

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI**

CA 144/2016 in CP 64/2015

IN THE MATTER OF COMPANIES ACT, 1956

SECTION 397, 398, 402 & 403

AND

Coram: B. S.V. Prakash Kumar, Member (Judicial) &
V. Nallasenapathy, Member (Technical)

IN THE MATTER OF

Shri Fidaali Moiz Mithiborwala & Anr.

.... Petitioner

Versus

Aceros Fortunate Industries Pvt. Ltd. & 2 Ors.

.... Respondents

Petitioner Counsel: Ms. Tasneem Ahmadi.

Respondents' Counsel: Mr. Saurabh Kalia.

ORDER

(Heard on: 09.01.2017)

(Pronounced on: 06.02.2017)

The Petitioner filed CA 144/2016 seeking amendment of main CP to add paras in relation to the allegations mentioned below:

- To add the following clause-e in paragraph 6 in the main CP -
(e)The Respondents have not prepared and got audited the final accounts for the financial years 2014-15 and 2015-16, not sent copies of such accounts to the petitioners, not filed the same with the ROC and not filed annual returns for the said years.
- To add the following as sub-clause-b of clause 2 in para 6(ii)-
(b) The Respondents No.2 & 3 have committed fraud in managing the affairs of the company as amply proved by what is stated above rendering themselves liable to be punished by way of imprisonment and fine as per section 447 of the said Act, that the Petitioners withdraw their offer of sale of their shares and that the Respondent company is not the guarantor to any loans taken so cannot sell the properties owned/possessed by the Respondent company to pay of the loans of the other companies.

- To add the followings in clause 8 in the Interim Relief sought after the existing sub para (i) and may be read as sub para (j) and sub para (k) under and existing sub para (j) should be read as sub para (l) of the Petition
 - (j) A retired judge of a High Court be appointed to look into the records of the company and determine the amount of loss caused to the company by the mismanagement of the affairs of the company by Respondent no. 2 & 3.
 - (k) Respondents be directed to convene annual general meetings for the years 2015 and 2016 and place there at the audited final accounts of the company for the financial years 2014 -15 and 2015-16
- The prayer clause (c) in para 10 in final relief should be deleted and clause (d) be treated as clause (c) and clause (e) be treated as clause (f)
- To add the following in para 10 of Final Relief as clause (d) and (e) the existing clause (e) be read as clause (f)-
 - (d) Direct the Respondents No.2 and 3 to compensate for the losses caused to the company.
 - (e) An administrator be appointed to look after the affairs of the company to the exclusion of the Respondents 2 and 3 pending the hearing and final disposal of the petition.

2. The Petitioners' Counsel submits that the above amendments are necessary for the adjudication of the real controversy involved in the main petition and also submits that these amendments will not cause any prejudice to the Respondents herein.

3. On perusal of this application, it is evident that these Petitioners asking amendments to improve the case of the Petitioners, to insert new material facts giving new cause of action to the Petitioners to enlarge their case on some other grounds as well which they now feel inconvenient to them.

4. The Respondents' reply to this application is that the Petitioners now alleging that the Respondents indulged in fraudulent activities, which was not there in the original company petition and averments in the application are vague and baseless.

5. They further submit that these Respondents filed an elaborate reply in the Appeal 12/2016 filed before Honourable NCLAT, now looking at the said reply, the Petitioners, to improve their case, has come up with these amendments. The Respondents submit that as to the allegation of not filing audited Balance Sheets for the financial years 2014-2015 and 2015-2016, these Petitioners made this reckless allegation forgetting that P1 himself was present on the Board till Feb.2015. However, this allegation was not present in the main original petition.

6. The Petitioners are raising fraud allegation against the Respondents which is not present in the Company Petition filed by them.

7. Now the Petitioners want to incorporate two more Interim reliefs and two more Final reliefs which were not there in the main Petition. The Respondents further submit that the averments the Petitioners want to add to the Original Petition are not incidental or supplemental to the allegations made in the main Company Petition, therefore, they are not necessary for the adjudication of the controversy involved in the present Petition, hence, sought for dismissal of this CA.

8. The Company Petition reveals that R1 company was incorporated on 20.08.2008, P1 and P2, the husband and wife, were holding 4000 and 3000 shares of ₹10/- each respectively out of the total shareholding of 10,000 shares. R3 who is the younger brother of P1 was holding 3000 shares of R1 company. P1 is the

managing director of the company, P2 is the promoter director (subsequently resigned) and R2 and R3 who are the younger brothers of P1 were directors of the company. P2 and R3 resigned from the Board. The Petitioners states that they left for USA in May, 2013 and returned to India on 24.03.2015. They further averred that the company is a family owned one and the original share certificates were lying in the office of R1 company. Taking advantage of this, R1 and R2 arranged to get the shares of P1 and P2 fraudulently transferred in favour of R3 during 2011-2012. When P1 and P2 returned to India, they came to know that their entire shareholding (except one share of P1) in R1 company was transferred in favour of R3 fraudulently.

9. The Petitioners case is that taking advantage of the fact that P1 was preoccupied with the activities of other companies of the group outside India, R2 in connivance with R3 arranged for transfer of 3999 shares held by P1 and 3000 shares held by P2 in favour of R3 during 2011-12. P1 and P2 alleged that they had neither submitted any share transfer deed nor the original share certificates for effecting the transfer of their shares in favour of R3. They have further alleged that R2 and R3 played fraud on the Petitioner and therefore the share transfer in favour of R3 should be set aside. It was further alleged that petitioners did not receive any notice for the Board meeting and AGMs for the last 2 years. P1 alleges that he had not signed the balance sheet as on 31-03-2013 and 31-03-2014 and hence he suspects that his signature has been forged on the Balance Sheets. It was averred that R2 is attempting to sell the company's land at Morbi in Gujarat taking advantage of the fact that he is the only Director of R1 present in India.

10. If reliefs sought by the Petitioners in the main CP are looked into, the reliefs are for a direction to R1 and R2 to cancel the transfer of shares held by P1

and P2 in favour of R3, to rectify the register of members, to file revised annual returns for the years 2011-12, 2012-13 and 2013-14, and for offer of Petitioners' shares to the Respondents or in the alternative offer of the Respondents' side shares to the Petitioners.

11. So, the cause of action to the Petitioners for filing this case is fraudulent transfer of shares of P1 and P2 in favour of R3, non-receipt of notices for meetings of Board and AGM, forging of P1's signature by R2 in the Balance Sheets for the year ending on 31-03-13 & 31-03-14 and attempting to sell company's land at Morbi, Gujarat.

12. Now, by filing this Amendment Petition, the Petitioner says that the Respondents have not prepared and got audited the final accounts for the Financial Years 2014-15 and 2015-16, not sent copies of such accounts to the petitioners, not filed the same with the ROC, not filed annual returns for the said years, R2 and R3 has committed fraud in managing the affairs of the company and liable to be punished with imprisonment and fine u/s 447 of the Companies Act, 2013, the Petitioners withdraw their offer of sale of their shares and R1 company not being a guarantor to any loans, its properties cannot be sold to pay off the loans of other companies.

13. By looking at the pleadings of this Amendment Application and the pleadings present in Original Petition, to us, it appears that they are not in continuation or supporting the existing facts set out in the Original Petition. The Original Petition is simplicitor that the transfer of shares held by P1 and P2 in favour of R3 be cancelled, the register of numbers be rectified, revised annual return be filed for 3 years and for direction to R3 to purchase the shares of the petitioners at a fair value after valuation.

14. Before going into the merits of the Amendment Petition, it is pertinent to look into the arguments of either side over this Application.

15. The Petitioner's Counsel submits that the pleadings put forth for addition to the Original Petition are necessary for the purpose of determining the real question in controversy and such addition will not change the nature of the Petition.

16. For which, the Petitioner's Counsel relied upon *A.K. Gupta vs. Damodar Valley Corporation* (AIR 1967 SC 96); *Kanmani Films vs. G.K. Kutty* (AIR 1969 Knt 259); *Nanda Moharana vs. Lakshman Moharana & Ors.* (AIR 1973 Ori 42); *Mangal Dass Sant Ram Gauba vs. Union of India & Ors* (AIR 1973 Del 96); *Tarlok Chand Butail vs. Union Co-operative Fire & General Insurance Society Ltd. & Anr.* (ILR 1974 3HP 981); *M/s. Allahabad Law Journal Co. Ltd. vs. M/s. Skyway Construction Corporation & Ors* (AIR 1992 Del 9); *K.V. George vs. Secretary to Government, Water & Power Department, Trivandrum & Anr* (AIR 1990 SC 53); *Sanjiv kumar Dalmia & Anr vs. Tobu Enterprises Ltd.* [93 (2001) DLT 265]; *Mundra Salt & Chemical Industries vs. The Collector, District Thane & Ors* [2001(4) Bom LR 534].

17. By reading all these judgements, the ratio common in all the above cases is that amendment does not include new case or new cause of action to the original case, the amendment can be a clarification in nature and the Court shall allow all the amendments necessary for determining the real matter without causing injustice to the other side, the merits of amendments not required to be considered while considering the Application for amendment; if the additional relief sought to be included is flowing from the same cause of action and facts set out in the Original Case and when such addition is not going to cause any

hardships or injustice to the Respondents, then such additional relief claimed on the original facts shall not be disallowed.

18. Therefore, even though amendment is allowed in all the cases referred above, the principle noticeable in all the cases is that no new cause of action shall be set out to bring a new case that is not connected to decide the real controversy in respect to the cause of action already raised by the pleading party.

19. To fortify the argument of the Respondents' side, the Counsel of the Respondents relied upon a case viz. *Revajeetu Builders & Developers vs. Narayana Swamy & Sons & Ors.* (2009) 10 SCC page 84 to say that this Application for amendment deserves to be dismissed with costs.

20. It is a decision of Hon'ble Supreme Court making illustrative observations tracing the legislative history, objects and reasons holding that,

"Para 29. We have no hesitation in also observing that this is one of the most misused provisions of the Code for dragging the proceedings indefinitely, particularly in the Indian Courts which are otherwise heavily overburdened with the pending cases. All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The Application for amendment lead to further delay in disposal of the cases.

30. It may be pertinent to mention that with a view to avoid delay and to ensure expeditious disposal of suits, Rule 17 was deleted on the Recommendation of Justice Malimath Committee by the Code of Civil Procedure (Amendment) Act, 1999 but because of public uproar it was revived. Justice C.K. Thakkar, an eminent former judge of this Court in his book on Code of Civil Procedure (2005 edition) incorporated this information while dealing with the object of amendment.

31. In a recently published unique, unusual and extremely informative book "Justice, Courts and Delays", the Author Arun Mohan, a Senior Advocate of the High Court of Delhi and of this Court, from his vast experience as a Civil Lawyer observed that 80% applications under Rule VI Order 17 are filed with the sole objective of delaying the proceedings, whereas 15% application are filed because of lackadaisical approach in the first instance, and 5% applications are those where there is actual need of amendment. His experience further revealed that out of these 100 applications, 95 applications are allowed and only 5 (even may be less) are rejected. According to him, a need for amendment of pleading should arise in a few cases, and if proper rules with regard to pleadings are put into place, it would be only in rare cases. Therefore, for allowing amendment, it is not just costs, but the delays caused thereby, benefit of such delays, the additional costs which had to be incurred by the victim of the amendment. The Court must scientifically evaluate the reasons, purpose and effect of the amendment and all these factors must be taken into consideration while awarding the costs.

32. To curtail delay in disposal of cases, in 1999 the Legislation altogether deleted Rule 17 which meant that amendment of pleading would no longer have been permissible. But immediately after the deletion there was widespread uproar and in 2002 Rule 17 was restored, but added a proviso. That proviso applies only after the trial has commenced. Prior to that stage, the situation remains as it was. According to the view of the learned author Arun Mohan, as observed in his book, although the proviso has improved the position, the fact remains that amendments should be permissible, but only if a sufficient ground therefore is made out, and further, only on stringent terms. To that end, the rule needs to be further tightened.

33. *The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases."*

21. The Hon'ble Supreme Court in this judgement referred various English judgements and Indian judgements to arrive to a conclusion that the first condition which must be satisfied before the amendment can be allowed by the Court is **whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the court's discretion in grant or refusal of the amendment.** The next important condition which should govern the discretion of the Court is the potentiality or prejudice or injustice which is likely to be caused to the other side, the Courts have very wide discretion in the amendment of pleadings, but Courts' power must be exercised judiciously with great care.

22. The Honourable Supreme Court further held that the decision on an application made under Order VI Rule 17 is a very serious judicial exercise and **the said exercise should never be undertaken in a casual manner.** Finally, the Hon'ble Supreme Court analysed what are the basic principles that are to be taken into consideration while deciding the amendment Application, which are as follows:

“67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?*
- (2) Whether the application for amendment is bona fide or mala fide?*
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money*
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;*
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and*
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.”*

23. The real controversy in the main Petition is as to whether the transfer of shares held by P1 and P2 in favour of R3 is oppressive against the Petitioner or not.

24. The Amendment the Petitioner asking is that the Respondents have not prepared and got audited the final accounts for the Financial Years 2014-15 and 2015-16, not sent the copies of such accounts to the Petitioners, not filed the same with the ROC, not filed the returns for the said years. The Petitioner, R2 and R3 were the two Directors who are in management and administration of R1 company. The amendments which were asked are not required for deciding the

final relief sought by the Petitioner. Therefore, the first element that is a requisite under Order VI, Rule 17 has not been complied with to consider as to whether this plea is to be impleaded in the Original Company Petition, therefore, this Bench hereby holds that issue is not required to decide any of the controversies set out in the Original Company Petition. Hence the argument for impleadment of this pleading in the Original Petition is unmeritorious.

25. As to second point that the Petitioner wants to implead in the Original Petition is that R2 and R3 have committed fraud in managing the affairs of the company and liable to be punished with imprisonment and fine u/s 447 of the Companies Act, 2013. On seeing this pleading for amendment, it is evident that it is in the nature of fraudulent allegation, in pleading it; the Petitioner has to mention the source of information, the details of information, and the details of fraud. He wants to establish everything only after preparation of annual accounts for 2014-15 and 2015-16, thereafter scrutiny of the books by a retired Judge of a Hon'ble High Court, therefore, it is a vague allegation thrown against the Respondents to first find out in the scrutiny of the accounts as to whether any fraud is there or not, thereafter assuming if fraud is there, then to what extent that fraud is. He has already inspected the records of R1 Company as if he is innocent of the affairs taken and taking place, if really it is the information subsequently born out reflecting fraud. Not even an iota of fraud is depicted. So, to get a window to make fishing and roving enquiry, he has thrown it at the Respondents.

26. It is an established principle that whenever plea of fraud is taken, the particulars (with dates and items, if necessary) shall be stated in the pleading as stated in Order VI, Rule 4. Though CPC is strictly not applicable, since this allegation being an allegation made against the character of a human being, the legislature has taken special care that vague and vexatious allegations in respect

of misrepresentation and fraud should not be entertained until and unless such happenings have been explicitly and specifically stated in the pleading. This Petitioner has not mentioned how he has arrived to a conclusion that fraud has taken place. Maybe, party sometimes will not be in a position to provide proof immediately, but no impediment is there to the party to give information which has made him to come to the figure above mentioned. This Bench is not going into the merit of this allegation whether it is true or false, but since it is not part of the facts to determine the real controversy in the main Petition and since the requisite particulars not being given and since the party has not mentioned that this undescribed and illexplained fraud had come to his notice only after filing this Company Petition, this allegation is therefore not required on any of those counts to decide any of the controversies the Petitioner raised in the Original Petition. Hence, this argument to include this debut pleading with new cause of action has no merit.

27. The Petitioner wants an amendment to the effect that they withdraw their offer of sale of shares, that the Respondent company is not a guarantor to any loans taken, so R1 properties cannot be sold to pay off the loans of the other companies and the relief of convening the Annual General Meeting of the company for 2015 and 2016, will not become material to decide the relief the Petitioner asked in his main Petition, hence it is decided against the Petitioner.

28. That the relief of appointment of a retired High Court Judge and appointment of an Administrator and not allowing Respondents to continue in the management are all the reliefs that will cause objections to the functioning of the Company, which will certainly have bearing on the ongoing concern, and such appointment need not be asked at this juncture, in case this Bench makes an observation that R2 is required to be removed, this Tribunal will pass appropriate Orders, if required appoint somebody to administer the company.

29. We know that we cannot get into the merits of any amendments sought, but in respect to company affairs, any decision or any order passed without taking business realities into consideration will certainly become a disaster to a running company. This company is a closely held company primarily run by the brothers. If the yardstick that is applied to decide other civil cases is applied *mutatis mutandis* to company jurisprudence, it cannot be sensible, because the wellbeing of a company is normally above the interest of independent shareholders. By the actions in the company sometimes, the rights and interest of shareholders, also affected, but the only criteria that has to be taken into consideration is the act of the person in the management shall not be *malafide* with a sole motive for their unlawful gain or to unlawful loss to the aggrieved. At times, the decision of the management may not be palatable to the remaining shareholders, sometimes at the cost of the interest of the shareholders also, but the only yardstick is to see as to whether such decision is in lack of fairness and probity or not. So every action or inaction of the Court will have colossal effect on the company, therefore, every decision of Court has to be tested on the fulcrum of "Business Judgement Rule".

30. Therefore this Bench reiterates that interference of the court shall be minimal in granting oppression remedy respecting the business decisions unless they are *malafide* as said above. This rule shall remain a common thread all through from the date of filing till the disposal of the case; it can't be said since it is an amendment or since it is an inspection application or any other application, it has to be decided independent of the niceties in handling jurisdiction conferred under 397 & 398 of the companies Act 1956 or under 241/242 of the Companies Act 2013.

31. On the earlier order of this Bench, this Petitioner himself filed an Appeal before Hon'ble NCLAT and obtained an Order for early disposal of the Company Petition, but no sooner than obtaining such an Order, he filed five Amendment Applications in all Petitions for impleadment of the above reliefs. This Bench already decided one Inspection Application allowing the Petitioner to inspect the documents and obtain the copies of those documents, the Respondents' side, in the very presence of this Bench, provided thick bundles of copies of the documents, now he has come up with another Inspection Application that is ready for hearing.

32. This Petitioner, despite knowing well that Hon'ble NCLAT directed the parties to co-operate for disposal of the main Company Petition, stymied the object and desire of the Appellate Court for early disposal of main CP by filing these Applications.

33. As to the amendments sought for, this Bench is of the opinion that they are not related to the real controversies of the Original Petition, those amendments are rejected.

34. The Petitioner's Counsel tried to impress upon this Bench saying that the allegations set out in the Amendment Application are all part and parcel of controversy in relation to oppression and mismanagement thereby the allegations set out in the Amendment Application in all shall be carried to the Original Petition. It is needless to say that Law by itself will not have any legs to stand, the law will come into action only when the fact or set of facts fall within the compass of a legal provision, so sections 397/398 of the Companies Act 1956 or sections 241/242 of the Companies Act 2013 will only determine as to whether such set of facts become cause of action to invoke jurisdiction under respective

provision or not. The facts and reliefs sought in the amendment application are distinct from the pleadings and reliefs sought in the original petition.

35. Therefore, one cannot be in a misconception that other distinct cause of actions not set out in the original petition, though different, but when falling under one section of law, they could also be subsequently added to the original cause of actions. If any such distinct and new cause of actions are sought to be added as amendments, it will certainly be hit by the determination of real controversy doctrine. Because the basic object of amendment is to help the court to determine the controversy already set out in the facts propounded, but it is neither to replace the original one, nor to make amendment to launch new case in the event the pleading party fails to prove his original case. Of course, the window given in the company jurisprudence in the judge made law is subsequent facts in 397 & 398 jurisdiction could be considered depending on the facts of the case. Therefore, different cause of actions cannot be seen as common cause of action to prove the ingredients of a Section.

36. In view of this principle, this Amendment Application is dismissed for no point raised in the amendment application is related to the controversies raised in the original petition.

37. Accordingly, this Application is hereby dismissed.

Sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)

Sd/-

V. NALLASENAPATHY
Member (Technical)