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TATA Sons v Cyrus Mistry

Supreme Court bench led by Chief Justice of India assembles to hear the appeals filed by Tata Sons Pvt Ltd against the NCLAT direction to reinstate Cyrus Mistry as Company Chairman.



Senior Advocate Harish Salve starts submissions for Tata Sons.

[@RNTata2000](#) [@TataCompanies](#)

Salve : This(Chairmanship) is not a post as understood in service law. In Company Law, this is designation.

[#TatasCyrusMistryDispute](#)

Salve : Tata Sons Ltd is a company of considerable vintage. It was created in 1917.

CJI : Was it a public limited company?

Salve : Never. It has always been a private company.

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#CyrusMistry

Salve : The curious thing which has happened in the case is that there is a provision in Tata Son's Articles which restricts the transfer of shares. It also has a remarkable feature that the Board could direct a shareholder to sell shares.

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Salve : The NCLAT overlooked the fact that the primary contract between the shareholders and the company is the Articles of Association.

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CJI Bobde : The Article giving power to direct selling of shareholder is Article 137?

Salve : Yes. It is an unusual Article. At interim stage, we undertook not to invoke it against #CyrusMistry.

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#SupremeCourt

Salve : After the new Act came in 2013, we asked the Registrar to add the name 'Private' to Tata Sons. The Registrar did it. By statutory definition, we are private. The NCLAT came down heavily on the Registrar for allowing the adding of 'private'.

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Salve : The NCLAT used a curious interpretation. The Ministry of Corporate Affairs has also filed an appeal against the observations made by the NCALT.

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Salve : Tille 1965, Shapoorji Pallonji group was not in existence in Tata Sons.

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Salve : The shares to Tata Sons to the extent of 68% are with the Tata Trust.

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Salve : We all grew up with Mr. JRD Tata as the main person. After JRD retired, Ratan Tata [@RNTata2000](#) came.

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Salve : The trustees of Tata Trust which held 68% was always in the control of Tata Sons. It nominated eminent persons to the board. Tata Sons hold controlling stake in many listed companies of Tatas, like Tata Steel, Tata Chemicals etc.

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Salve : It is a matter of pride that Jaguar cars are manufactured by Tata owned company. Jaguar has a hybrid version now. Having got one, I can tell it has the highest insurance because they are the most stolen cars in UK.

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Salve : Pallonji Mistry, Cyrus Mistry's father was included in Tata Sons as non-executive Director in 1980. Cyrus Mistry joined Tata Sons in 2006

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Salve : Mistry's appointment as Executive Chairman would have ended in March 2017. It was not a life long appointment.

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Salve : He was removed in October 2016. After March 2017, he had no right to seek re-appointment.

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Salve : Corporate democracies must have its places. Your lordships held in Escorts case held that these are mini democracies.

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Salve : He was removed only as Executive Chairman. He would have continued as Director.

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Salve : Mr N Chandrashekharan, a home grown person of Tata, was made the Chairman later. His appointment was never challenged and he was not made a party too. But his appointment was set aside.

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Salve : Chandrashekharan was not connected with the promoters or the shareholders. He was selected for his merit.

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#CyrusMistry

CJI Bobde : Does NCLT has power to appoint Director?

Salve : They do. If they have reasons to do so.

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#CyrusMistry

Salve : NCLT can appoint Director but the appointment must be pro-term. The Shareholders have the right to appoint. The corporate democracy must be respected. This fundamental principle has been overlooked.

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#CyrusMistry

Salve : Mistry wrote an email supposedly for the Board but before the Board could set its eyes, the media got it.

CJI : This happens in corporate world also?

Salve : In fact, this was invented by the corporate world and spread to other fields.

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Salve : During the times of JRD and Ratan Tata, the representative of Tata Trust was the Chairman of the Tata Sons. Therefore, there was cohesion between the company and the trust.

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Salve : The NCLAT has virtually restrained the operation of various Articles going beyond the scope of judicial review.

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#CyrusMistry

Salve : The NCLAT made unwarranted remarks calling the Trustee nominees 'puppets' 'stooges' etc.

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#CyrusMistry

Salve : The Tribunal held that since the Articles allow Tata Trust to interfere, it was oppression of shareholders. This was missing woods for the trees.

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Salve : Mistry was not a minority. He was an Executive Chairman appointed by the Selection Committee.

The NCLAT order now means that the minority in the rule removing the majority.

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#CyrusMistry

Salve : A person who was from a group having 18% shares now must have full run of the Tata Group. That is how absurd the order is.

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#CyrusMistry

Salve : The power under Section 241 Companies Act 2013 is an alternative power to be exercised only if it is found that the company is liable to be wound up.

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#CyrusMistry

Salve : The Tribunal must find that it is 'otherwise just and equitable' to wind up the company to exercise the powers under Sections 241/242 Companies Act.

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#CyrusMistry

CJI : So the Tribunal must find that it is just and equitable to wind up the company but we would rather not do it in the interest of shareholders and instead pass other directions.

Salve : Yes.

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Salve : The Tribunal said because of the acts of oppression, it is just and equitable to wind up. This is circular reasoning.

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CJI : We will resume at 2.15 PM.

The bench rises. Arguments will resume at 2.15 PM.

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The bench re-assembles.

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CJI : Mr. Salve, you were arguing that the statutory scheme of Companies Act is such that the Tribunal must arrive at a conclusion that it is just and reasonable to wind up the company but in the interest of shareholders Section 241 order is passed instead.

Salve agrees.

Salve : The complaint is under Section 241(a) of Companies Act. Carefully read, this provision can only mean 'oppressive' to the shareholder.

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Salve : The complaint must refer to 'The' Company, i.e Tata Sons. But there is a litany of allegations against downstream company, Tata Motors, Tata Steels etc.

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CJI : But if the complaint is that Ratan Tata is running affairs in such a manner that the investment of Tata Sons is being jeopardized by other projects, why can't these allegations be made?

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Salve : But there is no single allegation that money of Tata Sons has been lost.

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Salve : Hindsight is always different. When car industry was booming, Ratan Tata thought he will give a car for Indians at Rs one lakh. But the project ran into trouble later. It got into problems in West Bengal, had to be shifted to Gujarat etc.

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Salve : There could be different perceptions about the decisions. But can it be mismanagement.

CJI : So you are saying if there is a strategy which did not work, it will not be mismanagement?

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Salve : A member of Tata Sons may complain about Tata Sons Ltd and not other companies. There is not a single allegation about mismanagement within Tata Sons Ltd.

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Salve : I don't think the language of Section 242 of Companies Act admit of any ambiguity. The Tribunal has to come to two conclusion :

1. There is prejudice, oppression etc, AND
2. The facts would justify the making of a winding up order.

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Salve : The grounds for winding up are in Section 271 of the Companies Act. Those factors have to be fulfilled.

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Salve : The company had been run amazingly. During tenure of Mr. Ratan Tata @RNTata2000 between 1991 to 2012, the market cap of Tatas went up 500 times.

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Salve : When you have a growth story of 500%, there will be some winners projects some loser projects. It is a mix.

CJI : This is like that of a successful Senior Advocate. The successful lose more cases.

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CJI : The best lose more than they win. In worst cases, the litigants find the best lawyer to argue for them.

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CJI : This is our way of saying that if we dismiss our case, it is not because you are a bad lawyer.

Salve (laughing) : That is what we tell our clients. Mr Ramaswamy used to say, when a case is lost in first instance, client will be told that he has won a right to appeal.

Salve coming back to arguments.

The Tribunal has no power to rewrite the Articles of Association.

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Salve : Can the Tribunals select the Chairman? The answer is No. It is for the shareholders to decide.

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Salve : Ultimately the selection must be by the Shareholder.

CJI : Precisely. We do not see any power for the Tribunal to select Chairman.

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CJI : Section 242(h) speaks about power of Tribunal to remove as Managing Director etc. But there is no power given to set aside an order of removal.

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CJI : Section 242(k) talks about the power to appoint a Director to report to the Tribunal. It is like appointing a Commissioner Director.

Salve : Virtually, yes.

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Salve : This power (Section 242(k) is nuanced. The appointment is for a specific purpose. In that case the Directors come with a mandate.

CJI : It is like appointing a Commissioner.

Salve : Yes

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CJI : So your contention is that the Tribunal cannot choose a particular person as the Director?

Salve : Generally, yes. Tribunal cannot say so and so will be the Director.

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Salve points out that the 1956 did not have a condition that the Company Court should come to a conclusion that winding up order is otherwise necessary.

Parliament has now decided that this condition should be there in the 2013 Act.

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Salve : In ordinary circumstances, Mistry, with 18% shares, will not get even 1% share in the Board, that too in a private company.

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Salve : If Tata Sons is distributing huge amounts of dividends, where is the question of winding up Tata Sons? That is a long and short of this case.

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Salve now refers to the findings of the Tribunal that the oppression is such that a winding up order is just and equitable.

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CJI : Is there any finding that because of the losses the minority was affected more?

Salve : Every one gets affected the same. I am losing 68 Rupees for every 100 rs lost by the company.

CJI : So everybody has lost money including the majority.

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CJI : A mere loss cannot come under Section 242 unless it is a loss caused only to the minority.

Salve : That is our submission.

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Salve : The next ground cited by the Tribunal is the changing of public company to private company. How did the minority lose(because of this)?

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Salve : There is no single instance of Cyrus Mistry bringing a resolution and the same being vetoed by the trustee directors. The veto has not been exercised for at least 20 years. Such was the harmony. And the directors are called 'puppets'!

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Salve : Where has the Tribunal come to the finding that there should be winding up OTHERWISE?

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Salve emphasizes on the word "otherwise" in Section 242(1)(b) of the Companies Act, 2013.

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CJI : What seems to be the correct position is that, if a petition is filed for winding up, and the Tribunal comes to a conclusion that instead of winding up, the problem can be fixed, alternate orders can be passed.

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CJI : If a petition for oppression is filed, and the Tribunal finds the oppression is so gross that the company should be wound up, why can't the company pass orders under Section 242.

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Salve : The settled position is that the company should be run with lack of probity. But just because some decisions are bad, it cannot be oppression. There should be lack of probity established.

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CJI : Is there any authority for the proposition that oppression and mismanagement cannot lead to winding up order and "just and equitable" grounds should come dehors oppression and mismanagement?

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Salve stresses that there should be 'lack of probity' in the acts and decisions.

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Salve : Just because you are outvoted, it is not oppression. The Articles of Association give the power to the Board. Where is the violation of the Articles in the case?

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Salve referring to the 'Needle Industries' decision of 1976.

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There should be 'no hope for the smooth functioning of the company' and 'lack of probity in running its affairs' for ordering winding up : Salve.

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Salve : Nobody can capture exhaustively what are 'just and equitable grounds' for winding up.

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CJI : The degree of oppression and mismanagement must be such that the court must come to a conclusion that running the company is impossible.

Salve : There is one more element- that of lack of probity.

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Salve :The judge cannot sit in the chair of the manager of the company and review the decisions.

CJI : The judge needs to see if the situation is not remediable due to lack of probity.

Salve : That is right.

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CJI : If the grounds on which oppression and mismanagement are of such gravity that the company itself need to be wound up but it is not expedient to wind up, the court can exercise powers under Sec 242.

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Salve referring to the English decision in 'Harmer's case'.

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Lack of confidence springing from the oppression of the minority by the majority involving lack of probity is needed : Salve quotes from the Harmer's case.

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The conduct must be "burdensome", "harsh", and "wrongful". It should involve at least a lack of probity or fair dealing : Salve quotes from the Harmer's case.

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CJI : So the situation should be so bad that the Court should be find that the company must be wound up.

Salve : We (Tata Sons) are miles away from that.

CJI : Because you have done so well.

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Salve : Their (Mistry's) complaint is that the company is being run in accordance with the Articles of Association and the Articles are unfair.

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CJI : This is another point we need to consider. Can there be a finding of oppression or mismanagement because of Articles of Association or it should come out of the acts of management?

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Salve : It should come out of the acts of the management and the acts should be inconsistent with the Articles of Association.

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CJI : Mr. Salve, how much more time you will take?

Salve : I will take at least one hour more.

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Singhvi says he would need 2 hours at least. Shyam Divan says he will take a couple of hours. C A Sundaram says he might need four hours.

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CJI : We would like not to 'mismanage' this case and not to cause 'oppression'.

Lawyers laugh.

CJI : We would like the arguments not to be repetitive.

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The bench rises. Arguments over for the day. Hearing to continue tomorrow.

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