

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, MUMBAI

COMPANY PETITION NO.6/59/CLB/MB/MAH/2016

CORAM:

SHRI M.K. SHRAWAT
MEMBER (JUDICIAL)

IN THE MATTER OF:

The Companies Act, 2013

IN THE MATTER OF :

Section 59 of the Companies Act, 2013.

IN THE MATTER OF :

M/s. Dolce Pharmaceuticals Pvt. Ltd.

Mr. Vijay Vasant Dhavale
502, Ompriyanka CHS,
Prataprao Gujar Marg,
Neelam Nagar, Mulund-(E)
Mumbai 400 081.

).....Petitioner.

Versus

1. M/s. Dolce Pharmaceuticals Private Limited)
An incorporated company having registered Office)
At 101, Beena Apartment, Opp. Ram Mandir)
Navpur Road, Boisar, Taluka Palghar, Boisar.)
2. Mr.Nagesh Shripad Jere, and adult Indian)
inhabitant, residing at 16,Dhuswadi Haribhau,)
Ram mandir, Thakurwar, Mumbai – 400 002.)
3. Mrs. Sulochana Nagesh Jere, adult, Indian)
Inhabitant residing at 16, Dhuswadi, Haribhau,)
Ram Mandir, Thakurwar, Mumbai-400002.)
4. Gopalkumar Prabhakumar Nair, adult, Indian)
inhabitant, residing at)
H.No.8A Bunglow Khairaphatak,)
Sushil Nagar, Boisar E, 401501)

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5. Mrs.Rakhi Gopalkumar Nair, adult, Indian)
inhabitant, residing at)
H No.5413, Plot No.8, Sushil Nagar, Saravali,)
Tuluka Palghar, Dist, Thane,)
Thane, 401501, Maharashtra.).....Respondents.

PRESENT ON BEHALF OF THE PARTIES

FOR THE PETITIONER

Mr.B.B.Parekh Advocate.

FOR THE RESPONDENTS.

Mr. R.T. Gaj Guroo, Advocate

INTERLOCUTARY ORDER

Date of Hearing : 6th April, 2017

Date of Pronouncement: 01st May, 2017.

- 1) This Petition was filed before the erstwhile CLB on 20/04/2015 by the Petitioner who is stated to be one of the Promoter Director of the Company M/s Dolce Pharmaceuticals Pvt. Ltd. (R-1) Incorporated on 23.11.1994. The Petition is filed U/s 59 of the Company Act 2013 (hereinafter referred as The Act). The main object of the Company is to manufacture, trade sale etc. of the Pharmaceuticals products.
- 2) That the Petitioner is a qualified Architect of 1981 batch and holding 10 equity shares of Rs.100/- per share. Likewise the R-2, Mr. Nagesh Jere, at that time working in a Pharmaceutical Company, was holding 10 shares each of Rs. 100/- only. Hence each having 50% share holding to run the Company as a quasi-partnership. The date of allotment as per share certificate was 30/11/1994. The Company acquired a plot bearing no. J/94 admeasuring 1000 sq. mtrs at MIDC Boisar, for construction of factory premises. The Company had raised a loan of Rs.30,00,000/- Abhyubaya Cooperative Bank. The Petitioner had raised an issue of inflated bills and a payment by cheque of Rs. 27,77,000/-, however later on the impugned payment was stopped.
- 3) Subsequently, in the year 1996 (around 31/03/1996) , the authorized capital of the Company of Rs. 2,000/- was raised to Rs. 2,57,000/- . The allegation is that without proper authorization or Board meeting a unilateral decision was taken. The Respondents have issued 1000 shares to R-2 , 1000 shares to the father of R-2 and 550 shares to Mrs. Sulochana Jere R-3 (wife of R-2). That thereafter on the death of father of R-2 his 1000 shares were also transmitted in the name of Respondent No.2 without the knowledge of the Petitioner and without holding

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Board meeting. No shares were allotted to the PETITIONER. According to the Petitioner he was entitled to 1275 shares to constitute 50% holding of the Share Capital. It was an understanding that the Petitioner and the Respondent-2 shall remain always as equal stakeholders, however diluted from 50% to 0.39% . In the Petition it is further informed that R-2 had partly transferred out of his shareholding few shares in favor of R-4 and R-5 i.e. Mr. Gopal Nair and Mrs. Rakhi Nair.

- 4) The next allegation is that the Petitioner is removed from the Directorship without due process of law and removal was not only *malafide* but *void ab initio*.
- 5) That the Petitioner had doubted the integrity and loyalty of Respondent-2 hence caused an inspection of Registrar of Companies around 12.10.2010. The Petitioner had also filed a Petition before the Company Law Board bearing No. 25 of 2012. That Petition was dismissed on 28.05.2013 on law point of Limitation but side by side vide that order the Petitioner was reinstated as Director . An Appeal was also filed U/s 10(f) of the Act bearing No. 9 of 2014, however, dismissed by the Hon'ble Bombay High Court.
- 6) That after the order of the Hon'ble CLB (dated 28/5/2013) through which the Petitioner was reinstated , the Petitioner had received a notice on 22/7/2013 about the Board Meeting to be held on 9/8/2013. Vide a letter dated 6/8/2013 the Petitioner on health ground had excused himself from the said meeting. Thereafter another notice dated 25/10/2013 was received for convening a Board Meeting scheduled for 15/11/2013. In the Petition there is a mention of ' leave note ' of the Petitioner intimating not to attend another Board Meeting. There is a reference of such Board Meeting scheduled for 5/7/2014. Consequently the Company has initiated proceedings for removal prescribed U/s 169 of the Companies Act 2013. Vide a Notice dated 21/01/2015 a Board Meeting was fixed for 28/01/2015 with an Agenda to remove the Petitioner on the ground that the Petitioner had not attended the meeting in the previous calendar year. Finally on receiving a notice U/s 115 of the Companies Act 2013 EOGM was held on 21/02/2015 and resolution was passed to remove Petitioner from Directorship.
- 7) In the light of the above factual matrix the Petitioner had sought relief in this Petition as under :-

"a) The delay if any in filing this present Petition be condoned.

b) The name of the 3rd and 4th Respondents (correct is R-4 & R-5) illegally placed on the Register of Members of the 1st Respondent Company without any sufficient cause may kindly be removed.

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- c) *The purported resolution dated 21.02. 2015 stated to have been passed by the 1st Respondent Company in the alleged requisition meeting of even date purportedly removing the Petitioner as a Director of the 1st R3espondent Company be quashed or suspended in exercise of jurisdiction vested in this Hon'ble Forum.*
- d) *Pending hearing and final disposal of the Petition Respondents, their agents, servants or anybody acting or purporting to act on their behalf may be restrained by an order of injunction of this Hon'ble Court from preventing or seeking to prevent the Petitioner functioning as a director or 1st Respondent Company.*
- e) *Such other and further reliefs as this Hon'ble Court may deem fit and proper.*
- f) *Cost of this Petition be provided for."*

8) **PRILIMINARY OBJECTION OF THE RESPONDENT :-** The Respondent has raised a preliminary legal question through a written reply (filed on 5/10/2016) on the ground of applicability of principles of "RESJUDICATA" relevant portion is reproduced below :-

" THAT, The Petitioner falls under the doctrine of "RESJUDICATA" as the points of litigations were already finally decided between the same litigants in the CP No.25 of 2012 by the then Hon'ble Mumbai Bench of the earstwhile Company Law Board. Not only this but also the Appeal against the said Order was dismissed by the Hon'ble High Court of Bombay on the grounds of abnormal delay more than 7 years. All these facts have been agreed to by the Petitioner in his Petition. In this Petition also same facts have been repeated except of the changing section number. Even the present petition is beyond the limitation period."

9) A ' Rejoinder' of the Petitioner (filed on 24/10/2016) is on record wherein a reliance has been placed on a report of a Learned Company Secretary dated 11/6/2015 who had on inspection of ROC Records reported few information to the Petitioner. However , on perusal it is noticed that there is no discussion opposing the applicability of principles of " RESJUDICATA ". The main emphasis in the REJOINDER is on the furnishing of Annual Return and Balance Sheet belatedly in the year 2010. There is one more objection about non-joining of issue by Respondent No.2 , especially not filing of Reply . It is noticed that in this Rejoinder vide para (4) and para (5) the Petitioner had again raked up the issue of dilution of share holding (enhancement of capital to Rs. 2,57,000/- and allotment of 2010 shares to R-2 , 550 shares to R-3 (around 31/03/1996) of the Petitioner by allotment of shares to other Respondents and induction of R-4 and R-5, reproduced below :-

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"4. With reference to para 2 of the said reply, I emphatically deny that I am holding only 10 equity shares of Rs.100/- each on the date of the Petition in the paid up capital of the Company consisting of alleged 2570 of Rs.100/- each. I further deny that the present Petition being under Section 59 it is not required to meet the criteria for the institution of the petition under Section 244 of the Companies Act,2013. This averment is without prejudice that my shareholding in the Company has been falsely brought down by illegal action of Respondent No.2 and the Respondents No.s 4 & 5 as beneficiaries and collaborators.

5. I further say that I being one of the promoter/director of the 1st Respondent Company along with my co-founder of the Company Mr. Nagesh Jere – Respondent No.2 with who I had basic understanding of being equal stake holder which he vouched as back as 2002 in the Company, has defrauded me by unlawfully inducting the Respondents No. 4 & 5 in rampant violations to the provisions of law and the said Mr. Nagesh Jere – Respondent No.2 is conveniently keeping himself out of the picture so as to hide truth."

Certain other old facts have been discussed such as construction of factory building around 1998 on plot no. J 94 MIDC Tarapur, loan by Petitioner of Rs. 12,00,000/-, reference of decree dated 18/11/2006 directing R-4 to pay Rs. 13,59,139/- to R-4etc., but the question of Resjudicata appears to be not dealt with therein.

- 10) From the side of the Petitioner Ld. Counsel Mr B.B. Parekh appeared and pleaded that the question of "Resjudicata" is not applicable on the facts of this Petition. It is vehemently pleaded that merits of each case determine this legal question. His next argument is that if a case had not been decide on merits than the principal of Res judicata shall not apply in a subsequent suit. According to Ld. Counsel in this case previously the Petition was not decided on merits but dismissed on the issue of limitation. Rather referring an observation of Hon'ble Bombay High Court in this case (Company Appeal no. 9of 2014) order dated 4/3/14 he has pointed out that it was specifically mentioned that there was no necessity to examine the case on merits because a question of law of delay is involved. Mr. Parekh has further elaborated that an ex-parte decree if passed against a litigant than such decision must be taken as a final decision passed after

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hearing on merits. Next point he has argued that the issue raised in the previous suit must be **directly** and **substantially** involved in the later suit. In that situation the later suit filed is at least hit by constructive re-judicata. Therefore, vehemently contended that this being the position when in the previous verdict the merits have not been adjudicated upon hence the present Petition is not hit by the principal of res-judicata. By placing reliance on the facts of this Petition, as discussed hereinabove, he has concluded that the events took place previously and subsequent to the filing of the first Petition, both, are now required to be adjudicated and addressed on merits. The list of case-laws relied upon are as under :-

- (1) Saroja Vs. Chinnusamy (Dead) – (AIR 2007 SUPREME COURT 3067)
- (2) Madhurkar D Shende, Appellant Vs. Tarabai Aba Shedage, Respondent – (AIR 2002 SUPREME COURT 637)
- (3) Escorts Farms Ltd. Appellant Vs. Commissioner, Kumanon Division, Nainital and others, Respondents. (AIR 2004 SUPREME COURT 2186)
- (4) Sheodan Singh, Appellant Versus Daryao Kunwar, Respondent (AIR 1966 SUPREME COURT 1332 (V 53 C 257)

- 11) From the side of the Respondent Ld. Advocate Mr. R.T.Raj Guroo strongly opposed the proposition that res-judicata do not apply in this case by placing vehement reliance on Sec. 11 of CPC . According to him on these very facts a final view had already been taken by the Hon'ble CLB and High Court that the issue raised in barred by limitation hence. Admitted factual position is that the question of allotment of shares and other allied issued have already been held as barred by limitation. Merely by repeating that very issue in a subsequent Petition do not change the position of Limitation. He has thus pleaded that at the very threshold the principle of res-judicata be applied and to held that the Petition is barred by limitation as already held hence to be dismissed as non-maintainable. Decided cases relied upon is listed below :-

ESQUIRE ELECTRONICS

Vs.

NETHERLANDS INDIA COMMUNICATIONS ENTERPRISES LTD.

(2016) 135 CLA 267 (NCLT) 6TH October, 2016



- 12) **FINDINGS :-** Heard both the sides at length. Carefully perused the pleadings. Examined the evidences placed on record in the light of the precedents cited. To deal with the preliminary objection it is necessary to examine the provisions of Section 11 of the Code of Civil Procedure which says that :-

Section 11 RESJUDICATA – *No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*

It is Doubtless, the principle of Resjudicata is a fundamental doctrine of Law, that there must be an end to litigation. This general doctrine is founded on consideration of high Public Policy to achieve two objectives namely, i) that there must be a finality to litigation and ii) that the individual should not be harassed twice over on account of the same litigation. A judicial decision passed by a competent court thus binds the parties in litigation. To apply this provision it is requisite to see that whether the present issue was directly and substantially raised in the former suit ?. It is also to be ascertained that whether the parties are the same and whether the former litigating was under the same title before a competent court. It is also necessary to ascertain that the issues so raised should have been heard and finally decided in the former suit.

So as to examine these basic ingredients, inter-alia, in the order passed earlier by the then CLB in CP No. 25 of 2012 order dated 20th May, 2013 titled as 'Mr. Vijay Vasant Dhavale Versus M/s. Dolce Pharmaceuticals Pvt. Ltd. & Others', the facts narrated were as under:-

" 2. The brief facts stated in the petition are that the R1 Company is a private Limited Company incorporated on 23/11/1994 having its registered office at i.e. Dhuswadi, Haribhau, Ram Mandir, Thakurdwar, Mumbai-400 002. The R1 Company is in the business of manufacturing/ trading of drugs, chemicals, pharmaceuticals, patent medicines, medical preparations, etc. The Petitioner was holding 10 equity shares of Rs.10- each in the Company along with the R2 who was holding 10% shares and thus shareholding of both of them constituted constituting to 50% of total issued subscribed and paid-up capital of the company. Besides both them were the directors of the R1 Company.

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3. It appears that there was no dispute until end of September, 2005. In September 2005 the Petitioner came to know from the records of the ROC that R2 without informing the Petitioner, increased the paid up capital of R1 Company from Rs.2,000/- to Rs.2,57,000/- and purportedly allotted 2000 shares of Rs.100/- each in his own name and 550 shares in the name of his wife Mrs. Sulochana Jere unilaterally. According to the Petitioner, no Board meeting took place nor was any Board Meeting called for such purpose. Further, he did not receive any notice for such Board meeting nor he ever attended such meeting. According to the Petitioner, by the said illegal act of the R2 and his wife his shareholding was diluted from 50% to 0.39% which clearly proves the malafide intention and illegal act on the part of the Respondents to exclude the Petitioner from the management of the Company which is contrary to all norms of corporate governances. Further, issue of additional shares in the said manner thereby converting the majority into a significant minority amounts to grave act of oppression."

3.1. The question of maintainability on the ground of inordinate delay has been considered and decided by the respected CLB as under:-

"21. I have considered the submission advanced by the Ld. Counsel for the R3 and R4. The Ld. Counsel for the Petitioner failed to give any satisfactory answer to the inordinate delay caused in filling the petition, which itself is evident from the perusal OF THE PLEADINGS OF THE PETITION. The Petitioner has admitted in para No.13 of the petition that he came to know about the allotment of additional shares, appointment of R3 and R4 from the Annual Return filed by the R1 Company for the AGM held on 30/09/2005 available in the record of ROC. In para No.18 of the petition he has further admitted that the R2 did not allow the Petitioner to participate in the affairs of the company which is evident from the notice dated 21/09/2007 of his removal from directorship of the company sent by R2 to the Petitioner making the charges that he Petitioner did not attend three consecutive meetings. However, the Petitioner did not give any satisfactory and cogent reason as to why he kept silent for all 7 years and why he approached this Bench so belatedly in the year 2011. In Rejoinder also, the Petitioner did not explain any reason as to why he approached this forum so late. It is settled law that if there is inordinate delay and laches in the Petition the Petitioner is not entitled for any relief on equitable basis as held in the following cases:"

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"22. Having considered the submission advanced by the Ld. PCs for both the sides in the light of law stated above, I find force in the submissions the Answering Respondent. From the perusal of the pleadings, it is evident that the acts complained by the Petitioner were in his knowledge since 2005 but taking no action until 2012 against the Respondents, in my view it a sufficient ground to reject the claim of the Petitioner. It is a trite law that a party who seeks equity must do equity. In my view, the Petitioner is himself guilty of inordinate delay and laches in bringing their grievances for appropriate redressal by way of filing the petition within a reasonable period. I, therefore, hold that the action challenged by the Petitioner and the relief sought by him are not sustainable."

13) The said decision of the respected CLB was challenged by the Petitioner before the Hon'ble High court and in Company Appeal No.9 the Hon'ble Bombay H.C. vide order dated 4th March 2014 has held as under:-

"2. It is not, in my view, necessary to examine the appellants case on merits. It must be borne in my mind that a Company Court exercising jurisdiction under Section 10F of the Companies Act is not a first appellate Court. There must be, before it, a question of law. The impugned order in paragraph 21, and more particularly in paragraph 22, holds that there is a gross, inordinate and unexplained delay on the part of the petitioner / appellant himself. This delay is not of few day or even a few months: it is of seven years, if not more. On facts, the Company Law Board found no explanation for this delay. It is on that basis that the Company Law Board held that the petitioner is not entitled to any equitable relief."

14) In view of the above factual and legal position I am of the conscientious view that the relief claimed vide para 10 (b) of the Main Petition, that "the name of the fourth and fifth Respondents, respectively namely Mr. Gopalkumar Prabhakumar Nair and Mrs. Rakhi Gopalkumar Nair, illegally placed on the Register of Members of the first Respondent Company, without any sufficient cause, may kindly be removed." **had already become barred by limitation.** The dates on which the said impugned event took place, had been held as the date on which the Petitioner was required under law to initiate the legal proceedings however took the action in the year 2012 against the Respondents which was held as sufficient ground to reject the claim of the Petitioner being barred by limitation. Even by the repeated litigation the facts could not be changed as well as the dates could not be altered

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therefore the result shall also not get effected. Once an event had been held as barred by limitation and not entertained for due adjudication on merits, that event or cause of action shall always remain thereafter that too forever as barred by limitation. As far as the question of application of Resjudicata is concerned, definitely the issue of allotment of shares to Respondent No. 4 & 5 should not be re-adjudicated being repetitive in nature already stood finally decided by a competent court. I have no hesitation in holding that the said issue was exactly the issue directly and substantially raised in the former Petition (CP No.25 of 2012), hence barred by the principle of Resjudicata. For the sake of brevity it is felt that the case laws cited supra are not required to be discussed at length.

15) The Petitioner has claimed another relief vide para 10 (c) of the Main Petition, reproduced for ready reference:-

"The purported resolution dated 21.02.2015 stated to have been passed by the 1st Respondent Company in the alleged requisition meeting of even date purportedly removing the Petitioner as a Director of the 1st Respondent Company be quashed or suspended in exercise of jurisdiction vested in this Hon'ble Forum".

16) The admitted factual position is that the respected CLB vide para 23 of the order dated 20th May, 2013 had directed the Company to induct the Petitioner as a Director. Consequence thereupon a Notice of Board Meeting dated 22-07-2013 was circulated to intimate the date of the meeting stated to be convened on 9th Aug. 2013. However the Petitioner had excused himself on medical grounds. Records of the case have further revealed that another notice for Board Meeting dated 25th Oct. 2013 was circulated proposing to convene a Board Meeting on 15-11-2013. The Board meeting was repeated vide notice of 16th May 2014 intimating the date of meeting to be convened on 24-05-2014. The Petitioner was removed from the Board of Directors by passing a resolution vide EOGM held on 21st Feb. 2015 by invoking the provisions Section 169 of Companies Act 2013.

17) From the dates as narrated herein above there is no two opinion that the event of removal of the Petitioner took place after the order passed by the CLB. Due to this reason, obviously, the event which took place as a consequence of the order as well as after the passing of the said order, naturally had not been taken into consideration by the CLB and therefore the event took place subsequent to



the said order must not hit by the principle of Resjudicata. It is worth to mention at this juncture that this Petition, now under consideration, had been filed on 21st April, 2015. I have already discussed in above paragraphs the conditions under which the principle of Resjudicata is required to be applied. As a result the issue of removal of the Petitioner from the Directorship vide EOGM held on 21st Feb. 2015 do not fall within the ambits of "Resjudicata". As a consequence it is justifiable to hold that this question / relief is required to be adjudicated upon as raised in the Main Petition now under consideration. I hold accordingly.

18) In order to adjudicate relief claimed vide para 10 (c) of the Main Petition the hearing is now **fixed for 30th June, 2017**. This is the only issue left open for adjudication on the next date of hearing. The Registry is directed to intimate the concerned parties the next date of hearing. Ordered accordingly.

Sd/-

M.K. SHRAWAT
MEMBER (JUDICIAL)

Date: 1st May, 2017.