

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****COMPANY APPEAL(AT) NO.09 OF 2018**

(ARISING OUT OF IMPUGNED JUDGEMENT AND ORDER DATED 23.10.2017 PASSED BY NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HYDERABAD IN COMPANY PETITION NO.58/2015).

IN THE MATTER OF:

Rachakonda Siva Kumar
R/o H.No. 8-2-293/82/G/A,
Flat No.202, Aditya Elegance,
Road No.34, Jubilee Hills,
Hyderabad 500033
Telangana.

Appellant

Vs

1. Zetatek Engineering Systems Pvt Ltd
Plot No.39,
Ananth Info Park, Phase II,
Hi-Tech City, Madhapur,
Hyderabad-00081
Telangana.
2. Dr.Subba Rao Pavuluri,
Plot No.1355C,
Road No.45, Jubilee Hills,
Hyderabad-500033
Telangana.
3. Mr. V. Shashi Kumar,
R/o 10-2-289/110/202
Shanthi Nagar,
Hyderabad 500028
Telangana.

Respondents

For Appellant:-Mr S. Chidambaram, PCS, Ms Monalisa Kosaria and Mr. Abhinav Rao, Advocates.

For Respondents: - Mr. Y. Suryanarayana, Advocate.

JUDGEMENT

MR. BALVINDER SINGH, MEMBER (TECHNICAL)

The present appeal has been preferred by the appellant under Section 421 of the Companies Act, 2013 against the impugned order dated 23.10.2017 passed by the National Company Law Tribunal, Hyderabad Bench at Hyderabad in Company Petition No.58 of 2015 wherein and whereunder the company petition has been dismissed.

2. The brief facts of the case are as under:

3. 1st respondent, Zetatek Engineering Systems Pvt. Ltd., is a private Limited Company incorporated under the provisions of the Companies Act, 1956 on the 18th January, 2008. Its authorized equity share capital is Rs. 10,00,000/- (Rupees Ten Lakhs Only) divided into 1,00,000 number of equity shares of Rs.10/- each. The paid up equity share capital is 10,000 number of equity shares equally subscribed by both the subscribers to the Memorandum of Association i.e. the appellant and the 2nd Respondent herein at 5000 shares each. Thus the appellant and 2nd Respondent are its co-promoter with 50:50 equity shareholding pattern.

4. The main objects of the Company is to carry on business as manufacturers, converters, producers, buyers, sellers, suppliers, suppliers, stockist, servicing of Navigation Systems and calibration, Inertial and etc.

5. Appellant stated that the 2nd Respondent is indulging in anti-company activities and resorted to acts of mismanagement and creation of fake documents, tampering the public records of ROC/MCA web portal by

uploading fake documents and resolutions. He has also failed to comply with the mandatory statutory compliances of the Companies Act, 1956/2013.

6. It is stated that a Board Meeting was held on 25.08.2014 where 2nd respondent was present. It is stated that 1st and 2nd respondent uploaded two Forms i.e. Form DIR-12 regarding appointment of Mr. Shashi Kumar Vijayabalan as an Additional Director of the company and also one more Board Resolution in Form No.MGT 14 was uploaded which was not at all an item of agenda thereof. It is stated that from the attachment to above Form No.MGT 14 it was revealed that 500 equity shares have been transferred from 2nd respondent to a third party i.e. 3rd respondent. The said transfer was not at all an item of agenda and further it is also in violation of Articles 17 to 22 of the Articles of Association of 1st respondent and the said transfer is illegal and untenable and the 3rd respondent cannot become a Member of the 1st respondent.

7. It is next stated that another Board Meeting was held on 3.9.2014 in which the appellant, 2nd and 3rd respondent were present and there were nine items of agenda. It is further stated that from the web portal of MCA it is seen that an allotment of huge numbers of 90,000 equity shares of 1st respondent company were issued to 2nd respondent and stated that the “**application**” received for allotment of 90000 equity shares of Rs.10 each was considered. It is stated that the allotment of 90000 equity shares was not an agenda of the Board Meeting dated 3.9.2014. It is stated that through this fake allotment of 90000 shares the 2nd respondent has misrepresented himself as if he is holding 95000 equity shares (including 5000 shares shown as subscriber to

Memorandum of Association). altered and attaching a fake board resolution adopted on that date.

8. The 2nd Respondent failed to convene and conduct mandatory AGM and violated the provisions of the Companies Act, 1956/2013 in this regard. The appellant had questioned the Board Meetings dated 25.08.2014, 03.09.2014 & 14.10.2014.

9. The appellant is one of the subscribers to the Memorandum of Association and he was also the First Director of the Company by Holding equally 50% of the paid up equity shares along with second respondent in the Company. However, the appellant has resigned as Director of the Company on 18.11.2014 and remains as shareholder holding 50% of the shares of the Company.

10. Being aggrieved by the said acts of 2nd respondent the appellant had filed a company petition seeking the following reliefs:-

a) to declare the fake board resolutions uploaded with the Form No.MGT-14 transferring 500 shares by the 2nd Respondent to the 3rd Respondent as void and illegal and violative of provisions of Articles 17-22 of the Articles of Association of the 1st Respondent Company and set aside the said Form No.MGT-14 as illegal.

b) To declare the allotment of 90000 shares solely to the 2nd Respondent at the purported board meeting dated 3.9.2014 as void and illegal, declare the Form No.PAS-3 filed by the Respondents as null and void.

c) Order the Respondents 1 and 2 to convene and conduct the AGM for the year 31.3.2014 immediately as per the approved Annual Accounts at the Board Meeting held on 3.9.2014.

d) To such further order or other orders as the Hon'ble Company Law Board may deem fit and proper in this service of justice.

11. 2nd and 3rd Respondents filed the reply thereby stating that the petitioner has come to the Tribunal with unclean hands by suppressing several material facts. 2nd respondent is a Founder Director and shareholder of the Company and he is currently holding 94,500 equity shares of Rs. 10/- each; it is next stated that the appellant has not disclosed another Company namely Gagan Aerospace Limited was floated by 2nd Respondent. It is the appellant who wanted the 2nd Respondent to be associated to promote the Respondents No.1 Company. The appellant and 2nd Respondents then became the Founder Directors holding 50:50 shareholdings initially in the Company. So it is a joint responsibility of both the appellant and the 2nd respondent for conducting AGM. The appellant has not co-operated for smooth conducting of business though subsequently he has resigned on 18.11.2014.

12. 2nd respondent stated that he disputes started when the appellant has sent P& L Account, in which a provision was made for Rs. 1.79 Crores for payment of technical services, salaries, etc., payable into the appellant's bank account. The appellant had sent the different balance sheet contrary to be based on 03.09.2014 before the Board of Directors of the Company. The Company tries to correct the balance sheet and placed proper balance sheet before the Board Meeting held on 03.09.2014. However, the appellant refused

to sign the balance sheet, on the contrary, he is making counter allegations. Due to the non-cooperation of the appellant, it has become impossible for the Company to function in a normal manner resulting in non-finalization of account for the year 2013-14, non-holding of annual general meeting (AGM) etc

13. 3rd respondent was appointed as an Additional Director of the Company during Board Meeting held on 25.08.2014, and 500 shares of the Respondent No.2 were also transferred to him. The appellant, in fact was also present at the Board Meeting and necessary transfer deeds were duly executed by the Respondent No.2 in favour of Respondent No.3. The 2nd Respondent has chosen to file Form No.MGT-14 with the Registrar of Companies/MCA Portal only to ensure compliance in law in true letter and spirit. However, the appellant has created fake document filed by the appellant in support of company petition bears no signature of the Chairman. As per section 118 of the companies Act, 2013, the minutes of the meeting of the Board of Directors of the Company should be signed by the Chairman of the meeting or by the Chairman of the next meeting. Therefore, the minutes submitted by the appellant are absolutely false, fake and bogus.

14. It is stated that it is appellant, who have committed offence U/s 340 of Cr PC as he has filed fabricated and fake documents. It is also stated that shareholding of the appellant was not at all disturbed or diluted in any way since the transfer of shares in question admittedly doesn't belongs to the appellant. It is stated that between the years 2007-08 to 2013-14, 2nd respondent has contributed Rs. 16,455,000 through banking channels

towards the share application money, while at the same time, the appellant has sold assets that were purported to be valued at Rs. 2,86,00,000 and the same was treated as share application money in the books of the Company. However by the end of 2013-14 the entire share application money was converted into unsecured loan and the unsecured amount from the 2nd respondent was Rs.18,753,530/-however, appellant's unsecured loan has come down to Rs.23,100/-. Therefore, it is stated that the appellant was well aware that there was share application money/unsecured loan to the credit of 2nd Respondent, which was pending allotment, and that the same would be allotted at any time.

15. After hearing both the parties, the Learned NCLT passed the impugned order dated 23.10.2017. The relevant portion of the impugned order is as under:

“11. It is not in dispute that the petitioner has resigned as Director of the respondent No.1 company on 24.10.2015 (18.11.2014 is stated in the Company Appeal filed before the NCLAT). So the present status is only a shareholder holding 5% of shares of the total shares of the Company. When the petitioner admittedly ceased to be a Director with effect from 14.10.2014/18.11.2014, the alleged acts of Oppression and Mismanagement ae also ceased to exist. Therefore, he cannot continue the present petition on those grounds. It is a settled position of law that acts of Oppression and Mismanagement is not to be available at the time of filing the Application/Petition but they should be perpetuated till the petition is actually taken up for final hearing. As held by the Hon’ble High Court of Kerala in Palghat Exports private limited and P.;Ramkumr Vs. T.V.Chandran and _ others(1994)79 Comp cas 213(KER) , isolated acts cannot constitute oppression and there should be continuous acts which are unfair and unjust which can be construed as oppression. And it is relevant to point out here the statement of petitioner in his Rejoinder to the counter filed by Respondent No. 2, dated 15" December, 2016, under para 4.18, which reads as “The petitioner chose to exit as Director only with the right to nominate his nominee and with the trust that the second and 3rd

respondents would be discharging their duties as per law and protect the interest of all stakeholders. "It prima facie shows that the allegations of acts of oppression and mismanagement as made by him prior to his resignation holds no water. Therefore, it is to be held that the petition is not at all maintainable on this score also.

12. So far as reducing the shareholders of the petitioner is concerned, it is not in dispute that the shareholdings of the petitioner in the Company was not at all touched upon by transfer and issue of further shares. As per Article-18 of Association of the Company, right of preemption is available to the existing shareholder. When the petitioner is admittedly participated in the impugned Board meetings held on 25.08.14 & 03.09.2014, he did not raise any objection or expressed his willingness to purchase the shares of the 2nd Respondent. Even otherwise, there is no absolute bar to transfer shares in the Company, but it is only a condition to offer the shares to the existing shareholders before offering to others. Therefore, the contention of petitioner that the impugned share transfers are illegal and contrary to AOA is not correct and the same is baseless. Moreover, the transfer of shares itself without directly affecting shareholding pattern of the petitioner cannot be called as an act of Oppression and Mismanagement.

Both the petitioner and respondent have contributed to the Company as share application money. The Respondent No.2 contributed Rs.1,64,55,000/- through banking channels and the petitioner also contributed to company for share application money as for an amount of Rs. 2,86,00,000/-. However, by the end of 2013-14 the entire share application money was converted into unsecured loan and while the unsecured amount from the Respondent No.2 is Rs.18,753,530/- whereas the petitioner's has come down to Rs.26,011/-. It is also to be noted the balance sheet as on 31.03.2014, which is also signed by the petitioner and the respondents contains details of share application money as on 31.03.2013 and unsecured loan as on 31.03.2014.

14. When the provisions of section 42 of the Companies Act, 2013 relating to allotment of securities came into force from 01.04.2014 which stipulate that the Company shall allot its securities within 60 days from the date of receipt of the application money, failing which the application money should be repaid within date of completion of 60 days. We are satisfied that the Company followed all extant rules in this regard.

15. The transfer of shares of the Company is dealt with under Article-17 to 26 of the Articles of Association. Article-17 is more relevant to extract for ready reference as it is referred in the case:

“Article-17: Save as hereby otherwise provided, no shares shall be transferred to any person who is not a member of the Company so long as any member is willing to purchase the same at the fair value to be determined in the manner hereinafter provided.”

The above provisions did not bar to transfer of the shares to non-member of the Company, but it is only says the Company should explore the possibility purchasing shares by the existing members of the Company before offering it to others. As stated supra, there are only two shareholders before the impugned transfer/allotment of shares So there is nothing wrong to transfer and allotment of shares to respondent No.1 and respondent No. 2 Admittedly the petitioner, who is aware proposal of transfer of shares of the 2ndrespondent, being a Director at the relevant point of time, has not opposed the transfer of shares of 2ndrespondent to the 3rdrespondent. Therefore, there is no illegality in transfer of the shares of the 2nd respondent as per Board Resolution 25.08.2014.

So far as the issue of Board of Directors is concerned, Articles 29-47 of Articles of Association of the Company dealt with the constitution of the Board of Directors, appointment, retirement, etc., as per Article 30 Mr.R.Shiv Kumar (Petitioner) and Dr.Subba Rao P (Respondent No.2) of the First Directors of the Company. As per the Article-29 the member of Director should not be less than two and not more than 12 including Managing Director or nominated Director and other Directors if any.As per Article 34 Board of Directors shall have power to appoint Additional Directors subject to the maximum mentioned as sated above. As per Article-38: the quorum for a meeting of the Board of Directors shall be 1/3" of its total strength (any fraction contained in that 1/3 being rounded off as one) or two Directors whichever as stated supra the petitioner as well as the 2" respondent are admittedly present during Board Meeting in question to transact the business of the Company. Accordingly, the business of the Company was conducted duly following the above articles of Association of the Company. It is also relevant to point out here that the petitioner is not disputing the appointment Mr. V Shashi Kumar (respondent No.3) but selectively opposing allotment of shares to him for the reasons best known to him. Since we hold that the impugned transfer and allotment are legal, there is no question of application of section 59 of Companies Act to the facts and circumstances of the case.

16. So far as the issue of Board of Directors is concerned, Articles 29- 47 of Articles of Association of the Company dealt with the constitution of the Board of Directors, appointment, retirement, etc., as per Article 30 Mr.R.Shiv Kumar (Petitioner) and Dr.Subba Rao P (Respondent No.2) of the First Directors of the Company. As per the Article-29 the member of Director should not

be less than two and not more than 12 including Managing Director or nominated Director and other Directors if any. As per Article 34 Board of Directors shall have power to appoint Additional Directors subject to the maximum mentioned as stated above. As per Article-38: the quorum for a meeting of the Board of Directors shall be 1/3 of its total strength (any fraction contained in that 1/3 being rounded off as one) or two Directors whichever is higher.

As stated supra the petitioner as well as the 2nd respondent are admittedly present during Board Meeting in question to transact the business of the Company. Accordingly, the business of the Company was conducted duly following the above articles of Association of the Company. It is also relevant to point out here that the petitioner is not disputing the appointment Mr. V Shashi Kumar (respondent No.3) but selectively opposing allotment of shares to him for the reasons best known to him. Since we hold that the impugned transfer and allotment are legal, there is no question of application of section 59 of Companies Act to the facts and circumstances of the case.

17. The learned counsel for the petitioner has relied upon the following cases in support of his case. SP Chengalvaraya Naidu vs Jagannath (AIR 1994 SC 853) Dale & Carrington Investment (P.) Ltd. Vs P.K.Prathapan ([2004] 54 SCL 601 (SC) Smt. Claude- Lila Parulekar vs. Sakal Papers (P.) Ltd. [2005] 59 SCL 414 (SC)

We have perused the facts and circumstances of those cases, and found that the ratio held in those cases would not be applicable to the facts and circumstances of the present case as stated supra.

18. For the aforesaid reasons, we are of the considered view that the petitioner failed to make out any case so as to interfere in the issue by the Tribunal, and thus it is liable to be dismissed. Accordingly, we hereby dismiss the company petition bearing CP No. 58 of 2015 (TP No.80/HDB/2016) with no order as to costs."

16. Being aggrieved by the said impugned order the appellant has filed the present appeal.

17. Appellant stated that the Board Meeting was held on 25.8.2014 which was attended by the appellant and 2nd respondent. It is stated that the agenda of the Board Meeting consisted only five items and the actual and correct Minutes of the Meeting was prepared by the Practicing Company Secretary which were duly signed by the appellant and 2nd respondent. It is stated that

the 3rd item of the agenda was appointment of 3rd respondent as Additional Director. It is stated that 2nd respondent uploaded Form MGT 14 to the website of the MCA which showed a transfer of 500 shares from 2nd respondent to 3rd respondent. It is stated that the said transfer was done without the approval of the Board and in contravention of articles 17 to 22 of the Articles of Association.

18. It is next stated that a Board Meeting was held on 3.9.2014 and the minutes were prepared and were duly signed by appellant and 2nd respondent. It is stated that the minutes contain 9 items and there was no agenda for allotment of equity shares. It is next stated that in November, 2014, 2nd respondent fraudulently uploaded fake return of allotment in Form PAS-3 showing an allotment of 90000 shares to himself due to which the shareholding of the appellant has been come down to 5% from 50% and 2nd respondent has been shown as holding 95% shareholding.

19. It is stated that the appellant through an email dated 17.12.2014 disputed the fraudulent actions of the 2nd respondent in tampering with the Board Resolutions dated 25.8.2014 and 3.9.2014 and the same has not been disputed by 2nd respondent.

20. It is next stated that the Board of Directors approved the annual accounts for the year ending 31.3.2014 and also approved the draft notice of AGM in its Meeting held on 3.9.2014 but the 2nd respondent failed to convene and conduct the statutorily mandatory AGM and thereby violated the provisions of the Companies Act, 2013.

21. It is next stated that the learned NCLT has erred in passing the impugned order in gross oversight of Articles 17 to 22 of the Articles of Association of 1st respondent which prohibited the transfer of shares unless and until the rights of pre-emption have been exhausted. It is next stated that the Learned NCLT erred in holding that as the appellant ceased to be a Director w.e.f. 18.11.2014, the acts of oppression and mismanagement also ceased to exist, without considering that fraudulent transfer of shares to 3rd respondent and the allotment of 90000 shares to 2nd respondent. It is further averred that the NCLT has erred in holding that the shareholding of the appellant in 1st respondent was not at all touched upon the transfer of shares to 2nd respondent and issuance of further shares to 2nd respondent without considering that appellant has been reduced into a minority shareholder and that the appellant being a director and having participated in the Board Meeting dated 25.8.2014 and 3.9.2014 is stopped from challenging the same, without considering that the Minutes of the Meeting donot actually reflect any agenda of Transfer of Shares and Allotment of 90000 equity shares and the same has been tampered with by 2nd respondent.

22. In reply Respondent stated that the appellant was present at the Board Meetings held on 25.8.2014 and 3.9.2014 and the meetings were chaired by 2nd respondent. It is stated that the no signed copy of the notice or the agenda has been annexed with the company petition. It is stated that the minutes of the Board Meetings held on 25.8.2014 and 3.9.2014 were not signed by the 2nd respondent. It is next stated that resolution for transfer of shares were duly passed. It is stated that the contention raised by the appellant that the

transfer of shares is in contravention of articles of association is not tenable since the appellant himself was present in the Board Meeting and having consented to the transfer of shares (Page 65-69 of the Reply).

23. It is stated that the Board Meeting was held on 3.9.2014 and the appellant was present in the said Meeting. It is stated that the contention raised by the appellant that the allotment of shares was never an item of Agenda discussed at the Board Meeting is not tenable since the appellant himself was present at the Board Meeting and having consented to the allotment of shares (Page 70-75 of the Reply).

24. It is stated that the appellant is alleging transfer of 500 shares by 2nd respondent to 3rd respondent as oppression. It is stated that it is inconceivable as to how can the appellant call the transfer of shares made by 2nd respondent from his shareholding to 3rd respondent as oppression. It is stated that the allegation that the said transfer of shares is not in compliance of Article 17 and 18 of the Articles of Association is untenable since the appellant himself was present at the meeting and participated in the meeting and did not raise any objection to the said transfer of shares. The appellant was a party to the decision of the Board to approve the transfer.

25. We have heard the parties and perused the record.

26. The appellant has argued that the Board Meeting dated 25.8.2014 in which the appellant duly participated. The appellant argued that the transfer of 500 shares from 2nd respondent to 3rd respondent was done without the approval of the Board and in contravention of Articles 17 to 22 of the Articles of Association.

27. Learned counsel appearing on behalf of the respondents argued that it is not disputed that the appellant was present and participated in the Board Meeting dated 25.8.2014. Learned counsel for the respondent argued that the minutes of the meeting dated 25.8.2014 and attendance sheet of that date is at Page No.65 to 67 of the reply. Learned counsel for the Respondents further argued that the appellant did not raise any objection to the said transfer and was in fact a party to the decision of the Board to approve the transfer.

28. We have seen the Agenda of the Meeting dated 25.8.2014 (Page 69 of the Reply). In the agenda, there is Item No.4 i.e. **Approval for transfer of shares to Mr. Shashi Kumar Vijaybalan**. We also observe from the minutes of the Meeting dated 25.8.2014 that the minutes are duly signed by the Chairman and the transfer of shares is one of the minutes. We further observe from the attendance sheet of the said meeting and the same is also signed by the appellant. The decision to transfer shares from 2nd respondent to 3rd respondent was taken in the said Meeting and the appellant was present and participated in the said Meeting. When the decision has been taken and the appellant was present there, therefore, it is not fair to raise this issue now when the appellant has already consented to it. Further, even if the contention of the appellant is accepted and the transfer of shares from 2nd Respondent to 3rd Respondent is set aside by us, then the shares in the name of 3rd Respondent will be transferred back to the 2nd respondent, even then there would be no benefit which would accrue to the appellant. That this transfer has not impacted the interest of appellant as his shareholding

remains 50% even after this transfer. Thus we are in agreement with the conclusion drawn by NCLT on this issue.

29. Appellant argued that 2nd respondent has illegally allotted 90000 shares to himself on 3.9.2014 when there was no agenda item for any allotment of equity shares. Appellant further argued that the 2nd respondent fraudulently uploaded fake return of allotment in Form PAS-3 showing an allotment of 90000 shares to himself. Appellant further argued due to this illegal allotment the appellant has been reduced to minority shareholding from 50% to 5% in 1st respondent. Appellant further argued that he has raised objection vide email dated 17.12.2014.

30. Learned counsel for the respondent argued that the Meeting dated 3.9.2014 was duly attended by the appellant and allotment of equity shares to 2nd respondent was one of the agenda items. Learned counsel for the respondents also drawn our attention to Page No.70-75 of the Reply filed by the Respondents and argued that the minutes of the meeting dated 3.9.2014 are duly signed by the Chairman and the attendance sheet of the Meeting dated 3.9.2014 is duly signed by the appellant, 2nd and 3rd respondent, all directors, of 1st respondent. The Agenda is shown at Page 75 of the reply filed. The appellant consented to the allotment of equity shares to 2nd respondent. It is argued that once the appellant consented, he can not raise the objection now.

31. We have heard both the parties on this issue. It is not disputed that the appellant participated in the said meeting. We observe from the minutes duly signed at Page No.70 of the reply that the allotment of equity shares to 2nd respondent is there. NCLT in its impugned order has held that the

appellant ***“is only a shareholder holding of 5% of shares of the total shares of the company. When the petitioner admittedly ceased to be a Director w.e.f. 14.10.2014/18.11.2014, the alleged acts of oppression and mismanagement are also ceased to exist. Therefore, he cannot continue the petition on those grounds.”*** Oppression and Mismanagement is not to be available at the time of filing the application/petition but they should be perpetuated till the petition is actually taken up for final hearing, it was held.

Appellant disputed the allotment of 90000 shares and consequently his shareholding has come down from 50% to 5%. That in case if this allotment is held to be not oppressive, there will be no further issue out of it. But if this is held to be oppressive appellant being permanently reduced from 50% to 5% will be continuous oppressive act. Hence the petition has to be tested whether this allotment is oppressive or not.

32. Admittedly allotment of 90000 shares have been done on 3.9.2014. Before we examine this issue, it will be advisable to look into the legal provisions regarding issue of shares. The Companies Act, 2013 came into effect w.e.f. 1.4.2014 and further issue of share capital will be done by complying the Companies Act, 2013. Section 62 of the Companies Act, 2013 deals with further issue of Share Capital. Section 62 of the Companies Act, 2013 is applicable to all companies. It does not make any distinction whether it is a public or private company. Section 62(1)(c) of the Companies Act, 2013 reads as under:-

“62. Further issue of share Capital.-- (1) Where at any time, a company having a share capital proposes to increase its

subscribed capital by the issue of further shares, such shares shall be offered—

(a) to persons who, at the date of the offer, are holders of equity shares of the company in proportion, as nearly as circumstances admit, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions, namely:—

(i) the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;

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

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

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

(c) to any persons, if it is authorised by a special resolution, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.

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33. We note that Section 62(1)(a) of the Companies Act, 2013 deals with issuance of shares on the principle of Rights basis. Section 62(1)(b) of the Companies Act, 2013 deal with issuance of shares to employees under a scheme of employees' stock option, subject to special resolution passed by company and subject to such conditions as may be prescribed. Section 62(1)(c) deals with issue of shares to any person. The present case is covered under Section 62(1)(c) of the Act because the shares have been allotted to only one person. The shares so issued must have the compliance of Section 62(1)(c) of the Companies Act, 2013.

A reading of the Section 62(1)(c) shows that

(a) special resolution has to be passed by the company; and

(b) that the price of share as will be determined by valuation report of registered valuer.

34. It is noted that the special resolution can be passed only in the AGM or EOGM where all the shareholders will have a say. That is so, even if the shares have to be issued as Employees Stock Option in terms of Section 62(1)(b), a special resolution is envisaged under the law. Therefore, in case shares are not issued under Section 62(1)(a), the law envisaged that special resolution is must whenever the shares are to be issued under Section 62(1)(b) or 62(1)(c).

No such material has been produced or pleaded before this Tribunal that the special resolution has been passed. Neither any material has been placed before the Tribunal that the fair price has been determined on the basis of the registered valuer. It is noted that the allotment has been done at the face value of Rs.10/-. In the absence of fair value it cannot be determined that the Rs.10/- is the fair value of the equity share.

35. We are of the opinion that compliance of Section 62(1)(c) ensures that the allotment is done to any person at a price which is not prejudicial to the interest of other shareholder or to the interest of the company. Though enough has been pleaded to justify allotment of 90000 shares to 2nd respondent but not a single evidence has been pleaded or produced to show that the compliance of Section 62(1)(c) has been done. NCLT has not dealt with this issue and completely ignored the legal provision applicable on the date of issue of the shares. In view of the position, allotment of 90000 shares to 2nd respondent cannot be held to be validly done. We are of the opinion that the exercise carried out is not only illegal but oppressive to the appellant. As the

company is ongoing it would not be in the interest of the company or in the interest of shareholder to be wound up.

36. In view of the foregoing discussions, impugned order dated 23.10.2017 passed by the NCLT, Hyderabad is set aside. Company Petition is allowed in part. The allotment of 90000 equity shares to 2nd respondent is set aside. Other reliefs sought for are rejected. No order as to costs.

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

(Mr. Balvinder Singh)
Member (Technical)

New Delhi
Dated:08-3-2019

bm