

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) No. 162 of 2022

&

I.A. No. 3749 of 2022

IN THE MATTER OF:

**Hotel and Restaurant Association of
(Western India) & Anr.**

...Appellants

Versus

**Hotel and Restaurant Federation
Association of Eastern India & Ors.**

...Respondents

Present:

For Appellant: Mr. Abhijeet Sinha, Ms. Ranjeeta Rohatgi, Mr.
Sourabh Tandon, Ms. Samten Doma,
Advocates

For Respondent: Mr. P Nagesh, Sr. Adv. with Mr. Mahesh
Agarwal, Mr. Shubham Kulshreshtha,
Kaustubh Singh, Mr. Akshay Sharma,
Advocates for R1 to 11
Mr. Sumit Goel, Ms. Swati Bhardwaj,
Advocates for R12

with

Company Appeal (AT) No. 166 of 2022

IN THE MATTER OF:

**Hotel and Restaurant Association of
Northern India & Anr.**

...Appellants

Versus

**Hotel and Restaurant Association of
Eastern India & Ors.**

...Respondents

Present:

For Appellant: Mr. Krishnendu Datta, Sr. Adv. with Mr. Talha Abdul Rahman, Lzafeer Ahmad, Mohd. Shaz Khan & Palash Singhai, Advocates

For Respondent: Mr. P Nagesh, Sr. Adv. with Mr. Mahesh Agarwal, Ms. Shubham Kulshreshtha, Mr. Kaustubh Singh, Mr. Akshay Sharma, Advocates for R1 to 11
Mr. Sumit Goel, Ms. Swati Bhardwaj, Advocates for R12

JUDGMENT (Date: 21.02.2023)

[Per. Dr. Alok Srivastava, Member (Technical)]

The two appeals viz. CA(AT) No. 162 of 2022 and CA (AT) No. 166 of 2022 have been filed under section 421 of the Companies Act, 2013 (in short "Companies Act") by the respective Appellants assailing the order dated 30.8.2022 (hereinafter called "Impugned Order") passed by the National Company Law Tribunal, New Delhi (in short "NCLT") in Company Petition No. 437/241-242/PB/2018. Both the above-mentioned appeals are being disposed of through this judgment.

2. The facts of the case, common to both appeals, in brief are that a petition namely CP No. 437/241-242/PB/2018 was filed by the Hotel and Restaurant Association of Eastern India

which is Respondent No. 1 in both the appeals. This company petition alleged oppression and mis-management on the part of Federation of Hotel & Restaurant Associations of India (in short "FHRAI") regarding the appointment of the nominee of Respondent No. 1 as the President of FHRAI. The Appellants have stated that the appointment of President of FHRAI is done in accordance with Article 52 of Articles of Association (in short 'AoA') of FHRAI, according to which the President of FHRAI shall be elected by the members of the Executive Committee region-wise by rotation, for one term in the order of Eastern Region, Western Region, Southern Region and Northern Region, and in the year 2018-19 it was the turn of Hotel & Restaurant Association of Eastern India (in short 'HRAEI') to get its candidate elected as the President of FHRAI. The Appellants have further stated that the election of the President is carried out by members of the Executive Committee of FHRAI and the Executive Committee comprises of six members each from each of the four regional associations. They have stated that the regional associations elect six members each to represent them in the Executive Committee of FHRAI, and thus, 24 members who constitute the Executive Committee elect the President of FHRAI for a term of one year from the date of election of the President.

3. The Appellants have further stated that the election of President for the year 2018-19 was taken up in the EC meeting held on 30.10.2018, when the three candidates who were elected in three rounds of election, namely M/s Nitin Kothari, Ashoke Singh and Vijay Dewan each declined to accept the position of President, and thereafter the issue of election of the President became a contentious one and could not be resolved as some Executive Committee members from HRAEI insisted on the nomination of Mr. Sudesh Kumar Poddar as President, whereas the majority of members of Executive Committee were not in favour of the proposal of the name of Mr. Sudesh Kumar Poddar. The Appellants have claimed that Article 52 of the AoA stipulates that the Federation's President shall be elected by the members of the Executive Committee, and therefore, the insistence of members of HRAEI for the appointment of their sole chosen nominee Mr. Sudesh Kumar Poddar was not in accordance with the provision of AoA, and therefore, the said election of the President could not be conducted successfully as per the provision of AoA. They have further stated that, in such a situation, the matter of election of President of FHRAI was kept pending and the Executive Committee in the same meeting which was taking place on 30.10.2018 continued under the chairmanship of Mr. Garish Oberoi, the sitting President, and went on to elect the Vice Presidents and other office bearers of FHRAI. The Appellants have stated that HRAEI filed CP No.

437/241-242/2018 on this single instance of dispute claiming it to be an act of oppression and mis-management, seeking the relief of appointment of their nominee Mr. Sudesh Kumar Poddar as President of FHRAI for a term of one year and also restraining the Northern and Western regions members, and also FHRAI from making any changes in the AoA without the leave of NCLT.

4. The Appellants have alleged that even though the CP No. 437/241-242/2018 was filed alleging oppression and mis-management of FHRAI, the only relief sought in the company petition is regarding appointment of a pre-decided and nominated person as President of FHRAI, which is not a matter of oppression and mis-management. The Appellants have further alleged that the Impugned Order directs for holding of Annual General Meeting and election of the President of FHRAI in accordance with the past established practices and as per the AoA even though no such relief was sought in CP No. 437/241-242/2018.

5. We heard the arguments of Learned Senior Counsel of Hotel and Restaurant Association of Northern India & Ors. in CA (AT) No. 166 of 2022, Learned Senior Counsel of Hotel and Restaurant Association of Western India in CA(AT) No. 162 of

2022 and the Learned Senior Counsel of Respondent HRAEI and perused the record of both the appeals.

6. The Learned Senior Counsel/Counsel for both Hotel and Restaurant Association of Northern India and Hotel and Restaurant Association of Western India (“Appellants”) have claimed in their arguments that the CP No. 437/241-242/2018 was filed by HRAEI and some other petitioners, but they do not satisfy the conditions stipulated in section 244 of the Companies Act to act as petitioners. The company petition has been filed by only 11 members (all from HRAEI) out of more than 3890 members of FHRAI which does not satisfy the requirement under section 244 (1) (b) and thus the waiver application is a clear proof that the petitioners, who are only eleven number, do not enjoy the support of the requisite number of members of their own region, as there is no letter of support from other members of the Eastern Region or any General Body resolution of the Eastern Region expressing support to the original petitioners or consent for filing the company petition. They have claimed that Shri Vijay Dewan, who is a member of the Executive Committee from the Eastern Region has not joined the petitioners in preferring Company Petition No. 437/241-242/2018, and moreover Eastern Region has the status of a single member as per the AoA, being a member under the ‘Organisation Member’ category and being a

sole organisation member, it cannot dictate terms which are contrary to the provisions of AoA of FHRAI. He has further claimed that the company petition filed under sections 241-242 does not relate to any act/s of oppression and mis-management of the company. In support, the Learned Senior Counsel for Northern Region Association has cited the judgment of this Tribunal in the matter of **Cyrus Investments Pvt. Ltd. & Anr. Vs. Tata Sons Ltd. & Ors. [2017 SCC Online NCLAT 261]**, where in para 151 this Tribunal has elucidated on the factors that are required to be noticed before forming its opinion as to whether the application merits “waiver”. Moreover, neither any oppression or mismanagement is made out nor any exceptional circumstances have been mentioned by the petitioners for grant of waiver. The Learned Senior Counsel has further clarified that the grievance of the petitioners was only a ‘directorial complaint’ regarding Mr. Sudesh Kumar Poddar’s election as President of FHRAI and an application relating to ‘directorial complaint’ does not constitute act/s of “oppression and mis-management” under sections 241-242 as has been held in the matter of **Assam Chemical & Pharmaceutical v. Deba Kumar Hazarika, [2019 SCC Online NCLAT 864]**.

7. The Learned Senior Counsel for Appellant HRANI has referred to the judgment of Hon’ble Supreme Court in the matter of **Chatterjee Petrochem (India) Private Limited**

versus Haldia Petrochemicals Limited & Ors. [(2011) 10 Supreme Court Cases 466] to contend that the issue raised by the Eastern Region Association relates to an isolated instance and does not constitute oppressive conduct as a series of continuing acts and argued that the minority members have to raise the issue with events as part of continuing acts of oppression and mismanagement.

8. The Learned Senior Counsel for hrawi has also cited the judgment of this Tribunal in the matter of **Cyrus Investments Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors. [Company Appeals (AT) No. 133 and 139 of 2017]** to point out that while granting waiver, the Tribunal has to see whether the application under section 241 pertains to 'oppression and mis-management' but before that see whether the appellants are members of the company in question and whether similar allegation of oppression and mis-management was earlier made by any other member, which was decided and concluded and also whether there is any exceptional circumstance made out for grant of waiver. The Learned Senior Counsel has claimed that if the grant of waiver to the petitioners in original CA No. 473/241-242/2018 is seen from this lens, there is no case made out by the petitioners in their favour, and therefore, the appeal should be dismissed on account of non-maintainability at the threshold.

9. On the point of the HRAEI being an “aggrieved person”, the Learned Senior Counsel for Appellant HRANI has claimed that legal mandate, as held by Hon’ble Supreme Court in the matter of **Bar Council of Maharashtra v. M.V. Dabholkar (1975) 2 SCC 702** is that any one, who has been denied or deprived of something to which he is legally entitled and if a legal burden imposed on her, shall fall in the ambit of “person aggrieved”, whereas in the present case, HRAEI which has not been able to install its candidate as nominee President of FHRAI, cannot be labelled as ‘aggrieved person’ since no legal right of HRAEI was infringed. The Learned Senior Counsel has contended that therefore, the issue of maintainability on the ground of waiver and also the petitioner HRAEI being “person aggrieved” should have been decided at the threshold before going into the merits of the petition, but the Impugned Order has considered the case on merits without first adjudicating on the issues of maintainability and waiver.

10. The Learned Senior Counsel for Appellant HRANI has further alluded to Article 52 of AoA of the FHRAI to explain that the said article stipulates that the Federation President shall be ‘elected’ by the members of the Executive Committee, whereas in the instant case the Executive Committee members from the Eastern Region have decided and ‘nominated’ Mr. Sudesh

Kumar Poddar as their sole choice for appointment as President, thereby making light of the condition of election laid down in the AoA. He has further referred to The Representation of the People Act, 1951, wherein the process of nomination is defined, which is entirely different from the process of election, and in the present case, HRAEI is conflating the term 'nomination' with 'election', which is against the intent of corporate democracy. Further, expanding on this argument, the Learned Senior Counsel for Appellant HRANI have said that by insisting on appointment of their 'nominated' person as President without going through the election, the HRAEI is going against the letter and spirit of Article 52 of AoA.

11. The Learned Counsel for Appellant HRANI has also refuted the argument put forth by the Respondents that the nomination of Mr. Sudesh Kumar Poddar is being opposed for election out of vindictiveness, as in the past he had supported the plea of Casino Hotels, who had approached NCLT against the attempts of the Executive Committee to amend the AoA to remove the 8 one-year terms bar of being a Executive Committee member and increase it to 12 one-year terms and claimed that the Respondents have not made any pleadings regarding malice, which should have been pleaded specifically. He has claimed that the election of Mr. Sudesh Kumar Poddar was vehemently opposed for genuine and bonafide reasons,

which have been enumerated in the replies filed before NCLT, and as there are serious allegations against him, the Executive Committee members have no confidence in Mr. Poddar.

12. The Learned Senior Counsel for Appellant HRANI has also argued that Mr. Garish Oberoi continued to chair the Executive Committee meeting held on 30.10.2018 when no President for year 2018-19 could be elected, as Article 52 of AoA stipulates that the term of President is one term which ends only when the successor is elected and in the present case, since the President could not be elected, Mr. Oberoi was correct to chair the meeting, though he chose to step down when important agenda items came up for deliberation and adjourned the meeting till election of the new incoming President. He has also refuted the argument that the appointment of Mr. Sudesh Kumar Poddar as President of FHRAI is a legitimate expectation of HRAEI by contending that any legitimate expectation cannot be contrary to the provision of AoA and that of corporate democracy.

13. The Learned Senior Counsel for Appellant HRANI has argued regarding the arguments of the Respondents that the past practice in the appointment of the President of FHRAI, when one candidate for the post of President was the 'chosen nominee' of the six members of that particular regional association whose turn fell for appointment of the President, is

correct, since the provision for 'election' by the Executive Committee has been brought in by an amendment in the AoA in the year 2010 to specifically enjoin the Executive Committee to 'elect' a President, and not install a previously decided nominee as President.

14. The Learned Senior Counsel for Appellant HRANI has also referred to clause 4 of the Memorandum of Association to point out that it is an objective of the Federation to unite the regional associations of hotels and restaurants functioning in the country rather than give a right to a regional association thrust its decision in installing a particular person as of President of FHRAI.

15. Lastly, the Learned Senior Counsel for Appellant HRANI has argued that it is not correct that there is no other candidate for the post of President as in the instant case, Mr. Vijay Dewan, who was elected as President, decided to step down, after being communicated to do so by Mr. Poddar and if Mr. Vijay Dewan or some such person is not allowed to become President due to a unholy collusion among the Executive Committee members of the Eastern Region and the conduct of Mr. Poddar, that would be not correct for the corporate democracy. The Learned Senior Counsel has also argued that the Impugned Order goes beyond the prayers made in CP

437/241-242/2018 by giving a detailed methodology for holding election of President including allowing the members of the Eastern Region to give their nomination for the post of President of FHRAI for election which is totally against article 52 of the AoA.

16. The Learned Counsel for Appellant HRAWI (in CA No. 162/2022) has endorsed the arguments put forth by the Learned Senior Counsel for HRANI. He has strongly argued that there is no question of any ulterior motive of the members of Western and Northern Regions in opposing the appointment of Mr. Sudesh Kumar Poddar as President of FHRAI but their insistence is that the AoA should be followed while holding the election. He has also stressed that the 'waiver' granted by NCLT is not correct and further the alleged acts of oppression and mismanagement are merely dispute in interpreting the provision of Article 52 of the AoA.

17. The Learned Senior Counsel for HRAEI-Respondent in both the appeals has initiated his arguments by arguing about the maintainability of the petition on account of waiver by claiming that the petitioners of CP 437/241-242/2018, who though are eleven in number, actually represent a large body of members of the Eastern Region and the six members, who represent the Eastern Region in the Executive Committee of

FHRAI represent the legitimate interest of its members. The original company petition CP 437/241-242/2018 was filed by eleven petitioners including a majority of Executive Committee members from the Eastern Region and therefore, the petition under sections 241-242 is entitled for waiver under section 244 and is maintainable. He has expanded on his argument to point out that the members in the Executive Committee from the Eastern region are duly elected by the General Body of the Eastern Region and, therefore, they represent the interests and aspirations of the General Body of HRAEI. He has contended that, therefore, even though the stipulation of section 244 (1)(b) i.e. that one-fifth of the total number of members of FHRAI should prefer an application under section 241 is not strictly applicable in the present case and this is a fit case for providing waiver as per the requirements of clause (b) of section 244 (1) to enable its members to prefer a petition under section 241. He has claimed that even though HRAEI is a single member, it is a member in the 'Organisation Member' category of FHRAI, and it actually represents the voice and interests of the entire General Body of the Eastern Region which is articulated by the members of the Eastern Region in the Executive Committee, and therefore the waiver granted on this ground by NCLT is in order. He has also argued that even though the question of waiver has been dealt with mentioned in the Impugned Order in paragraphs 13 to 15, the issue of waiver was heard alongwith the other issues

in the Company Petition and therefore, it is not very relevant as to how and what stage the findings on the issue of waiver are included in the Impugned Order.

18. The Learned Senior Counsel for HRAEI has claimed that the company petition under sections 241-242 preferred before NCLT pertained to not just one act of oppression and mismanagement, but started from the time an attempt was made by some members of FHRAI to amend Article IV(b) and (c) in Appendix A of the AoA, regarding which an application being CP/CA No. 273(ND)/2017 was filed by M/s. Casino Hotel before the NCLT, New Delhi in which by an order dated 22.9.2017, NCLT had stayed proceedings of the agenda item No. 4, which pertained to approving the said amendment in Article IV(b)(c) in Appendix A of AoA. He has further pointed out that after the NCLT order dated 22.9.2017 staying proceedings of this additional item in the ensuing AGM, the Executive Committee of FHRAI passed a circular resolution dated 17.4.2018, whereby it was resolved that the Executive Committee shall not proceed or otherwise take up in any manner whatsoever, in the proposed alteration and amendment to AoA of FHRAI in relation to provision of maximum period/duration of office bearers and the Executive Committee of FHRAI. He has, further argued that since Mr. Sudesh Kumar Poddar supported the action of the petitioner Casino Hotels in CP No. 273(ND)2017, the members

of Western and Northern Regions were not happy with him and decided to put obstacles in his election and appointment as President of FHRAI. He has added that the appellants continue to make efforts to amend the AoA, which have not fructified yet due to hurdles placed by members of Eastern Region, particularly Mr. Sudesh Kumar Poddar, which is the main grouse of the Appellants and therefore, they want to stall his appointment as President of FHRAI.

19. The Learned Senior Counsel for Respondent-HRAEI has argued that in the AGM of FHRAI held on 30.10.2018 at 12.30 pm, Mr. Garish Oberoi, the President for the previous term and other Executive Committee members retired, and new members of Executive Committee were appointed for the next term. He has argued that in such a situation, it was illegal for Mr. Garish Oberoi to chair the meeting of the Executive Committee held on 30.10.2018 soon after the AGM wherein the controversy regarding the election and appointment of the President of FHRAI for the term 2018-19 erupted. He has also argued that Mr. Garish Oberoi along with members of the Executive Committee decided to overpower the members of EC, who objected to his chairing the Executive Committee meeting and thereafter, in a blatantly high-handed manner along with some other members, resorted to randomly proposing the names of persons from the Eastern Region other than Respondent No. 1

Mr. Sudesh Kumar Poddar, even though such random persons had neither given consent nor were interested in contesting the elections for the post of President. Such actions of Mr. Garish Oberoi and other members are clearly oppressive in nature and further by appointing a member from the Western Region to act as an Interim President, they have continued their actions of oppression and mismanagement. He has argued that, therefore, it is not a single act of oppression and mismanagement, but a continuing series of such acts starting from the actions of some members to bring an amendment in the AoA culminating in the **Casino Hotels case** and many objectionable actions, which constitute acts of oppression and mismanagement.

20. Regarding election of President of FHRAI, which was an agenda item in the meeting dated 30.10.2018 of Executive Committee, the Learned Senior Counsel of HRAEI has referred to Article 52 of AoA, which provides for rotation of presidency between the four regions and gives the provision for election of Federation's President. He has further referred to the minutes of Executive Committee meeting dated 30.10.2018, wherein the election of the President of FHRAI for the year 2018-19 was taken up. He has elucidated that while considering this agenda item, the sitting President Mr. Garish Oberoi (from Northern Region) first proposed the name of Mr. Nitin Kothari from the

Eastern Region, which was seconded by Mr. Pradeep Shetty leading to unopposed election of Mr. Kothari, but Mr. Kothari expressed his inability to take up the post of President. He has added that, thereafter the name of Mr. Ashoke Singh was proposed, who was also elected unopposed, but he also declined to take over the post of President due to personal reasons and he (Mr. Ashoke Singh) informed that the Executive Committee members from Eastern Region has nominated Mr. Sudesh Kumar Poddar for the post of President of FHRAI for the year 2018-19 and simultaneously proposed the name of Mr. Suresh Kumar Poddar as President. Another member Shri P.S. Ghai proposed the name of Mr. Vijay Dewan and in the voting that ensued Mr. Dewan obtained 13 votes in his favour against 5 votes in favour of Mr. Poddar, and even though Mr. Dewan was elected by majority vote, he declined to take over Presidency and stated the tradition that the name finalised by Eastern Region for the post of President should be followed, and since Mr. Sudesh Kumar Poddar has been nominated by the Eastern Region, therefore, he should be appointed as President. He has further stated that some members of the Executive Committee claimed that the name of Mr. Poddar was being thrust upon the Executive Committee for appointment as President, whereas some other members stated in the Executive Committee meeting that since only one name of Mr. Sudesh Kumar Poddar was proposed from Eastern Region for the post of President he

should be appointed as President of FHRAI. He has argued that the Chairman did not accede to the legitimate request of the members of Executive Committee from the Eastern Region, and the election of the President from the Eastern region was not given effect to and as a result Shri Garish Oberoi continued to chair the meeting of the Executive Committee and some agenda items were decided under his chairmanship in the meeting which was not lawful.

21. The Learned Senior Counsel for HRAEI has further argued that in the Executive Committee meeting, after refusing to accept the sole candidature of Mr. Sudesh Kumar Poddar, the Chairman Shri Garish Oberoi continued to request the Eastern Region members to propose another name for President that is acceptable to Executive Committee, but such a request was not in keeping with the principles of corporate democracy and also not in the interest of Eastern Region members, and despite the insistence of Eastern Region members in putting forward the name of Mr. Sudesh Kumar Poddar, whom they had confidence in, the chairman Mr. Garish Oberoi did not listen to the repeated requests of members from Eastern Region. He has pointed out that in the past years, the practice has been that the Executive Committee members from the region decide on a single member's name, who would be then elected unopposed as President of FHRAI. In this connection, he has pointed out

that for the year 2014-15, Mr. Tejinder Singh Walia's name was the sole name proposed and he was unanimously elected as President of FHRAI. He has stated that again for the year 2015-16 when the President was to be appointed from the Western region, a single name of Mr. Bharat Malkani was proposed, who was elected unopposed and unanimously as President. He has also referred to the election of President for the year 2016-17, when Mr. K. Syama Raju was the only name proposed from Southern Region, who was elected unopposed. In the same way, for the year 2017-18, the sole name of Mr. Garish Oberoi was proposed from the Northern Region, who was elected unopposed. He has thus claimed that the proposal of a single name by the members of the region whose turns falls for Presidentship is in the interest of harmonious functioning and unity within FHRAI, and this tradition is honoured by members from the other regions in the Executive Committee. He has contended that in the same tradition and manner Mr. Sudesh Kumar Poddar's name was unanimously decided for Presidentship by the Executive Committee members from the Eastern Region, and there is no reason why he should not be elected unopposed and unanimously following the past tradition in the interest of preserving unity and harmony in FHRAI. He has also claimed that it was in this spirit that Mr. Nitin Kothari, Mr. Ashoke Singh and Mr. Vijay Dewan declined to take up the post of President of FHRAI as they have themselves decided that

Mr. Sudesh Kumar Poddar shall be their preferred candidate. It is also clear that when their names were proposed by members from the other regions, they had not been consulted, and therefore they declined to take up the post of President. He has clarified that there is a sinister ploy of Executive Committee members from Western and Northern regions to stall Mr. Poddar from taking over as President, even though he is the preferred and chosen candidate of Eastern Region and would be elected unopposed if a proper election in accordance with provisions of AoA were to take place. He has claimed that the members of Executive Committee from the Western and Northern Regions are not abiding by the AoA, which is a clear act of oppression and mis-management of the affairs of FHRAI by the sitting President and Executive Committee members from Western and Northern Regions.

22. The Learned Senior Counsel for Respondent HRAEI has pointed out that even if there is one candidate in the fray, she is still termed as elected, even though she is elected unopposed, and such an election is a perfectly valid election. In this connection, he has referred to judgment of Hon'ble Madras High Court in the matter of **T. Ekambara Nicker and Anr. vs. Commissioner of the Madras Corporation (1926 SCC Online Mad 437: AIR 1927 Mad 22)** wherein it is held that on the date of the notification there was only one valid nomination of a

candidate for election and therefore, the lone candidate was elected unopposed.

23. The Learned Senior Counsel for HRAEI has also cited the judgment in the case of **Vilas Dadarao Chavan vs. Kiran Ashok Patil Dongaonkar [2008 SCC Online Bom 1167]** in support of his contention that even if there is only candidate in the field, there is an obligation on the Returning Officer to declare the election of such one candidate as the elected candidate, and therefore, in the same way it was incumbent on the Chairman presiding over the meeting of Executive Committee on 30.10.2018 to consider candidature/nomination of just one person viz. Mr. Sudesh Kumar Poddar for the purpose of election and declare him as elected, even if there was no contest and he was elected unopposed.

24. The Learned Counsel for Respondent HRAEI has also referred to section 53 of The Representation of The People Act, 1951 to point out that in the light of provision regarding elections which are uncontested, when there is only one candidate in the field, such an election would be uncontested but it would be still categorised as an election. The same principle applies *mutatis mutandis* in Article 52 of the AoA of FHRAI wherein the use of word 'election' does not necessarily

mean there has to be more than one candidate in the fray and even a sole contesting candidate can be elected unopposed.

25. The three issues that arise for consideration in the instant appeals are as follows:-

- (i) Whether petitioners in the original CP No. 473/241-242/2018 were entitled to maintain the said Company Petition under sections 241-242 of the Companies Act and whether the waiver granted to them under section 244 to prefer such a petition is correct;
- (ii) Whether the alleged acts of oppression and mis-management as claimed by the petitioners in original CP No. 473/241-242/2018 actually amount to oppression and mis-management as claimed by the petitioners in original company petition and as are required for a section 241-242 petition; and
- (iii) Whether the AoA regarding election of President of FHRAI have been followed properly in letter and spirit in the election of President of FHRAI for the year 2018-19, as was required by law?



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26. On the first issue of whether the 'waiver' granted by NCLT to the petitioners if CP No.473-241-242/2018 is correct as per law and in the facts of the case, we reproduce the relevant provision under section 244 of the Companies Act for reference:-

“244. 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.”

27. We note that the original CP No. 473/241-242/2018 was preferred by eleven petitioners, with HRAEI being petitioner No. 1 and petitioners Nos. 2 to 11 are members of FHRAI. The

company petition specifically notes that HRAEI, which is petitioner No. 1, has around 450 hotel members, 266 restaurant members and around 58 associate members, all located in the states of Eastern India. It is further noted that HRAEI is an Organisation Member of FHRAI having membership no. 50001 and petitioner nos. 2 to 11 are also members of FHRAI and their membership numbers are 41062, 21933, 40245, 40027, 41076, 21758, 21918, 21986, 22404 and 11372 respectively. Thus, while petitioner no. 1 is one single member of FHRAI, it actually represents at least 774 members from the Eastern Region and other petitioners are also members of FHRAI. FHRAI is a company, which does not have share capital and as per section 244(1) (b), not less than 1/5th of total members of FHRAI have the right to maintain a petition under sections 241-242. The proviso to section 244 (1) provides that NCLT may waive all or any of the requirements specified in clauses (a) and (b) of section 244 (1) so as to enable members to apply under section 241. We also look at the factors, which though not exhaustive, have been enumerated by this Tribunal in its judgment in the matter of **Cyrus Investments Pvt. Ltd. (supra)**. This Tribunal has held therein that if the Appellants are members of the company in question and have alleged oppression and mis-management, which is not a frivolous complaint, the Tribunal should examine whether similar allegation of oppression and mis-management was earlier made

by any other member or there is exceptional circumstance made out to grant waiver.

28. A perusal of the Impugned Order, wherein the issue of grant of waiver has been dealt by the NCLT shows that the NCLT has considered the matter of **Casino Hotels**, where the proposed action of the Executive Committee to amend clauses IV(1)(a) and (b) of Appendix-A of the AoA of FHRAI was under challenge, and in which the Eastern Region members had opposed the stand of Northern and Western Regions members. The NCLT has found that the issue which was raised in the **Casino Hotels case** has found reflection in the process of election of President of FHRAI for the year 2018-19. Looking to the facts and circumstances pleaded by the Respondent HRAEI, we are of the view that the acts of oppression and mismanagement have continued in one form or the other right from the filing of the Casino Hotels petition, and therefore, in the interest of corporate democracy and to ensure proper functioning of FHRAI in accordance with the AoA and to examine the alleged acts of oppression and mismanagement, we are of the view that it is a case whether exceptional circumstances demand grant of waiver under section 244 of the Companies Act to enable the petitioners of CP 473/241-242/2018 to raise their grievances which could then be

adjudicated upon. We thus hold that the Impugned Order is correct on this account.

29. On the issue whether the actions of the sitting President Mr. Garish Oberoi and other Executive Committee members, mainly from the Western and Northern Regions, can be labelled as acts of oppression and mis-management, we note the relevant provision of section 241 of the Companies Act, which is as hereunder:-

“241. Application to Tribunal for relief in cases of oppression, etc.- (1) Any member of a company who complains that—

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,

may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.”

30. We note that in the earlier petition titled CP/CA No. 273(ND/2017 was filed by the **Casino Hotels Unit of CGH Earth Pvt. Ltd. vs. FHRAI & Ors.** under Sections 241, 242 & 244 of the Companies Act, 2013, the main issue was to restrain the Respondents from making any amendment in clauses IV(b) and (c) of Appendix A of the AoA. This case was decided vide final order dated 23.4.2018, in the light of the following resolution dated 17.4.2018 adopted by the Executive Committee:-

“RESOLVED THAT the Executive Committee be and hereby resolves not to proceed or otherwise take up in any manner whatsoever, any proposed alteration or amendment to Articles of Association of the Federation of Hotels and Restaurant Association of India in relation to the provisions of maximum period/tenure of office bearers and Executive Committee of FHRAI”.



BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

31. The issue in the company petition in the Casino Hotels case regarding proposed amendment to the AoA was being opposed by members of Eastern Region against the proposal of the members of Northern and Western Regions. Thus while, overtly, there may not appear to be any direct relation between the matter in consideration in the **Casino Hotels case** and the issue in instant petition CP No. 473/341-242/2018, it is clear that there is certainly an under-current of feeling against the Eastern Region members, and Mr. Sudesh Kumar Poddar among the Western and Northern Regions members which

arose from the time of the Casino Hotels case. We are inclined to think so because while Mr. Sudesh Kumar Poddar is fully qualified to contest for the post of President, FHRAI, and that the Eastern Region Executive Committee members have decided to put forward his name as the sole candidate for the post of President of FHRAI, the members of Executive Committee from Northern and Western Regions are insistent on accepting any other member as President except Mr. Sudesh Kumar Poddar, which is a stand that does not have any legal or rational basis.

32. Thus, this act of the Western and Northern Region members in EC is definitely an act of oppression and mismanagement and when seen in conjunction with the earlier incident where members of Western and Northern Region were bent upon amending the AoA to increase the number of terms of membership in the Executive committee, it is clear that those members, who either stood to benefit from such an amendment or who were supporting it would be peeved or unhappy with the stand taken by Mr. Sudesh Kumar Poddar. We, therefore, are of the view that the procedure being adopted in the election of the President of FHRAI for the year 2018-19 as interpreted by the sitting President Mr. Garish Oberoi is clearly an act of oppression and mismanagement, which if not checked at nascent stage right in the beginning, can result in further oppression of FHRAI's members and mismanagement of the

affairs of the company to the detriment of the functioning of the company FHRAI and against the legitimate interests of its members. The intent of sections 241-242 is to protect the company's members from acts of oppression and mismanagement and to also protect and preserve the interest of the company, and in that light we are of the clear view that in the present case, the acts as stated in CP 473/241-242/PB/218, clearly constitute acts of 'oppression and mismanagement'.

33. We also look at the judgment of Hon'ble Supreme Court in the matter of **Chatterjee Petrochem (India) Private Limited (supra)** cited by the Learned Senior Counsel for appellants. The relevant portion as cited is as follows:-

"138. Let us examine as to whether any of the complaints contained in the company petition before the CLB make out a case that the affairs of the Company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members, which was sufficient to justify the passing of a winding-up order on the ground that it was just and equitable that the Company should be wound up, but that to wind up the Company would prejudice such member or members.

139. In Shanti Prasad Jain case', referred to hereinabove, in a similar situation, it was observed by this Court as follows: (AIR p. 1543, para 19)

"19. it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of Section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as

members and this requires that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

142. As has been indicated in some of the cases cited, the language of Section 397 suggests that the oppressive manner in which the Company's affairs were being conducted could not be confined to one isolated incident, but that such acts would have to be continuous as to be part of a concerted action to cause prejudice to the minority shareholders whose interests are prejudiced thereby. In the aforesaid context, what do the facts reveal in the instant case and do they bring the acts of oppression complained of within the purview of Section 397 for grant of relief under section 402 of the Companies Act?"

34. What follows from the above judgment of the Hon'ble Supreme Court is that the conduct of the majority shareholders should be considered not in isolation, but as part of consecutive story in order to maintain a case of oppression of the minority member. In the present case it is seen that from the time certain members of the Executive Committee initiated attempt to amend clause IV (b) and (c) of Appendix A of AoA, which was resolutely opposed by some other members of the Executive

Committee which section was challenged in the **Casino Hotels case(supra)** and the later actions of members of the Executive Committee to subvert the proper election process for the post of President of FHRAI for the year 2018-19, we find that in the instant case, there is a “continuing story” of oppression by some members of the Executive Committee against some other members of the Executive Committee who are both members of FHRAI. Thus the judgment of Hon’ble Supreme Court in the matter of **Chatterjee Petrochem (India) Private Limited (supra)** is distinguished from the issue in the instant case on the above basis.

35. On the third issue, which relates to the procedure adopted in this election of President of FHRAI for the term 2018-2019, we note the relevant provisions of AoA which are as hereunder:-

“Articles of Association of The Federation of Hotel & Restaurant Associations of India.

Xx xx xx xx

EXCUTIVE COMMITTEE

40.(g) To determine its own procedure insofar as such procedure may not be in consistent with the act or these articles.

Xx xx xx xx

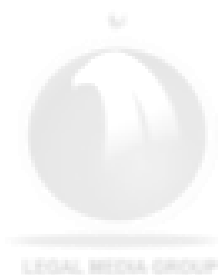
49. Questions before the Executive Committee shall be decided by a majority of votes of the members present.

Xx xx xx xx

52. *The Federation President shall be elected by the Members of the Executive Committee region-wise, by rotation, for the term, in the following order:*

*Hotel & Restaurant Association of Eastern India
Hotel & Restaurant Association (Western India)
South India Hotels & Restaurants Association
Hotel & Restaurant Association of Northern India*

For the purpose of these Articles, one term shall mean the period commencing from the date and time of election of the President until his/her successor is elected by the incoming Executive Committee. It is made clear that no person shall be entitled to a tenure exceeding two terms as President of the Federation during his lifetime. Provided further that the second term is approved by the 3/4th members of the Executive Committee present in the meeting.



53. *Under the general superintendence and control of the Executive Committee, the President shall be Executive Head of the Federation and shall be vested with all administrative powers, including the appointment of necessary staff and the supervision of the work of the office.*

The President may, however, delegate all or any of his administrative powers, including the appointment of necessary staff and the supervision of the work of the office, to the Honorary Secretary and/or Secretary General as may be considered necessary for conducting the day-to-day business. However, in the event of any contradiction, the decision taken and instruction issued by the Executive Committee shall be final and shall prevail.”

36. We also note section 53 of The Representation of the People Act, 1951, wherein the procedure in contested and

uncontested elections has been provided, which is as hereunder:-

“53. Procedure in contested and uncontested elections.

(1) If the number of contesting candidates is more than the number of seats to be filled, a poll shall be taken.

(2) If the number of such candidates is equal to the number of seats to be filled, the returning officer shall forthwith declare all such candidates to be duly elected to fill those seats.”

37. Article 52 of the AoA of FHRAI stipulates that the election to the post of President of FHRAI is carried out by the members of the Executive Committee region-wise by rotation for one term and the order of rotation as stipulated is in the order of Eastern Region, Western Region, Northern Region and Southern Region. It is not disputed that it was the turn of Eastern Region to have its member elected as President of FHRAI for the term 2018-19. We also note that Article 49 of the AoA, provides that question before the Executive Committee shall be decided by a majority of members present. Further, clause (g) of Article 40 of the AoA stipulates that the Executive Committee could devise its own procedure in so far as such procedure is not inconsistent with the Companies Act or the AoA. When we read the above mentioned provisions of the AoA of FHRAI, it is clear that there

shall be an election by the members of the Executive Committee and such election shall decide the winner through a majority vote and further, the Executive Committee could devise its own procedure to carry out its duties insofar as such procedure is not inconsistent with the Companies Act or the provisions of AoA. It is also logical and rational to assume that any EC member could propose and second the nomination of a candidate as there is no specific provision regarding the same. Such an inference would be in consonance with democratic functioning of FHRAI and keeping in mind the rights of the EC members.

38. We now look at how the process of 'election' of President of FHRAI was carried out for the term 2018-19. In this regard, the minutes of the Executive Committee's meeting dated 30.10.2018 (attached at pp. 220-229 of appeal paperbook Vol.II in CA(AT) 166 of 2022) are worth reproducing. The proceedings as recorded for agenda item No. 5 and item No. 7 which are relevant, are extracted hereunder :-

"The Federation of Hotel & Restaurant Associations of India

Minutes of The Federation of Hotel & Restaurant Associations India

Executive Committee Meeting held at 2.00 p.m. on 30th October 2018 at Pride Plaza Hotel, Aerocity, New Delhi

Item No.5: Election of President for the year 2018-19 as per Articles of Association of FHRAI

The Chairman stated that he would like to step down after handing over the Chair to the incoming President.

The Chairman, proposed the name of Mr. Nitin Kothari from Eastern Region as the President of FHRAI. This was seconded by Mr Pradeep Shetty. Mr Kothari was elected as President by a majority vote. The Chairman announced that Mr Nitin Kothari from the Eastern Region has been elected as President. However, Mr. Kothari stated that he is unable to accept the Presidency and declined to take the Chair of the President.

Mr. P. S. Ghai then proposed the name of Mr. Ashoke Singh from Eastern Region as the President of FHRAI and Mr. Jaiswal seconded it. The Chairman then announced that Mr Ashoke Singh was elected as President by a majority vote. However, Mr. Ashoke Singh declined due to personal reasons as he stated that he would be travelling out of India more often this year.

Mr. Ashoke Singh further Informed Mr. Sudesh Kumar Poddar has been nominated by the Eastern Region for the post or President of FHRAI for the year 2018-19. Mr Ashoke Singh proposed the name of Mr Sudesh Poddar as President.

Mr P.S. Ghai then proposed the name of Mr. Vijay Dewan as the President.

The Chairman highlighted that usually voting does not take place in FHRAI for the post of the President, but since two names have been proposed by members i.e. Mr. Sudesh Poddar and Mr. Vijay Dewan for the President's position of FHRAI, he requested the members to give their opinion & vote on this. Thirteen members gave their assent for Mr Dewan as the President and five members in favour of Mr Poddar. Thus, Mr Dewan was elected as President by a majority vote.

Mr. Dewan was contacted over telephone by Mr. Sudesh Poddar and informed him about the decision of the EC to elect him as the President of FHRAI.

Mr. Dewan conveyed over telephone that tradition should be followed in FHRAI and the nomination from the Eastern Region for the President remains with Mr Sudesh Poddar

and no one else. Further Mr Dewan declined to take up the post of President, FHRAI for 2018-19.

Mr. Pradeep Shetty observed that after their elections to the Executive Committee is ratified by the AGM, the EC members of FHRAI function in their individual capacity as Board of Directors of FHRAI and in that respect any nomination from any region cannot be thrust on the EC members to be accepted. That would undermine the role of the EC members. Mr Shetty further stated that once the regional nominees are approved by the FHRAI General Body, all the said members / persons lose their regional colour and act as a Board member of FHRAI.

Mr. Pranav Singh pointed out that the EC Members should adhere to the constitution of FHRAI. He further stated that as per the constitution, the President nominee has to be from Eastern India and the Region has only one name of Mr Sudesh Poddar for this position and if the EC does not want him as the President, there will not be any President during the year.

The Chairman pointed out that since the EC could not resolve the issue of election of the President, he would proceed with the election of other office bearers and would come back once again and request to the Eastern Region to nominate another Member to the post of the President.



xx xx xx xx

Item No. 7: Election of Office Bearers as per Articles of Association of FHRAI.

xx xx xx xx

The Chairman, again requested the Eastern region members to propose a name for the President that is acceptable to the EC. However, the members insisted on the name of Mr. Poddar.

xx xx xx xx

Mr. Poddar and Mr. Walia insisted on a reason for not accepting Mr. Poddar's name as President. Mr. Shetty informed that there had been a polling and in every election the electorate votes for someone and someone is defeated and that does not mean that a reason can be asked for not choosing the candidate who has lost.

xx xx xx xx

The Chairman once again requested the Eastern region to reconsider their decision and recommend a name acceptable to the EC Members.”

(Emphasis supplied)

39. It is clear from the above extracted proceedings of the Executive Committee meeting held on 30.10.2018, the names of Mr. Nitin Kothari and after he declined that of Mr. Ashoke Singh and after he refused to take up the post of President due to personal reasons that of Mr. Vijay Dewan were proposed by members from other regions. The minutes do not make clear that while their names proposed and seconded by members of Northern and Western regions, their consents were sought before proposing their names, but the fact that they declined to take up the President's post immediately after being elected is a clear pointer to the fact that they were not consulted or their consent was obtained prior to the proposal of their names. It is also clear from the proceedings recorded in Item No. 7 that Mr. Garish Oberoi, the outgoing Chairman continued to request the Eastern Region members to propose the name for the President that is acceptable to the Executive Committee, but the members insisted on the name of Mr. Sudesh Kumar Poddar. It is also seen from the proceedings that Mr. Poddar and Mr. Tejinder Singh Walia wanted to know the reasons for not accepting Mr. Poddar's name, but no reason was communicated

by the Chairman. It is also seen from the proceedings that Mr. Amanvir Singh and Mr. Sherry Bhatia (one of the Appellants in CA(AST) No. 162 of 2022) even went to the extent of suggesting that till such time the issue of President is resolved, one of the Vice Presidents could be entrusted to deliver the functions of the President and Mr. Amanvir Singh even suggested the name of Mr. Gurubaxish Singh Kohli for this role.

40. We note that the members of the Executive Committee are elected at every Annual General Meeting as provided in Appendix 'A' of AoA and the incoming Executive Committee is deemed to have taken office from the date its office bearers are elected. Further, the previous Executive Committee as well retiring office bearers continue to hold office until the new office bearers are elected by the incoming Executive Committee. Therefore, it is clear that once the new Executive Committee members were elected in the Annual General Meeting held on 30.10.2018, they were to have taken office. Also, the other office bearers which would certainly include the President also continued to hold office until the new office bearers are elected by the incoming Executive Committee. By not completing the process of election of President for the year 2018-19, and presiding over the Executive Committee as sitting President and also electing the office bearers including the Vice Presidents

and others, Mr. Garish Oberoi not only exhibited a blatant and high-handed oppressive behaviour nefariously assisted by some other members who were acting like a 'clique', he also disregarded provisions of the AoA and acted in an oppressive manner.

41. Thus, a detailed perusal of the minutes of the Executive Committee meeting dated 30.10.2018, particularly in item No. 5 and Item No. 7 make it abundantly clear that the members of the Western and Northern regions in the Executive Committee had formed a clique and were relentlessly pursuing their iniquitous, perverse and flagrant design to block the appointment of Sudesh Kumar Poddar as President of FHRAI as preferred candidate of the Eastern Region. Such acts of Executive Committee members, mainly by the above stated members of the Northern and Western regions, are clearly acts of oppression of members of the Eastern region and that the outgoing President Mr. Garish Oberoi was clearly an active party in perpetuating such illegal acts. Moreover, the FHRAI which was not being allowed to elect a President for the term 2018-19 and would affect the smooth management of FHRAI's affairs. Thus, these acts would also constitute acts leading to mismanagement of the affairs of the company, which would be

covered under sections 241-242 and which are not merely 'directorial complaints'.

42. We also consider the argument put forth by the Learned Senior Counsel for the Appellants that Article 52 of the AoA lays down that there should be election for the post of President, whereas in the present case, the Executive Committee members from Eastern Region were insisting on their chosen/nominated person Mr. Sudesh Kumar Poddar to be appointed as President. We refer to section 53 of The Representation of the People Act, 1951, which clearly lays down that even when a single member is in fray in an election, she is elected unopposed, but the fact is that it would still be called an election. We also refer to the judgment cited by the Learned Senior Counsel for Respondent HRAEI in the matter of **T. Ekambara Nicket and another (supra)**. The relevant portion of the judgment is as follows:-

" 21. Though I have thus come to the conclusion that the notification of the 28th of September fixing the election to be held on the 30th was illegal; as being against R. 6 it does not of course necessarily follow that I would be justified in issuing a mandatory order under Section 45 of the Specific Relief Act, restraining the holding of the election in this case. If it should be held that there remained on the date of the notification only one valid nomination of a candidate for election and that there was no right or possibility of making any other nominations, it follows that in the absence of any contest the election to be held would only be a merely formal election and the absence of three days' notice of the election, even though

illegal, would not be calculated to injure in any manner the rights of any person whatsoever. In this connexion may allude to the argument of Mr. N. Chandrasekara Iyer for the petitioners that a right of franchise included a right to canvass for or against a candidate and that the provision as to three days' notice should be regarded as material even in the case of an uncontested election, because it would enable the voters to go about and see that no one voted for some particular candidate."

(Emphasis Supplied)

43. The judgment of Hon'ble Supreme Court in the matter of **Saraswati Devi (supra)** is also cited by the Ld. Senior Counsel for Respondent in this regard, which holds that even when there is a sole candidate on a seat reserved for Scheduled Caste, who is eligible, such a sole candidate gets elected as per Haryana Municipal Election Rules, 1978. The relevant portion of the judgment is reproduced below:-

3.After the said elections were over question arose about the election of President of the said Municipal Committee. As per Section 10 sub-section (5) of the Act the offices of the President in the municipalities shall be filled up from amongst the members belonging to General category, Scheduled Castes, Backward Classes and women by rotation and by lots in the manner prescribed. Rule 70 sub-rule (4) of the Haryana Municipal Election Rules, 1978 ('Election Rules' for short) prescribes the manner in which the election to the office of President of municipality could be held. The Local Government Department of Haryana vide its notification dated 20-1-1995 declared in terms of Rule 70(4) of the Election Rules that the seat of the President, Municipal Committee, Loharu, inter alia, shall be filled up from amongst the members belonging to Scheduled Caste category.....

Xx xx xx xx

5.

xx xx xx xx

On a combined reading of Article 243-T of the Constitution of India, Sections 10(5) and 18 of the Act and sub-rule (4) of Rule 70 of Election Rules, it becomes clear that Parliament as well as the legislature have enacted these provisions in order to provide for reservation of office of the President for members of Scheduled Castes, Scheduled Tribes, Backward Classes and women in rotation. A bare reading of Section 10(5) and Rule 70(4) shows that the offices of the Presidents are to be filled from amongst members belonging to different categories by rotation and by lots. It is not disputed that the post of President of Loharu Municipal Committee at the relevant time was reserved for Scheduled Caste women. So far as the appellant is concerned, she has been elected from Ward No. 5 on a seat reserved for Scheduled Caste women. Therefore, in that category she is the sole candidate.The very concept of rotation presupposes that for the contest of Presidentship once by rotation a reservation is made for members elected from a particular category only those members can contest for Presidentship.....

(Emphasis supplied)

44. We also refer to the judgment of Hon'ble Bombay High Court in the matter of **Vilas Dadarao Chavan (supra)**, in which the relevant portion regarding election in the event there is only one candidate is as follows:-

"15.

xx xx xx

There is no difficulty in coming to the conclusion that there is an obligation on Returning Officer to declare the election of such only one candidate in the field, as elected candidate and he has to do this forthwith. The mandatory duty is cast on the Returning Officer in this regard. Therefore, he had no option but to declare the respondent No. 1 as elected on that day as on the date fixed for withdrawal of nominations, he was the only one candidate in the field and therefore, in view of Rule 30, he was obliged to declare him as elected which in fact, the Returning Officer has done.

(Emphasis supplies)

45. We also take note of the judgment of this Tribunal in the matter of **The Hamlin Trust & Ors vs. LSFIO rose Investments s.a.r.l & Ors. (CA(AT) No. 77 of 2022)** cited by the Learned Counsel for Respondent HRAEI wherein the following is held:-

“31. The import of article 140 of the AoA is certainly not that the first two suggestions could be of ineligible candidates so that the Appellants have to then accept the name of the third candidate as Hobson's choice. Thus the effect of first two suggestions being of ineligible candidates could also mean that the Appellants would be forced to accept the name of the third candidate who may be, for some reason, not acceptable to them.”

46. The judgment in **the Hamlin Trust (supra)** case only points to the fact that if a candidate is eligible, only then the nomination would be considered valid. In the present case, the candidature of Mr. Sudesh Kumar Poddar has not been shown

to be invalid or that he is an ineligible candidate and therefore, he is fit to contest for the post of President.

47. We also take note of Articles 7 and 8 of the AoA, wherein the provision for removal of the members of the Executive Committee through “No Confidence Motion” is provided. Therefore if, as contention of the Appellants that Mr. Sudesh Kumar Poddar is not fit to be appointed as President, is correct, the members of the Executive Committee could pass a no confidence motion for his removal, but till the time removal of Mr. Sudesh Kumar Poddar in such basis and manner does not happen, he is entitled and eligible to contest as President of FHRAI and no disqualification attaches to his candidature.

48. From perusal of the above stated judgments and the provision cited above from The Representation of the People Act, 1951, it is lucidly clear that, even when there is a single candidate in fray, she will be elected unopposed provided she is eligible to contest, and such election is proper and legitimate election in the eyes of law. Thus, the act of the Appellants not to let Mr. Sudesh Kumar Poddar's name be proposed as a 'nominated' candidate of the Eastern Region when no other candidate opposing him was in the fray, was certainly not in accordance with the principle of corporate democracy and corporate governance and also not in consonance with the

requirement of Article 52 of the AoA of FHRAI. While holding this view we are conscious of the fact that even for the years 2014-15, 2015-16, 2016-17 and 2017-18, there was a single candidate every year, who was elected unopposed as President of the FHRAI in the respective years and at that time nobody raised an issue about the nomination of a single candidate from the particular region. Quite clearly, the word 'nomination' when used in a reference to putting forward the name of Mr. Sudesh Kumar Poddar may give an impression that he is not a contesting candidate, but practically in the eyes of law he is merely a candidate, whose name would be duly proposed by any Executive Committee member, and be considered a valid nomination/candidate as is understood, under The Representation of the People Act, 1951, where nomination merely means that someone has proposed and some other person has seconded the name of the candidate, but it that the nominated candidate is elected unopposed without going through the process of voting. Further, if such candidate is a sole candidate, she can obviously be elected unopposed, but the fact is that she will still be elected in accordance with the provisions of AoA and in the manner which is correct in the eyes of law.

49. A perusal of pleadings submitted by the parties makes it clear that the election of President was carried out for the year 2014-15 (at pg.367 of appeal paperbook Vol.II in CA(AT) 166 of 2022), for the year 2015-16 (attached at pg.371 of appeal paperbook Vol.II in CA(AT) 166 of 2022), for the year 2016-17 attached at pg.379 of appeal paperbook Vol.II in CA(AT) 166 of 2022) and for the year 2017-18 (attached at pg.388 of appeal paperbook Vol.II in CA(AT) 166 of 2022) when only one name was proposed in the election of President for the relevant term, who was then elected unopposed. It thus appears correct, as was argued by the Ld. Senior Counsel for Respondent HRAEI, that in the interest of harmonious working of FHRAI, there is an established tradition that one name is decided by the Executive Committee members from the particular region as their 'preferred' or 'nominated' candidate for the post of President, who is then elected unopposed as President. The fact still remains that such a person is elected, even though she/he is elected unopposed.

50. In the light of the above-stated detailed discussion, we are of the clear view that the waiver granted by the NCLT with regard to section 244 of the Companies Act, 2013 to the petitioners of CP No. 437/242-242/2018 was in order and was necessary to allow the petitioners to agitate their case about alleged oppression and mis-management under sections 241-

242 of the Companies Act, 2013. We further find that the acts of some members of the Executive Committee, who have formed a “clique” to give shape to their chosen but perverse design are clearly acts of “oppression and mismanagement” beginning from the attempts to amend clause IV(b) and (c) of Appendix A of the AoA, which had carried on till the time of election of President of FHRAI for the year 2018-19. We also find that even if there is a sole candidate, whose name is put forth as the preferred candidate of a particular region, his election would be unopposed, but that election would still qualify as a election under article 52 of the AoA provided the proposed name is of a person who is eligible to contest. We therefore hold that the Impugned Order is correct and needs no intervention.

51. We direct that election for the post of President of FHRAI for the year 2018-19 shall be completed within 30 days of this judgment/order to enable the company FHRAI to carry on its functions in accordance with law and for the benefit of the Company and its members.

52. It is clear from the date of the Executive Committee meeting dated 30.10.2018 that the parties in this case have been continuously involved in litigation. It is also clear that the normal activities of FHRAI including the meeting of the Executive Committee in the absence of a regular President have

not only affected the functioning of FHRAI, but have not been carried out in accordance with provisions of the AoA. The actions taken by the Executive Committee on 30.10.2018 in the meeting chaired by Mr. Garish Oberoi are patently illegal and this meeting should have taken place under the chairmanship of the new President. We, therefore, are of the opinion that the Executive Committee members as they stood on 30.10.2018 shall be deemed to continue to hold office till a fresh AGM is held to elect Executive Committee members and thereafter the meeting of the Executive Committee takes place to elect the President for the term 2018-19 and appoint FHRAI's other office bearers and transact regular business. We, therefore, view the directions in para 24 (i), (ii) and (iii) of the NCLT order as fair and just and uphold them.

53. We further, are of the view that the period starting from 30.10.2018 till the pronouncement of this judgment shall not be included while considering the term and eligibility of the Executive Committee members as provided in the A0A in the election of President, Executive Committee members and other office bearers of FHRAI.

54. With regard to IA No. 3749 of 2022, which was filed by Respondent No. 12 FHRAI regarding direction for payment of statutory dues etc. for meeting expenses of FHRAI we close it

the new President shall be installed in accordance with the orders given above within 30 days, and the Executive Committee under charge of the new President shall be fully entitled to consider the issues raised in IA No. 3749 of 2022. Any other IAs pending in the matter are also closed in the light of this judgment in the instant appeals.

55. In the above-mentioned situation, we find that the judgment of NCLT and Impugned Order dated 30.8.2022 of NCLT is correct and we do not see any reason to interfere with the same. The appeals, namely CA(AT) No. 162 of 2022 and CA(AT) No. 166 of 2022 are therefore found to be devoid of merit and are disposed of accordingly through this common judgment.

56. There is no order as to costs.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Dr. Alok Srivastava]
Member (Technical)**

New Delhi

21st February, 2023

/aks/