

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SINGLE BENCH, CHENNAI**

CP/36/2018

Under Section 241 & 242 and 58 of the Companies Act, 2013

In the matter of

Mr. THOMAS GEORGE ... (Applicant)

Vs

M/s. MALAYALAM INDUSTRIES LIMITED & 3 OTHERS
.... (Respondents)

Order delivered on: 19.02.2018

CORAM

CH. MOHD SHARIEF TARIQ, MEMBER (J)

For Petitioner : Mr. Thriyambak J Kannan, Advocate
For Respondents : M/s. Chandramouli Prabhakar &
Balakishore, Advocates

ORDER

Per: CH. MOHD SHARIEF TARIQ, MEMBER (J)


1. Under consideration is CA/36/2018 filed in the matter of M/s. Malayalam Industries Limited by the Applicant, viz., Mr. Thomas George, wherein there are four Respondents, including the 1st Respondent Company. The Application has been filed to seek waiver of the requirement of Section 244(1)(a) which provides that in case of the Company having a share capital, any member or members holding not less than 1/10th of the issued share capital of the

Company, shall have a right to apply under Section 241 of the Companies Act, 2013, subject to the condition that the Applicant or Applicants has or have paid all the calls and other sums due on his or their shares.

2. In the Application, it has been prayed to waive the above said requirement, in the light of the proviso to Section 244(1), which provides 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 members to apply under Section 241 of the Companies Act, 2013.

3. The Applicant along with his wife is holding 8.84% of the total paid up capital of the 1st Respondent Company, therefore is not fulfilling the requirement under Section 244(1)(a) of the Companies Act, 2013, for filing Petition under Section 241. The Applicant submits that he and his wife being shareholders in the 1st Respondent Company are constrained to file the proposed Petition under Section 241 of the Companies Act, 2013, due to the illegal, wrong and burdensome conduct of Respondent Nos.2 to 4, resulting in

mismanagement of the affairs of the 1st Respondent Company and oppression of the Applicant along with his wife's rights therein. It has further been submitted that as Respondent No.2 Mr. John Mathew (Director) is conducting the affairs of the 1st Respondent Company solely to serve his personal interest and that of his family resulting in unjust enrichment to a select a few shareholders at the expenses of the Applicant. Respondent Nos.3 and 4 in collusion with the Respondent No.2 are acceding to all decisions made by the Respondent No.2 thereby becoming party to the oppressive activities conducted by the Respondent No.2 to the detriment of the Applicant. Thereby, the Board of Directors of the 1st Respondent Company, failed to act in good faith and in exercising care in promoting the interest of the 1st Respondent Company and failed in their fiduciary duty towards the Respondent Company. The main grounds taken by the Applicant for seeking waiver of the requirement of Section 244(1)(a) of the Companies Act, 2013, are as follows:-

- i) That an investigation has been conducted pertaining to the affairs of the Company on 

the direction of the Hon'ble High Court of Kerala. The investigation report has exposed the misdemeanours, illegalities, wrong doings of Respondent No.2 and those who are siding with him.

- ii) The second ground taken by the Petitioner is that the Respondent No.2 is attempting to strengthen his position by allotting to himself shares, by way of private placement which further dilutes the shareholding of the Applicant and his wife.

4. Besides the above grounds, the Applicant has stated that he and his wife has substantial interest in the company and he is subscriber to the charter documents of the Company, was a Managing Director and responsible for setting up of the hotel that is being run by the 1st Respondent Company. It has further been submitted by the Applicant that the matter complained of in the proposed petition clearly falls in the ambit of oppression and is agitable only before this Tribunal, and he has no alternative and

efficacious remedy for obtaining the reliefs sought for in the proposed petition from any other forum except this Tribunal. In case the Application is not allowed the 1st Respondent Company will suffer grave, irreparable and immense prejudice.

Having submitted as above, a prayer has been made that waiver of requirement of Section 244(1)(a) of the Companies Act, 2013, be granted in favour of the Applicant for filing the proposed Petition.

5. The reply has been filed on behalf of the Respondent to the Application wherein all the averments made in the application have been denied. It has been submitted that the Applicant has neither made out any case for oppression and mismanagement nor shown any exceptional reasons for grant of waiver as stipulated under Section 244(1)(a) of the Companies Act, 2013, the Respondents have taken two preliminary objections which are as follows:-

(a) That the Applicant had filed CP/33/2012 before the Company Law Board, raising the

very same allegations that have been made in the present proposed Petition for which the Applicants are seeking the waiver of the said requirement for filing the petition under Section 241 of the Companies Act, 2013. It has further been alleged that the Applicant has suppressed the very fact while filing the Application and has not come before the Tribunal with clean hands.

(b) The second preliminary objection raised by the Respondent, is that the Applicants cannot invoke the provisions of Section 241/242 for reliefs in respect of oppression or mismanagement based on an investigation report, since the scope and effect of a report filed under Section 223 of the Companies Act, 2013 is governed of the provisions of Chapter XIV of the Companies Act, 2013. The correct course of action to follow up the investigation is to resort to the provisions of Section 224 of

the Companies Act, 2013, which provides that if, from an inspector's report, made under Section 223, it appears to the Central Government that any person has, in relation to the Company or in relation to any other body corporate or other person whose affairs have been investigated under this Chapter been guilty of any offence for which he is criminally liable, the Central Government may prosecute such person for such offence. It has further been provided in the said provision that based on the investigation report made under Section 223, if it appears to the Central Government that it is expedient to do so by reason of such circumstances as referred to in Section 213, the Central Government may cause to be presented a petition to the Tribunal by any person authorised by the Central Government for winding up of the

Company on just and equitable grounds,
an application under Section 241 or both.

6. The para-wise reply has also been filed by the Respondent denying all the allegations levelled by the Applicant against the Respondents and prayed to dismiss the application on the ground that the Applicant has come before this Tribunal with unclean hands as he has suppressed the fact relating to the earlier proceedings and withheld the important documents. The Respondents have also given the detail about the cases which were filed by the Applicant before the then CLB and other Courts against the Respondents. The said cases have either have been dismissed in default or referred to Mediators.

7. During the course of arguments, the allegations levelled by the Counsel for Respondents against the Applicant, have been controverted. The Counsel for the Applicant referred to the ruling that has been given by the Hon'ble NCLAT in *Cyrus Investments Pvt.*

Ltd & another –vs- Tata Sons Ltd & others, reported in 2017 SCC OnLine NCLAT 261, wherein the Hon'ble Tribunal under para 91 of its Order has stated three factors for consideration of an application for waiver of the requirements of Section 244 of the Companies Act, 2013 for filing petition under Section 241, which are as follows:-

- a. What is the interest of the Applicant in the company? Is it insignificant or substantial?
- b. What are the issues raised in the Petition and whether Section 241 is the most appropriate jurisdiction to deal with the same?
- c. Is the cause raised of substantial importance to the appellants or to any class of members or to the company itself or in public interest?

If the above indicators are taken into consideration in the light of the facts and circumstances mentioned in the Application and the proposed CP, the said factors are available in the Application and

the proposed petition, as if the facts and circumstances stated in the Application/proposed CP are taken as absolutely correct, then the Applicant makes out a cause of an action for maintaining the petition under Section 241 of the Companies Act, 2013.

8. The Respondents in their reply has not established the fact that the Application/proposed CP is an act of malice and/or intended to achieve an oblique purpose or the Applicant is ex-facie estopped from complaining of the matter on account of acquiescence. Moreover, it is worthwhile to mention that the Hon'ble NCLAT in the above referred case has laid down under para 145 of its order that the Tribunal cannot deliberate on the merits of proposed petition under Section 241, while deciding an application for 'waiver' under the proviso to Sub-section (1) of Section 244. Therefore, by relying upon the principle laid down in the above noted case, this Tribunal is not supposed to discuss the merits of the proposed petition. However on perusal of the contents

of the Application and the proposed petition, the Applicant has made out a case for grant of the waiver of the requirement under Section 244(1)(a) of the Companies Act, 2013.

9. In the light of the above discussion and the legal position stated above, CA/36/2018 is allowed in exercise of powers conferred under the proviso to Sub-section (1) of Section 244 of the Companies Act, 2013, by granting the waiver of the requirement under Section 244(1)(a) of the Companies Act, 2013, in favour of the Applicant. The Applicant is permitted to file the Petition under Section 241 of the Companies Act, 2013.

10. Accordingly, the CA/36/2018 stands **disposed of**.

The Order is pronounced in the open Court today on 19.02.2018 in the presence of the Counsels for the parties


(CH. MOHD SHARIEF TARIQ)
MEMBER (JUDICIAL)

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