REASSESSING LOCUS STANDI IN OPPRESSION AND MISMANAGEMENT PETITIONS

Aditya Vikram Sen, B.A. LL.B. (Hons.), Jindal Global Law School
(O. P. Jindal Global University)

ABSTRACT

Corporate Governance, analogous to its parliamentary equivalent, entails the will of the majority as a key feature of a company's decision-making process. Simultaneously, it also safeguards the interests of the minority members from unjust prejudice caused to their interests. Section 241 of the Companies Act, 2013[1] lays down the right for any member of a company to approach the National Company Law Tribunal ('NCLT/Tribunal') for redressal on the belief that the operations of the company are being carried out oppressively and is detrimental to public interest, contrary to the company's own interests, oppressive to any member(s), or when substantial alterations are being brought about in the control and management of the company.

This right of the minority shareholders is based on the members meeting a numerical threshold, stipulated under Section 244.[2] However, the Act also permits the tribunal to waive the locus requirement, enabling members who do not attain the numerical criterion to approach the tribunal for cases involving oppression and mismanagement.

With regard to the maintainability of the petition under Section 241, the position of the law is still uncertain. The courts have rendered conflicting views on the right of an individual who is not a member of the company to maintain a petition for redressal against oppression and mismanagement.

This paper seeks to examine the grounds for the grant of a waiver by the Tribunal, as well as the shift in the scheme of the Companies Act, 1956 and the 2013 Act in determining membership and the judicial confusion emanating from the latter due to an undue reliance upon the jurisprudence under the 1956 Act wherein the courts adopted a more flexible approach.

[1] The Companies Act, 2013, § 241, No. 18, Acts of Parliament, 2013 (India).
[2] The Companies Act, 2013, § 244, No. 18, Acts of Parliament, 2013 (India).

Judicial Interpretation of the Term "Member" in the 1956 Act

In *Worldwide Agencies (Private) Limited v. Margarat T Desor*, the Supreme Court of India allowed a petition filed by a non-member under Section 397/398 of the erstwhile Companies Act despite the absence of names on the register of members and limited its decision onto just the facts and circumstances of the case without providing a definitive ruling.[3] The case law on the maintainability of oppression and mismanagement cases under the 1956 Act has been inconsistent. The Company Law Board has held that to maintain a case on oppression and mismanagement under Sections 397 and 398, the aggrieved party has to first file an application under Section 111 seeking a correction on the register of members.[4] However, in some cases, such as *Banford Investment Ltd. v Magadh Spun Pipe Ltd.,*[5] the court highlighted the possibility of companies circumventing this requirement by eliminating the names of the shareholders from the register of members to prevent them from filing petitions. Hence, in *Satish Chand Sanwalka And Ors. vs Tinplate Dealers Association Pvt. Ltd.*,[6] the Company Law Board held that for the purposes under Section 397 and 398, membership could be recognised employing a more expansive and accommodating interpretation such as allotment of share certificates and the company's treatment of the petitioner as a member. For instance, in *Dr Bais Surgical and Medical Institute Pvt. Ltd. and others v. Dhananjay Pande,*[7] the Company Law Board, based on a conjoint reading of the above two cases and the Supreme Court's view in *Shri Balaji Textile Mills (P) Ltd. v. Ashok Kavle*,[8] held that a contextual interpretation should be given to these sections, based on the circumstances. Thus, the petitioner in this case, despite not having his name enlisted on the register of members, was still recognised as a member on the grounds of substantial involvement in the affairs of the company, as he was appointed the Managing Director, and that he was entitled to the allotment of shares against his application money. Thus, a liberal reading of Section 399(1)[9] could imply a dilution of a locus requirement under Section 399. However, much before such liberal interpretations of the term 'member', the Bombay High Court in *Killick Nixon v. Bank of India*[10] had held that the locus requirement under Section 399 ought to be determined with reference to Section 41 of the Companies Act,

[3] World Wide Agencies Pvt. Ltd. v. Margarat T. Desor, AIR 1990 SC 737.
[4] C. Vasudevamurthy v. Associated Oxides, [2009] 150 Comp Cas 339.
[5] Banford Investment Ltd. v Magadh Sprin Pipe Ltd. (1998) 3 Comp LJ 509 (CLB): (1998) 93 Comp Cas 6851 (CLB).
[6] Satish Chand Sanwalka v Tinplate Dealers Association (P) Ltd (1998) 93 Comp Cas 701 (CLB).
[7] Dr Bais Surgical and Medical Institute Pvt Ltd v Dhananjay Pande, (2004) 121 Comp Cas 1 (CLB).
[8] Shri Balaji Textile Mills (P) Ltd. v. Ashok Kavle, [1989]66 COMPCAS654(KAR).
[9] Killick Nixon Ltd. v. Bank of India, 1983 (2) Bom CR 631.
[10] J P. Srivastava v. Gwalior Sugar, [2004] 122 Comp Cas 696 (SC).

1956, wherein the petitioner, if not included in the register of members, could not exercise the privileges of a 'member'. The same was followed in *J.P. Srivastava v. Gwalior Sugar*, wherein the court, despite making the requirements of "consent in writing" under Section 399(3) more flexible, held that the same is not useful in interpreting Section 399(1), as an equitable interest in the shares of a company does not entitle the owner to membership in the company. [11]

Perhaps, it may be argued that the expansive interpretation seen towards the later cases could be inferred to mean that in a case where complex factual and legal issues are involved, the petition should not be dismissed at the threshold. Rather, it may be potentially assessed on substantive merits even if the petitioner has not conclusively proved his membership. However, before the grant of relief, it is imperative for the petitioner to establish his membership status.

A Comparative Analysis of the 1956 and 2013 Acts: A Study of the Shift in the Statutory Scheme

The Companies Act, 2013, brought about not just structural alterations but also conceptual modifications, particularly concerning the broadening of powers conferred upon the National Company Law Tribunal (NCLT), with the inclusion of class action suits. Under the erstwhile Act, it was mandatory to seek permission and reference from the Central Government; however, the new law eliminates this requirement by allowing the aggrieved to approach the NCLT directly. The Central Government, under the 2013 Act, possess the authority to file an application wherein the prevention of oppression and mismanagement is not confined solely to the members. The statute serves as an exhaustive provision that also prescribes the punishment for any transgressors under section 243 of the Companies Act, 2013.[12] This is an addition that was not present in the earlier Act.

Section 241 of the Companies Act, 2013 employed supplementary language to imply that a petitioning shareholder is authorised to commence legal proceedings if the actions of the offending shareholders are "prejudicial … to him or any other member or members". Such a remedy that deals with the prejudice suffered by the shareholders was not present in Section 397 of the 1956 Act.[13] Thus, Section 241(1)(a)[14] expands the pre-existing oppression remedy

[11] The Companies Act, 1956, § 399(1), No. 1, Acts of Parliament, 1956 (India).
[12] The Companies Act, 2013, § 241, No. 18, Acts of Parliament, 2013 (India).
[13] The Companies Act, 1956, § 399(1), No. 1, Acts of Parliament, 1956 (India).
[14] The Companies Act, 2013, § 241(1)(a), No. 18, Acts of Parliament, 2013 (India).

through the inclusion of the newly established remedy of prejudice.

While the precise legislative intent behind the prejudice remedy is unknown, the concept first emerged in the Companies Bill, 2008 and can be substantially attributed to English Law, given that Section 397 of the 1956 Act[15] is largely pari materia to Section 210 of the English Companies Act, 1948.[16] The Jenkins Committee,[17] while analysing the inefficiencies of the oppression remedy, enunciated the unfair prejudice remedy to substitute it. This is because Section 210 applied to cases wherein the affairs of the company were not merely oppressive but conducted in a way that is unfairly prejudicial to the interests of some portion of the members. While a study of the emergence of the equivalent remedy could be beneficial for understanding the rationale behind the prejudice remedy in India, it is pertinent to note the key differences between the two legislative frameworks. The unfair prejudice remedy in English Law replaced the prior oppression remedy, a term which was eradicated by the British statute. However, in India, both oppression and prejudice are concurrently present. The prejudice remedy supplements the oppression remedy and does not substitute for it. This expands the choices available to the petitioning shareholders. Additionally, through the unfair prejudice remedy, British Law merges the concepts of unfairness and prejudice, wherein the courts have to evaluate both aspects. In India, the Companies Act, 2013 refers exclusively to prejudice and entails no reference to unfairness. The petitioning shareholders, prima facie, confront a lesser hurdle to fulfil the required threshold to invoke the remedy.

The pertinent question that needs careful evaluation is the extent of reliance on the jurisprudence of the 1956 Act to adjudicate the question of locus standi of non-members by courts. The 2013 Act provides the definition of a 'member' under Section 2(55) by outlining three categories of individuals who qualify as members for the purposes of the Act. This is pari materia to Section 41 of the erstwhile Act[18] with a few minor modifications. Under the earlier act, along with Section 41,[19] Section 2(27) also defined a member.[20] While Section 41 set out particular criteria for the recognition of membership, Section 2(27) deployed a negative tone by stating that a member does not encompass a bearer of a share warrant granted by a company as per Section 114, thereby making it expansive and non-exhaustive. The existence of two

[15] The Companies Act, 1956, § 397, No. 1, Acts of Parliament, 1956 (India).
[16] Companies Act, 1948, § 210, 11 & 12 Geo. 6, c. 38 (UK).
[17] BOARD OF TRADE, REPORT OF THE COMPANY LAW COMMITTEE, CMD. 1749 (1962) (UK).
[18] The Companies Act, 1956, § 41, No. 1, Acts of Parliament, 1956 (India).
[19] Ibid.
[20] The Companies Act, 1956, § 2(27), No. 1, Acts of Parliament, 1956 (India).

definitions enabled a degree of leniency in interpreting the membership requirement, as seen in *Shri Balaji Textile Mills Private Limited v. Ashok Kavle*.[21] In this case, maintainability under Sections 397 and 398 was objected to on the grounds that the requirements under Section 41(2) were not complied with. The Court interpreted the term 'member' comprehensively as per Section 2(27), and that it is not controlled by Section 41(2). Thus, a person could claim membership by proving their status as a shareholder by filing statutory returns and documentation despite their absence from the register of members. The problem lies in the fact that Courts still rely on cases like Balaji Textiles to decide non-member petitions under Section 2(55).

Conditions For the Grant of Waiver under Section 244

As mentioned above, Section 244(1) of the Companies Act, 2013[22] lays down the eligibility criteria for challenging an act of oppression and mismanagement under Section 241. *Cyrus Investments*[23] is the landmark case with regard to the Tribunal's power to grant a waiver under the proviso of Section 244(1). In 2016, Cyrus Mistry was removed as the Chairperson of the Tata Sons group, leading to all the Mistry family-led investments in the Tata Sons group to apply to the tribunal for oppression and mismanagement of minority shareholders continually. However, the NCLT dismissed the waiver application and the application under Section 241. On appeal, the NCLAT laid down a list of factors to be considered by the NCLT in such cases. This section delves into a detailed analysis of some of these factors.

(I) Determining Whether the Application Under Section 241 Establishes a Case for Oppression and Mismanagement

The NCLAT recognised the existence of a "*reciprocal harmony*" between Sections 241 and 244 of the Act.[24] The question of the grant of waiver and the application of the proviso to Section 241 is only necessitated when the locus standi is not fulfilled by the member filing the application under Section 241. In such instances, the Tribunal's authority to grant a waiver allows a member whose interests have been adversely prejudiced to initiate proceedings for oppression and mismanagement under Section 241. It is vital to recognise that Section 241 pertains to the subject matter of an application for which the waiver of locus is being sought.

[21] Shri Balaji Textile Mills (P) Ltd. v. Ashok Kavle, [1989]66 COMPCAS654(KAR)**.**
[22] The Companies Act, 2013, § 241 (1) (a), No. 18, Acts of Parliament, 2013 (India).
[23] Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. & Ors., C. A. (AT) No. 133 & 139 of 2017.
[24] Ibid.

This consideration stems from the established procedure of rejecting interim applications in the absence of a prima facie case being made out on substance. However, for waivers, such a requirement is not stringent, and the petitioners do not need to delve into the merits of the case in their favour. The Courts have dismissed interim applications in cases under Section 241 because of the absence of a substantiated claim of oppression and mismanagement. For example, in *Shanti Prasad Jain v. Kalinga Tubes Ltd.,*[25] the Supreme Court, while affirming the findings of the Orissa High Court, denied the application for injunction which was filed through an interim application. The appellants could not establish a case of oppression and mismanagement.

While the tribunal cannot delve into the merits of the case to waive locus under Section 244, it ought to carry out a prima facie enquiry on whether the case pertains to oppression and mismanagement.

(II) Dilution of a Member below the Ten Per cent Requirement

The dilution of a member's shareholding can be a subject matter for filing an application under Section 241, as well as a ground for waiver. In *Manoj Bathla* v. *Vishwanah Bathla,*[26] the shareholding of the respondent was reduced from 25% to 0.33%, and the same was the subject matter of the application and the plea for the grant of waiver. The NCLAT, while upholding the decision of the NCLT, had held that denying the grant of waiver would deprive the respondent of the remedies sought against oppression resulting from the manipulation of his shareholding. Similarly, in *Photocon Infotech Pvt. Ltd. v. Medici Holdings Ltd.,*[27] waiver was granted on just and equitable grounds as the dilution of shareholding was to prevent the aggrieved to prevent them from filing a case of oppression and mismanagement.

Conclusion: A Need for a More Uniform Interpretation of the Term 'Member'

The principles of statutory Interpretation necessitate the provisions of a statute to be interpreted according to their language and text unless the situation warrants otherwise. Section 2(55) of the Companies Act, 2013 deploys the term 'means' in defining a 'member', indicating its exhaustive scope.[28] Section 241, in no uncertain terms, states that any member can file an

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[25] Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535.
[26] Manoj Bathla v. Vishwanah Bathla, C. A. (AT) No. 399 of 2018.
[27] Photocon Infotech Pvt. Ltd. v. Medici Holdings Ltd., C. A. (AT) No. 375 of 2017.
[28] The Companies Act, 2013, § 2(55), No. 18, Acts of Parliament, 2013 (India).

application and further establishes locus standi by laying down that 'such member has a right to apply under Section 244.'[29] Section 244 lays down all the necessary criteria to be fulfilled for the maintainability of a petition under Section 241.[30] Thus, based on the text and framework of the 2013 Act, it is clear that a non-member cannot file a petition under Section 241, 242, read with Section 244. A stricter interpretation of the locus standi requirement can be implemented by the courts on two grounds: Firstly, the legislative intent and secondly, the decision of the apex court in *Severn Trent Water Purification Inc. v. Chloro Controls (India) (Private) Limited*.[31]

The primary source and rationale of confusion, as evident from a close perusal of cases both under the 1956 Act as well as the 2013 Act, emanates from a vague differentiation between a 'member' and a 'shareholder'. Despite the absence of the name from the register of members, locus standi has been considered to be fulfilled by the mere evidence of being a holder of shares. As noted above, in some cases, the court has used the term interchangeably, while in others it has distinguished the two. In this regard, it is pertinent to consider the 2018 amendment[32] wherein the term shareholder was replaced with 'shareholder or member', implying the difference between 'member' and a 'shareholder' under the 2013 Act, which should not be conflated by the courts and should be duly acknowledged.

Secondly, the court in *Severn Trent Water Purification Inc. v. Chloro Controls (India) (Private) Limited*[33] observed that Section 439(4) is a complete code in itself, and the term 'member' ought to be construed strictly as per Section 41 of the 1956 Act. Furthermore, the provision of a remedy, i.e rectification on the register of members,[34] necessitates a stricter interpretation. Given that the legislature has explicitly excluded categories of individuals who are barred from filing a petition, the exhaustive nature cannot be broadened by means of judicial interpretation. It is argued that an analogous rationale applies to locus standi for cases of oppression and mismanagement as well.

[29] The Companies Act, 2013, § 241, No. 18, Acts of Parliament, 2013 (India).
[30] The Companies Act, 2013, § 241, No. 18, Acts of Parliament, 2013 (India).
[31] Severn Trent Water Purification Inc. v. Chloro Controls (India) (Private) Limited., 2012 INSC 436.
[32] The Companies (Amendment) Act, 2017, § 88, No. 1, Acts of Parliament, 2017 (India).
[33] Severn Trent Water Purification Inc. v. Chloro Controls (India) (Private) Limited., 2012 INSC 436.
[34] The Companies Act, 1956, § 111, No. 1, Acts of Parliament, 1956 (India).