

## TUSSLE BETWEEN TATA AND S.P. GROUP: ASCERTAINING SHAREHOLDER ACTIVISM AND CORPORATE GOVERNANCE

Jagriti Singh\* Rohan Shah\*

### ABSTRACT

*In today's scenario, where companies have evolved into giant corporations with complex and unique ownership structures, there is an urgent need to apply the stringent corporate governance code of ethics and conduct requirements. This case, in point, relates to the friction between the shareholders of Tata Sons being played out in the chambers of the Board of Directors. When push came to shove, the matters spilled over into the public domain before the Media, The Income Tax Authority, RoC(Registrar of Companies), various tribunals (NCLT, NCLAT) and The Honorable Supreme Court of India. This article aims to analyse the findings of acts of oppression and mismanagement perpetrated in the Tata Sons boardroom. We will also delve into the rights of minority shareholders during proceedings in a court of law.*

**Keywords:** Corporate code of ethics and conduct, Duties of Board of Directors, Rights of Shareholders

### INTRODUCTION

Tata Sons is the principal investment holding company and promoter of the multinational conglomerate of the Tata Group of companies. Tata Trusts is a promoter-controlled entity with about 65.5% stake in Tata Sons. The S.P. Group, the largest outside shareholders, held a minority stake of 18.4%. The origin of the Mistry-Tata tussle was the surprise sacking of Cyrus Pallonji Mistry of the S.P. Group from the Executive Chairmanship of Tata Sons wherein Mr. Ratan Tata was reinstated as interim Non-Executive Chairman, thus, setting the stage for a classic David vs Goliath battle. The Mistry camp moved the NCLT to seek relief from the sudden events at one of India's oldest companies.<sup>1</sup>

\*ADVOCATE, INDORE DISTRICT COURT.

\*BARKATULLAH UNIVERSITY.

<sup>1</sup> <https://www.mondaq.com/india/shareholders/1055032/tata-mistry-case-a-bittersweet-victory-for-the-tata-group>

## **THE LEAK**

Confidential information arriving in the public arena through an employee reporting mismanagement and illegal or unethical practices is referred to as a whistleblower. Some might even call it shareholder activism in this case, but it was just a ruse to get onto an offensive. It was the contention of both the NCLT and the NCLAT, under the Evidence Act section 106<sup>2</sup>, that Mr. Mistry leaked internal emails regarding the failure of corporate governance at Tata Sons after he was removed from the post of Executive Chairman. This faux pas brought a cascading effect leading to the events that followed. It is to be noted that Mr. Mistry was still a Director on the board of Tata Sons.

## **CURIOUS CASE OF INCOME TAX SCRUTINY**

The Principal Officer of Tata Sons received a letter seeking specific information from the Deputy Commissioner of Income Tax(Exemptions) seeking certain information which was duly furnished with the necessary documentation. Claiming a mail that was addressed to him by the Income Tax Department, Mr. Mistry's reply contended that Tata Trusts controlled the decision-making processes and that the trustees themselves posed several regulatory risks. Tata Sons contended that this was a breach of confidentiality. They convened an Extraordinary General Meeting (EGM) seeking the removal of Mr. Mistry from the Directorship of Tata Sons. Subsequently, Mr. Mistry was relieved from the Directorship of some of the Tata group companies. Consequently, he resigned from all the remaining companies on whose boards he sat, seeing the writing on the wall.

After that, two companies by name Cyrus Investments Private Limited and Sterling Investment Corporation Private Limited, belonging to the S.P. Group, filed a company petition in C.P. No.82 of 2016 before the National Company Law Tribunal under Sections 241 and 242 read with 244 of the Companies Act, 2013.

## **THE NCLT SAGA**

The complainant encountered their first hurdle before the NCLT: they only controlled about 2% of equity shares while the rest were in preference shares. Thus an application seeking waiver of Section 244(1)(a) that required them to hold at least one-tenth of the issued share

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<sup>2</sup> <https://www.livelaw.in/top-stories/supreme-court-section-106-evidence-act-chain-of-events-sabitri-samantaray-vs-state-of-odisha-2022-livelaw-sc-503-199726>

capital was filed. Also, the complainant companies moved an application on the stay of the EGM. NCLT refused the application for waiver and refused the stay of the EGM. Subsequently, Mr. Mistry was removed from the Directorship of Tata Sons.

The complainant companies filed appeals before the NCLAT for the grant of waiver. It was allowed, and the matter was remanded back to NCLT. The petitions were heard on company merits and ultimately dismissed.

The prominent bone of contention between the factions was the mismanagement by Tata Trusts on the board of Tata Sons and using arm-twisting techniques against the minority shareholders to wrest control over the board to control the day-to-day affairs of the group. Mr. Mistry alleged he was never allowed to function independently, and hindrances were created every step of the way. There were questions raised on Mr. Ratan Tata's conduct w.r.t. certain company dealings, which were brought out to be against the organization's well-being.<sup>3</sup>

**The allegation of operation and mismanagement levelled against Tata Sons were:**

1. Abuse of Articles of Association, particularly Articles 121, 121A, 86, 104B and 118, to enable the trust to exercise control over the Board of Directors.
2. Dubious transaction with Tata teleservices limited.
3. Acquisition of Corus Group plc. Of the U.K. at an inflated price.
4. Removal of Mr. Mistry as Executive Chairman and an attempt to remove him from the Directorship of all operating companies.
5. Nano car project realising huge losses year after year.
6. Mr. Ratan Tata runs Tata Sons on his whims and fancies.
7. Providing corporate guarantee to loans sanctioned to Sterling by Standard Chartered and facilitating an inter-corporate bridge loan.
8. Leaking confidential information to Siva of Sterling.

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<sup>3</sup> <https://www.bqprime.com/law-and-policy/tata-vs-mistry-why-mistrys-oppression-case-failed-in-the-supreme-court>

9. Fraudulent transactions concerning Air Asia.

10. Issue of Mehli Mistry receiving favours due to proximity to Mr. Ratan Tata.

The petitioners sought the following reliefs from the Tribunal:

- a. Adequate representation on the Board of Directors of Tata Sons.
- b. The necessity of an affirmative vote by the majority of directors nominated by the trust be deleted;
- c. Representation on all committees formed by the Board of Directors of the respondent; and
- d. The Articles of Association and specifically Sec. 75 be amended accordingly.

The NCLT refused to provide any relief and dismissed the petitions.

### **THE RoC EQUATION**

In August 2018, at the peak of the struggle, Tata Sons received approval from the Registrar of Companies (RoC) to change its status from a deemed public limited company to a private limited one. The shareholders of Tata Sons had passed a resolution favouring a conversion at an AGM in September 2017. The RoC development, along with Article 75 of the Articles of Association, formally restricted the S.P. group from selling its stake to any external investor without the prior consent of Tata Sons.

### **THE NCLAT VERDICT**

After a series of setbacks, the complainant moved the Appellate Authority, and reliefs were granted over and above what was sought at the time;

- (i) The proceedings relating to the removal of Mr. Mistry were held illegal
- (ii) restoring Mr. Mistry as Executive Chairman and Director;
- (iii) declaring illegal the appointment of someone else in place of Mr. Mistry;
- (iv) curtailing the authority of Mr. Ratan Tata and nominees of Tata Trust to take any decision in advance;

(v) restraining use of Article 75 against minority shareholders except under exceptional circumstances and in the interest of the company;

(vi) declaring as illegal the decision of the Registrar of Companies to change the status of Tata Sons from a limited to a private company.

The reasoning of NCLAT regarding Mr. Mistry's reinstatement was that his removal was done hastily without following the due procedures and that no case could be made for mismanagement on his part. It was observed that the firm excelled under his leadership.

It was also noted that there was indeed oppression of the minority shareholders, and relief was granted against the interference of nominee directors and their affirmative voting rights.

NCLAT's objection to reconversion was an instance of lethargy from 2000 to 2013 when Tata Sons did not try to change its status from Public to Private but swung into action after the dismissal of the complaint by the NCLT.

### **SUPREME COURT: THE BUCK STOPS HERE**

The Honourable Supreme Court of India outright rejected specific allegations made by S.P. Group relating to the transactions with Siva and Sterling Group of Companies. Dubious transactions flagged by the S.P. Group regarding Air Asia were also held to be devoid of any wrongdoing. Transactions with Mehli Mistry were fair, while the losses arising from the Tata Nano project were just a business decision that failed to reach its desired outcome, among many others, like the acquisition of Jaguar Land Rover that ultimately did. The acquisition of Corus reached finality.

It was opined that the findings of NCLAT that led it to grant reliefs revolved around four areas in which NCLAT can be taken to have undertaken scrutiny and reversed the findings of NCLT.

### **REMOVAL OF MR. MISTRY**

It was contended that the mere removal of Mr. Mistry from his posts of Executive Chairman and Directorship of Tata Sons could not be held as oppressive or prejudicial conduct, which was sufficient to throw the petition under section 241 out.

It was also opined that the Tribunal could not grant relief under section 242 even if the removal was not per law or was not justified on facts as it is indeed not a labour court or an administrative tribunal. The court also rebuked Mr. Mistry for leaking confidential and sensitive information. At the same time, he was a Director, and thus such a person who set his own house on fire could not be tolerated to be on the board of any company.

### **JUST AND EQUITABLE CLAUSE**

For the invocation of the said clause, there must be sufficient grounds for a justifiable lack of conduct on the part of the Directors. A mere lack of confidence between the majority and minority shareholders is insufficient. The NCLAT failed to raise the fundamental question of whether it was equitable to wind up the company and starve to death the Charitable Trusts; otherwise, justifying the winding up of the company under the clause is entirely flawed.

### **REINSTATEMENT OF MR. MISTRY**

The Supreme Court found this to be quite incomprehensible as such a relief granted was not even sought, though the complainant wished for it. It is curious to note that in 2019 when the order of reinstatement was made, the five-year tenure of Mr. Mistry, beginning in 2012, had already elapsed while reinstating him on the board of Tata Group of companies was a fallacy as they had not been made parties and following the due procedure prescribed by the Statute and Articles.

### **RELIEF REGARDING ARTICLE 75**

There was no instance of invocation of Article 75, let alone its misuse.

That S.P. Group had willingly become party to the article when it was amended in its present form in the year 2000 and to which Mr. Mistry and his father were parties. NCLAT agreed that it had no jurisdiction to declare any Articles of Association illegal and to cover the likelihood of future bad conduct being impermissible under the law.

### **AFFIRMATIVE VOTING RIGHTS**

The complainant initially prayed to strike down Articles 86, 118, 121 and 121A and a portion of Article 124. However, after that, they were okay with the affirmative voting rights and

requested similar rights to be conferred on the S.P. Group. The frequent change in the position of the S.P. Group raises doubt about their intentions.<sup>4</sup>

### **CLAIM FOR PROPORTIONATE REPRESENTATION**

The right to claim proportionate representation is not available to minority shareholders but only to small shareholders. The claim that the Tata Group and S.P. Group were involved in a Quasi partnership was also rejected because they had agreed 50 years after the incorporation of Tata Group, and the induction of Mr. Mistry's father on the board 20 years later was not per any statutory or contractual right.

### **PUBLIC OR PRIVATE?**

The status of Tata Sons was that of a private company till 1975, then of a deemed public company under section 43A from 1975 to 2000 and further until 2013 by Act 53 Of 2000 and then as a private company from 2013 within section 2(68) of 2013 Act. The request made by Tata Sons and the action taken by RoC to amend the Certificate of Incorporation were perfectly in order.

### **THE TIMES ARE A-CHANGIN'**

There has been a sea change in law after the advent of the Companies Act 2013, and a paradigm shift has occurred from corporate democracy to corporate governance. The Directors have a fiduciary responsibility to act reasonably with the highest level of duty and, once appointed, owe their allegiance to the company and not their nominators. The provisions of sections 135, 149, 151, 166, 177 and 178 further strengthen the case for corporate governance in listed companies. The laws must keep evolving with the type of enterprises they wish to govern or regulate. The listing has increased social accountability and responsibility from large corporate houses established by individuals with their funds to the appointment of professional managers and increased social participation through public issues.

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<sup>4</sup> [https://main.sci.gov.in/supremecourt/2020/212/212\\_2020\\_31\\_1503\\_27229\\_Judgement\\_26-Mar-2021.pdf](https://main.sci.gov.in/supremecourt/2020/212/212_2020_31_1503_27229_Judgement_26-Mar-2021.pdf)