

In the National Company Law Tribunal
Mumbai Bench.

MA NO. 398/2017 IN TCP No. 46/397-398/CLB/MB/MAH/2011

Under Sections 397-398 of Companies Act, 1956

In the matter of

Prudence Maynard & Ors. : Petitioner

V/s

Mundra Corporate Services Pvt. Ltd. & Ors. : Respondent

Order delivered on: 27.11.2017

Coram: 1. Hon'ble Shri M.K. Shrawat, Member (Judicial)
2. Hon'ble Shri Bhaskara Pantula Mohan (Judicial)

For the Petitioner(s): : 1. Ms. Fereshte Sethna,
2. Mr. Adhiraj Malhotra,
3. Ms. Shreema Doshi, i/b DMD Advocates.

For the Respondent(s): : 1. Mr. Abhishek Mishra, Advocate for
Respondent No.1-7, 10, 15, 16, 18 & 19.
2. Mr. Abhishek Khare, Advocate for
Respondent No.17.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. This Application is submitted on 12th September 2017 and the main Prayer made is reproduced below:-

***"a. Modify its order dated 26th July 2017 with respect to tagging of Company
Petition No. 177 of 2007 with the Instant Petition by deleting the said
direction from the Order;"***

2. In support of this Application, Learned Representative Mr. Abhishek Mishra has narrated the background of the case and informed that earlier a Petition bearing No.177 of 2007 was submitted before the then CLB. At that time an Application bearing No.398 of 2011 was moved before the Principal Bench of CLB, Delhi for transfer of the said Petition, however, the said CA 398 of 2011 was dismissed by CLB Delhi vide Order dated 17th October 2011, relevant portion extracted below:-

"10. In view of the fact that the order dated 09/05/2011 had attained finality subject to the modifications contained in the minutes of the order dated 22/07/2011, the Petition

cannot be allowed to raise the issue of **diversion of corporate opportunity** from the Respondents No.1 company to other companies by way of an amendment. Similarly the prayer for transfer and consolidation of CP No.46/2011 filed before Mumbai Bench of CLB with CP No.117 and 199 deserves rejection as the Petitioner is to exit from Mundhra Container Freight Station Ltd. and Punjab terminals Pvt.Ltd. and therefore transfer and consolidation of CP No.46/2011 with CP No.177 and 199 would only complicate the issues further. Memorandum Annexure-2 tendered before my learned predecessor in May 2009 before the order dated 25/06/2009, was highlighted during arguments. In my considered opinion this Memorandum must be deemed to have been considered and rejected by order dated 25/06/2009. No such issue was pressed before the High Court of Judicature at Bombay in Company Appeal(L) No.24/ 2011 or was highlighted in the minutes of the order dated 22/07/2011. Similarly, CA No.457 filed in CP No.177 and CA No.459 filed in CP 199 seeking modification of the order dated 25/06/2009 deserves rejection in limine in view of the order passed by the Hon'ble High Court of Judicature at Bombay in Company Appeal (L) No.24/2011 and the minutes of the order dated 22/07/2011. The delay in valuation of the shares held by the Petitioners to facilitate their exit from R-1 at the value of their shares calculated on the balance-sheet of 31/03/2008 is solely attributable to the Petitioners and not the Respondents."

2.1 The Counsel of the Applicant has further informed that at that point of time the Petitioner wanted to circumvent Consent Orders dated 25th June 2009 and 22nd July 2011. The relevant portion of the Order dated 25th June, 2009 (CP No.177/2007) reproduced below:-

"1. The petitioners have filed the instant petition under sections 397/398 of the Companies Act, 1956. When the Petition was mentioned on 30.10.2007, the petitioners express their desire to go out of the company on receipt of fair consideration for their shares. In the hearing held on 15.11.2011, the respondents also agreed to purchase the shares of the petitioners on a valuation as provided in the Articles. Certain proposals were exchanged between the parties without concrete result. In the meanwhile, certain interim orders were also passed. In the hearing held on 20.4.2009, the parties had agreed that the petitioners would go out of the company on fair valuation of their shares as a one-third shareholders, both in respect of this company as well as M/s Punjab Terminal Private Limited. The consideration so arrived would be subject to the deduction of the amount of issue-price on the entitlement of the petitioners in the right issue. The valuation is to be based on the balance sheets as on

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31.3.2008. Since the parties could not agree on the name of a valuer, I had indicated during the hearing on 21.5.2009 that I myself would appoint a valuer.

2. I accordingly appoint M/s Chartuvedi & Shah, Chartered Accountants (Mobile No.0932222241) to determine the fair value of the shares of both M/s Mundra Container Freight Station Pvt. Ltd. and also of M/s Punjab Terminal Private Limited. The valuation would be based on the balance sheets as on 31.3.2008. The entitlement of the petitioners would be as a one-third shareholder in both the companies. The respondents will negotiate the remuneration payable to the valuers and pay the same. Both the sides will be at liberty to make both oral and written submissions. Every document referred to or relied on by any of the parties before the Valuer, then copies of the same should be furnished to the other side. Similarly, copies of written submissions should also be exchanged. The Valuer will take into consideration the submissions made by the parties. The Valuer will also circulate draft valuation reports to the parties and in preparing the final valuation report the Valuer will take into consideration the submissions of the parties in relation to the draft valuation reports. The final valuation report should be submitted latest by 30th September 2009."

2.2 It is informed by the Counsel of the Applicant that the said Order of 17th October 2011 of Principal Bench, CLB, New Delhi was challenged before the Hon'ble High Court and by order of 11th April, 2017 the Hon'ble High Court has made an observation vide para 212 as under :-

"212. Insofar as Company Application No.398 of 2011 inter-alia praying for transfer of company petition (46 of 2011) which was filed by the appellant before the Company Law Board, Mumbai is concerned, the said Company Petition No.46 of 2011 was filed by the appellant against Mundhra Container Freight Station Private Limited of various reliefs before the Company Law Board, Mumbai. The appellant had also impleaded the respondent nos. 1 and 6 herein the said company petition as respondents. The names of the respondent nos. 1 and 6 are subsequently deleted by the appellant from the arena of said Company Petition No.46 of 2011 pursuant to an order passed by the Company Law Board. A perusal of the record indicates that the reliefs and the nature of the allegations made by the appellant against the said company which is a different company who is respondent to the said petition are different. In my view Mr.Narichania, learned senior counsel for the respondent nos. 1 to 6 is right in his submission that the said application belatedly made by the appellant for transfer of that petition which was pending before the Company Law Board, Mumbai to the Company Law Board Delhi with a view to delay the outcome of the company petitions filed before the Company Law Board, Delhi. The Company Law Board

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in my view thus rightly rejected the company application seeking transfer of the Company Petition No.46 of 2011 pending before Mumbai Bench of the Company Law Board and to consolidate the same Company Petition Nos.177 of 2007 and 199 of 2007 on the ground that the appellant had to exit from the respondent nos. 1 and 6 and therefore transfer and consideration the said Company Petition No.46 of 2011 with Company Petition Nos.177 of 2007 and 199 of 2007 would only complicate the issues further. In my view there is thus no merits in these appeals impugning the said common order dated 17th October, 2011 insofar as rejection of the Company Application No.398 of 2011 is concerned."

2.3 The matter was carried further before the Hon'ble Supreme Court by filing SLP against the Order of the Bombay High Court dated 11th April 2017. The SLP bearing No.17834-17836/2017 (arising out of impugned final Judgment and Order dated 11.04.2017 in CA No.18/2012 and Others passed by the High Court of Bombay) was dismissed vide Order dated 24.07.2017 by the Hon'ble Supreme Court.

2.4 Learned Counsel has informed that the Company Petition No.177 and 199 of 2007 have recorded the Consent of the Petitioner to exit the Company upon fair valuation of the Shares to be valued by the Valuer appointed by the said Order dated 22nd July 2011. Since a view has already been taken in this regard and the attempts made by the Petitioner have failed, therefore, in respect of Company Petition No.177 and 199 of 2007, the only thing left for adjudication is in respect of the objection of the Petitioner pertaining to the Valuation Report submitted by the Valuer. According to the arguments in view of the Orders already pronounced, **the present Petition of the Petitioner is to be decided independently without to be tagged with the old Petitions.**

2.5 Finally, it is prayed that the Order 26th July 2017 passed by this Bench of NCLT is to be recalled because such Prayer had already been declined earlier by the Company Law Board and affirmed by the Bombay High Court and also by the Supreme Court. Learned Counsel has pleaded that Rule 11 of Companies Act has inherent powers to recall its earlier Order to meet the ends of justice. Learned Counsel has also pleaded that vide Notification of 21st July 2016 Rule 154 for rectification of Order has been introduced according to which any error arising from any accidental slip or omission, may, at any

time be corrected by the Tribunal on its own motion or on Application of any party by way of rectification. He has also referred Rule 155 through which the Tribunal is granted general power to amend an error in any proceedings.

3. On the other hand, from the side of the Respondent of this Application (Petitioner of the Petition) has placed strong reliance on the observation of this Bench recorded on 26th July 2017 as per the Order Sheet wherein directed the Registry to locate the records of CP 177 of 2007 and tag that Petition with the present Petition. It is pleaded that the Respondent had diverted the business of the Company to other Companies. As a result, the valuation of the Petition under consideration got diluted. The Respondent (of the Petition) had deliberately diverted the corporate opportunity from R1 Company to other Companies. Therefore, to proceed with any matter pertaining to the Valuation should first be decided by taking decision on diversion of business as raised in the impugned Petition, CP No.177 of 2007 and CP No.199 of 2007.

3.1 It is further pleaded that if the Applicant had any grievance against the said Notings on the Order Sheet of 26.07.2017, then the right recourse of the Applicant was to file an Appeal against the said Notings. Instead of filing Appeal, through this Application, the Petitioner is trying to get the Order of 26th July 2017 be recalled which is not permissible under the Act. Placing reliance on the Judgment of **Hon'ble NCLAT in the case of APC Credit Trading Private Limited Vs. RoC, NCT of Delhi & Haryana** (Company Appeal (AT) No. 206 of 2017 & Company Appeal (AT) No. od 221 of 2017) **dated 19/7/2017**, it is pleaded that the respected NCLAT had held that the Tribunal had no general power to review its own Order specially when against the Order of the NCLT an appeal is prescribed under the Act.

4. **FINDINGS :-** At the time when the matter was posted on 26th July 2017 the Learned Representatives, either Petitioner or Respondent of the main Petition, have failed to place on record the Orders passed in the past by Hon'ble courts viz. CLB , High Court, Supreme Court. We hasten to add that otherwise also there was no occasion at that stage to go into the details of the case because that was not the date to discuss / hear

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the merits or demerits of the case. As a result of the said omission, that too on the part of the litigants, a preliminary interim direction was given to the Registry to place the said other Petition along with this Petition. The directions were quite precise, **quote " 5. It is also transpired from the record that an Order is passed by Hon'ble High Court on 11.04.2017 wherein a reference of CP 177 of 2007 has been made. 6. Registry is directed to locate the file and tag the file along with this Petition and place on the next hearing." Unquote.** Although it was not a mistake of the Bench; but can be said to be a mistake committed by the Litigants by not mentioning those Orders, which had resulted into an erroneous, rather inaccurate, issuance of direction. In any event it was not an "Order" but simply an 'observation' that too in the nature of direction to the Registry to tag that petition along with the present Petition. The Bench had not made any indication that the said other Petition shall be adjudicated along with the present subjudice Petition.

4.1 Otherwise also, that observation pertained to the Registry to tag the file after locating the old file. Meaning thereby the direction was to place the old file along with the present Petition, but there was no Order to club for hearing the old Petition along with the Petition in hand. The clubbing for hearing is altogether a different connotation used generally by the Courts after considering the necessity of hearing the two Petitions/Cases for judicious disposal. While passing the preliminary observation, this Bench had no occasion to examine the merits of the old Petitions stated to be pending for disposal originally filed before the erstwhile CLB. Because of this reason as well, we are of the firm opinion that the said preliminary observation made on the Order Sheet has not given any indication that the old Petition is to be heard along with the Petition in hand.

4.2 The Applicant had pleaded and also made a Prayer that the impugned direction of "tagging" is to be deleted and the said Order is to be recalled. For recalling the Learned Counsel has informed that Rule 11 of NCLT Rules has enshrined enough power to pass such order which is justifiable under the facts of the case.

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At the outset it is important to mention that when the impugned observation dated 26th July 2017 was made that the Registry to locate the file (CP 177 of 2017) and tag the file along with the Petition under consideration (TCP No.46 of 2011) the Learned Representatives have not brought to the notice to the Bench all those earlier Judgments as referred today. In the absence of the previous development and decisions already taken the impugned observation was made which was nothing but an observation which can be termed as *per incuriam* in nature, although not in strict sense in legal parlance, but because of the simple reason that, firstly, it was nothing but a provisional observation, secondly, it was lacking the due appreciation of facts. Since the impugned observation was not made after due application of mind on the facts and law as held in the past, therefore, such an interim observation cannot be said to be binding in nature on the subsequent adjudication to be made on those lines only. As a result, we decline to follow the said observation at present, if the Petitioner of the main Petition persists that both the Petition must be heard together. We make ourselves clear that it was neither intention nor in our mind that any of the Party may take the advantage of the said casual noting in this fashion.

5. One of the argument of Learned Representative Ms. Sethna is that consolidation of suites are ordered for meeting the ends of justice, therefore, the impugned noting was a conscious order. Such an order cannot be recalled being not prescribed under the Companies Act. Any person aggrieved by an Order of the Tribunal may prefer an appeal to the Appellate Tribunal as prescribed under section 421 of the Act. We have considered this argument and also perused the cited decision of Hon'ble NCLAT in the case of APC Credit Rating Private Limited (*supra*). In our humble opinion there is no two opinion that NCLT has no general power to review its own Order or Judgment. However, the exception is prescribed in the Rules called NATIONAL COMPANY LAW TRIBUNAL RULES wherein rectification order is prescribed in rule under 154. Any clerical or arithmetical mistake or error therein arising from any accidental slip or omission at any time, be corrected by the Tribunal. In the Rules the Tribunal is enshrined with "General power to amend" under Rule 155 of the NCLT Rules wherein the Tribunal may within a period of 30 days from

the date of completion of pleadings amend any defect or error in any proceedings before it. Necessary amendment is to be made for the purpose of determining the real question raised in the proceedings. We have carefully considered the legal question that whether under the circumstances the impugned observation can be recalled or not?. In our opinion the said observation does not fall under the category of "Orders of Tribunal" as prescribed under section 420 of the Act. As per the definition of "Orders of the Tribunal", the Tribunal may after giving the parties a reasonable opportunity of being heard pass such orders as it thinks fit. An Order passed after giving a reasonable opportunity of hearing ought to be a reasoned Order on facts as well as on law, naturally after examining the corroborative evidence submitted by the litigant parties. This is not the situation in this case when the said observation was made. As a result, we hereby conclude that the impugned observation cannot be termed in strict sense "an Order" but a direction to be Registry which is an administrative direction rather than a judicial decision. Due to this reason the modification of that direction can be made if deemed fit by the Bench.

6. Rest of the legal arguments do not survive in the light of the observation made hereinabove. Legal questions such as the jurisdiction of rectification of mistake or inherent powers enshrined under the Companies Act need not be discussed further at length being not much of assistance or relevant to decide this trivial issue. Resultantly, Miscellaneous Application stood allowed.

7. The matter be listed for hearing on 05.12.2017.

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)

Date : 27.11.2017.

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Sd/-

M.K. SHRAWAT
Member (Judicial)