NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.334 of 2018

[Arising out of Order dated 29.08.2018 passed by National Company Law Tribunal, Hyderabad Bench, Hyderabad in CP No.248/59/HDB/2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
MAIF Investment India PTE Ltd. 9 Straits View # 21-07, Marina One West Tower, Singapore 018937	Original Petitioner	Appellant
Versus		
1. M/s. Ind-Barath Power Infra Limited New No.20 (Old No.129) Chamlers Road, Nandanam, V. Tenyampet, Chennai 600 035 Tamil Nadu	Original Respondents	Respondents
2. M/s. Ind-Barath Thermotek Private Limited Plot No.30A, Road No.1. Film Nagar, Jubilee Hills, Hyderabad – 500 096 Telangana		
3. M/s Vistra ITCL (India) Limited IL&FS Financial Centre, Plot No.C-22 G Block, 7th Floor, Bandra Kurla Complex, Bandra (East), Mumbai – 400 005		

4. M/s Ind-Barath Energy
(Utkal) Limited
H. No.8-5-210/43,
Plot No.44, Shiva
Enclave,
Old Bowenpally,
Secunderabad – 500011
And
Through the Interim
Resolution Professional
Mr. Udayraj Patwardhan,
Sumedha Management
Solutions Pvt. Ltd.
C-703, Marathon
Innova, Off Ganapatrao
Kadam Marg,
Lower Parel (W)
Mumbaio 400 013

5. Karvy Computershare
Limited
Karvy Selerium,
Tower B,
Plot No.31 & 32,
Financial District,
Nanakramugda,
Gachibowli,
Hyderabad – 500 032

6. National Securities
Depository Limited,
Trade World,
A-Wing, 4th and
5th Floors, Kamala
Mills Compound,
Senapath Napat
Marg, Lower Parel,
Mumbai – 400 013

7. Mr. K. Bharat,
Plot No.A-74,
Emaaar Hills
Township Pvt.
Ltd. Gachibowli,
Opp. ISB
Hyderabad – 500032

8. Dr. G.A. Rajkumar,
   Plot No.30A, Road No.1,
   Film Nagar, Jubilee Hills,
   Hyderabad – 500096
   Telangana

9. Dr. N. Kumaraswamy,
   75/A, Flat No.S-2,
   Sai Priyadarshini
   Apartments,
   Road No.53,
   Film Nagar,
   Jubilee Hills,
   Hyderabad – 500 096
   Telangana

10. Dr. V. Perraju,
    1-1-1/A, Neeladri
    Heights, Prabhath
    Nagar, Ranga Reddy,
    Hyderabad-500060
    Telangana

11. Mrs. V.L.N.R.S.
    Lakshmi
    Plot No.30A,
    Road No.1, Film
    Nagar, Jubilee Hills,
    Hyderabad-500096,
    Telangana

12. Mr. Victor Vijay
    Kumar Pande
    Plot No.30A,
    Road No.1, Film Nagar,
    Jubilee Hills,
    Hyderabad-500096
    Telangana

13. MAIF Investment
    India 2 PTE Ltd.
    9 Straits View # 21-07,
    Marina One West Tower,
    Singapore 018937

For Appellant: **Shri Arun Kathpalia, Senior Advocate with Shri Krishnendu Datta, Shri Lzafeer Ahmad, Ms. Parinaz Vakil and Ms. Bani Brar, Advocates**

For Respondents: **Shri Yogesh Kumar Jagia and Ms. Tanya Negi, Advocates (Respondent Nos.1, 2, 7 and 8)**

Shri Siddharth Mehta, Advocate

Shri Abhay Pratap Singh and Shri Anshuman Mozumdar, Advocates (Respondent No.3)

Shri Sujoy Chatterjee, Advocate (Respondent No.13)

Shri Satendra K. Rai, Advocate (Respondent No.4)

J U D G E M E N T

(28th May, 2019)

A.I.S. Cheema, J. :

1. This Appeal arises out of Impugned Order dated 29th August, 2018 passed by the National Company Law Tribunal, Hyderabad Bench (NCLT – in short) in CP No.248/59/HDB/2018 whereby the NCLT dismissed the Company Petition filed by the Appellant – MAIF Investment India PTE Ltd. under Section 59 of the Companies Act, 2013 (Act - in short).

2. The Appellant – original Petitioner filed the Company Petition claiming rectification in the Register of Members of Respondent No.2 – "M/s. Ind-Barath Thermotek Private Limited" (IBTPL) (hereafter referred, also as "Company").

Parties inter –se

Respondent No.1 – M/s. IND – Barath Power Infra Limited **(IBPIL)** is shareholder of Respondent No.2 Company holding 99.99% shares of

Respondent No.2. Respondent No.2 – the Company we are concerned with, is subsidiary of Respondent No.1. Respondent No.3 – M/s. Vistra ITCL (India) Limited (earlier IL&FS Trust Company Limited) (**Vistra** – in short) is debenture trustee in respect of non-convertible debenture holder in Respondent No.2 i.e. Respondent No.13. Respondent No.4 – M/s. IND-Barath Energy (Utkal) Limited (**IBEUL**) is subsidiary of Respondent No.2. Respondent No.5 – Karvy Computershare Limited is Registrar and Transfer Agent of Respondent No.2 and Respondent No.6 – National Securities Depository Limited is depository of securities of Respondent No.2. Respondent No.7 is Managing Director of Respondent No.2 while Respondent No.8 and 9 are Independent Directors of Respondent No.2 and Respondent No.10 is Director of Respondent No.2. Respondent No.11 is stated to be erstwhile Director at the time concerned of 26th March, 2018. Respondent No.12 is also a Director. Respondent No.13 is Company incorporated in Singapore registered as Foreign Portfolio Investor under SEBI.

3. It appears that Respondent No.4 had entered into Common Rupee Term Loan Agreement with 14 banks for part-financing cost of 700W Coal Fired Thermal Power Plant at Orissa (the "**Project**"). The said Agreement was entered into in March, 2010 and it came to be modified in March, 2017 between Respondent No.4 and the lenders. Respondent No.2 Company came to be incorporated in December, 2014.

Investment Agreement dated 25.06.2015 entered

As per record, Appellant and Respondent No.13 (The "Investors" – Investor 2 and Investor 1 – respectively) entered into Investment Agreement (Appeal Page – 130) on 25th June, 2015 with the Promoter Group consisting of Respondent No.7, Shri K. Raghu Rama Krishna Raju and Sriba Seabase Pvt. Ltd. (the promoters) and Respondents 1, 2 and 4. In terms of the said Investment Agreement, the Appellant and Respondent No.13 lent a sum of Rs.780 Crores. The Appellant had agreed to subscribe to 906599 compulsory convertible debentures (**CCD**) and had also taken one equity share for aggregate consideration of Rs.99,99,990/- while Respondent No.13 subscribed to 6990 non-convertible debentures (**NCD**) for an aggregate consideration of Rs.699 Crores.

Company Petition No.248/59/HDB/2018 filed

The Company Petition (Page – 88) came to be filed on 24.04.2018 only relating to the wrongful conversion of the CCDs of the Appellant, and consequent shares entered in Register of Members in the company without sufficient cause.

Articles of Association amended; other documents executed

4. As per record, in pursuance to the Investment Agreement, Articles of Association of Respondent No.2 also came to be amended so as to incorporate the terms of the Investment Agreement in the Articles of Association (Page – 594). It appears that Respondent No.4 issued a letter with regard to modification in equity structure of Respondent No.4 on

account of execution of Investment Agreement and Debenture Trust Deed was also executed between Respondents 2 and 3 in 2015. The obligations under the Investment Agreement are stated to have been secured by pledge of shares under Share Pledge Agreement executed between Respondents 1, 2 and 4 and Respondent No.3. It is stated that the Appellant and Respondent No.13 lent Rs.780 Crores to Respondent No.2 by way of subscription of debentures and acquired one equity share each in the Respondent No.2 and 4 in view of the Investment Agreement and this happened in July of 2015. Appellant provided a bridge loan for a sum of Rs.102 Crores by subscribing to 10,200,000 Optionally Convertible Debentures (OCDs) of Respondent No.4 at Rs.100/- per OCD (in February, 2017) for Rs.102 Crores.

Conversion sought by Appellant – Letter dated 29.08.2017

The Appellant claimed that no interest payments were made by Respondent No.2 within 12 months of the completion date under the Investment Agreement and record shows that the Appellant and Respondent No.13 in view of default sought to exercise their rights under the Investment Agreement together with Share Pledge Agreement and had sent a letter to the promoters, Respondents 1, 2, 4 and Arkay Energy Rameswaram Ltd. (Arkay – in short) on 29th August, 2017 (Page – 258) claiming inter alia, penal interest and called upon the promoters and Respondents 1, 2 and 4 to pay penal interest on the subscription amount; jointly and/or severally to redeem the NCDs held by Respondent No.13

and to convert CCDs held by Appellant in the Company into 906599 equity shares of Respondent No.2 – the Company.

Conversion sought again – Notice dated 05.09.2017; Respondent No.3 sought calling of EOGM

5. When there was non-compliance, record shows that the Appellant and Respondent No.13 issued letters/Notices dated 5th September, 2017 (Page – 265 and 267 respectively) to the promoters and Respondents 1, 2 and 4 (Contesting Respondents) and Arkay Energy Rameswaram Ltd., inter alia, Appellant calling upon them to convert CCDs into equity shares and claimed that in terms of the Investment Agreement, they were required to complete the process of conversion within a period of 5 days from the issuance of Notice. Respondent No.3 – Vistra sent Notice under Section 100(2) of the Act to Respondent No.2 on 12th September, 2017 (Page – 270) exercising right under Debenture Trust Deed, the Share Pledge Agreement and the power of attorney it had, calling upon Respondent No.2 to convene EOGM within 21 days to convert CCDs and remove the Directors/Additional Directors. It is stated that the Joint Lender Forum of Respondent No.4 had also convened meeting of lenders of Respondent No.4 on 26th September, 2017 in which Respondents 1 and 2 failed to attend the same in spite of Notice.

Respondent No.1 rushed into litigation

On the same date of 26th September, 2017, however, Respondent No.1 and the promoters filed Petition under Section 9 of the Arbitration

and Conciliation Act, 1996 (Arbitration Act – in short) seeking stay to the convening of EOGM. It was Commercial Arbitration Petition (L) 423/2017 which sought to restrain the Appellant from converting 906599 CCDs into equity shares. It is stated, they failed to get interim relief from High Court of Bombay.

6. It is stated, on 6th October, 2017, the Appellant and Respondent No.13 sent letter/Notice addressed to the Respondent No.3 so as to call EOGM of shareholders of Respondent No.2. Document (at Page - 292) shows Respondent No.3 – Vistra issued Special Notice on 06.10.2017 to Respondent No.2, its members and Directors, under Section 115 read with Section 169 of the Act for removing Respondent No.7 to 10 as Directors of the Company in the EOGM.

7. It is stated that the Petition under Section 9 of the Arbitration Act came to be withdrawn on 13th October, 2017. It is stated that Respondent No.1 then on 17th October, 2017 filed 2 Petitions before NCLT –

a. Company Petition 235/2017 under Section 110, 115 and 169 of the Act, and

b. Company Petition 243/2017 under Section 59 of the Act.

Record shows, NCLT, Hyderabad on 27th October, 2017 stayed (Page – 310 @ 334) the EOGM which was scheduled on 1st November, 2017 as had been called by Respondent No.3 – Vistra. The stay came to be

extended on 17.11.2017 till 12.12.2017 (Page – 335) (whereafter it does not appear to have been continued).

8. According to the Appellant, Respondents 1 and 2 protracted matter in the garb of settlement discussions. As per Appellants, in January, 2018, they had invited the lenders to the site and on 6th February, 2018, they had sent e-mail to Power Finance Corporation Limited informing that the site visit had revealed grave situation and it was very difficult to take over the project without revised debt package.

Respondent No.1 – withdrew its Company Petitions – Order dated 06.03.2018

9. According to Appellant, The Respondent No.1 initially protracted the Petitions it had filed and later withdrew the Petitions filed before NCLT, Hyderabad, which happened on 6th March, 2018 (Pages – 396 and 409) in CP 235/2017 filed by Respondent No.1, Respondent No.2 (in which it held 99.99% shares) was arrayed as Respondent No.1. Other present Companies were also parties. The Order of withdrawal in para – 5 read as under:-

> "5. In view of the above facts and circumstances of the case the present Company Petition bearing CP No.235 100 115 & 169 HDB-2017 is disposed of as withdrawn, by granting liberty to the Petitioner to file a fresh Company Petition, if the Petitioner is aggrieved by the action of the Respondent. Since the restraint Order passed by the Tribunal stands vacated by virtue of disposal of the present Company Petition the Respondent -1 may conduct the EOGM in accordance with law and also follow principles of natural justice.

Accordingly CA Nos.178 & 177 of 2017 also stands disposed of."

[Emphasis supplied]

Notice issued for Board Meeting on 26.03.2018

10. As per Record, after such withdrawal of the Company Petitions, Respondent No.2 issued Notice on 17th March, 2018 (Page – 400) to convene meeting of Board of Directors on 26.03.2018 for conversion of CCDs into equity shares.

Appellant and Respondent No.13 now opposed the unilateral conversion sought

11. The Appellant and Respondent No.13 responded to such Notice dated 17.03.2018, on 20th March, 2018 (Page – 414, 416) and informed the Promoter Group and Respondents 1, 2 and 4 as well as Arkay Energy Rameswaram Ltd. that any unilateral conversion of CCDs as was proposed in the Agenda would be contrary to the Articles of Association and the terms of CCDs and the Investment Agreement. The Appellant clearly informed them that, it had vide letter dated 05.09.2018 (read – 2017) called upon them to convert the CCDs into equity shares. That, however, IBTPL declined to do so for a very long time and the Notice period for conversion has expired now. It is stated that the Board of Directors of Respondent No.2 on 26th March, 2018, however, moved so as to hold the meeting to convert the CCDs. Appellant claims that the Board of Directors were purporting to act under the Orders of NCLT although the Order was only of withdrawal and no mention to hold meeting of Board of Directors was

there. The Appellant and Respondent No.13 reiterated the contents of letter dated 20th March, 2018 in their letter dated 26.03.2018 (Page 416) and informed:-

> "31. Any change to the share capital of IBTPL requires our consent under the terms of the Investment Agreement dated June 25, 2015 in relation to IBTPL (the *Investment Agreement*) and the Articles of Association of IBTPL. Accordingly, any purported conversion of the CCDs and issuance of equity shares of IBTPL without our consent is ultra vires IBTPL and the corporate authority of the board of directors of IBTPL.
>
> 32. .....
>
> 33. .....
>
> 34. Since IBTPL has, due to the actions of its promoters, breached the terms of the agreements with us, we are withdrawing our nominee directors on the Board. Please note we reserve all our rights under the IA and applicable law and will nominate an observer to the Board of Directors of IBTPL in accordance with the Investment Agreement."

Company Investor Directors Resigned: No Quorum

The nominee Directors of the Appellant and Respondent No.13 resigned from the Board of Respondent No.2 (Page – 418 and 419). Appellant and Respondent No.13 addressed yet another letter (Page – 420) on 28.03.2018 to the Respondents 1, 2 and 4, the promoters and Arkay Energy Rameswaram Ltd. highlighting that any resolution, decision or action of the Board of Respondent No.2 to convert the CCD into equity shares would be ultra vires, void and invalid. It was informed:-

> 3. As we had stated in the said Letters, any purported conversion of the compulsory convertible debentures (CCDs) held by us in IBTPL into equity shares is contrary to the terms of the said debentures and the articles of association on the Company.
>
> 4. Despite our letters as aforesaid, and despite our nomine directors pointing out the above in the said meeting, you purported to proceed with the meeting to discuss the agenda in relation to the conversion of CCDs which was not only ultra vires the articles of Association but also based on deliberate misinterpretation of the Order dated March 6, 2018 passed by the Hon'ble National Company Law Tribunal, Hyderabad ("said Order"). Our nominee directors thereupon resigned from the Board.
>
> 5. We call upon you to ensure that the CCDs are not converted into equity shares without our prior written consent for the reasons mentioned in our said Letters.
>
> 6. Please note that any resolution or decision or action of the board of the Company or the Company to convert the CCDs into equity shares ultra vires, void and invalid and would amount to contempt of the said Order besides being in direct breach of the articles of association of the Company as also the Investment Agreement dated June 25, 2015, in which case we will proceed under legal advice.
>
> 7. We would like to remand the directors of IBTPL of their fiduciary duties which they owe to IBTPL and its shareholders. Acting contrary to the terms of the Articles of Association of IBTPL and contrary to the agreement entered into by IBTPL will render them personally liable for the breach of their fiduciary duties."

12. According to the Appellant, with the resignation of nominee Directors of Appellant and Respondent No.13, i.e. the Company Investor Directors, the quorum required for the Board Meeting on 26.03.2018 as per Articles 60.2 of the Articles of Association was no longer available and as per the

Articles of Association, the meeting could not have been continued or any business transacted as claimed by contesting Respondents.

Prayers of Appellant in its Company Petitions

13. It is stated that the Appellant later came to know on 06.04.2018 when SBI-SG Global Securities intimated that the CCDs had been converted. As per Appellant, in spite of the above action on the part of the Appellant and RespondentNo.13, the Board of Directors went ahead to convert the CCDs of the Appellant into equity shares. Because of this, the Company Petition came to be filed with the following prayers:-

> "8. RELIEF SOUGHT
>
> In view of the facts and circumstances mentioned above, the Petitioner prays for the following reliefs in the interest of justice, viz. that this Ld. Tribunal be pleased to:
>
> a. declare that the board resolution dated March 26, 2018 passed by the erstwhile Board of Director authorizing the conversion of the compulsory convertible debentures into equity shares of Respondent No.2 is ultra vires the Articles of Association. Respondent No.2 (as also the terms of the CCDs as set out in Schedule 9 Part B of the Investment Agreement), illegal and void ab initio and set aside the same;
>
> b. declare that the conversion of the compulsory convertible debentures is ultra vires and contrary to the Articles of Association of Respondent No.2 (as also the terms of the CCDs as set out in Schedule 9 Part B of the Investment Agreement), illegal and void ab initio;

c. direct Respondent Nos.5 and 6 to cancel the 9,06,599 equity shares of Respondent No.2 credited to the account of the Petitioner pursuant to the illegal instruction/corporate action on the basis of the resolution passed by the erstwhile Board of Directors (Respondent Nos. 7 to 12) in contravention of the Articles of Association of Respondent No.2;

d. pass such orders as it deems necessary for the rectification of the register of members of Respondent No.2; and

e. pass such further or other orders as this Ld. Tribunal may deem fit and proper in the facts and circumstances to meet the ends of justice and equity."

The Defence

14. Respondents 1 and 2 filed their Replies in NCLT. In the Replies in substance, these Respondents appear to have claimed that the relief claimed in the Petition was beyond the scope of Section 59 of the Act and that issues raised required detailed trial and interpretation of Agreements which had been executed between the parties. They referred to the statement in the Company Petition where Petitioner had stated that the Act of Respondent No.2 converting the CCDs was act of oppression and mismanagement for which the Petitioner was reserving right to file necessary proceedings, if and when advised. These Respondents appear to have claimed that the Petition was for collateral purpose as the Petitioner (Appellant) filed multiple Petitions out of which, one was under Section 7 of the Insolvency and Bankruptcy Code, 2016 which had been filed against Respondent No.4 – IBEUL and another Application under Section 425 of

the Act for contempt, had also been filed. These Respondents also claimed that the Company Petition was barred under Section 8 of the Arbitration and Conciliation Act. The Respondents claimed that the grievance of original Petitioner (Appellant) was that the act of Respondent No.2 converting 906599 CCDs into equity shares, did not constitute "sufficient cause" stipulated under Section 59 of the Act. These Respondents claimed that the Respondent No.2 could not convert the CCDs earlier due to operation of the Stay Order passed by NCLT on 27.10.2017 and continuation of pending litigation, and that since the pending Petitions were disposed of by Order of NCLT on 6th March, 2018, Respondent No.2 took action to comply with Notices issued by the original Petitioner on 29.08.2017 read with Notice dated 05.09.2017. These Respondents claimed that the CCDs were converted in accordance with the Investment Agreement read with Subscription Agreement on election of the Petitioner (Appellant). The stand of these Respondents is that the original Petitioner had not taken steps to stop recalling/invocation which had already been done and when original Petitioner had invoked the pledge, it had become major shareholder of Respondent No.2 and even when meeting of Board of Directors of Respondent No.2 was convened on 26.03.2018 to give effect to the conversion of CCDs, the original Petitioner did not take steps to withdraw/recall the pledge which was already invoked by them.

NCLT – dismissed the Petition

15. It appears that the learned NCLT heard the parties and was of the view that the issues raised were contentious issues which also required looking into Section 29(A) of the Insolvency and Bankruptcy Code, 2016; the question of dealing with Section 8 of Arbitration Act was also involved and it was contentious issue; that the Act of original Petitioner retracting the election it had made for conversion of CCDs was also contentious matter; the CCDs had been converted as per request of the original Petitioner; that whether after the passage of 5 days of the receipt of Notice, conversion of CCDs could have been done or not was question of law. For such and other reasons, as recorded in the Impugned Order, the NCLT went on to dismiss the Company Petition.

The Arguments in short

16. We have already referred to the case put up by Appellant, using the words "it is stated" but for contents of the documents, we have looked into the documents. At the time of hearing before us, the learned Counsel for the Appellant has then taken us through the contents of the Investment Agreement dated 25th June, 2015 and the Articles of Association in which the Clauses of the Agreement were got incorporated and made part of the Articles of Association. The Counsel pointed out that the Articles of Association referred to the Appellant and Respondent No.13 as the "investors" and the Articles provided that the Board of Directors shall at all times comprise maximum of 5 Directors of which NCD holder has the

right to appoint and maintain 2 Directors. It is argued that there is provision even regarding quorum of meeting in which also at least one of the Company Investor Director has to be present throughout the meeting. The Articles of Association provide that in reserve matters, decision cannot be taken unless consent is obtained of the Investors. The Articles also provide that the CCD was convertible into equity shares at the election of the holder of CCD and when Notice in this regard is given, the Company and its promoters were liable to convert the same within 5 days. According to the learned counsel in this regard, the Appellant first gave Notice on 29th August, 2017 and when within 5 days the action was not taken, yet another Notice was issued on 5th September, 2017 and when the Respondent No.2 and the promoter Directors did not comply, Respondent No.3 was moved so as to call EOGM. At such time, according to the Counsel, and as record shows, Respondent No.1 first moved the Hon'ble High Court under Arbitration Act and then withdrew the motion under Section 9 of the Arbitration Act and filed two Company Petitions on 17th October, 2017 and obtained a stay to the EOGM, which was to be held. It is argued that after having obtained the Stay, the Respondents 1 and 2 and promoter Directors went on prolonging the litigation and in the meanwhile, the Appellant found that the project concerned was in grave situation due to the acts of Respondents 1 and 2 and the promoters. It is argued for the Appellant that the Stay continued till 12th December, 2017 but the Petitions remained pending and the Respondent No.1 withdrew the Company Petitions only on 6th March, 2018. The learned Counsel stated

that if the Articles of Association are kept in view, the Respondents were required to convert the CCDs within 5 days of the Notice and when this had not been done, without exercise of fresh option from the side of the Appellant, the Respondents could not have, after prolonging the matter in litigation on their own, proceeded to convert the CCDs. The argument is that having the option of 5 days in the Articles of Association was with a purpose and the purpose was that when the Appellant exercises the option, it is aware with regard to the situation and standing of Respondent No.2. However, as Respondent No.1, which is the holding Company of Respondent No.2, indulged in litigation, the Appellant was later in no position to assess as to the actions these Respondents and promoters of Respondent No.2 had indulged into and thus when after withdrawing the Company Petitions, Respondents called for meeting to convert the CCDs, the Appellant had in writing informed that now the CCDs cannot be converted and the nominee Directors of the Investors also protested in the meeting and even resigned and the Board was left without quorum and thus, could not have proceeded further if the Articles of Association are considered. It is argued that although the Appellant had sought conversion of the CCDs into equity shares, the Respondent No.2 had not taken action and when subsequently, Respondent No.2 wanted to take action, the Appellant had by then withdrawn its consent to convert and when this is so, the post conversion on the part of the Respondent No.2 was illegal and there is no substance in the stand taken by Respondents that the Appellant had become the majority shareholder. According to the Counsel,

the Respondents 1 and 2 along with the promoters continued to control Respondent No.2. Only because Appellant sought conversion of CCDs, when contesting Respondents declined and resorting to litigation, the conversion had not taken place. It is argued that on the basis of pleas raised by the Respondents, the NCLT erred in observing that there were contentious issues. It is argued that after coming into force of the Companies Act, 2013 and provision like Section 430 of the Act coming into existence, the old law with regard to rectification of Register of the Company that contentious issues could not be examined, is no more good law. The Counsel submitted that earlier provisions of the Companies Act barring jurisdiction of Civil Court had not been enforced. Now, however, Section 430 bars jurisdiction of Civil Court and thus, even if there are contentious issues relating to Company matters even under Section 59 or under any other Section of the Act, the same can be and have to be decided by the NCLT. The learned Counsel placed reliance on the Judgement in the matter of "**Shashi Prakash Khemka Versus NEPC Micon and others".** Referring to this Judgement of Hon'ble Supreme Court, the submission is that the old law as appearing in the matter of **"Ammonia Supplies Corporation (P) Ltd. Versus Modern Plastic Containers Pvt. Ltd. and others"** relied on by the NCLT in the Impugned Order, was no more good law.

17. According to the Counsel, the CCDs were converted contrary to the Articles of Association and there was no affirmative consent of the

Appellant for conversion of the CCDs, at the time of Board Meeting, and that the Board Meeting held was without proper quorum and thus, there was no sufficient cause for the Respondent No.2 Company to reflect in the Register of Members that securities had been issued in favour of the Appellant against the conversion of CCDs.

18. Against this, the learned Counsel for Respondents 1, 2, 7 and 8 (Contenting Respondents) supported the Impugned Order. According to the Counsel, the remedy with regard to CCDs for the Appellant was to resort to arbitration. As the Appellant had invoked the pledge, it had become 51% shareholder. The documents referred to and relied on by the Appellant, have been referred by the learned Counsel for Respondents also and it is stated that in view of the Appellant and Respondent No.13 exercising their rights vide communication dated 29th August, 2017 (Page – 258) and letters dated 5th September, 2017 (Pages 265 – 267), the Respondent No.2 proceeded to call for meeting on 26th March, 2018, once the Company Petition filed by Respondent No.1 had been withdrawn and the actions taken were in compliance with the Orders passed by NCLT at the time of withdrawal and thus, Respondent No.2 could not be faulted with and there was sufficient cause for the Respondent No.2 to concert the CCDs into shares in favour of the Appellant.

19. It appears, and the learned Counsel for the Respondents accepted that copy of the Board Resolution dated 26th March, 2018 has not been put on record. The learned Counsel referred to the Memorandum of

Association to say that the Arbitration Act is applicable. The learned Counsel submitted that the Appeal deserved to be dismissed. According to the learned Counsel, the issues raised could not be dealt with and decided under Sections 59 and Section 430 of the Act will not be helpful, for, according to the Counsel, Section 430 applies when the Tribunal is empowered to determine a factor. Under Section 59 of the Act, NCLT was empowered to consider registration and transfer or refusal to transfer of existing shares without sufficient cause but it could not consider, if the same was contrary to the Articles of Association or Investment Agreement which has Arbitration Clause.

Certain aspects hardly or not in dispute

20. In this matter, there does not appear to be dispute with regard to the execution of agreements between the parties and the correspondence referred to by the Appellant. Legal proceedings which took place when the Appellant and Respondent No.13 sent communication dated 29th August, 2017 seeking to redeem NCDs and convert CCDs is also not in dispute. There does not appear to be dispute that Respondent No.1 (which as per the Company Petition holds 99.99% shares in Respondent No.2) resorted to litigation by first moving under the Arbitration and Conciliation Act and then filing Company Petitions; taking stay; and subsequently withdrawing the Petitions. In the arguments on the part of contesting Respondents, there is no resistance to the submissions of Appellant regarding facts that after withdrawal of the Company Petitions by Respondent No.1, the

Respondent No.2 proposed to convert the CCDs, which was opposed by the Appellant and Respondent No.13 with even Investor Directors opposing and at the penultimate stage resigning from the Board, but that contesting Respondents still went ahead to convert the CCDs.

21. The main thrust of the arguments of contesting Respondents is that the Petition being under Section 59 of the Act, the NCLT could not go into issues relating to arbitration; the effect of Appellant invoking Insolvency and Bankruptcy proceedings against Respondent No.4; the interpretation of the Investment Agreement and the Articles of Association, which it is argued NCLT found to be contentious issues which the NCLT could not go in, in Petition under Section 59 of the Act.

22. Sub-Section (1) of Section 59 of the Act which Section deals with Rectification of Register of Members reads as under:-

> "(1) If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is, without sufficient cause, omitted therefrom, or if a default is made, or unnecessary delay takes place in entering in 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 appeal in such form as may be prescribed, to the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register."

Apparently, a Petitioner will have to prima facie show whether or not the act or omission is without sufficient cause, but the Company, which is in control of the Register of members, will have larger burden and must put on record all evidence to justify the act or omission to show that the act or omission is not without sufficient cause.

23. Undisputedly, the Appellant has had held one share in the Company. Its grievance is regarding making entry in the Register of Members showing another 906599 equity shares treating the same as having been converted from CCDs. As per Section 59, the only question relevant is whether the name of Appellant has been entered regarding shares said to have been issued against CCDs to be "without sufficient cause". In this matter although there is Investment Agreement, we will not dwell much on the Agreement as admittedly, the protection sought by the Appellant and Respondent No.13 while entering into the Investment Agreement was translated into amendment of the Articles of Association which clearly has a higher binding nature and protection as the Company as well as all the shareholders including Directors become bound by the same.

Relevant Articles of Association

24. If the Articles of Association (Page – 594) are seen, the following aspects and relevant Articles require to be noted:-

a) Article 53 gives overriding effect to Articles 53 to 84 of the "Amending Articles" over the earlier Articles 1 to 52. Article 53.4 deals with

definitions which includes "CCD holder" to be the Appellant; "Company Investor Directors" have been defined as in Article 59.1 and "Investment Agreement" is stated to be the Agreement dated June 25, 2015. "Investor CCDs" have been defined as 906599 CCDs. "Investor's Consent" is stated to mean the prior written consent of the Investors. Article 54.1 (Page – 615) deals with "Fundamental Terms" which reads as under:-

> "54.1 It is fundamental term of these Articles that the Investors shall be entitled to realise their investment in the Company in accordance with the terms of these Articles and in particular:
>
> (a) NCD Holder shall be entitled to exercise its rights in respect of the Exit Options (and such other rights under these Articles and under applicable Law);
>
> (b) the Promoters, the Company and IBEUL shall comply with their obligations under these Articles and applicable Law, including in respect of the Exit Options, the Accrued Return, the Coupon Payment, and the conversion of the CCDs; and
>
> (c) the Promoters, the Company and IBEUL shall waive any rights, remedies or claims which they may have in respect of the legal enforceability of the Exit Options or any rights of the Investors hereunder."

b) Article 59.1 (Page 621) under Article 59 - "Investor Director" is as under:-

> "59.1 The Board shall at all times comprise a maximum of 5 (five) directors, of whom NCD Holder shall have the right to appoint and maintain in office

> 2 (two) directors (and to remove from office any director(s) so appointed and to appoint another in the place of the director(s) so removed) (such directors are referred to as the "Company Investor Directors" or "Investor Directors")."

NCD holder is the Respondent No.13

c) Article 60.2 and Article 60.4 read as follows:-

> "60.2 The quorum for a meeting of the Board (or committee of the Board) shall be one-third of its total strength (any fraction contained in that one-third being rounded up to one) or two directors (whichever is higher), and shall specifically include at least one of the Company Investor Directors, present throughout the meeting, unless otherwise agreed with the Investors' Consent."

> "60.4 The quorum for a meeting of the shareholders of the Company shall include representatives of the Investors, present throughout the meeting, unless otherwise agreed with the Investors' Consent. Without prejudice to Article 0 *(Reference: 60.2)*, no Reserved Matter will be discussed or approved without the presence of a Company Investor Director; unless the Investors' Consent in respect of such Reserved Matter has been received prior to the commencement of such meeting."

"Reserved matters" are in Article 62 and relevant portions of 62.1 and 62.2 read as follows:-

> "62.1 Post Completion, no action or decision (including any steps being commenced or taken for any action or decision) relating to any of the Reserved Matters as set out in Article 62.2 below with respect to the Company and/or IBEUL shall be proposed,

taken or given effect to (whether by the board, any director, any committee, the senior management or the shareholders of IBPIL, or the Company, or IBEUL; or any of the employees, officers, managers of IBPIL, Company or IBEUL) unless the Investors' Consent is first obtained."

"62.2 The following matters with respect of the Company, the Subsidiary and all subsidiaries investee companies of the Company/IBEUL/Resulting Company shall require Investors' Consent: .....

(d) Any change in the authorised, issued, subscribed or paid up equity or preference share capital of the Company and/or IBEUL, or re-organization of the share capital of the Company and/or IBEUL, including any Transfer of any Equity Securities, issuance of new shares or other securities of the Company and/or IBEUL, the issuance of convertible preference shares of debentures or warrants, or grant of any options over its shares by the Company and/or IBEUL or the redemption, retirement or repurchase of any shares or other securities;"

d) Article 76.5 relates to Redemption Procedure.

e) Article 77.2 relating to "Term" is as under:-

"77.2 Term

(a) The term of the CCDs shall be 120 (one hundred and twenty) months from the Completion Date, or such extended term as may be determined by the Board with the prior written consent of the CCD holders ("Conversion Due Date").

(b) The holder of the CCDs shall have the option to convert the CCDs, in whole or in part, before the Conversion Due Date in accordance with Article 0 below."

The relevant portion of Conversion Procedure is at Article 77.4(d) which is as under:-

"(d) Conversion Procedure

The CCDs shall be converted, when pursuant to Article 0(a), in the following manner:

(i) The Company shall convert the CCDs upon recipe of a written notice (the "Conversion Notice") by the CCD holders. The conversion of the CCDs shall be completed within a period of 5 (five) days from the date of receipt of the Conversion Notice.

(ii) Within a period of 5 (five) days from the date of receipt of the Conversion Notice:

(A) The Company shall issue and allot to the CCD holders one Equity Share for each CCD converted by them, and shall deliver duly stamped share certificates in respect thereof.

(B) The Company shall update its registers of debenture holders and members to record the conversion of the CCDs.

(iii) The Company and the Promoters shall do all such acts and deeds to give effect to the provisions of this Article 0(d), including without limitation, causing any Director nominated by the Promoters to exercise their voting rights in a meeting of the Board to approve the conversion of the CCDs."

Analysis

25. It is apparent from the above Articles that the Appellant and Respondent No.13 had taken sufficient precautions while investing money in the Company, to safeguard their interests. When the Appellant and Respondent No.13 claimed that there was default, and wanted to invoke their rights on 29th August, 2017 and sent the letter (Page – 258), the contesting Respondents did not act as per the Articles of Association referred above. The Appellant and Respondent No.13 again sent two letters/Notices dated 5th September, 2017 (as can be seen at Page – 265 and 267) clearly calling upon the contesting Respondents to do the needful conversion within a period of 5 days of the issuance of the Notice. They referred to the Investment Agreement in this context (which is part of Articles of Association also). When in spite of the Articles of Association providing right regarding conversion, the contesting Respondents did not act in 5 days as per Articles of Association, the Respondent No.3 issued requisition Notice dated September 12, 2017 (Page 270). The contesting Respondents at such stage resorted to litigation by first rushing to the High Court professing to invoke Section 9 of the Arbitration Act and later on, withdrew the same and filed two Company Petitions and took stay to the EOGM and then after keeping the matter pending, withdrew the Company Petitions also, on 6th March, 2018. Apparently, the contesting Respondents, if they had a grievance that "default" as contemplated under the Agreement and Articles of Association had not taken place, did not take the litigations to any logical ends. They can hardly say that they had good

case not to act in the prescribed 5 days. They by conduct, declined to accept liability in response to correspondence dated 29th August, 2017 and 5th September, 2017 as was sent by the Appellant and Respondent No.13. We find substance in the argument of the learned Counsel for the Appellant that when after the Appellant had exercised option to seek conversion on 5th September, 2017, the contesting Respondents had not done the needful act within 5 days and the contesting Respondents could not subsequently, purport to act under such exercise of option of the Appellant. There is substance in the argument of the learned Counsel that when there is specific provision made in the Investment Agreement and incorporated in Articles of Association, the period of 5 days had its own value. The learned Counsel rightly submits that the Investor may be in a position to know the financial and other standing of the Company on the particular date when he wants to exercise option but if Respondents by their conduct declined and went into litigation, the investor later, may not be in a position to judge the financial standing and viability of the Company and the Company cannot subsequently turn around and force the conversion on the Investor, claiming that you asked for it. If the Articles of Association prescribe or act to be done in a particular manner, the Company, Directors, shareholders are all bound to do the act in the particular manner prescribed, as Articles of Association is heart and soul of the Company, we find.

26. We also find substance in the submissions of the learned Counsel for the Appellant who pointed out Article 59.1 which makes it mandatory that the Board shall at all times comprise a maximum of 5 Directors of which 2 have to be of the NCD holders and the record shows that when, after withdrawing the Company Petitions by the Respondent No.1, Respondent No.2 proposed to hold Board Meeting for converting the CCDs, the Appellant had opposed and claimed that such meeting could not be held and the CCDs could not be converted. The learned Counsel for the Appellant submitted that in response to the Agenda (Page – 400) circulated by the Respondent No.2 so as to hold Board Meeting on 26th March, 2018, the Appellant and Respondent No.13 had both opposed and sent letter (Page - 414) with regard to the Notice dated 17th March, 2018 *(sic 2017)*. It is rightly argued by the learned Counsel for the Appellant that by this communication, the Appellant clearly conveyed to the contesting Respondents that it had withdrawn its option to convert CCDs sent on 5th September, 2017.

27. It is apparent on record that when contesting Respondents still wanted to go ahead, the Appellant and Respondent No.13 sent yet another communication dated 26th March, 2018 wherein, inter alia, it was mentioned:-

> "3.1 Any change to the share capital of IBTPL requires our consent under the terms of the Investment Agreement dated June 25, 2015 in relation to IBTPL (the *Investment Agreement)* and the Articles of Association of IBTPL. Accordingly, any purported conversion of the

CCDs and issuance of equity shares of IBTPL without our consent is ultra vires IBTPL and the corporate authority of the board of directors of IBTPL."

"3.4 Since IBTPL has, due to the actions of its promoters, breached the terms of the agreements with us, we are withdrawing our nominee directors on the Board. Please note we reserve all our rights under the IA and applicable law and will nominate an observer to the Board of Directors of IBTPL in accordance with the Investment Agreement."

Not only this, on 26th March, 2018, the Investor Directors did resign from the Board and the Appellant and Respondent No.13 informed the contesting Respondents on 28th March, 2018 (Page – 420), inter alia, as follows:-

"3. As we had stated in the said Letters, any purported conversion of the compulsory convertible debentures (CCDs) held by us in IBTPL into equity shares is contrary to the terms of the said debentures and the articles of association of the Company.

4. Despite our letters as aforesaid, and despite our nominee directors pointing out the above in the said meeting, you purported to proceed with the meeting to discuss the agenda in relation to the conversion of CCDs which was not only ultra vires the articles of Association but also based on deliberate misinterpretation of the Order dated March 6, 2018 passed by the Hon'ble National Company Law Tribunal, Hyderabad ("**said Order**"). Our nominee directors thereupon resigned from the Board.

5. We call upon you to ensure that the CCDs are not converted into equity shares without our prior written consent for the reasons mentioned in our said Letters.

> 6. Please note that any resolution or decision or action of the board of the Company or the Company to convert the CCDs into equity shares is ultra vires, void and invalid and would amount to contempt of the said Order besides being in direct breach of the articles of association of the Company as also the Investment Agreement dated June 25, 2015, in which case we will proceed under legal advice.
>
> 7. We would like to remind the directors of IBTPL of other fiduciary duties which they owe to IBTPL and its shareholders. Acting contrary to the terms of the Articles of Association of IBTPL and contrary to the agreements entered into by IBTPL will render them personally liable for the breach of their fiduciary duties."

28. The record speaks for itself. As on the part of contesting Respondents, they have not even put on record copy of the Board Resolution dated 26th March, 2018 to let the Tribunal know as to how and on what basis they proceeded. The Company cannot hold back material documents and expect the Tribunal to find that the Company had sufficient cause for inserting the concerned shares against the name of the Appellant. The Appellant has sufficiently put on record the evidence to show that the contesting Respondents and, especially, Respondent No.2 Company did not have sufficient cause to enter shares against the name of the Appellant purporting to have been converted from CCDs. We do not find that there are any contentious issues involved as being tried to be projected by the Respondents. Only because the Appellant took separate action against Respondent No.4 under Insolvency and Bankruptcy Code, 2016 with regard to bridge loan relating to OCDs, which related to a bridge

loan, there did not arise any contentious issue for decision in this matter which was clearly different. This has been held even by this Tribunal (by another Hon'ble Bench) in Company Appeal (AT) (Insolvency) No.597/2018 vide Judgement dated 23rd April, 2019, passed recently.

29. Even regarding arbitration, when we asked the learned Counsel for the contesting Respondents, he did not show any Article of Association relating to the arbitration. He referred to Clause 29.1 of the Investment Agreement (Page – 130 @ 186) which reads as under:-

> "29.1 Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Mumbai in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("**SIAC Rules**") in force at the date of applying for arbitration, which rules are deemed to be incorporated by reference in this Agreement."

30. In the Articles of Association, this does not appear to have reflected. The learned Counsel for the contesting Respondents referred to Memorandum of Association (Page – 500) in which, Clause – 40 is as under:-

> "40. To refer all questions, disputes or differences arising between the company and any other person whosoever (other than a Director of the Company) in connections with or in respect of any matter relating to the business or affairs of the company to arbitration in such manner and upon such terms as the company and such other person may mutually agree upon in each case, and such reference to arbitration may be in accordance with the provisions of the Indian Arbitration Act or the Rules of the

International Chamber of Commerce relating to arbitration or otherwise."

Clause 40 as mentioned above, is not part of Articles of Association but is part of the Memorandum of Association which is dated 4th December, 2014 (which is before the Investment Agreement dated 25th June, 2015). The Clause apparently shows that matters relating to business or affairs of the company can go to arbitration "in such manner and upon such terms as the company and such other person may mutually agree". Thus, it is only an enabling Clause which would be subject to the Agreement to be entered into with such other person. If we come back to Clause 29(1) of the Investment Agreement as referred above, in this matter, we are not dealing with the questions whether the Appellant rightly invoked the Agreement or not. We are concerned with the question of entry made in Register of Members. Whether there was sufficient cause or not to enter name is matter which only NCLT can decide under Section 59 of the Act.

Change of law under Companies Act, 2013

31. The contesting Respondents have relied on Judgement in the matter of **"Ammonia Supplies Corporation (P) Ltd. Versus Modern Plastic Containers Pvt. Ltd. and others"** reported in 1998 7 SCC 105 and the learned NCLT has also referred to this Judgement of the Hon'ble Supreme Court so as to state that there are contentious issues and they cannot be looked into under Section 59 Petition of the Act. This Tribunal had the

occasion of considering Section 59 in the changed context of the Companies Act, 2013 coming into force in the matter of **"Smiti Golyan & Ors. Vs. Nulon India Limited & Ors."** reported in MANU/NL/0118/2019. We had observed in that Judgement as under:-

> "21. In para – 31 of the Judgement in the matter of "Ammonia Supplies" portions of which we have reproduced above, the Hon'ble Supreme Court had observed that there was nothing under the Companies Act expressly barring the jurisdiction of the Civil Court and thus mandated that the "Court" should examine whether prima facie what is said is a complicated question or not. The earlier Section 10 GB of the companies Act, 1956 relating to Civil Court not to have jurisdiction, does not appear to have been enforced but the position has now changed with coming into force of Companies Act, 2013 and Section 430 of the Act providing that Civil Court would not have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act. Under the new Companies Act - Section 59, it is for the NCLT to consider if the name of any person is "without sufficient cause" entered or omitted from the register of members of a company. Recently in the matter of **"Shahi Prakash Khemka (Dead) Through LRs. and Another Versus NEPC Micon (Now called NEPC India Ltd.) and Others"** Civil Appeal Nos.1965 – 1966 of 2014 decided on 8th January, 2019 – 2019 SCC OnLine 223, the Hon'ble Supreme Court of India dealt with disputes which were before the Hon'ble Supreme Court relating to exercise of power under Section 111-A of the Companies Act, 1956 (relating to rectification of register on transfer) and noticed above Judgement in the matter of "Ammonia Supplies". It was observed:-
>
> > "Learned counsel for the appellants has drawn our attention to the view expressed in Ammonia Supplies Corporation (P) Ltd. vs. Modern Plastic Containers Pvt. Ltd. and Others (1998) 7 SCC 105, to canvass the proposition that while examining the

scope of Section 155 (the predecessor to Section 111), a view was taken that the power was fairly wide, but in case of a serious dispute as to title, the matter could be relegated to a civil suit. The submission of the learned counsel is that the subsequent legal developments to the impugned order have a direct effect on the present case as the Companies Act, 2013 has been amended which provides for the power of rectification of the Register under Section 59 of the said Act. Learned counsel has also drawn our attention to Section 430 of the Act, which reads as under:-

> "430. Civil court not to have jurisdiction.-
> No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate."

The effect of the aforesaid provision is that in matters in respect of which power has been conferred on the NCLT, the jurisdiction of the civil court is completely barred.

It is not in dispute that were a dispute to arise today, the civil suit remedy would be completely barred and the power would be vested with the

> National Company Law Tribunal (NCLT) under Section 59 of the said Act. We are conscious of the fact that in the present case, the cause of action has arisen at a stage prior to this enactment. However, we are of the view that relegating the parties to civil suit now would not be the appropriate remedy, especially considering the manner in which Section 430 of the Act is widely worded.
>
> We are thus of the opinion that in view of the subsequent developments, the appropriate course of action would be to relegate the appellants to remedy before the NCLT under the Companies Act, 2013."
>
> [Emphasis supplied]
>
> It is apparent that now even otherwise, exclusive jurisdiction with regard to Section 59 is of the NCLT. NCLT would now clearly have jurisdiction to deal with rectification and all questions including incidental and peripheral questions raised with regard to rectification for the purpose of deciding legality of the rectification. What could earlier be looked into to see if prima facie made out can now be considered if proved to justify rectification even if it was to be said to be complicated question."

32. We have already mentioned that the learned Counsel for the Appellant has relied on the above Judgement of Hon'ble Supreme Court in the matter of **"Shashi Prakash Khemka Versus NEPC Micon and others".** For above reasons, we are of the view that with change of law now under Section 59 of the Act, NCLT can deal with rectification and all questions including incidental and peripheral questions raised with regard to rectification for the purpose of deciding legality of the rectification. NCLT which exercises widest possible powers in a matter under Section 241, 242

of the Act; which even otherwise is expected to always keep interest of the Company in forefront, cannot be treated as unequipped only because the Petition is under Section 59 of the Act. In the present matter, firstly, we are of the view that there were really no complex questions involved and even if it was to be said that there were any complex questions, the same had to be decided by the NCLT and in Appeal, this Tribunal is bound to consider whether or not entry made in the Register of Members could be upheld.

33. When we look at the facts of the present matter and the concerned documents and developments, it is apparent that for the Board of Directors to take a decision, Article 59.1 and 60.2 required presence of the Company Investor Directors and there could not be quorum unless one of the two Company Investor Directors remains present throughout the meeting. It is clear that Board of Directors could not on their own have taken any decision with regard to the conversion. In the context of Article 62.1 read with Section 62.2, conversion of CCDs was "reserved matter" which also required change in the subscribed or paid-up equity and this could not be done without Investor's consent, which as per Articles 59.1 meant "prior written consent". In fact, in present matter, leave apart consent, there was recorded opposition. We reject the argument made in Appeal by the Counsel for contesting Respondents that conversion was only a ministerial act. Had it been so, these Respondents would not have called the Board Meeting with agenda in the first place. There is no substance in the

arguments of the contesting Respondents that Section 59 could not be resorted to if the effect would be reduction in capital under Section 66 of the Act. Contesting Respondents who have held back the copy of Resolution of the Board of Directors dated 26th March, 2018, cannot be heard on this count without they first showing justification as to how they entered disputed shares against the name of Appellant in the Register of Members. Again, even if a Resolution was taken by Promoter Directors on their own, in the face of facts of the matter and Articles of Association, the same would be and has to be termed as illegal.

34. For such reasons, we are unable to maintain the Impugned Judgement and we set aside the same. We direct cancellation of entry of the name of Appellant in the Register of Members of Respondent No.2 showing 906599 equity shares purported to have been credited on the basis of conversion of 906599 CCDs standing in the name of the Appellant. Appeal is allowed accordingly.

No Orders as to costs.

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

[Balvinder Singh]
Member (Technical)

/rs/nn