**IN THE NATIONAL COMPANY LAW TRIBUNAL,
CHANDIGARH BENCH, CHANDIGARH.**

**CA No. 34/C-II OF 2016 /
R.T. No. 22 A/2016
IN
CP No. 50 (ND) of 2010**

Date of order: 09.01.2017

IN THE MATTER OF SECTION 634-A OF THE COMPANIES ACT, 1956 REGULATION 44 OF COMPANY LAW BOARD REGULATIONS, 1991 FOR EXECUTION OF JUDGEMENT/ORDER DATED 13.08.2015 AND REGULATION 43, 44 & 45 OF CLB REGULATIONS 1991 FOR CLARIFICATION OF JUDGEMENT DATED 13.08.2015.

Maschinen Umwelttechnik Transportanlagen Gesellschaft GmbH ....Petitioner

Versus

Oswal F.M. Hammerle Textiles Limited & Ors. ...Respondents

Present: Mr. Amit Bansal, Advocate and Mr. Jayant Goel, CA for petitioner.
Mr. U.K. Chaudhary, Senior Advocate with Mr. Praveen Gupta and Mr. Himanshu Vij, Advocates for respondents.

**CORAM: HON'BLE MR. JUSTICE R.P. NAGRATH,
MEMBER (JUDICIAL)
HON'BLE MS. DEEPA KRISHAN,
MEMBER (TECHNICAL)**

DEEPA KRISHAN, MEMBER (TECHNICAL)

Order.

In Company Petition 50 (ND) /2010 filed under Sections 397, 398 & 402 of the Companies Act, 1956 by Maschinen Umwelttechnik Transportanlagen Gesellschaft GmbH (hereinafter referred to as MUT or HAHNL Group) versus Oswal F.M. Hammerle Textiles Limited & Ors. (hereinafter referred to as Oswal Group), Company Law Board, New Delhi passed a judgement/order dated 13.08.2015. The petitioner HAHNL Group filed Company Application 11/C-II of 2016 / RT No. 1/Ex/Chd/2016 dated

2.2.2016 for execution of the above mentioned judgement. Thereafter petitioner filed the instant CA No. 34/C-II/2016 dated 26.02.2016 under Regulation 43, 44 & 45 of Company Law Board Regulations, 1991 for clarification of judgement/order dated 13.08.2015.

2. On the notification of National Company Law Tribunal w.e.f. 1.6.2016 all the cases pending before the erstwhile Company Law Board were transferred to the concerned jurisdiction of N.C.L.T. i.e. NCLT, Chandigarh Bench including the instant case.The petitioners had also filed CA No. 46/Pb/2016 dated 28.03.2016 before the Principal Bench, NCLT, Delhi praying that the instant case be transferred to the Mumbai Bench of the NCLT to be heard by Hon'ble Mr. BSV Prakash Kumar, Member (Judicial), Mumbai Bench as the CLB order dated 13.8.2015 (which is sought to be rectified by this application), was pronounced by him. During arguments, Petitioner stated that CA 46/2016 was withdrawn. Record of CP-50 (ND)/2010 along with CA 11-C/2016 / RT No. 1/Ex/Chd/2016 and CA 34 C-II/2016 / RT No. 22 A/2016 was received on transfer by Chandigarh Bench of NCLT and the first notice for hearing was issued on 16.08.2016.

3. The petitioner's counsel had filed CA No. 11/C-II of 2016 / RT No. 1/Ex/Chd/2016 on 2nd Feb 2016 under Section 634-A for execution of CLB's order. In view of CA No. 34/C-II of 2016 / RT No. 22 A/2016 filed by the petitioner for clarification of the CLB's order dated 13.08.2015, the application under Section 634-A of the Companies Act, 1956 is not argued at this stage.

4. The instant CA No. 34 /C-II of 2016 / RT No. 22 A/2016 was filed on 26.2.2016 by the petitioner. This is an application under Regulation 43, 44 and 45 of the Company Law Board Regulations, 1991 for clarification of order dated 13.8.2015. It is stated that the CLB had passed this order directing that the applicant therein be given exit from the R-1 company on fair valuation of their 18.11% shareholding on the date of filing of the petition and further appointed M/s Ernst and Young to value the share of the company on date of the filing of the petition. The relevant portion of this judgement dated 13.8.2015 is reproduced below:-

"104. Since HAHNL GROUP and Oswal Group have not been trusting each other and they are busy running their own business since it has already been held that Oswals set up OFMHT with the technology, technical know-how and with the trade name of FM Hammerle, they shall provide honourable exit to the HAHNL Group on fair valuation to get a fair valuation to the shares of MUT, OFMHT's shares shall be valued taking 31.3.2010 as cut-off date and provide exit within 60 days from the date valuation report come from the valuer to the company.

105. For valuation of the share of the company, M/s Ernest and Young has been appointed to value the shares of the company and thereafter to calculate the value of the shares of HAHNL Group, taking 31st March, 2010 as cut off date. On valuation of those shares, OFMHT shall pay the value of the shares to MUT along with interest at the rate of 15% from 31.3.2010 till the date of realisation. The valuation shall be provided to OFMHT and HAHNL Group within 60 days from the date of receipt of this order. Oswals and HAHNL Group shall bear the remuneration proportionate to their shareholding in the company as agreeable to the valuer."

5. The learned counsel of the petitioner argued that an error had crept in Para No. 105 inadvertently and or on account of over sight. Instead of requiring Oswal Group or Vardhaman Polytex Ltd (R-2) to pay the value of shares to MUT (petitioner), it is stated that OFMHT shall pay the value of shares to MUT.The counsel argued that had it been the intention of CLB that OFMHT were to buy the shares of MUT, this would have been a case of

company buying back its own shares and the CLB would have made some observations regarding compliances/preconditions or waive off provision of Section 77 (a) of the Companies Act, 1956. The counsel further argued that this clerical mistake or error arising from accidental slip or omission may be corrected under Regulation 45 read with Regulation 44 of CLB Rules, 1991.

5.2 CA 34/C-II of 2016 / RT No. 22 A/2016 has been filed under Regulation 43, 44 & 45 of the Company Law Board Regulations, 1991. These Regulations are reproduced below for ready reference:-

*"43. **Enlargement of time-** Where any period is fixed by or under these regulations or granted by a bench, for the doing of any act, or filing of any documents or representations, the bench may, in its discretion, from time to time, enlarge such period, even though the period fixed by or under these regulations or granted by the Bench may have expired.*

*44. **Saving of inherent power of the Bench.-** Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Bench to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Bench.*

*45. **Amendment of order. -** Any clerical or arithmetical mistake in any order of the Bench or error therein arising from any accidental slip or omission may, at any time, be corrected by the Bench either on its own motion or on the application of any party."*

5.3 The corresponding Rule 154 of NCLT Rules 2016 which corresponds to rule 44 of the CLB Regulations, 1991 is also reproduced below:

*"154. **Rectification of order.-** (1) Any clerical or arithmetical mistakes in any order of the Tribunal or error therein arising from any accidental slip or omission may, at any time, be corrected by the Tribunal on its own motion or on application of any party by way of rectification.*

(2) An application under sub-rule (1) may be made in Form No. NCLT-9 within two years from the date of the final order for rectification of the final order not being an interlocutory order. "

5.4 The learned counsel for the petitioner argued that as per Para 105 of CLB's Order dated 13.8.2015, the R-1 company is to purchase the petitioner's share. This is as per sub-sections (b) & (c) of Section 402 of Companies Act, 1956, which reads as follows:-

Section 402 Powers of Company Law Board on application under Section 397 or 398 - Without prejudice to the generality of the powers of the Company Law Board, under Section 397 or 398 any order under either section may provide for –

(a) ----------
(b) the purchase of the shares or interest of any members of the company by other members thereof or by the company;
(c) In the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital.

The corresponding Section 242 of the Companies Act, 2013 has similar provisions which are reproduced below: -

***Section 242 (1) Powers of Tribunal** If on any application made under section 241, the Tribunal is of the opinion ----------*
(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for –
(a) -------
(b) The purchase of shares or interest of any members of the company by other members thereof or by the company;
(c) In the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital.

5.5 It is also stated in the Company Application 34/C-II/2016 / RT No. 22 A/2016 that the judgement dated 13.8.2015 has been challenged by the respondents by way of an appeal before the Hon'ble High Court of Punjab and Haryana in Appeal No. CAPP/45/2015 and CAPP 47/2015. It was further clarified that the appeal was still pending in the Hon'ble High Court and no interim stay has been granted on the operation of CLB's order dated 13.8.2015.

5.6 It was further stated in the company application No. 34/C-II/2016 / RT No. 22 A/2016 that the respondent company has been referred to BIFR on account of the gross mismanagement of the Company. The learned counsel for the parties have, however, admitted during arguments that the factum of the company having been referred to the BIFR was not brought to the notice of Company Law Board because the judgement was reserved after conclusion of arguments and order of BIFR was passed on 17.7.2015 subsequently as is apparent from reply to the Execution Application under Section 634 (A) of the Companies Act, 1956. However, the case was admitted by the BIFR as Case No. 91/2015 in which it issued directions vide order dated 17.07.2015, interalia ordering that "the company is restrained from alienating or transferring or otherwise creating any third party rights or disposing off in any manner, in respect of their immoveable assets of the company, without the prior approval of the Board."

5.7 The learned petitioner's counsel raised the following arguments to seek clarification of the CLB's order on the ground that there is an error within the ambit of Regulation 45 of the Company Law Board Regulations, 1991

(a) There is inconsistency between the language of paragraphs 104 and 105 of the judgement dated 13.08.2015.

(b) There was no specific mention of purchase by the company and consequent reduction of its share capital.

(c) R-1 co. is a loss making company with its reserves and surplus wiped out and is presently in BIFR. Accordingly, R1 co. will not be able to purchase the petitioner's shares and give it an honourable exit.

(d) BIFR order restraining R-1 co. leaves the petitioner relief less. The respondents are benefiting from their own actions of approaching BIFR.

(e) Purchase of shares by the co. would amount to reduction of capital that as per Supreme Court judgement in the case of Cosmosteels (1978) 1 SCC 215) has serious consequences for the company's creditors.

5.8 The petitioner's counsel has also cited several judgements to support his case. It was stated that the execution application vide CA No. 11/C-II/2016 / RT No. 1/Ex/Chd/2016 was filed under the impression that the majority shareholders will buy him out.

6. In the reply to the CA 34/C-II/2016 / RT No. 22 A/2016 the respondents have vehemently opposed the CA and stated that the petitioners are trying to get the order dated 13.8.2015 modified on knowing that execution against R-1 company is difficult in view of the pending reference before BIFR. They have also stated that the CLB order dated 13.8.2015 is pending before the Hon'ble Punjab and Haryana High Court and there is no clerical or arithmetical mistake arising out of any accidental slip or omission in the order dated 13.8.2015.

6.2 The respondent's counsel argued that CA 34/C-II/2016 was malafide. He argued that the CLB order was passed on 13.8.2015 but despite several letters written by the petitioner to the valuers, they did not raise the question of an error having crept in. Even when appeal was filed by the respondent on 5.10.2015 against the CLB's order and the petitioner was already on caveat, the petitioner did not point out any so called error.

Even while filing the execution application under CA 11/C-II/2016 / RT No. 1/Ex/Chd/2016, no errors were pointed out by the petitioners. He further stated that as per para-4 of CA 11/C-II/2016 / RT No. 1/Ex/Chd/2016, it is stated that valuator is to provide the valuation of the shares to OFMHT and HAHNL group. The said application also contained verbatim reproduction of para 104 and105 of the judgement dated 13.8.2015. The respondent's counsel, therefore, argued that despite so many occasions when the petitioners have reproduced and referred to the impugned portions of the said judgement, they did not detect any clerical or arithmetical mistake or error therein arising from any accidental slip or omission. Thus, the petitioner cannot argue that there was an accidental error in para 105. Hence the respondent's counsel argued that in Para 105 OFMHT has been put in deliberately as the petitioner invested in OFMHT by giving them technology. The respondent's counsel summed up his arguments by referring to several judgements and stated that there was no case of accidental error or omission or any clerical or arithmetical mistakes within the meaning of Regulation 45 of the Company Law Board Regulations, 1991which would have been detected immediately but a case of seeking review of the orders. The petitioner's counsel clarified that he was not seeking review of the order.

7. The petitioner in his rejoinder admitted their mistake in not detecting the error, but stated that the error was not malafide but genuine.

7.2 The learned counsel for petitioner has referred certain judgements in support of his contention. In the Madras High Court judgement of Shoes Specialities Pvt. Ltd. and others Vs. Standard

Distilleries and Breweries P. Ltd. and others dated 16.10.1996 (MANU/TN/0114/1996) wherein the High Court at length discussed whether CLB became functus officio after issuing the order. In para 10 of the instant judgement it was held that the Board was not functus officio, but retained seisin over the matter. However, this judgement is distinguishable on facts as in that case the Board while disposing of the petition had stated that "both the parties are at liberty to approach us in case of any difficulty in convening the general meeting."

7.3 The other contention of the learned petitioner's counsel was based upon the judgement of Hon'ble Supreme Court in the Cosmosteels Pvt. Ltd. (supra) that the very fact that Company Law Board in the final order dated 13.08.2015, has not indicated the consequent reduction in the share capital of the company as required by clause (c) of Section 402 of 1956 Act, is indicative of the clerical or arithmetical mistake arising from any accidental slip or omission. We are of the view that the direction to the company for purchasing the shares of the applicant-petitioner by the company in the penultimate paragraph of the order dated 13.08.2015 of the Company Law Board, would itself amount to reduction of the share capital as a natural consequence of the aforesaid provision and can by no means be considered as a clerical or arithmetical mistake arising from any accidental slip or omission. The Hon'ble Supreme Court observed that Section 77 of the 1956 Act leaves no room of doubt that reduction of a share capital may have to be brought about in two different situations by two different modes, in Cosmosteels Pvt. Ltd (supra). One is where the company has passed a resolution for reduction of its share capital and

submitted it to the court for confirmation of the procedure prescribed by Section 102 to 104 will have to be complied. The Hon'ble Supreme Court held that where the court while disposing of the petition under Section 397 and 398, gives a direction to the company to purchase share of its own members, the consequent reduction of the share capitals is bound to ensure, but before granting such a direction, it is not necessary to give notice of the consequence reduction of the share capital to the creditors of the company.

8. Learned Senior Counsel for the respondent has referred to Supreme Court judgement titled Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury (1995)1SCC 170. That was rather a case of review of the judgement and not only to remove clerical or arithmetical mistake in the order. The Supreme Court in Meera Bhanja case (supra) referred to the following observations in the case Satyanarayan Laxmi Narayan Hegde and Ors. V. Mallikarjun Bhavanappa Tirumale MANU/SC/0169/1959 : [1960] 1 SCR 890, in connection with an error apparent on the face of the record:

> *"An error which has to be established by a long drawn process of reasoning on point where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the power of the Superior Court to issue such a writ"*

8.2 Learned Senior counsel for respondents also referred to Apex Court's judgment in the case of State of Punjab Vs. Darshan Singh (AIR 2003 SC 4179) wherein while discussing section 152 of the Code of

Criminal Procedure, 1973 (which is identical to Rule 154 of NCLT Rules, 2016 and Regulation 45 of Company Law Board Regulations 1991), The Apex Court observed that *"section 152 provides for correction of clerical or arithmetical mistake in judgements, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgement, decree or order. The settled position of law is that after the passing of the judgement, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot, on mere change of view, is not entitled to vary the terms of the judgements, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefore and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgement earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgement, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party if at all is to file appeal or revision before the higher forum or review application before the very forum, subject to the*

limitations in respect of such review. It implies that the Section cannot be pressed into service to correct an omission which is intentional, however erroneously that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of Code even after passing of effective orders in the lis pending before them. No Court can, under the cover of the aforesaid section, modify, alter or add to the terms of its original judgement, decree or order. Similar view was expressed by this Court in Dwaraka Das v. State of Madhya Pradesh and another MANU/SC/0088/1999 : [1999]1SCR and Jayalakshmi Coelho v. Oswald Joseph Coelho MANU/SC/0145/2001 : [2001]2SCR207".

8.3 It was also held by the Apex Court in Bijay Kumar Saraogi vs. State of Jharkhand (2005) 7SCC 748 that Section 152 of the Code of Civil Procedure cannot be invoked for claiming a substantive relief which was not granted under the decree or as a pretext to get the order which has attained finality, reviewed.

9. Thus it is clear that Regulation 45 of Company Law Board Regulations, 1991 can only be invoked for correction of any clerical or arithmetical mistake in any order of the Board or error therein arising from any accidental slip or omission. We are of the view that in the instant case where a detailed judgement has been passed by CLB, it cannot be said that there is any clerical or arithmetical mistake in the order of the Board or error therein arising from any accidental slip or omission. The same was not detected by the petitioners despite their filing CA No. 11/C-II/2016 / RT No. 1/Ex/Chd/2016 for execution of the order dated 13.08.2015 despite reproducing the relevant paragraphs of the order verbatim in their petition.

The so called mistake or error was detected only after about six months of passing of the order and CA No. 34 C-II/2016 / RT No. 22 A/2016 was filed on 26.2.2016. Thus it cannot be said that the order of the CLB that on valuation of those shares, OFMHT shall pay the value of shares to the applicant in Para 105 has any clerical or arithmetical mistake or error therein arising from any accidental slip or omission, for which remedy under Regulation 45 of Company Law Board Regulations, 1991 can be sought. Accordingly, the petitioner's CA No. 34 C-II/2016 / RT No. 22 A/2016 is dismissed.

(JUSTICE R.P. NAGRATH)
Member (Judicial)

(DEEPA KRISHAN)
Member (Technical)

January 09, 2016