

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

TCP NO. 32/397, 398/NCLT/MB/2014

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

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

BETWEEN:

Mr. Rohtas Jugalkishore Gupta .. Petitioner
AND
Jugnar Processors Pvt. Ltd. & Ors. .. Respondents

PETITIONER

Mr. Rohtas Jugalkishore Gupta
F-1/602, Crystal CHS, Sundervan Complex
Before Shastri Nagar, Lokhandwala Road
Andheri (W)
Mumbai 400 053.

RESPONDENTS

1. M/s. Jugnar Processors Pvt. Ltd.
412/413, Jolly Bhavan No.1
10, New Marine Lines
Vithaldas Thackarsey marg
Churchgate, Mumbai 400 020 .. Respondent No.1
2. Mr. Devendra Jugalkishore Gupta
As above .. Respondent No.2
3. Mr. Ishwar Jugalkishore Gupta
As above .. Respondent No.3
4. Ms. Anita Devendra Gupta
4th Floor, Anandan Building
N.S. Road No.7
Near Cooper Hospital
Opp. BMC Market, Juhu Vile Parle
Mumbai 400 049. .. Respondent No.4

5. Mr. Ashok Vedprakash Gupta
412/413, Jolly Bhavan No.1
10, New Marine Lines
Vithaldas Thackarsey Marg
Churchgate, Mumbai 400 020 .. Respondent No.5
6. Mr. Mahesh Banwarilal Goenka
As above .. Respondent No.6
7. Mr. Prabhat Maheshwari
Partner, M/s. GMJ & Associates
Company Secretaries
3rd & 4th Floor, Vaastu Darshan, B Wing
Above Central Bank of India
Azad Road, Andheri (E)
Mumbai 400 069. .. Respondent No.7

PRESENT ON BEHALF OF THE PARTIES

FOR THE PETITIONER

Mr. M.S. Bhardwaj Advocate,
Along with Mr. V.P. Verma, Advocate.

FOR THE RESPONDENTS

Mr. Sahil Mahajan, Advocate for Respondent No.2.

ORDER

Reserved on : 31.01.2017

Pronounced on : 02.03.2017

1. A preliminary legal objection has been raised by the Respondents to the main Petition questioning its maintainability. The impugned Petition (C.P. No. 32/2016) has been filed on 21st October, 2015. On receiving a copy of the Petition, the Respondents have filed a Preliminary Objection on 18th of August, 2016 and the relevant paragraphs which are argued are as under:-

"4. At the further outset, I have a Preliminary Objection that the Petition is not entitled for any reliefs and the present Petition is not maintainable. The Petitioner has earlier filed the petition

being Company Petition No. 43/2014 against the same Respondents for the same reliefs in the Company Law Board at Mumbai. The said Petition was withdrawn by the Petitioner by making an Application dated 20.11.2014 to the Hon'ble CLB. The said petition was withdrawn by the Petitioner without taking liberty from the Hon'ble CLB to file the fresh Petition. By order dated 19.12.2014, the Hon'ble CLB has disposed off the Petition as withdrawn. In view of the above, the Petition filed against the Respondents is misconceived and not tenable in law. The Petition is, therefore, liable to be dismissed with costs against the Respondents. Hereto annexed and marked as Annexure "R-1" is a copy of the Company Petition No. 43/2014 filed by the Petitioner without annexures. Annexure "R-2" is a copy of the Application dated 20.11.2014 for withdrawal of Company Petition No. 43/2014 filed by the Petitioner and Annexure "R-3" is a copy of the order dated 19.12.2014 dated passed by the Hon'ble CLB in Company Petition No. 43/2014."

2. From the side of the Respondents, Ld. Counsel has drawn the attention of the previous Order of the erstwhile CLB, Mumbai Bench dated 19th December, 2014 passed in C.P. No.43/2014 u/s 397-398 of the Companies Act, 1956 wherein it was pronounced as under:-

"C.P. No.43 of 2014

1. Case taken up today in presence of the Petitioner-in- person.
2. The Petitioner seeks permission to withdraw the Company Petition. Prayer considered. Allowed.
3. The Petitioner is permitted to withdraw the Company Petition. C.P. stands disposed off as withdrawn.
4. In view of the withdrawal of the Company Petition, pending C.A., if any, also stands disposed off accordingly. Interim order, if any, stands vacated.
5. No order as to costs.
6. Let copy of order be issued to all concerned.

Dated the December 19, 2014

Sd/-
A.K. Tripathi
Member (Judicial)"

2.1 Ld. Counsel for the Respondents has also pleaded that the reliefs claimed in this Petition are identical in nature. He has tried to

compare the reliefs as per the present Petition with the reliefs claimed in the previous C.P. No. 43/2014. According to him, the Petitioner should not be allowed for repetitive litigation. Another argument has also been raised that at the time when the previous Petition was withdrawn, the Petitioner has not sought permission or liberty to file a fresh Petition. This litigant should not be allowed for multiple litigation. The principle of estoppel is squarely applied in this case. The Petition is in the nature of forum shopping by choosing one forum at one time and later on another forum to agitate the same matter. It was nothing but abuse of process of law. The Respondents should not be put to double jeopardy. He has further elaborated that if a Petitioner seeking the leave of the Court for withdrawal, for any reason whatsoever, had an option to seek permission that if an occasion arises in future, can ^{was} approach the Court again on the same cause of action. Therefore, it is necessary to ask the Court to grant liberty to file a fresh Petition on the same cause of action. The previous Suit was withdrawn willingly; hence the Petitioner has no legal right to file a repetitive Suit. On these legal points, reliance was placed on the following precedents:-

- i) Ambaji Narsing Mali (Since deceased) through LHs. Smt. Leelabai Laxman Mali and others *Versus* State of Maharashtra and others. Equivklent Citations: 2015 (2) All.M.R. 774 : 2014 (6) Mh.L.J. 325 : Before : Oka A.S. : Chandurkar A.S. : J J
- ii) Pradip Kumar Sengupta and Others *Versus* Titan Engineering Co. Pvt. Ltd. and Others, (1998) 94 Comp Cas 825 (CLB) C.P. No. 35 of 1993, decided on July 27, 1998.
- iii) Raj Sekhar Agarwal & Anr. *Versus* Pragati 47 Development Ltd. & Ors., GA 3592 of 2013, 2014 SCC OnLine Cal 22094, (Before Arijit Banerjee, J.)
- iv) Jacob Cherian v. Cherian and others (Palaniswamy, J.) In the matter of Companies Act and in the matter of Thompson and Ptd. Ltd. Company petition No. 10 of 1971.
- v) Sarguja Transport Service *Versus* State transport Appellate Tribunal, Madhya Pradesh, Gwalior, 1986 DGLS(SC) 805 (SUPREME COURT) Before :- E.S. Venkataramiah : M.M. Dutt : JJ."

3. From the side of the Petitioner, Ld. Counsel has drawn attention on the Rejoinder to the Reply wherein it was mainly stated as under:-

"2. Paras 4 to 6 (Page 2)

i) The Petitioner had submitted a letter dated 20.11.2014 to the Hon'ble Board for withdrawal of the earlier CP No. 43/2014 and not any application as falsely stated by Respondents No. 2 & 3. Respondent No.2 also conveyed his no objection for withdrawal of the said CP and accordingly, the Hon'ble Tribunal permitted the petitioner to withdraw it on 19.12.2014. The petitioner had mentioned in his letter dated 20.11.2014 that he was withdrawing the CP based on the family understanding. A copy of the said family understanding / settlement deed dated 10.11.2014 is enclosed at Page No. 168 as part of Annexure 30 to the present CP No.32/2016. It may be observed from the above that the Company / Respondent No.2 was required to pay Rs. 75 lakhs to the Petitioner as compensation in lieu of his resigning as a Director and vacating the office property. Further, it was agreed that out of Rs.75 lakhs, Rs. 5 lakhs would be paid in 3 days and the balance in 6 months, i.e. on or before 10.5.2015. **Respondent No.2 has not denied the settlement deed.**"

3.1 It is vehemently pleaded that the previous withdrawal was a conditional withdrawal because a settlement was executed on 10th November, 2014 according to which it was mutually decided and an assurance was given by one Mr. Devendra Gupta to make a full and final payment of Rs.75 lakhs within the stipulated time limit. In the said Petition vide Clause 3 it was decided that subject to the fulfilment of the above condition the Petitioner viz. Rohtas Gupta agreed to forego his claim as a Director and also agreed to withdraw the Petition filed before the CLB. Immediately thereafter, on 20th November, 2014 a letter was written by Mr. Rohtas Gupta to the Bench Officer, CLB, Mumbai wherein it was stated as under:-

"Honourable Bench.

I have agreed and decided to withdraw the above said case based on our family understanding without any pressure on me.

Therefore in view of the aforesaid, I have resultantly decided and agreed to withdraw the respected prayers and relief as sought by me till date in the present case.

The next hearing of the case before the Honourable Bench is on 19th December 2014.

You are requested to take this letter on record and pass necessary order for closing the case."

3.2 From the side of the Petitioner, it is further informed that the other side has not fulfilled the promises and only a sum of Rs.5 lakhs was paid. Till date no further payment is made. In the letter dated 20th November, 2014 addressed to CLB, Mumbai Bench the Respondent viz. Mr. Devendra Gupta has written "I have no objection". According to the arguments of the Ld. Counsel, it is not a case of wilful withdrawal, but a conditional withdrawal. The Petitioner was not only persuaded but later on cheated; hence had no option but to file this Petition. The earlier Petition was not decided on merits; therefore, the Petitioner had good reason to file a fresh Petition. In good faith he has withdrawn the Petition; therefore, at that point of time there was no prima facie reason to seek liberty of the Court to file another Petition. The principle of estoppel, *inter alia*, does not apply in this case. Non-performance of obligation on the part of the other side is a good reason to revive the claim which was not decided on merits earlier. The Petitioner, in a way, was not only persuaded to withdraw but also forced to withdraw the earlier Petition. On these legal points, reliance was placed on the following decisions:-

- i) Jet Plywood (P) Ltd. and Another *Versus* Madhukar Nowlakha and Others *with* Civil Appeal No. 1368 of 2006 Biswarup Banerjee and Others *Versus* Madhukar Nowlakha, Civil Appeals No. 1367 of 2006 with No. 1368 of 2006 decided on February 28, 2006. (2006) 3 Supreme Court Cases 699 (Before H.K. Sema and Altamas Kabir, JJ), Civil Appeal No. 1367 of 2006.
- ii) Indira Bai *Versus* Nand Kishore, Civil Appeal No. 105 of 1990, decided on September 5, 1990. (1990) 4 Supreme Court cases 668 (BEFORE K. JAGANNATHA SHETTY AND R. M. SAHAI, JJ).
- iii) S. Shanmugam Pilla & Others *Versus* K. Shanmugam Pillai & others. AIR 1972 SUPREME COURT 2069 (V 59 C 383)

(From madras: AIR 1968 Mad 207) K.S. HEGDE AND A.N. GROVER, JJ.

- iv) Mohandeo S/o Sukhdeo Udan & Others *versus* The State of Maharashtra 7 Others. The High Court of Judicature at Bombay, Bench at Aurangabad. Criminal Application No. 1487 of 2007. Order passed on 22nd November, 2016. V.K. JADHAV, J.
- v) Indira Bai *Versus* Nand Kishore. (1990) 4 Supreme Court Cases 668 (BEFORE K. JAGANNATHA SHETTY AND R.M. SAHA, JJ).
- vi) Sarguja Transport Service *Versus* State Transport Appellate Tribunal, Gwalior and others. AIR 1987 SUPREME COURT 88 (From : Madhya Pradesh) E.S. VENKATARAMIAH AND M.M. DUTTA, JJ.
- vii) Duroflex Limited *Versus* Shri Johnny Mathew on 9 January, 2007
Company Law Board, ORDER K.K. Balu, Vice-Chairman
- viii) N. R. Harikumar *Versus* WW Apparels (India) Private Ltd. & Ors. In the High Court of Judicature at Madras
Company Appeal No.3 of 2011
Reserved on: 09.10.2014 Delivered on: 16.04.2015
Hon'ble Mr. Justice V. Ramasubramanian"

4. Arguments of both the sides heard at length in the light of the Compilation filed and the precedents cited. At the outset, it is worth to mention that one of the undisputed facts existed at the time of withdrawal of the previous Petition (CP. No. 43/2014) was the presence of a mutual settlement dated 10th November, 2014. The objectors i.e. Respondents challenging the maintainability of the impugned Petition, now under consideration, have not challenged or disputed the existence of the said settlement deed dated 10th November, 2014. Further, it has also not been disputed that Mr. Devendra Gupta had agreed to make a payment of Rs.75 lakhs to Mr. Rohtas Gupta (Petitioner). Another undisputed fact as brought to my notice is that only Rs.5 lakhs was paid and rest of the amount remained unpaid. Whatever could be the reason for non-fulfilment of the said commitment, but at this juncture it is worth to mention that every litigant should approach the Court with clean hands. I hasten to

add that this observation should not pre-judge the merits of the case which shall be decided judiciously after due consideration of facts, evidence and case laws.

4.1 The basic question that whether the impugned withdrawal was conditional or unconditional is controversial. The said withdrawal is definitely linked with the settlement agreement. The proximity of the dates i.e. the date of the settlement and the date of the said withdrawal, surely indicate that the withdrawal was not independent but appeared to be connected with the promises made in the settlement.

4.2 Although it is a trite law that without any liberty to file a fresh petition on the same cause of action, the second Petition raising the very same issues would not, in general, be held as maintainable. But in a situation when the impugned withdrawal is closely knitted with the promises as a consequence of the settlement, then definitely falls under the category of exception. As a result, such withdrawal does not even attract the provisions of Section 11 of the Code of Civil Procedure, 1908 defining the principles of *res judicata*. Even the principle of estoppel does not prima facie apply under the prevailing circumstances because the principle of estoppel *per rem judicatam* is a rule of evidence. Therefore, I am of the conscientious view that the present Petition is out of the ambits of the allegation of "deliberate multiple litigation".

4.3 The forum chosen earlier has not decided the said earlier Petition on merits. Therefore, it is not correct to allege that the Petitioner has chosen another forum to agitate the same matter on which a judgement on merits has already been pronounced. I am of the view that the facts and circumstances of the case, *inter alia*, demonstrated that the Petitioner has not *mala fidely* repeated the

Petition, rather established his *bona fide* intention. As a result, the provisions of CPC as referred by the Ld. Counsel do not apply under the facts and circumstances of this case. On the other hand, this is a case where the merits remained undecided which are to be decided now as per this Petition.

4.4 For imparting real and substantial justice, as in this case, it can be hold that at the time of withdrawal the Petitioner was incapable of apprehending or contemplating all the possible circumstances. In good faith he was persuaded to withdraw the Petition. I am of the view that estoppel is a rule emerging from the rule of equity as also flow out of fairness. The equity is nothing but demonstration of fairness on the part of the litigants. The settlement thus hinges upon equitable principle and serve as a tool for administration of justice.

5. Resultantly, I hereby hold that in view of the reasons assigned hereinabove the Petition under consideration (C.P. 32/2016) is legally required to be admitted for adjudication on merits. As a caution it is clarified that any of the observations made supra does not affect in any manner the decision yet to be taken on the subjudice Petition. The preliminary objection of "maintainability" is overruled. The Registry is directed to list the Petition for hearing on 10th of April, 2017. The parties to the litigation are given liberty to complete the pleadings earliest possible.

Dated: 2nd March, 2017

Sd/-

M.K. SHRAWAT
MEMBER (JUDICIAL)