

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, PRINCIPAL BENCH

NEW DELHI

C.P. No. 108/ND/2016

PRESENT : CHIEF JUSTICE M.M. KUMAR
HON'BLE PRESIDENT

INA MALHOTRA
HON'BLE MEMBER (J)

In the matter of Sections 241 & 242 OF THE COMPANIES ACT, 2013

AND

In the matter of

Esquire Electronics

Petitioners

Vs.

Netherlands India Communications Enterprises Ltd.

Respondents

Present on behalf of the parties

1. Mr. Uttam Datt, Manu Beri, Tarun Sharma, Advocates (for Petitioners)

ORDER

M.M. Kumar, President

It is a well settled principle of law that law comes to the rescue of those who are vigilant about their rights. For measuring the extent of vigilance, the legislature has provided period of limitation under the Limitation Act, 1963 (for brevity, 'Limitation Act.'). The Limitation Act incorporated by reference and has been applied to matters concerning companies by Section 433 of the Companies Act, 2013(for brevity, '2013 Act'). It is pertinent to first notice Section 433 of 2013 Act which reads as follows:

"433 – The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be."

2. A perusal of the aforesaid provision makes it patent that the Limitation Act would apply to the proceedings or appeals before the Tribunal or the Appellate Tribunal. The question then is, what would be the period of limitation in cases where the petitioner has complained of illegal induction of respondents as directors and wrongful reduction of their share capital with the allegations against the respondents of grabbing majority shareholding unfairly as an act of oppression. It appears that there is no specific provision made either in the substantive section of the Limitation Act or in the Articles as per the Schedule. A close scanning of the schedule, however, reveals that Articles 1-112 deal with various types of suits viz., suits relating to accounts where period of limitation is three years, suits relating to contracts where again the period of limitation is three year; suits relating to declarations, suits relating to immovable properties, suits relating to movable properties, suits relating to Trust and Trust property and miscellaneous matters. In most of the cases, the period of limitation is three years except the suit for possession of a hereditary office etc (from Articles 107 to 110) where the period of limitation prescribed is 12 years or Articles 111 and 112 where the period prescribed is 30 years.

3. It appears that the matters concerning illegal removal or induction of directors has not been specifically dealt with in any of the articles. It also becomes obvious that no period of limitation has been provided for illegal reduction of shareholding with malafide intention to acquire majority shareholding. In these circumstances, the question is which provision of the Limitation Act would apply. The answer is found in Article 113 which deals with the subject of suits for which there is no prescribed period of limitation. The aforesaid provision reads as below:-

" PART X – SUIT FOR WHICH THERE IS NO PRESCRIBED PERIOD

<i>Description of Application</i>	<i>Period of Limitation</i>	<i>Time from which period begins to run</i>
<i>113. Any suit for which no period of limitation is provided elsewhere in this Schedule.</i>	<i>Three years</i>	<i>When the right to sue accrues"</i>

4. A perusal of the aforesaid provision would show that in cases where no period of limitation is provided elsewhere in the Schedule, there Article 113 is to apply. In such cases, the period of limitation provided is three years from the date when the right to sue accrues.

5. It is equally well settled that when the adjudication results in passing of a decree by a Court or Tribunal, then it is preceded by filing of suits. Every suit is commenced by filing of a plaint. Honourable the Supreme Court, in the case of **Manish Mohan Sharma v. Ram Bahadur Thakur Ltd. AIR 2006 SC 1690** held that Section 634A of the Companies Act, 1956, read with Sections 397 & 398 indicate that all orders passed by the Company Law Board in an application u/s 397 & 398 are enforceable like decrees without any limit on the nature of the order passed by the Company Law Board. In that case, it was further held that the order passed by the Company Law Board in terms of the Memorandum of Family Arrangement was a preliminary decree and the final decree was to be passed after complete implementation of its terms. It was further held that the Company Law Board, when it deals with an application u/s 634A of the 1956 Act and sits as an executing court, then it is subject to all the limitations to which a Court executing a decree is subject.

6. The aforesaid view is based on the provisions of Companies Act, 1956 and the position of the present Tribunal is far superior than the erstwhile Company Law Board in the matter concerning implementation of orders passed by the Tribunal. Section 424 of 2013 Act classifies the nature of proceedings before the Tribunal and provides as under:

"424 – (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder,

the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have for the purpose of discharging their functions under this Act [or under the Insolvency and Bankruptcy Code, 2016], the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;*
- (b) requiring the discovery and production of documents,*
- (c) receiving evidence on affidavit;*
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872) requisitioning any public record or documents or a copy of such record or document from any office*
- (e) issuing commissions for the examination of witnesses or documents*
- (f) dismissing a representation for default or deciding it ex parte*
- (g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte and*
- (h) any other matter which may be prescribed.*

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,-

- (a) in the case of an order against a company, the registered office of the company is situated; or*

(b) in the case of an order against any other person, the person concerned voluntarily resides or carried on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860), and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

7. A perusal of the aforesaid provisions would reveal beyond any doubt that the Tribunal is not bound by the procedure laid down by the Code of Civil Procedure. For the purposes of discharging their functions under 2013 Act or under the Insolvency/Bankruptcy Code, it is vested with the same powers as are vested in a Civil Court under the Code of Civil Procedure while trying a suit in respect of the matter specified in items 2(a) to 2(h). Sub-section 3 makes it further clear that any order made by the Tribunal may be enforced by it in the same manner as if it were a decree made by a Court in a suit pending therein. It has further been clarified that all proceedings before the Tribunal are deemed to be judicial proceedings within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code. The Tribunal is deemed to be a Civil Court for the purpose of Sec. 195 and Chapter 26 of the Code of Criminal Procedure, 1973.

8. Another feature in this regard is revealed by Sec. 425 of 2013 Act. The Tribunal has been vested with the same jurisdiction, powers and authority in respect of its contempt as the High Court has and it may exercise for this purpose all the powers under the provisions of Contempt of Courts Act 1971. Therefore, it becomes evident that the orders passed by the Tribunal are executable as decree of the Court and in case of any violation of its orders, Sec. 425 vests the Tribunal with the power of issuing contempt. Once it is a decree then it follows that the proceedings under Sec. 241 and 242 of 2013 Act are necessarily proceedings in a suit. It has all trappings of a suit.



Therefore, the period of limitation provided for suits would, *ipso facto*, be applicable as the Limitation Act has been specifically made applicable by Sec. 433 of 2013 Act. Therefore, in cases where no period of limitation has been provided, the residuary Article 113 would be applicable and the period of limitation would be three years from the date the right to sue accrues.

9. It is also pertinent to mention that the provision of Sec. 5 of the Limitation Act would not apply to proceedings before the Tribunal as it is the original Court of jurisdiction and the petition filed before it u/s 241 and 242 of the 2013 Act are in the nature of suits. The adjudication by the Tribunal would result in passing of a decree which is executable by virtue of the provisions made in Sections 424 & 425 of 2013 Act.

10. The benefit concerning acknowledgment in writing u/s 18 of the Limitation Act would be available to a party if it is able to show that before the expiration of the prescribed period for a suit or application, all acknowledgments of liability in respect of such rights must be made in writing duly signed by the party against whom such right is claimed or by his representative. The aforesaid position is evident from the reading of Sec 18(1) itself and it has been explained in details by the Hon'ble Supreme Court in the case of ***Sampuran Singh v. Niranjana Kaur AIR 1999 SC 1047.***


11. We have prefaced this order with various principles of law, equity and justice for the reason that the facts presented before us in the present petition are required to be examined in the light of the aforesaid principles.

12. It would be first profitable to closely examine the reliefs claimed by the petitioner which are evident from the perusal of para 8 of the petition filed in July 2016. The petitioner has claimed that Respondent Nos. 2 to 5 be removed as directors and directions be issued to bonafide shareholders of the company for re-constitution of the Board of Directors by excluding Respondent Nos. 2 to 5. A consequential relief of restraining Respondent Nos. 2 to 5 either by themselves or by their agents, from interfering in the management and affairs of Respondent No.1 company and not to hold

themselves out as directors of Respondent No. 1 company. They have further prayed that all resolutions passed by Respondent No. 1 company allotting shares to various shareholders between 2000 and 2012 be declared as null and void. As a consequential relief, the names of such allottees be deleted from the register of Respondent No. 1 company by rectifying the same.

13. On a close scrutiny of the averments made in the body of the petition filed u/s 241 & 242 of 2013 Act, it is revealed that Respondent No. 6 company was incorporated in the year 1995 and Respondent Nos. 2 & 3 were its initial promoters. There is a Joint Venture Agreement dated 20.12.1995 between Petitioner No. 1 and Respondent No. 6 (S.M. Telesys Ltd., NOIDA) along with two other companies. They had all agreed initially to incorporate a Joint Venture Company in India by the name of NICE Telecom Ltd. A copy of the Joint Venture Agreement dated 29.12.1995 has been placed on record (P-9). However, on a proposal mooted out by Respondent No. 2 on a subsequent date, all parties to the joint venture agreement agreed to subscribe to the shares of Respondent No. 6 company in the same proportion as agreed in the joint venture agreement. The idea of incorporating NICE Telecom Ltd. was dropped. Consequently, the petitioner subscribed to the shares of Respondent No. 6 company which was followed by the other partners of joint venture agreement like LG Information and Communications Ltd. and NARAY Mobile Telecom Inc. of South Korea. One Shri G.S. Saluja was appointed as nominee of petitioner No. 1 on the Board of Directors; and Respondent Nos. 2 & 3 were appointed as nominee directors of Respondent No. 6 company. Likewise, one director each was appointed as its nominee by L.G. Information and Communication Ltd. and NARAY Mobile Telecom Inc. In total six members Board was constituted in accordance with the stipulations of joint venture agreement. The nominees of the petitioners were appointed as Non-residential directors. Accordingly, Form No. 32 was filed before the Registrar of Companies showing the appointment of G.S. Saluja and S.S. Lamba as directors (P-10).

14. It is also important to notice that as per the allegations of the petitioners, Respondent No. 1 company was secretly incorporated in the year 1996 and the



petitioners have claimed that they had no knowledge of its incorporation (see para 6, Facts of the Case, sub-para xxxv). Respondent No. 1 was granted paging licenses by Ministry of Telecommunications, Government of India and Respondent No. 1 had an arbitral claim dispute in different arbitral proceedings where a total claim of Rs. 200/- Crores has been made. It has also been alleged that Respondent Nos. 2 to 5 had kept the petitioner in dark about the arbitral proceedings and failed to disclose the status of those proceedings till the talks for compromise were started. It is thus alleged that Respondent No. 1 was incorporated fraudulently which has the same name as was considered by the Joint Venture Agreement dated 29.12.1995 (P-9).

15. The petitioners have also alleged that Respondent No. 1 company has failed to file audited balance sheet since the year 2003 till date and no AGM has been ever convened after 2012. Even prior to 2012, as per record available with the Registrar, no AGM was conducted for the year 2002 till 2010. Disclosing the particulars of Respondent No. 1 company, it has been stated in para 1(b) that the registered office of the company is at A-18, Shivalik, New Delhi-110 017. It has further been stated that the aforesaid premises were auctioned some time back and it has no office, which is in violation of Sections 17, 18 & 19 of the Companies Act, 1956. The company was incorporated with Respondent Nos. 2 & 3 being its initial promoters with the authorized share capital of Rs. 10/- lacs which was increased later to Rs. 4,50,00,000/-. It is further alleged that Respondent No. 1 company has not been doing any business since 2004-2005 and no statutory filings and compliances have been made since 2012. Even the filings prior to 2012 are incomplete. The last AGM was held in September 2012 which was illegal.

16. There are allegations of oppression and mismanagement against Respondent Nos. 2 & 3, with further allegations of siphoning of funds in the name of fictitious creditors of the company. A reference has been made to an illegal AGM held on 30.8.2010. Likewise, instances have been given of appointment of one Adardeep Apparels (P) Ltd. as a Consultant on 07.08.2009.



17. The petitioners have also disclosed that the petitioners have not previously filed any suit, application or petition with regard to matters complained of in the instant petition against Respondent No. 1 company. However, Petitioner No.1 is stated to have filed a petition u/s 397 & 398 of Companies Act, 1956 against Respondent No. 6 being CP 67/2006 but Respondent No. 1 has not been a party respondent in the aforesaid petition. It is thus patent that the petitioners have not agitated any cause before any forum against Respondent No. 1 company except the one in hand for the first time.


18. A perusal of Annexure P-3(Form 20B) shows that the last AGM of Respondent No. 1 company was held on 29.9.2012 and there is no mention of names of either petitioner No. 1 or petitioner No. 2. Likewise, a copy of the Annual Return again would show that the petitioners were neither directors nor shareholders in Respondent No.1 company.

19. In the facts and circumstances set out in the paragraphs above, we asked the learned counsel for the petitioner to show how this petition is not hit by the bar created by the Limitation Act as it has been filed beyond the period of three years. According to our view, the cause of action, if any, arose to the petitioners on 30.9.2012 and the instant petition having been filed on 25.7.2016 is clearly beyond the period of three years provided by Article 113 of the Limitation Act as noticed above. We suggested to the learned counsel that the petition is liable to be dismissed on that count.

20. Mr. Uttam Datt, learned counsel for the petitioner, however, made an endeavour to point out that there are numerous e-mails which have been placed on record (P-8) from 21.8.2013 to 02.10.2015 which reveal acknowledgement on the part of Respondent Nos. 2 & 3 conceding the claim of the petitioners to remove Respondent Nos. 2 to 5 as directors and have reconstitution of the Board without them. Learned counsel also claims that acknowledgement has also been made with regard to illegal allotment of shares to shareholders between 2000 and 2012 and, therefore, the instant petition is not hit by the period of limitation. He has taken us through various e-mails which did not even touch upon the aforesaid issues as per the claim made by the

learned counsel. A perusal of e-mail dated 3.6.2014, 20.7.2014 and 24.7.2014 at page 174 did not reveal any acknowledgment of the relief claimed by the petitioners. It only refers to the working out of account on the shareholding as per the request made by one Subodh. The other email also did not reflect on any acknowledgment nor any such email could be pointed out by the petitioner. We deem it appropriate to make a reference to the email of December 2014 and 2015 which talks of grant of amnesty and filing of the Company Petition. There is no mention of any acknowledgement in terms of Sec. 18 of the Limitation Act, either before the expiry of the period of three years which commenced from 30.9.2012 and expired on 29.9.2015 or thereafter. Moreover, acknowledgment has to be made to those who have some interest in Respondent No. 1 company. The petitioners have never been director or shareholder in Respondent No. 1 company. The question of acknowledgment does not even arise. There is a serious doubt whether the petitioners have any locus standi to file such a petition. Therefore, we are satisfied that this petition is liable to be dismissed without grant of any benefit of Section 18 of the Limitation Act and for lack of locus standi on the part of the petitioners.

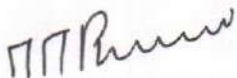
21. In so far as CP 67/2006 filed by Petitioner No. 1 against 09 respondents is concerned (P-6), it has no bearing on the grievances made in the instant petition preferred against Respondent No. 1 company. It has not been even a party in CP 67/2006. The present petition is directed against Respondent No. 1 company or its directors – Respondent Nos. 2 to 5. CP 67/2006 as filed by petitioner No. 1 is directed against 9 respondents which are as follows:

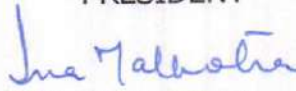
- 1) M/s S.M. Telesys Limited, Bhiwadi (Raj)
 - 2) Ram Janki Sharan, Lucknow
 - 3) Mr. Nageshwar P. Sen, New Delhi
 - 4) Ms. Renuka Devi Sen, New Delhi
 - 5) Rohit Kumar, New Delhi
 - 6) Jaya Kumar, New Delhi
 - 7) Ms. Kamna Gupta, New Delhi
 - 8) S.N. Gupta, Etah (U.P.)
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9) Sanjay Kumar, Vaishali, Bihar

22. It is needless to say that any observation made in the instant order shall not be construed as an expression of opinion on the merit of controversy raised in CP 67/2006 or any application filed therein. As the petitioners have filed the instant petition against Respondent No.1 and against its directors Respondent Nos. 2 to 5 and Respondent No. 6 company, we find that the petition is hopelessly time barred and an attempt has been made to rake up issues in respect of, and seeking reliefs pertaining to, the years 2000 to 2012. Even otherwise, the petitioners lack locus standi to file the instant petition as they have neither been director, shareholder or members of the Respondent No. 1 company at any stage whatsoever.

23. Accordingly, this petition fails and the same is dismissed with Rs. 25,000/- as cost.


(CHIEF JUSTICE M.M. KUMAR)
PRESIDENT


(INA MALHOTRA)
MEMBER (J)