Analysing the 'Cyrus Mistry-Tata battle' through the legal prism

Columns

VK Unni| Professor, IIM Calcutta

Updated Dec 19, 2019 | 14:02 IST

Undoubtedly, Tata Sons will challenge the NCLAT decision before the Supreme Court and another round of interesting legal battle will unfold before the apex court

Based on the decision of the Director Board of Tata Sons Ltd. (TSL), its executive chairman Cyrus Mistry was suddenly removed from the position in October 2016. This removal was subsequently challenged before the National Company Law Tribunal (NCLT) by the minority shareholders of TSL namely Cyrus Investments Pvt. Ltd. (CIPL) and Sterling Investment Corporation Pvt. Ltd. (SICPL) under sections 241-242 of the

Companies Act 2013 (Act) alleging prejudicial and oppressional acts of Tata Trusts and others who were the majority shareholders in TSL.

While the petition of CIPL and SICPL was pending before NCLT, TSL changed the status of the company from public limited to private limited by filing an application before the Registrar of Companies (RoC). In July 2018 NCLT dismissed the petition filed by CIPL and SICPL. The order of NCLT was challenged by CIPL and SICPL through an appeal filed before the National Company Law Appellate Tribunal (NCLAT).

Sections 241 and 242 of the Act are dependent on two factors, namely — (i) whether the affairs of the company have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company, and (ii) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up.

If both the aforesaid questions are answered in affirmative, NCLT/NCLAT can exercise its power under Section 242 of the Act in order to resolve the matters complained of and make such order as it thinks fit. NCLAT undertook a thorough examination of the Articles of Association (AoA) of TSL to find out whether there was any direct control of the majority shareholder Tata Trusts on TSL. Art. 86 of TSL provided that no quorum at a general meeting of the shareholders was completed in the absence of the authorised representative of Tata Trust which held an aggregate of at least 40 per cent of the paid-up ordinary share capital. Art. 121 was unequivocal that affirmative vote of a majority of directors nominated by Tata Trusts was indispensable for matters required to be decided by a majority of directors. Art. 121 clearly demonstrated the pre-eminent position of the nominee directors of Tata Trusts on the director board of TSL. Art. 121 were based on the aggregate paid up ordinary share capital of Tata Trust.

However, if one were to read Art. 121 along with Art. 121A especially clause (g), it became clear that it was very difficult to change the shareholding of Tata Trust to make it less than 40 per cent, as in the TSL board meeting, the nominated directors of Tata Trust had an affirmative vote on this matter also. Art. 121A (h) dealt with the voting rights of the Company at the general meeting of any Tata Company including the appointment of a representative of the company under relevant provisions of the Act with regard to the general meeting of any Tata Company mentioned. The said provisions under Art 121 and 121A made it very clear that the nominated directors of Tata Trusts were in direct control of Tata Companies and its subsidiaries. Art. 75 empowered TSL at any time to transfer ordinary shares of any of the shareholders without following the normal procedure of transfer.

TSL’s power to transfer ordinary shares of any shareholders including that of the petitioners without notice could be exercised through a special resolution in the general meeting of the holders of the ordinary shares of the company which required the presence of nominated directors of the Tata Trusts, who held an affirmative vote.

NCLAT noted that there was nothing on the record to suggest that TSL’s director board or any of the Tata Trusts, at any time had expressed displeasure about the

performance of Cyrus Mistry. However, records pointed out that on date of the board meeting Ratan Tata, chairman emeritus of TSL had asked Cyrus Mistry to step down from the post of executive chairman in presence of another TSL director. If there were a failure and loss caused to any Tata Company which also affected TSL, then Tata Trusts or TSL's director board could not be absolved of its responsibility particularly when the nominee directors of the Tata Trusts had affirmative votes which could have reversed the majority decision. NCLAT found from the records that the removal of Cyrus Mistry had nothing to do with any lack of performance on his part.

On the contrary, there was material which showed that TSL under the leadership of Cyrus Mistry performed well which was evaluated by the Nomination and Remuneration Committee (NRC) of TSL. Interestingly NRC had a member from Tata Trust and the report of NRC was unanimously approved by the director board of TSL, just three months before Cyrus Mistry's removal. Two of the Directors, who voted for the removal Cyrus Mistry were members of the NRC which just three months prior to his removal praised the performance of Cyrus Mistry as executive chairman.

According to Art. 121 the nominated directors of the Tata Trusts had affirmative voting rights over the majority decision and in the light of these affirmative rights, NCLAT observed that it was not possible for the Tata Trusts to allege that loss in different Tata Companies was due to the mismanagement of affairs by Cyrus Mistry.

Another important issue which came up before the NCLAT was the conversion of TSL from a public limited company to a private limited company without following the provisions under Sec. 14 of the Act. Even though TSL, by relying on General Circular No. 15/2013 as well as the central government notification, submitted that TSL came within the meaning of private company under Section 2(68) of the Act and thus it could take direct permission from the RoC to change the Articles of Association and to record it as private company. But NCLAT rejected this contention by pointing out that the said general circular and notifications could not override the substantive provisions of Section 14 of the Act, which was mandatory for the conversion of a public limited company to a private limited company.

Finally, NCLAT declared illegal the proceedings of TSL's director board meeting which related to the removal and other actions taken against Cyrus Mistry. Cyrus Mistry has been restored to his original position as executive chairman of TSL and consequently as a director of the Tata Companies for rest of the tenure. However, NCLAT has suspended for a period of four weeks the part of the judgment so far as it related to replacement of the present executive chairman and reinstatement Cyrus Mistry as executive chairman of TSL.

In the light of the prejudicial and oppressive decision taken during the last few years, TSL and its director board have been restrained from exercising its power under Art. 75 of TSL's AoA against the petitioners and other minority shareholders. Such power under Art. 75 could be exercised only in exceptional circumstances and in the interest of the company with proper notice. NCLAT also declared as illegal the decision of the RoC to change the status of TSL from public company to private company and the said decision has been set aside.

Undoubtedly TSL will challenge the NCLAT decision before the Supreme Court and another round of interesting legal battle will unfold before the Supreme Court. Until the Supreme Court delivers its final judgement it would be premature to assume that Tata Trusts have lost or Cyrus Mistry has won. Yes, it is a very interesting battle ahead which will definitely pave the way for more clarity on the jurisprudence relating to oppression and mismanagement under the Companies Act 2013.

VK Unni is a guest contributor. Views expressed are personal.

Source: https://www.timesnownews.com/columns/article/analysing-the-cyrus-mistry-ratan-tata-battle-through-the-legal-prism/529208