BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, MUMBAI

T.C.A. No. 198/2015 and T.C.A. No. 175/2015

In

T.C.P. No. 82/397-398/CLB/MB/MAH/2015

CORAM: Present: **SHRI M.K. SHRAWAT**
MEMBER (JUDICIAL)

In the matter of Sections 397 & 398 of the Companies Act, 1956.

BETWEEN

Mr. Nirupam Patel ... **Petitioner**

Versus

M/s. BNI Training Services Pvt. Ltd. & 2 Ors. ... **Respondents**

ORDER

Reserved on 21st September, 2016
Order pronounced on 17th October, 2016

1. A mention has been made for disposal of **C.A. 198 along with C.A. 175 (said to be reply of the Respondent)** to dispose of urgently prior to the disposal of C.P. 82/2015.

2. From the side of the Applicant Advocates Mr. Krishnendu Datta, Ms. Sanjana Saddy and Mr. Pulkit Sharma appeared and explained the purpose of filing of this Miscellaneous Application. An Order was passed by NCLT, New Delhi in **C.P. 82/2015 on 13th November, 2015** wherein it was recorded that an amicable settlement between the parties vide an **agreement dated 9th November, 2015** had arrived at and, therefore, C.P. was disposed of in terms of the said settlement. For the sake of ready reference, the contents of the said order are reproduced below:

"ORDER

There is an amicable settlement between the petitioner and all the respondents. Respondent No.1 is the company and respondent No.2 is its director. The Petitioner is also a director shareholder to the extent of 50% shareholding. The terms of amicable settlement has been drawn and placed

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before me in the form of a deed which is duly signed by the petitioner Shri Nirupam Patel. On behalf of the Respondent No.1-company Shri Niraj Shah has signed and then he has signed and authenticated the deed in his individual capacity as respondent No.2. Respondent No.3 has also signed the aforesaid deed. In addition, the deed is signed and authenticated by both the learned counsel for the parties. Learned counsel have also identified the signatures of the petitioner and Respondent Nos. 1 to 3.

Ms Natasha Bopaiah on behalf of the petitioner and Mr. Niraj Shah (who is personally present) have jointly stated the factum of execution of the amicable settlement dated 9.11.2015. They undertake to remain bound by the terms and conditions stipulated therein. A copy of the amicable settlement is taken on record. It is needless to say that the undertakings and promises made in the aforesaid amicable settlement shall remain binding on the parties.

Company Petition No.82(MB)/2015 is disposed of in terms of the settlement.

Sd/-
(CHIEF JUSTICE M.M. KUMAR)
CHAIRMAN

Dated: 30th November, 2015"

2. However, the reason for filing of the impugned Application is that the terms and conditions of the said **agreement / consent term dated 9th November, 2015** were not allegedly complied with by the Respondents. Ld. Counsel had explained that as per the terms of the said agreement a sum of Rs.7,50,00,000/- (Rupees Seven crores fifty lakhs only) was to be paid to the **Petitioner i.e. Mr. Nirupam Patel by the Respondent No.2 Mr. Niraj Shah** and others. Ld. Counsel had further informed that as per the clauses of the said agreement, the impugned amount of Rs.7,50,00,000/- (Rupees Seven crores fifty lakhs only) was segregated into three heads i.e. Rs.4,50,00,000/- (Rupees four crores fifty lakhs only) for transfer of 50% share of the Petitioner, R.1,00,00,000/- (Rupees one crore only) as a dividend and Rs.2,00,00,000/- (Rupees two crores only) towards non-compete charges, reimbursements, consultation fees, etc. It was an 'exit offer' to the Petitioner on execution of transfer of shares and resignation from the directorship of Respondent No.1 Company in favour of the Respondent No.2. However, the petitioner has not received any amount from the Respondents. Therefore, this Application has been moved. The crux of the argument of the Ld.

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Advocate is that when in a situation an Order has been passed by the Hon'ble Bench of CLB mentioning therein an amicable settlement, but that settlement was not complied with, hence, the Order by itself has become redundant and the C.P. 82/2015 should not be held as disposed of finally. Therefore, the petition in question is required to be listed again for hearing. The impugned order is thus required to be recalled being not complied with and the petition is required to be decided on merits, instead of being decided summarily on the ground of mutual settlement.

2.2 The argument of Ld. Advocate is that the very basis and the foundation on which the said Order dated 30th November, 2015 had been passed is not complied with; therefore, the Order should be treated as 'nullity' or to be 'recalled' for adjudication on merits.

2.3 Ld. Advocate has further pleaded that in a situation when the C.P. in question had not been decided on merits; therefore, the said Order is required to be recalled essentially when the NCLT is enshrined with an inherent power as per **NCLT Rule, 11** to pass such Order as may be necessary for meeting the ends of the process of law. He has pleaded that the impugned Order has clearly mentioned that "Company Petition No.82 (MB)/2015 is disposed of in terms of the settlement". Therefore, in a situation where the terms of the settlement were not fulfilled, the Order itself has become meaningless. For this legal proposition, reliance was placed on the decision of **Bennet Coleman And Co. v/s. Union of India& Ors., Company Cases Vol.47 page 92 (Bombay High Court)** wherein an observation was made that the CLB has the widest possible jurisdiction and ample powers to pass an Order to meet the ends of justice.

3. Ld. Counsel has further placed reliance on the decision of **Shoe Specialities Pvt. Ltd. & Ors. v/s. Standard Distilleries And Breweries P. Ltd. Vol.90 Company Cases page 1 (1997)** wherein the Hon'ble Madras High Court has held that the CLB can pass Orders to do full justice. There was a discussion that after an

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Order is passed, stated to be a final Order, whether the Court retained ***seisin*** over the matter. The Ld. Counsel has mentioned that the legal proposition as laid down by the Hon'ble Madras High Court was that the matter can be dealt with even after final disposal, **if *seisin* retained.** He has pleaded that in a situation when a controversy cannot be finally disposed of, the Court has power to retain the *seisin* over the matter. He has, therefore, pleaded that in a situation when the admitted factual position is that the terms of payment were not fulfilled by the Respondent, therefore, the C.P. No.82/2015 should not be held as finally disposed of and the CLB (now NCLT) is *seisin* of the matter. The order in question was a conditional order. The condition imposed was to fulfil the promises made in the agreement. It is the duty of the court to see whether his direction has been complied with by both the parties and till then the court is in *seisin* of the matter. To cut it short, the **vehement argument is that C.P. 82/2015 should be listed for hearing on merits.**

3.1 Ld. Advocate of the Petitioner has also placed reliance on an another Order of **Shree Cement Ltd. v/s. Powergrid Corporation Ltd. (1998) 93 Company Cases 854 (CLB)** for the legal proposition that inherent powers do exist with a court in order to give justice in the circumstances of the case. He has also pleaded that since the Order in question is like a **consent decree**, therefore, under the provisions of Civil Procedure Code, may **not be an appealable Order**. Hence in a situation when no other remedy is available and the terms of the Order were not fulfilled, the court who has passed such order always has jurisdiction to entertain the request to recall such an Order in the interest of justice.

4. On the other hand, from the side of the Respondents Ld. Advocates Mr. J.P. Sen, Mr. Onkar Chandurkar, Mr. Benny Joseph and Mr. Aniruddha Lad appeared and explained the reasons for non-payment as well as non-compliance of the terms of the impugned agreement. He has explained that the admitted factual position was that there was a **Master Franchise Agreement with BNIHQ.** The **agreement was executed on 9th November, 2015,** as duly recorded by NCLT

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in the impugned Order dated 30th November, 2015. However, immediately thereafter vide a **Notice dated 3rd December, 2015, BNIHQ** had cancelled the said Master Franchise Agreement. In the consent agreement, it was clearly mentioned that the **Respondents were liable to pay the sum to the Petitioner only upon the BNIHQ extending the franchise. S**ince the franchise was not extended by BNIHQ, therefore, the Respondents were not under any obligation to make the impugned payment. Ld. Counsel has further explained that the said condition was very much in the knowledge of the Petitioner. Even after that he had agreed to sign the said consent agreement. One of the clauses i.e. clause (9) made a condition that the parties to the consent agreement have undertook to jointly approach BNIHQ to obtain the extension of the franchise and in case the franchise is not extended then the Respondents would not be liable to pay any sum as stated therein.

4.1 The next argument of Ld. Counsel of the Respondents is that in the Petition i.e. C.P. 82/2015, certain allegations have been raised, but now those allegations cannot be contested by the Petitioner because one of the conditions of the said consent agreement (Clause 15) was that Petitioner had withdrawn all allegations and disputes including as set out in the impugned Company Petition. This has also been consented by the Petitioner that in case of non-extension of franchise the Respondents would not be liable to make the payment. Hence, according to his argument, the C.P. otherwise cannot be contested by the Petitioner. He has pleaded that the said Order should not be recalled; according to which the C.P. in question now stood finally disposed of.

4.2 A reliance was placed on the decision of **Mrs. Michelle Jawad-Al-Fahoum v/s. Indo-Saudi (Travels) Pvt. Ltd.& Ors. (1998) 93 Company Cases 151 (CLB)** for the legal proposition that in a situation that a settlement had reached in the presence of CLB and the parties were ***"ad-idem"*** with regard to the terms as contained in the consent terms and thereafter an Order has been passed, then no jurisdiction is available to 'review' that Order or to 'recall' that Order.

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4.3 Further, an Order of the Hon'ble Bombay High Court pronounced in the case of **Mohinidevi Choraria v/s. Apsara Cinema Pvt. Ltd. & Ors. (1990) 69 Company Cases 233** is cited for the legal proposition that the concerned Order is passed with a view to bring to an end to the disputes among the parties. If the Court, while passing such an Order has retained *seisin* over the matter, then further directions can be given, but otherwise an Order which has reached to its finality cannot be recalled. Ld. Counsel has pleaded, placing reliance on this judgement, that the CLB while passing the impugned Order dated 30th November, 2015 had not retained *seisin* over the matter and disposed of the C.P. in an uncontroversial manner. Hence, the C.P. should be treated as finally disposed of.

5. The Counsel has also cited a decision of **Hon'ble Supreme Court pronounced in the matter of Dwarka Das v/s. State of M.P. &Anr.(1999) 3 Supreme Court Cases 500** for the legal proposition that a correction or a mistake which is non-intentional and accidental can only be rectified, otherwise the provisions of Sections 151 and 152 of the C.P. do not allow review of an Order on the ground of ***lispending.*** After the passing of the judgement, decree or order, the Court or a Tribunal became **functus officio.**

6. For the legal proposition that in the absence of any statutory provision for review in the Companies Act, Review Application cannot be entertained in the guise of modification of an Order. Case law cited is **Kalabharati Advertising v/s. Hemant Vimalanath Narichania& Ors. (2010) 9 Supreme Court Cases 437**.In a decision of **CLB (Principal Bench) in the case of M.V. Paulose v/s. Citi Hospital (Private) Ltd. & Ors. (1999) 96 Company Cases 588 (CLB),** it was held that when a Consent Order is passed whether that can be reviewed or not? An interesting observation made was that the review power contained in Company Law Board Regulations, 1991 i.e. Regulation 27 has been omitted by the Company Law Board Amendment Regulations, 1912. As a result, an Order of the Bench could not be reviewed. When a valid Consent Order is not implemented, an aggrieved party can approach for execution of its Order. In that Order, it has also

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been mentioned that according to Order 23, Rule 3 of Civil Procedure Code, a Court should not interfere with the terms of the Consent Order unless both the parties give consent for such modification. It was held that in the precedent it is distinctly established that the Court does not have any discretion in respect of a 'Consent Order'.

7. In Rejoinder, the Counsel of the Petitioner has pleaded that the Tribunal can become **functus officio** only if the Order has reached to the finality, otherwise not. In this case, the Order can be treated as the final Order only when the terms and conditions of the agreement are completed. The Counsel has also discussed the powers conferred to a Court and in his opinion certain powers are enshrined within a statute which are termed as "codified power". However, in general the Court has always "inherent power". He has thus pleaded that to sub serve the justice, the **NCLT Rule 11** is incorporated through which 'inherent powers' to NCLT have been enshrined and, therefore, the codified conferred powers are not required.

8. Ld. Counsel of both the sides are heard at length in the light of the factual matrix of the case and the precedents cited. Findings on this legal issue, in brief, are herein below.

9. The legal issue is whether under the facts and circumstances of the case this Bench can recall an Order passed by the respected co-ordinated Bench i.e. CLB, New Delhi or not? Certain facts are undisputed that a consent agreement was executed between the parties dated 9th November, 2015. The said consent agreement was placed before the respected CLB, New Delhi. In a situation when an amicable settlement had arrived at between the Petitioner and the respondents, an observation was made that the parties undertook to be binding by the terms and conditions stipulated therein and the promises made shall remain enforceable on the parties. On those terms of the settlement, the C.P. in question was disposed of. At the outset it is worth to make an observation that the genesis of the order in question was the said Settlement Agreement. Hence the Agreement in its entirety

is required to be implemented and not to be read selectively. The whole of the Agreement was under consideration which was made the basis of the judgement by the respected coordinate Bench. As a consequence, the impugned clause of payment cannot be read in isolation but to be read along with rest of the clauses.

9.1 Although, undisputedly the Respondents have agreed to make a payment of Rs.7,50,00,000/- (Rupees seven crores fifty lakhs only) to the Petitioner, however, the said payment was subject to extension of franchise to be granted by BNIHQ. Facts of the case have revealed that the same was terminated vide a notice dated 3rd December, 2015, duly placed in the Compilation. The Respondent has informed the Petitioner that they were not liable to make payment of said amount because of the non-accomplishment of one of the major condition. As far as the question of awareness of this condition is concerned, this is not a case of the Petitioner / Applicant that he was unaware of such condition because as per clause 2, and clause 9, etc. of the Consent Agreement, it was reiterated in clear terms that the Respondents shall be liable to pay the said sum to the Petitioner only upon the extension of the franchise by BNI Headquarters. Before signing of the consent agreement, the Petitioner was, therefore, fully aware of the fact that only on accomplishment of the condition of extension of franchise, the Respondents shall be held responsible for the payment of the said amount. Therefore, impugned amicable settlement had become the basis for the disposal the C.P. The order has thus finally decided the C.P. The CLB while passing the Order has not retained any power or imposed any restriction for further adjudication of the issue. **Therefore, it can be safely held that the CLB was not in *seisin* of the issue.**

9.2 This is also not the case that the Petitioner was kept in dark and he was not "*ad-idem*" with regard to the terms and conditions contained in the consent terms. Rather, there was no ambiguity as far as the imposition of the said condition was concerned. All the conditions were expressed in clear terms without any ambiguity. Rather, the Petitioner was absolutely aware that the payment can be demanded only if the franchise is extended. Mks

9.3 An interesting point has also been raised that even if this Tribunal exercises its power, said to be inherent power, then also whether there is any scope to modify the terms and conditions of the consent agreement? Naturally, the answer is in negative. Rather, the answer is inbuilt in the said consent agreement because the Petitioner has also expressed in clause 14 that all the allegations contained in the impugned C.P. have been withdrawn. It was agreed upon that no dispute remained in existence including as set out in the said Company Petition. In other words, even if for assumption, this Application is allowed, then the C.P. cannot be adjudicated and the Petitioner cannot gain anything, what to say a financial gain, by contesting the C.P. in question.

9.4 Once an Order was passed as a final judgement, then this Tribunal has become **functus officio** having no power to review the same. In the guise of suitable modification or request to recall a finally passed Order, the same cannot be adjudicated again. This Tribunal cannot sit over a judgement already pronounced.

10. Before parting with this issue, this Bench feels to make an off-the-cliff observation that due to the dispute between two Indian Citizens, it appears that BNIHQ, the corporate body outside India, has taken the advantage by not extending the franchise to either of the rival Indian parties. It could have been wise to both of them to join hands and claim the extension of the franchise. It could have been possible only if both of them were united and made efforts jointly.

11. Be that as it was, at present the limited issue is whether the duly pronounced Consent Order can be recalled under the facts and circumstances of the case, I hereby hold that recalling of such an Order is beyond the jurisdiction as well as beyond inherent powers. As a result, the Application titled as C.A. 198/2015 is hereby dismissed.

sd/-

Dated: 17.10.2016

Shri M.K. Shrawat
Member (Judicial)