

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
CA 47/2016 in CP 68/2010

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

In the matter of Companies Act 1956 under Sections 397-398 and 241 & 242
of the Companies Act 2013.

AND

Between:

Vikram Ahuja

... Applicant/ Petitioner

Versus

1. M/s. Greenstone Investments Pvt. Ltd.

2. Marlene Devendra Ahuja

3. Devendra Ahuja HUF

4. Venkatesh Kamath

5. Mrs. Tania Deol

... Respondents/ Respondents

6. Mr. Sanjeev Bansal

7. Mr. Rajesh Shah

8. Mr. Amarjeet Jha

9. Mr. Kiran Jadhav

10. M/s. GMR & Co.

... Proposed Respondents

Present on behalf of the parties:

1. Mr. U.K. Choudhry, Sr. Counsel, Mr. Himanshu Viz, Advocates, Mr. Kamal Agarwal, CA for the Petitioner.

2. Mr. V. R. Dhond, Sr. Counsel, Mr. Ashish Kamat, Mr. Kunal Mehta, Mr. Gaurav Shah, Ms. Henna Daulat, Aditya Mehta, Advocates for Respondents.

ORDER

(Heard on 07.11.2016)

(Pronounced on 22.11.2016)

The applicant/petitioner filed this CA for interlocutory reliefs inter alia seeking an order declaring that R4 & R5 are disqualified to function as directors of R1 Company in terms of Section 164 (2) (a) r/w Section 167 (1) (a) of the Companies Act 2013 (herein after referred as *the Act*).

2. The applicant submits that the Hon'ble High Court of Bombay, on 28-1-2016, passed an order with the consent of the parties giving liberty to the applicant to raise all the issues afresh while setting aside the order dt.19-1-2016 passed by the erstwhile CLB in C.A 201/2015, hence the applicant filed this CA.
3. The applicant submits that he filed this CP u/s 397-398 of the Companies Act 1956 against his sister and others impugning the conduct of them as prejudicial to the interest of him as a shareholder of the Company.
4. The applicant submits that Section 164 (2)(a) of the Act mandates that no director of a company which has not filed financial statements or annual returns for three consecutive financial years shall be eligible to be re-appointed as director of that Company or appointed in any other Company for a period of five years from the date on which the said Company fails to do so. The applicant further submits that Section 167 (1) (a) of the Act says that office of a director shall become vacant in case he incurs disqualification of non-filing of financial statements or annual returns for a continuous period of three financial years as stated in Section 164 of the Act.
5. That R1 Company, wherein R4 & R5 functioning as directors, having not filed financial statements for five years consecutively i.e., from 31-3-2010 to 31-3-2014, R4&R5 shall be declared disqualified to continue as directors of R1 Company, despite a respite of two months from 15.08.2014 to 15.10.2014 the Central Government bestowed upon companies to hold AGMs and file financial statements, this R1 Company headed by R4&R5 ignored it and remained defaulters u/s 164 (2) (a) r/w Section 167 (1) (a) of

the Act, of course they held the AGMs for all these years on 30.09.2014 but not filed the financial statements.

6. The applicant further submits that after notification of the Act, Ministry of Corporate Affairs, by general circular No.34/2014 dated 12-8-2014, introduced the Company Law Settlement Scheme, 2014 (CLSS) giving an opportunity to the Companies to file all their pending financial statements and annual returns during the period 15-8-2014 to 15-10-2014 to avoid disqualification as mentioned above. Despite this window to the defaulting companies, R1 Company flouted the provisions of the Act as if it is not applicable to them.

7. The Senior counsel Shri U K Choudary appearing on the applicant submits that for the Hon'ble Bombay High Court in *Sridhar Sundararajan v. Ultra Marine Pigments and another* (Appeal (L) No.613/2015, order dated 8-2-2016), for the Queen Division Bench, England in *In Re. Solicitor's Clerk* ([1957] 3 All E R 617) and for the Hon'ble Supreme Court of India in *Ishwar Nagar Co-operative Housing Building Society v. Parma Nand Sharma and Ors.* (AIR 2011 SC 548) held that a statute providing posterior disqualification on past conduct does not become a retrospective one because a part of a requisition for its action is drawn from a time antecedent to its passing, the disqualification enunciated u/s 164 r/w Section 167 of the Act is squarely tantamount to disqualification to R4 & R5 failing to file financial statements for five consecutive years immediately before passing this Act. Therefore, the counsel submits that these directors could not shy away by saying that disqualification enunciated u/s 164 2(a) r/w 167 (1)(a) of the Act cannot relate back to the defaults in the past.

8. The applicant counsel further submits that as per Article 89 of the Articles of Association of the Company, the directors who are not permanent shall retire from the office at the general meeting of every subsequent year, therefore, for R4 not being a permanent director, he is liable to be retired at every ensuing AGM, but till date he has not been reappointed in any AGM by the shareholders of R1 Company.
9. The counsel has reiterated in this CA as well about retirement of deceased Davendra Ahuja, but the said Ahuja having already passed away, there is no point in making any discussion over the said issue to show him as now disqualified.
10. The petitioner counsel further states that since R4 has not been reappointed and no Resolution has been passed in any of the AGMs since 1-10-2009, he ceased to be director of the Company even under the Article above mentioned. To fortify the above proposition, the counsel relied upon *(Krishnaprasad J. Pilani v. Colaba Land and Mills Co. Ltd [(1959)29 Comp Cas 273 (Bom)]*.
11. The applicant counsel further submits that the power conferred upon this Tribunal is of widest amplitude and the power u/s 403 (equivalent to Section 242 (4) of the new Act) of the Companies Act 1956 for passing interim order as the same is incidental to the power to order substantial reliefs as set out in Section 402 of the Companies Act 1956. To show that this Tribunal can pass any order which it thinks fit, the petitioner counsel relied upon *Cosmo steels Private Ltd. And Ors. v. Jairam Das Gupta and Ors* [AIR 1978 SC 375]; *Shoe Specialities P. Ltd. and Others v. Standard Distilleries and Breweries P.Ltd and Ors.* [MANU/TN/0114/1966]; *Sanjay Gambhir and Ors v. D. D Industries Limited and Ors* [(2013)177 Comp Cas

99]; *Pramod Kumar Mittal v. Andhra Steel Corporation and Ors.* [(1985) 58 Comp Cas 772 (Cal)] and *Bennet Coleman & Co. V. Union of India and Ors* [(1977) 47 Comp Cas 92 (Bom)].

12. Denying the case of the applicant, the respondent side replied stating that R1 Company was incorporated in the year 1978 by one late Davendra Ahuja, who is father of this applicant and R5, along with husband of R2 and Karta of R3. It is an NBFC with a primary object of investing its funds in shares and securities of various companies including those promoted by late Davendra. In between 1988 and 1999, as his father Davendra caused applicant to have 3,58,844 shares of R1 Company, this applicant, while he was still minor, held 21.67 % shares in R1 Company. When the relationship between late Davendra and the applicant, his son, became acrimonious, late Davendra, through his will dated 20-2-2008 and public notice dt.30-6-2010 and affidavit dated 5-8-2010 castigated the applicant, thereafter he passed away on 20-8-2010. Soon after the death of his father, the applicant filed this CP on 1-9-2010 making various allegations against R5 i.e. his sister and the remaining respondents. Since then this applicant has been continuously filing one or other application though time and again Courts dismissing his applications.

13. The Respondents Counsel submits that the present application is nothing but second round of exercise over an issue that was already decided by Company Law Board on 19-1-2016, thereafter, by the Hon'ble High Court of Bombay on 26.01.2016. In spite of it, this applicant, being insensitive of the orders coming against him, filed this CA taking out a ground that R4&R5 directorship is hit by the disqualification come into existence u/s 164 of the Act 2013 over non-filing of financial statements for

the years 2010 to 2014 without realising that Sections 164 & 167 were notified on 1.4.2014 enabling this applicant to raise this plea along with other pleas since 1.4.2014 itself. But though the petitioner could take this plea in CA 201/2015 along with other pleas for removal of R4&R5, he consciously left taking such plea in CA 201/2015 filed on 19th October 2015. Since the reliefs sought in CA 201/2015 being substantially the same as that of the reliefs sought in the present CA, it is hit by the doctrine of Resjudicata. To say that this CA is hit by constructive Resjudicata for the petitioner failed to take this plea of disqualification of R4 & R5 u/s 164 (2)(a) r/w 167 (1)(a) of the Act, the Respondents' counsel relied upon *Satyadhyan Ghosal & Ors. v. Smt. Deorajain Debi & Anr* [(AIR 1960 SC 941) (Paragraphs 7 and 8)] and *Arjun Singh vs. Moinder Kumar & Ors.* [(AIR 1964 SC 993) (Paragraphs 10, 11 and 13)].

14. The respondents counsel submits that interim relief sought in this CA is not in aid of the reliefs in the main CP, therefore, the same is liable to be dismissed, for which the respondents counsel relied upon *Shanti Prasad Jain v. Kalinga Tubes Limited* (AIR 1965 SC 1535 para 35); *Shree Ram Urban Infrastructure Limited v. R. K. Dhall & Ors.* [(2010) 153 Comp Cas 150 (Bom) pages 152,154-157, 160-162)] and *United Commercial Bank v. Bank of India and Ors.* [(1981) 2 SCC 766, paras 50-54].

15. The Respondent counsel further submits that this applicant filed several CAs in the past against the assets of the Company and the functioning of Directors of the Company but none of the times, he was granted the reliefs he sought, the same is evident from the orders passed by Courts. The petitioner had filed CA 170/2010 seeking suppression of the Board and injunction against current assets of the Company, but no relief

was granted in the orders dt. 1-11-2010 and 11-2-2014. Again, when the petitioner filed CA 245/2013 seeking secretarial audit of R1 Company, CLB disposed of the CA passing injunction orders against the immovable assets of the Company, as to other reliefs, they were being rejected. In the saga of filing applications, he moved another CA 261/2014 against R5 to restrain her from acting as Director and also for a direction to R1 Company for holding AGMs for the years 2009-10- to 2013-14, wherein, an interim relief was granted directing R1 Company to hold AGMs for the years from 2009-10 to 2013-14. Thereafter, this applicant filed another CA 309/2014 for amendment of the Company Petition disputing appointment of the additional Directors and transfer of shares from late Devendra to R5 in March 2010, but this applicant has till date not moved this CA for any directions in it.

16. In CA 201/2015, this applicant comprehensively pleaded that R4 and R5 have been indulged in forgery, fabrication and antedating of documents in respect to the alleged transfer of the shareholding of late Devendra to R5; challenging appointment of additional Directors on 18-08-2008 and 21-8-2010, for not holding AGMs and consequentially not sending financial statements to the RoC and also for not holding board meetings within the time limits as prescribed under the Companies Act.

17. Without prejudice to the rights and contentions of the Respondents, their counsel further submits that since R4 was appointed as Director only in the year 2014, the period of three years qua R5 can only commence with effect from 2014, thereby as on date, no disqualification qua R5 can be invoked. The respondents counsel submits that the AGMs for the impugned years were already being held on 17-9-2014 and thereafter the

AGM for the year 2014-15 on 13-9-2015. On the contrary, this applicant has never raised any objection to the financial statements or annual reports as inaccurate, therefore, it cannot be construed that this applicant is put to prejudice by non-compliance of filing financial statements within the time prescribed. It is not the case of this applicant that he is not aware of figures in the financial statements and it is also not the case of him that these respondents are indulged in configuring of the financial statements to the benefit for their selves. In the present case, R5 is the promoter holding 93.37% of R1 Company. The counsel further submits that this applicant has not raised any objection in the AGMs stating that R4 & R5 should not continue as Directors of the Company, more so, the Company approved R4 and R5 continuing as Directors on year to year basis in the AGMs held. In fact, the applicant himself filed CA for holding AGMs for the years 2009-10 to 2013-14; therefore this applicant now cannot say that the respondents on their violation failed to file financial statements for the year 2009-10 to 2013-14. Besides this, this petition has never challenged the audited financial statements or the AGMs held for the year 2009-10 to 2013-14 as prejudicial to him or to R1 Company. Hence, he could not raise as a plea in the CP filed u/s 397-398 ignoring the fact that non-compliance of any section of law of the Companies Act will not have any bearing on the CP filed u/s 397-398 for the allegations in the Company petition u/s 397-398 are solely to be decided on the point as to whether the acts complained of are oppressive against the petitioner or reflecting mismanagement of the Company, hence the respondent counsel, for the reasons stated above, sought for dismissal of this CA.

18. On hearing the submission of either side, now the points for discussion is *as to*,

1. *whether this CA is hit by resjudicata or not,*
2. *whether the disqualification set forth in Section 164(2)(a) r/w 167 (1) (a) of the Act 2013 has retrospective effect or not,*
3. *whether the applicant can seek NCLT to declare that R4 & R5 cease to continue as directors in terms of Sections 164 (2) (a) r/w 167 (1)(a) of the Act 2013 in the CP filed u/s 397 and 398 of the Companies Act 1956/u/s 241 & 242 of the Companies Act 2013 or not.*

Point.1: - whether this CA is hit by resjudicata or not:

19. It is an admitted fact that the applicant herein filed CA 201/2015 before erstwhile CLB with the reliefs as follows:
- a) *The Hon'ble Board be pleased to issue an order and injunction restraining R-4 &5 from acting or holding themselves out as Directors of the R-1 Company,*
 - b) *The Hon'ble Board be pleased to pass an order superseding the Board of Directors of R-1 and appointing two Independent Directors and a professional Chairman to the Board of R-1*
 - c) *The Hon'ble Board be pleased to pass an order appointing an independent firm of Chartered Accountants for conducting a special audit of the accounts of R-1 with a direction to submit such audit report within a period of 30 days.*
 - d) *The Hon'ble Board be pleased to pass an order appointing a Practising Company Secretary to carry out a Secretarial Audit of R-1 for the period from 1st April 2009 till 31st March 2015 with a direction to submit such Secretarial Audit Report within a period of 30 days*
20. Now the reliefs asked in the present CA are as follows:

- a. *The Hon'ble Board be pleased to pass an order and declare that R-4 and R-5 have become disqualified from acting as Directors of R-1 w.e.f.30th September 2012 by operation of law under the provisions of Section 164 (2)(a) of the Companies Act,2013 and be further pleased to pass an order and declare that R-4 and R-5 have vacated the office of Directors of R-1 by operation of law under the provisions of Section 167 (a)(a) of the Companies Act,2013 w.e.f 30th September 2013,*
 - b. *The Hon'ble Board be pleased to pass an order declare that R-4 and R-5 have become disqualified from the directorship of TCFC Finance Ltd. and vacated the office of its directorship w.e.f.30th September 2013,*
 - c. *The Hon'ble Board be pleased to pass an order declaring that R-4 and R-5 have also become disqualified from the directorship of TCFC Securities Pvt.Ltd.(another associate company) and Citi Leasing Pvt.Ltd. (100% subsidiary company) and vacated the office of its directorship w.e.f 30th September 2013*
21. The applicant asked various other reliefs without prejudice to the reliefs sought above. Though the applicant asked various other reliefs, the counsel has not pressed the remaining reliefs; except the reliefs above mentioned, this Bench has therefore not discussed those reliefs. In the remaining reliefs, most of them are nothing but repetition of the reliefs already determined or sought in the CAs filed by this applicant
22. The applicant herein has asked to declare that R4 and R5 ceased to continue as Directors of R1 Company precisely on the ground that they are no more eligible to continue as Directors for they failed to file the financial statements for five consecutive years from 2009-10 to 20013-14

immediately before notification of Section 164 and 167 of Companies Act 2013. Likewise, in CA 201/2015 also sought an injunction restraining R4 and R5 from acting as Directors of R1 Company which is substantially the same as the relief sought in the present CA 47/2016 subsequently filed to CA 201/2015.

23. In CA 201/2015, CLB passed an elaborate order on 19-1-2016 over appointment of Sanjeev Bansal, R5 and others as additional Directors holding that their appointment is not in accordance with law, thereby restraint order was passed against non-applicant respondents not to interfere with any transactions in respect of the assets and investments of the Company as reflected in para 21 of the said order. The respondents having felt aggrieved of the same, when they filed an appeal over the said order, Hon'ble High Court of Bombay passed an order on 28-1-2016 stating as follows:

"By consent of parties, the impugned order passed by the Company Law Board on 19 January 2016 is set aside. Company Application No.201 of 2015 is disposed of with no order. It is, however, made clear that all rights and contentions of the parties, on the merits of the controversy, including, the interlocutory orders to be passed in the Company Petition pending before the Company Law Board, namely CP68/2010, are kept open. Respondent No.1 will be at liberty to take out a fresh Company Application for interlocutory reliefs pleading such additional facts, as he may choose to. As in the case of Respondent No.1, all the contentions of the Appellant concerning the permissibility of grant of interim reliefs in the matter, as may be prayed for by Respondent No.1, shall be kept open. No order as to costs."

24. In the above order, R1 is referred to the applicant herein. On reading the order passed by the Hon'ble High Court of Bombay, it is clear that the order passed by CLB on 19-1-2016 has not only been set aside, but CA201/2015 is also being disposed of with no order. Whether the order is by consent or on merits, it is obviously binding upon the parties so long as it is not set aside. Since it has not been appealed, it is to be construed as attained finality.

25. The Hon'ble High Court further held that all the rights of either side in relation to *the controversy in between the parties are still left open* to be decided by CLB/NCLT.

26. For the CA 201/2015 was disposed of without any order by setting aside the order already passed, it is meant that the parties consented not to raise the issues in CA 201/2015 anymore, at least in another CA, if not in the main petition. If at all on the same subject or set of facts, another CA is entertained, it would be nothing but making the order of High Court redundant. The only solace given to the applicant in the appeal order is that he can take out fresh application for interlocutory reliefs *pleading such additional fact as he may choose to*. Yes, he is free to take out a fresh application if additional facts emanate giving cause of action to him. In CA 201/2015 and in the present CA 47/2016, the relief asked is for removal of R4&R5 as directors. The Sections 164 & 167 of the Act were in force when CA 201/2015 was filed, as they are in force today. Then, one should not lose sight of the fact that these new Sections 164 and 167 have come into force from 1-4-2014, i.e., before filing CA 201/2015, therefore he ought to have brought these disabling provisions to the notice of RoC, at least to High Court, that has not been done. He kept quiet until CA 201/2015 was

disposed of without any order, since the appeal order is a consent order; he could not take it to appeal, rightly not taken to appeal. It does not mean that he is open to raise second round of litigation on removal of R4&R5 as directors by filing another CA under the cover of the above Sections.

27. It goes without saying that a person should not be inflicted again and again on the same issue, thereby this petitioner ought to have raised this legal point when he challenged continuation R4 and R5 as Directors of the Company. Since the Hon'ble High Court of Bombay has given liberty to the petitioner to file an interlocutory application on additional facts, it does not mean that he is at liberty to vex the non-applicants on the same set of facts, but on different legal ground, more specially such legal ground which was available to him when he sought removal of R4&R5 in earlier application 201/2015. It need not be separately held that fact in issue is different from law in issue. The Hon'ble high court has not given liberty to the applicant to file an interlocutory application on another law point, but only on additional facts. Whereby, we honestly believe that it is not permissible in the light of the principle laid under Section 11(IV) of CPC to seek removal of them as directors on another legal ground. No doubt it is true that if new legislation comes and gives new jurisdiction with retrospective action relating back to the acts in the past, it is altogether different situation. But when new Act has been in even before filing earlier CA 201/2015 for the removal of R4&R5 as directors, it can't be taken out separately subsequently after waiting until earlier application was dealt with. Therefore, we are of the opinion that the applicant cannot take out a sentence from the order saying that since he is given liberty to seek interlocutory order on additional facts, he is entitled raise on the same

facts by invoking another legal point. The applicant ought to have raised all these legal scores in the former application itself.

28. In view of the same, the relief sought by the applicant in this CA is held as hit by constructive resjudicata.

29. For completeness, remaining two points are dealt with assuming 1st point has been decided against the Respondents.

Point.2: - whether the disqualification set forth in Section 164(2)(a) r/w 167 (1) (a) of the Act 2013 has retrospective effect or not:

30. Senior counsel Shri Chaudhry vehemently argued that Section 164 (2) (a) and 161 (1) (a) of the Act 2013 is squarely applicable to the failure of filing financial statements for three financial years before notification of above Sections for the reason the posterior disqualification on the past conduct does not become retrospective for part of the requisition for its action is drawn from a time antecedent to passing new Act. For which he relied upon *In Re. Solicitor's clerk*, and *Ishwarnagar Co-Operative Housing Building Society* case, Supra to fortify his arguments that the Provisions aforesaid are applicable to the defaults happened antecedent to new enactment.

31. On perusal of Solicitor's clerk case, it appears that a solicitor's clerk was convicted of larceny before 1956 amendment to the Solicitors Act 1941, was made ineligible to continue as solicitor's clerk after amendment in the year 1956. The said clerk was convicted on April 14 1953 that was before the aforesaid amendment that a person convicted of larceny should not continue as clerk to a Solicitor. When the aggrieved Solicitor's clerk after his removal filed an appeal to the Queen's Bench, England challenging the said provision as not applicable to him retrospectively, on which, the Bench

held that the order has no retrospective effect because disqualifying a person from acting as a Solicitor's clerk in future cannot be considered as retrospective for what happened in the past is only a cause of action for making of the order. It is further clarified it would be retrospective if the Act provided that anything done before that Act came into force or before the order was made void or voidable. It is further said the Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

32. Likewise, in *Ishwarnagar supra* also, the same principle is reiterated, on the foundation of ratio decided in the Solicitor's clerk case, we, therefore, examined the ratio decided in Solicitor Clerk's case as to see whether the same is applicable or not.

33. In the Solicitor's clerk case, the conviction in the past is considered as disqualification to become ineligible in future to become clerk, it has not changed anything happened in the past, but here non filing of financial statement for three consecutive years in the past is neither an offence nor a disqualification to continue as directors in future.

34. In Solicitor's case, amendment has not brought any change to status of the past; only thing is the person convicted for larceny etc. is not permitted to become clerk. But in the given case, if the Sections 164 and 167 are read as the applicant counsel reading, then the act happened in the past, which was not default until before new enactment come into farce would become default and offence after enactment. This reading diagonally opposite to the ratio decided in the Solicitor's clerk case, because it has been clarified by the Queen's Bench that it would be retrospective if the Act provided that anything done before that Act came

into force or before the order was made void or voidable. Here before 1.4.2014, non filing of financial statements for three consecutive financial years was not a default; the directors continuing until before enactment were also not disqualified to continue as directors. When in solicitor's case clarified that 1956 amendment to Solicitors Act 1941 would not any ante to 1956 is not declared as void, making it clear that past status is not changed, the solicitor Act not made anybody in the past either as convict or defaulter. Therefore, an act antecedent to the enactment cannot and shall not be construed void relating the enactment to the acts back to it unless and until it explicitly said as retroactive. Indeed, Solicitor's case ratio comes to the rescue of the respondents rather to the applicant.

35. The need for accessibility, precision and general application flow from the concept of rule of law, a person should be able to know of the law and be able to confirm his or her conduct according to the law. Basis of presumption is based on eliminatory consideration of fairness which dictates that individuals should have an opportunity to know what the law is and confirm their conduct accordingly.

36. In the present case non-filing of financial statements before this enactment would not tantamount to disqualification to become Director or to continue as Director, new enactment made non-filing of financial statements for three consecutive years as disqualification and amounts to an offence only to the act after 1.4.2014.

37. If this disqualification is construed as applicable to the past acts, it is obviously unfair to the people conducted the affairs of the company under the impression that non-filing of financial statements for three years is not a default and not an offence.

38. Therefore, this provision has to be read as applicable to the situations where non-filing has started, at the most in the past and continuing while this enactment has come to into existence and also to future non-filing but not to be considered as applicable to the past acts for it is an established proposition that an Act has to be considered retroactive only when it has been explicitly mentioned in the Act.

39. Accordingly, this point is decided against the petitioner.

Point.3: - *whether the applicant can seek NCLT to declare that R4 & R5 cease to continue as directors in terms of Sections 164 (2) (a) r/w 167 (1)(a) of the Act 2013 in the CP filed u/s 397 and 398 of the Companies Act 1956/u/s 241 & 242 of the Companies Act 2013 or not.*

40. It has been time and again reiterated by the Constitutional Courts in India and England that the test applicable to see whether an act is covered by 397&398 of the old Act/241&242 of the new Act is test of unfair prejudice, not the test of validity on the anvil of legal provision. At times though it is legal, yet it can become prejudicial, on the contrast, though it is illegal, yet it need not be prejudicial, so in the equity jurisdiction, it is the test of prejudice that holds field, not other tests which normally holds field in civil cases. This doctrine has been consistently said from *Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Limited (AIR 1965 Guj 96)* and *Needle Industries (India) Ltd., & ... v. Needle Industries Newey (India) [1981 SCC (3) 333(FB)]*.

41. To supply force to the above proposition, the following para from *Needle Industries (India) Ltd., & ... v. Needle Industries Newey (India)* may be read:

"49. The question sometimes arises as to whether an action in contravention of law is *per se* oppressive. It is said, as was done by one of us, N.H. Bhagwati J. in a decision of the Gujarat High Court in *S.M. Ganpatram v. Sayaji Jubilee Cotton & Jute Mills Co.*, that "a resolution passed by the directors may be perfectly legal and yet oppressive, and conversely a resolution which is in contravention of the law may be in the interests of the shareholders and the company". On this question, Lord President Cooper observed in *Elder v. Elder*:

"The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the 'just and equitable' jurisdiction, and, conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding up, especially where alternative remedies are available. Where the 'just and equitable' jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy".

Neither the judgment of Bhagwati J, nor the observations in *Elder* are capable of the construction that every illegality is *per se* oppressive or that the illegality of an action does not bear upon its oppressiveness. In *Elder* a complaint was made that Elder had not received the notice of the Board meeting. It was held that since it was not shown that any prejudice was occasioned thereby or that Elder could have bought the shares had he been present; no complaint of oppression could be entertained merely on the ground that the failure to give notice of the Board meeting was an act of illegality. The true position is that an isolated act, which is contrary to law, may not necessarily and by itself support the inference that the

law was violated with a mala fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed. This may usefully be illustrated by reference to a familiar jurisdiction in which a litigant asks for the transfer of his case from one Judge to another. An isolated order passed by a Judge which is contrary to law will not normally support the inference that he is biased; but a series of wrong or illegal orders to the prejudice of a party are generally accepted as supporting the inference of a reasonable apprehension that the Judge is biased and that the party complaining of the orders will not get justice at his hands."

42. In fact, this applicant himself sought for holding AGMs for the years 2009-10 to 2013-2014, accordingly meetings were held, resolutions were passed by supplying all the statements after audit, therefore, if at all financial statements are not filed for the years mentioned, it can't be said as an act prejudicial to the interest of the applicants in the light of the ratio propounded in the above cases, therefore, this Bench has not found any merit in the argument the petitioner counsel taken out for declaring that R4&R5 ceased to continue directors of the company for it is in violation of the provision of law.

43. That apart, even if this issue is taken on standalone basis, for no jurisdiction is separately conferred upon NCLT to determine the issues falling u/s 164 and 167 of the Companies Act 2013, this Bench cannot otherwise also go into this issue as long as it is not treated as scheme to cause prejudice to the aggrieved. For his case is qua that they cannot

continue as directors by virtue of a provision, it cannot be a ground under Sections 397 & 398 of the Act 1956, 241 & 242 of the Act 2013.

Accordingly, this CA 47/2016 is hereby dismissed without costs.

sd/-

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

sd/-

V. NALLASENAPATHY
Member (Technical)