

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**AT CHENNAI**

**(APPELLATE JURISDICTION)**

**Company Appeal (AT) (CH) No. 17 / 2024**  
**(IA No. 293 / 2024)**

**In the matter of:**

**Madras Race Club**

Rep. by its Secretary  
Post Box No. 2639, Race Course,  
Guindy, Chennai – 600 032

**... Appellant**

**V**

**R.D. Ramasamy**

S/o. Duraimanickam  
No. 3/45, Sadaimnagalam,  
Ponbethi Post, Avudayarkoil Taluk,  
Pudukottai District, Tamil Nadu – 641 291

**... Respondent No.1**

**M. Magesh Kumar**

S/o. R. Munusami,  
No. 5/17, Velachery Road,  
Little Mount, Chennai – 600 015

**... Respondent No.2**

**Present :**

For Appellant : Ms. Preeti Mohan & Mr. M. Nandita Krishnan,  
Advocates

For Respondents : Mr. D. Sreenivasan & Mr. V. Jai Hari Sudhan,  
Advocates for R1  
Mr. A. Thiyagarajan, Senior Advocate &  
Mr. NR. Rajagopalan, Advocate for R2

**J U D G M E N T**  
**(Hybrid Mode)**

**Per : Justice Sharad Kumar Sharma, Member (Judicial):**

1. The Appellant i.e. Madras Race Club is a Company which stood registered within the meaning of Section 8 of the Companies Act and is a non-profit

Company, which does not have any share capital. It had about 7417 Club Members as on the date, when the Company Application i.e. CP (CA) / 64 (CHE) / 2022 was initiated by the Respondents by filing the same under Section 244 of the Companies Act, 2013, to be read Rule 11 of NCLT Rules, 2016, seeking a waiver of the requirements of Section 244(b) in order to enable them to pursue Company Petition, under Section 241 read with Section 242 and 59 of the Company Act, 2013, seeking remedial measures against the acts of Oppression and Mismanagement, by the Company.

2. The facts of the case are that, one of the members of the Appellant Club i.e. Mr. M. Muthukaruppan, had filed a Company Petition, being CP / 31 / 2017, before the Ld. NCLT, Chennai, seeking a direction under Section 96 of the Companies Act, to convene and hold the Annual General Meeting pertaining to the Financial Year 2015-2016. The said Petition was contested and it came on record that, the AGM could not be held as scheduled within the time prescribed, on account of certain revelations of irregularities and discrepancies, which were identified in the membership database of the Appellant Club, which was required to be resolve first before the conduct of AGM and hence, the Appellant had appointed a firm namely M/s. Brahmayya & Co., Chartered Accountants, to conduct a special audit so as to determine the actual status of the membership of the Club and their eligibility to continue as members of the Appellant.

3. The aforesaid Audit Firm, upon completion of its audit, submitted a report in January is said to have submitted a report in January 2017. Based on the findings of the said report, the Appellant Club submitted before Ld. NCLT a total of 924 persons (including the Respondent Nos. 1 and 2) who had purported to have become the club members during the period from 2000 to 2015, only 53 persons were found to be fully compliant with membership procedures as set out in the Articles of Association for the purposes of admission of members to the Appellant Club, that 277 persons had not complied with any of the procedures and the remaining 594 persons were identified to have partially complied with the said membership procedures as set out in the AoA of the Appellant Club. It further submitted before Ld. NCLT that, only 285 persons out of the total 924 persons, had paid the requisite entrance fees, as it was stipulated for the purposes of getting admission to the membership of the Club.

4. Thereafter, perusing the Audit Report, the Ld. NCLT, in the aforesaid Company Petition, being CP / 31 / 2017, held that, it would be apt that, all such identified members who were found to be not satisfying the conditions set down for getting the membership of the Appellant Company, should be provided with an adequate opportunity, before any decision is taken, so that, they will be able to substantiate their contentions and claims. Consequently, the Ld. Tribunal vide its Order of 27.08.2017 appointed Hon'ble Justice Mr. K.P. Sivasubramaniam (Retd.), former Judge of Hon'ble Madras High Court to conduct an enquiry and

determine the genuineness of the membership of the Club and to enlist those found to be genuine in the Register of Members for the purpose of giving notice for conducting the AGM.

5. Hon'ble Justice Mr. K.P. Sivasubramaniam (Retd.), after conducting a detailed enquiry into the affairs of the Club Membership, which included opportunities to submit documents and to appear personally, filed a report dated 15.11.2017 wherein he had observed that *“a club is an association of willing persons and entry as a member is not on the basis of any right but subject to the member satisfying the requirements of the association including payment of entrance fee, subscription fee etc. and it is for the club to decide whether a person is desirable and fit to be enrolled as a fellow member, which is decided in the process of election”* (as per the terms of the AoA). The Report further observed that *“mere long usage of the club cannot vest any adverse rights against the Club when the entry itself is void”*.

6. Based on the above observation made in the report of 15.11.2017 and the analysis made thereon, Hon'ble Judge (Retd.) concluded that, a total 635 members were identified to be non-compliant with the basic mandatory requirement for being even admitted as a member and that, out of it, a total of 285 members despite of being provided with an opportunity, did not provide any proof of payment of entrance fee for admission to the membership of the Club.

7. In addition to the list of persons covered in the report, the Appellant Club submitted before Ld. NCLT that, there were 21 other persons who were also in default in payment of the entrance fee for admission into the Club and in respect of whom there were no entries of payments, available in the Ledgers that were maintained by the Appellant Club.

8. Consequently, relying upon the report that was submitted by the Hon'ble Retired Judge, the Ld. NCLT proceeded to pass an order on 13.12.2017, directing to convene the AGM of the Appellant Company and appointed Mr. R. Ramakrishnan, as Chairman to preside over the AGM and Hon'ble Justice Mr. K.P. Sivasubramaniam (Retd.) as the Independent Observer.

9. As against the decision that was taken by the Ld. NCLT, in Company Petition No. 31 / 2017 dated 13.12.2017, determining that, 635 members have not complied with the mandatory conditions to justify their continuance as members in the Club, 22 persons who were part of the list of 635 appealed before the NCLAT, against the order passed on 13.12.2017 by Ld. NCLT. However, this Appellate Tribunal, while not going into the merits of the case, directed the Ld. NCLT to issue notices to the persons who are affected so as to enable them to, avail of the opportunity to file their objection. Consequent to this, a second round of hearing was conducted by Ld. NCLT, in the said process, more than 179 persons, including the Respondents herein, appeared before the Ld. NCLT and

made their oral and written submissions in relation to their claims to membership of the Appellant Club.

10. Ld. NCLT, in compliance of the order passed by the NCLAT after hearing the affected persons including the Respondents herein passed a detailed order on 24.09.2019, accepting the report that was submitted on 15.11.2017, by Hon'ble Justice Mr. K.P. Sivasubramaniam (Retd.) and held therein that all 635 persons listed in the report had not adhered to the provisions governing the process of induction into the Club as members and accordingly directed the Appellant Club to rectify the Register of Members by removing the names of the said 635 persons from it within the time as prescribed under Section 59(2) and to conduct AGMs for the year 2015-16, 2016-17, 2017-18 and 2018-19 thereafter, within a period of two months from the date of said order.

11. The Order of the Ld. NCLT dated 24.09.2019, was challenged before NCLAT in Company Appeal (AT) No. 332 / 2019, as it was filed by the Respondents herein primarily on the ground that the removal of 635 members from the Register was not in consonance with Article 21 & 22 of Articles of Association of the Appellant Club.

12. This Appellate Tribunal after hearing both sides and upon a detailed appreciation of the materials placed before it including the ``Audit Report'' submitted by M/s. Brahmayya & Co., the report filed by the Retired Hon'ble Justice Mr. K.P. Sivasubramaniam and the findings that were recorded by the Ld.

NCLT, it came to a conclusion that “**635 members have not paid the entrance fee**” dismissed the Appeal, confirming the order of the Ld. NCLT with modification to the effect that “the AGM of 2018 – 2019, shall additionally consider, inter alia, the issue of paying the entrance fee with the interest at the State Bank of India Fixed Deposit, rate for the years of delay in payment. The relevant observation, that was made by the NCLAT in its Judgment as rendered on 29.05.2020 is extracted as under:

*“Hence, we agree with the order of NCLT Chennai with an amendment that let the AGM 2018-19 to additionally consider also inter alia the issue of paying entrance fees along with interest at State Bank of India fixed deposit rate for the years of delay in payment. In order to have a clarity that the AGM be held for the years 2015-16, 2016-17, 2017-18 & 2018-19 within a period of next two months from the date of this order based on the genuineness of the members as identified by Independent Auditors Report, following by the scrutiny done by Hon’ble Justice K.P. Siva Subramaniyan a retired Judge of the Hon’ble Madras High Court. Hence, we uphold the order of NCLT with above modifications.”*

13. Subsequent to this, the Appellant Club held the AGMs as directed and placed the Agenda of issue of granting membership to persons whose names were directed to be removed by Ld. NCLT on payment of entrance fee with interest as directed by NCLAT before AGM 2019-20 and the AGM rejected the said resolution with an overwhelming majority. Aggrieved by this action of the Appellant Club, the Respondents filed CP No. 64 / 2022 in which the impugned order has been passed.

14. It has been argued by the Ld. Counsel for the Respondent, that owing to the fact that, they had been the members of the Appellant Company, they had all the rights to initiate the proceedings under Section 241 & 242 of the Companies Act, 2013, by seeking a waiver under Section 244(1)(b) of Companies Act.

15. For the aforesaid purpose, they contended that the Application which was thus preferred under Section 244 of the Companies Act, for seeking a waiver would be maintainable .

16. They have submitted that, since their status was being that of a member ever since their inductment in 1998 till their removal, that itself grant them a status to be the member of the Company, to be entitled for grant of waiver for the purposes of Section 244 of the Companies Act.

17. In relation thereto, they have submitted, that, in case if there happens to be any act of Oppression and Mismanagement in the Appellant Company, they cannot be left remediless to agitate the issues before the Competent Forum for the redressal of their grievances as against the act of oppression and mismanagement. However, the argument as extended by the Respondents Counsels cannot be accepted for the reason being that, the general principle that, no wrong could be left without a remedy, will not be applicable in the instant case, because, in case of a wrong being perpetrated by the Company, the remedy would always relate to and lie with a person who has got a right to agitate a cause against the Company and the said status would always be limited only to its members, which could be

very well crystallized from a conjoint reading of Section 2 (55) of the Companies Act, and the Section 244 of Companies Act, which lays down that only a member can exercise his rights for the purposes of initiation of the proceedings, under Section 244 of Companies Act.

18. The logic behind it is that, the basic intention of Section 244 of the Companies Act, is to carve out an exception by way of an enabling provision, that, in an event, if a member of a Company, who does not satisfy the parameters laid down under Section 244 for initiation of proceedings under Section 241 & 242 of the Companies Act, and feels himself to be aggrieved by any act of Mismanagement or Oppression, can still exercise his rights by filing of an application under Section 244 of Companies Act, for the grant of waiver for the purposes of initiation of proceedings under Section 241 & 242 of Companies Act. That is why provision has been confined to be invoked by the member of the Company only and not by any outsider, in order to curtail abuse of the provisions of Section 241 & 242.

19. If the directions that were given therein in the order passed by the NCLAT are considered, it has given a leverage that, the AGM of 2018 - 2019 would additionally consider the issue of paying the entrance fee along with the interest. By this, it was just carving out an exception that, all those persons who have been determined to have been settled to have been found to be illegally continuing to be the member of the Appellant Club, were to be given an additional opportunity

to become members by paying the entrance fee along with the interest, based upon the genuineness of their claim to the membership as it was identified by the Auditor's Report the member as it was identified by the Auditor's Report, followed by scrutiny of Hon'ble Justice Mr. K.P. Sivasubramaniam (Retd.).

20. It is under the garb of this direction, rendered in the 2<sup>nd</sup> phase of proceedings, that the matter was once again agitated by only two of the persons (i.e. Respondents herein), who were identified to have been illegally continuing as member of the Appellant Club, by filing a Company Petition being CP (CA) No. 64 (CHE) / 2022, being the proceedings intended to be drawn under Section 241 & 242 to be read with Section 59 of the Companies Act and Rule 81 of the NCLT Rules. It was accompanied with an Application for a waiver under Section 244 of the Companies Act, to be read with Rule 11 of the NCLT, seeking waiver of requirement of Section 244 (b) of the Companies Act, so as to pursue the Company Petition, to be drawn under Section 241 & 242 to be read with Section 59 of Companies Act, 2013 & Rule 81 of the NCLT Rules.

21. The controversy, which emanates at this juncture is that, the Application filed by the Respondents under Section 244 (b), seeking an exemption for the purposes of filing of a petition, under Section 241, 242 & 59 of the Companies Act, 2013, has been allowed by the impugned order dated 09.01.2024, granting a waiver on the ground that, the consideration of the said application for waiver is circumscribed by an **``exceptional circumstance''**, which has been derived by

the Tribunal by virtue of a self-perceived presumption in relation to an act of oppression and mismanagement qua the Respondents.

22. What becomes relevant for consideration is that, as to whether at all, the grant of waiver, can be considered by way of a presumption that has been drawn by the Tribunal on its own fiction, without there being relevant material available on record before the Tribunal and that too, in the absence of there being an elaborate consideration as to whether at all a waiver could be granted under Section 244 (b) of the Companies Act. For this, reference of Section 244 becomes inevitable.

*Section 244 of the Companies Act, reads as under:*

***Right to apply under Section 241.***

*(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.*

*(2) Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.’’*

23. Section 244 of the Companies Act starts with the word, **‘‘the following members of the Company, shall have the right to apply under Section 241’’**.

This implies that only those members having a Share Capital not less than 1/10<sup>th</sup> or, constituting not less than one-tenth or one-fifth of the total number of members, can file Petition against any act of oppression and mismanagement, under Section 241 of Companies Act. However, an exception under law has also been carved out for the members of the Company, holding less than 1/10<sup>th</sup> of the Share Capital of the Company or, constituting one-fifth of total number of members who can apply for a waiver under the proviso to sub-section (b) of Section 244 of the Companies Act, to draw a proceedings of oppression and mismanagement, as contemplated under Section 241 & 242 of the Companies Act.

24. What becomes relevant is that, under law even for the purposes of seeking waiver under Section 244, a person who is applying to be granted with the waiver, has had to necessarily establish that he happens to be the member of the Company even though, he may not be holding the prescribed Share Capital or, constituting not less than one-tenth or one-fifth of the total number of members as the case may be. The term **‘‘member’’** has been widely dealt with in the definition clause

as contained under Section 2 of Sub-Section (55) of the Companies Act, which is extracted hereunder:-

*“(55) “member”, in relation to a company, means—*

*(i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;*

*(ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;*

*(iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;*

25. For the purposes to enjoy to seek a waiver, under Section 244 of the Companies Act, 2013, the first basic and essential ingredient, which is required under law to be satisfied by the Respondents was, they were required to first establish that they were the existing members of the Company in respect of which the proceedings under 241 and 242 are being sought to be drawn.

26. The fact that, they were not the existing members of the Company, was a fact which stood established by the reports of the Auditor and the Hon’ble Retired Judge of the Madras High Court. Hence, the finding qua the Respondents not being the member of the Company, was a finding which stood affirmed upto the stage of the proceedings of the NCLT, which stood concluded by the Order dated 24.09.2019, as it was rendered in a leading Company Petition i.e. CP No. 31 / 2017.

27. More importantly, in fact, there was already a judicial determination made, that the Respondents are not the members of the 'Appellant Company' / 'Club', but the observation which has been made in Para 11 of the Judgment dated 29.05.2020 in Company Appeal (AT) No. 332 / 2019 only, was by way of a gratuitous direction issued to 'additionally consider', meaning thereby, that the Respondents were found not being a member was a fact which stood established and undisturbed by the Judgment of the NCLAT dated 29.05.2020. The exception that was carved out therein in fact, was not creating a right, but, it was rather a 'gratuitous direction', issued to consider the genuineness of membership as per the reports of the Auditor and the report of the Hon'ble Retired Judge of the Hon'ble High Court of Madras. Rights under law cannot be determined based on a gratuitous direction, unless it is based upon the satisfaction required under law.

28. The findings contained in the Auditor's Report and in the report filed by the Hon'ble Retired Justice Mr. K.P. Sivasubramaniam, was not disturbed at all by the Judgment of the NCLAT dated 29.05.2020, which held that Respondents were not the legally inducted members of the Appellant and thus inference would be that they were not the existing members of Appellant Club.

29. In that eventuality, when the said Judgment, was only granting an accommodation to the Respondent, to be reconsidered so as to be treated as to be the member of the Club, that in itself will not create any substantive right for the

Respondents to be conclusively treated as to be members for the purposes of filing of an Application under Section 244(1) of Companies Act.

30. Moreover, so far as the Judgment of 29.05.2020 of NCLAT is concerned, where the liberty was granted to the AGM to ``**additionally consider**'' the claim of the Respondents to the membership of the Club as per the Articles of Association, subject to payment of entrance fee with interest was that, may not be treated as to be a substantive determination of the Appellant as to be brought within the ambit of definition of a ``member'', under Sub-Section 55 of Section 2 of the Companies Act.

31. If the impugned order is taken into consideration, where a waiver has been granted under Section 244 (1) (b) of the Companies Act, for the purposes of initiation of the proceedings under Section 241 & 242 of the Companies Act, certain expressions given in Para 20 of the impugned order become relevant to be considered and remarked upon. The Ld. NCLT in the impugned order had used the following terms:

*``The issue could be an exceptional circumstances which may permit ``waiver''. It was held that there are exceptional circumstances for which waiver could be allowed to members who have moved the Company Petition. The Hon'ble NCLAT upheld the order of the Tribunal and allowed the application for waiver.``*

32. If the extract, as given above is taken into consideration, the Ld. NCLT was conscious of the fact that, there was a conflicting document with regards to the aspect of determination of membership meaning thereby, the factum of membership by the said time was not even established and it was yet a disputed fact, that was under judicial scrutiny.

33. As far as we are concerned, we are of the view that since Section 244 of the Companies Act, enables only a member to invoke Section 244 of the Companies Act, for the grant of waiver to overcome the restrictions imposed by Section 244 of Companies Act, the pre-condition is, that the Respondents should have established themselves to be members of the Club before invoking Section 244 of Companies Act, for grant of waiver, in which they have failed. Thus, there cannot be any presumption or gratuitous treatment under law to treat them to be members for the purposes of Section 244 of Companies Act.

34. Having not done so and having admitted the fact that they are not the members of the Appellant / Club, and there having been established and admitted fact due to the two unrebutted reports that, they are not the members of the Appellant Club who have been validly inducted in the light of the provisions contained under the relevant Articles of Association, the Application under Section 244 of the Companies Act, for grant of waiver, would not be maintainable. This could be looked into from yet another perspective, the impugned order specifically uses the expression ``**the issue could be an**

**exceptional circumstances which may permit waiver**”. We have to bear in mind that, a proceedings under Section 244 of Companies Act, are judicial proceedings taken up, before a right to sue is crystallized and it does not entail an exercise of an equitable jurisdiction because, it entails consideration of a substantive right if it already exists under law and only then Section 244 of Companies Act, can be made applicable, to be exercised otherwise not.

35. The above observation made by the Ld. Tribunal shows that, the Ld. Tribunal itself was not very sure as to whether at all, a waiver could have been permitted, since having made the expression, for example like that of **“could” be an exceptional circumstance, may permit waiver**”, this itself creates a bona fide doubt about a conclusive decision taken by the Ld. NCLT for the grant of waiver even before determining as to whether the Respondents were at all falling to be within an ambit of the definition of **“member”** who could be entitled to file an Application under Section 244 of Companies Act, for grant of a waiver, since the aspect of not being a member, at the relevant time was an aspect admitted by the Respondents themselves, and settled by the Judgment of the NCLAT as rendered on 29.05.2020. The said direction of waiver could not have been given on basis of self-adorned conception, owing to the ratio laid down by the NCLAT in the matters of *Cyrus Investments Private Limited & Anr. V. Tata Sons Limited & Ors.*, wherein in Para Nos. 145 & 146, it is observed that for the purposes of enabling a person to apply for a waiver under Section 244 of

Companies Act, he has had to be a member, since being a member is a pre-condition. If that first step is not satisfied, Section 244 of Companies Act will not be attracted. Relevant paragraph is extracted hereunder:-

*“145. The Tribunal is not required to decide merit of (proposed) application under Section 241, but required to record grounds to suggest that the applicants have made out some exceptional case for waiver of all or of any of the requirements specified in clauses (a) and (b) of sub-section (1) of Section 244. Such opinion required to be formed on the basis of the (proposed) application under Section 241 and to form opinion whether allegation pertains to ‘‘oppression and mismanagement’’ of the company or its members. The merit cannot be decided till the Tribunal waives the requirement and enable the members to file application under Section 241.*

*146. 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 one or other 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. ?’’*

36. The Ld. Tribunal has taken a view that, since the object of the Appellant Club is to promote a social cause amongst the members of the Club and their friends, coupled with the fact that, the Respondents had been enjoying facilities of a member, since 1998, that in itself will entitle the Respondents for grant of waiver under Section 244. But, it cannot be a justified reason, to allow grant of waiver under Section 244(1) of Companies Act for the reason that, the social objective of the Club is not an ingredient, which is permissible and even legally perceived, to be considered under Section 244 sub-section (1) of Companies Act, for the purposes of grant of waiver under Clause (b).

37. The laudable social objective of Appellant Club, is altogether a different aspect and it cannot be adopted to act as a substitute, to treat the Respondents as to be the members of the Club so as to bring them within the ambit of a definition of a member under Section 2(55) of the Companies Act.

38. Besides that, the observation that the Respondents had been functioning as a member since the year 1998, will in itself cannot be a justified reason for consideration for grant of waiver because of the fact that, because of the fact that to them, the law requires that, at the relevant point of time, when the controversy has arisen that is, when this Tribunal has passed an order of 29.05.2020, the admitted position was that, owing to the report of the Auditor and the report of the Hon'ble Justice Mr. K.P. Sivasubramaniam (Retd.) of the Madras High Court, the Respondents stood determined to be non-members of the Club. If that be so,

merely because they had been functioning as members since 1998 and later had ceased to be member, cannot be a reason, particularly when on the date of filing of the application it was established that they i.e., the Respondents herein were not the members of the Club.

39. Hence, in these circumstances, allowing of an Application under the proviso to Section 244 would be de hors to the provisions of law.

40. What is relevant is that, the Ld. Counsel for the Respondent, while addressing upon the present Company Appeal, had not answered the fact with regards to the finding, which has been recorded in Para 21 of the Impugned Order, where a finding has been recorded that, the Respondents **“had been the members of the Company / Club and they had enjoyed the facilities for more than 20 years”**. It is an expression in past tense and not in present tense, which establishes that Respondents were not the members of Appellant Club at the time of filing application under Section 244 of the Companies Act.

41. Since the status of the Respondents being non-members of the Club, stands established by the reports submitted by the Auditor, as well as by the Hon’ble Justice Mr. K.P. Sivasubramaniam (Retd.), the status of the Respondents remains unaltered, and hence, merely because of the fact that they had earlier continued to be as a member since 1998 does not grant them any indefeasible right to press their rights as members for all times to come, even when there is admittedly non-

revival of their status of being the member of the Club, in order to sustain the proceedings under Section 244 of Companies Act.

42. This expression given therein itself shows that, as on the date of initiation of the proceedings under Section 244 of the Companies Act, for the grant of the waiver, it is an admitted case of the Respondent that, they ``had'' enjoyed the status of being the member, but, ultimately as on the date when the proceedings was drawn under Section 244 they did not enjoy the status of being a member of the Appellant Company. The condition precedent for the purposes of consideration of the application under Section 244 of the Companies Act is that, the status of the Applicant has had to be that of an existing member of the Company, and in no way, any previous right which Respondents enjoyed being the member of the Appellant Company in the past prior to their removal, will grant them a right to initiate a proceedings under Section 244 of the Companies Act, merely because of the fact that, they had been a member and enjoyed the status for the last 20 years, for the reason being that immediately after their removal, their rights ceased to exist.

43. In other words, it could be said that, the Respondents have admitted, that on the date of the institution of the Application, they have already been removed as members.

44. It is not the case of the Appellant that at any stage of the proceedings, after their removal they had ever resorted to any process as contemplated under law,

to revive back their membership with the Appellant Company as per law. In that eventuality, when there is nothing on record to show that the Respondents have ever made any efforts to revive their membership with the Appellant Company, and to change their status of being a ``removed member`` . The findings in Para 21 of the Impugned Order also records that ``after the Audit, they were removed as members``. Thus, it has to be accepted that, the Respondent had admitted to their status of being that of a ``removed member``.

45. To such a scenario, the Respondents can, at best be, described as ``erstwhile members of the Appellant Company``, who have raised their concern about the alleged act of oppression and mismanagement on part of the Appellant Company. But, that in itself will not entitle them to move a waiver application, as it has been observed in the matters of *Nasik Diocesan Trust Association & Anr. V. Uday Daniel Khare* where it has been settled that, a member of a Company who is now not a member at the relevant point of time is not entitled to move any application for waiver, relevant observations made therein are extracted as hereunder:-

*``28. As per Cyrus Mistry case it is admitted position that if applicant is not member he cannot move an application. In the present case, we also noted that there are 46 members in the company meeting on November 28, 2014 at Nasik and the appellant is stating that there are only 8 members. Therefore, there has to be some linkage how 46 members have become 8 members. Further the appellant has stated that certain directors stood automatically vacated of the office of directors by operation of law on account of non-filing of annual accounts and annual returns and thereby*

*failing to discharge their duties as directors. However, we are of the opinion that there is provision in the Companies Act that a director can be removed but members are not normally removed. On the other hand, as per the claim of the appellant that respondents are not members and counter claim by the respondents that they are members. There are also some conflicting documents as some documents are showing that they are members of the company at some point of time and some documents are showing that they are not members of the company. Even if there is a provision in the articles of association for removal of the members, it may conflict with the provisions of law and if not so, strict compliance with the requirement for removal need to be placed on record so as to deny the membership right to a person who has been a member at one point of time or the other. This issue could be an exceptional circumstances, which may merit "waiver".'*

46. Regarding the ``exceptional circumstances'', that has been sought to be carved out by the Ld. Tribunal while passing the Impugned Order for the purposes of grant of waiver, it could be observed that, first of all, there is no definite logical conclusion that has been drawn by the Ld. Tribunal as to what were the exceptional circumstances, which could have permitted a waiver in relation to an Applicant in the proceedings before Ld. NCLT, who is not a member of the Company and moreover, there is no discussion of the circumstances to establish exceptional circumstances, which could have necessitated permitting the waiver for initiation of the proceedings under Section 241 / 242 of Companies Act.

47. Besides that, the observation pertaining to the exceptional circumstances and permission of a waiver is based upon hypothetical constraints, without there being any credible material being brought on record to support the same. Even if

it is to be presumed for the time being that, there were exceptional circumstances then the question will arise as to who would be the person who would be legally entitled to agitate a cause, under such exceptional circumstances, for the purposes of establishment of the act of oppression and mismanagement. Obviously, the answer would be, that on a simpliciter language of Section 244 of Companies Act to be read with Section 2 (55), it could have been only a person who still continues to be in the Register of ``Members`` of the Appellant Company and not otherwise. Because, if field of filing of applications under Section 244 of Companies Act, is left open even to non-members, it would create procedural chaos, enabling all and sundry who are not even a member of the Company, to raise allegations of oppression and mismanagement.

48. This particular provision of law has been drawn in order to regulate and to prevent chaotic initiation of proceedings under Section 244 of Companies Act, and that is why it has been limited to be exercised by the members only, who do not have the required numbers or, hold the required percentage of shareholding. Because of the aforesaid, the conclusion drawn by the Impugned Order of permitting the proceedings to be drawn by a person, who is not even a member of the Club will rather amount to be an abuse of process and it would result in an unending litigation, when Section 241 proceedings would be permitted to be carried even by a person who has got no concern in relation to the affairs of the

Company, which is intended to be protected and regulated by drawing of a proceedings under Section 241 & 242 of the Companies Act, 2013.

49. The very fact that, the Respondents have not been able to establish themselves to the members of Appellant Club, and rather admitted that, they are not the members, the Application preferred for grant of waiver at their behest would not be maintainable. If that be so, the Impugned Order, which grants the waiver on the basis of a hypothetical constraint without the same, being foundationed upon a sound principle of law, cannot be sustained. Accordingly, the Impugned Order dated 09.01.2024, as rendered in CP (CA) / 64 (CHE) / 2022, is hereby quashed and the instant Company Appeal (AT) (CH) No. 17 / 2024, would stand allowed. All pending Interlocutory Applications, if any, would stand closed.

**[Justice Sharad Kumar Sharma]**  
**Member (Judicial)**

**[Jatindranath Swain]**  
**Member (Technical)**

17/09/2025

SR/MS/RS