CASE NO.:
Appeal (civil) 4766 of 2001

PETITIONER:
Ramesh B. Desai and others

RESPONDENT:
Bipin Vadilal Mehta and others

DATE OF JUDGMENT: 11/07/2006

BENCH:
Ashok Bhan & G.P. Mathur

JUDGMENT:
J U D G M E N T

G.P. Mathur, J.

This appeal, by special leave, has been preferred against the judgment and order dated 10.3.2000 of a Division Bench of High Court of Gujarat by which the appeal preferred against the order dated 12.3.1996 of the learned Company Judge, was dismissed and the order of the learned Company Judge dismissing the Company Petition No. 35 of 1988, was affirmed.

2. The appellants had filed the Company Petition No. 35 of 1988 for rectification of the register of the company M/s. Sayaji Industries Ltd. (hereinafter referred as to "the Company") as provided by Section 155 of the Companies Act. The respondent Nos. 1 and 2, viz., Bipin Vadilal Mehta and Priyam Bipinbhai Mehta moved Company Application No. 113 of 1995 before the learned Company Judge to dismiss the Company Petition No. 35 of 1988, without going into the merits of the petition, on the ground that the same is barred by limitation. This application was allowed by the learned Company Judge by the judgment and order dated 12.3.1996 and the said order was affirmed in appeal by a Division Bench of the High Court by the judgment and order dated 10.3.2000, which are subject-matter of challenge in the present appeal.

3. The Company Petition No. 35 of 1988 was filed by Ramesh B. Desai and 8 others, who are shareholders of the Company, which is a public limited company. The allegations made in the company petition are as follows. Vadilal Lallubhai Mehta was the Chairman and Managing Director of the Company. He had two sons, viz., Bipin Vadilal Mehta and Suhas Vadilal Mehta (for short "Bipinbhai and Suhasbhai") and four daughters, who are all married. The family owned several properties. Besides shares in the Company, there was HUF Trust and other private limited companies under control of the said family. A Memorandum of Understanding (MOU) was executed by the family members on 30.1.1982 and the main object thereof was to entrust the management of some of the companies to Bipinbhai and some to Suhasbhai. It was decided that the management of M/s. Sayaji Industries Ltd. and M/s. C.V. Mehta Private Ltd. was to be entrusted to Bipinbhai while other companies such as M/s. Industrial Machinery Manufacturers Pvt. Ltd., M/s. C. Doctor and Company Pvt. Ltd., M/s. Mehta Machinery Manufacturers Pvt. Ltd. and M/s. Oriental Corporation Pvt. Ltd., were to remain with Suhasbhai. Clause 10 of MOU provided that Bipinbhai should deposit Rs.40 lacs and odd with M/s. C.V. Mehta Pvt. Ltd. in order that the latter could pay back the debts which it owed to Suhasbhai and his family members and family concerns. This amount of Rs.40 lacs and odd was the consideration for getting the controlling interest and management of M/s. Sayaji Industries Ltd. and M/s. C.V. Mehta Pvt. Ltd. Though under the terms of the MOU the said amount of Rs.40

lacs and odd was to be paid by Bipinbhai immediately, but he could not do so as he could not arrange the necessary funds. The result of non-payment by Bipinbhai was that he could not get the control and management of M/s. Sayaji Industries Ltd. and M/s. C.V. Mehta Pvt. Ltd. in January, 1982 as was contemplated by the MOU dated 30.1.1982. A modified MOU was accordingly executed on 13.11.1982 whereunder it was provided that Bipinbhai would pay the entire amount in two instalments, one in the sum of Rs.20 lacs pursuant to which the control and management of M/s. Sayaji Industries Ltd. were to be transferred to him by making the transfer of 13,000 shares of the Company in his name and in the names of his family members. The balance amount of Rs.19 lacs and odd was to be deposited by Bipinbhai with M/s. C.V. Mehta Pvt. Ltd. within a period of 24 months from the date of the agreement. This was necessary as M/s. C.V. Mehta Pvt. Ltd. held 9,000 equity shares of M/s. Sayaji Industries Ltd. Acquisition and control of M/s. C.V. Mehta Pvt. Ltd. and thereby 9,000 equity shares of M/s. Sayaji Industries Ltd. would have been possible only after payment of the said amount. It is further averred in the company petition that Bipinbhai was not in a position to pay or deposit Rs.20 lacs without which he could not have got the controlling interest in M/s. Sayaji Industries Ltd. He, therefore, devised a scheme whereunder the Company, viz., M/s. Sayaji Industries Ltd. paid an amount of Rs.20 lacs by way of advance to M/s. Santosh Starch Products by means of three cheques of Rs.10 lacs and Rs.5 lacs (both dated 13.11.1982) and third cheque of Rs.5 lacs dated 25.11.1982, all drawn on Punjab National Bank, Maskati Market Branch, Ahmedabad. The said M/s. Santosh Starch Products paid an amount of Rs.20 lacs to Bipinbhai and his family by means of three cheques of Rs.7 lacs, 6 lacs and 7 lacs all dated 13.11.1982 and drawn on the same branch of Punjab National Bank. The aforesaid amount paid through cheques was deposited in the personal account of Bipinbhai and his family members on the same day. This whole amount of Rs.20 lacs was transferred to M/s. C.V. Mehta Pvt. Ltd. in order to get control of the company M/s. Sayaji Industries Ltd. as per the MOU. The specific case of the petitioners in the company petition is that the funds of the company amounting to Rs.20 lacs were utilized by Bipinbhai in paying the said amount to M/s. C.V. Mehta Pvt. Ltd. for the purpose of acquiring the shares of M/s. Sayaji Industries Ltd. and thereby he became the director of the said company. This camouflage was adopted only to ensure that the violation of Section 77 of the Companies Act, which provision imposes a restriction on a company to buy its own shares unless the consequent reduction of capital is effected and sanctioned in pursuance of Section 100 to 104 or Section 402 of the Companies Act, would not be known. The aforesaid devise of payment of advance by the Company to M/s. Santosh Starch Products also violated Article 20 of the Articles of Association. Bipinbhai had thus devised a scheme whereunder funds of the company were directly used for the purpose of acquiring shares of the company and also that of M/s. C.V. Mehta Pvt. Ltd., which in turn was holding substantial shares of M/s. Sayaji Industries Ltd. The company had no knowledge of the devise adopted by Bipinbhai nor the company had authorized these transactions by passing any resolution of the Board and the Company never rectified the action of Bipinbhai. Bipinbhai was inducted in the management of the company on 18.11.1982 and payment of cheque by the Company to M/s. Santosh Starch Products on 25.11.1982 represented act of the Company itself and clearly showed that the funds of the company were being utilized in order to benefit Bipinbhai and his family members. The transactions whereunder shares of M/s. C.V. Mehta Pvt. Ltd. were acquired related to the period when Bipinbhai had been inducted in the management of the Company. The manner of acquiring the control of M/s. C.V. Mehta Pvt. Ltd. was violative of Section 77(2) of the Companies Act as it was only a devise for the ultimate control of shares of M/s. Sayaji Industries Ltd. It was also

averred in the petition that Article 20 of the Articles of Association of the Company stipulates that "none of the funds of the company shall be employed in the purchase of shares of the company". The transaction devised by Bipinbhai in order to purchase the shares and get control of the company is also contrary to Article 20 of the Articles of Association of the Company and, therefore, it is void. It was further pleaded in the company petition that the petitioners could not detect the fraud earlier. They came to know about the same in detail in the month of May, 1987 when a criminal complaint was filed by some office bearers of the union of the Company before a criminal court at Narol. After making enquiries and collecting information the petitioner No. 1 gave a notice dated 14.6.1987 to the respondents to make rectification in the register of the Company. It was accordingly prayed in the Company Petition that directions may be issued to the respondents to rectify the register of the Company in accordance with Section 155 of the Companies Act and the names of Bipinbhai Vadilal Mehta, Smt. Nirmaiben Bipinbhai Mehta and Priyambhai Bipinbhai Mehta may be deleted from the register of the Company.

4. Though the Company Petition was filed on 10.11.1987 but after nearly 8 years on 20.3.1995 an application being Application No. 113 of 1995 was filed by Bipinbhai and Priyambhai Mehta (respondent Nos. 2 and 3 in the Company Petition) praying that the Company Petition be dismissed as barred by limitation, without going into the merits of the petition. The application was moved on the ground that the Company Petition had been filed on 10.11.1987 seeking rectification of the register and for deletion of names of respondents Nos. 2 to 11 in accordance with Section 155 of the Companies Act. The rectification had been sought in respect of shares registered in the names of the respondents on 17.11.1982 and as the limitation for moving such a petition was three years from the date of transfer of shares, the period of limitation expired on 17.11.1985 and consequently the company petition was barred by limitation. It was submitted that the petition under Section 155 of the Companies Act, which confers power on the court to decide the title, is in fact a suit and it was only a summary proceeding in place of a suit and, therefore, the period of limitation applicable for a suit would also apply to such a petition. No application for condoning the delay would be maintainable and the claim is extinguished on the expiry of period of limitation. Assuming that the company petition is to be construed as an application, even then the petition was barred in view of Article 137 of the Limitation Act. The knowledge of the proceedings was not relevant for the purpose of Article 137 because for the purpose of such Article, limitation would start running from the date the right accrues and the date of acquiring knowledge cannot extend the period of limitation. It was also submitted that the petitioners had asserted in the Company Petition that they came to know about the transfer of shares and other details in the month of May, 1987 when a criminal complaint was filed but the said complaint had in fact been filed on 18.6.1987 whereas the petitioners had given notice on 17.6.1987. It was further submitted that the petitioners in the Company Petition had filed a separate application for condoning the delay and since no order had been passed on the same, there was no valid petition in the eyes of law.

5. The appellant No. 1 Ramesh B. Desai (petitioner No. 1 in the Company Petition) filed reply on the grounds, inter alia, that the application was not maintainable as the same had been filed when the Company Petition had already been notified for final hearing and was on the final hearing board. The Company Petition had been filed in September, 1987 on which notice had been issued and respondent Nos. 2 and 3 in the Company Petition filed their detailed affidavit and reply on 22.3.1988 and the company also filed reply on the said date. In their reply the contesting respondents raised a preliminary objection regarding limitation and contended that on the preliminary issue the main petition should be dismissed in limine. The said preliminary objection was raised at the time of hearing and after

considering the objections the learned Company Judge considered it appropriate to admit the main petition as far back as on 24.6.1988. It was also submitted that by the order of the learned Company Judge dated 17.2.1995 the Company Petition had already been fixed for final hearing and in view of the said order the Company Application No. 113 of 1995 moved by the contesting respondents was not maintainable at that stage and was liable to be dismissed. It was also submitted that the contesting respondents wanted that the issue regarding limitation should be heard as a preliminary issue which cannot be done in law. The respondents had committed serious fraud on the shareholders and also on the company and company's funds had been fraudulently utilized to purchase its own shares, which is violative of Section 77 of the Companies Act. Whether there is a fraud committed or not and whether in the circumstances of the case delay can be condoned or not and what is the point of time for commencement of limitation, are questions of fact and such questions cannot be tried as a preliminary issue as they require evidence. It was specifically asserted in para 4 of the affidavit filed in reply that the question of limitation involved in the petition is not a pure question of law as the same had to be decided on the basis of fraud, which will be question of fact and the company court will have to decide whether the petitioners in the company petition had got the knowledge of the fraud and, if so, at what stage. This being a purely factual matter could not be decided as a preliminary issue as the whole matter had to be heard. That apart there being clear averments of fraud in the Company Petition, under law, the limitation would start running only from the date the fraud was discovered.

6. As mentioned earlier the learned Company Judge allowed the Company Application No. 113 of 1995 and dismissed the Company Petition as being barred by law of limitation. The appellants preferred an appeal against the decision of the learned Company Judge before the Division Bench of the High Court but the same was also dismissed on 10.3.2000.

7. Mr. Soli J. Sorabjee, learned senior counsel for the appellants, has submitted that the Code of Civil Procedure shall be applicable in proceedings before the learned Company Judge. Sub-rule (1) of Order XIV Rule 2 CPC lays down that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub-rule (2) of Order XIV 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. Learned counsel has submitted that the grounds on which a plaint can be rejected are given in Order VII Rule 11(d) CPC and the plea raised by the contesting respondents was one as contemplated by clause (d) of the said Rule, which lays down that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. The plea raised by the contesting respondents in the Company Application was a plea of demurrer where only the allegation made in the company petition had to be seen and after assuming the averments made in the petition to be true and correct it had to be seen whether the petition was barred by any law including that of limitation. The learned counsel has elaborated his arguments by submitting that the petitioners in the Company Petition had clearly averred and taken a plea of fraud that they could not get knowledge of the fact that the funds of the company were utilized by Bipinbhai and his family members in buying the shares of the Company and they got knowledge of the same only in May, 1987 and in this view of the matter the provisions of Section 17 of the Limitation Act are clearly attracted and the limitation shall not begin to run till the date the petitioners discovered the fraud or got knowledge of the same. Mr. Sorabjee has also submitted that at any rate the plea raised by the petitioners involved

adjudication into questions of fact, which could not have been done until the parties got opportunity to lead evidence and the learned Company Judge committed manifest error of law in deciding the issue of limitation as a preliminary issue and recording a finding against the petitioners even before they had got an opportunity to lead evidence.

8. Mr. Iqbal Chagla, learned senior counsel for the respondents, has supported the judgment of the learned Company Judge and also of the Division Bench and has submitted that the expression "a bar to the suit created by any law for the time being in force" occuring in sub-rule (1)(b) of Order XIV Rule 2 CPC contains within its ambit a plea relating to the bar of limitation. The learned counsel has elaborated his contention by submitting that Section 3 of the Limitation Act mandates that subject to the provisions contained in Sections 4 to 24, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence and sub-rule (d) of Order VII Rule 11 also says that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. In view of these provisions, it has been submitted that the Company Petition was rightly dismissed as the transaction in shares in question took place on 13.11.1982 and as the period of limitation by virtue of Article 137 of the Limitation Act is only three years, the Company Petition which was filed in May, 1987, was clearly barred by limitation. The learned counsel has further submitted that the petitioners could not take any advantage of Section 17 of the Limitation Act as the Company Petition did not contain full particulars of the alleged fraud which is mandatory in view of Order VI Rule 4 CPC nor any averment has been made therein that the knowledge of right or title on which the petition is founded was concealed by the fraud of the contesting respondents. Mr. Chagla has also submitted that transfer of shares had taken place as father Vadilal Lallubhai Mehta wanted that the control of two companies, viz., M/s. Sayaji Industries Ltd. and M/s. C.V. Mehta Pvt. Ltd. should vest with Bipinbhai and some other companies, viz., M/s. Industrial Machinery Manufacturers Pvt. Ltd., M/s. C. Doctor and Company Pvt. Ltd., M/s. Mehta Machinery Manufacturers Pvt. Ltd. and M/s. Oriental Corporation Pvt. Ltd. should vest with Suhasbhai and the particulars of the arrangement so made was recorded in MOU dated 30.1.1982 and the modified MOU dated 13.11.1982. The fact that Suhasbhai supported the petitioners of the Company Petition clearly demonstrated that he had turned dishonest and wanted to deprive Bipinbhai of the control of the two companies, which he had got after transfer of shares in his name. The whole thing had been done in the knowledge of the father Vadilal Lallubhai Mehta, who was the chairman and also his two sons and thus the High Court had rightly held that the petition was barred by limitation.

9. Before examining the contentions raised by the learned counsel for the parties it will be useful to refer to the relevant statutory provisions and the basic principles, which are involved in the case. The Company Petition has been filed seeking rectification of the register of members as contemplated by Section 155 of the Companies Act. This provision has been deleted by Section 21 of the Companies (Amendment) Act, 1988 (Act 31 of 1988) with effect from 31.5.1991 and has been incorporated in a modified form in Section 111. Prior to its omission the said Section stood as under: -

"155. Power of Court to rectify register of members \026

(1) If \026

(a) the name of any person \026

(i) is without sufficient cause, entered in the register of members of a company, or

(ii) after having been entered in the register, is, without sufficient cause, omitted therefrom; or

(b) default is made, or unnecessary delay takes place, in entering on the register the fact of any person having become, or ceased to be, a member;

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.
(2) The Court may either reject the application or order rectification of the register, and in the latter case, may direct the company to pay the damages, if any, sustained by any party aggrieved.
In either case, the Court in its discretion may make such order as to costs as it thinks fit.
(3) On an application under this section, the Court \026
(a) may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and
(b) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification.
(4) From any order passed by the Court on the application, or on any issue raised therein and tried separately, an appeal shall lie on the grounds mentioned in section 100 of the Code of Civil Procedure, 1908 (5 of 1908) \026
(a) If the order be passed by a District Court, to the High Court;
(b) If the order be passed by a single Judge of a High Court consisting of three or more Judges, to a Bench of that High Court.
(5) The provisions of sub-sections (1) to (4) shall apply in relation to the rectification of the register of debenture-holders as they apply in relation to the rectification of the register of members."

Section 77 of the Companies Act imposes restrictions on purchase by company, or loans by company for purchase, of its own or its holding company's shares. Relevant part of sub-sections (1) and (2) of this Section read as under: -
"77. Restrictions on purchase by company, or loans by company for purchase, of its own or its holding company's shares. \027(1) No company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of sections 100 to 104 or of section 402.
(2) No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company:
Provided that .....
....." (omitted as not relevant)

10. The vexed question of the legality of the purchase by a limited company of its own shares was set at rest by the decision of the House of Lords in Trevor v. Whitworth (1887) 12 AC 409, since which it has been clear law that a limited company cannot purchase its own shares except by way of reduction of capital with the sanction of the court. (see Buckley on the Companies Act \026 14th edn. p.1499). In the same decision it was also held that even express authority in the

memorandum to the contrary was unavailing. The main reasons for this prohibition were that such a purchase could either amount to "trafficking" in its own shares, thereby enabling the company in an unhealthy manner to influence the price of its own shares on the market, or it would operate as a reduction of capital which can only be effected with the sanction of the court and in the manner laid down in the statute (See Palmer's Company Law \026 23rd edn. \026 p. 440). In the Guide To The Companies Act by A. Ramaiya (16th edn. p.951) apart from Trevor v. Whitworth (supra), British and American Trustee and Finance Corporation v. Couper 1894 AC 399, has also been referred as a leading authority on the subject. Reference has also been made to several decisions rendered by the superior courts in Australia and New Zealand wherein it has been unequivocally held that "a transaction which upon examination can be seen to involve a return of capital, in whatever form, under whatever label, and whether directly or indirectly, to a member, is void". It is, therefore, well settled legal principle that any valuable consideration paid out of the company's assets will make a transaction amounting to a purchase and, therefore, invalid.

11. It may be mentioned here that in view of Rule 6 of the Companies (Court) Rules, the provisions of the Code of Civil Procedure will be applicable in proceedings under the Companies Act (See Sangramsingh P. Gaekwad vs. Shantadevi P. Gaekwad (2005) 11 SCC 314).

12. Sub-rule (2) of Order XIV 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 AIR 1964 SC 497, and it was held as under:-

> "Under O. 14 R. 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 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 XIV 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.

13. The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further. In O.N. Bhatnagar vs. Smt. Rukibai Narsindas and others (1982) 2 SCC 244 (para 9) it was held that the appellant having raised a plea in the

nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by respondent 1 under Section 91(1) of the Act and those allegations must be taken to be true. In Roop Lal Sathi vs. Nachhattar Singh Gill (1982) 3 SCC 487 (para 24), it was observed that a preliminary objection that the election petition is not in conformity with Section 83(1)(a) of the Act i.e. it does not contain the concise statement of the material facts on which the petitioner relies, is but a plea in the nature of demurrer and in deciding the question the Court has to assume for this purpose that the averments contained in the election petition are true. Reiterating the same principle in Abdulla Bin Ali and others vs. Galappa and others (1985) 2 SCC 54, it was said that there is no denying the fact that the allegations made in plaint decide the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement. In Exphar Sa and another vs. Eupharma Laboratories Ltd. and another (2004) 3 SCC 688 (para 9), it was ruled that where an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of Delhi High Court and also that the respondent No. 2 did not carry out business within the jurisdiction of the said High Court. Following the same principle in Indian Mineral & Chemicals Co. and others vs. Deutsche Bank (2004) 12 SCC 376 (paras 10 and 11), it was observed that the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer.

14. The principle underlying Clause (d) of Order VII Rule 11 is no different. We will refer here to a recent decision of this Court rendered in Popat and Kotecha Property vs. State Bank of India Staff Association (2005) 7 SCC 510 where it was held as under in para 10 of the report: -

"10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."

It was emphasized in para 25 of the reports that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by sub-rule (d) of Order VII Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the Company Petition was barred by limitation has to be examined by looking into the averments made in the Company Petition alone and any affidavit filed in reply to the Company Petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the Company Petition cannot at all be looked into.

15. Paragraphs 14 and 21 of the Company Petition read as under: -

"14. Even the action on the part of respondent Nos. 2 and 3 to use company’s funds would amount to fraud on

the statute. They have clearly played fraud on Section 77 of the Act and it is also settled law that the party who has committed fraud could not be allowed to retain the fruits of the fraudulent action perpetrated by them. On this principle also status quo ante should be restored so that respondent Nos. 2 and 3 do not get benefit of the fraud played upon the statute."

"21. The petitioners further say that though the share transfers were effected in the year 1982, the petitioners could not have detected the fraud earlier, but they came to know about the fraud in detail when the specific criminal complaint was filed by some interested persons, the office bearers of the Union of the Company before the Criminal Court at Narol and they came to know by or about in the month of May, 1987. Hereto annexed and marked Annexure I is the copy of the said complaint. Thereafter they enquired into the matter and collected whatever additional material available. Petition No. 1 gave notice dated 14.6.1987. However, respondents 2 to 11 wasted too much time in correspondence and thereafter this petition is filed immediately."

The case set up by the petitioners in the Company Petition is that they had absolutely no knowledge of the alleged utilization of the funds of the Company for purchase of shares by Bipinbhai and they came to know about it by or about in the month of May, 1987 when a criminal complaint was filed by some office bearers of the union of the Company and thereafter petitioner No. 1 gave notice dated 14.6.1987. As mentioned earlier two cheques of Rs.10 lacs and 5 lacs were given on 13.11.1982 and another cheque of Rs.5 lacs was given on 25.11.1982 by M/s. Sayaji Industries Ltd. to M/s. Santosh Starch Products and on the same day M/s. Santosh Starch Products gave Rs.20 lacs through cheques to Bipinbhai and his family members. Thereafter, Bipinbhai purchased 8,600 shares of the Company M/s. Sayaji Industries Ltd. and became its Managing Director on 18.11.1982. Though we should not be understood as recording any finding on this point, but in the natural course of events or at least it looks quite probable that the petitioners in the company petition, who are small shareholders of the Company, may not have come to know about the aforesaid transactions.

16. 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 VII 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 Civil Appeal No. 4539 of 2003 (Balasaria Construction Pvt. Ltd. vs. Hanuman Seva Trust and others) decided on 8.11.2005 and it was held: -

"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 paint 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 VII Rule 11(d) CPC.

17. In natural course of events it looks quite probable that a third party may not come to know that the Company had advanced money to M/s. Santosh Starch Products on 13.11.1982 and M/s. Santosh Starch Products gave Rs.20 lacs to Bipinbhai and his family members on the same day and the said money was utilized for purchasing the shares. It is noteworthy that M/s. Santosh Starch Products is a supplier of the Company M/s. Sayaji Industries Ltd. and in such circumstances the payment of money by the Company to M/s. Santosh Starch Products could not have raised any suspicion. At any rate accepting the version given in the Company Petition as correct and without taking into consideration any plea raised in the affidavits filed in reply thereto or any other material or evidence, it is absolutely clear that having regard to the provisions of Section 17(1) of the Limitation Act, the limitation for filing the Company Petition had not begun to run until May, 1987 when the petitioners claim to have got knowledge of the alleged fraud committed by the respondents in utilizing the funds of the Company for purchase of its shares, which is a clear violation of Section 77 of the Companies Act. Thus the Company Petition cannot be thrown out at the preliminary stage as being barred by limitation and the view to the contrary taken by the learned Company Judge and also by the Division Bench is clearly erroneous in law.

18. As mentioned earlier before the admission of the Company Petition notice was issued and affidavit in reply was filed by R.T. Doshi, who was working as Company Secretary of the Company. This affidavit was filed for the purpose of opposing the admission of the Company Petition. It was averred therein that the Company Petition was barred by gross laches, delay, acquiescence as the petition had been filed after more than five years of transaction in question. The plea raised by the petitioners that they came to know about the alleged transaction in May, 1987 when a criminal complaint was filed was sought to be refuted by stating that the criminal complaint was filed on 18.6.1987, but before that the petitioner No. 1 had given a notice to the Company dated 17.6.1987. It was also averred in the affidavit of R.T. Doshi that the petitioners were aware of the transaction right from November, 1982 and the petitioner No. 1 Ramesh B. Desai, who was Administrative Manager of the Company, resigned from the post held by him on 7.10.1983. Based upon these facts it was submitted in reply affidavit of R.T. Doshi that the petitioner No. 1 was aware of the fact that the petition was barred by limitation. The learned Company Judge, after referring to the aforesaid material and the contentions raised by the learned counsel for the parties, held as under: -

"Here, before me, looking to the averments in the petition and in the affidavit in reply, it can be said that, a material proposition regarding the limitation has been affirmed by the petitioners and the same is being denied by the other side and, therefore, there is a subject of a distinct issue and that issue appears to be an issue of law, for the reasons which I shall have to assign."

The learned Company Judge then proceeded to hold that "there is not only no proof of fraud, but even the "averments of fraud" made in the petition do not amount to the averments of fraud in eye of law" and finally held that "the petition appears prima facie to be barred by the law of limitation, regard being had to the residuary Article 137 of the Limitation Act". After referring to some authorities and Order VI Rule 4 CPC the learned Company Judge held that "though the word "fraud" and the term "fraud on the Company", "fraud on statute" and "fraud on the shareholders" are used more than once, but absolutely no particulars in that respect have been given". After so observing the learned Company Judge has concluded that "the position would be that, these averments of fraud said to be made in the petition cannot be said to be the averments of fraud, in eye of law, within the meaning of

Order VI Rule 4 CPC."

19. Undoubtedly, Order VI Rule 4 CPC requires that complete particulars of fraud shall be stated in the pleadings. The particulars of alleged fraud, which are required to be stated in the plaint, will depend upon the facts of each particular case and no abstract principle can be laid down in this regard. Where some transaction of money takes place to which 'A', 'B' and 'C' are parties and payment is made by cheques, in normal circumstances a third party 'X' may not get knowledge of the said transaction unless he is informed about it by someone who has knowledge of the transaction or he gets an opportunity to see the accounts of the concerned parties in the Bank. In such a case an assertion by 'X' that he got no knowledge of the transaction when it took place and that he came to know about it subsequently through some proceedings in court cannot be said to be insufficient pleading for the purpose of Order VI Rule 4 CPC. In such a case 'X' can only plead that he got no knowledge of the transaction and nothing more. Having regard to the circumstances of the case, we are of the opinion that the High Court was in error in holding that there was no proper pleading of fraud.

20. The learned Company Judge has referred to the affidavit in reply filed by R.T. Doshi opposing the admission of the Company Petition and on the basis of the said affidavit has laid great emphasis on the fact that father Vadilal Lallubhai Mehta was present all along with the appellant No. 1 Ramesh B. Desai at all material times and that things were done in the presence of everyone, viz., two sons of Vadilal Lallubhai Mehta, namely, Bipinbhai and Suhasbhai. Emphasis has also been laid on the fact that the last cheque dated 25.11.1982 given by the Company to M/s. Santosh Starch Products was signed by the petitioner No. 1 Ramesh B. Desai himself. These are all questions of fact, findings on which could be recorded only after the parties had been given opportunity to adduce evidence. The mere fact that one cheque for Rs.5 lacs was signed by Ramesh B. Desai does not lead to the only inference that he got knowledge of the entire transaction relating to payment of Rs.20 lacs by the Company to M/s. Santosh Starch Products and the payment of the said amount on the same day by M/s. Santosh Starch Products to Bipinbhai and his family members. The learned Company Judge and the Division Bench in appeal have referred to these facts and have recorded a finding that the petitioners had knowledge of the entire transaction and the Company Petition was barred by limitation. It is important to point out that apart from Ramesh B. Desai there are 8 other shareholders who had filed the Company Petition. There is not even a slightest inkling in the impugned judgments of the High Court that the other 8 petitioners had acquired knowledge of the transaction much earlier. In our opinion the approach adopted by the High Court is clearly illegal as no finding on the point of knowledge could have been recorded until the parties had been given opportunity to lead evidence and in such circumstances dismissal of the Company Petition at a preliminary stage on the finding that it was barred by limitation is clearly erroneous in law.

21. Mr. Iqbal Chagla, learned counsel for the respondents, has submitted that the full particulars of fraud had not been given in the Company Petition and as such there was no compliance of Order VI Rule 4 CPC in the Company Petition and the learned Company Judge has rightly dismissed the same. In support of this submission he has placed reliance on Bishundeo Narain and another vs. Seogeni Rai and others AIR 1951 SC 280 wherein it was held that "in case of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be". Reliance has also been placed on Bijendra Nath Srivastava vs. Mayank Srivastava and others (1994) 6 SCC 117 and paragraphs 208 and 228 of the report in Sangramsinh P.

Gaekwad and others vs. Shantadevi P. Gaekwad and others (2005) 11 SCC 314, where the same principle has been reiterated. We have already considered this aspect of the matter and in our opinion in the facts and circumstances of the case the plea raised in the Company Petition cannot be held to be wanting in compliance of Order VI Rule 4 CPC.

22. The learned Company Judge and the Division Bench of the High Court have dealt with the point of limitation by posing the question whether the petitioners could avail of the benefit of Section 17(1)(b) of the Limitation Act as they were claiming that they did not get any knowledge of the transaction prior to May, 1987 and that the petition was within time from the date on which they got knowledge of the transaction. Mr. Chagla has strenuously urged that in order to invoke the aid of Section 17(1)(b) of the Limitation Act the petitioners must establish that there has been fraud and that by such fraud they have been kept away from knowledge of their right to or of the title whereon it is founded. For substantiating this submission reliance has been placed on Syed Shah Gulam Ghouse Mohiuddin and others vs. Syed Shah Ahmad Mohiuddin Kamisul Quadri and others AIR 1971 SC 2184, Kasturi Lakshmibayamma vs. Sabnivis Venkoba Rao and others AIR 1970 AP 440 and in Re Marappa Goundar AIR 1959 Madras 26, wherein the aforesaid principle has been enunciated.

23. The petitioners in the Company Petition have relied upon Section 17 of the Limitation Act in support of their claim that the limitation will start running only when they got knowledge of the fraud committed by the contesting respondents, i.e., in May or June, 1987. The relevant part of sub-section (1) of Section 17 on which the petitioners base their claim is being reproduced below: -

"17. Effect of fraud or mistake.\027(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,\027

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) ..... (omitted as not relevant)

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that .....
....." (omitted as not relevant)

24. In our opinion, in view of the facts pleaded in the Company Petition, the case is covered by Section 17(1)(a) of the Limitation Act and not by Section 17(1)(b) as the petitioners are not claiming any right or title over the shares of the Company, which according to them were purchased out of the funds of the Company. Section 17(1)(b) will apply when the plaintiff or applicant is claiming any kind of right or title to any moveable or immoveable property etc. Their simple case is that in view of the fact that the funds of the Company were utilized for purchase of shares by Bipinbhai, which were then recorded in his name, the whole transaction was in violation of Section 77 of the Companies Act, and consequently the register of the Company required to be rectified in accordance with Section 155 of the Companies Act. It was also pleaded that the petitioners had got no knowledge of the fraud played by the respondents of the Company Petition whereby the funds of the Company were utilized for purchase of shares and they came to know about it in May, 1987 through the

criminal complaint. In view of the pleadings as aforesaid, it is Section 17(1)(a) of the Limitation Act which would govern the situation and not Section 17(1)(b) of the Limitation Act.

25. The decisions cited by Mr. Chagla have been rendered on Section 18 of the Limitation Act, 1908 which reads as under: -

"S.18. Effect of Fraud :

Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application \026

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production."

26. The corresponding provision of Section 18 of the Limitation Act, 1908 is Section 17 of the Limitation Act, 1963. The Statement of Objects and Reasons for amending Section 18 of the old Limitation Act read thus : -

"OBJECTS AND REASONS"

Clause 16: - Section 18 of the existing Act has been re-cast on the lines of Section 26 of the Limitation Act, 1939, of the united Kingdom so as to include actions based on fraud and also for relief founded on mistake. The clause also seeks to afford suitable protection to purchasers for valuable consideration in all such cases.

Sub-clause (2) incorporates the principle contained in the proviso to Section 48 of the Code of Civil Procedure, 1908, which now finds a place in this Bill (see Art. 135). The benefit is, however, made available only if the application for extension is made within one year from the date of discovery of the fraud or cessation of force."

Clause (a) of sub-section (1) of Section 17 of Limitation Act, 1963 is same as clause (a) of Section 26 of the English Act. There was no corresponding provision like clause (a) of sub-section (1) of Section 17 in Section 18 of the old Limitation Act and this provision has been introduced for the first time as a result of the amendment. All the decisions cited by Mr. Chagla have been rendered on Section 18 of Limitation Act, 1908. In view of the amendment incorporated in the Limitation Act, 1963 and specially the language in which Section 17 is cast now, they can have no application to the facts of the present case

27. Mr. Soli Sorabjee has also submitted that the continuance of the name of Bipinbhai in the register of the Company was a continuing wrong and, therefore, the period of limitation would begin to run at every moment of time during which the wrong name of Bipinbhai continues to remain in the register. Learned counsel has submitted that in such a situation the principles enshrined in Section 22of the Limitation Act will apply and the Company Petition cannot be held to be barred by limitation and the view to the contrary taken by the High Court is erroneous in law. Since we have held above that the Company Petition could not be dismissed on a preliminary issue, namely, as being barred by limitation as the petitioners had not been given opportunity to lead evidence and the finding of the High Court

has been reversed on that point, we do not consider it appropriate to examine the aforesaid contention on merits. However, as the High Court has to hear the Company Petition again, the findings recorded by the High Court on the point of continuing wrong and condonation of delay are set aside.

28. The appeal accordingly succeeds and is hereby allowed with costs throughout. The judgment and order dated 12.3.96 passed by learned Company Judge and that of the Division Bench dated 10.3.2000 are set aside. The High Court shall decide the Company Petition afresh in accordance with law.

29. It is made clear that any observation made in this order is only for the limited purpose of deciding this appeal and shall not be construed as an expression of opinion on the merits of the case.

JUDIS