

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 254 of 2018

IN THE MATTER OF:

Cyrus Investments Pvt. Ltd. & Anr.

...Appellants

Versus

Tata Sons Ltd. & Ors.

...Respondents

Present:

For Appellants :

Mr. C. A. Sundaram, Mr. Arun Kathpalia and Mr. K.G. Raghavan, Senior Advocates assisted by Mr. Somasekhar Sundresan, Mr. Manik Dogra, Mr. Rohan Jaitley, Ms. Rohini Musa, Mr. Sonali Jaitley Bakshi, Mr. Jaiyesh Bakshi, Mr. Apurva Diwanji, Mr. Ravi Tyagi, Mr. Shubhanshu Gupta, Ms. Sanya Kapoor, Ms. Rini Badoni, Mr. Abhishek Venkataraman, Mr. Akshay Doctor and Mr. Gunjan Shah, Advocates.

For 1st Respondent :

Dr. A.M. Singhvi, Senior Advocate assisted by Mr. Prateek Sekseria, Ms. Ruby Singh Ahuja, Ms. Tahira Karanjawala, Mr. Anupm Prakash, Mr. Arjun Sharma, Mr. Shubham Saigal, Mr. Utkarsh Maria, Mr. Sidhartha Kalia, Mr. Avishkar Singhvi and Mr. Siddharth Sharma, Advocates.

For 2nd Respondent :

Mr. S.N. Mukherjee, Senior Advocate assisted by Mr. Dhruv Dewan, Mr. Nitesh Jain, Ms. Reena Choudhary and Mr. Rohan Batra, Advocates.

For 6th, 14th & 16th

& 22nd Respondents :

Mr. Mohan Parasaran, Senior Advocate assisted by Mr. Saswat Pattnaik, Mr. Ashwin Kumar D.S. and Ms. Aditi Dani, Advocates.

For 11th Respondent Mr. Neeraj Kishan Kaul, Senior Advocate assisted by Ms. Madhavi Divan and Mr. Akshay Makhija, Advocates.

O R D E R

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Applicants preferred applications under Sections 241 & 242 of the Companies Act, 2013 alleging oppression and mismanagement on the part of the Respondents. By impugned judgment dated 12th July, 2018, the National Company Law Tribunal (hereinafter referred to as “Tribunal”), Mumbai Bench, Mumbai, dismissed the petition with certain observations.

2. At the stage of admission, prayer has been made on behalf of the Appellants to pass interim order of stay of the conversion of Respondents- ‘Tata Sons Limited’ from a ‘Public Limited Company’ to ‘Private Limited Company’.

3. Learned Senior Counsel appearing on behalf of the Appellants submitted that the ‘Tata Sons Limited’ is a ‘Public Limited Company’. The Board of Directors by its notice intimated that the ‘99th Annual General Meeting of Tata Sons’ Limited will be held on Thursday, September 21, 2017 to consider the following resolutions:

“16. Approval for amendment of the Articles of Association of the Company to convert the Company from a public limited company to a private limited company

To consider and If thought fit to pass with or without modification(s), the following resolution as a Special Resolution:

“RESOLVED that pursuant to the provision of Section 14 of the Companies Act, 2013 (“Act”) and all other applicable provisions of the Act, if any, and the rules made thereunder, as amended from time to time, and subject to the approval of the National Company Law Tribunal, consent of the members of the Company be and is hereby accorded, to amend the Articles of Association of the Company to convert the Company from a public limited company to a private limited company and make the following changes in the Articles of Association:

- a) The name of the Company shall be changed from Tata Sons Limited to Tata Sons Private Limited;*
- b) The following sentence in Article 2A “the Company or this Company means Tata Sons Limited” shall be deleted in its entirety and replaced with the following:
“the Company or This Company means Tata Sons Private Limited”*
- c) the first sentence in Article 4 of the Articles of Association “The Company is a deemed public*

*Company and in accordance with the Act-
“shall be deleted in its entirety and replaced
with the following. “The Company is a private
company in accordance with the Act and
therefore”-*

*“RESOLVED FURTHER that the Board be and
is hereby, authorised to do all such acts and
things and to approve such agreements,
deeds, documents and writings and give such
directions as may be necessary or desirable
to implement this Resolution.”*

4. It is alleged that after the decision of the Tribunal, the Respondents hurriedly moved before the Registrar of Companies, Mumbai, for conversion of the Company from ‘Public Limited Company’ to ‘Private Limited Company’ without any decision of the Annual General Meeting. It is stated that no application under Section 14 of the Companies Act, 2013 has been filed by the Company, but the Tribunal wrongly observed that an application under Section 14 has been filed by the Company.

5. It was alleged that just after the appeal was filed before this Appellate Tribunal, in the evening of 6th August, 2018 the Respondents hurriedly moved before the Registrar of Companies (RoC), Mumbai, who passed certificate converting the Company as ‘Tata Sons Private Limited’, copy of which has been enclosed:-

decision in the Annual General Meeting no application under Section 14 has been filed by the Respondent- 'Tata Sons Limited'.

7. It appears that the Tribunal in different paragraphs of its judgment observed that a petition under Section 14 has been filed. However, we are not deliberating on such issue for the present in view of the reasons as discussed below.

8. Section 14 of the Companies Act, 2013 relates to "Alteration of Articles", and reads as under:

"14. Alteration of articles. *—(1) Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of—*

(a) a private company into a public company; or

(b) a public company into a private company:

Provided that where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as

from the date of such alteration, cease to be a private company:

Provided further that any alteration having the effect of conversion of a public company into a private company shall not take effect except with the approval of the Tribunal which shall make such order as it may deem fit.

(2) Every alteration of the articles under this section and a copy of the order of the Tribunal approving the alteration as per sub-section (1) shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

(3) Any alteration of the articles registered under sub-section (2) shall, subject to the provisions of this Act, be valid as if it were originally in the articles.”

9. As per the aforesaid provision, if any Company by a Special Resolution intends to alter its articles, including alterations having the effect of “conversion of a public company into a private company”, it is required to take approval of the Tribunal in absence of which it cannot be given effect.

The question arises for consideration whether Section 14 is applicable in the case of the 1st Respondent- 'Tata Sons Limited'.

10. Learned Senior Counsel appearing on behalf of the 1st Respondent provided the historical evolution of Tata Sons, including the four phases of external legal changes which are as follows:

- i. Phase 1: from Tata Sons incorporation on 8th November, 1917 till 1st May, 1975;
- ii. Phase 2: after 1st May, 1975 till 12th December, 2000;
- iii. Phase 3: from 13th December 2000 till 12th September, 2013; and
- iv. Phase 4: post 12th September 2013 under the Companies Act, 2013

11. Tata Sons was incorporated as a 'Private Company' on 8th November, 1917 under the Indian Companies Act, 1913. It continued to remain a private company under the Companies Act, 1956 which came into force on 1st April, 1956.

12. During the aforesaid period, the Articles of Association of Tata Sons contained three restrictions which are applicable to private companies in terms of Section 3(1)(iii) of the Companies Act, 1956 *viz.*,

- a) Provisions restricting the right to transfer the company's shares;
- b) Provisions limiting the number of members to 50; and
- c) Provisions prohibiting any invitation to the public to subscribe to any shares in, or debentures of, the company.

13. It was submitted that Article 75 of the Articles of Association of Tata Sons, which is now assailed by the Appellants has been a part of the Articles of Association since inception in 1917 without interruption, in some form or the other.

14. It was also submitted that the Appellants became the shareholders of Tata Sons in the year 1965, when it was a private limited company. Subsequently the Companies Act, 1956 was amended by the Companies (Amendment) Act 1960 to introduce Section 43A. Section 43A (1) set out certain situations when a private company would become a 'public company' under the Companies Act, 1956 i.e., it would be deemed to be a 'public company' under Section 43A (hereinafter referred to as a "Deemed Public Company").

15. It was submitted that Section 43A of the Companies Act was further amended by the Companies (Amendment) Act 1974 w.e.f. 1st February, 1975, whereby sub-section (1A), along with certain other sub-sections and provisos, was inserted in Section 43A. Sub-section (1A) of

Section 43A of the Companies Act, 1956, *inter alia*, provided that if the average annual turnover of a private company exceeded a prescribed amount, the private company would become a 'Deemed Public Company' by virtue of the said sub-section. However, the proviso to Section 43A(1A) stated that even after a private company had become a 'Deemed Public Company' under Section 43A (1A), its Articles of Association may continue to include matters specified in Section 3(1)(iii) of the Companies Act, 1956.

16. It was submitted that on account of its average annual turnover exceeding the prescribed amount w.e.f. 1st May, 1975, Tata Sons, while retained the aforesaid three core characteristics of a private company under Section 3(1)(iii) of the Companies Act, 1956, but became a 'Deemed Public Company' under Section 43A(1A) of the Companies Act, 1956 (as it then stood). Consequently:

- a) The word "private" was deleted from 1st Respondent name and it was, therefore, referred to as 'Tata Sons Limited'.
- b) In the Second Certificate of Incorporation, the word "private" has been struck out with a notation on the left "Deleted u/s 43A(1)". It is submitted that other than the aforesaid "strike-off" on the certificate of incorporation and consequent changes in the name of Tata Sons in its Memorandum of Association and Articles of Association, no other process was required to effect the aforesaid change.

- c) By virtue of proviso to Section 43A(1A), Articles in the Articles of Association corresponding to each of the aforesaid three clauses of Section 3(1)(iii) listed above continued to be fully effective and applicable.

17. Therefore, according to learned Senior Counsel for the 1st Respondent- 'Tata Sons', continued in phase 2 as a hybrid company- the word 'hybrid' being used to denote essentially a private company exhibiting all the restrictions of Section 3(1)(iii) of the Companies Act, 1956, which however, is 'deemed to be public Company' on account of *inter alia* excess annual turnover.

18. It was further contended that the hybrid company concept was, essentially, in all respects a private limited company concept (especially with Section 3(1)(iii) restrictions as summarized above). The very fact that the word 'deemed' was used to mean essentially that the company was actually a private company and by operation of law was treated as a public limited company.

19. The Companies Act 1956 was amended in the year 2000 *vide* the Companies (Amendment) Act, 2000, which *inter alia* brought about the following important changes w.e.f. 13th December 2000:

- a) Sub-section (11) was inserted in Section 43A which rendered inoperative all operative aspects of Section 43A (except

sub-section (2A) inserted *vide* the Companies (Amendment) Act, 2000);

b) Sub-section (2A) of Section 43A, however, continued to operate and provided that a public company which 'becomes a private company' after the Companies (Amendment) Act, 2000 shall (i) so inform the Registrar of Companies (ii) substitute in its name the word 'private company' for 'public company' and (iii) make necessary changes in its certificate of incorporation and Memorandum of Association (including the Articles);

c) Amended Section 3(1)(iii) to add sub-clause (d) which stipulated that a private company's Articles were required to prohibit invitation/acceptance of deposits from persons other than such company's members, directors or their relatives.

20. Reliance was placed on the decision of the Hon'ble Supreme Court in "***Darius Rutton Kavasmaneck vs. Gharda Chemicals Limited and Ors. (2015) 14 SCC 277***", wherein the Hon'ble Supreme Court held that concept of hybrid companies did not vanish, was not abolished and not repealed by the Companies (Amendment) Act, 2000.

21. In this context, it was submitted that the 'Deemed Public Companies' like 1st Respondent remain and continue to be a hybrid company even after the Companies (Amendment) Act, 2000.

22. According to learned Senior Counsel for the 1st Respondent under the last and fourth phase, w.e.f. 12th September, 2013 under the Companies Act, 2013, the legislature sought to create a binary distinction of 'private' and 'public companies'.

23. Section 2(68) of the Companies Act, 2013 defines a 'private company' as a company which by its Articles contain three restrictions enumerated in sub-clauses (i), (ii) and (iii) of Section 2(68), which reads as follows:

“2. Definitions. – (68) *“private company” means a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and which by its articles,—*

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

(A) persons who are in the employment of the company; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company;”

24. Therefore, according to counsel for the 1st Respondent, the features as prescribed under Section 2(68) of the Companies Act, 2013 makes it clear that Articles of Association of the Tata Sons continued to be aligned with the definition of the ‘private company’ and, therefore, it will be deemed to be a private company since 2013. For the said reason, there is no requirement to file an application under Section 14 of the Companies Act, 2013.

25. One of the issues which was formulated and considered by the Tribunal is:

“306. Whether action of passing a special resolution and filing an application for conversion of the company, without altering any of the articles of the company so as make it private from public u/s 14 of Companies Act, 2013 and continuation of

Article 75 amounts to conducting the affairs of the company in a manner oppressive/prejudicial to the interest of the Petitioners or not?”

26. The aforesaid issue being a part of the issue for determination of question of ‘oppression and mismanagement’, though we have noticed the rival contention of the parties, we are not inclined to decide the aforesaid issue at the stage of hearing for grant of interim relief.

27. The next question arises as to whether any interim relief at the stage of admission of the appeal should be granted or not.

28. Article 75 of the Articles of Association relates to “*Company’s Power of Transfer Shares*”, which reads as follows:

“75. COMPANY’S POWER OF TRANSFER

The Company may at any time by Special Resolution resolves that any holder of Ordinary shares do transfer his Ordinary shares. Such member would thereupon be deemed to have served the Company with a sale-notice in respect of his Ordinary shares in accordance with Article 58 hereof, and all the ancillary and consequential provisions of these Articles shall apply with respect to the completion of the sale of the said shares.

Notice in writing of such resolution shall be given to the member affected thereby. For the purpose of this Article any person entitled to transfer an Ordinary share under Article hereof shall be deemed the holder of such Share.”

29. The Registrar of Companies having now changed the certificate of the Company from ‘Public Limited Company’ to ‘Private Company’, and in view of Article 75, the Company may by special resolution resolve to direct the holders of ordinary shares to transfer their shares.

30. Learned Senior Counsel for the 1st Respondent has specifically stated that Article 75 has never been acted upon so far as Applicants are concerned since 1965, even when it was a ‘Private Company’.

31. Taking into consideration the aforesaid facts and that the appeal is pending and if the Appellants are forced to sell their shares which may affect the merits of the appeal, as they will cease to be member(s) of the company, we direct the Respondents not take any step in terms of Article 75 for transfer of shares of minority shareholders like Appellants and others during the pendency of the appeal. No further interim order is required to be passed at this stage.

32. The appeal is admitted for hearing.

33. 1st, 2nd, 6th, 11th, 14th & 16th & 22nd Respondents have already appeared. No notice need be issued to them. They may file their reply, if any, within ten days. Rejoinder, if any, be filed by the Appellants within a week thereof.

34. Let notice be issued on rest of the Respondents by speed post. Requisite along with process fee, if not filed, be filed by 27th August, 2018. If the Appellants provide the e-mail address of the rest of the Respondents, let notice be also issued through e-mail.

Post the appeal for hearing on 24th September, 2018 at 2.00 P.M.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI

24th August, 2018

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