THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

C.A. 654 OF 2022

In

C.P. 276 OF 2022

Under Section 244 of the Companies Act, 2013 r/w Rule 11 of NCLT Rules, 2016

Dr. Dipen Kailash Chandra Agarawal & Others

…**Applicant**

V/s

Nag Vidarbha Chamber of Commerce & Others

… **Respondents**

C.A. 66 OF 2023

Mr. Ashwin Prakash Agarwal

…Applicant

In the matter of

C.P. 276 OF 2022

Under Section 241-242 of the Companies Act, 2013

Dr. Dipen Kailash Chandra Agarawal & Others

…**Applicant**

V/s

Nag Vidarbha Chamber of Commerce & Others

… **Respondents**

Order delivered on: 02.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant : Mr. Shyam Dewani, Advocate

For the Respondent : Mr. Aman Kacheria, Advocate

ORDER

Per: V.G. Bisht, Member (Judicial)

1. This Company Application CA 654/2022 is filed by Mr. Dipen Kailash Chandra Agrawal in the Company Petition (IB) No. 276 of 2022 ("Petition") seeking an order from this Tribunal seeking waiver specified in clause (a) & (b) of Sec. 244(1) of the Companies Act 2013 for filing the Company Petition under Section 241, 242 & 244 R/w Section 246 of the Companies Act.

2. The Petitioners are the Past Presidents and existing members of Respondent No. 1 Company and are also the interested persons in day-to-day affairs, businesses and fulfillment of the objects of Respondent No. 1 Company.

   2.1. The petitioners/applicants are suffering at the hands of the respondent's due to the oppression and mismanagement happening in the company.

   2.2. That the Respondent No. 1 Company is incorporated under the Companies Act, 1956 (erstwhile). That the Company is a Section 8 Company, Limited by Guarantee, having no Share Capital.

2.3. The Petitioners are mainly aggrieved, affected by the malafide actions and illegalities which are being committed by the Respondent No. 2 and all these actions are detrimental to the interest of the Respondent No. 1 as well as its members including the Petitioners.

2.4. There can be no explanation for the Respondent No. 2's action(s) to defraud the members in running the affairs of the Respondent No.-1., Hence the same amounts to oppression and mismanagement.

2.5. The Petitioners have also filed a writ petition No. 766/2022 before The Hon'ble Bombay High Court, Nagpur Bench for appropriate direction in the matter. This demonstrates the bonafides of the Petitioners in perusing the matter. The petitioners also pursued the complaints before respondent No. 3 also.

2.6. Thus, in view of the submissions made hereinabove, prima facie case has been made out that the Respondent No. 2 and his associates are managing the affairs of the Respondent No. 1 company as per their whims and wishes and deliberately not adhering to the provisions made under the Memorandum of Association or Article of Association. Therefore, this is the fit case to invoke the proviso u/s 244(1) of the Companies Act by waiving the requirement specified in clause (a) & (b) of Sec. 244(1) of the Companies Act and entertain the Company Petition preferred by the Petitioners under Section 241 to 242 of the Companies Act, 2013 challenging the oppression and mismanagement by the Respondent No. 2 and his close associate in the management of the Respondent No. 1 company.

3. The Applicant have also filed an additional affidavit dated 09.09.2023 in support of waiver application stating that he has filed an affidavit dated 27.01.2023 in support of waiver application, wherein due to inadvertence, he has missed the following point:

3.1. That, the Respondent No.1 is a company incorporated under Section 8 of Companies Act 2013, with the objective of promotion of commerce & other social objectives more particularly mentioned in incorporation documents. With such social objects being ingrained in the constitution of Respondent no.1 ('NVCC), any grievance of its members regarding the fraud/mismanagement /misappropriation/ oppression is to be given more serious attention as the consequential of allowing such fraud could cause havoc to all its members and defeat the very purpose of incorporating it as section-8 company.

3.2. That, the members of the Respondent No.1 are small time traders with little means to take action against the errant officials. With the members of around 1400+ (manipulated by Respondent no.2 to around 840 members as more particularly explained in captioned Company Petition) it is almost impossible to obtain consent of 20% of members (as Respondent no.1 do not have a share capital) to take effective steps. Even if such an exercise has to be attempted, it could have resulted in further delay in approaching this Tribunal, which could have caused even more loss to its members. It has never been the intent of the legislature to close the door of law on the ground of technicality even when the exceptional circumstances are made out. It was for the same reasons that the judicial discretion has been granted to waive any such requirements to advance the cause of justice.

3.3. Beside the difficulties as aforesaid, the Affidavits of Additional 36 members of the Respondent No. I have been submitted in support of the captioned application beside the Petitioners. The Petitioners have no other alternate to get redressal of the grievances, in much as, the remedy of filing Suit is also barred under Section 430 of Companies Act 2013. It is thus submitted that it's only the Tribunal that is empowered to determine any action under the Companies Act 2013. That grave prejudice shall be caused if the Respondent No.2

and his associates are allowed to perpetrate illegalities in respect of running the affairs of Section 8 Company at the cost & expense of its members. Therefore, the Petitioners/ Applicants have brought to the kind notice of this Tribunal exceptional circumstances in present matter making the Petitioners/ Applicants entitled to get waiver of the condition of the requirements specified in clause (a) or clause (b) of Section 241 of the Companies Act.

3.4. The threshold to take action against the oppression and mismanagement of a Section 8, company should be interpreted more liberally as denial to entertain such petition would have a far graver consequence not only for the members of such company but also on society as large. A complaint against Section 8 Company should be construed as complaint against the society as the defeat the very purpose of the enactment.

3.5. An exceptional case is being made out to waive the threshold/eligibility criteria prescribed under Section 244 of the Companies Act.

4. The Respondent No. 2 filed affidavit in reply dated 23.05.2023 stating that the Applicants are essentially attempting to advert to the merits of the captioned Company Petition in seeking a waiver of the conditions imposed under Section 244 of the Companies Act, 2013. By doing so, the Applicants have sought for this Tribunal to take cognizance of the merits of the Company Petition, even though the Applicants do not meet the threshold requirements to maintain a Petition under Section(2) 241, 242 of the Companies Act, 2013.

4.1. The Applicants have misled this Tribunal by attempting inter alia to (i) agitate and espouse their own private grievance with other members of Respondent No. 1 under the guise of the same being oppressive qua them as members of Respondent No. 1, purportedly leading to mismanagement of Respondent No. 1; (ii) give this

Tribunal impression that due to the answering Respondent's conduct, Respondent No. 1 has suffered consequences, even though the Applicants have entirely failed to substantiate such allegations.

4.2. The Petitioner No. 1's brother i.e. Sanjay Agrawal set up Petitioner No. 1 as a proxy litigant to make frivolous allegations against the present Respondents by filing multiple proceedings before multiple forums for which they have failed to get any favourable order against Respondent No. 2. The list of proceedings filed by the Petitioners is as below :

a. Writ Petition No. 766 of 2022 filed before the Hon'ble High Court of Bombay, Nagpur Bench which is disposed of vide order dated 22.02.2022;
b. Complaint to Director General of Foreign Trade (DGFT) dated 24.01.2022 which was disposed of vide advisory dated 4.7.2022;
c. Complaints with the Registrar of Companies and Ministry of Corporate Affairs dated 02.11.2021, 10.12.2021 and 14.12.2021, which are still pending till date;
d. Complaint to Commissioner of Police dated 02.12.2021, 9.12.2021 and 04.01.2022.

4.3. 77th Annual General Meeting had to be postponed due to unavoidable reasons and on 23.10.2021 vide a Board Meeting it was decided to postpone it. Thereafter on 25.10.2021 by a Board Meeting and by an Emergent Executive Meeting both held on the same day by the approval of the Executive Committee the 77th AGM was postponed. The Petitioner no 1's brother Mr. Sanjay Agrawal was in attendance of both these meetings and had assented to such postponement. Further, the information of postponement of 77th AGM was published in Lokmat Times, Lokmat (Marathi) Newspaper, Lokmat Samachar and The Hitwada on 26.102.2021. In fact, the Petitioner no. 1' brother Mr. Sanjay Agrawal being head

of the legal committee was responsible for ensuring timely issuance of notice of 77th AGM and the postponement notice of 77th AGM.

4.4. The disqualification of Respondent No. 2 under section 164(2) of the Companies Act, 2013 was only qua the directorship in a company and not as President of Respondent No. 1 and he was democratically elected as President during 2019-20 to 2020-21 and not appointed as Director for disqualification period.

4.5. The allegation of a clone company i.e. Nag Vidarbha Market and Warehouse Pvt Ltd by my son and one Mr. B C Bhartiya is bald and vague allegation, as there has been no transactions and/or no money has been received by the said Company and/or transferred from the account of Respondent No. 1 to the said Company nor has there been any agreement/contracts for development of any infrastructure between Respondent No. 2 and the said Company.

5. The Petitioner had filed affidavit in rejoinder to the reply filed by Respondent No.2 stating that it is incorrect to say that Petitioners/Applicants are 0.3% members of the Respondent No. 1 Company. It is pertinent to mention that the members of Respondent No. 1 are small time traders with little means to take action against the errant officials. With members of around 1400+ (manipulated by Respondent No. 2 to around 898 members) it is almost impossible to obtain consent of 20% members as Respondent No. 1 being a Company without share capital. Even if such an exercise has to be attempted, it could have resulted in further delay in approaching the Tribunal, which could have caused even more loss to their members. Despite the aforesaid difficulties, the Petitioners have filed Affidavits of almost 36 members, who have stated the mismanagement and ill measures obtained by Respondent No. 2 in several AGMs of the Respondent No. 1 Company.

5.1. It is a settled principle of law as held by the Hon'ble National Company Law Appellate Tribunal in Smruti Shreyans Shah v. The Lok Prakashan Limited - Company Appeal (AT) No. 25 of 2018

dealing with powers of the Tribunal empowers it to pass such order as it thinks fit if, based on application filed under Section 241 of the Companies Act it is of the opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member(s) or prejudicial to public interest. It is therefore imperative that the member complaining of oppression or mismanagement makes out a prima facie case warranting grant of relief in the nature of interim order. In furtherance let alone members of the Company, Section 241(2) of the Act even enables Central Government to apply to the Tribunal for an Order if in its opinion the affairs of the Company are being conducted in a manner prejudicial to public interest. Needless to state that the interim reliefs were granted to the Petitioners/Applicants considering the scope of section 213 of the Companies Act 2013 also and not just under section 241 of the Companies Act 2013.

5.2. It is in fact the Respondent No. 2 who right since his election has been taking undue advantage of his position as the President of the Respondent No. 1 Company. The Respondent No. 2 with active connivance of his associates has committed various illegalities including but not limited to manipulation of renewal of memberships, illegal admission of new members, illegal cancellation of memberships and thereby manipulated the entire election process. These illegalities were brought to the kind notice of this Tribunal through the Company Petition and hence this Tribunal on observing the same passed an Order dated 31.01.2023 suspending Respondent No. 2 and appointing an Administrator. It is pertinent to mention that the Administrator has duly submitted his report before this Hon'ble Tribunal affirming the illegalities of Respondent No. 2 as contended by the Applicants/Petitioners.

5.3. As far the allegation of Petitioner No. I being made a proxy litigant on behalf of his brother is concerned, there is no cause for the

Petitioner to go about such roundabout ways to go seek redressal and there are no shackles on the Petitioner No. 1's brother to approach this Tribunal directly if he had so desired. It must further be noted that the Petitioner No. 1 is not the sole Petitioner in the case and in fact other past presidents of Respondent No. 1 Company had jointly filed the petition on par with the Petitioner No. 1. Not only this, but during the course of proceedings, a multitude of members had come forth and filed their affidavits, being aggrieved by the conduct of the Respondents and their other associates. The Respondent No.2 has made a misleading and false statement, by submitting that the Petitioner has failed to get any favourable order before any of the forum it has approached and the same can be seen from the following.

a. Writ Petition No. 766/2022, before Hon'ble High Court, Bench at Nagpur - The case was decided in the favour of the Petitioners and the Hon'ble High Court was pleased to direct the Registrar of Companies to decide the representation of the Petitioner at its earliest. In any case, the issues brought in the instant Company Petition were by no means exhausted by the Hon'ble Court.
b. Complaint to Director General of Foreign Trade (DGFT)- The DGFT was pleased to take cognizance of the complaint of the Petitioner and had issued an Advisory dated 04/07/2022 by which the Respondent No. 2 and other members of the Board of Director were put to strict terms to comply with the law and Foreign Trade Policy, failing which they were warned of legal action by the DGFT.
c. Complaint to Registrar of Companies (ROC) - The ROC had also taken cognizance of the complaints made by the Petitioners and was pleased to issue a show Preliminary Finding Letter, in which the ROC had taken special note of the many illegal acts of the Respondents and demanded a justification from the Respondents

as to their actions. The ROC had also made a specific observation that there was prima facie material to show that Respondent No. 2 had committed fraud in the land settlement with the previous landlord of Respondent No. 1 Company.

d. Complaints to Commissioner of Police - The complaints were taken cognizance of and they culminated into FIR No. 98/2023 registered with Police Station Sitabuldi, Nagpur. Looking at the seriousness of the crime, the case was transferred to the Economic Offence Wing of the Crime Branch and it is currently being investigated by it.

5.4. The Petitioners further have no other alternative to get redressed of the grievances in much as the remedy of filing Suit is also barred under Section 430 of the Act. It is thus submitted that it is only the Hon'ble Tribunal that is empowered to determine any action under Companies Act, 2013.

5.5. It is the case of the Petitioners that grave prejudice will be caused if the Respondent No. 2 and his associates are allowed to perpetrate illegalities in respect of running the affairs of Section 8 Company at the cost and expense of its members. Therefore, the Petitioners/Applicants have brought to the kind notice of this Tribunal exceptional circumstances in the present matter making them entitled to get waiver of the condition of requirements specified in clause (a) and (b) of Section 244 of the Companies Act. The threshold to take action against the oppression and mismanagement of a Section 8 company should be interpreted more liberally as denial to entertain such Petitioner/Applicant would have a far graver consequence not only for the members of such company but public at large. Hence an exceptional case is made out by the Petitioner to waive the threshold criteria prescribed under Section 244 of the Companies Act. It is worthwhile to state here, the Petitioners/Applicants have also moved the application for waiver

under Section 213 of the said Act as well as Rule 11 of NCLT Rules also. It is submitted that Sub Section (b) of Section 213 empowers this Tribunal to order for the investigation of the affairs of the Company upon being satisfied about the circumstances suggesting conducting the business of the Company in fraudulent or unlawful manner.

5.6. That, it is also necessary to bring to the kind notice of Tribunal that during the course of proceedings Mr. U. C. Nahata was appointed as Administrator by this Hon'ble Tribunal vide its Interim Order dated 31.01.2023. The report of the said Administrator submitted before Tribunal makes it crystal clear that all contentions of the Petitioners in the present petition with respect to operation and mismanagement on part of the Respondent No. 2 are found to be justified by the Administrator, who has taken the assistance of a forensic auditor and an Independent auditor also. lt is also worthwhile to state that an offence punishable Under Sections 406, 420, 409, 465, 467,468, 469, 470, 471 R/w Section 34 of Indian Penal Code vide Crime No.98/2023, registered with Police Station Sitabuldi, Nagpur which is being investigated by Economic Offence Wing of Crime Branch, Nagpur, which has also applied for the cancellation of Anticipatory Bail granted to the Respondent No.2 herein before the Hon'ble High Court, which is awaiting adjudication in accordance with law.

6. Heard the Counsel and perused the material on record.

6.1. We note that Company Petition 276/2022 u/s 213, 241, 242 & 244 read with Section 246 was filed by the Petitioner on 10.12.2022. The said Petition 276/2022 does not contain any prayer for waiver of threshold specified in Section 244 of the Companies Act, 2013. Accordingly, this Application seeking waiver in terms of section 244(1)(b) of the Companies Act, 2013 was filed on 14.12.2022 by the petitioners. This Tribunal appointed an Administrator Sh. U C

Nahata vide Order dated 31.01.2023, and at that time this Application seeking waiver was still pending for adjudication.

6.2. We note that the Respondent No. 1 Company is a Section 8 company limited by guarantee having 842 members and this Petitioner has been filed by 4 members and later on another 36 members joined the petitioner by filing affidavit. The Respondent No. 1 claims it membership of approx. 1400 members, while the Petitioner claims its correct membership of approximately 800 members 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.*

6.3. *The Hon'ble NCLAT in case of* ***Cyrus Investments Private Limited & Anr. Vs. Tata Sons Limited & Others 2017 SCC Online NCLAT 261*** has 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 merit, 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.

6.4. Further, at para 151 & 152 of the decision in this case of *Cyrus Investments Private Limited (Supra)* lays 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".

6.5. 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.

6.6. At the outset it will be relevant to state that the Petitioner has brought our attention to Order dated 31.01.2023 passed by this Tribunal appointing Sh. U. C. Nahata as Administrator by suspending Respondent No. 2. The Petitioner has relied heavily on the report submitted by the Administrator, who has affirmed the illegalities of Respondent No. 2 as contended by the Applicants/Petitioners. However, the question before us whether in terms of decision in Cyrus Mistry, can this Tribunal could have proceeded to grant any relief in the Company Petition thereby making the Report of Administrator as admissible evidence at this juncture. We note that the Hon'ble NCLAT has specifically stated in Cyrus Mistry case that this Tribunal cannot decide the question as to whether a prima facie case has been made out or not, or whether the allegation pertains to Directorial Complaint or not. The Petitioner also emphasized that the appointment of Administrator was made in accordance with the provisions of section 213 of Companies, however the said section also

prescribes similar threshold for making an application, though it further provides that an application u/s 213 can be made by any other person in case of fraudulent or unlawful or oppressive conduct of affairs of the Company. Nonetheless, we are of considered view that powers vested under section 213 pertains to direction for investigation into the affairs of the Company and such investigation is to be carried out by the person appointed by the Central Government. Section 213 does not vest powers in this Tribunal to appoint any third person as Administrator to carry out Investigation. Accordingly, we are of considered opinion that contents of the Report of Administrator are irrelevant for the purpose of exercising of discretion vested in this Tribunal in terms of Section 244 of the Companies Act, 2013.

6.7. We note that the Petitioner has raised the issue of non-compliances, release of lease rights for inadequate consideration and formation of another Company by the relatives of Respondent No. 2 to take benefit of a scheme announced by the Minister. Further, there are several complaints before various authorities in relation to allegations contained in this Petition.

6.8. The Petitioner has also impleaded Registrar of Companies as Respondent No. 3 and it is stated that the said Registrar is already seized of issue of non-compliances committed by the Respondent No. 2. The office of ROC is also vested with sufficient powers to prosecute and levy fine for non-compliances of provisions of Companies Act, 2013. Accordingly, we are of considered view that the non-compliances with the provisions of Companies Act, 2013 does not constitute oppressive act or mismanagement of affairs of the Company.

6.9. As regards release of lease hold rights in a property for inadequate consideration, it is undisputed fact that third party interest has been created and a complaint before EOW is under investigation. However, the pleadings suggest that an inquiry by this Tribunal may be necessitated as this aspect may constitute the mismanagement even

though the EOW has sufficient power to take necessary corrective action to recover the amount of money equivalent to loss caused to the Respondent Company from the beneficiary of any wrongful act on the part of the management as alleged in the petition.

6.10. As regards formation of clone company by Respondent's son to derive benefit from a scheme announced by minister, we are of considered view that any person is at liberty to take advantage of such scheme. However, the issue whether formation of clone company by the Respondents resulted into advantage to Respondent No. 2 to the detriment of the Respondent No. 1 Company may require inquiry so as to constitute it the act of mismanagement which is prejudicial to the interest of the Petitioners., even though Respondent No. 1 company managed by elected body of office bearers and its members is competent to resolve to incorporate another company to take advantage of scheme if they wish to. However, whether such formation has precluded the Respondent Company to take advantage of the scheme may be looked into by this Tribunal if this Petition is admitted.

6.11. We note that Section 241(2) empowers 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. Public Interest, in the context of Section 8 Companies has wider import and encompasses the Company and its members within its ambit as Section 8 companies are meant to be non-profit making organisation where the members are barred from taking any benefit from such company in any manner. The Ld. Counsel relied upon decision of Principal Bench of this Tribunal in case of Union of India, Ministry of Corporate Affairs vs. Delhi Gymkhana Club {C.P. 71 of 2020}. However, in that case, the petition was filed by the Central Government in terms of Section

241(2) of the Act, hence provisions of section 244(1)(b) of the Companies Act, 2013 were not applicable to that case.

6.12. The interest of an applicant in a company whether it is substantial or significant, the issues raised in the petition u/s 241 of the Companies Act, 2013, Is the appropriate / competent jurisdiction to deal with them by the Tribunal, and whether the cause / case projected in the petition is of primordial importance to an 'applicant' or to the 'company' or to 'any class of members' etc. are some of the pertinent factors to be taken note of for projecting an application for waiver of the requirements under section 244 of the Companies Act, 2013. Only 4 members out of more than 800 members filed this petition initially and later on 36 members are stated to have joined them which together constitutes less than 5% of total members of the Respondent Company. We are of considered view that the pleadings in the petition pertaining to release of leasehold interest in the property of the Respondent Company and formation of clone company by the Respondent No. 2's relative constitute act of mismanagement, which this Tribunal ought to look into the same. Since, the Respondent Company is an association of small traders, the monetary incidence of these decisions, if perverse, may cause prejudice to their interest, which is against the basic object of the Respondent Company i.e. to protect the interest of its members. Accordingly, we hold that there exists exceptional circumstances warranting exercise of discretion by this Bench in the matter.

6.13. Since the issues of non-compliances and impropriety alleged in this Petition are matter of inquiry before ROC and EOW, we direct both the offices to conclude their inquiry and take necessary action, if found desirable, against the Respondent No. 2 or any other person found guilty of involved in action prejudicial to the interest of company.

6.14. Accordingly, we allow the applicant's prayer for waiver of conditions of section 244(1)(b) of the Companies Act, 2013 as the same deserves to be allowed with directions to ROC and EOW stated in para 6.14.

6.15. IA 66/2023 seeks recall of order dated 31.1.2023 and its corrigendum order dated 10.2.2023 & 15.2.2023 whereby the Administrator came to be appointed. The Tribunal's power to recall its order was dealt with by Hon'ble Supreme Court in the case of ***Greater Noida Industrial Development Authority v. Prabhjit Singh Soni and Anr Civil Appeal Nos. 7590-7591 of 2023.*** The Hon'ble Supreme Court held that

> *"50. In light of the discussion above, what emerges is, a Court or a Tribunal, in absence of any provision to the contrary, has inherent power to recall an order to secure the ends of justice and/or to prevent abuse of the process of the Court. Neither the IBC nor the Regulations framed thereunder, in any way, prohibit, exercise of such inherent power. Rather, Section 60(5)(c) of the IBC, which opens with a non-obstante clause, empowers the NCLT (the Adjudicating Authority) to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC. Further, Rule 11 of the NCLT Rules, 2016 preserves the inherent power of the Tribunal. Therefore, even in absence of a specific provision empowering the Tribunal to recall its order, the Tribunal has power to recall its order. However, such power is to be exercised sparingly, and not as a tool to re-hear the matter. Ordinarily, an application for recall of an order is maintainable on limited grounds, inter alia, where (a) the order is without jurisdiction; (b) the party aggrieved with the order is not served with notice of the proceedings in which the order under recall*

has been passed; and (c) the order has been obtained by misrepresentation of facts or by playing fraud upon the Court /Tribunal resulting in gross failure of justice."

6.16. In the present case, these Order(s) were passed without hearing Respondent No. 2 & 3 and was obtained by the Petitioner even though the Petitioner's application for waiver of condition stipulated in section 244 of the Companies Act, 2013 was still sub-judice. The proviso to Section 244 (1) provides that "*the Tribunal may, 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*". This clearly shows that an Application u/s 241 can lie only if this Tribunal waives all or any of the requirement provided u/s 244(1)(a) or (b) of the Act. Section 242 vests the power in this Tribunal to pass an order on any Application made u/s 241. Accordingly, this Bench assumes jurisdiction to pass any order whether interim or final only after a Petition u/s 241 is filed and such Petition first complies with the threshold requirement stated in Section 244(1). Hence, we are of the considered view that this Bench had no jurisdiction to pass any interim order without first deciding on the pending Application for waiver of conditions u/s 244(1)(b) of the Companies Act, 2013. In view of this, we are of the considered view that order dt. 31.1.2023, falls within the circumstances propounded by Hon'ble Supreme Court in the case of ***Greater Noida Industrial Development Authority v. Prabhjit Singh Soni*** (supra), and accordingly, deserves to be recalled.

6.17. Nonetheless, we also note that the Respondent Company has revenue earned from its members amounting to Rs. 49,42,600/- in financial year 2021-22 and its net surplus of income over expenditure for the year was Rs. 3,79,300/- and making such Respondent Company to bear a monthly remuneration of Rs. 3.00 pm aggregating to Rs. 36.00 lakh by appointment of an independent administrator as obtained by

the Petitioner is in itself prejudicial to the interest of the Company. We further note that the Administrator has tendered a report on the allegations made by the Petitioner, which can be appreciated by this Bench, if this application seeking waiver is allowed. However, we further take note of the financial position of the Respondent Company and the fact that allegations in the petition may be appreciated in the light of findings of Administrator, which is already available on record. Nonetheless, in this background also, we are of the considered view that the administrator's services may not further be warranted at this juncture and this will be in the interest of the Respondent Company to relieve it of huge financial burden placed by this Tribunal if such Administrator's appointment is terminated at this juncture. Accordingly, we direct the Administrator to restore the management of the Respondent Company to the then management with immediate effect and the management of Respondent Company shall now vest in the then management from the date of communication of this Order.

7. In view of aforesaid decision, CA 654/2022 is allowed, and IA 66/2023 is allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)