding on the grant of waiver to the applicants, laid down comprehensive requirements to be satisfied for the grant of waiver under the section. The NCLAT laid down a list of factors that must be assessed by the NCLT while deciding an application of waiver before it. These factors have been reproduced below:

“151. (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 §241 pertains to ‘oppression and mismanagement’? If the Tribunal on perusal of proposed application under §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 §241 etc.?”²⁰

For an analysis on the NCLAT’s approach towards waiver application, the four factors ought to be discussed in detail.

A. WHETHER THE APPLICANT/S ARE MEMBER(S) OF THE COMPANY

The first factor that the Tribunal must consider while deciding an application for waiver is whether the applicant is a member of the company. A negative answer to this question would result in an outright rejection of the waiver application.

With non-membership ensuing in severe consequences for the applicant, it becomes essential for the Tribunal to analyse whether the applicant could or should be considered a member. The first step in determining membership of a person would be an inspection of the register of members of the company. §88 of

¹⁹ Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. C. A. No. 26 of 2017 in C. P. No. 82 of 2016 (April 17, 2017).

²⁰ Cyrus Investments (P) Ltd. v. Tata Sons Ltd. 2017 SCC OnLine NCLAT 282, ¶151.

the Act mandates every company to keep and maintain a register of members, indicating the class of shares held by them. In *Manoj Bathla v. Vishwanah Bathla*,²¹ the NCLAT rejected the argument that the respondents could not be considered members of the company on the grounds that they had ‘virtually zero percent shareholding’. The tribunal held that even a reduced shareholding 0.3 percent of the company would not divest a shareholder of their membership of the company. Thus the extent of shareholding is insignificant for the assessment of membership for the purposes of grant of waiver.

However, a mere perusal of the register of shareholders may not always be conclusive of whether the applicant is a member of the company. The Courts have faced various contentious questions on this requirement. One such ambivalent category is cases of membership in anticipation. These arise when persons acquire share on the death of registered shareholders as nominees or legal heirs. In *World Wide Agencies (P) Ltd. v. Margarat T. Desor*,²² the Supreme Court of India (‘Supreme Court’) distinguished the rights of a nominee of the deceased and that of a legal heir of the deceased in relation to their potential membership. According to the Supreme Court, a nominee, a holder of the shares, held the shares only for some time before they devolved on the legal heirs.²³ During this period, nominees may receive some benefits of membership, such as dividends. However, they do not acquire membership by way of this holding. The actual membership in shares essentially vests in the legal heirs of the deceased.²⁴ Relying on this argument, the NCLAT, which was faced with a waiver application by a legal heir of the deceased member in *Oswal Greentech Ltd. v. Pankaj Oswal*,²⁵ allowed the respondent a waiver of the ten percent shareholding requirement under §244. Although the claim over the deceased’s shares was *lis pendens*,²⁶ and it is questionable whether the Tribunal had the authority to declare the petitioner a member while another matter in relation to his entitlement of the shares was *lis pendens*, the ratio that ownership of shares was held to devolve on the legal heirs, and not nominees, stands. Hence, for the purposes of §244, the Tribunal considered the respondent to be a member of the company. This was based on the understanding that the respondent was a natural legal heir to his deceased father’s property.²⁷ Thus, the first factor was satisfied with an entitlement to membership in this case.

In another set of cases, the Tribunal held the alleged entitlement to shares of the company to be insufficient to meet the requirement of membership under the section. In the case of *Group Captain Kulbir Singh Dutta v. M.P. Jain*,²⁸ before the NCLT, the petitioner sought waiver under §244 based on an alleged

²¹ *Manoj Bathla v. Vishwanah Bathla* 2019 SCC OnLine NCLAT 198, ¶5.

²² *World Wide Agencies (P) Ltd. v. Margarat T. Desor* AIR 1990 SC 737, ¶12.

²³ *Id.*, ¶¶25–26.

²⁴ *Oswal Greentech Ltd. v. Pankaj Oswal* 2019 SCC OnLine NCLAT 1526, ¶23.

²⁵ *Id.*

²⁶ *Id.*, ¶3.

²⁷ *Id.*, ¶24.

²⁸ *Group Captain Kulbir Singh Datta v. M.P. Jain* 2019 SCC OnLine NCLAT 939, ¶6.

promise of twenty percent shareholding, which was made to him a decade ago. The applicant argued entitlement to these shares, which were fraudulently never transferred to him. The Tribunal held that it was not within their powers to grant waiver because the applicant did not presently hold any shares in the company.²⁹ In is interesting to note that the applicant also tried to rely on his long-standing relationship with the company based on his ownership of five percent of the company up until 2015. This prompted the Tribunal to clarify that past membership did not satisfy the requirements of the section.³⁰

In the case of *Nasik Diocesan Trust v. Uday Daniel Khare*,³¹ a question as to the membership of a charitable trust, registered under §8 of the Act as a limited company, emerged. §8 companies are special type of companies that are incorporated with an objective to promote commercial, social, literary, etc. endeavours. Rather than distributing dividends to its members, these companies apply any income or profits earned back for the promotion of its objects.³² Once registered as a limited company, they enjoy all privileges as well as all obligations of a limited company.³³ The charitable trust was backed by guaranty as opposed to share capital. The Articles of Association here provided little indication as to the list of members, only stating that nominated or elected persons could be members. Therefore, to assess the satisfaction of the section, the Tribunal decided to ascertain membership based on attendance to the Annual General Meeting ('AGM') of the trust. As only members can participate in a company's AGM,³⁴ all persons who attended the AGM for the trust could be presumed to be members of the company, unless it was proved that they were removed as members after the AGM, following due procedure laid down under the Act.

Therefore, under §244, determination of membership is essential to claim rights under §241 of the Act. It is clear that every person that can prove subsisting membership of the company –name in the register of companies being best evidence for this– would have the right to seek waiver. Even persons who are members in anticipation, the ones that have an existing right over shares of the company, however, are yet to be added as members of the company who would have a right to seek waiver under the section. Further, members on expectation, the ones who have no existing right of the shares, but expect to come in possession of shares, would not have a right to be granted waiver under this section.

²⁹ *Id.*, ¶7.

³⁰ *Id.*, ¶6.

³¹ *Nasik Diocesan Trust Assn. (P) Ltd. v. Uday Daniel Khare* 2018 SCC OnLine NCLAT 276, ¶26.

³² The Companies Act, 2013, §8(1)(b).

³³ *Id.*, §8(2).

³⁴ *Nasik Diocesan Trust Assn. (P) Ltd. v. Uday Daniel Khare* 2018 SCC OnLine NCLAT 276, ¶¶16, 26.

B. WHETHER THE APPLICATION UNDER §241 MAKES OUT A CASE FOR OPPRESSION AND MISMANAGEMENT

A grant of waiver is subject to whether the proposed application under §241 itself pertains to oppression and mismanagement. While the Tribunal cannot delve into the merits of the application under §241,³⁵ the Tribunal, in adjudicating on the waiver petition, is to ensure that the proposed application *prima facie* pertains to oppression and mismanagement of the company or the member(s) of the company.³⁶ Unlike the *prima facie* standard under the Code of Civil Procedure, 1908, the Tribunal need not ensure that a *prima facie* case *in the favour of* the applicant plain reading of the proposed application under §241 should demonstrate that the *allegations pertain to* oppression and mismanagement.³⁷ A discussion on what would constitute oppression and mismanagement is beyond the scope of this paper.

§244 of the Act is a pre-requisite to deciding an application under §241. It lays down the eligibility criteria or the *locus standi* for members to file for suits under §241. The NCLAT has observed that there existed a “reciprocal harmony” between §241 and §244 of the Act.³⁸ While §244 defined who had the right to apply under §241, the latter makes reference to the former to reciprocate that only those who would have the right to apply under it could make a waiver application to the Tribunal. The grant of waiver and invocation of the proviso to §244(1) is only required in cases where the *locus standi* under §244(1) is not satisfied by the member filing an application under §241. In such cases, the power of waiver given to the Tribunal enables a member whose interests have been prejudiced to file for oppression and mismanagement under §241.³⁹ It is important to note that §241 is the subject matter of an application in relation to which the waiver of *locus* is sought.⁴⁰

This factor follows from the standing practice of rejecting interim applications where no case on substance is *prima facie* made out albeit for a grant of waiver this requirement is less onerous as the petitioners need not go into proving the case in their favour. The Courts have dismissed interim applications in cases under §241 for the want of any actual case on oppression and mismanagement being made out. For instance, in *Shanti Prasad Jain v. Kalinga Tubes Ltd.*,⁴¹ the appellants sought grant of injunction in their favour by way of interim application. The Supreme Court, upholding the findings of the Orissa High Court,

³⁵ *Cyrus Investments (P) Ltd. v. Tata Sons Ltd.* 2017 SCC OnLine NCLAT 282, ¶145.

³⁶ *Id.*, ¶¶148, 150.

³⁷ *Id.*, ¶¶169, 170.

³⁸ *Id.*, ¶62.

³⁹ The Companies Act, 2013, §§241(a), 241(b).

⁴⁰ *Cyrus Investments (P) Ltd. v. Tata Sons Ltd.* 2017 SCC OnLine NCLAT 282, ¶161.

⁴¹ *Shanti Prasad Jain v. Kalinga Tubes Ltd.* AIR 1965 SC 1535.

rejected the application for the grant of injunction since the appellants could not demonstrate a *prima facie* case of oppression and mismanagement.

While the Tribunal cannot go into the merits of the oppression and mismanagement application, to waive *locus standi* under §244, it must nonetheless ensure that the application under §241 pertains to oppression and mismanagement. The *prima facie* enquiry could be made based on recognised principles as to what constitutes oppression and mismanagement under the Act. If such perusal leads to the conclusion that the application under §241 is frivolous and does not merit consideration, then the waiver application is rejected.

C. *WHETHER SIMILAR ALLEGATION OF OPPRESSION AND MISMANAGEMENT WAS EARLIER MADE BY ANOTHER MEMBER AND STANDS CONCLUDED*

The Tribunal must ensure that no applications making out similar allegations of oppression and mismanagement by other members stand decided.⁴² Such an application, if already decided, would render the subsequent grant of waiver redundant as the issue in question would have already been settled, and the waiver, if granted, would be a futile exercise of the Tribunal's discretionary authority. While this factor is not the same as *res-judicata*, there seems to be a bar on the subject matter of the application once any such application stands decided.

The Tribunal's failure to do so, and any subsequent decision of the Tribunal on the application, would also disturb the earlier recorded findings of the courts and affect concluded proceedings. It is also in the interest of justice that companies are protected against multiplicity of proceedings especially with respect to already settled matters. Moreover, this requirement perhaps also stems from the exceptional nature of waiver of the eligibility requirement under §244(1), given that it is a digression from the substantive rule under §244(1). If such an allegation is already decided and accordingly disposed, any grant of such an exception (of waiver) to the applicant would be a misuse of the waiver. Since the waiver itself is an exceptional recourse adopted by the tribunals in exceptional circumstances to protect the interests of the minority or other members from any apparent prejudice, this cannot be permissible.

D. *WHETHER THERE IS AN EXCEPTIONAL CIRCUMSTANCE MADE OUT FOR GRANT OF WAIVER*

A grant of waiver is clearly an exception to the substantive provision under §244. Thus, for the Tribunal to invoke the proviso, certain exceptional circumstances should be made out that warrant the waiver. The decision for grant of waiver is a judicial act by the Tribunal, and therefore, it is obligatory for the

⁴² *Cyrus Investments (P) Ltd. v. Tata Sons Ltd.* 2017 SCC OnLine NCLAT 282, ¶151.

Tribunal to give a reasoned order explaining why the case merited a grant of waiver.⁴³

The jurisprudence on exceptional circumstances that has emerged from decisions of NCLAT and NCLT benches is discussed below. The Tribunals have primarily granted a waiver for three reasons: (1) substantial interest in the company, (2) fragmented shareholding, and (3) an act of oppression leading to dilution of member below ten percent requirement. However, it is essential to state that these do not form an exhaustive list of circumstances that would be considered exceptional and compelling enough for grant of waiver.

1. Substantial Interest in The Company

In *Cyrus Investments*, *Cyrus Investments Pvt Ltd.*, the appellants, had an interest to the extent of 1/6th of the overall value of the company. As discussed above, the reason the appellants fail to meet the ten percent requirement is because of large chunk of preference share capital (albeit without voting rights)⁴⁴ reducing the appellants issued share percentage from eighteen percent to 2.71 percent. The NCLAT held the appellant's substantial interest in the overall value of the company was exceptional and compelling enough to grant a waiver under §244. The high monetary investment in a company was seen an exceptional factor warranting grant of waiver, enabling the party to succeed in filing an application under §241.

Similarly, Chennai Bench of the NCLT in *Thomas George v. Malayalam Industries Ltd.* noted that the substantial interest of the applicant, *inter alia*, would be characterised as an exceptional reason for the grant of waiver under §244(1) proviso.⁴⁵ The applicant and his wife together held 8.84 percent of the total issued share capital of the respondent company, and thus fell short of the requirement under §244(1). However, the applicants were “subscriber[s] to the charter documents of the company[;][the husband] was a managing director and responsible for setting up of the hotel that was being run by the first respondent-company”⁴⁶ Thereafter, despite not meeting the ten percent requirement, the applicants' long-standing relation with the company as promoter and key managerial personnel reflected their substantial interest in the company's affairs. Accordingly, waiver under §244 proviso was granted.

Therefore, substantial interest as an exceptional circumstance meriting the grant of waiver could have its basis in the substantial monetary investment of the aggrieved member in the company. It could also be a substantial

⁴³ *Id.*, ¶148.

⁴⁴ *Cyrus Investments (P) Ltd. v. Tata Sons Ltd.* 2017 SCC OnLine NCLAT 282, ¶164.

⁴⁵ *Thomas George v. Malayalam Industries Ltd.* 2018 SCC OnLine NCLT 1071, ¶2.

⁴⁶ *Id.*, ¶3.

long-standing relationship with the company forming a substantial emotional investment in the company.

2. Fragmented Shareholding

§241(b) of the Act allows multiple minority shareholders of a company to come together and collectively form the ten percent issued share capital requirement.⁴⁷ This was reiterated in the case of *Aum Capital Market (P) Ltd. v. Jyoti & Ltd.*,⁴⁸ where the Tribunal held that it was permissible for minority shareholders to come together to form the 10% requirement under §244 to file a case of oppression and mismanagement under §241. The Tribunal expressed that the intention behind §244 was to avoid frivolous and vexatious litigation rather than prohibiting certain classes of minority shareholders holding getting justice.

However, it is not always possible to expect minority shareholders to come together and form clusters to fulfil the ten percent requirement, especially in cases of fragmented shareholding of minorities.⁴⁹ In *Cyrus Investments*, the Tribunal accepted the waiver application as they believed this to be compelling and exceptional circumstances. In the instant case, there were forty-nine minority shareholders all having shareholding less than 2% individually. This meant that they could not form the required ten percent unless they approached the Tribunal in groups of six or more. The Tribunal held that it was absurd that rights of the minority shareholders were so dependent on each other. Therefore, to protect the rights and interests of the minority shareholders, the Tribunal admitted the waiver application observing that the members cannot always be expected to approach the Tribunal in groups where the minority shareholding was fragmented to an extent that multiple shareholders would have to rely on one-another to fulfil the ten percent requirement under §244(1).⁵⁰

3. Act of Oppression Leading to Dilution of Member Below Ten Percent Requirement

Yet another exceptional circumstance based on which the Tribunal has granted waiver is of dilution of a member's shareholding ensuing from the act of oppression and mismanagement for which waiver is sought. The dilution of a member's shareholding in a company can be the subject-matter for filing for oppression under §241 as well as the ground for seeking a waiver under the proviso to §244(1) to be able to file a §241 suit. However, it may also be so that the application under §241 bases itself in acts of oppression and mismanagement other than

⁴⁷ The Companies Act, 2013, §241(b).

⁴⁸ *Aum Capital Market Pvt. v. Jyoti Ltd.*, C. P. No. 8 of 2016 (July 17, 2017), ¶67.

⁴⁹ Peter Gourvitch, *Collective Action Problems in Monitoring Managers the Enron Case as a Systematic Problem*, Vol. 3(3), ECONOMIC SOCIOLOGY: EUROPEAN ELECTRONIC NEWSLETTER, MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES, 3 (2002).

⁵⁰ *Thomas George v. Malayalam Industries Ltd.* 2018 SCC OnLine NCLT 10718, ¶2.

the act of dilution, however the *exceptional circumstance* warranting a grant of waiver bases itself in only the oppressive dilution of members.⁵¹

In the case in *Manoj Bathlav. Vishwanah Bathla*,⁵² the shareholding of the respondent was dramatically reduced from twenty-five percent to 0.33 percent in the company. This was the subject-matter of the application under §241 as well as the plea for warrant of grant of waiver. The NCLT had already granted the waiver, but appealing to the NCLAT, the appellants argued that the respondent had no *locus* to file for a §241 application, nor did he have the *locus* to file for 244(1) waiver, as his shareholding was virtually zero percent, even disentitling him from the status of a member.⁵³ The NCLAT upholding the decision of the NCLT, observed that refusing the grant of waiver herein would be depriving the respondent from the relief sought against allegations of oppression manifesting from manipulation of shareholding, because of which the respondent's interest in the company seemed prejudiced.⁵⁴ Noting this, the NCLAT upheld the grant of waiver to enable the respondent to proceed under §241.

In the case of *Photocon Infotech Pvt. Ltd. v. Medici Holdings Ltd.*,⁵⁵ the reason for application under §241 was the attempts of the management in demerging key assets of the company in slump sale. However, the Tribunal observed that the aggrieved were also purposely further diluted and left with a minute shareholding of 0.038 percent and 6.62 percent in order to prevent them from filing a case of oppression and mismanagement. This was done by increasing the number of members of the company by transferring fifteen shares to the employees. This dilution of the aggrieved, preventing them from fulfilling the criterion under §244 was held to be an exceptional circumstance and in the *interest of justice*, waiver was granted.

In *Cyrus Investments*, the Tribunal recognised, albeit not utilising this as an exceptional circumstance, “a lack of maintainability under §244(1) [...] attributable to an alleged act of oppression [when] the shareholding of the complaining shareholder is brought below ten percent of the issued share capital of the company concerned.”⁵⁶ While this was not a consideration in deciding this case, nonetheless, such a fact seems to have been accepted as an exceptional circumstance meriting grant of waiver under §244.

⁵¹ See *Photon Infotech (P) Ltd. v. Medici Holdings Ltd.* 2018 SCC OnLine NCLAT 632.

⁵² *Manoj Bathla v. Vishwanah Bathla* 2019 SCC OnLine NCLAT 198.

⁵³ See discussion *supra* Part III.A (discussing NCLAT's decision on the membership).

⁵⁴ *Id.*, ¶5.

⁵⁵ *Photon Infotech (P) Ltd. v. Medici Holdings Ltd.* 2018 SCC OnLine NCLAT 632, ¶15.

⁵⁶ *Cyrus Investments (P) Ltd. v. Tata Sons Ltd.* 2017 SCC OnLine NCLAT 282, ¶102.

4. Other Miscellaneous Extraordinary Circumstances

In most cases, the Tribunal has applied the aforementioned extraordinary circumstances to grant a waiver for applications under §244(1). However, there may be other reasons that qualify as extraordinary, and hence, merit waiver of the ten percent requirement under the section.

One such situation may be the case of charitable trusts registered under §8 of the Act. In *Uday Daniel Khare v. Nasik Diocesan Trust*,⁵⁷ the Tribunal held that charities run for a noble cause; therefore, protecting the company, its property, and its members against oppression fall squarely within the mandate of §241.⁵⁸ Being a charitable entity, companies come under special obligation to ensure the object of the charity and social welfare are carried out properly. Therefore, courts must ensure that any alleged mis-administration of a charity is allowed to be checked into as broader societal welfare and interests are at stake.⁵⁹ On appeal, the NCLAT affirmed the grant of waiver upholding that extraordinary circumstances were made out in cases of charitable trusts, even where only one/few member(s) approached the Tribunal alleging oppression and mismanagement.⁶⁰

Other than the holding in *Cyrus Investments*, the arguments extended in the case also shed light on criteria that would merit a grant of the special privilege of waiver to the petitioner. One category of cases that comes out from the discussions is that of applications that make out a case of supervening national interest or public interest from the proceeds under §241.⁶¹ As this was not the circumstance in the case, the Tribunal went on to add other exceptional circumstances that may also merit a grant of waiver, seemingly accepting and adding to the list of exceptional circumstances that may exist. As public or national interest was not a circumstance in the matter, this remains an *obiter* from the NCLAT's decision.

As mentioned above, this paper does not and cannot give an exhaustive list of cases that would come under the banner of extraordinary circumstances. It has classified the circumstances in categories based on the decisions of the Tribunal. The Tribunal has wide discretion in granting waivers, caveated by the requirement to give reasons for their decisions.

⁵⁷ *Uday Daniel Khare v. Nasik Diocesan Trust*, 2017 SCC OnLine NCLT 2294.

⁵⁸ *Id.*, ¶8.1.

⁵⁹ *Id.*

⁶⁰ *Nasik Diocesan Trust Assn. (P) Ltd. v. Uday Daniel Khare*, 2018 SCC OnLine NCLAT 276, ¶26 (May 21, 2018).

⁶¹ *Cyrus Investments (P) Ltd. v. Tata Sons Ltd.* 2017 SCC OnLine NCLAT 282, ¶102.

