

IN THE HIGH COURT OF BOMBAY AT GOA**COMPANY APPEAL NOS. 1/2013, 2/2013,
7/2013 and 8/2013****COMPANY APPEAL NO. 1/2013**

Shri Auduth Modu Timblo,
Major of age, of Goa,
having his address at
La Marvel Colony,
Dona Paula,
Goa – 403 004.

... Appellant

Versus

1. Shri Dilip Modu Timblo,
Major of age, of Goa,
having his address at
Radha Enclave Building,
B-301 to B-311, 1st Floor,
Ascanio Da Costa Road,
Behind Grace Church,
Margoa, Goa – 403 601.
2. Sociedade de Fomento Industrial
Private Limited,
Villa Flores da Silva,
Erasmus Carvalho Street,
Margoa, 403 601, Goa.
3. Smt. Sushila Modu Timblo,
Major of age,
"Zaiwanti", Cupangal,
Fr. Agnel Road,
PO Fatorda, Gogol,
Margoa, Goa – 403 602.
4. Shri Prashant Modu Timblo,
Major of age,
29, Parijat, 95, Marine Drive,
Mumbai – 400 020.

... Respondents

Shri J.E. Coelho Pereira, Senior Advocate with Shri S. Karpe and Ms. D. Lotlikar, Advocates for the Appellant.

Shri Joseph Kodianthara, Senior Advocate with Shri E. Correia and Shri J. Sequeira, Advocates for the Respondent No. 1.

COMPANY APPEAL NO. 2/2013

Shri Auduth Modu Timblo,
Major of age, of Goa,
having his address at
La Marvel Colony,
Dona Paula,
Goa – 403 004.

... Appellant

Versus

1. Shri Dilip Modu Timblo,
Major of age, of Goa,
having his address at
Radha Enclave Building,
B-301 to B-311, 1st Floor,
Ascanio Da Costa Road,
Behind Grace Church,
Margoa, Goa – 403 601.
2. Sociedade de Fomento Industrial
Private Limited,
Villa Flores da Silva,
Erasmio Carvalho Street,
Margoa, 403 601, Goa.
3. Smt. Sushila Modu Timblo,
Major of age,
"Zaiwanti", Cupangal,
Fr. Agnel Road,
PO Fatorda, Gogol,
Margoa, Goa – 403 602.

4. Shri Prashant Modu Timblo,
Major of age,
29, Parijat, 95, Marine Drive,
Mumbai – 400 020. ... Respondents

Shri J.E. Coelho Pereira, Senior Advocate with Shri S. Karpe
and Ms. D. Lotlikar, Advocates for the Appellant.

Shri Joseph Kodianthara, Senior Advocate with Shri E. Correia
and Shri J. Sequeira, Advocates for the Respondent No. 1.

COMPANY APPEAL NO. 7/2013

Shri Dilip Modu Timblo,
Radha Enclave Building,
B-301 to B-311, 1st Floor,
Ascanio Da Costa Road,
Behind Grace Church,
Margoa, Goa – 403 601. ... Appellant

Versus

1. Haradesh Ores Pvt. Ltd.,
Villa Flores da Silva,
Erasmus Carvalho Street,
Margoa - 403 601, Goa.
2. Smt. Sushila Modu Timblo,
"Zaiwanti", Cupangal,
Fr. Agnel Road,
PO Fatorda, Gogol,
Margoa, Goa – 403 602.
3. Shri Auduth Modu Timblo,
La Marvel Colony,
Dona Paula,
Goa – 403 004.
4. Shri Prashant Modu Timblo,
29, Parijat, 95, Marine Drive,
Mumbai – 400 020. ... Respondents

Shri Joseph Kodianthara, Senior Advocate with Shri E. Correia and Shri J. Sequeira, Advocates for the Appellant.

Shri J.E. Coelho Pereira, Senior Advocate with Shri S. Karpe and Ms. D. Lotlikar, Advocates for the Respondent No. 1.

COMPANY APPEAL NO. 8/2013

Shri Dilip Modu Timblo,
Radha Enclave Building,
B-301 to B-311, 1st Floor,
Ascanio Da Costa Road,
Behind Grace Church,
Margoa, Goa – 403 601.

... Appellant

Versus

1. Sociedade de Fomento Industrial
Private Limited,
Villa Flores da Silva,
Erasmus Carvalho Street,
Margoa - 403 601, Goa.

2. Smt. Sushila Modu Timblo,
"Zaiwanti", Cupangal,
Fr. Agnel Road,
PO Fatorda, Gogol,
Margoa, Goa – 403 602.

3. Shri Auduth Modu Timblo,
La Marvel Colony,
Dona Paula,
Goa – 403 004.

4. Shri Prashant Modu Timblo,
29, Parijat, 95, Marine Drive,
Mumbai – 400 020.

... Respondents

Shri Joseph Kodianthara, Senior Advocate with Shri E. Correia and Shri J. Sequeira, Advocates for the Appellant.

Shri J.E. Coelho Pereira, Senior Advocate with Shri S. Karpe and Ms. D. Lotlikar, Advocates for the Respondent No. 1.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 24th AUGUST, 2015

PRONOUNCED ON:- 28th AUGUST, 2015

JUDGMENT :

All these Company Appeals involve common and connected questions of law and fact. As such, they are being disposed of by this common judgment.

2. These four appeals represent two sets of cross appeals, one each by, Auduth Timblo (AT) being Company Appeal Nos. 1/2013 and 2/2013 and the other by his brother, Dilip Timblo (DT) being Company Appeal Nos. 7/2013 and 8/2013. It would be sufficient to set out the facts in Company Appeal No. 2/2013.

Background Facts:

3. The brief facts are that Sociedade de Fomento Industrial Private Limited (SFIPL), (Company, for short) is a Company registered under the Companies Act, 1956 (the Act,

for short) with authorised share capital of Rs.1,00,00,000/- (Rupees One Crore only), divided into 50,000 equity shares of Rs.100/- each and 50,000 unclassified shares of Rs.100/- each. The paid up share capital is Rs.25,00,000/- (Rupees Twenty-Five Lakhs), divided into 25,000 equity shares of Rs.100/- each. The Company is in the business of extraction and sale of iron ore. The Company was incorporated by late Modu Timblo (MT), who was said to be a pioneer in Mining Industries in Goa. Modu Timblo died on 08.01.1993. Smt. Sushilabai Modu Timblo (ST) is the widow of MT, while AT, DT and Prashant Timblo (PT) are the sons of MT. The initial share holding pattern of the Company was as under:

Name of Shareholders	No. of equity shares of Rs.100/- each	Percentage of holding in paid up equity share capital of the Respondent No.1 Company
Late Modu Timblo	10,000	40%
Auduth Timblo	5,000	20%
Dilip Timblo	5,000	20%
Prashant	5,000	20%

4. DT presently holds 6,666 equity shares of the Company. DT had filed a Company Petition No. 7/2012 on 14.02.2012, before the Company Law Board (CLB), Western

Region Bench at Mumbai, under Section 111(4) of the Act, for rectification of the share holders register. He further prayed for a direction to the Company to record 10,000 shares constituting the part of inheritable estate of MT in the Company, jointly in the name of ST, AT, PT and DT (original petitioner).

5. That, Auduth Timblo (AT) filed an application dated 30.08.2012 being Company Application No. 147/2012 in Company Petition No. 7/2012 with the following material prayers:

(a) That the Hon'ble Company Law Board be pleased to frame a preliminary issue, as to whether the present Company Petition is barred by the law of limitation, or, in any case, is not maintainable as being barred by delay and laches and take on record this present application and set a suitable date for the final hearing and disposal of the same.

(b) Company Petition No. 7 of 2012 be dismissed with Costs.

(c) That, in the alternative to prayer (b) above, the Hon'ble Company Law Board be pleased to dismiss the present Company Petition, as being not maintainable on the ground of delay and laches.

6. It was contended that vide clause 4 of the Family Arrangement and Settlement dated 18.11.1994, the parties had agreed on division of shares and the percentage of shareholding of each party, as per the arrangement set out therein, as under:

"The shareholding of the family consisting of ST, AT, DT and PT in the companies, as per the list annexed hereto, shall be brought on par with as it exists in SFI i.e. ST 20% and AT, DT and PT 26.2/3% each."

7. Thereafter, the Shareholders Agreement dated 18.11.1994 was executed between the Company and AT, DT, ST and PT. The relevant clause is as under:

The Share holding of each party is in the following proportion:

ST	-	5000
AT	-	6667
DT	-	6666
PT	-	<u>6667</u>
		25,000

8. It was contended that the said transfer of shares were reflected in the Register of Members of the Company as on 05.04.2005. The petitioner (DT) became aware of the transmission and transfer of shares on 11.04.2005, when he was given a copy of Agreement dated 05.04.2005, before the CLB, in other proceedings between the parties. This is evident from the correspondence annexed to the petition, as also from the contents of the petition. It was also contended that DT accepted dividend of his shareholding of 6,666 shares for the years ended March 31, 2002 and March 31, 2006. It was thus, contended that the Company Petition having been filed on 14.02.2012, after a period of almost seven years, is barred by limitation.

9. It was alternatively contended that the petitioner (DT) had accepted the transmission of shares and availed the benefit of the transmission, including the dividend thereon and thereafter, approached the CLB with unclean hands and the Company Petition also suffers from vice of delay and laches. In these circumstances, it was contended that the preliminary issues be framed, tried and decided.

10. The original petitioner (DT) opposed the application stating that no period of limitation is prescribed, in case of application under Section 111(4) of the Act. It was also denied that the petition suffers from delay or laches. It was further contended that even assuming, that there is delay, such delay, if any, has not caused AT, to change his position to his detriment and therefore, petition under Section 111(4) of the Act, cannot be defeated on any such ground. It was further contended that it was only in 2009 that the petitioner (DT), was made aware that the transfers were illegal and thus, were done fraudulently, only to prevent him from getting what was due to him. It was

contended that DT was also otherwise entitled to 1/3rd share in the share of ST. In fact, in the Inventory Proceedings, AT has admitted that under the Portuguese Civil Code, DT is entitled to 1/3rd in the share of ST. It was contended that the application was frivolous and was filed only to delay the proceedings.

11. The learned Member of the CLB on hearing the parties has dismissed the Company Application No. 147/2012 by order dated 04.12.2012, thus, refusing to frame and try the issue of limitation, as a preliminary issue, as also refusing to reject the company application under Order 7 Rule 11 of the Code of Civil Procedure (C.P.C., for short). Feeling aggrieved, AT has filed Company Appeal No. 2/2013.

12. Company Appeal No. 8/2013 is filed by DT, the original petitioner, challenging certain findings in para 17 of the impugned order dated 04.12.2012, wherein the CLB has held that a Company Petition would be governed by the residuary Article, namely Article 137 of the Limitation Act.

13. M/s Hardesh Ores Private Limited is yet another Company, which is a part of the Fomento Group of Companies. The petitioner (DT) had filed a similar petition being Company Petition No. 8/2012, before the CLB under Section 111(4) of the Act for rectification of the Register of the shareholders of M/s Hardesh Ores Private Limited particularly, in respect of 800 shares, belonging to MT and transfer of certain shares by the said Company by ST and PT to AT. That petition, was also filed on 14.02.2012. AT filed a similar application being Company Application No. 148/2012, stating that the Company Petition was barred by limitation particularly, in view of the admission by DT that the impugned transfer of shares was recorded in the Register on 06.04.2005. It was contended that DT became aware of the said transmission on 11.04.2005, when he was given a copy of the Settlement Agreement dated 05.04.2005, before the CLB, in other proceedings between the parties. Thus, the framing of preliminary issue of limitation and dismissal of the Company Petition was sought for, which was opposed on similar grounds. The CLB has rejected the Company Application Nos. 147/2012 and 148/2012, by common order

dated 04.12.2012. Company Appeal No. 1/2013 is filed by AT, challenging the said order, while Company Appeal No. 7/2013 is filed by DT, challenging the observations in para 17 of the order dated 04.12.2012.

Submissions of the Parties:

14. I have heard Shri Pereira, the learned Senior Counsel appearing for the appellant, AT and Shri Joseph, the learned Senior Counsel for the first respondent, DT. With the assistance of the learned Senior Counsel for the parties, I have perused the impugned order and gone through the relevant records.

15. It is submitted by Shri Pereira, the learned Senior Counsel for the appellant-AT that the CLB has all the trappings of a Court and as such, the provisions of the Limitation Act would clearly apply to the proceedings before the said Board. It is submitted that the findings recorded by the CLB in paras 15 and 17 of the impugned order are contradictory. It is submitted that in para 15 of the impugned order, the CLB has held that no relief can be

granted as sought in the application, in view of the settled law on the applicability of Limitation Act, 1963 "in cases attracting the provisions of sub-section 4 of Section 111 of the Act, seeking rectification of the Register of Members", while in para 17, the CLB has held that the proceedings would be governed by residuary Article, namely Article 137 of the Limitation Act. The learned Senior Counsel took exception to the findings recorded in para 16 of the impugned order wherein, the CLB has held that there can be no waiver (by Dilip Timblo) unless, the person who is said to have waived is fully informed as to his rights and with full knowledge of such right, he intentionally abandons it. The learned Senior Counsel was at pains to point out that while, refusing to try the issue as preliminary issue, the CLB could not have dealt with the findings of some of the aspects, on merits which may have a bearing, on the point of limitation.

16. The learned Senior Counsel has placed reliance on the decision of the Hon'ble Apex Court, in the case of **Canara Bank Vs. Nuclear Power Corporation of India Ltd. and Others**, reported in **1995 Supp(3) SCC 81**, in order to

submit that it has been held that CLB is a Court.

Reliance is then placed on the decision of the Kerala High Court, in the case of **Duroflex Ltd. Vs. Tommy Mathew and Others**, reported in **[2007] 137 Comp Cas 229 (Ker)**, and yet another decision of the Hon'ble Supreme Court, in the case of **The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma**, reported in **(1976) 4 SCC 634**.

The learned Senior Counsel would submit that even the petitioner (DT), is aggrieved by the order and thus, the same has to be set aside. The learned Senior Counsel has taken me through the contents of the Company Petition, in order to show that the petition, as it stands would clearly show that it is barred by limitation. He therefore, submitted that the impugned order needs to be set aside.

17. On the contrary, it is submitted by Shri Joseph, the learned Senior Counsel for the respondent-DT that under Section 111(4) of the Act, the cause of action would arise from the time when the transfers are registered namely, the name of the transferee's are entered in the Register. He

would submit that thus, mere knowledge of the agreement dated 05.04.2005 (on 11.04.2005, when the copy was served to the petitioner, DT), cannot afford a cause of action.

It is next submitted that the only substantial question of law, if at all arises, would be whether the CLB was justified in refusing to frame and decide the issue of limitation as a preliminary issue. The learned Senior Counsel has placed reliance on the decision of the Hon'ble Supreme Court, in the case of **Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others**, reported in **(2006) 5 SCC 638**, in order to submit that the Board is not obliged to frame the issue of limitation as preliminary issue. It is submitted that where the issue involves the question of law and fact, as to knowledge of the petitioner about transfer, the issue could not have been decided as a preliminary issue.

Reliance is then placed on the decision of the Hon'ble Supreme Court, in the case of **Satti Paradesi Samadhi and Pillayar Temple Vs. M. Sankuntala and Others**, reported in **(2015) 5 SCC 674**, in order to submit that a limitation issue would require inquiry into facts and as such, cannot be tried as a preliminary issue.

The learned Senior Counsel would submit that the CLB had allowed inspection of the record of the Company to the petitioner, DT on 02.02.2011, when he came to know about the impugned transfers.

The learned Senior Counsel has relied upon the decision of the Calcutta High Court, in the case of **Smt. Nupur Mitra and Another Vs. Basubani Private Limited and Others, (2002) 108 Comp Cas 359 (CLB)**, in order to submit that the provisions of the Limitation Act would not apply to the proceedings before the CLB and the Company Petition cannot be said to suffer from delay and laches.

18. In so far as, the petitioner, DT getting the dividend for years ended March 31, 2002 and March 31, 2006 is concerned, the learned Senior Counsel has invited my attention to Clause 15 of the agreement, in order to submit that mere acceptance to the dividend would not be sufficient, as the parties had agreed that registration of the shares would be the material date. The learned Counsel would submit that the CLB has rightly refused to frame a preliminary issue, in its discretion, which does not call for any interference.

Consideration:

19. Under Section 10F of the Act, an appeal lies against any decision or order of the CLB "on any question of law, arising out of such order". In these appeals, no specific substantial questions of law have been formulated, at the time of Admission. However, the appellant has set out the following substantial questions of law in the appeal memo:

(a) Whether the provisions of the Limitation Act, 1963 are applicable to a petition/application filed before the CLB under Section 111 of the Companies Act, 1956 ?

(b) What would amount to waiver in the context of a petition/application filed under the provisions of Section 111 of the Companies Act, 1956 ?

(c) Whether, in a case where admittedly the petitioner/applicant is aware of the transmission and transfer of shares effected in the Register of Members of a Company, and a company petition/application is filed for the rectification of the said Register of Members after a period of 3 years from the date of such knowledge, the Hon'ble

Company Law Board is justified in not deciding the issue of limitation as a preliminary issue, on the alleged ground that it is a mixed issue of law and fact ?

20. A good deal of arguments were advanced at the Bar, on the question, whether the provisions of the Limitation Act are applicable to the proceedings before the CLB. Nonetheless, the considerations based on the principle of delay and laches, would indeed apply to such proceedings. Be that as it may, on hearing the learned Counsel for the parties, I find that although, the CLB has adverted to a certain extent, to the question of waiver (para 16) and the applicability of the Limitation Act, to such proceedings, the main issue was whether, these questions need to be gone into and decided as a preliminary issue. It would appear from the impugned order that the CLB, on the premise that the issue of limitation is a mixed question of law and fact has refused to decide the said issue as preliminary issue. It is not disputed that the appellant is yet to file reply on merits to the petition before the CLB. Normally, when the CLB had come to the conclusion that the issue cannot be decided as a

preliminary issue, the reference to the merits, as to whether the provisions of the Limitation Act would apply or not and the issue of waiver, could have well been avoided. This is because the Court/Tribunal cannot on one hand refuse to decide the particular issue as a preliminary issue and then, delve upon the merits thereof. The net result of refusal to decide the same as a preliminary is that the issue would be decided on merits, at the stage of final disposal. In my considered view, the substantial questions of law (arising out of the order) are as under:

(i) Whether the CLB was justified in refusing to frame the preliminary issue of limitation and/or delay and laches in the matter ?

(ii) Whether the petition could have been dismissed at the threshold on principles akin to one contained under Order 7 Rule 11 (d) of the Code of Civil Procedure.

21. At the outset, the parties have been put to notice that the aforesaid are the basic substantial questions that

arise in the appeal and the parties have been heard on the same.

22. My answer to the first question is in the affirmative and the second, in the negative. Here are the reasons:

23. The CLB is constituted under Section 10E of the Act.

Under Section 10E (4D) of the Act, the CLB is deemed to be a Civil Court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure and every proceeding before the Board shall be deemed to be judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code and for the purpose of Section 196 of that Code.

Section 10E (4D)(5) of the Act provides that without prejudice to the provisions of the sub-sections (4C) and (4D), the Company Law Board, shall in the exercise of its powers and discharge of its functions under this Act or any other law be guided by the principles of natural justice and shall act in its discretion.

Section 10E (4D)(6) of the Act provides that subject to the foregoing provisions of Section 10E, the Company Law Board, shall have power to regulate its own procedure.

Under Section 10E (4C) of the Act, there is an enabling provision, in which certain powers under the Code of Civil Procedure, which are available to the Civil Court while trying a suit are conferred on the Company Law Board, which includes the power of examining witnesses etc.

24. This Court in the case of **Anju Timblo Vs. Dilip Timblo and Others** (Company Appeal Nos. 1 to 7/2015), by judgment dated 06.08.2015, has held that although, the provisions of the Code of Civil Procedure would not *stricto sensu* be applicable to the proceeding before the CLB, the principles underlying the same wherever applicable, can be called into aid and would apply.

25. In the context of the question, whether the issue of limitation and/or delay and laches could have been tried as preliminary issue, a reference to Order XIV Rule 2 of C.P.C is

inevitable. It reads thus:

"2. Court to pronounce judgment on all issues— (1) *Notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.* (2) *Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—*
(a) the jurisdiction of the Court, or
(b) a bar to the suit created by any law for the time being in force,
and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

26. It can thus be seen from Rule 2(1) of Order XIV of C.P.C. that the normal rule is that although, a case could be disposed of on preliminary issue, the Court shall subject to the provisions of sub-rule (2), pronounce judgment on all issues.

Rule 2(2) of Order XIV of C.P.C. provides that where issues both of law and fact arise in the matter and the Court is of the opinion that the case or any part thereof may be disposed of "on the issue of law only", it may try that issue first, if that issue relates to, (a) the jurisdiction of the Court; (b) a bar to the suit created by any law for the time being in force.

In such a case, the Court would postpone the settlement of other issues, until the preliminary issue has been determined. One thing which is apparent from the aforesaid provisions is that the normal rule is that Court shall pronounce judgment on all issues, subject of course, to the contingency of Rule 2(2) of Order XIV of C.P.C., where the Court "may decide a preliminary issue". Here also, there is a discretion vesting in the Court, which is apparent from the word "may".

27. In the case of **Krishna Kumar Birla Vs. Rajendra Singh Lodha**, reported in **(2008) 4 SCC 300**, it has been held that the Court having regard to its general power, as also the power under Order XIV Rule 1 of the Code

of Civil Procedure, can decide the matter by framing preliminary issue with regard to the maintainability or otherwise of the application. It has been further held that it is a rule of procedure and not of substance.

28. In the case of **Ramesh B. Desai and Others** (supra), the Hon'ble Supreme Court has held thus in para 13 of the judgment:

"13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna vs. Brig. F.J. Dillon and it was held as under:

"Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of

on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."

29. The Hon'ble Apex Court in para 19 has held as under:

"19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order 7 Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two Judge Bench of this Court to which one of us was a member (Ashok Bhan J.) in Balasaria Construction Pvt. Ltd. vs. Hanuman Seva Trust and others it was held :

"8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint

it cannot be held that the suit is barred by time."

This principle would be equally applicable to a Company Petition. Therefore, unless it becomes apparent from the reading of the Company Petition that the same is barred by limitation the petition cannot be rejected under Order 7 Rule 11(d) CPC."

30. The main thrust of the argument, on behalf of the appellant in claiming that the petition filed by DT is barred by limitation and/or delay and laches is that the copy of Settlement Agreement dated 05.04.2005 was given to DT on 11.04.2005 and he was all along aware about his shareholding in the Company (SFIPL) and had received the dividend thereto twice that is in the year ending March 31, 2002 and March 31, 2006, without any demur. Thus, it is claimed that the petition having been filed in the year 2012, is barred by limitation and in any case, bad on account of delay and laches.

31. On the contrary, it is claimed by DT that it was only as late as 2009, that he was informed and was made

aware that the transfers were illegal and this was done fraudulently. In this regard, reliance is placed on the provisions of Section 111 (4) of the Act, in order to submit that the cause of action to file the application for rectification under Section 111 of the Act would arise on the name being entered/or removed from the Register of Members. The contention is that mere family arrangement or Deed of Settlement would not afford a cause to file an application for rectification. It is contended that getting dividend would not be material unless, there is record of the names in the shareholder's Register of the Company. Further, according to DT, he came to know of the relevant facts, when the CLB had allowed inspection to him by an order dated 02.02.2011.

32. The CLB in para 17 of the impugned order has held on the basis of the decision of **Ramesh B. Desai and Others** (supra), that the plea of limitation being a mixed question of law and fact, the petition cannot be thrown out at the preliminary stage, as being barred by limitation. It has been found that the decision on an issue of law, in this case would depend upon a decision of fact and as such, cannot be

tried as a preliminary issue.

33. I have set out the rival contentions on the point of limitation and/or delay and laches, in order to show that indeed, a disputed question of fact as to the knowledge, in the context of the point of time when the right to apply accrues, would arise in the company petition. This is because, even under Article 137 of the Limitation Act, (assuming that Limitation Act applies) the time would start “when the right to apply accrues”. If that be so, no exception can be taken to the refusal by the CLB to frame and decide the issue of limitation and/or delay and laches as a preliminary issue. I would hasten to add that no opinion is expressed nor one is called for at this stage, on merits of the rival contentions. The only consideration is whether the refusal to frame, try and decide the issue of limitation and/or delay and laches as a preliminary issue is legal and proper or not.

34. This would take me to the question based on Order VII Rule 11(d) of C.P.C. At the outset, the application

filed on behalf of AT did not make a reference to the provisions of Order VII Rule 11 (d) or principles akin thereto. The prayer clause in the application dated 30.08.2012 would show that, the only prayer is for framing a preliminary issue as to whether the petition is barred by limitation or not. Nonetheless, the impugned order in para 17 makes a passing reference to Order VII Rule 11(d) of C.P.C., holding that “unless it became apparent from the reading of the company petition that the same is barred by limitation, the petition cannot be rejected under Order VII Rule 11(d) of C.P.C”.

35. It is trite that under Order VII Rule 11, the Court can only look to the suit/plaint. If, we were to import the principles akin thereto, in the proceedings before the CLB, we will have to confine to the contents of the petition. The question whether the provisions of the Limitation Act in *stricto sensu* apply, would also be relevant. The petition mentions that the petitioner became aware of the transfers only as late as in the year 2009. Thus, the impugned order passed by the CLB, refusing to dismiss the petition, at the threshold, in my considered view, does not call for any interference.

36. It is true that in so far as, findings recorded in paras 15 and 17 are concerned, (which according to the appellant are contradictory) in para 15, it is stated thus:

"CLB is a quasi-judicial authority exercising equitable jurisdiction guided by the principles of natural justice in the exercise of its powers and discharge of its functions under the Act and shall act in its discretion. The CLB has all the trappings of the Court. The CLB has its own Regulations. The C.P.C does not apply, the principles do. The provisions of the Limitation Act are not applicable to the proceedings before the CLB. But delay and laches do apply."

In para 17 of the impugned order, the CLB after referring to the decision of the Division Bench of the Calcutta High Court in **Nupur Mitra's** case (supra), finds that the residuary Article, namely Article 137 would apply.

On the basis of this, it is contended that observations in para 17 that the residuary Article would apply are contrary to the observations in para 15 that the Limitation Act does not apply.

DT has filed the two appeals being Company Appeal Nos. 7/2013 and 8/2013 against the observations in para 17. It is contended that in **Nupur Mitra's** case (supra), nowhere it is held that residuary Article, namely Article 137 applies.

37. In **Nupur Mitra's** case (supra), the Division Bench of Calcutta High Court has held thus:

60. The scope of Section 111 as set out in the notes on clauses in the Bill which preceded the Companies (Amendment) Act, 1988 says that "there is no limitation period provided for making the application for rectification of Register of Members under sub-section (4)". [See: Simret Katyal Vs. Bhagwan Das & Co.(P) Ltd. (1994 (1) Com. LJ 442, para 18]. In fact in several decisions of the Company Law Board it has been consistently held that the Limitation Act does not apply to applications under Section III [See: Shiv Dayal Agarwal Vs. Siddhartha Polyester Pvt. Ltd., (1997) 88 Comp. Cases 705; T.G. Veela Prasad Vs. Rayalsecma Alkalias, (1997) 89 Comp. Cases 13; Dr. G.N. Byra Reddy Vs. Arathi

Cine Enterprises Pvt. Ltd., (1997) 89 Comp. Cases 745]”

38. In para 65, the Division Bench has held thus:

"65. Assuming that the Limitation Act, 1963 does apply, in the absence of a specific provision covering applications under Section 111, the residuary article namely Article 137 would apply. If the cause of action arose in 1996 as claimed by the appellants, the application under Section 111 having been filed in 1998 would be within time."

39. It can thus, be seen that in **Nupur Mitra's** case (supra), it is nowhere held that Limitation Act applies. The Court in para 65 observes that assuming that the Limitation Act applies, the petition under Section 111 of the Act would be covered by the residuary Article 137 of the Limitation Act. To that extent, the observations in para 17 may not be correct.

40. In the case of **Canara Bank** (supra), it was held that CLB was a "Court" for the purposes of section 9-A of

Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

41. As noticed earlier, although the CLB has made certain observations on the applicability or otherwise of the Limitation Act in proceedings before it, the material question was whether the same can be tried as a preliminary issue. It is only during trial of the issue, that such a question could be gone into. Once, this Court has found that the CLB was justified in refusing to frame and try the issue of limitation and/or delay and laches, as a preliminary issue, I do not propose to go into the question of applicability of the Limitation Act *stricto sensu*.

42. This takes me to the observations in para 16. Here again, the CLB has delved upon the issue of waiver, which could have been done only, if the CLB had decided to try the issue as a preliminary issue. The said point is specifically kept open to be decided at the hearing of the company petition.

43. Insofar as Company Appeal Nos. 7/2013 and 8/2013 are concerned, it needs to be stated that separate appeals, challenging some observations, (when the final order was in favour of the appellant in these appeals) are not maintainable. It is only when the final judgment/order is adverse to some extent, that a party can file a counter challenge. Nonetheless, it is already found that **Nupur Mitra's** case (supra), no where holds that the Limitation Act applies.

44. In the result, no exception can be taken to the impugned order refusing to frame the preliminary issue.

Thus, the Company Appeal Nos. 1/2013 and 2/2013 are hereby dismissed.

Company Appeal Nos. 7/2013 and 8/2013 are dismissed, as not maintainable.

The rival contentions on merits are kept open.

In the circumstances, there shall be no order as to costs.

C. V. BHADANG,J.

EV