

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH, MUMBAI

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH, MUMBAI.

MA 99 OF 2017 IN CP No. 28 OF 2016

IN THE MATTER OF SECTION 241-242 OF THE COMPANIES ACT, 2013

AND

IN THE MATTER OF UDAY DANIEL KHARE & ORS AND M/S. NASIK DIOCESAN TRUST & ORS.

CORAM : SHRI M.K. SHRAWAT
Member (Judicial)

Shri Uday Daniel Khare & Ors. : Petitioner

Versus

Nasik Diocesan Trust & Ors. : Respondents.

Represented by:

1. Mr. Vishal Kale
a/w Mr. Jayendra Khairnar : Advocates for Petitioner
2. Mr. Amol A. Shinde
(Respondent advocate) : Advocate for Respondent No.14
3. Mr. Shubhakarta Chakraborti
a/w Mr. Durgesh Khanapurkar : Advocates for Respondent No.1 & 2.

Date of Order :12-06-2017

1. A Petition was filed on 12th of September 2016 (CPNo.28/241-242/NCLT/MB/2016) by the Petitioner Mr. Uday Daniel Khare (Petitioner No.1) and Mr. Satish Phillip Kalshikar (Petitioner No.2). On the other hand the Respondents are as many as 12 in number, however, Respondent No.(1) is Nasik Diocesan Trust and Respondent No.(2) is Mr. Ajay P Shrivastava. The Petitioner has alleged in the Petition that the Respondent along with others have purportedly hijacked the management of the Trust, illegally convened meetings, inducted members without due process of law, wrongly utilized the property of the Trust and several other such illegal activities etc.
2. On the other hand, Respondent in his defence has stated that the meetings were conducted as per the procedure and the members have been legally inducted as well as there is no mismanagement of any nature in conducting the affairs of the Trust.
3. The undisputed fact is that the Respondent-1 is a Company under the provisions of **Section 8 of Companies Act 2013** having objects to promote welfare of Christian society and allied charitable activities. According to the Articles and

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4. Memorandum of Association the Charitable Company is managing Churches, Educational Institutes, Orphanage, etc.. The Company was also incorporated to carry out relief and social work.
5. Through an Affidavit-in-Reply filed by Mr. Ajay Shrivastava (R-2) for himself and on behalf of Respondent No.1 has challenged the validity of the Petition on the ground that the Petitioner had failed to demonstrate the requisite number of members joining Petition and even failed to establish that filing the Petition in the capacity of one of the members of the Respondent Company. It was pointed out that **Section 244 requires that an application under section 241 of the Companies Act 2013 has to be filed by not less than 1/5th of the total number of members.** The Petitioner had admitted that there are 47 members in Respondent No.1 Company, therefore, minimum number of members required to file the Petition should be 9, however, only 2 persons claiming to be the members have filed the Petition. In the absence of fulfilment of this preliminary condition the Petition in question is bad in law, thus required to be dismissed at the threshold.
6. Because of the aforementioned preliminary objection raised from the side of the Respondent No.2 the Petitioner has filed an application, now under consideration numbered as MA 99/2017, **seeking "waiver"** of the pre-requisite condition prescribed under section 244 for filing a Petition under section 241 of the Companies Act 2013.
 - 6.1 Attention was drawn on **First Proviso to Section 244 of The Act 2013** which prescribes that the Tribunal may on an application made to it in this behalf **waive** all or any of the requirement specified in the clauses of Section 244 so as to enable the members to apply under section 241 of The Act.
7. **FINDING** : - Considered the rival submissions in the light of the factual matrix of the case as narrated in the Pleadings submitted by the rival parties and the precedents cited. I have also taken note of an Additional Affidavit of Respondent No.14, filed by Rt. Rev. Dr. Pradip L Kamble. At the outset it is worth to mention that the Petitioner has made a statement that number of other aggrieved members of the Christian society are also willing to join hands so as to participate in this litigation. It is equally necessary to place on record that this case is falling under a special category of Companies doing charitable work or social activity for which required to get registered under section 8 of The Act. **Under the Companies Act 2013 where it is proved to the satisfaction of the Central Government that an Association proposed to be registered**

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8. as a Limited Company has in its objects of promotion of Education, Social Welfare, Charitable activity, Protection of Environment, etc. and also intends to apply its profits in promoting such objects can allow association to be registered as a Limited Company under section 8 of The Act. Undisputedly the Respondent Company falls under this category.

8.1 It may not be out of place to mention that the members of the Association are under social obligation to ensure that the object of charity, social welfare etc. are carried out properly and there is no element of personal benefit to any of the members. This Company being a charitable entity is also required to function for a noble cause to establish and/or to run educational as well as religious institutions. The grievance of the Petitioner is that the Respondent No.2 along with other respondents has deviated from the noble object for which this Association was created. Hence filed this Petition so as to protect the entity of the Respondent No.1 Company along with its property. *Prima facie* the intention of the Petitioners does not appear to be *mala fide*. The allegation of mismanagement on the part of the Respondent is yet to be examined.

These are the reasons which are revolving around the benefit of a particular society forced me to consider whether to apply discretion of granting "waiver" or not. The **First Proviso** unequivocally prescribes total discretion to Tribunal that on an application may grant waiver so as to enable the members to apply under section 241 for relief if there is an element of "oppression or mismanagement". In my humble opinion the Hon'ble Legislatures in their profound wisdom have aptly granted this discretion so that under exceptional circumstances it can be invoked. According to me this case falls under that exceptional circumstance. Protection of members against unfair oppression and also to prevent any group of persons to misuse the property of a charitable company are the fundamental reason for incorporation of section 241 in the statute. A member can speak of mismanagement on his own behalf ; else he can also speak on others behalf, specially when the allegation are going to affect a particular cast or society at large, not confined to the listed members of an 'Charitable Company'. So the uniqueness of Section 241 is that a Petitioner/ Complainant can not only seek remedy for himself but can also seek remedy on behalf of other members as well, if the exceptional circumstance is established so as to fall under this Proviso. It is well known that a Company is a juristic person and being a judicial body can only be represented by a physical body. A company thus needs a mouth to speak about the irregularity or mismanagement if any. So it can be propositioned that a member can take up such matter before a judicial forum for legal redressal ; some times independently or some

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times collectively. Burning question is that whether technicality should prevail over the practicality? Disturbing feature some times is that majority themselves become perpetrators. Natural remedy than is that such a member should be allowed to raise his voice, which is generally the majority voice of minority members. A corporate body must not be left in a helpless situation, if being misused by the majority.

As far as the use of a Proviso in resolving legal dispute is concerned, the established principle is that wherever an exception is to be introduced in the Statute the same is being done by way of introduction of a Proviso to the main Section. Meaning thereby the moto or the purpose of insertion of Proviso is adjudication of an exception. In the foregoing paragraph the exception as carved out in Section 244 of The Act has duly been adjudicated upon.

I have taken due note of the two case laws cited from the side of the Respondent(2): (1) AE Al Ameen and Others Versus Bayangudi Muslim Educational Association and Others (C.P. No.35 of 2004) and (2) Prem Nath Gangneja Versus Edwardganj Public Welfare Association and another (C.P. No.72 of 1985). However, noticed that those facts are distinguishable from the facts of this case. A glaring distinction is that if the Petitioner with mala fide intention is creating litigation to hinder the social/charitable activity then the Courts have thought it proper to thwart such attempt. In contrast, the Petitioners in this case are making a bonafide attempt to streamline the social/charitable activity of this Institution. Before I conclude I want to make it clear to both the parties that any of the observation in this Interim Order shall not prejudice in any manner the lawful claim of the litigants and nothing should be pre-judged on the merits. The Petition under consideration has already been admitted in the past. As a consequence, the Petitioners are entitled to pursue this Petition as per law. The application (MA-99 of 2017) is allowed. **Petition is listed for hearing on 20th July, 2017.**

Sd/-

M.K. SHRAWAT
Member (Judicial)

Date : 120-06-2017