

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

CA No. 53/JPR/2021,
CA No. 57/JPR/2021
In CP No. 222/241-242/JPR/2020

IN THE MATTER OF:

RAJ KUMAR JOSHI & ORS.

...PETITIONERS

Versus

SHRI GANPATI FERTILIZERS LIMITED & ORS.

...RESPONDENTS

CA No. 53/JPR/2021

MEMO OF PARTIES

SHRI GANPATI FERTILIZERS LTD.

Gora Ji ka Nimbahera, Kapasan
Chittorgarh- 312202 (Rajasthan)

...Applicant No. 1

DCM SHRIRAM LIMITED

(formerly known as DCM Shriram Consolidated Ltd.)
2nd Floor, West Wing, World Mark 1,
Aerocity, New Delhi- 110037

...Applicant No. 2

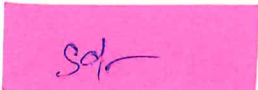
VERSUS

MR. RAJ KUMAR JOSHI

Near Panchayati Kuan, Ward No. 11,
Suraj Garh, District Jhunjhunu
(Rajasthan)

...Respondent No. 1

CA No. 53/JPR/2021,
CA No. 57/JPR/2021
In CP No. 222/241-242/JPR/2020





SMT. KUSUM JOSHI

Near Panchayati Kuan, Ward No. 11,
Suraj Garh, District Jhunjhunu
(Rajasthan)

...Respondent No. 2

MR. PRAKASH CHAND PUROHIT

Purohiton ka Mohallah, District
Jhunjhunu (Rajasthan)

...Respondent No. 3

MR. SOVAN CHAKRABORTY

D-128, 11th Floor, Saket, New Delhi

...Respondent No. 4

CA No. 57/JPR/2021

MEMO OF PARTIES

MR. SOVAN CHAKRABORTY

D-128, 11th Floor, Saket, New Delhi,
110017

...Applicant

VERSUS

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CA No. 53/JPR/2021,

CA No. 57/JPR/2021

In CP No. 222/241-242/JPR/2020

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Purohiton ka Mohallah, District
Jhunjhunu (Rajasthan)

...Respondent No. 3

SHRI GANPATI FERTILIZERS LIMITED
Gora Ji ka Nimbahera, Kapasan
Chittorgarh- 312202 (Rajasthan)

...Respondent No. 4

DCM SHRIRAM LIMITED
(formerly known as DCM Shriram Consolidated Ltd.)
2nd Floor, West Wing, World Mark 1,
Aerocity, New Delhi- 110037

...Respondent No. 5

For the Petitioner : V. L. Mathur, Adv.
For the Respondent : Nilanjan Chatterjee, Adv.
Prem Prakash, Adv.
Prashant Kumar Sharma, Adv.

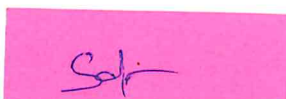
Order Pronounced On: 16.07.2024

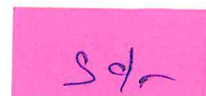
ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The Company Application bearing no. 53/JPR/2021 has been filed by *Sri Ganpati Fertilizers Ltd.* ('Respondent Company 1'/ 'SGFL') and *DCM Shriram Limited* ('Respondent Company 2'/ 'DCM') under Section 244 of the Companies Act, 2013 seeking dismissal of the main Company Petition bearing no. 222/241-242/JPR/2020 filed by *Mr. Raj Kumar Joshi, Smt. Kusum Joshi* and *Mr. Prakash Chand Purohit* ('Petitioners'). Further, the Company Application bearing no. 57/JPR/2021 has been filed by *Sovan*

CA No. 53/JPR/2021,
CA No. 57/JPR/2021
In CP No. 222/241-242/JPR/2020





Chakraborty ('Applicant') under Section 244 of the Companies Act, 2013 seeking dismissal of the main Company Petition bearing no. 222/241-242/JPR/2020. In both the aforementioned Applications it has been alleged that the Petitioners in the CP no. 222/241-242/JPR/2020 do not have the requisite shareholding as mandated under Section 244 of the Companies Act, 2013 and therefore, the Company Petition deserves to be dismissed. Since, the prayers sought in both the Applications are of the same nature, therefore, for the sake of brevity, both the Applications are adjudicated upon together.

2. Before delving into the details of the aforementioned Applications, it is imperative to give a brief background of the main CP No. 222/241-242/JPR/2020. The Company Petition has been preferred by the Petitioners under Section 241-242 of the Companies Act, 2013 alleging certain acts of oppression & mis-management in the affairs of Respondent Company No. 1 i.e., *Shri Ganpati Fertilizers Limited*. The brief facts of the main Petition are as under:

- 2.1. The Petitioner Nos. 1 to 3 are the Promoters and Petitioner No. 1 is also the Managing Director of *SGFL*. It was alleged that *SGFL* was a family concern wherein the Petitioners along with their family members held 81.41% in the Company. Since, *SGFL* was in need of funds, it approached DCM for financial assistance. On the aforementioned request, DCM agreed to provide funds for raw materials which were to be converted into GSSP and SSP and further sold to DCM at a fixed

conversion price. The terms of the assistance included pledging of 82.88% equity shares of SGFL and the same was agreed to by the promoters of SGFL.

2.2. Consequently, a Supply and Purchase Agreement dated 31.01.2006 and a Memorandum of Understanding ('MoU') dated 11.01.2006 i.e., Umbrella Agreement, were entered into between DCM and SGFL. Subsequently, the Petitioners made a request for amendment of the aforementioned agreements *vide* letter dated 26.12.2007, however, no heed was paid to the same by DCM.

2.3. Thereafter, DCM appointed four of its employees as nominee Director in SGFL on 27.03.2008 without giving any notice to the Petitioners. Further, in the Board Meeting of SGFL dated 05.05.2008, the pledged equity shares i.e., 82.88%, were transferred in favour of DCM without any notice to the existing directors/Petitioners of SGFL. It was contended that the said transfer was in violation of the pledge agreement as per which the pledge of shares were to remain valid for the entire period of the agreement. In violation of the terms of the Agreement, the shares were pre-maturely transferred *vide* Resolution dated 05.05.2008 in favour of DCM.

2.4. DCM in its letter dated 27.05.2008 withdrew the powers bestowed upon Petitioner No. 1 who was MD of SGFL and asked him to handover the assets, records etc. of SGFL. Moreover, the registered

office of SGFL was changed *vide* resolution dated 15.05.2008. In the meantime, the Petitioners and other existing directors of SGFL were removed in an arbitrary manner in the Extra Ordinary General Meeting ('EGM') dated 11.06.2008 without following the prescribed procedure. To redress the aforementioned grievances, Petitioner No. 1 also filed a criminal complaint and a complaint to Law and Justice Minister.

- 2.5. It was contended by the Petitioners that Petitioner No. 1 was removed in complete violation of Section 256 of the Companies Act, 1956. The Petitioner alleged mismanagement and oppression as contained in Section 241 of the Companies Act, 2013 on the basis of the aforementioned facts.
3. During the pendency of the Petition, CA No. 53/JPR/2021 has been filed by *Shri Ganpati Fertilizers Limited* and *DCM Shriram Limited* under Section 244 of the Companies Act, 2013 seeking dismissal of the Company Petition. The contentions raised in the aforementioned Application are summarized hereunder: -
- 3.1. It was contended that the Petitioners do not have the requisite shareholding as envisaged under Section 244 to maintain the instant Petition of oppression and mismanagement. The authorised share capital of SGFL is 22,00,000 (Twenty-Two Lakh) shares having face value of Rs. 10 per share and the issued capital of SGFL is 21,50,000 (Twenty-One Lakh Fifty Thousand) shares of Rs. 10 per share. The

cumulative shareholding of the Petitioners is 1,23,180 (One Lakh Twenty-Three Thousand One Hundred and Eighty) shares, hence, it is way short of the requirement prescribed under Section 244 of the Companies Act, 2013. Further, the total number of members of SGFL is 56, and the Petition has been filed by merely three member and the Petitioners have failed to produce any evidence concerning the consent of the other members of the company to satisfy the threshold of 1/10th of the total number of members of SGFL. Therefore, the petition is not maintainable in view of Section 244 of the Companies Act, 2013. The Applicants relied upon the Judgment of the Hon'ble Apex Court in the case of *Rajmundri Electric Supply v/s A Nageshwara Rao and Ors.* AIR 1956 SC 213 in support of its contentions.

3.2. This Tribunal lacks territorial jurisdiction to adjudicate the present Petition since the registered office of SGFL was situated at New Delhi at the time of filing of petition. Subsequently, the registered office was changed to Chittorgarh w.e.f. 09.01.2021. It was contended that in cases of oppression and mismanagement, facts and circumstances at the time of filing of the Petition are of utmost relevance and the adjudication of a Petition remain unaffected by the subsequent change in circumstances. Thus, the Company Petition is not maintainable and the subsequent change in registered office of SGFL will not confer the jurisdiction upon the Tribunal.

3.3. It was submitted that Petitioner No. 1 has not enclosed any letter of consent/ authority from Petitioner No. 2 and 3 in support of the Company Petition. The affidavit filed in support of the Company Petition is given only by Petitioner No. 1 and the said affidavit is silent about any authority being granted to Petitioner No. 1 on behalf of Petitioner Nos. 2 & 3. Thus, the instant Petition filed by Petitioner No. 1 who only holds 10 shares is not maintainable.

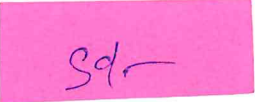
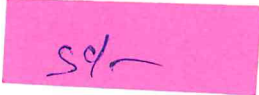
3.4. The petitioners have failed to show any prejudice being caused to them or to public at large from the alleged acts of oppression and mismanagement. Further, in order to trigger the invocation of Section 241-242 of the Companies Act, it is imperative that a case for winding up of the company is made out. In the instant Petition, there is neither any pleading nor any evidence so as to warrant winding of SGFL. Thus, the precondition for invocation of Section 241 and 242 of the Companies Act, 2013 remains unsatisfied.

3.5. The grievance of the petitioners in the Company Petition revolves around their removal from the directorship of SGFL and the same cannot be projected as something that would trigger the just and equitable clause for winding up or to grant of relief under Sections 241-242 of the Companies Act, 2013. The Applicants placed reliance upon the Judgment of *Hanuman Prasad Bagri & Ors. Vs. Bagress Cereals Pvt. Ltd.* (2001) 4 SCC 420 in support of its contentions.

- 3.6. The allegations of Oppression and Mismanagement by the Petitioners pertains to the year 2008 and the Petitioners despite having complete knowledge of the incidents chose not to file any application before any court of law for 12 long years and has not justified the same in the Petition. The Applicants relied upon Section 433 of the Companies Act, 2013 to contend that the provisions of Limitation Act are applicable to the proceedings before the NCLT and NCLAT. A conjoint reading of Section 433 of the Companies Act, 2013 and Article 137 of the Limitation Act, 1963 reveals that the outer limit of limitation for the Petitioners to file the Petition ended long back in the year 2011. Thus, the Petition is grossly time barred and liable to be dismissed.
- 3.7. The Company Petition suffers from non-joinder and misjoinder of parties. It was submitted that *M/s Otswal Phoschem India Limited* has not been arrayed as a party in the Company Petition although DCM has already sold its shareholding to the said Company. Thus, *M/s Otswal Phoschem India Limited* was a necessary and a proper party to the present proceedings.
4. The Petitioners have filed their Reply to CA No. 53/JPR/2021 *vide* diary No. 2290/2021 dated 08.11.2021 whereby stating the following:
- 4.1. The Petitioners submitted that from the supply and purchase agreement dated 31.01.2006, 82.88% equity shares were held by SGFL which were pledged in favour of DCM. Further as per EGM dated 11.06.2008

one *Mr. B. L. Sachdeva*, proxy holder of DCM was holding 17,50,275 equity shares, constituting 81.4% of the voting power. In the said meeting Petitioners were removed from the post of Directors of SGFL. To redress the aforementioned grievances, Petitioner No. 1 also filed a criminal complaint and a complaint to Law and Justice Minister.

- 4.2. It was stated that the Petitioners have not added *Otswal Phoschem India Limited* as party in present proceedings. The reason behind this was that entire deal was undertaken by the Respondents without any notice to Petitioners and secondly the transfer of shareholding was illegal as the shares were pledged with Respondents as security and no prior notice was given to the Petitioners before said deal and no prior notice was given to the Petitioners about the EGM, in which said decision was taken.
- 4.3. The main Petition is not time barred by limitation as the instances of oppression and mismanagement provides continuous cause of action. Moreover, AGM of members of SGFL took place on 30.09.2020 however no notice of this meeting was given to the Petitioners.
- 4.4. The Petitioners have produced notice of AGM in the main Petition wherein decision was taken to shift the registered office to State of Rajasthan and as such the NCLT has territorial jurisdiction to hear and decide and an application was moved to Registrar NCLT Jaipur for

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issuance of such notice to Respondent No. 1 and this Tribunal permitted to issue notice on changed address of Respondent No. 1.

5. SGFL and DCM had filed their Rejoinder *vide* Diary No. 2833/2021 dated 22.12.2021 wherein they reiterated the contentions made in the Application and stated the following:

5.1. In order to maintain Petition under Section 241-242 of the Companies Act, 2013, the minimum threshold limit prescribed under Section 244 has to be followed. Admittedly, the Petitioners do not hold the requisite number of Shares and thus, the Petition deserves to be dismissed.

5.2. It was contended that the Petitioners have not sought waiver of the threshold requirement prescribed under Section 244 of the Companies Act, 2013. In the absence of an application for waiver by the Petitioner, the threshold cannot be automatically waived by the Tribunal. In support of its contention, the Applicants relied upon Rule 83A of the NCLT Rules and the same is reproduced hereunder: -

“An application in Form No. NCLT. 9 may be filed before the Tribunal for waiver of requirement of clause (a) or (b) of Section 244 of the Act which shall be accompanied by such documents as mentioned in Annexure-B”

5.3. It was contended that the transfer of shares in favour of DCM was made in compliance of the Contract Act as well as Companies Act, 1956.

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6. Another Company Application bearing no. 57/JPR/2021 has been filed by *Mr. Sovan Chakraborty* under Section 244 of the Companies Act, 2013 seeking dismissal of the company petition on the following grounds: -

6.1. It was contended that the Petitioners do not have the minimum threshold as prescribed under Section 244 of the Companies Act to file and maintain the instant Petition under Sections 241-242 of the Companies Act, 2013. It was submitted that neither the Petitioner has the requisite shareholding nor the Petition has been filed by minimum number of the Shareholders as provided under Section 244 of the Act.

6.2. It was pointed out that the issued share capital of SGFL is 2150000 out of which the cumulative shareholding of the Petitioners is 123180 which is less than 6% of the total issued share capital of SGFL. Further, the total number of members of SGFL is 56 and the instant Petition has been filed only by 3 members. Thus, the Company Petition in the instant case is liable to be dismissed.

6.3. It was submitted that the Applicant i.e., *Mr. Sovan Chakraborty*, has retired from the directorship of the SGFL and has ceased to be a director of SGFL much prior to the filing of the present Petition. The Applicant had tendered his resignation letter to the Board of Directors of DCM on 02.08.2018 which was duly accepted on 10.08.2018 w.e.f. 02.08.2018. Further, Form DIR-12 had also been filed.

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- 6.4. It was submitted that Petitioner No. 1 has not enclosed any letter of consent/ authority from Petitioner No. 2 and 3 in support of the Company Petition. The affidavit filed in support of the Company Petition is given only by Petitioner No. 1 and the said affidavit is silent about any authority being granted to Petitioner No. 1 on behalf of Petitioner Nos. 2 & 3. Thus, the instant Petition filed by Petitioner No. 1 who only holds 10 shares is not maintainable.
- 6.5. It was contended that the Petitioners have not sought waiver of the threshold requirement prescribed under Section 244 of the Companies Act, 2013. In the absence of an application for waiver by the Petitioner, the threshold cannot be automatically waived by the Tribunal.
- 6.6. The allegations of Oppression and Mismanagement by the Petitioners pertains to the year 2008 and the Petitioners despite having complete knowledge of the incidents chose not to file any application before any court of law for 12 long years and has not justified the same in the Petition. The Applicant relied upon Section 433 of the Companies Act, 2013 to contend that the provisions of Limitation Act are applicable to the proceedings before the NCLT and NCLAT. A conjoint reading of Section 433 of the Companies Act, 2013 and Article 137 of the Limitation Act, 1963 reveals that the outer limit of limitation for the Petitioners to file the Petition ended long back in the year 2011. Thus, the Petition is grossly time barred and liable to be dismissed. In support

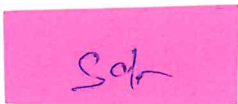
of his contentions, the Applicant relied upon the case of *Tata Consultancy Limited v/s Cyrus Investments Pvt. Ltd. and Others* 2021 SCC OnLine SC 272.

- 6.7. The grievance of the petitioners in the Company Petition revolves around their removal from the directorship of SGFL and the same cannot be projected as something that would trigger the just and equitable clause for winding up or to grant of relief under Sections 241-242 of the Companies Act, 2013. The Applicants placed reliance upon the Judgment of *Hanuman Prasad Bagri & Ors. Vs. Bagress Cereals Pvt. Ltd. (2001) 4 SCC 420* in support of its contentions.
- 6.8. The Applicant stated that Section 241 and 242 of the Companies Act does not permit the Tribunal to read into the sections and grant it the power to make an order for reinstatement as prayed in the Petition. Such a relief is barred by Section 14 of the specific Relief Act, 1963. Further, the Tribunal cannot make an order for enforcing a contract which is dependent on personal qualifications of a person. The Applicant relied upon the case of *Executive Committee of Vaish Degree College v/s Lakshmi Narain (1976) 2 SCC 58*.
- 6.9. This Tribunal lacks territorial jurisdiction to adjudicate the present Petition since the registered office of SGFL was situated at New Delhi at the time of filing of petition. Subsequently, the registered office was changed to Chittorgarh w.e.f. 09.01.2021. It was contended that in cases

of oppression and mismanagement, facts and circumstances at the time of filing of the Petition are of utmost relevance and the adjudication of a Petition remain unaffected by the subsequent change in circumstances. Thus, the company petition is not maintainable and the subsequent change in registered office of SGFL will not confer the jurisdiction upon the Tribunal.

6.10. The petitioners have failed to show any prejudice being caused to them or to public at large from the alleged acts of oppression and mismanagement. Further, in order to trigger the invocation of Section 241-242 of the Companies Act, it is imperative that a case for winding up of the company is made out. In the instant Petition, there is neither any pleading nor any evidence so as to warrant winding of SGFL. Thus, the precondition for invocation of Section 241 and 242 of the Companies Act, 2013 remains unsatisfied.

6.11. The Company Petition suffers from non-joinder and misjoinder of parties. It was submitted that *M/s Otswal Phoschem India Limited* has not been arrayed as a party in the Company Petition although DCM has already sold its shareholding to the said Company. Thus, *M/s Otswal Phoschem India Limited* was a necessary and a proper party to the present proceedings.

SdrSdr

7. The Petitioners filed their Reply vide diary No. 2291/2021 dated 08.11.2021 to the Company Application bearing no. 57/JPR/2021 and stated the following:

7.1. *Mr. Sovan Chakraborty*, Applicant/Respondent, was an officer of the DCM and later became a Director of SGFL and signed the supply and purchase agreement dated 31.01.2006 on behalf of DCM. Subsequent to the signing of the agreement, Petitioner no. 1 sought amendment of the supply and purchase agreement but no heed was paid to the same by *Mr. Sovan Chakraborty*.

7.2. DCM appointed four of its nominees as Director of SGFL in the meeting on 27.03.2008 and *Mr. Sovan Chakraborty* filed Form No. 32 without any notice to Petitioner No. 1.

7.3. The Share Certificates of Petitioner No. 1 were pledged with DCM (cover 80% of the equity share capital of SGFL totalling 17,50,280 equity shares). The said shares were transferred in favour of DCM without any notice to Petitioner No. 1. Further, the Petitioners along with other directors were removed as directors of SGFL in the EOGM dated 11.06.2008 without any notice. In this regard, the Petitioners submitted a complaint dated 06.03.2017 concerning fraud to RoC and to the Office of Director, Serious Fraud Investigation Office.


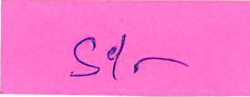
7.4. Concerning the retirement of the Respondent, it was submitted that mere retirement from service will not absolve the Respondent from the

criminal liability as per Section 241 (3)(a) of the Companies Act. Further, it was alleged that the Applicant/Respondent has filed the instant Application instead of filing a Reply to the Petition under section 241, 242 to avoid the factual misdeed raised by the petitioners right from the year 2008.

7.5. The affairs of the Company conducted in a manner prejudicial or oppressive to petitioners as laid down under clause (a) and (b) of subsection 3 (a) of Section 241. The Respondents, particularly Respondent No. 3, are guilty of fraud and breach of trust and the Petitioners are raising this issue continuously on all the channels provided under law and as such the present petition cannot be treated as frivolous.

7.6. In relation to the transfer of shares of DCM in favour of *Otswal Phoschem India Ltd.*, it was submitted that the said handing over of SGFL took place without knowledge of the Petitioners and the entire exercise took place without knowledge of the Petitioners. Further, the fact of transfer of shares was not in the knowledge of the Petitioners and the same was done in utter disregard of the provisions of law.

7.7. The Petitioners urged that the alleged acts of mismanagement and oppression provides a continuous cause of action and as such the present Petition has been filed within time and is not barred by limitation.

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8. Mr. Sovan Chakraborty, Applicant/Respondent, has further filed a Rejoinder to the Reply filed by Petitioners in CA No. 57/JPR/2021 *vide* Diary No. 2566/2021 dated 02.12.2021 and stated the following:
- 8.1. In the Rejoinder, the Applicant reiterated its earlier submissions and urged dismissal of the Petition on the ground of limitation. Further, the Applicant stated that the equity shares of SGFL were transferred in due compliance of the Umbrella Agreement dated 30.01.2006 read with the Companies Act, 1956. Further, the transfer of shares was approved *vide* resolution dated 05.05.2008 and the share certificates were endorsed in favour of SGFL.
- 8.2. The Applicant/Respondent placed reliance upon the Judgment of *Hanuman Prasad Bagri v/s Bagress Cereals Pvt. Ltd.* (2001) 4 SCC 420 in support of his contentions.
9. The Petitioners filed a Reply to the Rejoinder filed by the Applicant/Respondent *vide* Diary No. 602/2022 wherein they have reiterated their earlier submissions and have brought on record the letters dated 20.05.2010 and 07.10.2014 addressed to *Mr. Sovan Chakraborty*.
10. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply and Rejoinder along with the documents enclosed therein.
11. In the instant case, two Applications bearing *CA No. 53/JPR/2021* and *CA No. 57/JPR/2021* have been filed challenging the maintainability of the

Company Petition bearing CP No. 222/241-242/JPR/2020. The moot question of law in the aforementioned Applications relates to filing of the Company Petition without meeting the threshold prescribed under Section 244 of the Companies Act, 2013. It has been contended that the Petitioners neither has the requisite no. of shares nor the Petition has been filed with the required number of shareholders, and thus, the Petition deserves to be dismissed.

12. Before diving into the merits of the case, it is relevant to first refer to Section 244 of the Companies Act, 2013:

Section 244. Right to apply under Section 241–

(1) The following members of a company shall have the right to apply under section 241, namely:–

(a) in the case of a company having a share capital, 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;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members:

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (1) or clause (b) so as to enable the members to apply under section 241.

Explanation– For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(2) Where any members of a company are entitled to make an application under sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make an application on behalf and for the benefit of all of them.

Sd/-

Sd/-

13. Upon perusal of Section 244 of the Companies Act, 2013, it is evident that only those members of a company shall have the right to file an Application under Section 241 of the Companies Act, 2013 who fulfil the criteria laid down under the provisions of clause (a) or clause (b) of the Section 244. The qualifications prescribed under the section seeks to ensure that only persons with sufficient interest in the affairs of the company can file the petition under Section 241 of the Companies Act, 2013. The proviso to Section 244(1) provides that the Tribunal have ample powers to waive the requirements under the Section to enable minority shareholders to file petitions under Section 241 so that the complaints of oppression and mismanagement are not forced to be shelved for want of the qualification requirements under the Section.
14. The Hon'ble NCLAT in the matter of *Cyrus Investments Private Limited vs. Tata Sons Limited*, (2017) SCC Online 261/Company Appeals (AT) No.133 and 139 of 2017, has laid down that while examining an application of waiver, it is not open for the Tribunal to examine the merits of the proposed application seeking reliefs against cases of oppression and/or mismanagement. Further, at para 151 and 152 of the Order in this case of *Cyrus Investments Private Limited (Supra)*, the Hon'ble NCLAT has laid down the conditions for waiver u/s 244 and the same is reproduced hereunder:

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“151. Normally, the following factors are required to be noticed by the Tribunal before forming its opinion as to whether the application merits waiver of all or requirement as specified in clauses (a) and (b) of sub-section (1) Section 244:-

- (i) Whether the applicants are member(s) of the company in question? If the answer is in negative i.e. the applicant(s) are not member(s), the application is to be rejected outright. Otherwise, the Tribunal will look into the next factor.
- (ii) Whether (proposed) application under Section 241 pertains to oppression and mismanagement? If the Tribunal on perusal of proposed application under Section 241 forms opinion that the application does not relate to ‘oppression and mismanagement’ of the company or its members and/or is frivolous, it will reject the application for waiver. Otherwise, the Tribunal will proceed to notice the other factors;
- (iii) Whether similar allegation of ‘oppression and mismanagement’, was earlier made by any other member and stand decided and concluded?
- (iv) Whether there is an exceptional circumstance made out to grant waiver, so as to enable members to file application under Section 241 etc.?

152. The aforesaid factors are not exhaustive. There may be other factors unrelated to the merit of the case which can be taken into consideration to whether application merits ‘waiver’.”

15. In view of the guidelines laid down in the aforementioned Judgment, to adjudicate upon the maintainability of the Petition, this Adjudicating Authority has to determine whether the Petitioners in the instant case satisfy the above guidelines or not.
16. As far as the shareholding of the Petitioners in SGFL is concerned, the same is reproduced hereunder as per the records of the case: -

Sr. No.	Name of the Shareholder	No. of Shares
1.	Raj Kumar Joshi	10

Sr. No.	Name of the Shareholder	No. of Shares
2.	Kusum Joshi	10
3.	Prakash Purohit	123160
Total Shares		123180
Consolidated Shareholding Percentage		5.72%

17. Once the membership of the Petitioners in SGFL is established, it remains to be seen whether the Petition pertains to Oppression and Mismanagement and whether the Petitioners have made out an exceptional case for grant of waiver.
18. In the instant case, SGFL entered into a Supply and Purchase Agreement dated 31.01.2006 and MoU (Umbrella Agreement) dated 11.01.2006 with DCM. As a condition of providing funds, DCM stipulated that 82.88% of equity shares of SGFL would be pledged with it and the same was agreed to by the promoters of SGFL. Subsequently, DCM appointed four of its nominees viz. *Srikanth Chundi, Sharad Kumar Singh, Vivek Srivastva* and *Sanjiv Lal Mathur* as directors of SGFL in the Board Meeting dated 27.03.2008. Further, in the Board Meeting dated 05.05.2008, DCM transferred the pledged shares of SGFL in its favour. Thereafter, in the EGM dated 11.06.2008, *Mr. Raj Kumar Joshi* was removed from the post of Managing Director and Director of SGFL, and *Mr. Prakash Chand Purohit* and *Mrs. Kusum Joshi* were removed from the directorship of SGFL.
19. In the instant Petition, the Petitioners have challenged the aforementioned actions that were taken way back in the year 2008. The same become

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inconspicuous from the prayer clause of the Petition which is reproduced hereunder: -

- “(i) Removal of petitioners from the post of Directors of the Company SGFL contrary to law and as such illegal;*
(ii) Restore the humble petitioners to the office of Directors of the Company SGFL;
(iii) Direct the respondents to vacate the office of Directors of the Company SGFL;
(iv) Direct DCM Shriram Consolidated Limited and respondents to return pledge of the equity shares held by the petitioners of the Company SGFL total 82.88% and documents given towards equitable mortgage by deposit as per clause 5.1 and 5.3 of the Agreement dated 31.01.2006 (Annexure-P2) to the Company SGFL and handover the possession of the factory premises;
(v) Declare the supply and purchase Agreement dated 31.01.2006 (Annexure-P2) and umbrella Agreement as fraudulent act of DCM Shriram Consolidate Limited;
(vi) Declare that whatever action taken by the respondents No. 2 to 3 are illegal and not binding on respondent No. 1 the Company SGFL;”

20. A perusal of the reliefs prayed by the Petitioners makes it amply clear that in the guise of the Petition for mismanagement, the Petitioners are trying to challenge the transfer of shares and their removal from the directorship which occurred way back in the year 2008. Further, it is imperative to mention that the said Supply and Purchase Agreement dated 31.01.2006 and MoU (Umbrella Agreement) dated 11.01.2006 were admittedly entered into by SGFL and the promoters of SGFL agreed to pledge 82.88% of equity shares to DCM.

Sd/-

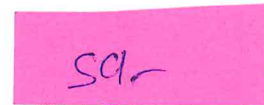
Sd/-

21. On perusal of the instant Application, it appears that the Petitioners are trying to cancel the Supply and Purchase Agreement dated 31.01.2006. As far as the allegations of the Petitioners *qua* the Supply and Purchase Agreement and change in directorship and shareholding of SGFL is concerned, we cannot be oblivious to the fact that there is a gap of 14 years in happening of the said acts and filing of the instant Petition. Further, the Petitioner has neither justified the delay nor has been able to make out an exceptional case that can warrant the interference of this Tribunal under Section 244 of the Companies Act, 2013.
22. In so far as the allegations concerning change in the registered office of SGFL is concerned, we are of the *prima facie* view that the same does not relate to oppression and mismanagement of the Company. Further, the remaining allegations raised by the Petitioners with regards to the alleged oppression and mismanagement of SGFL cannot be termed as exceptional in nature so as to warrant the waiver under Section 244 of the Companies Act, 2013. Moreover, in the instant case, the Petitioners have not filed any Application under Section 244 of the Companies Act, 2013 seeking waiver of the mandatory requirement for filing an Application under Section 241-242 of the Companies Act, 2013.
23. Thus, we observe that the instant Petition under Section 241-242 has been filed by the Petitioners who does not have the required shareholding to meet the threshold as prescribed under Section 244 of the Companies Act, 2013.

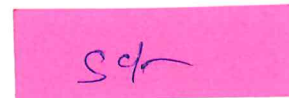
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Further, it cannot be held that the Petitioners have made out a case of exceptional circumstances for grant of waiver to maintain a Petition under Section 241-242 of the Companies Act.

24. In view of the forgoing, we are of the opinion that the Petitioners have failed to meet out the requirements set out in the case of *Cyrus Investments Private Limited (Supra)* for grant of waiver under Section 244 of the Companies Act, 2013. Thus, we allow the Applications bearing *CA No. 53/JPR/2021* and *CA No. 57/JPR/2021* challenging the maintainability of the Company Petition bearing no. *CP No. 222/241-242/JPR/2020*. Consequently, the *CP No. 222/241-242/JPR/2020* is not maintainable and disposed off.



**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**



**RAJEEV MEHROTRA,
TECHNICAL MEMBER**