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Long Fought Corporate Battle of the Decade

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ABSTRACT

Often both law and logic are forgotten when countered with a strong emotional stand of minorities being supressed. Cyrus Mistry had a strong and convincing emotional ground of challenging his removal from the position of chairman. However, both law and logic won in this long fought battle between Tata Sons and Cyrus Mistry. This article aims to negate all the negative opinions framed on this recent judgement, believing that it was a loss for the minority shareholders in company. The Apex court rightly set aside the arbitrary order passed by NCLAT regarding Article 75 and removal of Cyrus Mistry. This proves to set strong boundaries for all the corporate cases ahead, and explicitly stating that Articles of Association is supreme and cannot be challenged once signed by a member. The ratio decidendi is discussed in details as to how the Apex court stated the obvious laws which were overlooked by the NCLT and NCLAT, and delivered the 282 long judgment which will prove to be a huge landmark in the corporate world.

I. INTRODUCTION

India's fiercest corporate battle came to an end in courtroom with the Apex court delivering a landmark judgement in favour of Tata Sons in 2021. A bench comprising of Chief Justice SA Bobde, and Justices V Ramasubramanian and AS Bopana set aside the order of National Company Law Appellate Tribunal (NCLAT) which directed the reinstating of Cyrus Mistry as Chairman, and also noted that Article 75 of the Articles of Association of Tata Sons was oppressive in nature with regard to minority shareholders. As the Hon'ble Apex Court noted, *"One may be entitled to a collateral benefit arising out of a substantial argument, but one cannot seek to succeed on a collateral issue so as to make the substantial argument sustainable"*

Nevertheless, only one point has emerged out as the strongest in this judgement, i.e., Articles of Association holds much more value than it is given, and that once it's signed, it can't be turned around and argued upon. This paper focuses on the logical ratio decidendi laid down by the Supreme Court in ruling that the stand of oppression of minority shareholders with regard to Article 75 and removal of Cyrus Mistry falls flat. It also compares the order of NCLAT with

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regard to both the issues and the reason behind it being overruled. The Apex Court's observations and the judgement is altogether understandable in strict sense of law, given the precedents and facts. This paper aims to negate the perspective of Supreme Court having a selective approach in this case.

II. Articles of association – Constitution of a company

Memorandum of Associations and Articles of Associations together form the Constitution of a company. Articles of Association lays down the bye-laws along with rules and regulations for smooth functioning of the internal management of a company. They define the duties, rights, and powers of the governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carried out[2]. It's a public document which binds not only the company but even its members together and has paramount significance. This particular document which has proven to be a crucial and vital document for any company includes issue and transfer of shares, alteration of capital, borrowing powers, dividends, accounts, general meeting, voting rights, directors, their appointment and powers, and winding up, etc. However, Article of Association must always be in consonance with Memorandum of Association.

Articles as defined in section 2(5) of the Companies Act states "*the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this act*".[3] It entails that Articles of Association contains all the rules and regulations that govern the company policy. Further, section 10 of the act states that Memorandum of Association and Articles of Associations, after registration, shall bind the company and its members as to the same extent as if it had been signed by them. This section aims to impart contractual force to both the public documents. Articles laid out in the Articles of Association have contractual force between the company and its members as also between members inter se in relation to their rights as such members[4]. It binds the members inter se so far as the duties and rights which arise out of the Articles are concerned. As stated in Duraiswami v UIL Assurance Co[5], "The purpose of the Memorandum and Articles is to define the position of the shareholder as shareholder, not to bind the shareholder in his capacity as an individual".

However, whenever Articles of Association and Company Act are in conflict, the provisions

[2] Ashbury Railway Carriage Co. v Riche 1875
[3] The Company Act 2013
[4] Ramakrishna Industries (Pvt) Ltd v. P.R. Ramakrishnan 1988
[5] AIR 1956

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of Company Act 2013 will prevail. Hence this document, as crucial role as it plays, doesn't override Company Act 2013. The articles of a company have a binding force but do not have the force of a statute.

III. THE HUE AND CRY AGAINST ARTICLE 75 OF TATA SONS

Article 75 of Tata Sons Articles of Association was allegedly oppressive in nature against minority shareholders. Article 75 of the Articles of Association reads as follows : "*75. Company's power of transfer: The Company may at any time by special resolution resolve that any holder of ordinary shares do transfer his ordinary shares. Such member would thereupon be deemed to have served the company with a sale notice in respect of his ordinary shares in accordance with article 58 hereof, and all the ancillary and consequential provisions of these Articles shall apply with respect to the completion of the sale of the said shares. Notice in writing of such resolution shall be given to the member affected thereby. For the purpose of this Article any person entitled to transfer an ordinary share under Article 69 hereof shall be deemed the holder of such share*". A clear reading of the Article simply suggests that it allows the company to ask any shareholder to sell his/her shares.

NCLAT observed that the above stated Article embedded in Articles of Association was oppressing the minority shareholders, even though it had never been invoked in past. Foreseeing the mere possibility of it being invoked, NCLAT passed an order to mute the power of the company. It ordered the company to use it in the rarest of rare case and sparingly, and also have the reasons in writing whenever invoked. The Appellate Tribunal ordered an injunction by which the company was prevented from exercising its rights under the Article. What NCLAT failed to observe was that neutralising an Article embedded in Articles of Association merely on basis of likelihood of misuse is impermissible in law. An act which has never been done before, but merely because court believes that there is a possibility of it occurring in future, and in that passing an order to restrict a person or company is unacceptable and impermissible in any law of land. NCLAT itself agreed that it has no jurisdiction to declare any of the Articles stated in a company's Articles of Association as illegal. Further, the said Article nowhere explicitly states minority shareholders, but takes up all shareholders together. There has been no single instance of invocation of Article 75 in the main company petition. In fact, it was duly noted in observations by Supreme Court that Cyrus Mistry was party to an amendment of the said article in year 2000. This Article existed even before Mistry joined the company, and continued to be part of the company for years later as well. Mistry was aware of the Article in dispute for years. Keeping that in mind, it is also pertinent to note that a person

who has willingly become a shareholder of a company and subscribed to the Articles of Association, was a willing and consenting party to the amendments carried out in the Article in dispute cannot challenge it later.

Section 44 of the Companies Act 2013 explicitly states that shares and debentures of a member in a company shall be moveable property transferable as per the manner prescribed or laid down in the Articles of Association of a company. Shares and debentures of a company are transferable just like any other movable property. The only restriction that can be imposed on transfer of shares of a company is as laid down in articles of the company, if any. Any restriction which is not specified in the articles of a company is not binding on the company or on the shareholders[6]. Supreme Court's observation regarding Article 75 is understandable and within the ambit of law. The article poses as an exit clause for unwilling shareholders, which is a traditional method in both English and Indian law, paving a way for a safe and honourable exit. The court further noted that future action is not covered under oppression.

IV. Oppression of minority

The meaning of the term "oppression" was observed by Lord Cooper in Elder v Elder & Waston Ltd[7], "The essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely". In other words, oppressive means burdensome, harsh and wrongful. It has been explicitly stated in previous cases that a persistent and persisting course of unjust conduct must be shown; the phrase "affairs of company are being conducted" indicates a continuous wrong up to the date of the petition, isolated acts of oppression will not suffice to prove the grounds of oppression as legitimate[8].

Cyrus Mistry alleged several acts to be oppressive in nature with regard to minority shareholders, one of them being losses suffered by Tata Motors Ltd in Nano car project. What was not looked upon in-between all this was the landmark judgement that states the mere fact of business losses does not by itself show either oppression or mismanagement[9]. The Hon'ble court in Scottish Co-operative Wholesale Society v Meyer[10] held that it is absolutely necessary to show that not only there has been oppression of minority shareholders, but also that it has

[6] V. B. Rengaraj vs. V. B. Gopalakrishnan 73CC201 (SC)
[7] 1952 SC 49 Scotand
[8] H.R. Harmer Ltd, Re 1958 3 All ER 689
[9] Ashoka Betelnut Co. v M.K. Chandrakanth 1997
[10] 1958 3 All ER 66

been the affairs of the company which have been conducted in oppressive manner. The court further went on to state that it is not lack of confidence between the shareholders per se that brings the section into play. An allegation of oppression must involve at least an element of lack of probity or fair dealing to member in the matter of his proprietary right as a shareholder. Persons concerned with the management of the company's affairs must be in connection therewith be guilty of fraud, misfeasance or misconduct towards the members.

The Apex court, delivering a landmark judgement Shanti Prasad Jain v Kalinga Tubes, held that for a case of oppression and mismanagement there needs to be a conduct amounting to misconduct by the majority towards the minority. The court further iterated that the conduct under scrutiny cannot be in one isolated instance but rather a continuous act. Although Mistry alleged more than 5 instances to prove the case of oppression, but none amounted to an act of oppression, let alone be in a continuity. National Company Law Tribunal also stated that there needs to be a continuous action with a motive to prove the act of oppression and mismanagement; a mere violation of articles states in Articles of Association of a company will not suffice to prove the charges being pressed[11].

V. CAUSA PROXIMA - REMOVAL OF CYRUS MISTRY

Cyrus Mistry was first removed from the position of Executive Chairman of Tata Sons by a resolution passed by the Board on 24th of October 2016, and later on from the position of Director. Firstly, the appeal of having proportionate representation in Board for minority shareholders has no strong ground to stand on. The provision for inclusion of a representative of small shareholders in the Board of Directors has been recently inculcated under section 151 of the Companies Act 2013, which is applicable only to listed companies. To begin with, Tata Sons is not a listed company. Furthermore, the difference between minority shareholders and small shareholders has been iterated by the Apex court in the present case. A small shareholder holds shares of nominal value of not more than ₹20,000. On the other hand, a minority shareholder owns less than half of the company's total shares. Cyrus Mistry holds 18.5% of the shares of Tata Sons. The Hon'ble court rightly rejected the contention of Mistry terming himself as small shareholder.

NCLAT observed that there was nothing material on record to suggest that Tata Sons' board or Tata Trust had expressed any displeasure over Cyrus Mistry's performance. It further observed that there was enough material on record that showed that Mistry's leadership turned out to be a positive influence on Tata Sons' and that the company was performing well. NCLAT

[11] *Sidharth Gupta & Ors. Vs. M/s. Getit Infoservices Pvt. Ltd. & Ors* 2016

held that the removal of Mistry from the position was of without any basis and hence passed an order to instate Mistry back to his position "for the rest of the tenure". Although this order was widely appreciated and taken as a win for the minority shareholders, what people failed to observe and interpret was that it was completely beyond NCLAT's jurisdiction and a decision taken by not keeping the legal facts in mind. This order was passed on 18th December 2019, by the time a period of nearly 7 years had passed from the date of Mistry's appointment as Executive Chairman. The tenure had already ended as it was only for a period of 5 years, so the order to reinstate Mistry for the rest of his tenure was more of an emotional judgement than that of law. Above this, NCLAT went on to grant a relief that wasn't even sought by Mistry. It appears as NCLAT had granted relief of reinstatement without any foundation in the pleadings, pray, and basis of law.

An act of removing someone from a position cannot be termed as an oppressive act to claim relief under Companies act. This has been reiterated every now and then in various cases. In Quinlan v Essex Hinge Co. Ltd [12] it was observed "The complaining member must prove that he is suffering from oppression in his capacity as member and not in any other capacity, i.e., as a director. What ought to be established is that an individual as a member of the company has suffered due to any unfair and prejudicial conduct of the majority shareholders. The deprivation of directorship is a kind of oppression".

Supreme Court in the present case further observed that in cases where removal of a director from his position might be carried out perfectly in accordance with law but yet may be part of a bigger and larger design to oppress the interests of members. In such situations only the Tribunal can grant a relief under section 242 of the Companies Act. Unlike an administrative Tribunal or Labour Court, a Company Tribunal cannot entirely focus on the manner of removal of a person from his position.

Keeping in mind the causa proxima of the case, the Apex court went on to observe that reinstating does not come in the scope of relief as it will only perpetuate disagreements. The court noted that certain failed business decisions cannot be called as acts of oppressive to minority shareholders, neither can losing confidence in an individual amount to the same.

VI. CONCLUSION

It can be unanimously agreed upon that Articles of Association, being a public document is supreme, and once it's signed, a member cannot turn around and challenge the same. Although

[12] 1996 2 BCLC 47 Ch. D

Mistry had more of an emotional stand than that of strong grounds of law and facts supporting him, the Apex court rightly scrutinised the case and put an end to the long fought battle between Tata Sons and Cyrus Mistry. NCLAT's order needed to be overturned before it became a negative precedent that could have been misused. Supreme Court's verdict however came out as harsh judgement for minority shareholders, but in strict legal sense, it was all done within the ambit of law. The only thing that is a major drawback is that the Hon'ble court asked both the parties to decide valuation among themselves, sending them back to boardroom where all the drama began. This appears to be sending both the parties to exactly where they began, only now one has lost the case and the other emerged as a winner. It is also pertinent to note that the Articles of Association of Tata Sons give a very little to almost negligible leeway to Mistry in deciding the valuation of shares.

However, it is clear that with regard to the Article 75 of Tata Sons' Articles of Association and removal of Cyrus Mistry from his position, the Apex court successfully laid out a strict boundary for corporate law. It also appeared as a wakeup call for minority shareholders to be aware of how important Articles of Association of a company is and the major role it can play in a situation. Also, in case of oppression of minority shareholders, it helps to bring light on cases where parties misuse the given provision to gain benefits. As the court had duly noted - one cannot seek to succeed on a collateral issue so as to make the substantial argument sustainable.

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