NATIONAL COMPANY LAW TRIBUNAL
COURT ROOM NO. 1,
MUMBAI BENCH

Item No. 45

MA 3216/2019 CA 40/2020 CA 473/2020 IA 28/2021 In CP 1498/2019

CORAM:

SH. PRABHAT KUMAR **JUSTICE VIRENDRASINGH BISHT (Retd.)**

HON'BLE MEMBER (TECHNICAL) **HON'BLE MEMBER (JUDICIAL)**

ORDER SHEET OF THE HEARING ON **24.01.2024**

NAME OF THE PARTIES: **ITC LTD & ANR V/S HOTEL LEELA VENTURES LTD & ORS.**

Section 242(4),241- 242 of the Companies Act, 2013

ORDER

1. Mr. Aveez Gazdar, Advocate a/w Ms. Rohini Jaiswal, Advocate i/b Veritas Legal appeared for the Respondent no. 1.
2. Mr. Ravitej Chilumuri, Advocate a/w Ms. Shobhana Narayan, Advocate a/w Ms. Radhika Kulkarni, Advocate i/b Khaitan & Co. appeared for the Respondent no. 16.
3. At the request of Counsel appearing for the parties, list this matter on **12.02.2024** for hearing.

Sd/- **Sd/-**

PRABHAT KUMAR **JUSTICE VIRENDRASINGH BISHT**

MEMBER (TECHNICAL) **MEMBER (JUDICIAL)**

Sapna

THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

M.A. 1544 OF 2019

Under Section 244(1) of the Companies Act, 2013

ITC Limited & Another

…Applicant

In the matter of

C.P. No. 1498/MB/2019

ITC Limited & Another

… Applicant

Vs.

Hotel Leela Venture Limited & Others

… Applicant

Order delivered on: 24.01.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Darius J Khambata, Ld. Sr. Advocate a/w Mr Soli Cooper, Ld. Sr. Advocate and Mr. Yahaan Gooper, Ms. Yagandhara K, Mr. Tushar a/w Ms. Sneha Singh and Ms. Alvina Godwin, Advocates

For the Respondents : Mr. Ravi Kadam. Ld. Sr. Advocate a/w Mr. Rohan Kadam and Ms. Gauri Joshi, Advocate for Respondents No. 2,3,7 & 14

Mr. Ashish Kamath, Ld. Sr. Advocate a/w Mr. Areez Gazdar, Advocates for Respondent No.1

Mr. Rohit Gupta a/w Ms. Shobhana Narayan and Mr. Ravitej Chilimuri and Ms. Radhi Kulkarni, Advocate for Respondent No. 16

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application MA 1544/2019 is filed by M/s ITC Limited and M/s Russell Credit Limited ("Applicants") in C.P. No. 1498 of 2019, filed u/s 241 & 242 of Companies Act, 2013 against the alleged acts of Oppression and Mismanagement of the Respondents, seeking waiver of conditions stipulated in Section 244 of the Companies Act, 2013.

2. The Applicant has submitted that it held 4,99,53,055 and 50,27,565 fully paid up equity shares, representing 11.78%, in the share capital of Respondent No. 1 until September 2017. The promoters held 63.88% of the fully paid up share capital of Respondent No. 1 i.e. Hotel Leelaventure Limited. A sum of Rs. 4150.14 crores, being debt owed by Respondent No. 1 was assigned by the Corporate Debt Restructuring (CDR) lenders to M/s JM Financial and Assets Reconstruction Company Limited ("Respondent No. 16") and one Phoenix ARC Pvt Limited in 2014. Out of the said debt of Rs. 4150.14 crores, about 95.6% of the CDR debt was assigned to Respondent No. 16.

2.1. In September 2017, Respondent No. 16 converted about Rs. 275 crores of its loan at a premium of Rs.14.78/- per equity share as against the

prevailing price of Rs. 21.04 per equity share. The combined shareholding of Respondent No. 16 and the promoters went up to 73.27% of the issued capital of Respondent No. I and the shareholding of the Applicants was reduced below 10%.. Resultantly, any resolution, even special resolutions, could be passed at meetings of shareholders of Respondent No. 1 by virtue of the brute majority of the promoters and Respondent No. 16 and the rights of the minority shareholders, including the Applicants were stifled.

2.2. As on date of Petition, the composition of top-ten non promoter shareholding of the Respondent Company is as follows :

S. NO.	Shareholding Entity	% Shareholding as at 31.3.2018
1.	JM Financial Asset Reconstruction Company Limited (Respondent No. 16)	26.00%
2.	ITC Limited (Applicant No. 1)	7.92%
3.	Life Insurance Corporation of India	2.08%
4.	LIC of India Market Plus Growth Fund	1.00%
5.	Russell Credit Limited (Applicant No. 2)	0.80%
6.	Innovations Investment Management India Private Limited	0.70%
7.	Gopikishan Shivkishan Damani	0.14%
8	LIC of India Future Plus Growth Fund	0.29%
9	Polaris Banyan Holdings Private Limited	0.21%
10.	Chalakkal Krishnan Kutty	0.16%

2.3. The Transaction complained of is aimed at paying off Respondent No. 16 and is for the benefit of Respondent No. 16. However, the Transaction has been structured in a manner to circumvent applicable laws and for the benefit of the promoters who will receive Rs.300 crores or more, while the minority shareholders of Respondent No. I will be left with nothing but a shell business but which will still have huge liabilities/ exposures including income tax liabilities consequent to the proposed Transaction.

2.4. Respondents' actions have been deliberate so as to dilute the shareholding of the Applicants below 10% and to engineer a situation by which the Transaction can be consummated without taking into account the rights of the minority shareholders, including the Applicants.

2.5. None of the shareholders, other than the promoters (being Respondents No. 2, 3, 7 to 15) and Respondent No. 16, have the requisite shareholding to maintain the present action.

2.6. The Applicants collectively held more than 10% of the shareholding of Respondent No. 1, prior to the acts complained against. By way of abundant caution and in order to avoid any technical objections in connection with the maintainability of the petition under Section 241 of the Companies Act, 2013 (Act) filed by the Applicants, the Applicants are making the present application under Section 244 of the Act seeking a waiver of the requirement shareholders holding not less than one- tenth of the total share capital of the Company filing a petition under Section 241 of the Act.

2.7. The Petition 1498 of 2019, inter alia, challenges a composite transaction ("Impugned Transaction" between one BSREP III India Ballet Pte. Ltd. ("Brookfield"), Hotel Leelaventure Ltd. ("Company", now known as

"HLV Limited"), Respondent Nos. 2, 3, 7 to 15 ("Promoters") and Respondent No.16 by which:

(i) Almost all hotel assets (4 out of 5 hotels) of the Company, the entire hotel management business of the Company, as well as the Company's trademark "The Leela" by which the Company had been carrying on its hospitality business stood transferred to Brookfield for an aggregate consideration of Rs. 4250 crores.

(ii) The substratum of the Company was eroded since the Impugned Transaction, consummated by way of separate slump sale transactions, stripped off all the assets of the Company except (i) hotel in Mumbai and (ii) land parcel in Hyderabad, each of which are heavily embroiled in litigation and together have huge associated liabilities (over Rs. 800 crores); and a joint development project in Bangalore.

(iii) The Impugned Transaction also gives Brookfield a right of first refusal to purchase the Mumbai hotel in the future.

2.8. It is further stated that the Impugned Transaction was consummated on 17 October 2019, during the pendency of the present Petition. and The Promoters, of which Respondent Nos. 2 and 3 who are also directors of the Company, have made undue and unfair gains/benefits from the Impugned Transaction as set out below:

i) The Promoters were paid Rs. 150 crores for "The Leela" brand. The trademark "The Leela" is a registered trademark of the Company for the hospitality business. While the Company received only Rs. 10,000 for assignment of the trademark, the Promoters received Rs. 150 crores. Significantly, the Company is the registered proprietor of the "The Leela" trademarks used in hospitality services under Trademark Nos. 1330327, 13302328 and 1330329.

ii) The Promoters are to receive up to Rs. 150 crores to provide 'business expansion services' to Brookfield. Significantly. Non-compete obligations have been imposed on the Company; while Promoter Directors receive Rs. 150 crores to provide business expansion services to Brookfield which is a competitor of the Company. Valuers have indicated that no meaningful valuation could be attributed to these "business expansion services" for which the Promoters are to receive Rs. 150 crores.

iii) The Promoters receive lease rentals from Brookfield in relation the land on which the Bengaluru hotel is situated;

iv) The mortgages and security interests created by the Promoters, including their personal guarantees, stand released.

v) The Promoters receive benefits under the joint venture agreement for development of real estate projects.

2.9. Respondent No. 16 has also benefited from the Impugned Transaction as set out below:

i) Respondent No. 16 would receive Rs.165.85 crores and JM Financial Products Ltd. would receive Rs.6.69 crores, i.e. the JM Group would receive Rs 220 crores (including fees and expenses) approximately.

ii) Additionally, JM Financial Limited, the parent of Respondent No. 16 would receive up to Rs. 70 crores as fees for being the merchant banker for the Transaction.

iii) Cumulatively, the JM Group would therefore benefit to the tune of Rs. 290 crores were the Transaction to go through.

2.10. It is further stated that the Company, its Promoters and Respondent No. 16, did not accept higher bids from other parties viz. Al Habtoor Group, Highgate Ventures and Trinity Wide City Ventures. Reportedly, the bid received from the Al Habtoor Group (Rs. 4,300 crore) fell through due to the onerous conditions imposed by the

Company and Respondent No. 16 requiring an upfront deposit of Rs. 800 crores. No such conditions were imposed on Brookfield.

2.11. It is alleged that the only presumption for such preferential treatment afforded to Brookfield is the fact that the Promoters stood to benefit significantly from the Impugned Transaction with Brookfield, unlike the bids received from Al Habtoor Group, Highgate Ventures and Trinity Wide City Ventures, which did not provide for similar benefits to the Promoters.

2.12. Based on this, the Applicant submitted that the there exists a prima-facie case of Oppression & Mismanagement, which is be inquired into by this Tribunal. Since, the shareholding pattern of the Respondent Company is such that no non-promoter shareholder can file a petition before this Tribunal in terms of Section 244 of Companies Act, 2013.

3. The Respondent No. 1 has contested the waiver application stating that –

i) shareholder(s) securing a waiver under the proviso to Section 244. As such, the proviso to Section 244, (and therefore, the entitlement to maintain a Waiver Application) can arise only when the proposed Petitioner is non-compliant and accepts non-compliances with the stipulations contained in Section 244 (a) and (b) and not otherwise. Any other reading is impermissible, since the same would entail a dilution of the principal statutory provision viz., Section 244 (a) and (b). As such, any party seeking waiver under the proviso to Section 244 must necessarily accept the position that it is not compliant with and does not qualify under Section 244 (a) and (b).

ii) there is no provision in law which permits the making of a waiver application on a 'without prejudice' basis, or 'as and by way of abundant caution'. As such, since the Waiver Application does not unequivocally accept that the Petitioners shareholding is below 10%

and proceed on that basis, the same is legally misconceived and not maintainable.

4. The Respondent No. 2, 3, 7 to 14, being the Promoter group, have filed a combined written submission and have opposed the present Application on following grounds :

   i) An application for waiver under Section 244 mandatorily requires a Petitioner to satisfy a jurisdictional fact of not crossing the 10% shareholding threshold. The Petitioners cannot in one breadth argue that they are 10% shareholders and at the same time claim that they are below that figure to seek a waiver;

   ii) The Petitioner has not made out a prima facie case of oppression and mismanagement to warrant a grant of waiver in the Waiver Application; and

   iii) The Waiver Application does not justify the exercise of discretionary jurisdiction under Section 244 (b) since the Petition does not disclose a cause of action for oppression and also suppresses material facts.

4.1. It is further stated that the Petitioner is not seeking to protect any interest in the company. Rather it's interest in seeking a waiver is to;

   i) Protect its own hotel business interests that directly compete with the Company's hotels and which would be threatened by Brookfield post the sale of the Hotel Undertakings.

   ii) Frustrate the recovery of money that would accrue from the sale to the public sector banks represented through their trustee Respondent No.16.

iii) Jeopardize the employment prospects of 6500 employees currently working at the Company's hotel undertakings at Udaipur, Chennai, Bangalore and Delhi.

5. We have heard the learned Counsel and perused the material available on record.

5.1. We find that none of shareholder of Respondent No. 1 Company, except Respondent No. 16, have requisite shareholding to maintain the Petition in terms of Section 244 of the Companies Act, 2013. Needless to say, the Respondent No. 16 has been impleaded as the party to the alleged Oppressive Acts in the present petition, hence it is an interested party in so far as the alleged acts are concerned. Section 244 of the Companies Act, 2013 provides as under –

> *244. (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 (a) 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.*

5.2. The Applicant has relied upon the ***Cyrus Investments Private Limited & Anr. Vs. Tata Sons Limited & Others 2017 SCC Online NCLAT 261*** wherein it was held at Para 144 & 145 that

144. Therefore, before grant of waiver, the question of forming opinion by Tribunal-on-an, application made under Section 241 and to pass any order as it thinks fit does not arise. If the Tribunal intends to decide the application under Section 241 on ment, it is required to waive the requirement as prescribed under sub-section (1) of Section 244./

145. For the reasons aforesaid, we hold that the Tribunal cannot deliberate on the merit of a (proposed) application under Section 241, while deciding an application, for, 'waiver under proviso to sub-section (1) of. Section.244.

5.3. Per contra, the Respondent also relied upon the para 151 & 152 of the decision in the case of *Cyrus Investments Private Limited (Supra)* laying down the conditions for waiver u/s 244 it reads as under "*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".

5.4. The Hon'ble Tribunal in the case of Cyrus Investments Private Limited (Supra) at Para 145 opined that Whether a prima facie case is made out or not is dependent on merit of the case as may pleaded in the (proposed) application under Section 241. The Tribunal cannot decide the question (i) as to whether a prima facie case has been made out or not, (ii) question whether (proposed) application under section 241 is barred by Limitation or not, (iii) whether the allegation pertains to Directorial Complaint or not,, or (iv) the question of deciding the conduct of an applicants to disentitle them from seeking a relief, while deciding an application for 'waiver.

5.5. It is contended by the Petitioners that the impugned transaction entails sale of 4 of out 5 hotels, 96.8% of the assets of the Company stood transferred (which by the Respondents' own showing accounted for 88% of the revenues), denuding the Company of its substance and substratum and leaving it to be like a husk without a grain. It is further contended that the assets left with the Company are mired in litigation and have significant associated liabilities. The Company is bound by non-compete covenants and restrictions while the Promoter Directors are to offer business expansion services to Brookfield in competition with the Company.

5.5.1. It is further contended that "The Leela" trademarks in the relevant classes relating to hospitality services were registered in the name of the Company and are being transferred to Brookfield as part of the Impugned Transaction. While the Company was to receive a paltry sum of Rs. 10,000/- for the assignment of such trademarks,

the Promoters were to receive Rs. 150 crores for transfer of the intellectual property rights held by them. In any event, the brand "The Leela" has acquired value only because of its extensive use in connection with the hotels owned and managed by the Company and any amounts towards such goodwill legitimately belonged to the Company and not to the Promoters. Moreover, on assignment of "The Leela" trademarks to Brookfield, the Company would have to obtain licenses from Brookfield to use the "The Leela" trademarks, and such licenses could be revoked, or terms of such licenses could be altered by Brookfield.

5.6. On perusal of the Petition, we find that the Petitioners have pleaded (i) the transaction of sale of 4 out of 5 hotels of the Respondent Company, whereby the Promoters Group and Respondent No. 16 are being put to benefit at the cost of Respondent Company, and (ii) the transaction of conversion of loan by the Respondent No. 16 into equity thereby diluting the equity of the Applicant below 10%, to be prejudicial to the interest of the Company and its members.

5.6.1. We note from the perusal of pleadings of both the parties that the conversion of the loan took place with the knowledge and consent of Applicants in accordance with the rights vested in Respondent No. 16 to exercise option to convert its loan into equity of the Respondent Company. Further, such conversion took place at the fair market value of shares of the Respondent Company and resulted into discharge of Respondent Company's obligations towards such debt to the extent of conversion. We are of the considered view that the Petitioner has pleaded this act to demonstrate how his shareholding in the company went down below 10% of threshold limit, and this can not be held to be Oppressive or prejudicial to the interest of the Company or its members on the prima-facie perusal of the pleadings.

5.6.2. However, the Applicant has alleged in the pleadings that the Promoter group and Respondent No. 16 are being paid substantial

amounts additionally by the buyer of Hotels and these amounts are being paid at the cost of the Respondent Company. In other words, it is pleaded that such transaction of sale of Hotels entails certain consideration, which goes to the Promoters Group and Respondent No. 6, accordingly approval of this transaction is biased on account of pecuniary interest of these parties in such transaction. The Counsel for Promoters pleaded that this allegation was rejected by Hon'ble Securities Appellate Tribunal. Perusal of the decision rendered by Securities Appellate Tribunal in the case of ***ITC Ltd. vs. Securities and Exchange Board of India and Others {Appeal No. 357 of 2019}*** that the said contention was not examined from the perspective of it being at arm's length qua the Respondent Company or other beneficiaries of the transaction. The argument of the appellant therein was rejected by the Securities Appellate Tribunal on the ground that while SEBI as regulator define related party transaction as a transaction "between a listed entity (Company) and a related party", the Parliament define the term as per Section 188 of the Companies Act, 2013 as "a transaction of a Company with a related party". Accordingly, the Tribunal held that the Parliament as well as the regular SEBI did not intend to bring such transactions within the scope of the restrictions put on the related party transactions. Therefore, the rigors of Regulation 23 of LODR Regulations will not be attracted.

5.6.3. It is further contended by the Applicant that Directors of a company have a fiduciary duty towards the company and act as trustees of the shareholders. They cannot act against the interest of the company nor profit at its expense (***AES OPGC Holding (Mauritius) and Anr. v. Orissa Power Generation Corporation Ltd. and Ors. (2005) 125 CompCas 299 (CLB)***).

6. The Hon'ble NCLAT at 145 held that, the question whether the Proposed Application makes out a prima-facie case or not can be decided on merit of the case only, and hence, is not a factor while considering the application for

'Waiver', and therefore refrained from holding any view on the facts pertaining to transactions. We find that the Hon'ble NCLAT in the case of *Cyrus Investments Private Limited (Supra)* held at Para 161 & 162 as under–

> *161. That means in the context of present case, except that the minority shareholders join together, i.e. either six in numbers or such numbers of members whose joint shareholding will come up to 10% of the issued share capital of the Company, which will be also not less than 3 to 4 members, none of the 49 shareholders can file an application under Section 241 alleging 'oppression and mismanagement'. It will remain only in the hands of major shareholders, namely Mr. Ratan Naval Tata or Mr. Narotam S. Sekhsaria, who only have right and their prerogative to file such application.*
>
> *162. One or the other minority shareholder cannot be asked or directed to form a group of 10% of the member(s) that means six person(s) in the present case, as it will be dependent on the prerogative of the other member(s).*

7. Since, the composition of shareholding the Respondent Company is in the present case also demonstrate that none of shareholder, except the Promoter group or Respondent No. 16 both whom are alleged to be interested party in the transaction alleged to be oppressive and prejudicial to the interest of the Company and its members, hold the requisite shareholding of 10%. Accordingly, we find that in the present case, the minority shareholders shall have to join together so as to constitute 10% or more shareholding which will be more than 4-5 shareholders to maintain a petition under section 241 of the Companies Act, 2013. It follows therefrom that until such group is formed, only promoter group or the Respondent No. 16 shall be entitled to maintain an application and no one can maintain an application against their conduct in managing the affairs of the company.
8. This takes us to the issue of exceptional circumstances. The Applicants placed reliance on the decision of ***Hon'ble National Company Law Appellate Tribunal in Photon Infotech Pvt. Ltd. & Ors v. Medici Holding Pvt. Ltd. [2018 SCC Online NCLAT 632]*** @ pr. 19 to contend that when the

substratum of the company itself is transferred, there exists an exceptional circumstance, for which waiver must be granted under Section 244 of the Act and the Directors representing Promoter group and Respondent No. 16, who are only shareholders holding more than 10% shares, are benefitting from side deals collateral to the alleged transaction. The Hon'ble NCLAT at Para 163 of the Cyrus Investment Private Limited categorically held as under –

> *"163. We are of the view that this is one of the exceptional and compelling circumstances, which merit the application for Waiver subject to the question. whether (proposed) application under Section 241 relates to 'oppression and mismanagement."*

9. As regards contention of the Respondents that the Applicant has made out a 'without prejudice' case and that applicant are still holding that conversion of loan into equity was another oppressive act that reduced its shareholding below threshold of 10%, we are of the considered view that this contention appears to be primarily to demonstrate how the applicant's shareholding came down to below 10% and to make out its case for waiver. We do not find any infirmity in such contention so as to as disentitle them from seeking waiver under this application.
10. Accordingly, we allow the applicant's prayer for waiver of conditions of section 244(1)(a) of the Companies Act, 2013 and hold that the Petition C.P. No. 1498 of 2019 be listed for hearing on merits.
11. In view of foregoing, IA 1544/2019 is allowed and disposed of.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)