NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.365 OF 2017

(ARISING OUT OF IMPUGNED ORDER DATED 29.8.2017 PASSED BY THE NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HYDERABAD IN C.P. NO.03/2012 (T.P. NO.61/HBD/2016)

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Venkat Sudhakar Sattur S/o Late Appa Rao, 9-2-12/1, MIG-4/2, Pithapuram Colony, Vishakhapatnam 530003.	1st Petitioner	1st Appellant
Vs		
1. Dictasol (India) Pvt Ltd HIG-33, 5th Phase, KPHB Colony, Hyderabad 500072 Andhra Pradesh	1st Respondent	1st Respondent
2. Mr. Ramakrishna Reddy Raya, S/o Rosi Reddy Raya, HIG-76, 5th Phase, KPHB Colony, Hyderabad 500072 Andhra Pradesh	2nd Respondent	2nd Respondent
3. Mr. Eturi Jageswara Rao, S/o Eturi Venkata Ramana, H.No. 1-58/A & 1-58/B, F-303, Earthcon Future Plaza, Madinaguda, Hyderabad-500072 Andhra Pradesh	3rd Respondent	3rd Respondent
4. Mrs Sushma Arisetty, W/o Eturi Jagdeswara Rao, H.No.1-58/A & 1-58/B, F-303, Earthcon Future Plaza, Madinaguda, Hyderabad-500072. Andhra Pradesh	4th Respondent	4th Respondent

5. AMK Holdings Limited, S.A. CP 32, 1294 Genthod, Switzerland.	5th Respondent	5th Respondent
6. MR. Kanwaljith Singh Bharj, S/o Pritam Singh Bharj, Chemin de La Pralay 13 Genthod 1294	6th Respondent	6th Respondent
7. Mr. Roland Francois Ferdinand Farina S/o Antonio Farina, Chemin De La Tour-De-Chempel 6, Geneva, 1206	7th Respondent	7th Respondent

For Appellant:- Dr. K.S. Ravichandran, PCS and Ms S. Manjula Devi, Advocate.

For Respondents: - Mr. B.V. Satish Kumar, Advocate and Mr. N. Sudheer, PCS.

JUDGEMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

The appellant, original petitioner, have filed this appeal, under Section 421 of the Companies Act, 2013, being aggrieved by the impugned order passed in CP No.03/2012 (TP No.61/HDB/2016) filed in National Company Law Tribunal, Division Bench, Hyderabad Bench, Hyderabad (NCLT in short) whereby the Company Petition has been dismissed vide impugned order dated 29.8.2017.

2. 1st appellant filed the company petition under Section 111/397/398/402/403 of the Companies Act, 1956 originally before the Company Law Board and later on the matter was transferred to NCLT, Hyderabad Bench.

3. The brief facts of the case are that 1st respondent company was incorporated on 8.9.2009. The capital structure of 1st respondent as at 31st March, 2011 is as under:

Authorised Capital	Rs.5,00,000/- equity shares of Rs.10/- each.
Issued, subscribed and paid up Capital.	Rs.1,00,000/- equity shares of Rs.10/- each.

The shareholding pattern of the 1st respondent company was as under:

S.No.	Name	No.of shares	Value of the shares in Rs.	Status in the Appeal
1	Mr. Venkat Sudhakar Sattur	9,900	99000	1st appellant
2	Mr Rakakrishna Reddy Raya	100	1,000	2nd Respondent
	Total	10,000	1,00,000	

4. 1st appellant is the founder, chief promoter and majority shareholder (99%) of 1st respondent which is handling the back office services like Finance & Accounts, HR, Legal transcription, Call handling and Scanning and Archiving works of the UK based company viz Duncan Lewis, London, UK. 1st appellant and 2nd respondent are the promoters and subscribers to the Memorandum of Association of the Company. Both were the first directors and shareholders of the 1st respondent as per Article 30 of the Articles of Association of the 1st respondent. 1st appellant has been the Managing Director of 1st respondent since its incorporation.

5. It is stated that until the impugned allotment of shares to 2nd to 4th Respondent on 27th October, 2011, this position continued. 3rd Respondent was inducted as a director on 20th February, 2010 only by virtue of an

arrangement made by the 1st appellant to meet requirements during his absence from India.

6. The Annual General Meeting for the year 2010 was not conducted at all. 2nd and 3rd Respondent signed the account got it audited also.

7. 2nd and 3rd respondent had apparently colluded with each other and filed Form 32 on 18.10.2011 alleging cessation of directorship of the 1st appellant with effect from 20.01.2011 on account of non-attending three Board Meetings dated 20.5.2010, 27.8.2010 and 10.11.2010.

8. On 27th October, 2011 the Board Meeting was held and in the said meeting 40,000 equity shares of Rs.10/- each totalling Rs.4,00,000/- were allotted to 2nd to 4th Respondent. The particulars whereof are given below:

S.No.	Name of Allottee	No.of shares	Value of the shares in Rs.	Status in the Appeal
1	Mr. Ramakrishna Reddy Raya	10,000	1,00,000	2nd Respondent
2	Mr Jagdeshwara	20,000	2,00,000	3rd Respondent
3	Ms Sushma Arisetty	10,000	1,00,000	4th Respondent
	Total	40,000	4,00,000	

After the allotment of the above shares to the 2nd to 4th respondent, the shareholding pattern of the 1st respondent company as on 27.10.2011 is as under:-

S.No.	Name of Allottee	New No.of shares allotted	Total shares (existing + new shares)	Percentage of shares	Status in the appeal
1.	Venkat Sudhakar Sattur	Nil	9900	19.8% approx.	1st appellant
2	Ramakrishna Reddy Raya	10000	10100	20.2%	2nd respondent

3.	Mr Eturi Jageswara Rao	20000	20000	40%	3rd respondent
4	Ms Sushma Arisetty	10000	10000	20%	4th respondent
Total		40000	50000	100%	

As a result of the above, the stake of the 1st appellant was reduced from 99% to 19.8%.

9. The Respondent called and held the AGM for 2011 on 25th November, 2011. 1st appellant received notice for AGM on 2nd November, 2011 and he immediately issued letter dated 11th November, 2011 and stated that the AGM 2011 is unauthorised, invalid and illegal due to several reasons. Notice for AGM was not a proper notice. Further there was no valid Board of Directors existing at the relevant time for calling of the AGM not to speak about approving and authenticating the financial statements for the year 2010-11.

10. Subsequently the authorized capital of the Company has been increased from Rs.5,00,000/- to Rs.50,00,000/- (500000 shares) in the EGM held on 7th December, 2011.

11. 1st appellant levelled allegations of threatening him by respondents and one of his relatives Mr. Sridhar to transfer his shareholding to others. 1st appellant attended the AGM 2011 and marked his attendance by showing his protest and asked for copy of the audited accounts which was not provided to him. On 21st December, 2011 Board Meeting was held and 269634 shares has been allotted to 5th Respondent. Again on 16.1.2012 Respondent No.5 was allotted 180166 shares on 16.1.2012. The said allotment was further made to reduce the shareholding of 1st appellant. The shareholding pattern

after allotment of 269634 shares on 21.12.2011 and 180166 shares on 16.1.2012 to 5th respondent is as under:

S.No.	Name of Allottee	New No.of shares allotted	Total shares (existing + new shares)	Percentage of shares	Status in the appeal
1.	Venkat Sudhakar Sattur	Nil	9900	1.98	1st appellant
2	Ramakrishna Reddy Raya	Nil	10100	2.2%	2nd respondent
3.	Mr Eturi Jageswara Rao	Nil	20000	4%	3rd respondent
4	Ms Sushma Arisetty	Nil	10000	2%	4th respondent
5.	AMK Holdings Ltd	269834 + 180166= 450000	450000	90%	5th Respondent
Total		450000	500000	100%	

12. 1st appellant issued letter dated 11.11.2011 under Article 31 of the Articles of Association to five directors. However, when 1st appellant wrote letter dated 11.11.2011, 1st appellant was not aware that he was removed from the directorship of the 1st appellant by 2nd and 3rd respondent.

13. Thereafter the authorised share capital of the 1st respondent company was increased from Rs.50 lakhs (500000 shares) to Rs.1,00,00,000 (1000000 shares) on 24.1.2012 and further 3,30,000 shares were allotted to Respondent No.5 and thereafter further 168448 shares were allotted to Respondent No.5 on 6.6.2013. The shareholding pattern of 1st respondent after allotment of 498448 shares (33000+168448 shares =498448 shares) as on 6.6.2013 is as under:-

S.No.	Name of Allottee	New No.of shares allotted	Total shares (existing + new shares)	Percentage of shares	Status in the appeal
1.	Venkat Sudhakar Sattur	Nil	9900	0.99	1st appellant
2	Ramakrishna Reddy Raya	Nil	10100	1.01%	2nd respondent
3.	Mr Eturi Jageswara Rao	Nil	20000	2%	3rd respondent
4	Ms Sushma Arisetty	Nil	10000	1%	4th respondent
5.	AMK Holdings Ltd	330000 + 168448= 498448	948448	95%	5th Respondent
Total		498448	998448	100%	

14. Therefore, 1st appellant filed company petition alleging oppression and mismanagement in the year 2012 before the Company Law Board, Chennai. Later on it was transferred to NCLT, Hyderabad Bench and numbered as TCP No.61/HDB/2016. During the pendency of the company petition, further allotment of shares to Respondent No.5 and transfer of shares from 2nd, 3rd, 4th to 5th respondent, resignation of 3rd respondent and appointment of 6th and 7th respondent as directors was done. Respondents filed their reply. After hearing the parties, the Tribunal passed the impugned order dated 29.8.2017. Relevant portion of the impugned order is as under:-

> ***"So far as the enhancement of the Authorised share capital of the Company is concerned, the petitioner was given due notice of the all meetings during EGMs. After giving due notice only, the impugned allotment of shares consecutively was done and the same cannot be found fault with. The petitioner utterly failed to substantiate various material allegations made in the Company Petition. The Petitioner still has not shown any interest in running the affairs of the Company, except making wild allegations against the Company, which is giving employment to more than 100***

employees and their families. The petitioner as stated supra, had employment in UK and still he had not shown any interest in running the affairs of the Company though he is invited for the same as stated supra.

19. As stated supra, the respondents have shown their bonafide by their willingness to allot as many shares to the petitioner to subscribe at nominal value of a share, or Sell all the respondents' shares to the petitioner at a fair value, or Buy all the petitioner's shares at a fair value. Any way, it is for petitioner and respondents to settle their issue mutually and we are not expressing anything on this offer.

20. After perusing all the records especially with regard to conducting of meetings of Board where, the petitioner was absent, we are convinced that the petitioner was terminated his Directorship in accordance with law. We are of the view that as per Law, managing Director of a company should be available in the Country to take care of day to day affairs etc. It is relevant to point out here that the petitioner claimed that he is also promoter and Managing Director of the Company. So if he is MD of the Company, he is not expected to live in the other Country unlike a Director. The petitioner failed to make out any case so as to interfere in the case and this it is liable to be dismissed.

21. In view of the above facts and circumstances of the case, the Petitioner has miserably failed to make out even a prima facie case, so as to invoke provisions of Section 111, 297/398, 402, 403 of Companies Act, 1956. Therefore, we hereby dismissed the Company Petition bearing CP No.03 of 2012 (TP No.61/HDB/2016) with a cost of Rs.50,000/- (Rupees Fifty thousand only), which is to be paid by the petitioner to Mr. Ramakrishna Reddy Raya and Mr. E. Jagadeshwara Rao (Respondent No.2 and 3 respectively) within a period of three weeks from the date of order."

15. Being aggrieved by the said order the 1st appellant have filed the present appeal.

16. 1st appellant has stated that he is the founder and the life time director as per Article 30 of the Article of Association of 1st respondent (Page 269). 1st appellant further stated that 2nd respondent just holds 100 shares (1%) as per Memorandum of Association at Page 263.

17. 1st appellant further stated that no notices were issued for those alleged meetings and no proof was produced despite sufficient opportunity. Respondents have only produced some computer printout of the notices which lets the cat out of the bag.

18. 1st appellant stated that on 20.1.2011, a meeting was held in which the cessation of directorship of appellant was taken note of but the Form 32 was filed only on 17.10.2011(Page 374), which was 10 days prior to the impugned allotment of shares made on 27.10.2011. 1st appellant stated that the only purpose is to allot shares out of unissued shares and create sufficient number of members and stake to do away with the power of appellant even in general meetings.

19. 1st appellant admitted that a Board Resolution on 20.5.2010 was signed by him and was used by the 1st respondent before the Department of Telecommunications (Page 529).

20. 1st appellant submitted that he has not acted in any manner prejudicial to the interest of the 1st respondent. 1st appellant stated that the appellant, respondents and statutory auditor of 1st respondent have been corresponding through email almost on a daily basis (Page 387-406)

21. 1st appellant stated that when he was the promoter with 99% stake, respondents who have no stake could not have done anything worse than this to achieve a collateral purpose.

22. 1st appellant stated that after his unceremonious and malicious removal, 10000 shares were allotted to 2nd respondent, 20000 shares to 3rd respondent and 10000 shares to 4th respondent (Page 379) on 27.10.2011. 1st appellant stated that this date i.e. 27.10.2011 was chosen after creating

records and filing of Form 32 on 17.10.2011 for the alleged cessation of directorship of appellant. 1st appellant submitted that any allotment of shares made without the consent of 99% shareholder in any company is unimaginable and is per se oppressive. 1st appellant stated that the board constituted by 2nd and 3rd respondent to make this allotment is invalid board as 3rd respondent has lost his directorship on the date of AGM as he was not appointed at the AGM (Page 278). Further by allotting 40000 shares to themselves and 4th respondent being the wife of 3rd respondent is perfectly a violation of fiduciary duties and breach of trust. No proof was furnished to say that this sum of money was urgently in need. Even if there was a need appellant should have had the opportunity to use is Right to subscribe to additional shares.

23. 1st appellant submitted that the authorised capital consisted of 40000 unissued shares. Therefore, the Respondents have chosen to allot 40000 shares. Anymore allotment would have necessitated calling a general meeting to increase the authorised share capital. As the appellant with 99% and the 2nd respondent with 1% are only two shareholders prior to this impugned allotment on 27.10.2011, the question of the Respondents calling general meeting and forming a quorum and passing resolution without consent of appellant does not arise. 1st appellant submitted that between March 2010 to October 2011 with more than 18 months of the operations of the company having been carried on without this sum of Rs.4 lakhs it is exceedingly clear that the allotment is oppressive and has been done with a malicious motive.

24. 1st appellant submitted that 3rd respondent is not validly continuing in office. 3rd respondent was appointed on 20.02.2010. 1st appellant stated that

as per Article 32 of the Articles of Association, the person can only be appointed as an Additional Director or alternate director. The word "co-opting means appointing as additional director as per the corporate practice (Page 269). 1st appellant stated that without any enabling provision in the articles of association the Board of a Company cannot appoint a director otherwise than by way of an additional director. 1st appellant stated that the contention of the Respondents would have been valid if as required under Section 255 of the Act. In the absence of such provision in the Articles and in view of specific language of Article 32 the appointment of 3rd respondent is only by way of additional director.

25. 1st appellant stated that Section 260 of the Act very clearly establishes that a person appointed as an Additional Director will continue office only until the date of AGM. The notice of AGM for 2010 (Page 296) obviously does not contain any agenda for appointing 3rd respondent as a regular director. 1st appellant submitted that continuation of 3rd respondent after 26.9.2010 is invalid and he could not legally be forming part of any Board Meeting thereafter, more particularly the meetings allegedly held on 10.11.2010, 20.01.2011 and 27.10.2011.

26. 1st appellant stated that the validity of the acts of directors as stated in Section 190 of the Act will not apply to actions purported by 3rd respondent was not in good faith and in violation of his fiduciary duties. Therefore, any resolution passed with 3rd respondent forming quorum will have to be set aside.

27. 1st appellant stated that the AGM 2010 was held without valid notice to the appellant and in view of the invalidity of the impugned allotment made on

27.10.2011 to 2nd, 3rd and 4th respondent, the quorum for the AGM 2011 with the presence of 2nd, 3rd and 4th as shareholders is not valid.

28. 1st appellant stated that the notice dated 28.11.2011 for the EGM dated 7.12.2011 was received by him only on 7.12.2011. 1st appellant sent a letter dated 7.12.2011 (Page 442) in this regard. Therefore, the notice is not valid and consequently the meeting is also invalid. 1st appellant further stated that there was no requirement of increasing the authorised capital. The explanatory statement is inadequate (Page 474 and 580).

29. 1st appellant stated that the allotment of shares made on 21.12.2011, 16.1.2012 and 3.8.2012 and 6.6.2013 are oppressive, invalid and illegal. 1st appellant stated that the allotment of shares was made by the invalid Board and without any bonafide reasons for further issue of shares. The shares were allotted without any consideration. In view of the further allotment of shares the appellant stake has been reduced to almost 0%. 1st appellant states that the allotment was made only for the purpose of grabbing the company from appellant.

30. 1st appellant stated that he has challenged the proposal for allotment of shares on 10.8.2012 in CA No.137 of 2012 before Company Law Board and in its order dated 9.8.2012 (Page 674) the CLB has stated that the decisions taken at the meeting will be subject to outcome of the Company Petition. Respondents filed Form 2 stating share allotment on 3.8.2012. No Board Meeting was called on 3.8.2012 not to speak about holding a meeting. The Notice of Meeting for 10.8.2012 itself was only on 1.8.2012 and therefore, the question of having a meeting on 3.8.2012 did not arise. This was done by respondents only to circumvent the order of CLB dated 9.8.2012 that had put

all the decisions to be taken on 10.8.2012 as subject to outcome of the CP. The respondents have played a fraud on court. Respondents cannot get away with this by saying it was through inadvertence.

31. 1st appellant stated that allotment and appointment of directors is invalid. Notice of Board Meeting dated 10.8.2012 was issued on 1.8.2012(Page 635) and Minutes of the Board Meeting dated 3.8.2012 is at Page 666. 1st appellant stated that even if there had been a Board Meeting on 3.8.2012, as per Company Law Board order, notices ought to be given to Appellant (Page 674). Therefore, the appointment of directors made on 3.8.2012 is invalid.

32. 1st appellant stated that the transfer of 40,100 shares made on 3.10.2013 from 2nd, 3rd, 4th respondent to 6th respondent is oppressive, in contravention of articles and oppressive. 1st appellant stated that without complying with the Articles of Association of the company, no share transfer could have been made without offering them to the appellant who has pre-emptive right of first refusal. There was no board meeting at all on 3.10.2013 in which share transfers were recorded. 1st appellant stated that in the revised annual return made upto 30.9.2014, it is shown that 6th Respondent has 50000 shares, though he has not been allotted any shares. It is stated that the shares held in the name of appellant-petitioner too added in the said shares and the same is reflected in Page No.846.

33. 1st appellant stated that by altering the composition of Board of Directors, shareholding pattern, by removing the directorship of appellant w.e.f. 20.1.2011 and allotting shares on 27.10.2011 and constituting the Board of Directors and allotting shares to 5th Respondent on 21.12.2011,

16.1.2012, 3.8.2012, 6.6.2013 and transferring shares on 3.10.2013 and resignation of directorship of 3rd Respondent on 12.11.2014, there has been material change in the company which is against the interest of the shareholders and the company. It is stated that the status of 5th respondent whom the shares were allotted frequently is unknown as per the Dun and Bradstreet India report (Page 540).

34. At last the 1st appellant stated that the NCLT has failed to appreciate these facts and circumstances and apply ordinary rules to adjudicate the issues and evidence. NCLT has failed to appreciate that in the above facts and circumstances even if the meetings had been called and held as per law, the acts would still remain oppressive and would have been set aside.

35. Reply has been filed on behalf of 1st to 7th Respondent. Respondents in their reply has stated that the appellant is a person with a fraudulent track record and that he is a post graduate in Commerce and master degree holder in Business Administration with fake certificate which came to Respondent knowledge recently (Page 1173, 1174, 1177 and 1178). Appellant had fabricated fake education certificates to obtain a work visa under Highly Skilled Migrant Programme from the Government of U.K. long before lodging his petition with Company Law Board and at present he is a Permanent Resident of the United Kingdom.

36. Respondents stated that the appellant has tried to make profit out of the transactions of the company and appellant had made a nefarious understanding with the owner of the premises in which the company was initially started. It is further stated that as per this immoral agreement with the owner, the appellant would get a monthly kickback of Rs.25,000/- from

the rent paid by the 1st respondent. This continued for two years even after the appellant moved to UK for employment. The appellant also got a one time kickback of Rs.2,00,000 from the rental deposit paid by the 1st respondent to the owner of the premises (Page 1116 to 1120).

37. Respondent stated that the cessation of directorship of appellant is proper as the Managing Director of the company needs to be present in India to carry on day to day operations of the company whereas the appellant had taken up employment in the client company of the 1st respondent and that too as a Legal Costs Assistant (Page 1070). It is further stated that the Articles of Association, Clause 35 provides the onus on the Managing Director to hold the Meeting of the Board. It also provides that the place of the meeting of the Board should be the Registered Office of the Company and the Board shall meet at least once in every 3 months (Page 270). Therefore, he cannot take up employment outside India. Clause 58 of Articles of Association provides that such Director should provide a declaration pledging himself to observe strict secrecy with respect of all transactions and affairs of the company, with the customers (Page 274). The act of joining the client company is in complete violation of the Articles of Association of the company.

38. Respondents stated that the allotment of shares to 2nd, 3rd and 4th respondent on 27th October, 2011 is absolutely valid and legal. Form 2 with respect to the said allotment was also duly filed with the ROC, Hyderabad. The company, in the course of its business had to raise additional capital and it is the prerogative of the Board to decide as to in what form funds would be raised. Clause 4 of Articles of Association (Page 265) provides that the shares shall be under the control of the Directors, who may allot or otherwise dispose

of the same to such persons on such conditions. Respondents stated that Section 81 of the Companies Act, 1956 is not applicable to the Private Limited Companies. Respondents stated even if the appellant was on the Board on the date of allotment, by majority on the Board the shares would have been issued. The appellant could have only protested on the same. Respondents stated that Section 36 of the Companies Act, 1956 provides that the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles. The appellant being the first subscriber to the Memorandum and Articles of Association, by virtue of law, is bound by the same and he cannot contest the allotment made on 27.10.2011.

39. Respondents stated that the appellant has himself admitted that he had left India to take up full time employment (Page 1070). Clause 3.1 of his Employment Contract (Page 1071) mentions that he needs to work in the company on a full time basis. Clause 4.2.1 (Page 1081) mentions that it is mandatory for the appellant to devote his whole time and attention and abilities to the business and affairs of the employer in the UK and nowhere has he claimed that he had come to India in May, 2010, August 2010 and November, 2010 and attended any Board Meeting of company. 1st respondent company is conducting quarterly Board Meeting and for each board meeting notices were duly sent to the appellant as director but he did not attend the meeting. Respondent stated that if the appellant was still the Managing Director, he was responsible for calling and holding Board Meeting but he is

claiming that he has not received the agenda, therefore, his act clarifies that he is not a Managing Director anymore as claimed by him. Respondent stated that as the appellant did not attend three consecutive meetings without claiming any leave of absence, he vacated the office as per the provisions of Section 283(1)(g) of the Act and, therefore, the 1st respondent company had filed Form 32 intimating his vacation to the ROC as required under the law.

40. Respondent stated that the appellant has alleged that he has not received the notice of the Meeting held on 20.5.2010. Respondent stated that the appellant has received the notice. Respondent further stated that if he has not received the notice for the meeting then why did the appellant sign the extract of the minutes of the Meeting dated 20.5.2010. Respondent further stated that as per Clause 35 of the Articles of Association, the onus is on the Managing Director to hold the Meeting of the Board and the venue of the meeting of the Board should be the Registered Office of the company and the Board shall meet at least once in every 3 months (Page 270). Respondent stated that appellant did not take initiative to call and hold the meetings of the Board of Directors from time to time and even after signing the extract of the Resolution on 20th May, 2010, he did not take any interest in convening the next board meetings which proves that he had handed over the management and operations before leaving for the UK.

41. Respondents stated that Clause 4 of the Articles of Association provides that the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to other persons. (Page 265). Respondent further stated that the provisions of Section 81 of the Companies Act, 1956 is not applicable to the Private Limited Companies and the Articles of

Association provides the power to the Board to allot shares. Respondent stated that even if the appellant was on the Board on the date of allotment, by majority on the board the shares would have been issued and the appellant could have only protested on the same.

42. Respondents stated that there has been email correspondence between the parties during the relevant period as the appellant was working for the client company as its employee. Respondent stated that if the emails are observed the 2nd and 3rd Respondent have used their official email ID like ireturi@dictasol.in but the appellant had used both his personal and official email id venkats@duncanlewis.com. Appellant had never used his official dictasol.in email id. The emails also bring out the fact that the appellant had given a NOC for the incorporation of another company called Dictasol Mediscript India Private Ltd to be promoted by the other promoters and the appellant was withdrawing. This clearly proves that the appellant was not interested in carrying any business in India as he wanted to settle in the UK.

43. Respondent stated that the appellant may have been in India for different spells of time for his personal purposes which does not prove anything about his involvement in the company. Respondent further stated that after passing the order by the Company Law Board allowing him to attend the Board Meetings, in the last 5 years he was present in 7 board meetings only. The appellant is not taking any active participation in the Board because he is working in the UK and enjoying the fruits and pushing the Respondent company into legal tangles.

44. Respondent stated that the appellant was given opportunity to subscribe further share and increase his stake, therefore, there is no question

of oppression. Respondent stated that the appellant's act of leaving the company within 6 months, and moving to the UK and again claiming his position back is oppressive in nature. The appellant has not provided anywhere which acts, provisions, sections have been violated. Respondent further stated that the appellant was given equal opportunity to invest in further issue of shares. Respondent stated that the NCLT Hyderabad has acted in accordance with the law. NCLT has considered the legal and factual issues and passed the order accordingly. NCLT has clearly understood the intentions of the appellant and has made a judgement in accordance with law. NCLT has also seen the motive and conduct of the appellant which was visible explicitly through his fabricated documents and falsified claims. Respondent further stated that the NCLT is convinced that the appellant moved to the UK for permanent residency and could not attend the meeting and the appellant himself has agreed to sign the extract of the resolution. Respondent stated that the appellant should understood that the literal meaning of the word 'promoter' is not the one who just establishes a company but the one who has control over the affairs of the company whether directly or indirectly. Respondent lastly submitted that the NCLT has done natural justice by dismissing the company petition.

45. We have heard the learned counsel for the parties and perused the record.

46. Appellant has argued that 3rd respondent is invalidly continuing as an additional director or alternate director. We have noted that 3rd respondent was appointed as an additional director on 20.2.2010 under an arrangement as per Article 30 of the Articles of Association of 1st respondent (Page No.269

of Vol.II). Further as per Section 260 of Companies Act, 1956, the Act applicable at that time, 3rd respondent shall hold office only up to the date of the next AGM of the 1st respondent. After the appointment of 3rd respondent as additional director on 20.2.2010, the AGM of 1st Respondent was held on 26th September, 2010. Notice for the AGM was issued on 27.8.2010 (Page 296). We have observed from the said Notice dated 27.8.2010 that there is no agenda item for appointing 3rd respondent as a regular director. Respondent stated that 3rd respondent has been appointed as a director and not as additional director. Admittedly Respondents also agree that the appointment of 3rd respondent was never got approved in the AGM held on 26.9.2010. Even if there is such provision in the Articles of Association not in consonance with Section 260 of Companies Act, 1956, it would not be a valid provision. Therefore, we hold that the continuation of 3rd respondent as additional director after 26th September, 2010, the date of Annual General Meeting, is not as per law.

47. Appellant argued that cessation of his directorship is oppressive, illegal and invalid. Appellant further argued that no notices were issued for those alleged meetings and no proof was produced despite sufficient opportunity. Appellant argued that he has not acted in any manner prejudicial to the interest of the company.

48. Counsel for the Respondents argued that notice of the meetings were received by the appellant and he was aware of the meetings. Counsel further argued that if the notice of meetings were not received by him then why did he sign the extract of the minutes of the meeting held on 20th May, 2010. Counsel further stressed that by signing the extract of the meeting and by not

questioning how the meeting was conducted without his presence, it is proved that he was aware of the meetings and its Agenda. Appellant has nowhere claimed that he had come to India in May, 2010, August, 2010 and November, 2010 and attended any board meeting of 1st respondent. For all these meetings, notices were sent and received by the appellant. Counsel for Respondent further argued that if the appellant was still the Managing Director, appellant was the one responsible for calling and holding Board Meetings and the appellant is claiming that he has not received the Agenda of the Meeting. Therefore, the appellant's acts clarify that he is not a Managing Director any more as claimed by him. Counsel for the Respondent further argued that as the appellant did not attend three consecutive meetings without claiming any leave of absence, he vacated the office as per the provisions of Section 283(1)(g) of the Act and therefore, the 1st respondent filed Form 32 intimating his vacation to the ROC and the vacation of office as Director of the appellant is legal and valid.

49. After hearing both the parties we have noted that Form No.32 was filed with ROC (Page 374) intimating that 1st appellant has vacated the office under Section 283 of the Companies Act,1956 with effect from 20.01.2011 for not attending three consecutive meetings i.e. 20.5.2010, 27.8.2010 and 10.11.2010. We have also observed from para 9 of the counter filed by Respondents No.1 to 7 (Page 9) in which the Respondents have stated that the extract of the meeting dated 20th May, 2010 were signed by the appellant. The respondents have further stated that *"it is proved that he was aware of the meetings and its agenda."* We have seen the said extract, Annexure P-30 at Page 529 and find that the same has been signed by the appellant.

Therefore, we have come to the conclusion that when the extract of meeting dated 20.5.2010 has been signed by the appellant, it also establishes that impliedly the leave of absence in defacto is given to the appellant for 20.5.2010. It also proves that the appellant had a cooperative attitude when signing an extract of the meeting dated 20.5.2010 as it will be in the interest of the company. Respondents having asked the appellant to sign the extracts of meeting for the benefit of the company and also denying the leave of absence as having not been formally applied and allowed would be unfair to the appellant. Appellant has pointed out that in NCLT Arguments were over on 20.1.2017 and subsequently with Index dated 30.1.2017 bunch of documents were filed by Respondents, without affidavit and attaching computer generated Notices and without giving opportunity to Appellant to argue NCLT simply held Notices were served. Counsel for Appellant referred to Memo filed by Appellant in NCLT(Page 246) pointing out that for Meetings of 20.5.2010, 27.8.2010, 10.11.2010, 20.1.2011 and AGM of 26.9.2010 no proof of despatch of Notices or proof of service were filed. It is argued that these objections and arguments were not even referred or dealt with by NCLT and it simply relied on computer generated Notices and accepted them. We find substance in this argument. Therefore, the action of the Respondent for filing Form No.32 with ROC regarding vacation of office by the appellant is not legal.

50. As regards the appellant's allegations that the notice of meetings were not received by him. The respondents in brief synopsis has stated that notice of every meeting has been sent as per Section 286 of the Companies Act, 1956. We have seen the notice dated 12.1.2012 and telegram sent for EOGM on

16.1.2012 (Page 541 and 542), we noted that the same has been sent at the address of the appellant at Vishakapatnam. We have also seen the acknowledgement receipt, Annexure P12, Page 383 and noted that the same has been sent at the address of the appellant at Vishakapatnam. On this issue, we are of the view that the respondents were very well aware that the appellant is in U.K. and the respondents themselves or through their subordinates are corresponding with the appellant via emails, as is evident from the various emails which have been annexed in the appeal. Therefore, the propriety demands that the appellant should have been intimated notices of meetings also via emails and the appellant being the first founder/promoter of the company should have been asked his availability in India so that the meetings can be conducted while he was in India. The good practice requires that the appellant being founder Director and majority shareholder should have been given notice at his foreign address. Further the meeting now a days can be held via video conferencing. Nothing of the sort have been done by the company especially when on day to day matters, it is having its business with the foreign countries.

51. The other issue raised by the appellant is that the allotment of 40000 shares to 2nd, 3rd and 4th respondent is illegal and invalid. Appellant argued that 10000 shares were allotted to 2nd respondent, 20000 shares to 3rd respondent 10000 shares to 4th respondent on 27.10.2011. Appellant argued that this date i.e. 27.10.2011 is crucial as the Respondent has cleverly, after creating records and filing of form 32 on 17.10.2011 for the cessation of directorship of appellant, allotted the shares to Respondents. Appellant further argued that the Balance Sheet of 1st respondent for 2010-2011 shows

that there was no need of funds and by allotting 40000 shares to themselves and 4th Respondent, being wife of 3rd respondent, is a violation of fiduciary duties and breach of trust.

52. Counsel for the Respondent argued that the company in the course of its business had to raise additional funds and it is prerogative of the Board of the company to decide as to and in what form funds would be raised. Clause 4 of Articles of Association provides that the shares shall be under the control of Directors, who may allot or otherwise dispose of the same to such persons on such conditions (Page 365). Counsel for the Respondent further argued that Section 81 of the Companies Act, 1956 is not applicable to the Private Limited Companies, and the Articles of Association provide the power to the Board to allot shares. Counsel for the Respondent further argued that even if the appellant was on the Board on that date of allotment, by majority on the Board, the shares would have been issued and the appellant could have only protested on the same. Counsel for the Respondent further argued that Section 36 of the Companies Act, 1956 provides that the Memorandum and Articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the Memorandum and Articles. Counsel for the Respondent further argued that the appellant being the first subscriber to the Memorandum and Articles of Association, by virtue of law, is bound by the same and he cannot contest the allotment made on 27.10.2011. Counsel for the Respondent argued that the appellant was given opportunity to participate in further allotments of shares on numerous occasions, but he has never

invested anything above his Rs.99,000/-. Counsel for the Respondent further argued that they had offered the shares to the appellant even before he had approached the Company Law Board/NCLT with the petition for oppression and mismanagement. Counsel for the Respondent argued that the allotment of shares to 2nd, 3rd and 4th respondent is legal and valid.

53. After hearing both the parties we noticed that as argued by the respondent Clause 4 of Articles of Association provides that the shares shall be under the control of Directors, who may allot or otherwise dispose of the same to such persons on such conditions (Page 365). Counsel for the Respondent further argued that Section 81 of the Companies Act, 1956 is not applicable to the Private Limited Companies, and the Articles of Association provide the power to the Board to allot shares. We have already observed that 3rd respondent was appointed as additional director on 20.2.2010 under an arrangement. After the appointment of 3rd respondent on 20.2.2010, the AGM of the 1st Respondent was held on 26.9.2010 and his appointment as additional director was not regularised. Therefore, we have already held that his continuation as additional director after 26.9.2010 is not as per law. Further, as per Section 287 of the Companies Act, 1956 the quorum for a meeting of the Board of Directors of a company shall be one-third of its total strength or two directors whichever is higher. As we have already held that the continuation of 3rd director is not as per law after 26.9.2010, therefore, the Board Meeting held on 27th October, 2011 in which the decision was taken to allot 40000 shares to 2nd, 3rd and 4th Respondent is not as per law as for conducting the Board Meeting the quorum should be complete and one Director cannot hold the Board Meeting. Similarly the subsequent decisions

to allot 268834, 168448 and 330000 shares to 5th Respondent on 20.12.2011, 16.1.2012 and 3.8.2012 were taken. It is noted that on removal of appellant on 20.01.2011 and filing the same with ROC on 17.10.2011 (almost 9 months after removal) (Page 374), immediately allotment of shares has been made in a very short period thereafter. In fact, allotment of shares has taken place on 27.10.2011, merely 10 days after filing with ROC on 17.10.2011. Even subsequent two allotment of shares on 20.12.2011 and 16.1.2012 seems to be as if allotment of shares are being hurriedly done to completely reduce the shareholding of the appellant to hopeless minority. Therefore, the subsequent actions/decisions such as allotment of 268834, 168448 and 330000 shares to 5th Respondent on 20.12.2011, 16.1.2012 and 3.8.2012 and induction of two other directors etc are also held illegal.

54. The respondents have alleged that the appellant has obtained the HMSP Visa with the fake educational documents and his conduct is not up to the mark. The respondent further argued that the appellant is a person with a fraudulent track record and he is trying to convince the Tribunal that is a post graduate in Commerce and master decree holder in Business Administration with fake education certificates to obtain a work visa.

55. On this issue we are of the opinion that NCLT or this Appellate Tribunal is not proper forum to deal with such matters.

56. Respondents have argued that the company was in need of funds, therefore, the above shares were allotted to other respondents. After going through the records we have observed that the appellant was first promoter and was holding 99% shareholding of 1st respondent. After the allotment of shares to other respondents, which we have held as illegal, the shareholding

of the appellant has come down from 99% to 0.99%. Further it is noted that the Meeting dated 10.11.2010 is held after the AGM in the year 2010. We have already observed above that continuation of 3rd respondent after 26.9.2010 is not as per law. Even if 3rd respondent has attended the meeting after 26.9.2010 it would be illegal. In the light of the above, three meetings in which appellant is not alleged to have been attended, we observe that impliedly leave of absence for meeting dated 20.5.2010 was there. It is in fairness that the counting of meeting dated 20.5.2010 as having not attended would not be fair. We also note that it would be desirable that the special audit of the company may be conducted to see if funds were brought in the company and if they have been properly used.

57. In the aforesaid discussions we have held that appellant has been oppressed. However, we have also noted that the company is employing more than 100 employees and is a running concern. It would not be in the interest of the company or other stake holders to wind up the company.

58. In the light of the above the appeal is party allowed. In the interest of justice, the following directions are issued:

i) The appellant is restored as director.

ii) Continuation of 3rd respondent as Director with effect from 26.9.2010 is not valid. Subsequently all decisions to appoint Directors, increase of share capital and allotment of shares on 27.10.2011, 20.12.2011, 16.1.2012 and 3.8.2012 etc with his/their participation are also irregular, and set aside.

iii) Appellant and 2nd respondent to take appropriate decisions in the interest of company and to ensure that adequate funds with the company are available to keep it ongoing.

iv) Penalty imposed on appellant in the impugned order is set aside.

v) Respondents No.2 and 3, each will pay costs of Rs.1,50,000/- to the Appellant from their own funds.

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

(Mr. Balvinder Singh)
Member (Technical)

Dated:08-02-2019

New Delhi.

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