

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) No. 217 of 2017**

**(Arising out of Order dated 1<sup>st</sup> May, 2017 passed by the National Company Law Tribunal, Mumbai Bench, Mumbai in Company Petition No. 6/59/CLB/MB/MAH/2016)**

**In the matter of :****Mr. Vijay Vasant Dhavle****... Appellant****Versus****M/s. Dolce Pharmaceuticals Private Limited and Others.****... Respondents**

**Present : For Appellant : Shri Virender Ganda, Senior Advocate with Mr. Iswar Mohapatra and Mr. Tarun Mehta, Advocates.**

**For Respondents: Mr. Rudreshwar Singh, Mr. Kaushik Poddar, Advocates for Respondent No.1, 4 & 5.**

**J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant/Petitioner preferred a petition under Section 59 of the Companies Act, 2013 in the year 2015 before the erstwhile Company Law Board with relief as prayed therein. On the constitution of the National Company Law Tribunal (hereinafter referred to as "Tribunal"), the petition was transferred before Mumbai Bench, Mumbai, as C.P.No.6/59/CLB/MB/MAH/2016. By impugned order dated 1<sup>st</sup> May,

2017, the Tribunal noticed the relief as claimed by the Appellant/Petitioner at para 10 (b) of the main petition that the names of the 4<sup>th</sup> and 5<sup>th</sup> respondents, namely Mr. Gopalkumar Prabhakumar Nair and Mrs. Rakhi Gopalkumar Nair respectively have been wrongly included as members of the 1<sup>st</sup> Respondent Company for which, prayer was made to remove their names. Further, prayer was made to set aside the resolution dated 21<sup>st</sup> February, 2015 passed by the 1<sup>st</sup> Respondent Company, whereby the Appellant/Petitioner was removed as Director of the said Company.

2. The Tribunal by impugned order dated 1<sup>st</sup> May, 2017, noticed the fact that the names of the 4<sup>th</sup> and 5<sup>th</sup> Respondents, namely Mr. Gopalkumar Prabhakumar Nair and Mrs. Rakhi Gopalkumar Nair, were recorded in the year 2010. Earlier the Appellant filed a Company Petition No. 25 of 2012 before the erstwhile Company Law Board- "Mr. Vijay Vasant Dhavale Vs. M/s. Dolce Pharmaceuticals Private Limited & Ors" for deletion of the names of 4<sup>th</sup> and 5<sup>th</sup> Respondents namely Mr. Gopalkumar Prabhakumar Nair and Mrs. Rakhi Gopalkumar Nair, which was dismissed by the Company Law Board on 20<sup>th</sup> May, 2013 on the ground of delay and laches, as the Appellant kept silent for seven years.

3. Having noticed the aforesaid fact and the decision of the erstwhile Company Law Board, by impugned order dated 1<sup>st</sup> May, 2017, the Tribunal held as follows: -

"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 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.”*

4. While holding so, the Tribunal kept the matter pending with regard to the removal of the Appellant/ Petitioner from the Directorship made pursuant to EoGM dated 21<sup>st</sup> February, 2015, as the same do not fall within the ambits of *res judicata* and directed to list the main petition for hearing on 30<sup>th</sup> June, 2017.

5. The Appellant/Petitioner has not made it clear as to whether any final order was passed in the Company Petition in regard to the EoGM dated 21<sup>st</sup> February, 2015, the case having been fixed for 30<sup>th</sup> June, 2017.

6. Learned counsel appearing on behalf of the Appellant/Petitioner submitted that the Tribunal erred in holding that rejection of the application on the ground of limitation amounts to *res judicata*, as observed by the Tribunal and quoted above. Reliance has been placed on

the decision of the Hon'ble Supreme Court in **"Noharlal Verma Vs. District Co-Operative Central Bank Limited, Jagdalpur – (2008) 14 SCC 445"**, wherein the Hon'ble Supreme Court held:-

*"18. So far as res judicata is concerned, in our opinion, the appellant is right in submitting that the Tribunal was not justified in holding that the application filed by the appellant was barred by res judicata. It is clear from the facts stated hereinabove that the application was filed by the appellant to the Joint Registrar, Raipur. It was pending. Meanwhile, however, District Bastar had its own Registry and hence, an application was submitted to the District Registrar, Bastar. The application preferred by the appellant to the Joint Registrar, Raipur, in the circumstances, became infructuous. It was not decided on merits. As per settled law, such decision does not operate as res judicata. The High Court was, therefore, right in coming to the conclusion that the Tribunal was in error in dismissing the application on the ground of res judicata. That part of the order passed by the Tribunal was, therefore, rightly not approved by the High Court.*

*35. To us, the High Court was right in observing that the Tribunal was in error in allowing the appeal and*

*dismissing the claim of the appellant on the ground of res judicata. The High Court, therefore, considered the said question independently and held that the Bank was right in submitting that the appellant had not approached the Registrar within the period prescribed by law and his application was liable to be dismissed.”*

7. Reliance was also placed on the decision of the Hon’ble Supreme Court in **“State of U.P. and Anr. Vs. Jagdish Saran Agrawal and Ors. (2009) 1 SCC 689”**, wherein the Hon’ble Supreme Court held as follows:-

*“14. In the present case, the suit filed by Nagar Palika was dismissed on technical ground and in any case the State was not a party. So far the suit where the State was a party and amendments were made, the same was dismissed for non-prosecution. But the same was not dismissed under Order 9 Rule 8. Order 9 Rule 8 and Order 9 Rule 9 CPC read as follows:*

*“8. Procedure where defendant only appears.— Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission,*

*and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.*

*9. Decree against plaintiff by default bars fresh suit.—(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with suit.*

*(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”*

*Therefore, Order 9 Rule 9 cannot be said to be applicable. The dismissal of the suit for non-prosecution was not a decision on merit. Consequently, the said order cannot operate as res judicata.”*

8. Learned counsel appearing on behalf of the Respondents submits that once a relief earlier sought for i.e. about removal of the names of 4<sup>th</sup>

and 5<sup>th</sup> Respondents, namely, Mr. Gopalkumar Prabhakumar Nair and Mrs. Rakhi Gopalkumar Nair and such prayer was dismissed as barred by limitation or on the ground of delay and laches, no such subsequent relief can be sought for.

9. We agree with the submissions made on behalf of the Appellant/Petitioner that an application which is barred by limitation cannot be held to be *res judicata* for the purpose of subsequent claim, and hold that the Tribunal erred in holding that the prayer made in the petition is barred by limitation.

However, once a claim has been dismissed on the ground of limitation or on the ground of delay and laches, such prayer cannot be made thereafter, in absence of fresh cause of action.

10. The prayer of Appellant to remove the names of 4<sup>th</sup> and 5<sup>th</sup> Respondents i.e. Mr. Gopalkumar Prabhakumar Nair and Mrs. Rakhi Gopalkumar Nair from Register of the Companies earlier having been dismissed in the year 2012 on the ground of delay and laches, the subsequent petition for the same relief in the absence of any subsequent cause of action were not maintainable and thereby the Tribunal rightly held that earlier application having been dismissed on the ground of limitation and on the ground of delay and laches, no subsequent relief can be granted in absence of any fresh cause of action.

11. In so far as the EoGM dated 21<sup>st</sup> February, 2015 is concerned, by which Appellant/Petitioner was removed as Director, we do not express any opinion at this stage as the matter may be still pending with the Tribunal, but it has not been cleared by the Appellant as to how the declaration with regard to the decision taken on EoGM dated 21<sup>st</sup> February, 2015 can be decided in a petition under Section 59 of the Companies Act, 2013, therefore, such question is left open for determination by the Tribunal.

12. We find no merit in this appeal. It is accordingly, dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)  
Chairperson

(Justice A.I.S. Cheema)  
Member (Judicial)

(Balvinder Singh)  
Member(Technical)

NEW DELHI

20<sup>th</sup> November, 2017

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