NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) No.08 of 2018

[Arising out of Order dated 19.12.2017 passed by National Company Law Tribunal, Hyderabad Bench, Hyderabad in C.P. No.36/241/HDB/2017]

IN THE MATTER OF:

Mrs. Proddaturi Malathi
P. No.8, H. No. 40-434. Gopalnagar,
Moula-Ali, Hyderabad – 500 040

…Appellant
(Original Petitioner)

Versus

1. M/s. SRP Logistics Private Limited
1-11-242/1, Flat No.304,
3rd Floor, Kishan Residency, Begumpet,
Hyderabad – 500 016

2. Mr. Sekhar Pendam
Plot No.14, Prasanna Apartments, D-5,
Saibaba Colony, Sitarampur, Bowenpally,
Secunderabad – 500 011

Also at:
H. No.8-7-198/5/A, Plot No.131,
PV Enclave, Samatha Nagar, Pld Bowenpally
Secunderabad – 500 011

3. Mrs. Salalitha Parsha
Plot No.14, Prasanna Apartments, D-5,
Saibaba Colony, Sitarampur, Bowenpally,
Secunderabad – 500 011

Also at:
H. No. 8-7-198/5/A, Plot No.131,
PV Enclave, Samatha Nagar, Old Bowenpally
Secunderabad – 500 011

4. Mr. Mallesham Mekala
H. No. 1-3-47/1, Shanthi Nagar,
Peddapalli, Karimnagar – 505 172

5. Mr. Proddaturi Rama Krishna
P. No.8, H. No.40-434, Gopalnagar,
Moula – Ali, Hyderabad – 500 040

6. The Registrar of Companies
Andhra Pradesh and Telangana,
2nd Floor, Corporate Bhavan,
Near Central Water Board,
Bandlaguda, Nagole,
Hyderabad – 500 068

…Respondents
(Original Respondents)

Present: Shri V. Seshagiri, Shri Anchit Tripathi and Shri Adhish Rajvanshi, Advocates for the Appellant

Shri S. Chidambaram, PCS for Respondent Nos.1 to 4

Shri Vikas Reddy for Respondent No.5

J U D G E M E N T

A.I.S. Cheema, J. :

1. The Appellant (Original Petitioner) filed CP 36/241/HDB/2017 before the National Company Law Tribunal, Hyderabad Bench, Hyderabad (hereinafter referred as 'NCLT') making various grievances regarding oppression and mismanagement on the part of Respondents 2 and 3 helped by Respondent No.4 in the affairs of Respondent No.1 Company. The Company Petition filed on 19th March, 2017 came to be dismissed by Impugned Order dated 19.12.2017. Thus this Appeal.

(2) In short, the grievances raised by the Appellant can be stated to be as follows:-

a) The Appellant and Respondent No.2 as well as Respondent No.5 incorporated the Respondent No.1 Company in 2003. At that time, their

shareholding was:-

1. Appellant – 49.95% (5000 shares)
2. Respondent No.2 - 49.95% (5000 shares)
3. Respondent No.5 – 0.10% (10 shares)

b) In 2005 – 2006, 39,990 equity shares of Rs.10/- each were issued to existing shareholders namely, the Appellant and Respondent No.2. Respondent No.3 - wife of Respondent No.2 came to be substituted as shareholder of the 10 shares held by Respondent No.5. The Annual Returns of the Company for the year 2006 showed the shareholding as :-

1. Respondent No.2 – 49.99% (24,995 shares)
2. Appellant – 49.99% (24,995 shares)
3. Respondent No.3 – 0.02% (10 shares) (impugned transfer)

The Appellant claims that she came to know about such substitution subsequently and thus impugned the induction of Respondent No.3 – the wife of Respondent No.2 as holder of 10 shares in place of Respondent No.5. According to her, because of the induction of Respondent No.3 (the wife of Respondent No.2), the collective shareholding of Respondents 2 and 3 couple (hereafter also referred as – "Respondents") went beyond 50% of the total. In the Company Petition brought by the Appellant, she questioned this issue of shares to Respondent No.3.

c) The Appellant then in the Company Petition, impugned Board Resolution calling for EOGM dated 30th September, 2015 to increase authorized share capital of the Company and the EOGM held on 30th September, 2015, by which authorized share capital of the Company was increased from Rs.5 lakhs to Rs.15 lakhs. She challenged the distribution of the shares after the EOGM (dated 30th September, 2015) in Board Meeting said to have been held on 30th September, 2015 after the EOGM. The division of shares done on 30th September, 2015 questioned by Appellant is as under:-

1. Respondent No.2 - 39.08% (58615 shares)
2. Appellant – 28.58% (42,875 shares)
3. Respondent No.3 – 32.34% (48510 shares)
   (Impugned transfer)

She has impugned the number of shares issued to Respondent No.3 on the basis that there was no equitable distribution between the shareholders and the shareholding of the Respondents 2 and 3 couple went up to 71.42%. She also claimed that she had no Notice of any such Board Meeting for distribution of the shares.

d) The Appellant claimed that there was yet another Board Meeting Resolution dated 31.10.2016, to call EOGM on 25th November, 2016 to further increase the authorized share capital from 15 lakhs to 40 lakhs. She claimed that such calling of EOGM and holding of the same to increase

the authorized share capital was illegal as well as the Board Meeting dated 26.11.2016 allotting shares to Respondent No.2 and to an outsider Shri Mallesham Mekala – Respondent No.4 was illegal as according to her, shares were issued to Respondent No.2 and Respondent No.4 by preferential allotment and private placement basis without following the necessary procedure. According to the Appellant, after the meeting dated 26.11.2016, the shareholding constituted as under:-

1. Respondent No.2 – 69.51% (2,08,615 shares)
2. Appellant – 14.29% (42,875 shares)
3. Respondent No.3 – 16.17% (48,510 shares)
4. Respondent No.4 – 0.03% (100 shares)

It is claimed by the Appellant that because of such illegal acts, the Respondent Nos.2 and 3 couple illegally took over the control of the Company to oust the Appellant by reducing her shareholding which was initially 49.95% to just 14.29%.

e) In the Company Petition, there were pleadings of the Appellant to say that she did not receive Notices for the various Board Meetings and EOGMs. She pleaded that she had little knowledge regarding affairs of the Company as the Respondent No.2 was Managing Director and taking care of the affairs. According to her, she had no invitation for Board Meetings and General Meetings. It was closely held company and in good faith, Petitioner signed some papers given by the Respondent No.2. She claimed

that it was understanding between the parties not to deviate from shareholding without knowledge of the other party but Respondent No.2 violated the terms and conditions. The Company Petition claimed that the Petitioner received Notice dated 04.03.2017 with regard to Board Meeting dated 15.03.2017. She objected to the same vide letter dated 11.03.2017 questioning how Respondent No.4 could be regularized as Director and how it was being proposed to remove her from the position of Director. The Petitioner claimed that after she sent letter, Respondent No.2 talked to her on phone and lured her with certain promises, which she has detailed in the petition and according to her due to such promises she went for attending the Board Meeting on 15.03.2017 but was not allowed to enter into the venue of Board Meeting. The Company Petition claimed that the Appellant – Petitioner then received Notice dated 15.03.2017 of EOGM to be conducted on 10th April, 2017 with the agenda of removing her from the post of Director. She then filed the Company Petition on 19.03.2017.

f) The Company Petition raised these aspects as acts of oppression and mismanagement.

3. The Impugned Order shows (in para – 11) that NCLT had passed Order dated 06.11.2017 inter alia directing not to give effect to Resolution on the issue of removal of the Appellant as Director. The learned NCLT while rejecting other claims of the Appellant regarding oppression and mismanagement, on the basis that she had been attending the concerned meetings, did not find fault even with the decision taken by Respondents

to remove the Appellant from the post of Director and observed that the Company was free to take appropriate decision according to law.

4. We have heard learned counsel for both sides and perused the Impugned Order as well as the record placed before us. We proceed to take up the various grievances raised making reference to the arguments and recording our reasons and findings.

Substitution of Respondent No.3 in place of Respondent No.5 in 2005 – 2006

5. First is the issue raised by Appellant regarding substitution of Respondent No.3 in place of Respondent No.5 who held 10 shares when the Company was incorporated. Copy of the minutes of Board of Directors dated 16th June, 2005 is at Page - 69 filed with the counter affidavit on behalf of Respondents 1 and 2 (Diary No.3258). In this meeting, the Appellant and Respondents 2 and 3 are shown as present. The Respondent No.2 is shown as Managing Director and the Appellant and Respondent No.3 are shown as Directors. The approval for transfer of shares appears to have been recorded which states that P. Rama Krishna (Respondent No.5) who was holding 10 shares has filed transfer deed. The Resolution then records transfer of 10 shares to Respondent No.3.

5.1 This is an old Resolution of 2005 and Appellant who was full-time Director for so many years even after 2005 did not question the transfer till 2017. Respondent No.5 himself did not file any proceedings or complain

to claim that he had not transferred the shares to Respondent No.3. In this matter by Appellant, however, Respondent No.5 is supporting the Appellant in the arguments. The grievances raised in this regard are hopelessly delayed and do not merit consideration.

Increase of Share Capital from 5 Lakhs to 15 Lakhs and allotments

6. The next issue refers to the increasing share capital from Rs.5 lakhs to Rs.15 lakhs. The Statement No.2 below the Notice of Meeting (Appeal – Annexure A-9 Page – 158) reads as under:

> "2. Statement pursuant to section 102 of the Companies Act, 2013 relating to resolutions 1 to 3 under Special Business:
>
> It has been decided by the Board of Directors to enhance the paid up capital of the Company by allotting shares to the existing shareholders to the extent of share application money contributed by them. This requires enhancement of authorised capital. Keeping this in view and also future requirements in mind the Board proposes resolutions at 1 to 3 under Special Business of the notice above.
>
> The Directors are interested to the extent their shareholding in the company and to the extent they may participate in the further issue of them."

7. Thus the Notice issued by Respondent No.2 under Orders of the Board of Directors, itself mentioned and showed that there was share application money lying and share capital was to be increased so as to allot shares to the extent of share application money contributed. At the time of arguments, the learned counsel for the Appellant submitted that the Appellant is not disputing the fact that AGM dated 30th September, 2015 took place and there was increase in the share capital but according to him, the Appellant was disputing the manner in which distribution of the increased share capital was made. According to the counsel, the Appellant had no Notice of alleged Board Meeting dated 30th September, 2015. To recall, the Appellant had pleaded in the Company Petition that she had merely signed documents given by Respondent No.2 in good faith. At Page – 295, there is Board Meeting Resolution dated 30th September, 2015 which has signatures of the Appellant as Director along with the Respondent No.2 as Chairperson. The first page of the Resolution mentions that the AGM had been held on the same date and Resolution had been passed regarding increase of share capital from Rs.5 lakhs to Rs.15 lakhs. The other decision relates to allotment of equity shares which reads as under:

> "ALLOTMENT OF EQUITY SHARES:
>
> The chairman further informed the Board that share application money pending in the books of account since a long time has to be allotted to the persons depositing the above

money as per books. After due discussions it has been decided to allot shares to the persons mentioned in the books under share application money and the following resolution is passed.

"Resolved that Equity Share Capital to the extent of the Share Application money pending allotment as on 30/09/2015 be allotted to persons in whose name the above share application is pending for allotment. It is further resolved that Shri P. Shekar, Director of the Company be and is hereby authorized to sign in physical or digitally the various statutory forms and documents as and when required to effect the above."

8. Along with minutes, there is chart at Page – 297 which inter alia shows the number of shares held by the Appellant and Respondents 2 and 3 as on 30th September, 2015 before and after the allotment done on that date. Respondents 1 and 2 have, with the counter affidavit, filed Annexure R-4 (Page 71 – Diary No.3258) chart of share application money lying as till then and shares allotted and balance to be allotted as on 30th September, 2015.

9. The Appellant has questioned such allotment of shares after the meeting on the basis that in the Annual Return of 2015 – 2016 which was filed (copy of which is at Page – 120 of the Appeal), the entries relating to Board Meetings held during the year (at Page – 130) did not mention holding of Board Meeting dated 30th September, 2015. We find that this

may be error as on the same page the document does refer to the AGM dated 30th September, 2015. Apart from this, the Balance Sheet for the year ending 31st March, 2016 (see Page – 184 to 187) does show the allocation of the shares. This document bears signatures of the Appellant along with Respondent No.2 authenticating the entries. At Page – 187 with reference to the holdings which were more than 5%, the entries read as under:

"Holding more than 5%

Particular	31-03-2016 No. of Shares	31-03-2015 No. of Shares	31-03-2014 No. of Shares
1. P. Shekar	58615	24995.00	24995
2. P. Malathi	42875	24995.00	24995
3. P.Salalitha	48510	0.00	0

"

10. Appellant is more aggrieved by shares allotted to Respondent No.3. Looking to such documents signed by the Appellant herself, only by turning around disowning contents saying that she signed in good faith is not enough. The Appellant is stated to have been a full-time Director. When this is so, official records cannot be simply wished away.

11. It has been argued by the learned counsel for the Appellant that after passing of the Companies Act, 2013, Section 74 was introduced in the New Act requiring repayment of deposits accepted before commencement of the Act. According to him, the deposits received towards

share application money were thus required to be refunded. The counsel then referred to Notification No. GSR 241(E) (Appeal – Page 298) issued by the Ministry of Corporate Affairs exercising powers under Sections 73 and 76, dated 31st March, 2015 which amended Companies (Acceptance of Deposits) Rules, 2014 ("Deposit Rules" in short) relating to the acceptance of deposits by the Companies. In the definition of "deposit" under Rule 2(1)(c) – (a) in sub-clause (vii), in Explanation (a), this Notification added proviso. As per Clause (c) of the above Rules "deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include the amounts as stated in the various Sub-Clauses mentioned in the Rule. The amendment which was brought on 31st March, 2015 reads as under:-

> "2. In the companies (Acceptance of Deposits) Rules, 2014.—
>
> (1) in rule 2, in sub-rule (1), in clause (c).—
>
> (a) in sub-clause (vii), in Explanation (a), the following proviso shall be inserted, namely:—
>
> "Provided that unless otherwise required under the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules or regulations made thereunder to allot any share, stock, bond or debenture within a specified period, if a company had received any amount by way of

subscriptions to any shares, stock, bonds or debentures before the 1st April, 2014 and disclosed it in the balance sheet for the financial year ending on or before the 31st March, 2014 against which the allotment is pending on the 31st March, 2015, the company shall, by the 1st June 2015, either return such amounts to the persons from whom these were received or allot shares, stock, bonds or debentures or comply with these rules."

12. The argument is that in view of this Proviso added, the Respondent No.1 Company was required to allot the shares by 1st June, 2015 or else it was required to return the amounts received from the persons for allotment of the shares. It is argued that as shares were allotted on 30th September, 2015, which was beyond 1st June, 2015 prescribed by the above Proviso, the acts committed by the Respondents were not maintainable.

13. We recall that the Appellant herself has been party to such Resolutions being passed and also the allotment of shares in which she was herself a beneficiary. Her grievance is only regarding the division. Apart from this, the Rules of 2014 in Rule 21 prescribe for punishment for contravention and if there has been a contravention the learned Registrar of Companies would be duty bound to look into the same. There is no dispute that the share application money was lying with the Company and in view of Section 74 of the New Companies Act, 2013, read with window

opened by the above Notification, Company was required to act – either return the money – or allot shares. The Company took decisions (may be, late) as mentioned above and against the share application monies received the shares were allotted. The Appellant who was herself party to the acts cannot be heard questioning the same. R.O.C. however, will have option to take action deemed fit regarding violating Deposit Rules.

14. The learned NCLT discarded the claim of the Appellant with reference to the EOGM held on 30th September, 2015 and subsequent allocation of the shares on the basis of share application monies which had been received. We do not find any reason to interfere with this part of the Judgement of the learned NCLT.

Further increase of Share Capital from 15 Lakhs to 40 Lakhs and allotments

15. The 3rd issue relates to Respondents holding Board Meeting dated 31st October, 2016 and calling of EOGM on 25th November, 2016 to further increase the share capital from 15 lakhs to 40 lakhs and then in Board Meeting dated 26.11.2016 allocating of 1,50,000 shares to Respondent No.2 "at par" and also issuing 100 shares "at par" to Respondent No.4 who was admittedly an outsider.

16. Regarding this Annexure A6 Form No. MGT – 14 (Page – 144 of Appeal), shows reference to Notice dated 31st September, 2016 and Resolution dated 25th November, 2016 with the subject being increase of share capital from 15 lakhs to 40 lakhs and alteration of Memorandum of

Association. Annexure A-7 (Page – 148) is Return of allotment in Form PAS – 3 showing allotment of equity shares pari passu with existing shares. Then there is Annexure A-8 From No.DIR-12 (Page – 153) with reference to appointment of Respondent No.4 as Additional Director on 26.11.2016.

17. In this regard, learned PCS for the Respondents referred to Page – 261 of the appeal which is Attendance Sheet of the Board of Directors dated 31st October, 2016. It includes the Appellant and her signature. The minutes of the Board of Directors meeting dated 31st October, 2016 are at Page – 262 regarding presence of the Appellant. The Board resolved regarding EOGM required to be called for increasing the share capital from 15 lakhs to 40 lakhs. Page – 300 is the Attendance Sheet of the members in the EOGM dated 25th November, 2016. The Appellant was present even in this EOGM as per the Attendance Sheet. The minutes of the said meeting are at Page 301 which shows that the authorized share capital was increased from 15 lakhs to 40 lakhs. Regarding allotment of the equity shares, the Resolution was as under:-

> "**3. ALLOTMENT OF EQUITY SHARES**
>
> **RESOLVED THAT** pursuant to 62(1)(c) and other applicable provisions, if any, of the Companies Act, 2013, the Board of Directors be and is hereby authorized to issue 2,50,000 (Two Lakhs Fifty Thousands) equity shares of Rs.10/- (Rupees Ten) each the company by way of private placement or preferential allotment, whether at par or at premium and such shares be

offered to any person whether members of the company or not, as the Board of Directors may deem fit."

18. Then there is Attendance Sheet of the Board of Directors meeting dated 26th November, 2016 which is at Page – 264 of the Appeal. This document also shows presence of the Appellant and she is signatory. The Minutes of the Board of Directors meeting dated 26th November, 2016 are at Page 265. Regarding allotment of equity shares, the Resolution was as under:

"**ALLOTMENT OF EQUITY SHARES OF THE COMPANY**

The Chairman informed the Board that the Company has received share application money from applicants of the Company towards the Share Capital. The Board discussed further and passed the following resolutions unanimously.

"**RESOLVED THAT** the consent of the Board be and is hereby accorded for the allotment of 1,50,100 (One Lakh Fifty Thousand One Hundred) Equity Shares of face value of Rs.10/- (One Ten Only) each at par per share aggregating to Rs.15,01,000/- (Rupees Fifteen Lakhs One Thousand) to the applicant mentioned below from whom the money had been received by the Company and the entries be made in the Register of Members of the Company."

S No.	Name & Occupation of allottee	Address	No. of Shares	Amount Rs.	Face Value per Share in Rs.
1	Sekhar Pendam Occ: Business	S/o. Narayana Pendam, Plot No.14,Prasanna Apts, D-5 Saibaba Colony, Sitarampur, Bowenpally Secunderabad 500011	1,50,000	15,00,000	10/-
2	Mallesha M Mekala Occ: Business	S/o. Laxman Mekala, H.No.1-3-47/1, Shanti Nagar, Peddapalli, Karimnagar, Telengana - 505172	100	1000	10/-
TOTAL			1,50,100	15,01,000	

"

19. The Respondent No.4 was thus allotted 100 shares at par along with 1,50,000 shares allotted to Respondent No.2 at par.

20. In this regard, the Appellant has raised legal issue regarding the procedure adopted for raising the share capital from 15 lakhs to 40 lakhs and then allotment of shares on preferential basis and private placement basis.

21. The learned PCS for Respondents 1 to 4 pointed out the documents relating to Board Meeting Resolution dated 31.10.2016,

Resolution of EOGM dated 25.11.2016 and Resolution of Board Meeting dated 26.11.2016 to show presence of the Appellant in these meetings. However, one of the grievances of the Appellant is that she did not have notice of these meetings. It may be noted that by the time these meetings came about, Respondent 2 and 3 had already firmed up their position after the enhancement of share capital from Rs.5 lakhs to Rs.15 lakhs. Thus, the Appellant by this time, may not have been in that asserting position. As it appears from records that these meetings were called with the object of resorting to Section 62(1)(c) of the new Act, certain procedural requirements were required to be complied which included Notice in particular format (which we will refer [infra]). We need to mention here itself that Notice complying with procedural requirements for increasing subscribed capital and further issue under Section 62(1)(c) of the new Act have neither been brought to our Notice by the learned PCS for the Respondents nor proof of service of such Notice on the Appellant has been shown.

22. In this regard, the learned counsel for the Appellant has submitted that for making preferential allotment under Section 62(1)(c) of the new Act, it is necessary that Valuation Report of registered Valuer is obtained before any such issue can be there. According to the counsel, Section 62(1)(c) permits passing of such Resolution and issue of shares on preferential basis if the price of the shares has been determined by the Valuation Report of the registered Valuer and it is further subject to such

conditions as may be prescribed. According to the counsel in this regard, the legislature has passed "Companies (Share Capital and Debentures) Rules, 2014" ("Rules of 2014" in short) and procedure has been prescribed under Rule 13. It is also submitted by the learned counsel that the Rules further require compliance with provisions of Section 42 of the Act. According to him, neither these Rules nor provisions of Section 42 of the new Act were complied to increase this subscribed capital by issue of further shares nor preferential allotment was made to Respondent No.2 complying the provisions and the procedures were not followed for private placement when at par shares were issued to Respondent No.4, an outsider by picking him up and allotting shares at par. The counsel argued that there is nothing to show as to how Respondent No.4 was picked up for preferential allotment of shares at par. This being legal issue, we have heard parties with regard to the same and take it up for consideration.

23. The Judgement of the learned NCLT does not appear to have gone into these details regarding increase of share capital from 15 to 40 lakhs and allotments as the Judgement shows that while dealing with the increase of share capital from 5 to 15 lakhs on 30th September, 2015, the learned NCLT collectively dealt with the subject even with regard to EOGM dated 25.11.2016 and while observing that the Appellant was party, did not deal with the other details and legality. The raising of share capital with reference to EOGM dated 30th September, 2015 was in the context of allotment of shares to existing members considering the share application

money pending which appears to have become necessary in view of the amendments in the Act of 2013. But the raising of authorized share capital in EOGM dated 25th November, 2016 and the subsequent allotment of shares are on different footing. The portions which we have extracted from the EOGM, minutes of 25th November, 2016 and the portion extracted from Board Meeting dated 26.11.2016 which we have reproduced above shows that the Respondents 2 and 3 who by now had become majority shareholders were now aiming at Section 62(1)(c) for making private placement as well as preferential allotments (to themselves) and thus brought about these resolutions. Section 62(1) of the new Companies Act as at the time concerned read as under:-

> "**62. Further issue of share capital.**— (1) Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered—
>
> (a) to persons who, at the date of the offer, are holders of equity shares of the company in proportion, as nearly as circumstances admit, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions, namely:—
>
> (i) the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days and not exceeding

thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;

(ii) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (i) shall contain a statement of this right;

(iii) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of Directors may dispose of them in such manner which is not disadvantageous to the shareholders and the company;

(b) to employees under a scheme of employees' stock option, subject to special resolution passed by company and subject to such conditions as may be prescribed; or

(c) to any persons, if it is authorised by a special resolution, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such

shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed."

24. Thus, as per Sub-Clause (c) of Sub-Section (1) of Section 62, if the shares are to be issued to any person who is not included in Clause (a) or Clause (b) it can be done provided the pricing of such shares is determined by the valuation report of a registered Valuer. The provision is further subject to such conditions as may be prescribed. Admittedly, in the present matter, there is nothing to show that any report of registered Valuer was taken to issue shares on preferential basis at par to Respondent No.2 or at par to Respondent No.4 who was an outsider. Again the Resolution adopted in the EOGM dated 25th November, 2016 would require a Board of Directors Resolution whether to issue the shares "at par or at premium". There is nothing to show that there was any deliberation or decision in the Board Meeting of 26.11.2016 to issue the shares at par or at premium.

25. Learned counsel for the Appellant argued that Rule – 13 of the Companies (Share Capital and Debentures) Rules, 2014 which came into force on 01.04.2014 and as it stood at the time of present allotments requires:

"**Issue of shares on preferential basis**

13. (1) For the purposes of clause (c) of sub-section (1) of section 62, if authorized by a special resolution passed in a

general meeting, shares may be issued by any company in any manner whatsoever including by way of a preferential offer, to any persons whether or not those persons include the persons referred to in clause (a) or clause (b) of sub-section (1) of section 62 and such issue on preferential basis should also comply with conditions laid down in section 42 of the Act:"

[Emphasis supplied]

26. The explanation below Sub-Rule (1) and, inter alia, material portions of Sub-Rule (2) of the above Rule – 13 are reproduced as under:-

"Explanation.— For the purpose of this rule,

(i) the expression 'Preferential Offer' means an issue of shares or other securities, by a company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities;

(ii) the expression, "shares or other securities" means equity shares, fully convertible debentures, partly convertible debentures or any other securities, which would be convertible into or exchanged with equity shares at a later date.

(2) Where the preferential offer of shares or other securities is made by a company whose share or other securities are listed on a recognized stock exchange, such preferential offer shall be made in accordance with the provisions of the Act and regulations made by the Securities and Exchange Board, and if they are not listed, the preferential offer shall be made in accordance, with the provisions of the Act and rules made hereunder and subject to compliance with the following requirements, namely:-

(a) the issue is authorized by its articles of association;

(b) the issue has been authorized by a special resolution of the members;

[(c) ***]

(d) The company shall make the following disclosures in the explanatory statement to be annexed to the notice of the general meeting pursuant to section 102 of the Act.

(i) the objects of the issue;

(ii) the total number of shares or other securities to be issued;

(iii) the price or price band at/within which the allotment is proposed;

(iv) basis on which the price has been arrived at along with report of the registered valuer;

(v) relevant date with reference to which the price has been arrived at;

(vi) the class or classes or persons to whom the allotment is proposed to be made;

(vii) intention of promoters, directors or key managerial personnel to subscribe to the offer;

(viii) the proposed time within which the allotment shall be completed;

(ix) the names of the proposed allottees and the percentage of post preferential offer capital that may be held by them;

(x) the change in control, if any, in the company that would occur consequent to the preferential offer;

(xi) the number of persons to whom allotment on preferential basis have already been made during the year, in terms of number of securities as well as price;

(xii) the justification for the allotment proposed to be made for consideration other than cash together with valuation report of the registered valuer."

[Emphasis supplied]

*** (Omitted w.e.f. 19.07.2016)

27. The Rule further requires disclosure on pre issue and post issue position of shareholding pattern of the company in the format prescribed in the Rule which has to be part of the explanatory statement to be annexed to the Notice. Under Sub-Rule (2) there are further requirements as specified under 2(e) to (j).

27.1 Thus, if the Company having a share capital proposes to increase its subscribed capital by issue of further shares and such shares are to be offered to any persons as covered under Section 62(1)(c), the above Rule lays down conditions for such actions. The Rule also requires complying with Section 42 of the new Act. (In fact, Companies (Amendment) Act, 2017, w.e.f. 09.02.2018 has further amended Section 62(1)(c) to require compliance with applicable provisions of Chapter III (which includes Section 42) of New Act - making object of Legislature more clear). Section 42 deals with offer or invitation for subscription of securities on private placement. There are various compliances required to be done. As per Sub-Section (1) of Section 42 without prejudice to provisions of Section 26, a Company may, subject to the provisions of Section 42, make private placement through issue of private placement offer letter. Explanation II below Sub-Section (2) of Section 42 in Clause (ii) explains “private placement” as under:-

> “(ii) "private placement" means any offer of securities or invitation to subscribe securities to a select group of

persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in this section."

28. Sub-Section (5) of Section 42 reads as under:-

"(5) All monies payable towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash."

29. Sub-Section (7) of Section 42 is as follows:-

"(7) All offers covered under this section shall be made only to such persons whose names are recorded by the company prior to the invitation to subscribe, and that such persons shall receive the offer by name, and that a complete record of such offers shall be kept by the company in such manner as may be prescribed and complete information about such offer shall be filed with the Registrar within a period of thirty days of circulation of relevant private placement offer letter."

30. "Companies (Prospectus and Allotment of Securities) Rules, 2014" requires under Rule 14 dealing with private placement that for the purposes of Sub-Section (1) of Section 42, a company may make an offer or invitation to subscribe the securities through issue of a private

placement offer letter in format PAS 4. There are further compliances specified in this Rule.

31. If the present matter is perused, the Minutes of Board Meeting dated 26th November, 2016 show the Company taking Resolution to file Return of allotment in E-Form PAS-3. As mentioned, this Return of allotment is at Annexure A-7 of the Appeal. Form PAS-3 is pursuant to Section 39(4) and 42(9) of the Companies Act, 2013 and Rule 12 and 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014. Thus, the Respondents cannot deny the applicability of Section 42 of new Act. Sub-Section (9) of Section 42 required the Company making allotment of securities under Section 42 to file with the Registrar, Return of allotment in the manner prescribed. When this is so, the contesting Respondents 2 and 3 have not shown issue of Notice making disclosures in the explanatory statement to be annexed to the Notice of the General Meeting as detailed in Rule 13(2) of the Rules of 2014. There is no material to show that value of the shares was got fixed. The Respondent Nos.2 and 3 - husband and wife who were by this time in a better controlling position compared to the Appellant in the Board Meeting, simply issued large number of shares to Respondent No.2 by way of preferential allotment and that too at par.

32. If Notice as required by Rule 13(d) of the Rules of 2014 has not been issued along with the disclosures as mentioned in the Rule, preferential allotments cannot be made as permitted by Section 62(1)(c) of

the new Act. The Notice is mandatory and compliances required as per the Rule would have to be shown as done before the General Body Meeting. The Respondents have not shown either compliances or issue of such Notice along with disclosures nor service of such Notice on the Appellant.

33. Nothing is shown as to how Respondent No.4, an outsider, was selected for making private placement of shares to him and that too at par. Looking to Section 42 as well as Section 62(1)(c) of the new Act read with the Rules mentioned above, it appears necessary that before decision is taken for allotment by way of private placement, it would be necessary to follow the procedure of selecting the person/s to whom issue of private placement offer letter is to be made and then further comply with provisions of Section 42. If this is done, it would reflect in decision of General Body. In present matter, this does not appear to be there. Again the Board of Directors Resolution dated 26.11.2016 (Page – 265) does not show how money had been received and if Section 42(5) had been complied. Records do not show that for Respondent No.4, compliances as per Section 42(7) had been made.

34. For the view, we are taking, need to discuss further arguments of parties regarding Board Meetings dated 31.10.2016 and 26.11.2016 and EOGM dated 25.11.2016 is not there.

35. We find Respondents 2 and 3 to have acted in an oppressive manner with the Appellant, when such Board Meetings dated 31.10.2016

and 26.11.2016 and EOGM dated 25.11.2016 were conducted. Acting on the basis of their majority shareholding, Respondents 2 and 3 went ahead with the EOGM against the provisions of law and made preferential allotment of shares to Respondent No.2 and private placement of shares was made to Respondent No.4, an outsider. Having gained in numbers in such manner and having brought in Respondent No.4 with token shares, Respondents 2 and 3 appear to have then proceeded to get rid of directorship of Appellant. Thus, calculatively, Appellant was oppressed. In the process, Company was mismanaged by illegal increase and distribution of capital. Winding up of the Company would unfairly prejudice the Appellant who is a member, but otherwise the facts justify the making of a winding up order on the ground that it is just and equitable that the Company should be wound up.

36. We pass the following order:-

A. We hold that the Board Meeting Resolutions dated 31.10.2016 and 26.11.2016 and the Resolution of EOGM dated 25.11.2016 cannot be maintained regarding increase of share capital and the allotments made. These Resolutions are quashed. The increase of share capital from Rs.15 lakhs to Rs.40 lakhs and the subsequent allotment of shares to Respondent Nos.2 and 4 are quashed and set aside.

B. Consequent to the above directions, further steps taken by Respondents 2 and 3 to induct Respondent No.4 as Director and the Resolution taken pending litigation to remove the Appellant from the post of Director, are also quashed and set aside.

C. Respondents 2 and 3 are directed to refrain from indulging in oppressive acts and mismanagement as mentioned in this Judgement.

D. The appeal is thus partly allowed as above. Respondents 2 and 3 shall each pay costs of Rs.1 lakh, from their own funds, to the Appellant.

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

[Balvinder Singh]
Member (Technical)

New Delhi

24th July, 2018

/rs/nn