The Supreme Court of India's verdict in the *Tata-Mistry* case: the good, the bad and the unspoken

Kirthana Singh Khurana,

Assistant Professor, Jindal Global Law School, O.P. Jindal Global University, Sonipat, Haryana, India

Best Citation - Kirthana Singh Khurana, The Supreme Court of India's verdict in the Tata-Mistry case: the good, the bad and the unspoken, 1 ILE IPCLR 35, 2022

Abstract

One of the most intense corporate battles that India has witnessed in recent times has been that between Tata Sons Private Limited and its former executive chairman, Mr. Cyrus Mistry. The Supreme Court of India, in its ruling in the case of Tata Consultancy Services Limited v. Cyrus Investments Private Limited, shed light on many important issues relating to oppression and mismanagement, directors' duties, the National Company Law Tribunal's jurisdiction and the scope of its powers under the Companies Act, 2013. The paper examines the legal position relating to oppression, mismanagement, and affirmative voting rights in India. Additionally, the factual background of the case, along with the claims of Shapoorji Pallonji Group, to which Mr. Cyrus Mistry belongs, and Tata Sons Private Limited are amply discussed. The author argues that while the ruling provided clarification on numerous legal matters, there were several issues that it failed to address or did not address adequately.

Keywords:

company law, corporate governance, oppression, duties of directors, Tata-Mistry

I. INTRODUCTION

Robert Jackson, the US Supreme Court judge, and the Chief US Prosecutor at the famous Nuremberg trials, in the famous case of Brown v. Allen[98], explained the majesty enjoyed by the top courts of the land thus – "*We are not final because we are infallible, but we are infallible because we are final*." No wonder the arrival of any contentious litigation in the precincts of any top court leads to a lot of buzz with great anticipation. Apex court rulings have many milestones to their credit in the evolution of company law jurisprudence worldwide.

In India, though, while on the one hand, the Supreme Court can boast of many epochal judgements like *Kesavananda Bharati v. State of Kerala*[99], *Maneka Gandhi v. Union of India*[100], *Mohd. Ahmed Khan v. Shah Bano Begum*[101], *Olga Tellis v. Bombay Municipal Corporation*[102] and the *Union Carbide Corporation v. Union of India*[103] , which were trendsetting in their own right, it was found to be not only fallible but also tentative and not final in many of its other pronouncements.[104] In the above context, the recent Supreme Court judgment *in Tata Consultancy Services Limited v. Cyrus Investments Private Limited and others*[105] (*hereinafter* referred to as "**Tata-Mistry case**"), one of the significant company law pronouncements after the introduction of the Companies Act, 2013 (*hereinafter* referred to as "**Act**"), involving two leading business groups of the country, has evoked mixed reactions, as it came with a sting in the tail.

The genesis of the Tata-Mistry case lies in the allegations of oppression and mismanagement raised by the Shapoorji Pallonji (*hereinafter* referred to as "**SP**") Group, the minority shareholders in the Tata Group's holding company, Tata Sons, through Mr. Mistry. It also appraises the legality of the removal and reinstatement of directors and analyses the fair and unbiased reasons that may warrant a company's winding up in light of the allegations of

[98] Brown v. Allen 344 U.S. 443 (1953).
[99] Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461.
[100] Maneka Gandhi v. Union of India AIR 1978 SC 597.
[101] Mohd. Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945.
[102] Olga Tellis v. Bombay Municipal Corporation 1985 SCC (3) 545.
[103] Union Carbide Corporation v. Union of India 1990 AIR 273.
[104] Menaka Doshi, *Often, The Supreme Court Is Neither Right Nor Final: Chintan Chandrachud*, BLOOMBERG QUINT (2020), https://www.bloombergquint.com/law-and-policy/often-the-supreme-court-is-neither-right-nor-final-chintan-chandrachud (last visited Jun 10, 2022).
[105] Tata Consultancy Services Limited v. Cyrus Investments Private Limited 2021 SC 184.

oppression and mismanagement. The case also discusses the sanctity of the Articles of Association (*hereinafter* referred to as "**AOA**") of companies, and the extent to which they could be interfered with, and the legitimacy and scope of the Affirmative Voting Rights (*hereinafter* referred to as "**AVRs**") enjoyed by the nominee directors. Other important aspects covered by the case are the validity of the process employed for the conversion of a company from a public to a private company and the proportionate representation of minority shareholders on the company board.

In Part II of the paper, the legal position of oppression and mismanagement claims, the powers of the National Company Law Tribunal (*hereinafter* referred to as "**NCLT**"), and the applicability of AVRs are examined. In Part III of the paper, a brief history of the facts of the Tata-Mistry case, along with the view taken by the NCLT and the National Company Law Appellate Tribunal (*hereinafter* referred to as "**NCLAT**"), are analysed. Thereafter, Part IV summarises the issues of the case and the findings of the Supreme Court. In Part V, the author analyses the Supreme Court ruling through three heads – the good, the bad and the unspoken. The author argues that while some of the court's rulings provided clarification on numerous critical legal matters, there were several issues that the court failed to address or did not address adequately. Part VI concludes the paper.

II. LEGAL POSITION IN INDIA

A. Oppression and Mismanagement claims

§241 of the Act sets forth the legal remedy in respect of oppression and management. §241(1)(a) of the Act deals with complaints regarding the conduct of the company's affairs, which could be prejudicial to the public interest, the company's interests and prejudicial or oppressive to interests of its members, while §241(1)(b) of the Act deals with complaints arising out of a "material change" in management or control in the company, which is likely to be prejudicial to its own interests or of its members.

While there is no formal definition of 'oppression' given in the Act, one of the earliest cases decided under §210 of the English Companies Act, 1948 – *Elder v. Elder & Watson Ltd.*[106] enunciated its meaning. In this case, the term 'oppression' was supposed to "*at the lowest involve a visible departure from the standards, of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.*"[107]

Over time, Indian courts have developed comprehensive tests based on common law principles to determine whether an act amounts to a claim of oppression.[108] In *Shanti Prasad Jain v. Kalinga Tubes Ltd.*,[109] the Supreme Court endorsed the decisions of English and Scottish courts[110] while interpreting the meaning of the term "oppression". It had been held to refer to a series of events that demonstrated the company was conducting its affairs in a manner that was "*burdensome, harsh, and wrongful to the minority shareholder of the company*"[111]. Moreover, such conduct necessarily involved a lack of probity or fair dealing with the minority shareholders, who had contributed their capital to the company. According to the law, merely lacking confidence in the major shareholders would not qualify as oppression.

Hence, the oppression remedy is rooted in 'unfairness' or 'lack of probity. A remedy against oppression may be invoked even when the act is lawful, as opposed to other provisions of the company law, which require contravention of law to invoke the remedy.[112] It may also be noted that the NCLT may grant relief even against past acts of oppression.[113]

[106] Elder v. Elder & Watson Ltd. (1952) Scottish Cases 49.
[107] Per Lord Cooper in Elder v. Elder & Watson Ltd. (1952) Scottish Cases 49.
[108] Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535 ¶¶ 16-20; Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd., (1981) 3 SCC 333 ¶¶ 46-54.
[109] Shanti Prasad Jain v. Kalinga Tubes Ltd. AIR 1965 SC 1535 ¶¶ 16-20.
[110] Scottish Co-operative Wholesale Society Ltd. v. Meyer (1958) 3 All ER 66 (HL); Re H.R. Harmer Ltd. [1959] 1 W.L.R. 62.
[111] Scottish Co-operative Wholesale Society Ltd. v. Meyer (1958) 3 All ER 66 (HL).
[112] Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd., (1981) 3 SCC 333.
[113] The Companies Act, 2013, §241(1)(a).

On the other hand, a remedy for mismanagement is unique to the Indian companies' law and does not exist in the English company law or other common law jurisdictions. As mentioned above, §241(1)(b) consists of two limbs that cannot be split and have to be read as a whole.[114] While a part of the section mentions "material change" in the management or control of the company, the crucial part is that by virtue of such a change, there is a likelihood that the affairs of the company will be conducted in a manner prejudicial to the public interest or the company's interests. Accordingly, relief under this section cannot be granted based on a change in control alone. [115]

As per Chapter XVI of the Act, the NCLT is empowered to entertain claims of oppression or mismanagement by members who hold 1/10th of the company's issued share capital or 1/10th of its members.[116] However, the NCLT also has the power to grant a waiver in this regard.[117] In order to rectify the situation, the NCLT is empowered to make such order as it deems fit. In addition to demonstrating oppression, as part of the complaint, the shareholder must also demonstrate the facts which support a winding-up order, proving that it is 'just and equitable' but that such an order would be detrimental to some or all shareholders.[118]

This requirement again has been inspired by the company laws of the UK and other common law jurisdictions. For example, in English partnership law, the just and equitable clause has been invoked frequently when the analogy of a partnership applies, i.e., a company that is essentially a partnership or quasi-partnership between the shareholders. However, it is not restricted to companies fitting this description.[119]

Other instances befitting just and equitable grounds for winding up of company evolved and/or accepted by the Indian courts include – (a) disappearance of substratum[120]; (b) illegality of objects and fraud[121]; (c) deadlock in management[122]; (d) when the company is a 'bubble', i.e. the company never had any real business[123] (also known as '*fly-by-night'* companies[124]); and (e) a complete lack of confidence in this board's ability to handle the company's affairs.[125] However, in *Hind Overseas Pvt. Ltd. v. Raghunath Prasad Jhunjhunwala*, the Supreme Court quoted with approval the ruling in the case of *Ebrahimi v. Westbourne Galleries Ltd*. It observed that no straight-jacket formula could be applied to ascertain whether a just and equitable ground for winding up is made; instead, "*it must rest with the judicial discretion of the court depending upon the facts and circumstances of each case*."[126]

B. NCLT'S powers

The NCLT is vested with powers to grant any relief it deems fit to bring an end to the affairs complained of under §242 of the Act. These reliefs, *inter alia*, include regulation of the affairs of the company in the future[127], purchase of shares or interests of the company's members[128], restriction of allotment or transfer of shares[129], termination or modification of agreements entered into by the company with its managing director, directors, or manager[130], removal of the company's managing director, manager, or

[114] A RAMAIYA, GUIDE TO THE COMPANIES ACT (19th ed. 2020).
[115] *See generally* Jodh Raj Laddha v. Birla Corporation Ltd., C.P. 57 of 2004 CLB (unreported).
[116] The Companies Act, 2013, §241, 244, No. 18, Acts of Parliament, 2013 (India).
[117] The Companies Act, 2013, §244(1) Proviso, No. 18, Acts of Parliament, 2013 (India).
[118] The Companies Act, 2013, §242, No. 18, Acts of Parliament, 2013 (India).
[119] RAMAIYA, *supra* note 17.
[120] *See generally* Re German Date Coffee Co. [1882] 20 Ch. D 169; Re Bleriot Manufacturing Aircraft Co. [1916] 32 TLR 253; Re Varieties Ltd. [1893] 2 Ch. 235; Re Kitson & Co. Ltd. [1946] 1 All ER 435; Cotman v. Brougham [1918] AC 514 ¶520, per Lord Parker.
[121] *See generally* Princess Resuss v. Bos [1871] LR 5 HL 176; Re International Securities Corporation [1908] 25 TLR 31.
[122] *See generally* Yenidje Tobacco Co. Ltd. [1916] Ch. 426; Re American Pioneer Leather Co. [1918] 1 Ch. 556; Sumit Gupta v. MOD Serap Industries Pvt. Ltd. (National Company Law Tribunal) CP-154(ND)/2017.
[123] Re London and County Coal Co. [1867] L.R. 3 Eq.365.
[124] DR. G.K. KAPOOR & DR. SANJAY DHAMIJA, COMPANY LAW (23rd ed. 2021), 591.
[125] Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwala (1976) 3 SCC 259; Loch v. John Blackwood Limited [1924] AC 783, Rajahmundry Electric Supply Corporation v. Nageswara Rao, AIR 1956 SC 213.
[126] Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwala (1976) 3 SCC 259 ¶33.
[127] The Companies Act, 2013, §242(2)(a), No. 18, Acts of Parliament, 2013 (India).
[128] The Companies Act, 2013, §242(2)(b), No. 18, Acts of Parliament, 2013 (India).
[129] The Companies Act, 2013, §242(2)(d), No. 18, Acts of Parliament, 2013 (India).
[130] The Companies Act, 2013, §242(2)(e), No. 18, Acts of Parliament, 2013 (India).

any other director[131], alteration of the company's AOA[132] and appointment of directors.[133]

Hence, NCLT enjoys unfettered powers to handle oppression, mismanagement, and prejudice cases.

C. The applicability of AVRs

The affirmative voting rights or veto rights hold enormous significance for shareholders who aspire to attain substantial control over the company instead of just an investment in a profit-making venture. Even though the Act does not address clauses like this, investors have the right to insert them into Shareholders' Agreements (*hereinafter* referred to as "**SHA**") that grant them AVRs at the company's general meetings. However, the investor should make sure that the company is made a party to the SHA, with the understanding that it will modify and incorporate those clauses into its AOA. The AOA of a company grant the company the power and authority, and the members of that company are obligated to follow the provisions of the company's AOA, in accordance with § 10 of the Act as was held by the Supreme Court in the case of *V.B. Rangaraj v. V.B. Gopalakrishnan and Ors.*[134], the agreed terms included in the SHA are only enforceable if they are incorporated into the company's AOA.

Nevertheless, the company must ensure that the AOA are compliant with the Act. If such AOA bypasses or contradicts the Act, the provisions of the statute shall prevail. Delhi High Court in its judgment in the case of *World Phone India Pvt. Ltd. and Ors. v. WPI Group Inc. (USA)*[135], held that exclusive rights agreed under the SHA, if not included in the AOA, shall not be binding on the company and clauses in the memorandum of association, AOA, SHA, or any company resolution that are contrary to the Act shall be invalid and unenforceable.

[131] The Companies Act, 2013, §242(2)(h), No. 18, Acts of Parliament, 2013 (India).
[132] *See generally* The Companies Act, 2013, §242(2)(5), No. 18, Acts of Parliament, 2013 (India).
[133] The Companies Act, 2013, §242(2)(k), No. 18, Acts of Parliament, 2013 (India).
[134] V.B. Rangaraj v. V.B. Gopalakrishnan and Ors [1992] 73 CompCas 201 (SC).
[135] World Phone India Pvt. Ltd. and Ors. v. WPI Group Inc. (USA) [2013] 178 CompCas 173 (Delhi).

III. BRIEF HISTORY OF THE CASE

The illustrious Tata Group in India is led by Tata Sons, the flagship holding company controlling major shareholding in the group companies. In an unexpected move, the Tata Sons' board passed a resolution on 24 October 2016 and removed Mr. Mistry from the position of company's executive chairman. He was, however, retained as a director of the company. A few Tata Group companies followed suit and removed Mr. Mistry from the directorship in the next few days. Sensing what the future held for him, Mr. Mistry resigned from the remaining Tata Group companies.

The SP Group, in which Mr. Mistry holds a controlling stake, felt aggrieved by the above board decision. Consequently, its two group companies, Cyrus Investments Private Limited and Sterling Investment Corporation Private Limited, approached the NCLT. In their petition, they raised allegations of unfair prejudice, oppression, and mismanagement, under §241 and §242, read with § 244 of the Act. However, since at the time of the filing of the petition, the complainant companies together less than ten per cent of the total issued share capital of Tata Sons, the petition was rejected as it did not meet the requirements of §244(1)(a). Later the two companies moved the NCLT for a waiver from this requirement, and when not so granted, the parties moved the NCLAT in an appeal, which extended the waiver. Parallel to the waiver application, the applicants also sought a stay from the NCLT on the 16 February 2017 Extraordinary General Meeting (*hereinafter* referred to as "**EGM**") notified by Tata Sons. The EGM was purportedly being held to remove Mr. Mistry from the directorship of Tata Sons. However, NCLT did not grant a stay, and consequently, this resulted in Mr. Mistry losing the directorship of Tata Sons also.

Meanwhile, Mr. Mistry's petition at the NCLT sought 21 reliefs, to begin with, but this number got reduced to 13 due to the withdrawal of some pleas and changed circumstances. The significant contentions related to the alleged abuse of the AOA, to enable the trusts to wrest control over the Tata Sons board, the illegitimate ouster of Mr. Mistry from the leadership position of executive

chairman, followed by his removal from the positions held in group companies, the utter failure of the directors in carrying out their fiduciary responsibilities of preventing the chairman emeritus Mr. Ratan N Tata, the chairman emeritus from treating Tata Sons as a proprietorship concern, and the illegal registration of the amended certificate of incorporation, leading to the rechristening of the company from being a public company to a private company with nefarious purpose. Also included in the petition were a whole host of allegations around the Nano project, the Corus acquisition, and transactions involving IL&FS, Air Asia, Kalimati Investments and NTT DoCoMo and some sundry matters.

The NCLT dismissed the SP Group petition in March 2017 and decided the case in favour of the Tata Group on all the points, factual as well as legal.

Against the above decision of the NCLT, the SP Group went in appeal to the NCLAT. Surprisingly while NCLAT dealt with the complete original petition at the NCLT stage, in its final verdict on 18 December 2019, while setting aside the NCLT decision on all counts, it focussed its attention on only five aspects of the case –

(a) the legality of the Tata Sons board decision ejecting Mr. Mistry, first from the top position at Tata Sons and thereafter taking away his directorship at various Tata Group companies;

(b) scope and extent of NCLT's powers under §242 of the Act, while dealing with allegations of oppression and management initiated through an application under §241 of the Act;

(c) legitimacy and maintainability of the right to first refusal extended by Article 75 of the AOA, entrusting the company to demand a share transfer, on the strength of a special resolution;

(d) AVRs available to the nominee directors under Article 121 of the AOA and their validity; and

(e) amendment of the certificate of incorporation and its registration, thereafter, leading to the change of the nature of Tata Sons from a public to a private company.[136]

In a sweeping verdict, the NCLAT ruled in favour of the SP Group on all the above issues. This practically meant that Mr. Mistry got back the lost position of executive chairman of Tata Sons and directorships of various Tata Group companies, as the NCLAT held that the company's power under Article 75 was bad in law and injuncted it from its exercise and declared the AVRs available to the nominee directors under Article 121 as being oppressive and prejudicial. As for the registration of the amended certificate of incorporation by the Registrar of Companies (*hereinafter* referred to as "**ROC**"), the NCLAT held the change in the nature of the company from a public to a private company bad in law and ordered the *status quo ante*. However, the most surprising part of the whole verdict was the reinstatement of Mr. Mistry on the Boards of the Tata Group companies, something which was not even prayed for.

The matter finally reached the Supreme Court, setting aside the NCLAT ruling in a comprehensive judgement on 26 March 2021. Thus, in a way, the Supreme Court verdict drew curtains on, or perhaps seemingly so, the no-holds-barred-battle between two prominent business groups of the country.

The winner-takes-all stance perceptible in all the three verdicts might give an impression of a clear and unambiguous approach adopted by the concerned forum. However, as we later analyse the Supreme Court judgment threadbare, we shall notice the glaringly mistaken position taken by the NCLAT in its verdict and several grey areas left by the apex court's judgment.[137]

IV. SUPREME COURT RULING

[136] Kavya Velagala, *Analysis of the Supreme Court ruling in the Tata-Mistry Case*, SAMASTI LEGAL (2021), https://samistilegal.in/analysis-of-the-supreme-court-ruling-in-the-tata-mistry-case/ (last visited Jun 10, 2022).

[137] Rajat Sethi, *Tata-Mistry Case: A Bittersweet Victory for the Tata Group*, S&R ASSOCIATES (2021), https://www.snrlaw.in/tata-mistry-case-a-bittersweet-victory-for-the-tata-group/ (last visited Jun 10, 2022).

The Supreme Court of India began by noting that there were several allegations about oppression and mismanagement in the original petition of the SP Group before the NCLT on which the NCLT gave findings based on facts and the NCLAT did not controvert the same. However, the court maintained that since the SP Group did not raise them in their appeal, the same shall be deemed to have been acquiesced by the SP Group. Accordingly, the court chose not to make any comments on them.

The Supreme Court dealt with 15 appeals in all, 14 filed against the NCLAT decision, on behalf of various parties from Tata Group's side, and the remaining one appeal on behalf of the SP Group. The SP Group appeal sought more reliefs in addition to those already extended by the NCLAT judgement. The following is how the Supreme Court decided on the five major findings of the NCLAT:

(1) NCLAT's affirmation that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to some members and that the removal of Mr. Mistry was in furtherance of the same.

The Supreme court pointed out that the invocation of just and equitable clause as envisioned in §241 and §242 of the Act needs the following two circumstances for justifying a winding up of a company – a. a functional deadlock which affects the working of the company at board or shareholder level; and b. where the company is a corporate quasi-partnership and an irretrievable breakdown in trust has taken place between the participating members.

The court held that with other allegations not being pressed, the only matter left to be looked at is the removal of Mr. Mistry and his reinstatement through the NCLAT order. It opined that in their pleadings, the SP Group has neither raised nor proved any instances of a deadlock in the working of the company. Regarding the existence of any corporate quasi-partnership at Tata Sons, the court held that although the SP Group enjoyed a long-standing relationship with the Tata Group, there was no such element of a corporate quasi-partnership. Mr. Mistry's appointment as a director, then deputy executive chairman and finally as executive chairman was not made in recognition of some entrenched right of representation and management as a shareholder of Tata Sons.[138]His removal, by the board, from the leadership position as executive chairman was purely in the company's interest, and his subsequent removal as director resulted from his unprofessional conduct, and such actions cannot be termed as oppressive or prejudicial. Moreover, the company's promoters being charitable trusts, winding up of the company shall negatively impact their philanthropic acts. Thus, the Supreme Court overturned the NCLAT's finding on the first point of law.

(2) The extent of the authority vested by §242 of the Act in the tribunal to deal with cases brought to it under §241 of the Act.

The court found the reinstatement of Mr. Mistry bad on two counts – (a) The scheme of §241 and §242 does not confer on the tribunal a power to reinstate, nor can such powers be inferred or implied; (b) Reinstatement as executive chairman on the board of Tata Sons was ordered without it being prayed for. Additionally, Mr. Mistry was brought back on the boards of the group companies without there being a prayer therefor and without such companies being represented in the case. The court held that the latter relief was in contravention of the principles of natural justice as the Tata Group companies were legally compliant while removing Mr. Mistry. Accordingly, the Supreme Court overturned the reinstatement of Mr. Mistry on the basis of facts as well as law.

(3) Whether NCLAT was right in tampering with Article 75 of the AOA and restraining the company from using the rights flowing from this Article.

It was held by the court that in view of the arrangement under §58(1) of the Act, there was nothing unusual in private companies having provisions like Article 75 in their AOA. The court added that, in fact, Article 75 constituted the bedrock of what is known as 'the right to first refusal'.

[138] Chaitanya Verma, *Analysis of Tata-Mistry case Judgment: Analysing it through the lens of established principles of corporate law*, LEGAL SERVICE INDIA , http://www.legalserviceindia.com/legal/article-1803-analysis-of-tata-mistry-case-judgment-analysing-it-through-the-lens-of-established-principles-of-corporate-law.html (last visited Jun 10, 2022).

Besides, it is a well-established norm in the corporate law space that restrictions imposed by its AOA bind a company more than other agreements with the members.[139]

The Supreme Court observed that Article 75 has been in vogue at Tata Sons for nearly a century, with its amendment in the year 2000 giving it the present form. It held that an SP Group representative was very much on board much before 2000, in the year 2000 when the amendment took place and has been there until 2016. Hence, raising a flag against the provision by such a shareholder is also barred by the principle of estoppel. Moreover, since the provision has never been misused in the past nor being presently misused, it cannot be opposed for its likely future misuse as §241 of the Act does not offer such protection. Accordingly, the court found the NCLAT order on Article 75 most unjustified and overturned the same.

(4) Whether the AVRs available under Article 121 of the AOA to the directors nominated by the trusts under Article 104B of the AOA was oppressive and prejudicial and whether the NCLAT was justified in nullifying the effect of the said AOA.

Article 104B of the AOA provided that the two trusts, the majority shareholders, shall have the right to nominate at least one-third of the directors to the Tata Sons board. Additionally, Article 121 of the AOA provides that any matter requiring the approval of a majority of directors shall require the affirmative vote of the majority of the nominee directors.

The court held that AVRs for the nominees of institutions holding a majority of companies' shares are an accepted global norm. As for the argument about directors holding their positions in a fiduciary capacity, the court held that such a duty is held towards both the company whose board they had been nominated to and the shareholder which nominated them. The court held that since the nominators were trusts engaged in philanthropic work, the nominee directors were well within their rights to protect the interest of their nominators. The court also noted that despite being a private company with no obligation under most provisions of the Act, Tata Sons brought outsiders on its board. It rejected the allegation of Mr. Ratan Tata running Tata Sons as a private firm and held Articles 104B, 121 and 121A of the AOA valid and legal.

The court also took exception to the SP Group changing its position regarding the AVRs in opposing them first and then praying that they would accept such AVRs for the majority shareholders if a similar right is extended to nominee directors of their own to be appointed on a proportionate basis. The court held that no provision of the Act allows directors to be appointed on a proportionate basis. Only under §151 of the Act, in a listed company, a director can be appointed to represent small shareholders, but the SP Group does not fall in that category. The court overturned the NCLAT ruling on this point also.

(5) The position regarding the reconversion of Tata Sons from a public company to a private company.

The point under consideration was whether the reconversion of Tata Sons from a public company to a private company required the necessary approvals under the Act or before the 2013 Act came into existence, under the 1956 Act.

The court observed that Tata Sons was originally incorporated as a private company. However, by virtue of §43-A(1A) of the Companies Act, 1956, it was deemed to have become a public company because of the annual turnover clocked by it then, not by its own choice. However, the AOA of the company continued as they were by virtue of the proviso to the said section. Such an arrangement of a company deemed to have become public was repealed by the Companies (Amendment) Act, 2000 and the Companies Act, 2013 had no such provision. Later, Tata Sons approached the ROC for the necessary changes in the certificate of incorporation, which it did in August 2018. At present, the definition of a private company is found in §2(68) of the Act, which Tata Sons fulfils as an entity.

[139] Nischal S Arora, Juhi Khanna & Mayank Arora, *Upholding the 'right of refusal'*, THE HINDU BUSINESS LINE (2021), https://www.thehindubusinessline.com/business-laws/upholding-the-right-of-refusal/article34239257.ece.

The Supreme Court completely disagreed with the NCLAT ruling that there was a connivance between Tata Sons and the ROC to carry out an act not permitted by law in a surreptitious manner. On the contrary, it conclusively held that the ROC had acted diligently as per law in carrying out the registration of the amended certificate of incorporation. Thus, the Supreme Court verdict decided all the questions of law raised in the appeals submitted from the Tata Group side in their favour and the NCLAT decision was overturned *in toto*. The Supreme Court dismissed the lone appeal from the side of the SP Group.

V. CASE ANALYSIS

The Tata-Mistry case drew a lot of curiosity, not only because the spat between two top corporate families had come out in the open, but also because it was a major occasion for the top court of the country to decide on vexatious points of company law and give guidance for the future. However, despite many far-reaching findings by the Supreme Court, few concerns persist unaddressed and echo a feeling similar to the famous 1970 Eagle's song Hotel California "*you can check out any time you like, but you can never leave*".[140]

This landmark judgment can be best appraised by evaluating it in terms of the '*Good'*, the '*Bad*' and the '*Unspoken*'.

A. The Good

The Supreme Court judgment was a most comprehensive attempt to analyse § 241 and 242 of the Act in terms of their efficacy in securing relief to the members of a company against the allegations of prejudicial or oppressive acts. It not only approved of the established principle in this regard but logically reiterated that there are two essential conditions – a functional deadlock affecting the company's functioning or an irretrievable breakdown in trust between members *inter se* where the company is a corporate quasi-partnership – which shall be required for invoking the just and equitable clause justifying the winding up of a company.

Similarly, the court gave a lucid explanation about the AVRs of the nominee directors as per the AOA and held that there was nothing oppressive or prejudicial in the above AVRs for the minority shareholders as such provisions are an accepted norm globally. For Article 75, which gave the right of first refusal to the company, the court was unequivocal in holding that the remedies against such rights are available only against their past or present misuse and not against the likely future misuse.

The court also gave a detailed response to the demand for the proportional representation of the minority shareholders on the company's board and clarified that the existing law does not provide for any such representation. It added that as per law, only in the case of listed companies there are provisions for independent directors in a company board and one director to represent the small shareholders.

While analysing the circumstances attendant to the ousting of Mr. Mistry from the leadership position Tata Sons and the power wielded by the tribunal under §241 of the Act to take cognisance of such situations, the Supreme Court expressed it categorically that such removal cannot be termed as oppressive. In such circumstances, the court opined that the relevant question is whether a removal, like in the instant case, is prejudicial or oppressive to some members. This was a decision taken by the board given the leadership exhibited by Mr. Mistry in steering the company forward. A lack of confidence cannot be read as oppression. It also made it clear that the approach to be taken by the tribunals in handling cases involving the removal of company directors must be distinct from the same adopted by labour courts or administrative tribunals. The court reiterated that §241 and §242 of the Act do not confer the power of reinstatement, and the tribunal should keep in mind that the purpose of the remedy sought under these sections remains to bring an end to the matters complained of, not complicate it further, as happened in this case as a result of NCLAT order.

The Supreme Court also expressed its disappointment that the NCLAT did not consider all the allegations of mismanagement made by the SP Group and just cherry-

[140] *Id.*

picked a few items out of the long list. It also made observations about the adjudication approaches followed by the NCLT and NCLAT in appraising the matters of both fact and law.

B. The Bad

Although it was a high-profile case and raised high expectations, the Supreme Court judgment left a few scars. The most prominent one was the typical approach followed by it in justifying the AVRs. By positing that since Tata Sons was a private company and bulk of Act's provisions are inapplicable to it, the judgment seems to have hit at the very edifice of §166 of the Act, which is company-form neutral by its very nature.[141]

Extending the above point further, even the refashioning of Tata Sons from a public company to a private company, though termed by the Supreme Court as a 'mere formality', became crucial for some of its pronouncements in this case. Thus, the point raised by the SP Group about its timing probably deserved much more attention. However, what makes the matter more interesting is why was the change brought about amid the litigation and why not much earlier. As things stood, the conversion seemed anything but a non-event because, on Article 75 of the AOA being challenged by the SP Group as restricting the free transferability of shares, the Court rejected its contention saying that the said provision of the Act applies only to the public companies, whereas Tata Sons was a private company. So, on balance, this whole series of events did not show a distinguished business group like the Tatas in good light and certainly left some uneasiness.

In the same way, while dealing with the duties of the nominee directors who, as per §166(2) of the Act are, like any other director of the company, under the fiduciary duty to act in the best interests of the company[142], the Supreme Court made a curious exception for the nominators, in this case, the charitable trusts, and validated the AVRs. However, again, this creates a legal problem as the law makes no such distinction, and the position taken by the Supreme Court can make it problematic for boards where the Government nominated directors can also seek a differential treatment as the Government also works principally for public welfare.

Another disappointing fact was Tata Sons not mentioning the executive chairman's removal as an agenda point for the board meeting and justifying the same under 'any other matter'. Though this is commonplace at present and the Supreme Court also deflected this crucial objection by maintaining that such removal *per se* was not oppressive or prejudicial, it did leave a sour taste. Moreover, the prior legal opinion sought by the company on this matter goes on to convey that if it was not a premeditated act, it was seemingly not a spur of the moment act too. Is this the tacit approval for a precedent that is better avoided?[143]

Speaking about the grounds for invocation of §241 and §242 of the Act regarding the justification for winding up on just and equitable grounds, though the Supreme Court came out with firm observations, it missed out on enumerating situations like a series of violations of AOA or the unauthorised diversion or siphoning of company funds.[144]

In this whole saga, the conduct of the SP Group also left much to be desired. Tata Sons was under no obligation to appoint Mr. Mistry as a director first and then as an executive chairman. His removal was purely a corporate administrative decision taken in the light of the confidence shared by the board about Mr. Mistry's capability in that leadership role. However, not only Mr. Mistry raised myriad allegations against the Tata Group in the initial stage, he later reduced them significantly and then he did not press many of them at the Supreme Court level, giving the impression that instead of building his case on genuine claims, it was more of an act of washing dirty linen in

[141] Umakanth Varottil, *Supreme Court on Directors' Duties in the Tata/Mistry Case: A Critique*, INDIACORPLAW (2021), https://indiacorplaw.in/2021/03/supreme-court-on-directors-duties-in-the-tata-mistry-case-a-critique.html (last visited May 26, 2022).

[142] The Companies Act, 2013, § 166(2), No. 18, Acts of Parliament, 2013 (India).

[143] Sethi, *supra* note 40.

[144] Jaimin R Dave, *Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd. : A Magna Carta on Law of Oppression and Mismanagement*, TAXMANN (2021).

public only out of desperation. Moreover, the continuous rant of the board acting with prejudice and vengeance held no ground as his removal was only from a position of group leadership and not from directorship in the first instance. The subsequent removal from directorship germinated from the unprofessional and inappropriate conduct exhibited by Mr. Mistry between the two events. In the end, Mr. Mistry's stance appeared more like an attempt aimed at restitution of the fallen grace rather than a solid case pursued through unimpeachable arguments on facts and law. This got further substantiated by his vacillating position on AVRs available under Article 121.

Besides complicating the position of a few legal provisions, it shall also be worth mentioning that the Supreme Court made some off the cuff remarks about the SP Group, which were a bit scathing.

C. The Unspoken

Despite delivering a comprehensive judgment, the Supreme Court verdict did leave a loose end, which could lead to acrimony soon. The court did not opine conclusively when the SP Group pleaded for separation of ownership and maintained that it was seized of only the NCLAT order and shall not dwell upon anything unrelated thereto. It also added that the ascertainment of the valuation of the SP Group shares shall call for the valuation of the whole Tata Sons stakes, including all the listed as well as unlisted entities, the immovable assets, and the Tata Sons brand value. The court held that the same required an adjudication of facts, which was beyond its purview at that stage. However, the court did suggest that the two sides are free to resort to either Article 75 of the AOA or any other legally available route to resolve this tangle.

The fact remains that after such a slugfest, the separation between the two groups is inevitable. The Supreme Court was perfectly correct in taking its position, but realising the ground realities, a roadmap with timelines for resolving this request from its side would have been the best response to the potential skirmishes. However, like Antonin Scalia, the famous US Supreme Court judge quipped so perfectly- "*Like other human institutions, courts and juries are also not perfect.*"

VI. CONCLUSION

As it stands, in India, the law on oppression and mismanagement, though reinforced by numerous court rulings, remains ambiguous in the absence of express legal provisions. This invariably saddles the courts with discretion to deal with each case in the light of its specific facts and circumstances. In this all-important case, both sides suffered reputational loss because of the persisting grey areas. In a fast-developing economy like India, where the corporates of the day are becoming more prominent by the day, a robust ecosystem for securing high standards of corporate governance will remain very critical.

As very aptly mentioned by Robert J. Sharpe – "*courts often come across 'hard cases', the headlines-grabbing ones, where the law may not yield a ready answer. In such situations, the law imposes the duty upon the judges to still come out with the best answer according to law*".[145] This case shall go into history as another such case and inspire both the bench and the legislature to prepare better responses to future challenges.

References:

1. Brown v. Allen 344 U.S. 443 (1953).
2. Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461.
3. Maneka Gandhi v. Union of India AIR 1978 SC 597.
4. Mohd. Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945.
5. Olga Tellis v. Bombay Municipal Corporation 1985 SCC (3) 545.
6. Union Carbide Corporation v. Union of India 1990 AIR 273.
7. Menaka Doshi, Often, The Supreme Court Is Neither Right Nor Final: Chintan Chandrachud, Bloomberg Quint (2020), https://www.bloombergquint.com/law-

[145] ROBERT SHARPE, GOOD JUDGMENT (University of Toronto Press 2019).

and-policy/often-the-supreme-court-is-neither-right-nor-final-chintan-chandrachud (last visited Jun 10, 2022).

8. Tata Consultancy Services Limited v. Cyrus Investments Private Limited 2021 SC 184.
9. Elder v. Elder & Watson Ltd. (1952) Scottish Cases 49.
10. Per Lord Cooper in Elder v. Elder & Watson Ltd. (1952) Scottish Cases 49.
11. Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535 ¶¶ 16-20; Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd., (1981) 3 SCC 333 ¶¶ 46-54.
12. Shanti Prasad Jain v. Kalinga Tubes Ltd. AIR 1965 SC 1535 ¶¶ 16-20.
13. Scottish Co-operative Wholesale Society Ltd. v. Meyer (1958) 3 All ER 66 (HL); Re H.R. Harmer Ltd. [1959] 1 W.L.R. 62.
14. Scottish Co-operative Wholesale Society Ltd. v. Meyer (1958) 3 All ER 66 (HL).
15. Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd., (1981) 3 SCC 333.
16. The Companies Act, 2013, §241(1)(a).
17. A Ramaiya, Guide to The Companies Act (19th ed. 2020).
18. *See generally* Jodh Raj Laddha v. Birla Corporation Ltd., C.P. 57 of 2004 CLB (unreported).
19. The Companies Act, 2013, §241, 244, No. 18, Acts of Parliament, 2013 (India).
20. The Companies Act, 2013, §244(1) Proviso, No. 18, Acts of Parliament, 2013 (India).
21. The Companies Act, 2013, §242, No. 18, Acts of Parliament, 2013 (India).
22. Ramaiya, *supra* note 17.
23. *See generally* Re German Date Coffee Co. [1882] 20 Ch. D 169; Re Bleriot Manufacturing Aircraft Co. [1916] 32 TLR 253; Re Varieties Ltd. [1893] 2 Ch. 235; Re Kitson & Co. Ltd. [1946] 1 All ER 435; Cotman v. Brougham [1918] AC 514 ¶520, per Lord Parker.
24. *See generally* Princess Resuss v. Bos [1871] LR 5 HL 176; Re International Securities Corporation [1908] 25 TLR 31.
25. *See generally* Yenidje Tobacco Co. Ltd. [1916] Ch. 426; Re American Pioneer Leather Co. [1918] 1 Ch. 556; Sumit Gupta v. MOD Serap Industries Pvt. Ltd. (National Company Law Tribunal) CP-154(ND)/2017.
26. Re London and County Coal Co. [1867] L.R. 3 Eq.365.
27. Dr. G.K. Kapoor & Dr. Sanjay Dhamija, Company Law (23rd ed. 2021), 591.
28. Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwala (1976) 3 SCC 259; Loch v. John Blackwood Limited [1924] AC 783, Rajahmundry Electric Supply Corporation v. Nageswara Rao, AIR 1956 SC 213.
29. Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwala (1976) 3 SCC 259 ¶33.
30. The Companies Act, 2013, §242(2)(a), No. 18, Acts of Parliament, 2013 (India).
31. The Companies Act, 2013, §242(2)(b), No. 18, Acts of Parliament, 2013 (India).
32. The Companies Act, 2013, §242(2)(d), No. 18, Acts of Parliament, 2013 (India).
33. The Companies Act, 2013, §242(2)(e), No. 18, Acts of Parliament, 2013 (India).
34. The Companies Act, 2013, §242(2)(h), No. 18, Acts of Parliament, 2013 (India).
35. *See generally* The Companies Act, 2013, §242(2)(5), No. 18, Acts of Parliament, 2013 (India).
36. The Companies Act, 2013, §242(2)(k), No. 18, Acts of Parliament, 2013 (India).
37. V.B. Rangaraj v. V.B. Gopalakrishnan and Ors [1992] 73 CompCas 201 (SC).
38. World Phone India Pvt. Ltd. and Ors. v. WPI Group Inc. (USA) [2013] 178 CompCas 173 (Delhi).
39. Kavya Velagala, Analysis of the Supreme Court ruling in the Tata-Mistry Case, Samasti Legal (2021), https://samistilegal.in/analysis-of-the-supreme-court-ruling-in-the-tata-mistry-case/ (last visited Jun 10, 2022).

40. Rajat Sethi, Tata-Mistry Case: A Bittersweet Victory for the Tata Group, S&R Associates (2021), https://www.snrlaw.in/tata-mistry-case-a-bittersweet-victory-for-the-tata-group/ (last visited Jun 10, 2022).
41. Chaitanya Verma, Analysis of Tata-Mistry case Judgment: Analysing it through the lens of established principles of corporate law, Legal Service India , http://www.legalserviceindia.com/legal/article-1803-analysis-of-tata-mistry-case-judgment-analysing-it-through-the-lens-of-established-principles-of-corporate-law.html (last visited Jun 10, 2022).
42. Nischal S Arora, Juhi Khanna & Mayank Arora, Upholding the 'right of refusal', The Hindu Business Line (2021), https://www.thehindubusinessline.com/business-laws/upholding-the-right-of-refusal/article34239257.ece.
43. *Id*.
44. Umakanth Varottil, Supreme Court on Directors' Duties in the Tata/Mistry Case: A Critique, IndiaCorpLaw (2021), https://indiacorplaw.in/2021/03/supreme-court-on-directors-duties-in-the-tata-mistry-case-a-critique.html (last visited May 26, 2022).
45. The Companies Act, 2013, § 166(2), No. 18, Acts of Parliament, 2013 (India).
46. Sethi, *supra* note 40.
47. Jaimin R Dave, Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd. : A Magna Carta on Law of Oppression and Mismanagement, Taxmann (2021).
48. ROBERT SHARPE, GOOD JUDGMENT (University of Toronto Press 2019).