

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI

C.P No. 64 to 68 of 2015

CORAM:

B.S.V. PRAKASH KUMAR
MEMBER (JUDICIAL)

V. NALLASENAPATHY
MEMBER (TECHNICAL)

In the matter of Companies Act, 2013 under Sections 59(1)(2) & section 397-398 & sections 402, 403 of the Companies Act, 1956.

CP NO. 64/2015

Between:
Shri. Fidaali Moiz Mithiborwala & Anr. Petitioners
Versus
M/s. Aceros Fortune Industries Pvt. Ltd. & Ors. Respondents

PETITIONERS

1. Shri. Fidaali Moiz Mithiborwala
2. Smt. Rukaiya, Fidaali Mithiborwala

RESPONDENTS

1. M/s. Aceros Fortune Industries Pvt. Ltd.
2. Shri. Rayhan Moiz Mithiborwala
3. Shri. Farhan Moiz Mithiborwala

AND

In the matter of Companies Act, 1956 under Sections 397-398 & sections 402, 403.

CP NO. 65/2015

Between:
Shri. Fidaali Moiz Mithiborwala Petitioner
Versus
M/s. Mojolica Impex Pvt. Ltd. & Ors. Respondents

PETITIONER

1. Shri. Fidaali Moiz Mithiborwala

RESPONDENTS

1. M/s. Mojolica Impex Pvt. Ltd.
2. Shri. Rayhan Moiz Mithiborwala
3. Shri. Sanjay Shukla
4. Shri. Suleman Vimanwala

AND

In the matter of Companies Act, 1956 under Sections 397-398 & sections 402, 403.

CP NO. 66/2015

Between:

Shri. Fidaali Moiz Mithiborwala Petitioner
Versus
M/s. Mojolica Properties (I) Pvt. Ltd. Anr. Respondents

PETITIONER

1. Shri. Fidaali Moiz Mithiborwala

RESPONDENTS

1. M/s. Mojolica Properties (I) Pvt. Ltd.
2. Shri. Rayhan Moiz Mithiborwala

AND

In the matter of Companies Act, 1956 under Sections 397-398 & sections 402, 403.

CP NO. 67/2015

Between:
Shri. Fidaali Moiz Mithiborwala Petitioner
Versus
M/s. Angel Exim Pvt. Ltd. and Ors.. Respondents

PETITIONER

1. Shri. Fidaali Moiz Mithiborwala

RESPONDENTS

1. M/s. Angel Exim Pvt. Ltd.
2. Shri. Rayhan Moiz Mithiborwala
3. Shri. Farhan Moiz Mithiborwala
4. Shri. Suleman Vimanwala

AND

In the matter of Companies Act, 1956 under Sections 397-398 & sections 402, 403.

CP NO. 68/2015

Between:
Shri. Fidaali Moiz Mithiborwala Petitioner
Versus
M/s. STMPL Enterprises Pvt. Ltd. and Ors.. Respondents

PETITIONER

1. Shri. Fidaali Moiz Mithiborwala

RESPONDENTS

1. M/s. STMPL Enterprises Pvt. Ltd.
2. Shri. Rayhan Moiz Mithiborwala
3. Shri. Shri. Sanjay Shukla
4. Shri. Suleman Vimanwala

Present on behalf of the parties in all CPs:

1. Shri. Sujit Gupta, Advocate for Petitioner.
2. Saurabh Kalia, Advocate for Respondents.

ORDER

(Heard on: 19.08.2016)

(Pronounced on 23.08.2016)

Common Order

1. The petitioner, on 14.7.2016, filed CA 12/2016 praying this Bench to direct the respondents to comply with the directions issued by CLB and provide all the documents/information and permit the petitioner to carry out the inspection of the companies.
2. The petitioner says that though CLB passed two orders dated 3.9.2015 and 9.4.2016 directing the Respondents to provide inspection of the documents of the Respondent group companies in the CPs pending and to supply all the relevant documents demanded by the petitioner, but the respondents has till date not provided inspection or the documents as sought by him.
3. The petitioner mentioned various issues in this CA alleging that the Respondents misled this Bench in passing the orders above mentioned to sell the unencumbered properties owned by M/s Majolica Properties (India) Pvt. Ltd (here in after referred as MP) and M/s Aceros Fortune Industries Pvt. Ltd (herein after referred as Aceros) to pay off the loans of other group companies despite MP and Aceros are not guarantors to any of the such loans availed by other group companies namely M/s Majolica Impex Pvt. Ltd, (herein after referred as Majolica) M/s Angel Exim Pvt Ltd (herein after Angel) and STMPL Enterprises (herein after referred as STMPL).
4. The petitioner says that Majolica, Angel and STMPL have receivables of INR 138crores outstanding as per the books available, since the money of these three companies have been stuck with debtors, the petitioner says it could be wise to realise those debts and pay off the loans instead of selling unpledged properties of MP and Aceros.
5. The petitioner also alleges that since he has learnt that the respondents have entered into agreements to sell off the properties of MP and Aceros causing prejudice to the petitioner, he says he moved CA180/2015 restraining the respondents from creating third party rights over the properties to any outsider person.
6. On perusal of this CA in relation to the issues paraphrased in paras 3 to 5, this Bench holds that they are not relevant for adjudication of the relief seeking compliance of the orders dated 3.9.2015 and 9.11.2015 in respect of inspection, hence not dealt with those allegations.
7. The petitioner says when the Respondents did not provide inspection despite two consent orders CLB passed on 9.11.2015 and 12.5.2016 for inspection in which the respondents' side agreed to provide copies of the documents directly to the petitioner on the same day evening as per the directions given in the order dated 9.11.2015. Accordingly, the answering

Respondents provided the documents allegedly left out, thereafter this issue was resolved for the Respondents provided copies in relation to the documents alleged to have not reached to the petitioner as per order dated 9.11.2015.

As to this allegation, for this Bench in the court hall itself having verified as to supply of the documents to the petitioner, having this Bench found nothing is left to be supplied to the petitioner as per the order dated 9.11.2015, CA 12/2016 is hereby dismissed as infructuous.

8. This petitioner, even before filing the above CA12/2016, moved CA180/2015 on 26.11.2015 for modification of the order dated 9.11.2015 not to sell the properties of MP and Aceros. For these two companies have not availed any loan from Banks, MP and Aceros, therefore, should not be directed to sell their properties to clear the loans of other companies. To clear the loans of Majolica, Angel and STMPL, the petitioner says, to submit a comprehensive plan to repay the loans availed by these companies, he needs the details of debtors and creditors to explore the possibility of repayment of loans without selling freehold properties.
9. Before going into merits of the reliefs sought by the petitioner, this Bench believes that it is essential to place the historical facts of the dispute, and the reliefs sought in the petitions and several orders passed in these cases so far.
10. The petitioner is real brother of R2 and R3. Though five companies are there, it is essentially family business. Perhaps for their convenience, they floated five companies to carry timber trading at international level. For this reason alone, though five CPs have been filed against each of the companies, this Bench, since beginning, has been passing common orders, and this has not been disputed by anybody.
11. The petitioner is the eldest of all these three, the interesting part is on one side, the petitioner; rest of the family is on the other side. I believe their father is on the side of younger brothers. The interesting part is this petitioner and another brother (R2) married real sisters, so father-in-law and brother-in-law of these two brothers are one, but father-in-law and brother-in-law are on the side of younger brothers, not on the side of the petitioner.
12. We must make it clear that the cases of oppression and mismanagement cannot be adjudicated basing on the validity or invalidity of the issues on standalone basis ignoring the historical facts and equities time demands. On seeing the way these companies working since beginning, the way loans obtained by the companies by mortgaging personal properties of the family members, it cannot be said that, the family is different and the companies are different.
13. It is established by precedents that companies set up by families cannot be viewed as independent companies and their issues shall not be decided on standalone basis, ignoring the facts interwoven with the facts of the family and its companies.

14. The petitioner continued in these companies as director till March 2015. Owing to some differences, the petitioner appears to have left the management leaving the business to be managed by the other two brothers and his brother in law. Of course, the petitioner filed these CPs on the allegation that he was removed as director from these companies without notice to him, but e-mails filed by the parties revealed that he shifted his residence to US and he himself resigned from the companies as director. Since this issue is not a point in this application, this Bench has not taken up for discussion.

15. It is an admitted fact that STMPL, Majolica and Angel have gone into losses and failed to service the debts of this company. The result is SARFASI notices were issued by the Banks. As to MP and Aceros, since no business is carried in these companies except acquiring properties, there is no occasion for these companies to avail loan facility over the properties of the respective Companies. Since the businesses of these companies are not being seen as separate, the petitioner and the respondents, these brothers uncle and father in law of the petitioner and the R2 mortgaged their personal properties to avail loans to STMPL, Majolica and Angel, though freehold properties are there in MP and Aceros. For having STMPL, Majolica and Aceros failed to service debts, the respondents presently in management, put their efforts for onetime settlement (OTS), in the result the banks agreed for onetime settlement far below to the loan payable to the banks. Since the respondents could not generate this money by other means, they say that the only way out to clear the debts is by selling the unencumbered properties held by MP and Aceros. Therefore, they proposed to sell the properties of MP and Aceros to clear the loans taken on Majolica, Angel Exim and STMPL to avail the benefit of one-time settlement.

15. Initially when the petitioner had mentioned these company petitions, on hearing either side, having CLB thought that this dispute could be resolved among the family members, CLB suggested the parties to find a solution to the dispute. Thereafter, on the consensus given by both the parties, this bench on 9.11.2015, passed an order directing the respondents to supply documents as mentioned in para 4, giving liberty to the respondents to sell the properties lying in survey number 609, Rangpar village, Morbi taluka Rajkot District in the name of Majolica Impex; survey no.626 Paikki-1 Rangpar village, Morbi taluka Rajkot District in the name of MP and the property in survey no.626 Paikki -2 Rangpar village Morbi Taluka Rajkot District lying in the name of Aceros for paying onetime settlement payment. Again, on 25.1.2016, this bench passed another consent order appointing one Mukesh Trivedi Charter Accountant as mediator to resolve the issues in between the parties. The aforementioned CA was appointed to mediate in between the parties, since both the parties themselves stated he knows this family for the last three generations for he worked for long time as CA to their family businesses but unfortunately he too could not resolve the same thereby reported owing to his age and because of the differences between the parties he requested this Bench to recuse him from the assignment given to him. When the time had again demanded this Bench to appoint somebody else as mediator cum facilitator for sale of the assets for clearing onetime settlement payment, on the agreement of the parties, one Mr. Rohit Chowksi has been appointed to act as chairman of the body constituting one member from the petitioner side and one member from the

respondent side with veto rights to the chairman as to sale of the assets mentioned in the order dated 9-11.2015 giving liberty to both the parties to have access to the documents filed by each other. This order was passed on 12.5.2016. Therefore, it is clear that 9-11.2015 order is a consent order for sale of the assets described in that order and the order dated 12.5.2016 is also consent order for appointing Mr.Rohit Chowksi as a chairman of the body constituting one member each from the petitioner side and the respondent side with veto rights to the chairman for sale of the properties above mentioned.

16. Though the petitioner filed this application on 26.11.2015 for modification of order dated 9.11.2015, the petitioner side on 12.5.2016, ignoring the pendency of the present application, gave consent for appointment of Chowksi as chairperson for sale of the assets mentioned in the order dated 9.11.2015.

17. It is needless to say when any party agrees to something contrary to the pending proceeding, that party is obviously estopped from rising the same issue already agreed subsequently. Here, the petitioner asked for modification of the order dated 9-11-2015 and for grant of a comprehensive plan to realise the debts and then to pay off the loans, or for sale of the mortgaged properties, instead of selling free hold properties directed in the order Dated 9.11.2015 to be sold. Subsequent to filing this CA on 12.5.2016, the petitioner side having again conceded for appointment of Mr. Chowksi for sale of the assets of the company, he is estopped assailing sale of the assets described in the order dated 9-11-2015.

18. Before going to decide as to whether a person can unilaterally seek modification to the consent orders, let us see what the petitioner has in his application.

19. It is not the case of the petitioner that debts were given by the company subsequent to his vacation from the management, it is also not the case of the petitioner that the debtors have failed to pay only after the petitioner left the management. Therefore, in the given situation, there cannot be any certainty when these debts would be realised. It is a testimonial fact that once money has gone out of the hands and failed to return as agreed and become non-performing asset, and these will never be expected as returnable in time bound manner until it is actually returned, therefore wishing realising unsecured debts and clearing secured debts is not a reality. Will it be that the banks would remain quiet and not proceed with SARFASI action until companies' debts are realised. We believe no bank will accept a proposal to repay onetime settlement payment on realisation of their debts. Will it be that banks accept selling mortgaged properties for clearing onetime settlement? It is certainly not, for which there need not be any confirmation from the Banks, because law doesn't say so. If the money agreed under OTS is placed upfront before the bank, then only banks will agree for OTS or else they will proceed to recover their debts under SERFASI Act, therefore, the second contention placed by the petitioner also deserves no merit.

20. As to the allegation of violating section 185 and 186 of the Companies Act 2013, we see that section 185 is applicable to the cases where Directors avail

loans on the properties of a company and create charge over the assets of the company. Here it is not the case that director availed loan from these companies.

22. It is undisputed fact that these companies are constituted with family members therefore, when the warring groups in a company agrees for consent order for sale of the assets, the consenting party cannot later come and say that sale of the assets is in violation of any prescribed law. However, the order passed is a consent order and more specially not in violation of section 185 of the companies Act 2013,
23. As to section 186 of the Companies Act 2013, it is a section deals with loans and investments by the company. On perusal of this section, it is clear that there is no bar for sale of the assets and it is permissible under sub section 2 and sub section 3 of section 186 of the Act. If a special resolution is passed, any company is free to sell its properties. It is needless to say that, notwithstanding any other provision of the Act, the Tribunal has power to pass an order which is just and equitable therefore, such an order cannot be changed without leave of this Tribunal and this Tribunal has power under section 242 to pass any order to end the litigation in a company. Moreover, when warring groups constituting almost 100 % of the shareholding, then an agreement or consent order passed by the court is as good as special resolution passed by the company. In view of this reason, the arguments of the petitioner counsel stating that the orders of this bench are hit by section 186 have no merit.
24. It is settled proposition that once any party for passing an order gives consent, he cannot unilaterally withdraw from the consent order or challenge the same unless such an order vitiated by fraud. For there being no such allegation in this application, this CA for modification fails, therefore, this C.A is hereby dismissed without costs.
25. For this petitioner is in the habit of filing application after application, he has also filed another CA 13/2016 on 14.7.2016 for appointment of a retired judge of the High Court of Gujarat in place of Mr. Rohit Chowksi, CA, who is appointed as chairman on 12.5.2016 through consent order and to issue necessary directions to the chairman not to proceed with sale of unpledged properties mentioned therein. This application is also for modification of consent order passed on 12.5.2016. The petitioner reiterated almost the same averments he mentioned in C.A 180 of 2015 about realisation of debts and sale the mortgaged properties before selling free hold properties.
26. This application is moved for replacement of Mr. Choksi with some honourable High Court Judge as chairman of the committee constituted in the order dated 12.5.2016. When this bench has asked as to why the chairman already appointed is to be replaced, the counsel of the petitioner has stated that an experienced legal brain is required to resolve the legal issues involved in the family disputes, in the same breadth, he has equally said that Mr. Rohit Chowksi is far intelligent and specialised in international taxation, mergers and acquisitions, foreign investments, foreign exchange regulations, but he has not since possessed with legal knowledge, it could be unviable for him to resolve the issues in dispute.

27. Before making this statement, the petitioner is lost to remember that no legal issue is left to be decided by chairman except to facilitate selling of properties mentioned in the earlier orders. Therefore, this bench with all humility observes that CA, who has exposure to corporate issues, is a fit man to facilitate selling of assets rather than honourable judges who are ordained to decide larger legal issues such as arbitrations and other legally related issues. Here business acumen is required to ascertain the value of the asset, not legal acumen. Moreover, the petitioner has not stated anywhere that Mr. Rohit Chowksi is acting partially or doing something prejudicial to the interest of the petitioner, therefore consent order passed by this bench will not be modified for just by asking of the petitioner. As to other paras, when they were one after another put to the petitioner counsel, he has categorically admitted that those paras are not relevant for adjudication over the relief of modification of the order.

28. We must also say appointment of Choksy is also on consent and it is not being the case of the petitioner that orders mentioned above are not consent orders, the petitioner could not ask modification to the consent order. If the order of this Bench have any shortfalls or is wrong, he should have filed appeal, that also he has not done. This kind of rehearing on the issues already dealt with is nothing but pushing hard on this Bench.

29. For the reasons stated above, CA 13/2016 also deserves no merit, therefore, it is also dismissed without costs.

30. However, since the petitioner has been purposely dragging out execution of consent order by filing application after application, this petitioner is hereby directed to nominate a member from his side as stated in the order dated 12.5.2016 within 15 days after the order is been communicated to the petitioner or the petitioner counsel, or else the chairman is at liberty to proceed with sale of the assets with the assistance of respondent side and also ensure that sale proceeds are put in an escrow account till the same is paid towards one time settlement agreed upon. The chairman is also suggested to ascertain the real value of the property before confirming the sale if any takes place.

sd/-

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

sd/-

V. NALLASENAPATHY
Member (Technical)