

Provisions regarding Prevention of  
Oppression and Mismanagement and  
Class Action Suits in India.

Project Report

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(MSOP)

# DECLARATION

We hereby declare that the project entitled "Provisions regarding Prevention of Oppression and Mismanagement and Class Action Suits in India" submitted in partial fulfilment of the requirements for the award of the certificate of MANAGEMENT SKILLS ORIENTATION PROGRAM (MSOP) is our original work done under the guidance of Mrs. Sarah Arokiaswamy and under the co-ordination of Mrs. Vidyalakshmi.

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## PREFACE AND ACKNOWLEDGEMENT

We, as participants of the Management Skills Orientation Program, conducted by the Institute of Company Secretaries of India, are required to prepare a project report as a team during the 15 days schedule. After keeping in mind recent developments in the corporate scenario, and under the Guidance of Mrs. Sarah Arokiaswamy, and Mrs. Vidyalakshmi, we have proposed this project report titled “Provisions regarding Prevention of Oppression and Mismanagement and Class Action Suits in India.” We are extremely grateful to you for your continuous help and for giving us this opportunity to conduct research work and present as a team.

The Project Report has been prepared by us after taking into consideration Provisions of Companies Act, 1956, Companies Act, 2013, and recent developments in cases revolving around this topic.

We have referred various books, newspaper articles and authenticated web articles for giving this project its context and framework. We have made our best efforts to choose a relevant core topic for our Project Report and to keep the matter simple and lucid. The successful completion of this project has been the result of the help extended by a number of people and the trust that we had as team members on our contributions.

Last but not the least, we would like to extend our sincere thanks to all the participants of our 42<sup>nd</sup> MSOP batch of SIRC Chennai for all the input and support during the course of this program.

# Contents

<b><u>S.NO.</u></b>	<b><u>TITLE</u></b>	<b><u>PAGE NO.</u></b>
1.	Background	5
2.	Oppression	6
	i. Origin of Oppression in the Act	7
	ii. Origin of Concept	8
	iii. Rule in Foss v. Harbottle	14
	iv. Provision in Companies Act	
3.	Mismanagement	18
	i. Analysis of Section 241	18
	ii. Position in Companies Act, 1956	19
	iii. Acts held as Mismanagement	20
	iv. Acts not held as Mismanagement	21
	v. Gist of certain cases	22
3.	Application to Tribunal for Relief in cases of Oppression, etc.	23
	i. Powers of Tribunal	23
	ii. Seeking of Orders from Tribunal	24
	iii. Application to NCLT for Relief of Oppression, etc.	26
	iv. Appeal Against the Order of Tribunal	27
4.	Drafting and Filing Petition before NCLT	31
	i. Application before Tribunal	31
	ii. Powers of Tribunal	32
	iii. Drafting of Petition	33

	iv. Petition Relief	33
	v. Reply and Rejoinder	34
	vi. Annexure A	35
5.	Class Action Suits – Background in India	45
	i. Section 245 of Companies Act, 2013	48
	ii. Difference between application under section 241 (Oppression and Mismanagement) and Section 245 (Class Action Suits)	53
	iii. Take-Aways	54
	iv. Annexure II – Letter from Chairman of the Board of Satyam Computers Services Limited – Mr. B Ramalinga Raju	55
6.	Case Study 1 : IL&FS – The Corporate Governance Failure of 2019	60
	i. Brief Facts	61
	ii. Decision of NCLT	62
	iii. Reason	63
7.	Case Study 2: Tata Sons-Cyrus Mistry Board Drama and Petition before NCLT, NCLAT	65
	i. Chronology of Developments	66
	ii. Facts of the Case	68
	iii. NCLT order dated 09.07.2018	68
	iv. Appeal before NCLAT	70
	v. Appeal before Supreme Court	71
8.	Conclusion	75
9.	References	76

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## *Background*

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Chapter XVI of the Companies Act, 2013 deals with the provisions relating to prevention of oppression and mismanagement of a company. Oppression is the exercise of authority or power in a burdensome, cruel or unjust manner<sup>1</sup>. During the course of business, oppression of small or minority shareholders could take place by the majority shareholders who are in control of the company. Mismanagement of resources is also not uncommon. Mismanagement could mean siphoning of funds, causing losses due to rash decision, not maintaining proper records, not calling requisite meetings. Finer version of mismanagement could arise where the management does not act/react to a business situation leading to downfall of business.

Oppression and mismanagement of a company indicates that the affairs of the company are being conducted in a manner that is oppressive and biased towards the minority shareholders or any member or members of the company. Therefore, to protect their interest and prevent oppression and mismanagement, provisions were made under the Companies Act, 1956 as well as under Companies Act, 2013 and the rules made there under.

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<sup>1</sup> <http://www.aolsvc.merriam-webster.aol.com/dictionary/oppression>

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## *Oppression*

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In layman's version, Oppression can be defined as an act or instance of oppressing, the state of being oppressed, and the feeling of being heavily burdened, mentally or physically, by troubles, adverse conditions, and anxiety.

Oppression as per section 397(1) of Companies Act 1956 has been defined as when affairs of the company are being conducted in a manner prejudiced to public interest or in a manner prejudicial to public interest or in a manner oppressive to any member or members.

Although, a company has an existence independent from its members, its affairs are carried on by the management. Difficulty arises when the interests of shareholders vary. However, the management of companies depends upon the majority.

Though, a shareholder cannot bring action relating to the internal disputes between the shareholders as per the Foss v Harbottle Rule, there arise certain exceptions to this provision. This includes the cases of oppression and mismanagement in the affairs of the company.

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## *Origin of Oppression in the Act*

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The primary provision dealing with the Oppression in this act is Sec.397, which was modeled in the likeness of Sec. 210 of the English Companies Act 1948. The section prescribes criteria for maintainability of application for relief in cases of oppression. The impugned act should be prejudicial to the interest of the company or oppressive upon a member or group of members; or the act may be prejudicial to general “public interest”. It is also the burden of the applicant to satisfy before the Board that winding up the company would “unfairly prejudice” him or the class he is representing; but otherwise the facts prima facie would justify that the company be wound up on just and equitable grounds. The right to apply is given to members as specified in the definition of “minority”. Both conditions under this section should subsist in order to entail relief from the Board. Where there are no allegations to support a winding up, a petition u/s 397 cannot be entertained.

On the other hand, Companies Act, 2013 provides for provisions relating to oppression and mismanagement under Sections 241-246. Section 241 provides that an application for relief can be made to the Tribunal in case of oppression and mismanagement. Section 244(1) provides for the right to apply to Tribunal under Section 241, wherein the minority limit is same as that mentioned in Companies Act, 1956. Under Companies Act, 2013, the Tribunal may also waive any or all of the requirements of Section 244(1) and allow any number of shareholders and/or members to apply for relief. This is a huge departure from the provisions of Companies Act, 1956 as the discretion which was provided to the Central Government to allow any number of shareholders to be considered as minority is, under the new Companies Act, 2013 been given to the Tribunal and therefore is more likely to be exercised.



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## *Origin of Concept*

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### **The concept of Rule of Majority:**

Companies are governed by the rule of majority. The rule of majority implies that the will of the majority of members of a company prevails in the management of affairs of the company. Therefore, every question relating to the management of the company is decided by a resolution passed by a requisite majority in the meeting of the company. A resolution is passed either by a simple majority or by a special majority of votes of the members as required by the Companies Act. When a resolution is passed, it is binding on every member of the company, whether he votes for or against the resolution or absents himself from voting.

It may be noted that every member of a company limited by shares has a right to vote on every resolution placed before the meeting. However, his right to vote shall be in proportion to his share of paid up equity capital in the company. Every member is at liberty to exercise his voting right for or against the resolution or not to exercise it at all. When a resolution gets a required majority of votes in its favour, the resolution is said to have been passed. Any decision reached after passing a proper resolution is binding upon all the members of the company even though some members have voted against the resolution. Thus, majority of the members of the company are entitled to exercise the powers of the company. It is therefore generally said that in companies, majority prevails. Majority of members enjoys supremacy of power over the minority shareholders.

Under such a situation, the protection of interests of minority shareholders in corporate activities remains one of the most complex problems. There is always a problem to strike a balance between effective management of the company and the interest of minority shareholders. But for effective and efficient management of a company proper balance of rights of majority as well as of minority shareholders is essential. The modern company law contains a large number of provisions for protection of the interests of all investors in companies including the minority shareholders.

### **Implications of the rule of majority**

The rule of majority is applicable in the management of the affairs of companies. Almost every question relating to the internal affairs of a company is decided by a vote of requisite majority. The rule of majority or supremacy of majority implies the following things

1. A person becoming a member of a company is deemed to know that the will of the majority prevails in the company. A member, therefore, is deemed to have agreed to submit to the will of the majority.
2. The majority of the members have a right to decide everything connected with the management of affairs of the company.
3. Anything decided by a resolution with requisite majority at duly convened and constituted meeting is binding upon all the members (including the minority members and the members not taking part in polling) and the company as a whole.
4. If anything wrong is done to the company by the majority shareholders, the minority generally cannot complain. It is only the company to sue in its own name and individual shareholders cannot sue in the name of the company.
5. Generally, the courts will not intervene in the management of the internal affairs of a company by its directors, as long as they are acting within the powers conferred on them under the articles of the company.
6. The courts generally do not interfere to protect the minority shareholders against the consequences of resolution passed by the requisite majority.
7. Generally, individual member or even the minority shareholders cannot sue against the directors of the company. However, where directors owe a duty to an individual member personally and make a breach of such duty, the individual member can sue the directors. For instance, a member is denied his right to vote or to receive dividend, he can sue the directors even if the decision of denial of such right is taken by majority.

The principal of supremacy of majority was said down in the celebrated case of Foss vs. Harbottle.

In this case, two shareholders of a company brought an action against the directors of the company charging them guilty of fraudulent acts resulting in loss to the company. They prayed the court to ask the directors to pay damages to the company for the loss caused to it on account of their acts. The company by majority had already decided and resolved not to take any action against them. The court dismissed the suit on the ground that injury was not to the plaintiffs exclusively. It was an injury to the whole company. In such a case, the action should have been brought by the company itself and not by minority members. Besides that, the acts of directors were such as could be confirmed by the majority members [Foss vs. Harbottle (1843) 2 Hare 461].

The effect of the ruling in the above case is that the minority shareholders cannot complain of any irregular act which the majority are entitled to do regularly [MacDougall vs. Gardiner (1875) 1 ch D 13].

The rule laid down in Foss vs. Harbottle has been followed in numerous cases by Indian courts.

The supreme Court of India in Rajahmundry electric supply corporation vs. A Nageshwara Rao AIR 1956 SC 213 observed.

"The courts will not, in general, intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of the company by its director so long as they are acting within the powers conferred on them under the articles of the company. Moreover, if the directors are supported by the majority shareholders in what they do, the minority shareholders can, in general do nothing about it."

Bombay high court applied the rule in Bhajekar vs. Shinkar 36 BLR 583. In this case, the director of the company resolved to appoint a company as its managing agents. Some of the minority shareholders challenged the appointment and contended that it was not in the interest of the company to appoint them. The court dismissed the suit and held that it is difficult to see how a few shareholders who represent a minority are entitled to maintain the suit and asked the court to interfere in the question as to who should be the managing agents of the company.

## **Exceptions to the Rule of Majority**

The rule of majority does not apply in the following exceptional circumstances:

- 1. Acts ultra vires company:** where the act done is ultra vires memorandum (ie. Beyond the powers of the company) the majority rule laid in Foss vs. Harbottle does not apply. It is so because ultra vires acts cannot be ratified by any majority.
- 2. Acts ultra vires statutes:** Where the act done is inconsistent with any law of the land including the Companies Act, it is illegal and the majority rule does not apply. For instance, directors get passed a resolution by huge majority to pay dividend out of capital or to forfeit share illegally. Such resolutions can be challenged even by a single member because these are against the provisions of Companies Act.
- 3. Acts requiring special majority:** According to the provisions of Companies Act certain acts can be done by a special resolution passed at a general meeting of the company. If any such act is done without passing special resolution (ie. By a resolution with less than three-fourth majority) any member can bring an action to restrain the majority [Dhakeshwari cotton Mills LTD. vs. Nilkamal chakravarti AIR (1937) Cal 645 and Nagappa Chettiar vs. Madras race club(1949) 1 MLJ 662].
- 4. Wrongful doers in control:** Sometimes, the wrongful doers are themselves in control of the affairs of the company. In such cases the rule of majority is relaxed in favor of the aggrieved minority shareholders. Hence, any member, may be allowed to bring an action in the name of the company [Foss vs. Harbottle and Charan Lal vs. Rameshwar Prasad AIR (1950) FC 133].
- 5. Infringement of individual membership rights:** Every individual shareholder has certain rights against the company. For instance, a shareholder has a right to receive notice of general meeting, to vote at the meeting, to contest for directorship, to claim payment of declared dividend etc. These are the individual membership rights conferred by the act. Some other rights may be conferred by the Articles of the company. In such cases, the majority rule does not operate and no majority can take away the individual rights of a member. If any individual member is denied of any such right, he is entitled to sue the company.
- 6. Fraud on Minority:** The majority rule does not apply where the majority of members use their power to defraud the minority or to take a discriminatory

action. The court will allow any action by minority where the majority of the shareholders attempt to benefit themselves at the expense of minority.

**7. Exceptions under the Companies Act:** The Companies Act makes many provisions which provide protection to minority shareholders. Some of such provisions are as follows:

- (a) Variation of rights attached to shares: A company may divide its share capital into different classes of shares. In such a case, the rights attached to the shares of any class can be varied with the consent of the three-fourth majority of shareholders of that class. But the minority shareholders (the holders of not less than 10 per cent of the issued shares of that class) who had not assented to the variation may apply to the Tribunal for cancellation of such variation [Sec. 48].
- (b) Request for investigation: Sometimes minority shareholders (ie. 100 or more members or members holding at least 10 per cent of the total voting power) make an application to the Tribunal for investigation into the affairs of the company. In case the company is without share capital, the application may be made by at least 20 per cent of the members. The Tribunal may order such investigation for safeguarding the interests of minority shareholders [Sec. 213].
- (c) Scheme of compromise or arrangement: A company may also propose a scheme of compromise or arrangement with creditors and members. In such a case, minority shareholders (holders of at least 10 per cent share capital) may make an application to the Tribunal objecting such compromise or arrangements. The Tribunal shall then consider the rights of the minority shareholders [Sec.230].
- (d) Takeover bids: Sometimes, a scheme of contract for transfer of shares or a class of shares in the company to another company is proposed. If such scheme is dissented by at least 10 per cent of shareholders of that class, they may make an application to the Tribunal for preventing such transfer. The Tribunal shall consider the interests of minority shareholders' before allowing such transfer [Sec.235].
- (e) Prevention of Oppression and Mismanagement: The majority rule does not apply where the majority uses its power in a manner which is oppressive to some of the members of the company, or which results in Mismanagement of the company [Sec.241 to 244].

(f) Class Action: Sometimes, an application is made by the prescribed number of members before the Tribunal seeking certain reliefs on the grounds that the affairs of the company are being conducted in a manner prejudicial to the interest of the company or its members. The Tribunal may grant such reliefs to the minority shareholders as it seems appropriate [Sec.245].

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## *Rule in Foss v. Harbottle*

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This rule was laid down in 19th century in the case of Foss v. Harbottle [(1843) 67 ER 189], where action was brought by two shareholders in a company against the directors charging them with concerting and effecting various fraudulent and illegal transactions whereby the property of the company was misapplied and wasted, and praying that the defendants might be decreed to make good to the company the losses. The action was rejected in respect of those transactions which a majority of the shareholders had the power to confirm. Briefly, the opinion of the court was:

“The conduct with which the defendants are charged is an injury not to the plaintiffs exclusively, it is an injury to the whole corporation. In such cases the rule is that the corporation should sue in its own name and in its corporate character. It is not a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation and the aggregate of members of the corporation are not same thing for purposes like this.”

This rule was restated in simpler terms in Edwards v. Halliwell [(1950) 2 All ER 1064] as “The rule in Foss v. Harbottle comes to no more than this. First, the proper plaintiff in respect of a wrong alleged to be done to a company is prima facie the company itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company by a simple majority of members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company is in favour of what has been done, then cadet quaestio.”

The Indian case illustrating the rule in Foss v. Harbottle is Bhajekar v. Shinkar [(1934) 4 Comp Cas 434] wherein The Board of Directors of a Company passed a resolution appointing certain persons as managing agents (now abolished). The resolution was confirmed by the company in general meeting with full knowledge of all the material facts. Some of the directors brought a suit for a declaration that the resolution was invalid on the grounds of certain

irregularities. Held, it was open to the company to ratify the resolution even if it was irregular and the plaintiffs were not, under these circumstances, entitled to maintain the suit and ask the court to interfere.

**Acts held as oppressive:**

Looking to the various judicial pronouncements, some of the acts amounting to oppression may be summarized as under:

- ) Not calling a general meeting and keeping shareholders in the dark.
- ) Non-maintenance of statutory records and not conducting the affairs of the company in accordance with the Companies Act.
- ) Depriving a member of the right to dividend.
- ) Refusal to register transmission under will.
- ) Issue of further shares benefiting a section of shareholders.
- ) Pushing a shareholder into hopeless minority.
- ) Violating statutory rights of shareholders.
- ) Not giving notices.
- ) Not allowing attendance in general meetings.
- ) Not permitting inspection of records.
- ) Disposing of the assets of the company in an illegal manner.
- ) Depriving a member of his membership.
- ) Imposition of new and risky objects that are being opposed by the other fraction of shareholders.

**Acts held as non-oppressive:**

The following acts have been held as not oppressive:

- ) An unwise, inefficient or careless conduct of a director.



- ) Non-holding of the meeting of the directors.
- ) Not declaring dividends when the company is making losses.
- ) Denial of inspection of books to a shareholder.
- ) Lack of details in the notice of a meeting.
- ) Non-maintenance or non-filing of records.
- ) Increasing the voting rights of the shares held by the management.
- ) Drawing of remuneration by a director to which he is not legally entitled.

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## *Provision in Companies Act, 2013*

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### **Section 241 of the Companies Act, 2013: Application to Tribunal for relief in cases of oppression, etc**

(1) Any member of a company who complains that—

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company;

or

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

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## *Mismanagement*

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The term mismanagement has not been defined in the Companies Act 2013.

### **Analysis of Section 241**

By analysing section 241 of the Act it can be defined as:

- ) Some unfair abuse of power by the person(s) in-charge of the management of the company.
- ) An unwise and inefficient management does not amount to oppression, though it may amount to mismanagement under section 241.
- ) Where the company is run overriding the wishes and interest of the majority of shareholders involving the company into costly litigations, the management can be said to be prejudicial to interest of the company.

Mismanagement or prejudice to public interest: Section 241 may be invoked in either of the following two circumstances:

- a) That the affairs of the company are being conducted in a manner which is-
  - ) Prejudicial to public interest: or
  - ) Prejudicial to the interests of the company.
- b) That due to a 'material change' that has taken place in the management or control of the company, it is likely that the affairs of the company will be conducted in a manner-
  - ) The company's Board of directors: or
  - ) Manager or
  - ) The ownership of the company's shares; or
  - ) The membership of the company, if the company has no share capital; or any other manner whatsoever (but not including a change brought about by, or in the interests of, any creditors, debenture holders, or any class of shareholders).

Continuity of mismanagement required: Where the wrongs contemplated were against a past director, the application was not maintainable under section 241. Charges of mismanagement even if proved in the past are not enough to establish an existing injury to the company or public interest. The mismanagement should be present and continuous (R.S. Mathur v H.S Mathur (1970)1 Comp LJ 35). If a director responsible for mismanagement is removed, mismanagement ends, and therefore application under section 241 is not maintainable.

### **Position in Companies Act 1956:**

The Companies Act 1956 had separate sections for oppression and mismanagement whereas there the no such separate section in Companies Act 2013. It has been clubbed under section 241 (1) and 241 (2).

### **Meaning U/s 398 of Companies Act 1956:**

Mismanagement is said to be done if:

the affairs of the company are being conducted in a manner prejudicial to the interests of the company; or

a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management of control of the company, whether by an alteration in its Board of directors, or if its managing agent or secretaries and treasurers, or in the constitution or control of the firm or body corporate acting as its managing agent or secretaries and treasurers, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the company.

### **Acts held as Mismanagement:**

*The following acts have been held as amounting to mismanagement:-*

- Where there is serious infighting between directors.
- Where Board of Directors is not legal and the illegality is being continued.
- Where bank account(s) was/were operated by unauthorised person(s).
- Where directors take no serious action to recover amounts embezzled.
- Continuation in office after expiry of term of directors.
- Sale of assets at low price and without compliance with the Act.
- Violation of Memorandum.
- Violation of statutory provisions and those of Articles.
- Company doomed to trade unprofitably.

### **Acts held as not Mismanagement:**

*The following acts have been held to not to amount to Mismanagement:-*

- Merely because company incurs loss, mismanagement can't be alleged.
- Arrangement with creditors in company's bonafide interest.
- Removal of director and termination of works manager's services
- Building up of reserves or non-declaration of dividend especially when it does not result in devaluation of shares.

### **What amounts to mismanagement? – Gist of decided cases:**

- 1) Where the vice-chairman grossly mismanaged affairs of the company and had drawn considerable amounts for his personal purposes, that large amounts were owing to the Government towards charge for supply of electricity, that the machinery was in a state of disrepair, these are sufficient evidences of mismanagement ( Rajahmundri Electric Sulpply Corporation v Nageshwara Rao AIR 1956 SC 213)
  
- 2) Where the assets of the company are sold without complying with the requirement of section 293 at low prices, it was held to be a case of

mismanagement (Re, Malyalam Plantaions (india) Ltd. (1991) 5 Corp LA 361)

- 3) Violation of the conditions of the memorandum by the person-in-charge of the management of affairs of the company would amount to mismanagement (S.M Ramakrishnarao v Banaglore Race Club Ltd. (1970 40 Comp Cas 674)
- 4) Serious disputes among the directors resulting in serious prejudice to the interest of the company amounts to mismanagement (Suresh Kumar Sangai Vs Sureme motors Ltd (1983) 54 Comp Cas 253).

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## *Application to Tribunal for relief in cases of oppression, etc*

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According to section 241, any member of the company who complains that the affairs of the company are being conducted in a manner that is prejudicial to public interest or in a manner prejudicial or oppressive to him or any material change that is being brought about by, or in the interests of, any creditors, including debenture holders or any class shareholders of the company etc. that would materially affect the management of the company and would make its affairs prejudicial to public interests or any of its member or class of members, may make an application to the tribunal in accordance with the provisions of Section 244 of the Act.

The central government may also make an application to the tribunal for its orders where it thinks that the affairs of the company are prejudicial to public interest.

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## *Powers of Tribunal*

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Under Section 242 of the Act, the Tribunal has the power to order for the regulation of the conduct of affairs of the company in future, the purchase of shares, restriction on the transfer of the share, termination, setting aside or modification of any agreement, setting aside of any transfer, delivery of goods, payment, execution or other act relating to property, removal of managing director, manager, or any of the directors of the company, recovery of undue gains made by any managing director, manager or director during the period of his appointment as such, imposition of costs as may be deemed fit.

A certified copy of the order shall be filed with the registrar within 30 days of the order by the tribunal.

Any contravention of the provisions of this chapter shall lead company towards the imposing of fine which shall not be less than 10 lakh rupees and which may extend to 25 lakh rupees and every officer of the company who is in default shall be punished with an imprisonment of six months and with fine which shall not be less than twenty-five thousand rupees and which may extend to one lakh rupees.

### **Consequences of termination or modification of certain agreement**

If an order of the tribunal set asides, modifies or terminates any ongoing agreement then as per the provisions of section 243 of the Act, such an action shall not give rise to any claims against any director or any person of the company for compensation for damages, etc. Any director, managing director, etc who has been terminated from the post as per the orders of the tribunal shall not hold the office of the same before the expiry of a period of five years from the order of the tribunal.

### **Right to apply:**

According to section 244 of the Act, the following people can apply for the orders from the tribunal-



1. In the case of a company having share capital of 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 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.
2. In the case of a company not having a share capital, not less than one-fifth of the total number of its members.

Section 245 of the act talks about class action suits, wherein the class of members having a similar cause of action can file an application before the tribunal to seek necessary orders.

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### *Seeking of orders from the Tribunal:*

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1. Restrain the company from
  - Committing an act which is ultra vires the AOA/MOA of the company
  - Committing breach of any provision of the AOA/MOA of the company
  - Acting on a resolution declared as void which had the effect of altering the MOA/AOA of the company by suppression of facts/misstatement to the members/depositors. The restraint is also imposed on the directors.
  - Performing any act which is in contravention of this Act/any other law for the time being in force.
2. or for any misleading /incorrect statement made by
  - The company/director
  - The auditor(including audit firm and the firm as well as all partners)
  - Any expert/advisor/consultant
3. To seek any other remedy as the Tribunal thinks fit.

## **Important Aspects**

The Tribunal shall look into the following matters before considering the application

1. The application should be made in good faith and the tribunal shall consider whether the application is made by some other persons other than the directors or officers of the company.
2. Whether the matter could be taken up in member/depositor's own right.
3. Any evidence of the views of the members who have no direct or indirect personal interest in the matters.
4. Where the cause of action is yet to occur and if it is capable of being authorised/ratified by the company before it occurs and where the cause of action has already occurred if it is capable of being ratified.

After the application is admitted the following aspects are worthy of note:

1. The members/depositors of the class have to be served with a public notice
2. All applications which are similar shall be taken as one and the lead applicant shall be selected by the class members/depositors. If no decision is reached regarding the appointment of the lead applicant the Tribunal shall appoint the same.
3. The same cause of action cannot have more than one application.
4. The cost shall be borne by the company or the person responsible for the oppressive act.
5. All orders passed by the tribunal shall be binding.
6. This section pertaining to a class action is not applicable to Banking Companies.

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*Application to NCLT for Relief for Oppression [Section 241(1)(b)]*

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Any member who complains that

a) the affairs of the company have been or are being conducted in a manner *prejudicial to public interest* or in a manner *prejudicial or oppressive to him* or any other member or members or in a manner *prejudicial to the interests of the company*.

b) the **material change**, not being a change brought about by, or in the interests of, any creditors, *including debenture holders* or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that *by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members*, may apply to NCLT if they have right under 244.

### **Powers of the Tribunal**

Under the provisions of Section 242 (2), the Tribunal may allow relief to the complaining shareholders in case of oppression or mismanagement, some of which include:

- Regulation of the company's future affairs;
- Direction to purchase the company's shares by other members;
- Restriction on transfer of allotment;
- Termination, setting aside, modification of any agreement between the company and its management;
- Termination, setting aside, modification of any agreement between the company and any third person;
- Setting aside of any transaction of transfer, delivery, payment, execution, etc.;

- Removal of any member of the management;
- Recovery of undue gains made by the management;
- Appointment of the members of the management;
- Imposition of costs.

The Indian legal system safeguards the interests of the shareholders who may suffer the impact of any oppression or mismanagement by providing recourse to appropriate remedy.

### **Power of Tribunal: Section 242 of the Companies Act, 2013**

The tribunal is the special adjudicatory body brought about to deal with the matters pertaining to the Companies Act in order to get efficient and immediate relief. Section 242 deals with the powers of the tribunal and the same have been examined and explained for your kind perusal.

- The first power granted upon it by the legislation is to pass an order. Such order may be passed if it is of the opinion that the affairs of the company have been or are being conducted in a prejudicial manner. It has been mentioned that the winding up of the company will not be ordered radically, but it is the oppression and mismanagement which is aimed to be stopped.
- The same provision also confers powers upon the tribunal regarding three issues which are concerning the 1) shareholders 2) Company and 3) others.
- With respect to shareholders, a tribunal may order to purchase shares of members by other members or by the company.
- A tribunal may as well order a reduction of the share capital or even enforce restriction on transfer of shares because oppression and mismanagement at root cause depends upon the coagulation of shares at the hands of individual or few members.
- Regarding the management of the company which is a crucial part of a company, a tribunal may terminate or modify agreements made between company and management or agreement between the company and any other person.

- The tribunal in case of management of the company may even remove the Managing Director, Manager, and Director, the tribunal may recover undue gains made by such official and also appoint another MD, manager, and director.
- In certain cases, the tribunal may appoint a person who shall report to the tribunal regarding the activities of oppression and mismanagement by the management to curb such oppression from taking place further.
- Lastly, the tribunal has certain other powers such as regulation of the conduct of the affairs of the company, setting aside the transfers of any property of the company and the tribunal may even impose costs. The procedural details are that the tribunal has to send a copy of its order to the registrar and if the order has not been finalised, it may provide an interim order to the registrar. Pertaining to changes made in MOA (Memorandum of Association) and AOA (Article of Association) the changed documents must be submitted to the registrar. The punishment prescribed in abeyance of the law is set at 1 Lakh to 25 Lakh for a company and 25000 to 1 Lakh for an officer in default and such officer may also be liable for a term of imprisonment of 6 months.

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## *Appeals against the Orders of the Tribunal and Variation of the Order of the Tribunal*

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The Award pronounced by the NCLT (National Company Law Tribunal) may be appealed before the NCLAT (National Company Law Appellate Tribunal). The procedure and provision granting such right to appeal.

- The appeal may be preferred by any person who is aggrieved by the decision of the tribunal.
- No appeal shall be entertained when the decision is given by the tribunal based upon the consent of the parties.
- Appeals must be made within a period of forty-five days from the disputed order passed by the tribunal and the extension may be given only when sufficient cause for such delayed filing is brought before the court by such party and such extension shall only be for another 45 days.
- On receiving such appeal, the appellate tribunal must give a reasonable opportunity to the parties and then pass an order confirming or modifying or setting aside the order appealed against.

### Maintainability of Petitions under Sections 241

- The validity of a petition must be judged from the facts as they were, at the time of its presentation, and a petition which was valid when presented cannot cease to be maintainable by reason of events subsequent to its presentation.
- For the purposes of the petition under Sections 241, it was only necessary that members who were already constructively before the court should continue the proceedings. The provision under the Companies Act provides substantive provisions regarding an application that is to be made when there is complaint of oppression and mismanagement. It clearly specifies who may complain and when.

- Shareholders may make a complaint when the company affairs are conducted prejudicial to the company and its shareholders.
- The central government may even take suo-moto action regarding the same under the aforementioned provisions. One could make an appeal from an order of the tribunal if such a person is aggrieved by the decision.
- The time duration of 45 days has been fixed as maximum period within which appeal shall lie from the order of company tribunal, but the appeal may be further extended to a maximum of another 45 days on convincing court of the sufficient cause of delay.
- Then the appellate tribunal finally gives the appellant a reasonable opportunity to present their case again, to either uphold or overrule the previous decision of the tribunal. This appeal provision is based upon the intrinsic right to appeal, which is provided to the aggrieved party in order to do complete justice.

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## *Drafting and Filing Petition Before National Company Law Tribunal*

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### **MAINTAINABILITY**

- ❖ Section 241 lays down eligibility criteria for filing an application for relief against oppression and mismanagement.
- ❖ According to Sub Section (1) following members shall have right to apply:
  - ✓ In case of Company having Share Capital: Not less than 100 member or not less than 1/10 of the total number of members whichever is less or any member(s) holding not less than 1/10<sup>th</sup> of the issue share capital.
  - ✓ In case of Company without Share Capital: Not less than 1/10<sup>th</sup> of the total number of members

(Note: The Tribunal may waive all or any of the requirement specified therein)

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### *Application to be made to the Tribunal*

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- ❖ An Application, shall be filed in the **Form No. NCT. 1.**
- ❖ If there are more than One Applicant – the Letter of Consent signed by the rest of the members so entitled, shall be annexed to the Application, and the names and addresses of all the members shall be set out in a schedule to the Application.



- ❖ A copy of every Application made under this rule shall be served on the company, other respondents and all such persons as the Tribunal may direct.

[Rule 3(3)]

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### *Section 242 (Powers of Tribunal)*

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If Tribunal is of the opinion that the Complaints are justified then it may pass any order to bring the complaints on an end, which includes following:

1. The regulation of conduct of affairs of the company in future.
2. Purchase of shares or interests of any members.
3. Restrictions on the transfer or allotment of Shares,
4. Removal of MD/Manager and/or Director of the Company.
5. Recovery of undue gains made by the any MD, Manager or director including transfer to IEPF or repayment to identifiable victims.
6. Manner of Takeover of Management of the Company
7. Appointment of any other person to manage the Company.
8. Imposition of Costs (If Tribunal Deemed it fit)
9. Any other matter for which, in the opinion of the Tribunal, it is just and equitable that the provision should be made.

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## *Drafting of Petition*

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1. Heading, Brief description of Petitioner, Company & Respondents, if any.
2. Concise narration of material facts only. Full particulars of fraud, undue influence and coercion to be stated.
3. Specific instances of acts of O&M, Grievance, etc.
4. In case of winding up petitions, specific averments as to admission of liability/quantified debt.
5. Petition should be accompanied by an affidavit sworn before the person specified in Section 558 of the Companies Act, 1956 / Section 355 of the Companies Act, 2013;
6. Multiple Reliefs – A petitioner shall be entitled to seek one or more reliefs provided that they are consequential to one another.

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## *Petition relief*

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### **INTERIM RELIEFS:**

- ✓ Interim relief should not exceed the final relief.
- ✓ The Interim relief should not amount to grant of the final relief.
- ✓ Purpose is to maintain the last non-contested status quo.

**FINAL RELIEFS:**

- ✓ Order to conduct the Company in a manner not prejudicial to the interest of members and to public interest;
- ✓ Order restitution for losses caused to the company.
- ✓ Order to put to an end the matters complained.
- ✓ Such other relief, as the Hon'ble Court may desire to grant, in the interest of justice.

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*Reply & rejoinder*

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**Reply:**

- ✓ Reply to the petition by the Respondent.
- ✓ Reply to be submitted within time line prescribed under an Order.
- ✓ It should be para wise reply of original averment supported by Affidavit.

**Rejoinder:**

- ✓ Rejoinder by the Petitioner on the Reply filed by Respondent.
- ✓ Reply to be submitted within time line prescribed under an Order.
- ✓ It should be para wise reply of original averment supported by Affidavit.
- ✓ No new facts. New facts only through amendment application.

**ANNEXURE-I**

**(See rule 4)**

**FORM NO. NCLT. 1**

**(see rules 34, 64, 66, 67, 68, 69, 70, 71, 73, 74, 75, 77, 78, 79, 80, 81, 83, 86 and 87)**  
[HEADING AS IN FORM NCLT. 4]

**Columns required for filing of Original Application / Reply / Rejoinder / Interlocutory Application or filing of additional documents under directions of the Bench**

**i. Details of Original Application / Reply / Rejoinder / Interlocutory Application**

Particulars of the Petitioner / Applicant / Respondent and state whether company, whether petitioner or not.

(Name, description, father's / husband's name, occupation, capacity, i.e. shareholder, depositor and address)

**ii. Jurisdiction of the Bench:**

The petitioner declares that the subject-matter of the petition is within the jurisdiction of the Bench.

**iii. Limitation: (If applicable)**

The petitioner / applicant further declares that the petition is within the limitation laid down in section ..... of the Companies Act, 2013 (where applicable)

**iv. Facts of the case are given below:**

(Give here a concise statement of facts in a chronological order, each paragraph containing as nearly as possible a separate issue, fact or otherwise.)

**v. Reliefs) sought**

In view of the facts mentioned above, the petitioner/applicant / respondent prays for the following relief(s): (Specify below the relief(s) sought explaining the ground for reliefs) and the legal provisions (if any) relied upon)

**vi. Particulars of Bank draft evidencing payment of fee for the petition or application made:**

Branch of the Bank on which drawn:

Name of the issuing branch:

Demand Draft No. ....

Date .....

Amount Rs. ....

(Signature/Signature of Authorised signatory)

Date: 27.01.2020

Place: Chennai

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL  
CHENNAI BENCH

COMPANY APPLICATION NO..... 2020

IN THE MATTER OF SECTIONS 241 & 242 AND OTHER APPLICABLE PROVISIONS OF  
THE COMPANIES ACT 2013

AND

IN THE MATTER OF KOCHI PHOTOS PRIVATE LIMITED

1. RAVICHANDRAN
2. SUDHARSAN

.....PETITIONERS

VS

1. CD GLOBAL DESIGNS PRIVATE LIMITED
2. CD WORLDWIDE CREATORS PRIVATE LIMITED

.....RESPONDENTS

MOST RESPECTFULLY SHOWETH:

DETAILS OF THE PETITION

1. That the present Petition is being filed under Sections 241, 242 read with Section 130 (1) of the Companies Act, 2013 in respect of the affairs of the Respondent No. 1 Company which are being conducted in the manner prejudicial and oppressive to the Petitioners , other shareholders of the Respondent No. 1 Company and also against public interest. The affairs of the

Respondent Company are also being mismanaged by Respondent No. 1. The acts of oppression and mismanagement as alleged in this Petition are directly attributable to Respondent No. 1, as elaborated and detailed herein below.

2. In the aforesaid circumstances the fraudulent share transfer in favour of the Respondents No. 2 to 5 has resulted into a situation that the Petitioner do not form the 10% shareholding of the Company in the records of the Registrar of Companies, thus a separate Application is being filed along with the present petition under proviso to Section 244(1) of the Companies Act, 2013 praying for waiving the requirements specified under clause (a) and (b) of Section 244(1) of the Companies Act, 2013.

## **1. FACTS OF THE CASE**

4.1. That the elucidate, facts of the matter are that Petitioner No.1 and 2 had promoted and incorporated the Company.

4.2. That at AGM dated certain shares were transferred by is marked and annexed herewith as Annexure-P 5.

4.3. That the aforesaid fraudulent transfer of shares done by Respondents No. 2 to 6 was with mal- intention to give controlling hand to Respondent No. 2 so that he can mismanage the affairs of the Company and oppress the Petitioner. The Petitioners being the directors of the Company having faith in the Respondent No. 6 being the auditor of the Company had on latter's asking had signed many blank papers which he said were required for

compliances and filing before ROC and the latter was also having access to the digital signatures of the Petitioner No. 1 & 2. The Respondent No. 6 misused the trust shown by the Petitioners in him by misusing the blank signed documents and digital signatures of the Petitioners in helping Respondents No. 2 to 5 to get their unsecured loans converted into share capitals without the knowledge of the petitioners

**2. JURISDICTION OF THE BENCH:**

The Petitioners declares that the subject matter of the petition is within the jurisdiction of this Bench.

**3. LIMITATION:**

The Petitioners further declares that this Petition is within time and not barred by limitation. In any event, the Petitioners submit that the cause of action is of continuing nature.

**4. MATTERS NOT PREVIOUSLY FILED OR  
PENDING WITH ANY OTHER COURT**

Except as disclosed in the petition above the Petitioners have not approached any other forum for below mentioned prayers. It is respectfully submitted that this Hon'ble Tribunal has jurisdiction to entertain the present petition and grant the reliefs sought therein.

The Petitioners hereby reserve the right to take such further and other actions against the Respondent No. 2 and other respondents for the violations of the law as may be available to them

**5. DETAILS OF INTERIM APPLICATION**

A stay application for the staying the respondents from holding the meeting of shareholders without permission of Hon'ble Tribunal and other interim prayers till the disposal of this Petition has been filed



separately along with this Petition

**6. RELIEFS SOUGHT :**

It is, therefore, most humbly prayed that the Petition may kindly be allowed and the Hon'ble Tribunal may kindly pass orders:

1. To declare and order that the affairs of Respondent No. 1 have been carried by Respondent No. and/or other Respondents in a manner that is oppressive and that the affairs of Respondent No. 1 also have been mismanaged in terms of Sections 241 (1) (b) read with Section 242 of the Companies Act, 2013;

Place: Chennai

Date: 27.01.2020

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL

CHENNAI BENCH

COMPANY APPLICATION NO..... 2020

IN THE MATTER OF SECTIONS 241 & 242 AND OTHER APPLICABLE PROVISIONS OF  
THE COMPANIES ACT 2013

AND

IN THE MATTER OF KOCHI PHOTOS PRIVATE LIMITED

1. RAVICHANDRAN

2. SUDHARSAN

.....PETITIONERS

VS

1. CD GLOBAL DESIGNS PRIVATE LIMITED

2. CD WORLDWIDE CREATORS PRIVATE LIMITED

.....RESPONDENTS

**AFFIDAVIT**

I hereby solemnly affirm and state as follows :-

1. That I am the Petitioner No. 1 herein and am competent to sign and verify the present Petition and am fully conversant with the facts and circumstances of the case and competent to swear the present affidavit.
2. That I have gone through the contents of the accompanying petition which has been drafted by the Counsel at my instance and I state that the same are true and correct to my personal knowledge and the records available with me.

3. That the documents filed with the accompanying Petition are true copies of their respective photocopies.

**DEPONENT**

**VERIFICATION**

I, the above named deponent, do hereby declare and verify on oath that the above affidavit are true and correct to my personal knowledge, no part of it is false or incorrect and nothing material has been concealed therefrom.

Verified at Jaipur on this the 27<sup>th</sup> January  
2020

Place: Chennai

Date: 27.01.2020

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL  
CHENNAI BENCH

COMPANY APPLICATION NO..... 2020

IN THE MATTER OF SECTIONS 241 & 242 AND OTHER APPLICABLE PROVISIONS OF  
THE COMPANIES ACT 2013

AND

IN THE MATTER OF KOCHI PHOTOS PRIVATE LIMITED

1. RAVICHANDRAN
2. SUDHARSAN

.....PETITIONERS

VS

1. CD GLOBAL DESIGNS PRIVATE LIMITED
2. CD WORLDWIDE CREATORS PRIVATE LIMITED

.....RESPONDENTS

**AFFIDAVIT IN SUPPORT OF STAY APPLICATION**

I do hereby solemnly affirm and state as follows :-

1. That I am the Petitioner No. 1 herein and am competent to sign and verify the present stay application and am fully conversant with the facts and circumstances of the case and competent to swear the present affidavit.

2. That I have gone through the contents of the accompanying stay application which has been drafted by the Counsel at my instance and I state that the same are true and correct to my personal knowledge and the records available with me.

**DEPONE  
NT**

**VERIFICATION**

I, the above named deponent, do hereby declare and verify on oath that the above affidavit are true and correct to my personal knowledge, no part of it is false or incorrect and nothing material has been concealed therefrom.

Verified at Chennai on this the 27<sup>th</sup> January

2020

Place: Chennai

Date: 27.01.2020

**I N D E X**

<b>S. No.</b>	<b>Particulars</b>	<b>Pages</b>
1.	List of Dates and Events	
2.	Memorandum of Parties	
3.	Petition under Section 241,242 read with section 130(1) of the Companies Act, 2013	
4.	Affidavit in support of Petition	

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## *Background – the need for Class Action Suits in India*

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Flashback to September 2008, Satyam Computer Services Limited was awarded with the 'Global Peacock Award' for global excellence in corporate accountability. Five months later, Satyam was all over the news for a massive accounting "fraud". The company was a frontrunner and a name everyone knew – globally. During the period of 2003-2009, the company traded with an average trailing EBITDA multiple of 15.36. Satyam's stock peaked at 526.25 INR – giving investors a 300 % improvement in share price. The external environment in which Satyam functioned was beneficial to its growth. But, did the numbers give the full picture?

As of December 2008, Satyam had a total market capitalization of \$3.2 billion. On January 7, 2009, Mr. Raju disclosed in a letter (Annexure 1) to Satyam Computers Limited Board of Directors that "he had been manipulating the company's accounting numbers for years". On 7 January 2009, Satyam's Chairman, Ramalinga Raju, resigned after notifying board members and the Securities and Exchange Board of India (SEBI) that Satyam's accounts had been falsified. Raju confessed that Satyam's balance sheet of September 30, 2008, contained the following irregularities: "He faked figures to the extent of Rs. 5040 crore of non-existent cash and bank balances as against Rs. 5361 crore in the books, accrued interest of Rs. 376 crore (non-existent), understated

liability of Rs. 1230 crore on account of funds raised by Raju, and an overstated debtor's position of Rs. 490 crore. He accepted that Satyam had reported revenue of Rs. 2700 crore and an operating margin of Rs. 649 crore, while the actual revenue was Rs. 2112 crore and the margin was Rs. 61 crore". As per his claims, the assets were overstated on Satyam's balance sheet by \$1.47 billion. Nearly \$1.04 billion in bank loans and cash that the company claimed to own was non-existent! Satyam also underreported liabilities on its balance sheet. Satyam overstated income nearly every quarter over the course of several years in order to meet analyst expectations.

Items Rs. in crore	Actual	Reported	Difference
Cash and Bank Balances	321	5361	5040
Accrued Interest on Bank Fixed Deposits	Nil	376.5	376
Understated Liability	1230	None	1230
Overstated Debtors	2161	2651	490
<b>Total</b>	Nil	Nil	7136
Revenues (Q2 FY 2009)	2112	2700	588
Operating Profits	61	649	588

How was this done? Who was responsible? The auditors, bankers, and SEBI, the market watchdog, were all blamed for their role in the accounting fraud. Mr. Raju and the company's global head of internal audit used a number of different techniques to perpetrate the fraud. Mr. Raju also revealed that he created 6000 fake salary accounts over the past few years and appropriated the money after the company deposited it. The company's global head of internal audit created fake customer identities and generated fake invoices against their names to inflate revenue. The global head of internal audit also forged board resolutions and illegally obtained loans for the company. It also appeared that the cash that the company raised through American Depository Receipts in the United States never made it to the balance sheets. Global auditing firm, PricewaterhouseCoopers (PwC), audited Satyam's books from June 2000 until the discovery of the fraud in 2009. Several commentators criticized PwC harshly for failing to detect the fraud. Indeed, PwC signed Satyam's financial statements and was responsible for the numbers under the Indian law. The large amount of cash thus should have been a 'red-flag' for the

auditors that further verification and testing was necessary. Furthermore, it appears that the auditors did not independently verify with the banks in which Satyam claimed to have deposits”.

Greed for money, power, competition, success and prestige compelled Mr. Raju to “ride the tiger”, which led to violation of all duties imposed on them as fiduciaries—the duty of care, the duty of negligence, the duty of loyalty, the duty of disclosure towards the stakeholders. The fraud took place to divert company funds into real-estate investment, keep high earnings per share, raise executive compensation, and make huge profits by selling stake at inflated price.

The need for Class Action Suits became the spotlight in the context of securities market when this scam broke out in 2009. At that time, Indian Investors in India could not take any legal recourse collectively against the company while their counterparts in USA filed class action suit claiming damages from the company as well as the auditing firm, PricewaterhouseCoopers (PwC). The shareholders of SCSL, approximately 300,000 were unsuccessful in claiming damages worth millions due to the absence of the provision for filing a class action suit under the Companies Act, 1956. Fighting for their rights collectively would mean pooling of resources and gaining the ability to afford representatives to stand before the court. American investors on the other hand were able to claim their part of damages in the US courts through a class action suit against SCSL. In 2011, Satyam and PwC agreed to pay \$125 million and \$25 million respectively to settle shareholder claims. The investors in India were saddened and left helpless as the Supreme Court ruled that in the absence of any such law, the investors cannot file a class action suit and that it was not in the power of the court to make any such law; it could only judge.

Post the Satyam scandal, the concept of a class action by shareholders was also recommended by the J.J. Irani Committee Report, 2005 which suggested that representative action may be initiated by one shareholder on behalf of one or more of the shareholders, on the premise that they would all have the same ‘locus standi’ to initiate an action against an erring company. The Indian Parliament drafted the Companies Bill, 2009 and introduced provisions enabling affected shareholders to file a 'Class Action Suit'. Section 245 and 246 of the Companies Act, 2013 Act ("**Act**") specifically deals with the class action suits.



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## *Section 245 of Companies Act, 2013: Class Action*

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As per **Section 245(1)**, the number of member or members, depositor or depositors or any class of them, as mentioned in Section 245(3), if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, then they can file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders:

- a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;
- (b) to restrain the company from committing breach of any provision of the company's memorandum or articles;
- (c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;
- (d) to restrain the company and its directors from acting on such resolution;
- (e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;
- (f) to restrain the company from taking action contrary to any resolution passed by the members;
- (g) to claim damages or compensation or demand any other suitable action from or against—
- (i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
- (ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

As per **Section 245(2)**, Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

**Section 245(3)** states the requisite number of member or depositors required to file a class action suit. The illustration below sets forth the provisions in the Act:

) **Required Number of Members**

For companies having a share capital—minimum 100 members or a **prescribed** percentage of total members whichever is less, or a member(s) holding a **prescribed** percentage of the shareholding in the company. For a company without share capital –not less than 1/5<sup>th</sup> of the total number of its members.

) **Required Number of Depositors**

Minimum 100 depositors or a **prescribed** percentage of the total depositors, whichever is less or a depositor(s) to which the company owes such percentage of the total deposits as **prescribed**.

Until recently, this prescribed numbers of members or depositors required to file a class action suit had not been notified by the government. The government has on **May 8, 2019** amended the **National Company Law Tribunal Rules, 2016** and notified the threshold limits for filing such class action suits under Section 245 of the Act. The notified threshold limits are:

Category	No. of Required Members/ Depositors	Percentage of total Members/ Depositors	Percentage of shareholding/deposits owed
	<i>(Whichever is less.)</i>		
<b>Members</b>  (In case of a company having a share capital)	100	5%	In the event of a listed company – 2%  In the event of an unlisted company – 5%
<b>Depositors</b>	100	5%	5%

As per **Section 245(4)**, while considering an application under sub-section (1), the Tribunal shall take into account, in particular—

- (a) whether the member or depositor is acting in good faith in making the application for seeking an order;
- (b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a) to (f) of subsection (1);
- (c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;
- (d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;
- (e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—
  - (i) authorised by the company before it occurs; or
  - (ii) ratified by the company after it occurs;

(f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

As per **Section 245(5)**, upon admitting the application, the Tribunal will –

- a) Issue public notice to all the members or depositors of the class in such manner as may be prescribed;
- b) Require the company to place the public notice on the website of such company in addition to the publication of such public notice in newspaper, along with it being published on the website of Ministry of Corporate Affairs, website of the Tribunal, of the concerned ROC, and in case of listed companies – the concerned stock exchange.
- c) Consolidate all similar applications prevalent in any jurisdiction into a single application and the class of members or depositors shall be allowed to choose a lead applicant. If they are unable to form a consensus, the Tribunal shall have the power to choose a lead applicant who shall be in charge of the proceedings from the applicant's side.
- d) Not to allow two class applications for the same cause of action.
- e) Have the company or any other person responsible for the oppressive act defray any cost or expenses connected with the application.
- f) Give notice of every application made to it under this section to the Central Government, and shall take into consideration the representations, if any, made to it by the CG before passing the final order.

**Section 245(6)** states that any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

**Section 245(7)** states the penalty for non-compliance of order passed by Tribunal. Any company which fails to comply with an order passed by the

Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

**Section 245(8)** states that where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.

**Section 245(9)** states that nothing in Section 245 shall apply to a Banking company.

*Difference between Application for Prevention of Oppression and Mismanagement under Section 241 to 244 and Class Action Suits filed under Section 245:*

	Prevention of Oppression and Mismanagement under section 241	Class Action under section 245
Who can file application?	Members of the Company	Members and Depositors of the Company
Against whom the application can be filed?	Company and its statutory appointees	Company; Any of its directors; Auditors, including Audit firm Experts, legal advisors, consultants
Matters for which application can be filed?	Any current or past activity or to prevent recurrence.	Any current, past or future activity to desist from one or more particular action that have not been taken yet.

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## *Our Take-Aways*

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In a class action, the court's decision applies to every participant who has opted into the class. All individuals who fit within the court's original definition of a class member are bound by the final court decision, even if they never actually go to court or otherwise participate in the lawsuit.

Class Action Suits also face certain challenges. In such cases, proving that the accused's actions did inflict the same damage on as many people as claimed in the suit. The case could suffer from poor representation. Class actions are usually brought by attorneys who are particularly trained and experienced in litigating and managing complicated lawsuits. Although class actions require much more work than the typical civil lawsuit, class action attorneys must have what it takes to represent the plaintiffs in the class action. The case could be dragged on for a long time, and therefore require patience.

The class action lawsuit brings together and disposes of thousands of claims at one time that are impractical to litigate individually, making the process much more efficient. This reduces the chance of similar cases clogging the already overburdened courts. As not everyone has the means or the time to pursue a legal case, a group or class of people collectively with the funds and ability to raise money can bring justice to other victims who may be disadvantaged. Because it aggregates small claims, the class action format lowers the often-high cost of litigation.

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## *Annexure -1*

### *Letter from Satyam Chairman – Mr. B Ramalinga Raju*

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To the Board of Directors

Satyam Computer Services Ltd. Dear Board Members, It is with deep regret, at tremendous burden that I am carrying on my conscience, that I would like to bring the following facts to your notice:

**1. The Balance Sheet carries as of September 30, 2008**

- **Inflated (non-existent) cash and bank balances of Rs.5,040 crore (as against Rs. 5361 crore reflected in the books)**
- **An accrued interest of Rs. 376 crore which is non-existent**
- **An understated liability of Rs. 1,230 crore on account of funds arranged by me**
- **An over stated debtors position of Rs. 490 crore (as against Rs. 2651 [cr.] reflected in the books)**

**2. For the September quarter (02) we reported a revenue of Rs.2,700 crore and an operating margin of Rs. 649 crore (24% Of revenues) as against the actual revenues of Rs. 2,112 crore and an actual operating margin of Rs. 61 Crore ( 3% of revenues). This has resulted in artificial, cash and bank balances going up by Rs. 588 crore in Q2 alone.**

The gap in the Balance Sheet has arisen purely on account of inflated profits over a period of last several years (limited only to Satyam standalone, books of subsidiaries reflecting true performance). What started as a marginal gap between actual operating profit and the one reflected in the books of accounts continued to grow over the years. It has attained unmanageable proportions as the size of company operations grew significantly (annualized revenue run rate of Rs. 11,276 crore in the September quarter, 2008 and official reserves of Rs. 8,392 crore). The differential in the real profits and the one reflected in the books was further accentuated by the fact that the company had to carry additional resources and assets to justify higher level of operations — thereby significantly increasing the costs.



**Every attempt made to eliminate the gap failed. As the promoters held a small percentage of equity, the concern was that poor performance would result in a take-over; thereby exposing the gap. It was like riding a tiger, not knowing how to get off without being eaten.**

**The aborted Maytas acquisition deal was the last attempt to fill the fictitious assets with real ones.** Maytas' investors were convinced that this is a good divestment opportunity and a strategic fit. Once Satyam's problem was solved, it was hoped that Maytas' payments can be delayed. But that was not to be. What followed in the last several days is common knowledge.

I would like the Board to know:

**1. That neither myself, nor the Managing Director (including our spouses) sold any shares in the last eight years — excepting for a small proportion declared and sold for philanthropic purposes.**

2. That in the last two years a net amount of Rs. 1,230 crore was arranged to Satyam (not reflected in the books of Satyam) to keep the operations going by resorting to pledging all the promoter shares and raising funds from known sources by giving all kinds of assurances (Statement enclosed, only to the members of the board). Significant dividend payments, acquisitions, capital expenditure to provide for growth did not help matters. Every attempt was made to keep the wheel moving and to ensure prompt payment of salaries to the associates. The last straw was the selling of most of the pledged share[s] by the lenders on account of margin triggers.

3. That neither me, nor the Managing Director took even one rupee/dollar from the company and have not benefitted in financial terms on account of the inflated results.

4. None of the board members, past or present, had any knowledge of the situation in which the company is placed. Even business leaders and senior executives in the company, such as, Ram Mynampati, Subu D, T.R. Anand, Keshab Panda, Virender Agarwal, A.S. Murthy, Han T, SV Krishnan, Vijay Prasad, Manish Mehta, Murali V. Sriram Papani, Kavale, Joe Lagioia, Ravindra Penumetsa, Jayaraman and Prabhakar Gupta are unaware of the real situation as against the books of accounts. None of my or Managing Director's immediate or extended family members has any idea about these issues.

Having put these facts before you, I leave it to the wisdom of the board to take the matters forward. However, I am also taking the liberty to recommend the following steps:

1. A Task Force has been formed in the last few days to address the situation arising but of the failed Maytas acquisition attempt. This consists of some of the most accomplished leaders of Satyam; Subu D, T.R. Anand, Keshab Panda and Virender Agarwal , representing business functions; and A.S. Murthy, Han T and Murali V representing support functions. I suggest that Ram Mynampã ti be made the Chairman of this Task Force to immediately address some of the operational matters on hand. Ram can also act as an interim CEO reporting to the board.
2. Merrill Lynch can be entrusted with the task of quickly exploring some Merger opportunities.
3. You may have a testatement of accounts' prepared by the auditors in light of the facts that.I have placed before you.

I have promoted and have been associated with Satyam for well over twenty years now I have seen it grow from few people to 53,000 people, with 185 Fortune 500 companies as customers and operations in 66 countries. Satyam has established an excellent leadership and competency base at all levels. I sincerely apologize to all Satyamites and stakeholders, who have made Satyam a special organization, for the current situation. I am confident they will stand by the company in this hour of crisis. In light of the above, I fervently appeal to the board to hold together to take some important steps Mr T R Prasad is well placed to mobilize support from the government at this crucial time. With the hope that members of the Task Force arid the financial advisor, Merrill Lynch (now Bank of America) will stand by the company at this crucial hour, I am marking copies of this statement to them as well.

Under the circumstances, I am tendering my resignation as the chairman of Satyam and shall continue in this position only till such time the current board is expanded. My continuance is just to ensure enhancement of the board over the next several days or as early as possible.

I am now prepared to subject myself to the laws of the land and lace consequences thereof.

(B. Ramalinga Raju)

Copies marked to:

1. Chairman SEBI
2. Stock Exchanges



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## IL&FS : “The Governance Failure of 2019”

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**THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH – I, MUMBAI**

**CP 3638/241-242/MB/2018**

**CORAM : SHRI V.P. SINGH, MEMBER (J)  
SHRI RAVIKUMAR DURAISAMY, MEMBER (T)**

**ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL  
COMPANY LAW TRIBUNAL ON 03.12.2018**

**NAME OF THE PARTIES: UNION OF INDIA, MCA**

**v/s**

**INFRASTRUCTURE LEASING & FINANCIAL  
SERVICES LTD. & ORS.**

**SECTIONS 241-242 OF THE COMPANIES ACT, 2013**

### **BRIEF FACTS:**

Subsection (2) of Section 241 of the Companies Act provides that if the Central Government is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an appropriate order under Chapter XVI, more particularly the order under Section 242 of the Companies Act. In the present case, the Central Government had approached the learned Tribunal under Section 241 of the Companies Act and for an appropriate order to suspend the existing Board of Directors of the Companies and to appoint new Directors in terms of the provisions of Section 242(2)(k) of the Companies Act, to manage the affairs of IL&FS and group companies. Accordingly central Government has filed this application for impleadment of Shri Vibhav Kapoor, Shri K. Ramachand, Shri R. C. Bawa, Shri Pradeep Puri, Shri S. Rengarajan, Shri Mukund Sapre, and Shri .Hari Sankaran as party Respondents in this case. The application has been filed on the basis that proposed Respondents exercised control over the Respondent No.1 and its group companies.

### **DECISION OF NCLT:**

Order dated 01.10.2018 allowed the said prayers and suspended the Board of Directors of IL&FS, and appointed the newly constituted Board to conduct the business as per the Memorandum and Articles of the companies.

### **REASON:**

That on 01.10.2018, the Central Government through the Ministry of Corporate Affairs filed a petition before the learned Appellate Tribunal under Sections 241 and 242 of the Companies Act alleging inter alia, mismanagement by the Board of IL&FS and that the affairs of IL&FS were being conducted in a manner prejudicial to public interest. That the Central Government prayed for the following reliefs:

1. That the existing Board of Directors of Respondent No. 1 company, comprising of R2 to R8, be suspended with immediate effect and 10 (Ten) persons be

appointed as directors in terms of provisions of Section 242(2)(k) of the Act, to manage the affairs of R1 company and its group companies through their nominees, and such directors any report and function under the Hon'ble Tribunal on such matters as it may direct:

2. That the Board of Directors appointed by the Hon'ble Tribunal in terms of 242(2)(k) of the Act be authorized to replace such number of directors of subsidiaries, joint ventures and associate companies as may be required to make the R1 and its group companies as going concern.

3. That it was found that the management of IL&FS and other group company/companies were responsible for negligence and incompetence, and had falsely presented a rosy financial statement. To unearth the irregularities committed by IL&FS and its companies, the provisions of Section 212(1)(c) of the Companies Act were invoked for investigation into the affairs of the company. The investigation was to be carried out by the Serious Fraud Investigation Office (hereinafter referred to as 'the SFIO') in exercise of powers under Section 212 of the Companies Act. The SFIO submitted an interim report dated 30.11.2018 to the Central Government placing on record that the affairs in respect of IL&FS group Companies were mismanaged, and that the manner in which the affairs of the company were being conducted was against the public interest. The said report shall be referred to herein below.

It appears that the Registrar of Companies also conducted an enquiry under Section 206 of the Companies Act, and prima facie concluded that mismanagement and compromise in corporate governance norms and risk management has been perpetuated on IL&FS and its group companies by indiscriminately raising long term and short terms loans/borrowings through Public Sector Banks and financial institutions. It was also observed that IL&FS Company has been presenting a rosy picture by camouflaging its financial statements, and concealing and suppressing severe mismatch between its cash flows and payment obligations, total lack of liquidity and adverse financial ratios. It was also found that IL&FS company has first defaulted on commercial paper and then on short term borrowings i.e. inter corporate deposits, negative cash flows in operating activities etc. It was further observed that the consolidated balance sheet of IL&FS company indicated the extremely precarious financial position, and was virtually in deep red. It was found that intangible assets of approximately Rs.18,540 crores as on 31.03.2017, has increased to approximately Rs.20,004 crores as on 31.03.2018, thus creating a serious doubt about the correctness of the financial statements. A Report dated 03.12.2018

was submitted by the Institute of Chartered Accountants of India (“ICAI”) which has been placed on the record of the Tribunal.

4. In this background, the Union of India approached the learned Tribunal for reliefs under Sections 241 and 242 of the Companies Act.

5. Thereafter, by a detailed and reasoned order, the learned Tribunal vide Order dated 01.10.2018 allowed the said prayers and suspended the Board of Directors of IL&FS, and appointed the newly constituted Board to conduct the business as per the Memorandum and Articles of the companies. That the learned Tribunal issued the following directions:

“On the basis of the foregoing discussions and after considering the facts of the case, as narrated in the Petition filed by the Union of India, this Bench is of the considered view that it is judicious to invoke the jurisdiction prescribed under Section 241(2) of the Companies Act, 2013 and the Tribunal is of the opinion that as per Section 242(1) of the Companies Act, 2013, the affairs of the IL&FS were being conducted in a manner prejudicial to public interest. The Interim prayer of suspending the present Board of Directors and reconstitution of the new Board of Directors is hereby allowed. At present, by an additional affidavit only 6 names (supra) of Board members have proposed by the Union of India.

Further directed that the present Board of Directors be suspended with immediate effect. The six Directors as reproduced supra shall take over the R1 company immediately. Newly constituted Board shall hold a meeting on or before 8th October, 2018 and conduct business as per the Memorandum and Articles of Association of the company and the provisions of the Companies Act, 2013. Liberty is granted to the Board of Directors to select a Chairman among themselves. Thereafter, report the roadmap to NCLT, Mumbai Bench at the earliest possible not later than the next date of hearing. The suspended directors hence forth shall not represent the R1 company as a Director and shall also not exercise any powers as a director in any manner before any authority as well.

6. That by an order dated 01.10.2018, the learned Tribunal, in exercise of powers under Section 242(2) of the Companies Act, has suspended the Board of Directors of IL&FS and has further passed an order for reconstitution of the new Board of Directors. Six persons are appointed as Directors as Board members. While issuing such directions, the learned Tribunal has specifically observed that the learned Tribunal is satisfied that the affairs of the IL&FS were being conducted in a manner prejudicial to public interest. Thus, pursuant to the said

order dated 01.10.2018, the erstwhile Board Members/Directors of the IL&FS are suspended, and new Directors are appointed as Board Members and the new Board of Directors are conducting the affairs of the IL&FS and group companies. It is further ordered that the suspended Directors henceforth shall not represent the IL&FS company as Directors, and shall also not exercise any power as Directors in any manner before any authority as well. The appellant herein is the Vice President and suspended Director of the company, who alone has challenged the impugned order passed by the learned Tribunal passed under Section 130 of the Companies Act.

7. Now insofar as the submission on behalf of the appellant that the order dated 01.10.2018 passed under Section 241/242 of the Companies Act is an interim order and the same is not a final order suspending the directors and the erstwhile board of directors of the company, and therefore the observations made in the order dated 01.10.2018 cannot be considered, has no substance. It is required to be noted that as on today the order dated 01.10.2018 suspending the erstwhile directors of the company including the appellant stands and remains in operation. The same is not challenged by way of an appeal before an appropriate appellate Tribunal/Court.



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*“TATA SONS-CYRUS MISTRY” Board Drama*

*Petition Before NCLT, NCLAT*

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The board room battles in Tata Sons Ltd have now become a high profile court room battle with the Supreme Court being moved against the National Company Law Appellate Tribunal's decision reinstating Cyrus Mistry as Executive Chairman of the company.

When Ratan Tata retired as chairman of Tata Sons Ltd in 2012, he proposed a change in the laws governing the relationship between India's largest conglomerate and its key shareholder, according to sources familiar with the situation. Until then, the Tata Trusts — public charities owning two-thirds of the company — had easily protected its investment. A Tata family member had

for decades held the chairmanship at both the Trusts and the company, whose businesses include cars, software and steel. But an outsider, Cyrus Mistry, had just taken the top job.

## **CHRONOLOGY OF THE DEVELOPMENTS THAT TOOK PLACE IN THE TATA-MISTRY CASE BEFORE THE MUMBAI-BENCH OF NCLT AND NCLAT**

- a) **December 2012:** Cyrus Mistry from Shapoorji Pallonji group appointed as Executive Chairman, Tata Sons Limited. The board of directors then appointed Ratan Tata as 'Chairman Emeritus' an honorary title for his contributions to the Tata Group. Ratan Tata had stated that he would be available only for advice and there would be no overhang from his previous role.
- b) **October 24, 2016:** Cyrus Mistry ousted as Tata Sons chairman, Ratan Tata named as an interim Chairman of the group.
- c) **December 20, 2016:** Two Mistry family backed investment firms, Cyrus Investments Pvt Ltd and Sterling Investments Corporation Pvt Ltd, move the NCLT Mumbai, alleging oppression of minority shareholders and mismanagement by Tata Sons. They also challenged Mistry's removal.
- d) **January 12, 2017:** Tata Sons names N. Chandrashekar as Chairman, the then TCS Chief Executive Officer and Managing Director.
- e) **February 6, 2017:** Mistry removed as a director on the board of Tata Sons, holding company of Tata group firms.
- f) **March 6, 2017:** NCLT Mumbai sets aside plea of the two investment firms of Mistry family over maintainability issue, citing they didn't meet the

criteria 10% ownership in a company for the filing of a case of alleged oppression of minority shareholders under the Companies Act.

- g) The Mistry family owns 18.4% stake in the closely-held Tata Sons but the holding is less than 3% if preferential shares are excluded.
- h) **April 17, 2017:** NCLT Mumbai also rejects plea by the two investment firm's plea seeking waiver in the criteria of having at least 10 per cent ownership in a company for filing case of alleged oppression of minority shareholders.
- i) **April 27, 2017:** The investment firms move the NCLAT, challenging NCLT order which rejected their petitions over maintainability. They also challenged rejection of their waiver plea.
- j) **September 21, 2017:** NCLAT allows pleas by the two investment firms seeking waiver in filing case of oppression and mismanagement against Tata Sons. It, however, dismissed Mistry's other petition on maintainability saying the firms do not have more than 10 per cent in Tata Sons. The appellate tribunal directs the Mumbai-bench of the NCLT to issue notice and proceed in the matter.
- k) **October 5, 2017:** Two investment firms approach the principal bench of NCLT at Delhi, seeking transfer of the matter from Mumbai to Delhi citing likelihood of bias. The principal bench reserves order on the plea of the two investment firms.
- l) **October 6, 2017:** The Principal bench of NCLT dismisses the pleas and imposed a cost of ₹10 lakh on the two investment firms, which was to be shared by both.

- m) **July 9, 2018:** NCLT Mumbai dismisses pleas of Mistry challenging his removal as Tata Sons chairman as also the allegations of rampant misconduct on part of Ratan Tata and the company's Board. NCLT said it found no merit in his allegations of mismanagement in Tata group firms.
- n) **August 3, 2018:** The two investment firms approach the NCLAT against the order of the NCLT dismissing his plea challenging his removal as chairman of the company.
- o) **August 29, 2019:** The NCLAT admits petition filed by Cyrus Mistry in his personal capacity and decided to hear along with the main petitions filed by the two investment firms.
- p) **May 23, 2019:** The NCLAT reserves its order after completing the hearing in the matter.
- q) **December 18, 2019:** The NCLAT restores Mistry as executive chairman of Tata Sons, but suspended its implementation for four weeks in order to provide time for Tatas to appeal.
- r) **Tata sons moved Supreme Court against the order of NCLAT** to restores Mistry as executive chairman of Tata Sons.

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### *Facts of the Case:*

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On 24.10.2016, Tata Sons Ltd. held Board Meeting with several agenda items including agenda of "any other item", where under, Chairman of the Company, Mr. Cyrus Pallonji Mistry was removed from the position of Chairman of the company under the head of "any other item", without being given 15 days prescribed notice to Mr. Cyrus.

Further petition was filed by the Companies of Pallonji family having above 18% equity of the company - to file the Company Petition against the company, Mr. Ratan Tata (Chairman Emeritus of the Company-R2),

Mr. Noshir, the Trustees of Tata Trusts and various other persons on 19,12.2016 alleging that the Respondents other than the company and Mr. Cyrus, conducted/conducting the affairs of the company in oppressive manner and prejudicial against the interest of the petitioners, the company and the public, hence sought various reliefs as mentioned in the company petition and affidavits subsequently filed by them under the head of oppression and mismanagement (sections 241-244) of the Companies Act, 2013,

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*NCLT ORDER DATED 09.07.2018 IS AS FOLLOWS:*

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- a) Removal of Mr. Cyrus Mistry as Executive Chairman on 24.10.2016 is because the Board of Directors and Majority of Shareholders, i.e., Tata Trusts lost confidence in Mr. Cyrus as Chairman, not because by contemplating that Mr. Cyrus would cause discomfort to Mr. Tata, Mr. Soonawala and others. Board of Directors are competent to remove Executive Chairman; no selection committee recommendation is required before removing him as Executive Chairman.
- b) Removal of Mr. Cyrus Mistry from the position of Director is because he admittedly sent the company information to Income Tax Authorities; leaked the company information to Media and openly come out against the Board and the Trusts, which hardly augurs well for smooth functioning of the company, and we have not found any merit to believe that his removal as director falls within the ambit of section 241 of Companies Act 2013.
- c) We have not found any merit to hold that proportional representation on Board proportionate to the shareholding of the petitioners is possible so long as Articles do not have such mandate as envisaged under section 163 of Companies Act, 2013.
- d) We have not found any merit in purported legacy issues, such as Siva issue, TTSL issue, Nano car issue, Corus issue, Mr. Mehli issue and Air Asia issue to state that those issues fall within the ambit of section 247 and 242 of Companies Act 2013.
- e) We also have not found any merit to say that the company filing application under section 14 of Companies Act 2013 asking this Tribunal

to make it from Public to Private falls for consideration under the jurisdiction of section 247 & 242 of Companies Act 2013.

- f) We have also found no merit in saying that Mr. Tata & Mr. Soonawala giving advices and suggestions amounted to interference in administering the affairs of the company, so that to consider their conduct as prejudicial to the interest of the company under section 241 of Companies Act 2013.
- g) We have found no merit in the argument that Mr. Tata and Mr. Soonawala acted as shadow directors superimposing their wish upon the company so that action to be taken under section 241 & 242 of Companies Act 2013.
- h) We have not found any merit in the argument that Articles 75, 104B, 118, 121 of the Articles of Association per se oppressive against the petitioners.
- i) We have not found any merit in the argument that Majority Rule has taken back seat by introduction of corporate governance in Companies Act, 2013, it is like corporate democracy is genesis, and corporate governance is species. They are never in conflict with each other; the management is rather more accountable to the shareholders under the present regime.
- j) Corporate governance is collective responsibility, not based on assumed free-hand rule which is alien to the concept of collective responsibility endowed upon the Board.
- k) We have observed that prejudice remedy has been included in 2013 Act in addition to oppressive remedy already there and also included application of "just and equitable" ground as precondition to pass any relief in mismanagement issues, which was not the case under old Act.

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## *Appeal before NCLAT*

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On **August 3, 2018** the two investment firms approach the NCLAT against the order of the NCLT dismissing his plea challenging his removal as chairman of the company. The NCLAT reserves its order after completing the hearing in the matter. It was held by the NCLAT as follows:

- a) The proceedings of the sixth meeting of the Board of Directors of 'Tata Sons Limited' held on Monday, 24th October, 2016 so far as it relates to removal and other actions taken against Mr. Cyrus Pallonji Mistry is declared illegal and is set aside. In the result, Mr. Cyrus Pallonji Mistry is restored to his original position as Executive Chairman of 'Tata Sons Limited' and consequently as Director of the 'Tata Companies' for rest of the tenure. As a sequel thereto, the person who has been appointed as 'Executive Chairman' in place of Mr. Cyrus Pallonji Mistry, his consequential appointment is declared illegal.
- b) Mr. Ratan N. Tata and the nominee of the 'Tata Trusts' shall desist from taking any decision in advance which requires majority decision of the Board of Directors or in the Annual General Meeting.
- c) In view of 'prejudicial' and 'oppressive' decision taken during last few years, the Company, its Board of Directors and shareholders which has not exercised its power under Article 75 since inception, will not exercise its power under Article 75 against Appellants and other minority member. Such power can be exercised only in exceptional circumstances and in the interest of the company, but before exercising such power, reasons



should be recorded in writing and intimated to the concerned shareholders whose right will be affected.

- d) The decision of the Registrar of Companies changing the Company ('Tata Sons Limited') from 'Public Company' to 'Private Company' is declared illegal and set aside. The Company ('Tata Sons Limited') shall be recorded as 'Public Company'. The 'Registrar of Companies' will make correction in its record showing the Company ('Tata Sons Limited') as 'Public Company'.

It is apt to notice some observations in the Judgment dated 9th July, 2018 passed by the Tribunal are inappropriate and avoidable

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### *Appeal before Supreme Court:*

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Tata Sons has appealed to Supreme Court against the order of NCLAT dated 18<sup>th</sup> December, 2019. Which reinstated Cyrus Mistry as the executive Chairman of the Company.

Some of the key points in the statutory appeal filed by Tata Sons under section 423 of Companies Act 2013 are as follows:

1. Cyrus Mistry's term as Chairman had expired in March, 2017. NCLAT lacks jurisdiction to direct Mistry's reinstatement beyond his original term, especially when such a relief is not sought for.
2. Cyrus Mistry was removed by the majority decision of Board of Directors due to loss of confidence. NCLAT direction to restore Cyrus Mistry amounts to undermining principles of corporate democracy.

3. The removal was in accordance with the process under the Article of Association. NCLAT has not given the reasons to state how the removal process was illegal or wrong.
4. NCLAT lacks jurisdiction to declare Tata Sons as public company when it is a private company under section 2(68) of Companies Act, 2013. Tata Sons possessed all the characteristics of the private company for over 100 years since its incorporation.
5. Restoring Cyrus Mistry for his remaining term, even after expiry of his term is a recipe of disaster as it will lead to more confusion and conflicts within the company.
6. Lack of confidence in Executive Chairman is a sufficient ground to remove him. Such removal will not amount to oppression.
7. NCLAT cannot sit in appeal over the Commercial Wisdom exercised by the Board of Directors regarding the suitability and fitness of a person to act as chairman.
8. NCLAT also ordered the reinstatement of Cyrus Mistry as director of other Tata Companies on the ground that it was a logical consequence of his reinstatement as Executive Chairman. However those three companies, which are distinct legal entities, were not parties to the litigation
9. NCLAT wrongly infers that merely because Tata Trust Nominees possess affirmative voting rights, all decision of the BOD are taken at the instance of Tata Trust or under the threat of exercise of affirmative voting rights.

Considering the same Supreme Court has now stayed the National Company Law Appellate Tribunal's (NCLAT) order reinstating Cyrus Mistry as executive chairman of Tata Group. The top court noted that the tribunal "seems to have committed errors in adjudicating and seems to lack powers to pass the directions that it has."

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## *Conclusion*

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The Companies Act, 2013 has seen reformative changes with a remarkable focus on protection of minority rights. It not only gives the minority shareholders a sense of safety, but also keeps the topline in check. Prevention of Oppression and Mismanagement has seen a number of cases before NCLT and NCLAT, even more after the introduction of the New Act.

The class action lawsuit brings together and disposes of thousands of claims at one time that are impractical to litigate individually, making the process much more efficient. This reduces the chance of similar cases clogging the already overburdened courts. As not everyone has the means or the time to pursue a legal case, a group or class of people collectively with the funds and ability to raise money can bring justice to other victims who may be disadvantaged. Because it aggregates small claims, the class action format lowers the often-high cost of litigation.

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