

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI

CA 148/2016 in CP 68/2015

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 ... Petitioner
Versus
STMPL Enterprises Pvt. Ltd. & 3 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 148/2016 seeking amendment of main CP to add paras in relation to the allegations mentioned below:

- To add para-c mentioned in the application in Page-8 of main CP as to "As of now..." to say that the petitioner was not present in the meeting held on 16-2-2015, wherein he was shown as removed as a Director.
- To add that the respondents have not prepared and got the audited the final accounts for the financial years 2014-15 and 2015-16 and not filed annual returns for the said years.
- To add that the petitioner has found a huge sum of ₹137 crores is due and payable by the debtors of the company to the company.
- To add R2 started a new company Gujrat Lumber Private Limited carrying on the same business as that of the company and diverting the business of the company to the said company causing huge loss to the company and further saying R2 is making high seas sales from the company to R1 and the sum of about ₹5 crores is payable by the said

company to R1 on account of dubious transactions between the two companies.

- To add R2 and R4 have committed fraud in managing the affairs of the company therefore, they are liable to be punished u/s 447 of this Act.
- To add relief "m" to direct the respondents to recover dues of the company from its debtors with a direction to such debtor to pay the amounts of such debts to the banks directing to the loans taken for funding such debtors.
- To add relief "n" to pay the amounts outstanding and payable to the bank only after payment of the amount recovered from the debtors.
- To add para "o" for appointment of a retired Judge of a High court to determine the amount loss caused to the company by the mismanagement of the affairs of the company by R2 and R4.
- To add para "p" to direct R2 to produce the books of accounts of Gujrat Lumber Private Limited since its inception.
- To add para "q" to convene AGMs for the years 2015 and 2016 and to place the audited final accounts of the company in the said AGMs.
- To delete prayer clause c in final reliefs which is in relation to a direction seeking against R2 to purchase the shares of the petitioner at the fair value as may be determined by this Bench by engaging a firm of Chartered Accountant or to direct R2 to sell his shares to the petitioner at fair value as determined by this Bench and also to compensate R1 for the loss sustained by R1 due to inefficient management by R2.
- To add relief to declare that the petitioner has not resigned as a Director of the company and continues as a Director without any break and direct the reinstatement of the petitioner as Director of the company.

- To add relief to direct R2 and R4 to bring to the account of the company the amounts received by them from the debtors of the company which are misappropriated by them and not brought to the company.
- To add relief to direct R2 and R3 to compensate for the losses caused to the company.
- To add a relief for appointment of an Administrator to look after the affairs of the company to the exclusion of R2 and R3 pending the hearing and final disposal of this C.P.

2. The petitioner 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 this Petitioner asking amendments to improve the case of the Petitioner, to insert new material facts giving new cause of action to the Petitioner to enlarge his case on some other grounds as well and also to delete the reliefs which he now feels inconvenient to the Petitioner.

4. The Respondents reply to this application is that the petitioners now alleging that the respondents indulged in fraudulent activities, which were 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 petitioner, to improve his case, has come up with these amendments. The Respondents submit that to fortify his averment of

assailing his removal as Director, the petitioner has now tried to set up a case saying that he was not in India when meeting was held for his removal which was not there in the original petition. The respondents further submit that as to the allegation of not filing audited balance sheets for the financial years 2014-2015 and 2015-2016, this petitioner made this reckless allegation forgetting that he himself was present on the Board till Feb.2015. However, this allegation was not present in the main original petition.

6. They further submit that the petitioner has come up with a new allegation that the company has receivables of ₹137 crores from debtors to all these five companies and that money should be first realised to pay off the bank debt, instead of selling the properties of the companies. They submit that the Petitioner should not get lost sight of the fact that there are trade payables in all five Companies to the tune of ₹92crores besides Bank liabilities of ₹46crores. They further submit that they have no objection if the Petitioner realises these receivables. Indeed, all these transactions of receivables were made when the Petitioner was in the management; in fact, he resigned from the Board and shifted to USA for he knows that none of these receivables could be recovered. When the Respondents attempted to realise the money from debtors, the Petitioner himself started writing e-mails and text messages to the debtors not to give any money to the Respondents.

7. As to the transactions in Gujarat Lumber Pvt. Ltd., they are all the transactions happened prior to the date of filing of this Petition and well within the knowledge of the Petitioner since incorporation of Gujarat Lumber Pvt. Ltd. Moreover, the said company is not a party to these proceedings. Furthermore, the Petitioner himself is aware and involved in day-to-day affairs of Gujarat Lumber Pvt Ltd. and the petitioner himself taking decisions in Gujarat Lumber as well, the same is evident in the mail

dated 15th January, 2015 showing participation of the Petitioner in the affairs of Gujarat Lumber.

8. The Petitioner is raising fraud allegation against the Respondents which is not present in the Company Petition filed by him. Initially, he sought a relief for direction against the Respondents to purchase the shares of him, now he wants deletion of that relief for it will not gel well with the reliefs presently seeking in the Amendment Application.

9. Now the Petitioner wants to incorporate many interim reliefs which were not there in the main Petition. The Respondents further submit that the averments the Petitioner wants 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 controversy involved in the present Petition, hence, sought for dismissal of this CA.

10. On perusal of the Company Petition, it appears that R1 Company was a company of Kapadia family and the shares held by them were transferred to the Petitioner's wife. Then the Petitioner's wife and himself were allotted fresh shares and until 30th September, 2011, the entire shareholding of the Company was rest with his wife and himself. That this Original Company Petition stands on the footing that the Petitioner holds 73.79% of the paid-up equity of the Company as on 30th September, 2014 mainly to deal with Timber business. In order to help the Petitioner, the Petitioner appointed his brother R-2 as a Director in the AGM held on 30th September, 2011. Thereafter, R-2 was appointed as Managing Director of the Company w.e.f. 21st February 2012, accordingly the Petitioner allotted 12,50,000 shares to R-2 and 12,50,000 shares to himself, by this allotment, the Petitioner's shareholding has remained at 73.79%, his wife's shareholding remained at 8.38% whereas R-2 shareholding has become 8.38%. Since his wife resigned

from the Board on 1st March, 2013, R-2 was appointed as professional Executive Director on 1st March, 2013, by these appointments, the Petitioner, R-2 and R-3 became the Directors of the Company and the same continued as reflected in the Annual Return as on 30th September, 2014. The Petitioner later left to Columbia, USA in March, 2013 and returned to India on 24th March, 2015 for a longer duration of around 45 days than usual trips to India. Taking advantage of his residing out of India, R-2 perpetrated various acts of oppression and mismanagement regarding the affairs of the Company by fraudulently removing the Petitioner from the Board on 16th February, 2015 as if the Petitioner resigned from the Company, and of appointment of R-4 as a Director on 14th March, 2015.

11. Because of his staying in USA, as he could not monitor the financial position of the Company from USA, the income in the business has come down from the financial year 2012-2013 to the financial year 2013-2014. The profit after tax was also lower at ₹0.26 crores as against ₹.75 crores in 2012-2013. The Petitioner's case is that he did not sign upon the balance sheet for the years 2012-13 and 1013-14 as he was out of the country, but he noticed that R-2 had forged the Petitioner's signature on the balance sheets of 2012-13 and 2013-14.

12. The Petitioner was surprised to receive a mail from Axis Bank on 28th February, 2015 stating that the accounts of the Company with the Bank irregular from December, 2014 due to devolvement of buyers' credit and there were dues of ₹3.65 crores to the Bank, by which, the account would become NPA. Knowing all these things, when the Petitioner had asked for an internal audit to find out irregularities happening in the Company, to avoid all these things get exposed, R-2 resorted to removal of the Petitioner from the Company on 16th February, 2015 by faking a resignation letter purported to have been submitted by the Petitioner on 16th February, 2015.

13. The Petitioner also made another allegation that R-2 started a new Company called Gujarat Lumber Traders Pvt. Ltd. on 8th March, 2011 which is also engaged in the same business as that of R-1 and has been diverting the business of R-1 to the said company thereby unduly enriching dividend at the cost of causing loss to R-1. The Petitioner made a specific allegation that R-2 diverted a sum of ₹36 lakhs from R-1 and another Company i.e. Angel Exim Pvt. Ltd. Therefore, said Gujarat Lumber Pvt. Ltd. has a paid up capital of ₹1.50crores and is operating well. But, R-2 neither took any action to return the funds diverted from R-1 Company nor shared the profits of the new company with R-1, because of which, R-1 could not clear the loan outstanding to Axis Bank. Now the company is saddled with a huge liability of more than ₹4crores, for which, R2 should be held responsible for repaying the above liability.

14. If the case of the Petitioner is culled out, the allegations aimed at the Respondents are that R-2 was brought into this Company as a Director on 30th September, 2011, R-3 was brought into the Company on 1st March, 2013, thereafter, the Respondents fraudulently removed the Petitioner as Director on 16th February, 2015 and fraudulently appointed R-4 as Director on 14th March, 2015, then the Respondents mismanaged the Company resulting into reduction of income and profit from ₹75 lacs in the year 2012-13 to ₹26 lacs in the year 2013-14, and an allegation of diversion of ₹36 lacs from R-1 Company and Angle Exim Private Limited to Gujarat Lumber Private Limited. By R2 mismanaging the affairs of R1, it could not repay the loan to Axis Bank causing accrual of liability to ₹4 crores to the Axis Bank.

15. If the reliefs sought by the Petitioner are looked into, they are simplicitor to restore him as Director, to cancel appointment of R-4 as Director and to direct R-2 to purchase the shares of the Petitioner at fair

valuation, or else a direction to R-2 to sell his shares to the Petitioner on fair valuation and also for a direction to recover ₹36lacs and the profit earned by R2 by diverting the business of R-1 Company to M/s. Gujarat Lumber Traders Pvt. Ltd.

16. So, the cause of action to the Petitioner for filing this case is his removal as Director, appointment of R-4 as Director, reduction of income and profits in R-1 Company, R-2 failing to make repayment of the loan to Axis Bank and also diversion of ₹36 lacs to Gujarat Lumber Traders Pvt. Ltd. Except the facts abovementioned, no other allegation is against Respondents in the Company Petition.

17. Now, by filing this Amendment Petition, the Petitioner says that R-2 has committed criminal offence of cheating, fraud and fabricating false evidence, therefore, he shall be liable to be punished under Section 448 r/w Section 447 of the Companies Act, 2013, that the Respondents have not prepared and got audited the final accounts for the Financial Years 2014-15 and 2015-16 thereby non-filing of accounts for the said years amounts to breach of Article 16 of the Articles of Association, that the Petitioner has found that ₹137 crores is due to company payable by the debtors of the Company which is four times to the loans payable to the banks and he also makes another allegation that he believes that huge amounts have been recovered by R-2 from such debtors and misappropriated the same, therefore, the Respondents should be directed to take immediate steps to recover the said amounts from the debtors. As to Gujarat Lumber Pvt. Ltd., the petitioner set up new facts saying that R-2 has been making high-sea sales from R-1 to Gujarat Lumber Traders Pvt. Ltd. saying that a sum of about ₹5 crores is payable by Gujarat Lumber to R-1 on account of dubious transactions between the two companies which are under the management of R-2, to prove the same, it is necessary to direct R-2 to produce books of

account of Gujar Lumber to scrutinise its transactions and to ascertain the amounts of profits made by R-2. In pursuance of these new facts, the Petitioner seeks further interim reliefs for a direction against the respondents to recover the receivables from debtors and pay the same to the banks and after making such payments, if any amount outstanding payable to the Banks, then such shortfall shall be paid by sale of all the assets mortgaged and pledged with the Banks and all such assets belonging to anybody, whether related or not related to the Company, be directed to be sold as above. He also sought for appointment of a retired judge of High Court to look into the records of the Company and to determine the amount of loss caused to R1 by R-2 and R-4 and for a direction against R-2 to produce accounts of Gujarat Lumber Pvt. Ltd since its inception. And also sought for direction to convening Annual General Meetings for the years 2015 and 2016 and for appointment of an Administrator to look after the affairs of the Company to the exclusion of R-2, R-3 and R-4 pending final disposal of the Company Petition.

18. The Petitioner also submits to delete their relief (C) in para 10 regarding offer of his Shares to R-2 or in the alternative, offer to buy their Shares by the Petitioner.

19. 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 for declaring appointment of R-4 as Director and removal of the petitioner as Director are null and void, for recovery of ₹36 lacs from M/s. Gujarat Lumber Pvt. Ltd. and for offer of his shares to the Respondents or in the alternative offer of sale of the Respondent shares to the Petitioners.

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

21. 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.

22. 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. LakshmanMoharana & 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].

23. 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.

24. 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.

25. To fortify the argument of the Respondents' side, the Counsel of the Respondents relied upon a case viz. *Revajetu 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.

26. 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."

27. 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.

28. 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."*

29. The real controversy in the main Petition is as to whether the removal of the Petitioner as Director is oppressive against the Petitioner or not, as to whether appointment of R-4 as Director is oppressive act against the Petitioner or not, whether income reduction in the Company business is such that causing prejudice to the interest of the Petitioner, as to whether ₹36lacs allegedly gone into Gujarat Lumber Traders Pvt. Ltd. from R-1 Company is an oppressive act against the Petitioner or not?

30. The Amendment the Petitioner asking is that there are receivables of ₹137crores in R-1 Company accounts, therefore, if at all liabilities of the Company are to be discharged, they shall be paid only after realising the receivables from the debtors. It is not the case of the Petitioner that these receivables were not there in the Company when he was in the management. It is not the case of the Petitioner that these receivables were created after he left management. It is not his case that this pleading is in any way connected to the pleadings of the Original Company Petition, in relation to this issue, there is not even a whisper in the original case. This controversy in relation to ₹137 crores is altogether new plea set up by the Petitioner which is not required to determine the real controversy that has been set out in the Original Company Petition. Therefore, the first element that is a requisite under Order VI, Rule 17 has not been complied with, because this controversy is separate from the controversies in the original CP

and not necessary to decide the controversies in the original CP, 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.

31. As to second point that the Petitioner wants to implead in the Original Petition is that R-2 is making high seas sales from the Company to Gujarat Lumber Traders Pvt. Ltd., therefore a sum of ₹5 crores is payable by Gujarat Lumber Traders Pvt. Ltd. to the Company on account of dubious transactions between the two companies which are under the management of R-2 and which amount is not yet paid since long. To prove the same, he wants the books of Gujarat Lumber Pvt. Ltd. to be scrutinised. 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 scrutiny of the books, 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 R2 embezzled ₹5crores from R1, what prevented this Petitioner to mention those details in the pleadings taken up in this amendment Application. Not even an annexure had been made alongwith this pleading. So, to get a window to make fishing and roving enquiry, he has thrown this allegation on the Respondents.

32. 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 ₹5 crores has been taken out from R-1 Company to Gujarat Lumber Traders Pvt. Ltd., he has not even mentioned on what date and which transaction has been taken into consideration to arrive at this figure of ₹5 crores. May be, 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 fact of ₹5 crores had come to his notice only after filing this Company Petition, this allegation is therefore not required on any count to decide any of the controversies the Petitioner raised in the Original Petition. Moreover, this Petitioner has not made Gujarat Lumber Traders Pvt. Ltd as a party in the Original Petition or sought for impleadment of Gujarat Lumber Traders Pvt. Ltd as a party through this Amendment Application. After all, Company is an independent entity, it will have its own assets and liabilities, thereby unless the party against which relief sought is not made as a party, the pleading party shall not make any allegation against the party which is not an answering Respondent, hence, this argument to include this debut pleading with new cause of action has no merit.

33.* That the relief of appointment of a High Court Judge as Chairperson and appointment of an Administrator and not allowing Respondents to continue in the management are all the reliefs that will cause impediments

to the functioning of the Company, which will certainly have bearing on the ongoing concern.

34. We know that we cannot get into the merits of any of the 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. If a Chairperson is appointed, first and foremost thing is, money is to be paid to the Chairperson, if an Administrator is appointed, money is to be paid to the Administrator. Thereafter the person appointed either as a Chairman or Administrator needs some time to understand the governance of the Company and the business needs of that particular Company, here it is a closely held Company, solely run by a family not by anybody else, particularly by the brother of the Petitioner and his own brother-in-law. This Company is already struggling to clear the debts of the banks; at the outset, the Petitioner has not raised any of these objections. Had there been an agreement to pay off the debts of the Banks, the Bank would have agreed for one-time settlement which would certainly have reduced the payment of debt to less than half of the debts subsisting. Indeed, the Banks had agreed for it, but now that has already been delayed almost for two years. If the yardstick that is applied to decide other civil cases is applied *mutatis mutandis* to company jurisprudence, it cannot be sensible, because the well-being 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 get affected, but the only criteria that has to be taken into consideration is the acts 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 decisions 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".

35. 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.

36. 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 again come up with another Inspection Application that is ready for hearing.

37. 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.

38. However, this Bench after perusal of the Amendment Application since the allegation of his staying in USA at the time of holding meeting and

fabrication allegation in respect to his removal as Director being connected to the controversy of the removal of the Petitioner as director in the Original Company petition, the Petitioner is hereby directed to carry sub-para (c) of para 3 of this Amendment Application in the Original Company Petition which is supplemental to the controversy of the Original Petition.

39. As to rest of the allegations, this Bench is of the opinion that they are not related to the real controversies of the Original Petition, hence remaining amendments are rejected.

40. 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, 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. If we take the present case, it is discernible that removal of the Petitioner, recovery of several crores from Gujarat Lumber are distinctive cause of actions loaded with distinct facts, from that of the controversies in the original Petition. All of them may fall under same section of law, but when the controversies are distinct from the original controversies, they shall not be added to the original Petition.

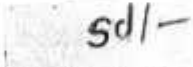
41. Therefore, one cannot be in a misconception that other distinct cause of actions not set out in the original Petition, could be subsequently added to the original cause of actions on the footing that all these cause of actions falling under the said section of law. If any such distinct and new cause of

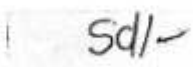
actions are sought to be added as amendments, it will certainly be hit by the determination of real controversy doctrine. Because the basic object of amendment is to help the court to determine the controversy already set out in the facts propounded, but it is neither to replace the original one, nor 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.

42. In view of this principle, this Amendment Application is partially allowed to the extent that is really related to the real controversies as allowed in para 38.

43. Accordingly the Petitioner is directed to carry out the portion of the amendment allowed to the original Petition, then to file amended Company Petition within 15 days hereof, reply by the Respondents within 15 days thereof, rejoinder if any, by the Petitioner within 15 days thereof.

44. Accordingly, this Application is hereby disposed of.


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


V. NALLASENAPATHY
Member (Technical)