

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, MUMBAI  
COMPANY APPLICATION NO. 30 OF 2015  
IN  
COMPANY PETITION NO. 27/111/CLB/MB/MAH/2013**

CORAM:

**SHRI M.K. SHRAWAT**  
MEMBER (JUDICIAL)

Birenbhai R. Panchal and Others.

).....Petitioners.

Versus

Eyelid Infrastructure Private Limited.

)...Respondents.

**PRESENT ON BEHALF OF THE PARTIES**

Mr. Harmish K. Shah along with Rakesh Sharma Advocates for the Petitioners.

Mr. Ajay Kumar Practising Company Secretary for Respondent No. 1.

Mr. Abdul Wahab A.H. Mukri i/b Purohit & Company Advocate for Respondent No.6.

**ORDER**

**Date of order: 02 May, 2017.**

1. Petitioner of the main Petition has moved an Application (CA-30/2015) on 6<sup>th</sup> of February, 2015 therein requesting to **recall an Order of the erstwhile CLB dated 22.12.2014.** For ready reference relevant paragraphs of the Application are reproduced below :-

*1. By an order dated 22/12/2014 the Hon'ble Company Law Board has allowed the withdrawal and dismissed the petition on the basis of the consent terms in the absence of the petitioners or their counsel. The copy of the order is annexed hereto and marked as **Annexure A** to this application.*

*2. The Applicants submit that the respondents had misguided the Hon'ble Company Law Board and also misrepresented as to the settlement and obtained the said order in absence of the petitioners. It is pertinent to mention that the terms of the proposed settlement was never acted upon by the parties though the documents were signed. The respondents has obtained the order by producing the only the Xerox copies of the original documents such as consent terms and withdrawal application. The settlements as per consent terms dated 18/10/2013 was never acted upon and therefore petitioners insisted for the hearing of the matter even after the*

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execution of the consent terms of 18/10/2013. It is submitted that due to the inability of the respondent to fulfil their commitment the consent terms as per the settlement were to be reviewed and revised. The copy of the alleged consent term dated 18/10/2013 is annexed hereto and marked as **Annexure-B** to this application.

3. ....

4. The order passed by the Hon'ble Company Law Board was communicated to the advocate of the Petitioners in the end of December, 2014. The applicants being under the bonafide impression that the pending the finalisation of the settlement the matter would not be further proceeded on 22/12/2014 and contacted their advocates to get the next date of the hearing. Only in the second week of January, 2015 the order was received by the applicants. ON receipt of the order the applicants were shocked that the respondents without fulfilling their commitments have fraudulently obtained the order. Thereby the object of the petition filed by the petitioners was defeated and therefore the applicants move this application for recalling of dismissal order dated 22/12/2014 and request the Hon'ble Board to restore the matter and decide the same on merit because no such settlement has taken place.

2. The reason for moving this Application and the background of the issue was that an Order was passed by the Respected erstwhile **CLB on 22<sup>nd</sup> of December, 2014** dismissing the Petition as withdrawn. The text of the said Order is as under:-

"1 Case taken up today in presence of the Respondents Counsel named above. Nobody is present on behalf of the Petitioners.

2. The Ld. Counsel appearing for the Respondents submitted a copy of the Consent Terms. Let the same be taken on record. The Consent Terms reveals that the Petitioners have agreed therein to withdraw their petition. The Petition is, accordingly dismissed as withdrawn. The Consent Terms shall form part of this order.

3. No order as to costs.

4. Copy of the order be issued to the parties.

Sd/-

Dated this December 22, 2014.

A.K. Tripathi  
Member (Judicial) "



3. In the Order-Folio there were two photocopies of the documents, one is '**Consent Terms' signed on 18.10.2013** and another document i.e. "**Application for Withdrawal of Petition**" dated **17.10.2013**, were annexed.
4. From the side of the Applicant/Petitioner Learned Advocate Mr. Harmish C. Shah along with Mr. Rakesh Sharma appeared and vehemently pleaded that the impugned order was procured by the Respondents **at the back of the Petitioner**, as also duly noted in the said Order by the Hon'ble Member that, quote "**No body is present on behalf of the Petitioners**", unquote. Learned Advocate has pointed out that the withdrawal petition was dated 17<sup>th</sup> October 2013, however the Consent Terms was dated 18.10.2013. It was an inconsistency which was never satisfactorily explained that why a person could sign a Withdrawal Petition a day earlier, when the Consent Terms had not been signed on that date. Learned Counsel has also vehemently pleaded that the Applicant was under the bonafide impression that during the pendency of finalisation of the Settlement the Respondents shall not represent before the CLB that the Petitioner wanted to withdraw the Petition. Immediately thereafter when the Petitioner came to know about the Ex-parte Dismissal; moved this Application so that the impugned Order can be recalled. Considering the prayer of the Petitioner, even on 30<sup>th</sup> March, 2015 the Hon'ble CLB had given an impression / indication that the impugned order was required to be recalled therefore, listed for hearing on 29.04.2015. The said observation of the Hon'ble Court made on 30<sup>th</sup> March, 2015 was as under :-

*"Heard. The Learned Counsel appearing on behalf of the Petitioners prayed to recall the order dated 22.12.2014 for having not been acted upon by the Parties despite the fact that they had filed consent terms.*

*Having heard the parties counsel, Petitioners are directed to appear-in-person on 29.04.2015 at 2.30 p.m. for hearing and Direction."*

5. From the side of the Respondent Mr. Ajay Kumar, Ld. Practicing Company Secretary and Learned Advocate Mr. Abdul Wahab .A.H.Mukri appeared and objected the Application primarily on the ground that an Order passed by the CLB cannot be recalled when the aggrieved party had an option to file an Appeal before the Hon'ble High Court. In this case, according to Learned A.R., the Petitioner could have exercised his right of appeal. Learned A.R. has also pleaded that the Petitioner is pressurizing the Respondents again although an amicable settlement was arrived at as well as implemented. In support of his Arguments reliance was placed on the decision of *Neelu Kohli and others V/s Nikhil Rubbers (P) Ltd. and others (2007) 78 CLA 171 (CLB)*.

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6. Heard both the sides at some length in the light of the pleadings on record and the case law cited. Although an Order had been passed and the impugned petition was "dismissed as withdrawn" but the admitted factual position is that the said Judgment was passed in the **absence of the Petitioner**. Only the Learned Counsel of the Respondent was present who had placed a copy of the Consent Terms on Record. No one was present from the side of the Petitioner to affirm the authenticity of the Consent Terms. As a result the admitted factual position on the said date of hearing was that an Ex-parte Order was passed qua the Petitioner. Moreover, another admitted factual position had created a genuine doubt that why the impugned withdrawal petition was signed on a day earlier (i.e. 17.10.2013), than the date on which the Consent Terms was signed (i.e. 18.10.2013). The Petitioner is stating that taking the undue advantage of ex-parte dismissal of the Petition, the Respondents are not fulfilling their part of commitment as agreed upon in the said Consent Term.
7. In my humble opinion, the principal of "Res Judicata" as prescribed under section 11 of the C.P.C. do not apply under the facts and circumstances of this case. It is not a situation that an issue had been decided on merits as raised in the Petition. No opinion has been expressed in the said impugned order on merits of the Petition, hence undisputedly out of the ambits of this provision.
8. Even the principal of "estoppel" is not to be applied because the Petitioner has not initiated any parallel proceeding against the Respondent. Cause of action for "estoppel" arises where the cause of action in later proceedings is identical to that in the earlier proceedings and the latter having been between the same parties and having involved the same subject matter. On account of this distinction this principal is also not applicable.
9. As far as the precedent cited by Learned A.R. of the Respondent is concerned the facts are clearly distinguishable. In the case *Neelu Kohli and others (supra)* the facts were that during the pendency of the Application a discussion was held with the parties to amicably settle the dispute. Thereafter, the Petitioner as well as the Respondent have filed Applications. The parties were present in person and discussed the terms of the compromise in the Chamber of the Hon'ble Member/Chairman CLB. Some suggestions were made and those suggestions have also been recorded when consent order was passed. Later on, one of the party was not satisfied and seeking the recalling of the consent order. On those facts it was held that, at no time any reservation was expressed by the Petitioner on the terms and it was not a case of a forced compromise. Hence, the Application seeking the recall of the Order was dismissed. On the contrary, in the present case, now under consideration before me, the Petitioner was not present, hence



an Order at his back cannot be enforced upon him for which he had never consented.

10. I therefore conclude that no prejudice is going to be caused to the Respondent if the impugned Ex-parte Order dated 22.12.2014 is recalled and the C.P. be listed for hearing. This view is almost in line with an observation earlier made by that very Hon'ble Member on 30<sup>th</sup> of March 2015 (reproduced supra) granting hearing to the Petitioner. The Respondent shall, as well, get a fair chance, either to demonstrate that the terms of the Consent have been implemented or to challenge the merits of the Petition. Nevertheless, in either case, the Respondent's legal right are not going to be adversely effected if the matter is listed for hearing.
11. The Registry is directed to fix the Petition for hearing on **28<sup>th</sup> of June, 2017**. The parties are directed to complete the Pleadings, if any pending, on or before the next date of hearing.

Date: 02<sup>nd</sup> May, 2017.

Sd/-  
**M.K. SHRAWAT**  
MEMBER(JUDICIAL)