NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.338 OF 2017
(ARISING OUT OF ORDER DATED 18TH SEPTEMBER, 2017 PASSED BY NCLT, MUMBAI BENCH, MUMBAI IN T.C.P. NO.44/397-398/2015)

IN THE MATTER OF:

1. Mr. Ajith Kunimal Venugopal,
   701Apsara Building,
   Plot No.51, Sector 17,
   Vashi, Navi Mumbai 400703
   Maharashtra.

2. Mr. Sajith Venugopal,
   701, Apsara Building,
   Plot No.51, Sector 17, Vashi,
   Navi Mumbai 400703
   Maharashtra.

3. Mr. Kunimal Parangattil Venugopal,
   701, Apsara Building,
   Plot No.51, Sector 17,
   Vashi, Navi Mumbai 400703
   Maharashtra. Appellant

Vs

1. Oil Tools International Services Private Ltd,
   Kharsundi, Post & Taluka Khalapur,
   District Raigad,
   Maharashtra 410 202

2. Ace Oil Fields Supply Inc. having its registered
   Office at P.O. Box 205, Sweeny,
   Sweeny, Texas, United States of America
   TX 77480

3. Mr. Paul Waters, 10310, C 321, Sweeny, Texas
   United States of America, TX 77480

4. Gopalkumar Puthan Kattoor,
   Puthan Kattoor House,
   Near Government Hospital, Chalakudy,
   Trichur, Kerala 679380 Respondents

Present: Dr. U.K. Chaudhary, Senior Advocate with Shri Dhaval Deshpandey and Shri Himanshu Vij, Advocates and Shri Anshul Bhatt, PCS for the appellants.
Shri Vivek Kholi, Ms Anubha Singh and Shri Nikhil Mathur, Advocates for Respondents Nos 2 and 3.
Shri Rahul Chitnis and Shri Aaditya Pande, Advocates for Respondent No.5

AND

COMPANY APPEAL(AT) NO.373 OF 2017
(ARISING OUT OF ORDER DATED 18TH SEPTEMBER, 2017 PASSED BY NCLT, MUMBAI BENCH, MUMBAI IN T.C.P. NO.44/397-398/2015)

IN THE MATTER OF:

Gopalkumar Puthan Kattoor,
Puthan Kattoor House,
Near Government Hospital, Chalakudy,
Trichur, Kerala 679380 Appellant

Vs

1. Oil Tools International Services Private Ltd,
   Kharsundi, Post & Taluka Khalapur,
   District Raigad,
   Maharashtra 410 202

2. Ace Oil Fields Supply Inc. having its registered
   Office at P.O. Box 205, Sweeny,
   Sweeny, Texas, United States of America
   TX 77480

3. Mr. Paul Waters, 10310, C 321, Sweeny, Texas
   United States of America, TX 77480

4. Mr. Ajith Kunimal Venugopal,
   702Apsara Building,
   Plot No.51, Sector 17,
   Vashi, Navi Mumbai 400703
   Maharashtra.

5. Mr. Sajith Venugopal,
   701, Apsara Building,
   Plot No.51, Sector 17, Vashi,
   Navi Mumbai 400703

Maharashtra.

6. Mr. Kunimal Parangattil Venugopal,
701, Apsara Building,
Plot No.51, Sector 17,
Vashi, Navi Mumbai 400703
Maharashtra. Respondents

Present: Mr. Rahul Chitnis, Mr. Aaditya Pande, Advocates for the Appellant.
Dr. U.K. Choudhary, Senior Advocate with Mr Dhayal Deshpande, Mr Hiamnshu Vij, Mr Anshul Bhatt, CS, Advocates for Respondents No.4 to 6
Mr. Vivek Kohli, Mr. Anubha Singh and Mr. Nikhil Mathur for Respondent No. 2 and 3

JUDGEMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

These two appeals, being Appeal No.338/2017 and 373/2017 has been preferred by the appellants against the common order dated 3rd October, 2017 passed by the National Company Law Tribunal (hereinafter referred to as 'the Tribunal'), Mumbai Bench, Mumbai in Company Petition No.44 of 2015. In both these appeals the facts are the same, parties are the same and similar relief has been sought in both the appeals, therefore, we will dispose off these appeals by a common order/judgement.

2. The Tribunal vide its impugned order dated 3rd October, 2017 has held as under:

> ***i) Since these Respondents held Board Meeting without calling one of the directors representing majority of the shareholding of the company and general meeting was held without any notice to the Petitioners for increase of authorized share capital, the increase happened in the EOGM held on 28.11.13 is hereby held as invalid.***
>
> ***ii) Allotment of shares to outsider is hereby held as invalid.***
>
> ***iii) The allotment of shares made to R2 and R3 is bad in law and prejudicial to the interest of the Petitioners.***

iv) This Bench hereby declares holding of such meeting is bogus because the date of meeting in the notice purportedly sent to P2 is different from the date shown in Form-32, therefore Form 32 filed showing P2 vacated office as invalid.

v) Allotment of shares to R5 itself is when said bad, the company being private company, for there being no valid notice to the petitioners, especially to P2, in appointing R5 as director, appointment of R5 as director of the company, his appointment as director is also declared bad.

vi) This Bench having already held that holding an extra ordinary general meeting on 28.11.2013 without notice to PI is invalid, the alteration of Memorandum of Association and Articles of Association in said meeting automatically would become invalid, therefore, alteration of Memorandum of Association and Articles of Association is hereby declared as invalid and prejudicial to the interest of Pl.

vii) These proceedings are bound by 397-398 of Companies Act, 1956 but not by Companies act 2013

3. The Tribunal has given the following directions:

i)That PI being a majority shareholder, PI through P2 shall take over the management of the Company on restoration of P2 as director of the company and with liberty to the petitioners to appoint more members as directors of RI Company within 15 days from the date Order is made available. R2-R4 will not continue as directors after 15 days from the date of delivery of this Order and they shall not pass any Board Resolution without approval of P2.

ii)A forensic audit is to be conducted from 01.04.2013 till date to find out as to whether funds come to RI Company as stated by the Respondents or not? To conduct audit, M/S. Shah & Gutka are hereby appointed as Auditor with remuneration proportionate to their shareholding of the petitioners and R2-4 in the ratio of 85:15. The Auditor can fix remuneration of him depending on the volume of work involved in this case.

iii)The Petitioners shall provide exit to R2 to R4 on fair valuation taking 31.03.2017 as cut-off date. The valuation of the shares shall be conducted by the same auditor after forensic report has been given by the Auditor.

iv)After ascertainment of infusion of funds from R5, loans given by the shareholders, utilization of the same and company funds and siphoning of funds if any from 31.03.2013 till date, RI Company, as per the report given by the auditor, shall refund the funds actually infused by R5 either in the form of share capital or in the form of loans within three months from the date valuation of share value and after preparation of forensic audit report. If such payment is not made within three months as stated above, the petitioners shall pay interest @10% over the amount payable to R5 after completion of three months as stated above.

4. The brief facts of the case are that the 2nd and 3rd respondents in appeal had filed a Company Petition No.44/2015 as petitioners before the Tribunal under Sections 397, 398 read with Section 402 of the Companies Act, 1956 being aggrieved by the acts of oppression and mismanagement committed by the appellants (2nd to 4th respondent in Company Petition) in 1st Respondent. It was also alleged in the company petition that the appellants in collusion and connivance with each other, have illegally and without any sanction and authority, filed false and frivolous documents with the Registrar of Companies (ROC) and on inspection of records available with ROC, it came to the knowledge that the appellants herein have illegally and unauthorisedly allotted shares of 1st respondent to themselves as well as to a third party and also fraudulently removed 3rd respondent from the post of director of 1st respondent.

5. 1st respondent is a company incorporated under the Companies Act, 1956 on 12.01.2005. It is engaged in the business of manufacture of tools and machineries used in exploration and extraction of oil and gas. The authorised share capital of 1st respondent is Rs.1,00,00,000 divided into

10,00,000 equity shares of Rs.10 each. The minimum paid up share capital of 1st respondent is Rs.1,00,000. Initially the 1st appellant and one Ms Lizy Babu holds 7500 shares each in 1st respondent. Subsequently on resignation of Ms Lizy Babu, her shares were transferred to appellant No.3. After incorporation the appellants approached the 2nd and 3rd respondents to enter into a joint venture in order to expand the business of tools and machineries across the world. Consequently, in the year 2005-2006, 1st respondent allotted substantial shares to 2nd respondent and a few other foreign companies and shareholding pattern of 1st respondent as on 30.09.2006 as reflected in annual returns of the 1st respondent for the **FY 2005-06** is as follows:

Ace Oilfields Supply Inc	Alberta Ltd	Hightly Corpn	Ajith Venugopal
232320 (34.99%)	232269 (34.98%)	99553 (14.99%)	99700 (15.01%)

6. 2nd respondent acquired the entire shareholding of M/s Highty Corporation in 1st respondent, whereby its stake in 1st respondent was increased 34.99% to 49.99%. In the year 2010-11 the 2nd respondent acquired the entire shareholding of Alberta Limited and its shareholding in 1st respondent was increased from 49.99% to 84.98% and thus 2nd respondent acquired the majority control of 1st respondent. On 16.2.2011, Mr. Charles Garvey resigned as Director and 2nd appellant was inducted as Director w.e.f. 01.04.2011

7. 2nd and 3rd respondent being majority shareholder in 1st respondent invested huge amount to promote the growth and business of 1st respondent. 2nd respondent acting through 3rd respondent granted huge amount of loan for management of day to day affairs of 1st respondent.

8. It was agreed that the overall control of the 1st respondent would lie with the 2nd and 3rd respondent and day to day affairs of the 1st respondent would be managed by 1st to 3rd appellants under intimation to and prior approval from the 2nd and 3rd respondents. It was also understanding between the parties that the 2nd respondent will procure high quality raw materials from across the world and supply the same to 1st respondent who will thereafter process the raw materials into final products. After manufacturing final products, 1st respondent will export them to the 2nd respondent who will thereafter invest its time and resources to trade the final products in the market. As per the understanding, 1st respondent was entitled only to the processing charges for the above manufacturing and nothing else.

9. Being majority shareholders, 2nd respondent incurred huge expenditures to meet out the day to day expenses of 1st respondent and paid monies towards the salary of employees of the company. That the 2nd respondent made various payments with respect to the business of 1st respondent and the payment so made have not been accounted for. 2nd and 3rd respondents have been making all efforts to augment the business of 1st respondent, the appellants have been showing indifferent attitude towards the investments made by the 2nd and 3rd respondents in 1st respondent. The

appellant issued a Demand Notice dated 28.2.2015 claiming a sum of USD 593605 from the 2nd and 3rd respondent to which the said respondents replied thereby reiterating the understanding between the parties referred above. The appellants failed to honour their obligations under the loan agreement and even did not pay the interest. The appellants induced the 2nd and 3rd respondents to issue waiver letters towards the interest payable under the loan agreement.

10. Apprehending malafide on the part of the appellants the 2nd and 3rd respondent carried out inspection of statutory records filed by appellants before the Registrar of Companies from where it was revealed that Form No.23 for registration of an alleged ordinary as well as Special Resolution dated 28.11.2013 by which the authorised share capital of 1st respondent has been increased from Rs.1,00,00,000/- to Rs.2,50,00,000/- and the Memorandum and Articles of Association of 1st respondent has been altered; Form No.5 notifying the alleged increase in share capital; notice dated 4.10.2013 to shareholders for calling EOGM; Board Resolution dated 4.10.2013 authorising 1st appellant to issue such notice; Form No.2 regarding alleged allotment of shares to appellant and allotment of 1816158 shares to an outsider Mr. Gopal Kumar (4th respondent in Appeal No.338/2017 and appellant in appeal No.373/2017). 3rd respondent, who was a director of the company, never received any notice, therefore, the same is ex facie frivolous and contrary to the provisions of the Act. The aforesaid act as enumerated above elucidate various acts of oppression of the 2nd and 3rd respondent and mismanagement of affairs of 1st respondent company by the appellants in both the appeals, therefore, the 2nd and 3rd respondents

filed Company Petition No. TCP/44/397-398/2015 before the Tribunal seeking various reliefs as prayed for in the Company Petition. After hearing the parties the Tribunal passed the impugned order dated 3rd October, 2017.

11. Being aggrieved by the said impugned order the appellants herein filed the above two appeals stating that sending of calendar of events which discloses when Meeting of the Board of Directors of the company are to be held is service of notice upon the Directors and stressed that the same is sufficient notice to the shareholders within the meaning of Section 172 of the Companies Act, 1956. It is further argued that the appellants were not required to give separate notice of each meeting to the 2nd and 3rd respondent as they were not resident in India.

12. It is next argued by the appellants that Section 81 of the Companies Act, 1956 is not applicable to the private companies and the shares have been allotted as per Article 5(1) of the Articles of Association of the 1st respondent. Learned counsel next argued that the allotment of unsubscribed portion of the rights issues of shares of a private company to a non-shareholder of that private company is valid and the Tribunal can not set aside the allotment of unsubscribed portion of the rights issue of shares of a private company to a non-shareholder and the company is not bound to allot right issue of shares of a private company to a non-shareholder at a premium. It is further argued that the appellants did not dilute the shareholding of the 2nd and 3rd respondent but the 2nd and 3rd respondent did not subscribe to the rights issue of shares and therefore unsubscribed portion of the rights issue was allotted to 4th respondent (appellant in appeal

No.373/17), therefore the shareholding of 2nd and 3rd respondent got diluted.

13. It is further argued that the Tribunal cannot adjudicate whether the private company actually needed the funds when it decided to go in for a right issue of shares. It is further argued that the 2nd and 3rd respondent made the enquiries regarding the company and they made enquiry only when they received notice of their outstanding dues to the 1st respondent. It is stated that the Tribunal gave undue weightage to the fact that the 1st respondent did not send notice to 2nd and 3rd respondent, whereas the notice were actually sent and the courier receipt were shown. It is further stated that the increase in authorised capital of the company was valid which was approved at the EOGM on 28th November, 2013 and as per Article 5(1) of the Articles of Association of the Company and Section 81 of the Companies Act, 1956 is not applicable to private companies. It is further stated that the Tribunal has wrongly held that the allotment of shares to 4th respondent (appellant in Appeal No. 373/2017) is not only bad in law but it has reduced the shareholding of the majority shareholders but is also prejudicial to the interest of 2nd and 3rd respondent. It is argued that the company was in need of funds for its survival and therefore decided to allot the unsubscribed portion of the right issue of share to 4th respondent. It is wrong and denied that the intention of the appellants in allotting shares to 4th respondent is primarily to dilute the shareholding of 2nd respondent. It is further stated that the Tribunal has wrongly interpreted the definition of the private company as per Section 3(1) (3) of Companies Act, 1956 and stated 4th respondent as “Public” and “allotment of shares to 4th respondent as

invitation of public". The appellants further stated that if 4th respondent is an outsider then 2nd respondent is also an outsider.

13. It is stated that the 3rd respondent had vacated the office under Section 283(1)(g) of the Companies Act, 1956 as he did not attend more than 3 consecutive meetings of the Board of Directors of the Company.

14. It is stated that the Tribunal has wrongly held that there is no delay in filing the petition whereas it is three years delay in filing the petition.

15. It is argued that the Board of Directors were within their rights when terminating the office of 3rd respondent as director and no notice was required to be given to that particular director against whom Section 283(1)(g) of the Companies Act, 1956 is being invoked and the said director had wilfully absented him from attending the Board Meeting.

16. It is argued that the Tribunal has wrongly issued direction that respondents shall take over the management of the company on restoration of 2nd respondent as a director and liberty to appoint more members as directors of the company. The Tribunal has also wrongly reinstated 3rd respondent after being aware about his intentions while being in the Management and Tribunal has also wrongly held that the appellants shall not be director of company and the forensic audit is to be conducted from 1st April, 2013 till date and the exit route will be provided to the appellants on fair valuation taking 31st March, 2017 as the cut off date.

17. It is argued that the Tribunal has not considered that the respondents are liable to pay outstanding amount due to the company for the invoices raised by the company for processing charges.

18. The respondents stated that sending a calendar of events cannot be called as service of notice upon them. The respondents stated that the notice was sent by post from India to America one day before the Meeting. They further stated that can anybody believe that the postal notice would reach to US from India the next day. It is stated that 1st respondent is private company and four elements make a private company different from public limited company i.e. restriction of right to transfer of shares, limiting the number of its members to 50, prohibiting any invitation to the public to subscribe for any shares in, or debentures of, the company, prohibiting any invitation or acceptance of deposits from persons other than its members, director or their relatives. Therefore, the subscription of shares by an outsider is prohibited. Therefore, the allotment of shares to an outsider i.e. appellant in Company Appeal (AT) No. 373 of 2017 violates the mandate to be followed by the private company. The respondents herein stated that no notice was given to them for increasing the authorised share capital, holding Board Meeting, filing form No.2. It is next argued that Board Resolution dated 30.1.2014 is shown as 3rd respondent has vacated the office on the basis that 3rd respondent has not attended a single board meeting, however, Form 32 shows that 2nd respondent vacated u/s 283 basing on a resolution held on 23.1.2014 that 3rd respondent was not associated with the 1st respondent w.e.f. 14.12.2013.

19. Learned counsel for the 2nd and 3rd respondent argued that the appellants had over the years not only seized the 1st respondent behind the back of it, but also ensured that systematic and severe mismanagement is illicitly administered in order to unlawfully enrich the appellants to the complete detriment of 1st respondent and 1st respondent is at crossroads with an inevitable financial crunch. It is further argued that the 3rd respondent has been removed from the directorship/chairmanship position of 1st respondent by illegal and allegedly convened Board Meeting dated 30.01.2014, notice for which was received by the 3rd respondent on 28.1.2014 at United States of America. It is argued that on perusal of the Form No.32 filed by the appellants, the authority to file the said form has been given to appellant No.1 by an alleged Board Meeting Dated 23.01.2014, notice of which was never given to the 3rd respondent. It is further stated that the said Form retrospectively removes the 3rd respondent from 14.12.2013, whereas the Board Meeting was convened on 30.01.2014. It is stated that 3rd respondent has been removed illegally and shareholding of the 2nd and 3rd respondent has been diluted through illegal means. It is argued that in order to reverse the illegalities committed by the appellants, as per impugned order the appellants were removed from the Board of 1st respondent 15 (fifteen) days from the date of the said order and 4th respondent (appellant in appeal No.373/2017) was removed from the directorship position with immediate effect from the date of the order.

20. It is further argued that the ex parte interim order dated 17.10.2017 passed by the Appellate Tribunal may be vacated as no notice was issued to

the 2nd and 3rd respondents. The company appeal filed by the appellants were served on respondent on 18.10.2017 at 4.30 PM.

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

22. The appellants have raised an issue that when a 'calendar of events' which discloses when meetings of the Board of Director of Company are to be held is sent is sufficient notice to the shareholders within the meaning of Section 172 of the Companies Act. The Respondents have argued that no notice of Board Meeting was received by them. On hearing both the parties at length, we have come to the conclusion that whenever any meeting is held, either Board meeting or General Meeting, duty is cast upon the persons holding meeting to send the respective notice with Agenda items as prescribed under the Companies Act. Since no such notice has been received by the 2nd and 3rd respondent, sending a calendar of events cannot be called as service of notice upon the 2nd and 3rd respondent and calendar is only a plan for the year giving indication to facilitate the planning by the parties to be available as and when the notice is received when the details of actual meeting have been finalised. Sending Notice with Agenda and documents does not get dispensed. Therefore, we hold that no notice was served upon 2nd and 3rd respondent.

23. The next issue raised is that after increase of authorised share capital, a Board Meeting was held on 12.12.2013 for allotment of 10000 shares each to 1st and 3rd appellant at par and filed Form 2 reflecting allotment of shares

to them for which no notice was sent to the respondents. Since no notice was sent to the existing shareholders (2nd and 3rd respondent), therefore, it is prejudicial to the interest of the 2nd and 3rd respondent and the allotment is bad. It is argued by the appellants that a meeting was called on 28.11.2013 in pursuance to Board Resolution dated 04.10.2013 for increase of authorised share capital and for this purpose in addition to calendar of events, on 27.11.2013 a reminder letter was sent to 3rd respondent regarding holding AGM to remind the respondent that EOGM was going to be held on 28.11.2013. Learned counsel for the respondent argued that the reminder reached to the respondent on 2.12.2013 when the meet was already held. Learned counsel further argued that the appellant's intention was that the respondent should not attend the meeting otherwise the appellants could have intimated them about the EOGM soon after 4.10.2013. We have heard the parties and would like to mention the observations given by The Tribunal on this issue:

> ***"14.As to Extra Ordinary General Meeting slated to be held on 28.11.2013 in pursuance of the board resolution dated 04.10.2013, the respondents' Counsel submits that in addition to the calendar of events of Financial year 2013-14, on 27.11.2013, a reminder letter was sent to P2 regarding holding AGM to remind the Petitioners that EOGM was going to be held on 28.11.2013. The answer from the Petitioners' side to this belated reminder is, this reminder reached to them on 0212.2013 i.e. almost 3-4 days after meeting was held. Had there been any intention to these respondents to send notice to the petitioners on time, what prevented them to send this notice immediately after Board Meeting held on 04.10.2013? More than one month fifteen days left in between, they did not admittedly send any notice, perhaps, to ensure that it should not reach to the Petitioners in time, so that they could not attend to the meeting on 28.11.2013. This notice was not sent by e-mail. It was sent by post from India to America one day before the meeting. Could anybody***

believe that a postal notice would reach to US from India on the very next day? Would anybody expect that a man living in America, even if it is assumed that it was reached on 27.11.2013, would be able to reach to the meeting scheduled to be held on the very following day? All these actions of the respondents can in clear terms sound that these respondents applied every trick of the trade to ensure that Petitioners do not to attend the meeting dated 28.11.2013.

15.Since these Respondents held Board Meeting without calling one of the directors representing majority of the shareholding of the company and general meeting was held without any notice to the Petitioners for increase of authorized share capital, the increase happened in the EOGM held on 28.11.13 is hereby held as invalid. Moreover, though it has been categorically mentioned u/s 172 of the Companies Act, 1956, every notice shall specify the place and the day and hour of the meeting and shall contain a statement of the business to be transacted there at by sending it 21 days before the date of meeting, sending of calendar of events not giving particulars, place and the day and hour of the meeting and the statement of the business to be transacted as mentioned u/s 172 would never become a notice u/s 172 of the Companies Act, 1956.

That all what has been recorded in the impugned judgement quoted above has again been argued before us. We are not able to convinced that sending a calendar of events in advance and not sending any further notice for the particular meeting alongwith agenda and other necessary papers be treated as a valid notice either under law or as a good corporate practice. Therefore, we hold that that the holding Board Meeting without calling one of the directors of the company and general meeting was held without notice to the contesting respondents for increase of authorised share capital in the EOGM held on 28.11.2013 is invalid.

24. The next issue raised is whether or not bringing an outsider as a shareholder is in violation of the Articles of Association and constitution of Private Limited Company. Board of 1st respondent is authorised to increase the subscribed capital of the company by way of allotment of further shares,

subject to the provisions of Section 81(1A) of Companies Act, 1956, the Board shall issue such shares in the manner set out in section 81(1) of the Act. Learned counsel for the appellant argued that the shares have been allotted as per Section 5 of Articles of Association of the company and the Board is authorised to increase the subscribed capital of the company. The Learned counsel for the respondents argued that the shares to the outsider have not been issued as stipulated in Section 81(1A) of the Companies Act, therefore, the allotment of shares made to an outsider is invalid. The Tribunal below has given its observations on this issue as under:

> ***"17.According to Article 5 of Articles of Association of RI company, Board is authorized to increase the subscribed capital of the company by way of allotment of further shares, subject to the provisions of section 81(1A) of Companies Act, 1956, the Board shall issue such shares in the manner set out in section 81(1) of the Act.***
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> ***18.If we read section 81, it is a section deals with rights issue for allotment of shares offering them to the holders of the equity of the company in proportion to the capital paid up on those shares as on the date of subscription, if any of the existing shareholders, failed to respond to the offer of allotment within 15 days from the date of notice, then it can be deemed as declined by such existing shareholder/s, meaning thereby, these shares could be issued to the remaining existing shareholder/s, this section 81 (1) does not deal with as to the procedure to be followed if such shares are to be issued to outsider.***
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> ***A separate sub-section has been carved out as section 81 (IA) saying that if such shares are proposed to be offered to any person/s, whether or not those persons are covered under sub-section 81(1), a special resolution has to be passed for allotting those shares to a person other than the persons covered under sub section 81(1). Of course, under sub section 81 (3), it has been said that this proposition is not applicable to a private limited company. But, for it has been specifically incorporated in the Articles of Association of this company that it requires to pass special***

resolution, if shares are allotted to an outsider, application of section cannot be found fault with, but for doing the same, the company has to mandatorily follow that procedure. That being the scenario, for allotment of shares to R5, the company ought to have passed a special resolution for allotment of shares to R5, since it is the case of the respondents that shares were allotted to R5 in a Board Meeting held on 14.12.2013 allotting 18,16,158 shares to R5 at par, it can never be an allotment as stated under section 81(1) (A) of the Act 1956. The blunder that has committed by the company is, R5 being an outsider, first shares should not have been issued, if at all any such issue has happened for Articles permitting such allotment of rights issue subject to section 81(1A), the company ought to have passed a special resolution for allotment of shares to R5. For no such special meeting was held and no such special resolution was passed, allotment of shares to R5 is not only bad in law for it has reduced the shareholding of majority to abysmally low, it is prejudicial to the interest of the Petitioners. Thereby allotment to outsider is hereby held as invalid."

Apart from what has been noted in the impugned order, as we have already held that increase in the authorised share capital is invalid, capital issued in pursuance of such increased capital cannot be sustained irrespective of whether proper procedure has been followed or not. Therefore, we are in agreement with the Tribunal that the allotment of shares to outsider is invalid.

25. The next issue raised is that while invoking Section 283(1)(g) of the Companies Act, 1956, the Board of Directors must give notice to that particular director (against whom the section is being invoked). We have gone through the record and find that the 3rd respondent is shown as vacated office on the basis that he has not attended a single board meeting since April, 2013 till January, 2014, but the appellants filed Form 32 showing as if 3rd respondent vacated office u/s 283 basing on a resolution allegedly held on 23.1.2014 stating that 3rd respondent was not associated with the company w.e.f. 14.12.2013 since he was not attending the meetings. A Board Meeting notice dated 30.01.2014 was issued on four agendas including

vacation of office by 3rd respondent. The notice for Board Meeting for 30.1.2014 was issued by the appellants and it was not mentioned in the notice that what meetings have not been attended by 3rd respondent and when these meeting were held. Form No.32 filed by 1st appellant, it appears as if Board Meeting was held and resolution was passed on 20.03.2014 with a confirmation that 3rd respondent is not associated with the company w.e.f. 14.12.2013. All these documents shows that as per notice sent by 1st appellant to 3rd respondent on 23.1.2014, meeting should have been held on 30.01.2014, whereas in Form 32 it was shown as meeting held on 23.12.2013. Therefore, both the documents are contradictory and 1st appellant is not certain on which date meeting was held, therefore, the 1st appellant failed to establish that a Board Meeting was held to pass a resolution for invoking Section 283(1)(g) to show deemed vacation of 3rd respondent of 1st respondent. Therefore, we hold that date of meeting in the notice purportedly sent to 3rd respondent is different from the date shown in Form 32. Further we have already expressed our opinion that calendar of events is not a sufficient notice, non-attending of the meeting as per calendar of events cannot be held against a director for not attending for the purpose of vacating the office under Section 283(1)(g) of the Companies Act, 1956. Therefore, vacation of the office by the director in terms of Section 283(1)(g) is invalid. Form 32 filed showing 3rd respondent vacated office is also invalid.

26. The appellants have raised an issue that the respondents are not making payment as per their commitment and there was amount due from the 2nd and 3rd respondent to the company, because of which the company

retained the material of the 2nd and 3rd respondent. On this issue we observe that making or not making payment as per commitment or contractual terms is a matter among the appellants, 1st respondent and 2nd and 3rd respondent. This issue does not come under oppression and mismanagement. Therefore, the appellant is at liberty to approach appropriate forum for this purpose.

27. During the course of the arguments, the learned counsel appearing on behalf of the appellant in Appeal No.373/2017 made submissions that he adopts the arguments made in the main Appeal No.338/2017. The learned counsel further argued that since he is not otherwise among the original shareholders and he has been allotted equity by the company, therefore, his interest should be duly protected as a bona fide investor. He also further argued that he being an outsider he may not be aversed of getting his investment back with appropriate interest for the period the funds which has been used by the company. The learned counsel further argued that he has also given loan to the company and that amount may be refunded to him with interest.

28. The argument of the learned counsel for the appellant in Company Appeal (AT) No.373/2017 is that this appellant gave loan to the extent of Rs.98600000/- and towards purchase of shares spent to the extent Rs.18100000/- and he was allotted the unsubscribed shares of the company and according to him there were no allegations of syphoning and so the directions for forensic audit was not necessary. We find from impugned order that direction (iv) uses the words “siphoning of funds, if any”. According to us looking to the impugned order directing take over of the company by the

original petitioners No.1 and 2 and restoration of original petitioner No.2 as director, the original petitioners can ascertain from the records the infusion of funds by R5 towards loan and share capital. It would be reasonable and win win situation for both sides if the petitioners are directed to ascertain from records the infusion and utilization and if satisfied, immediately pay back the funds infused by R5 within two months of the order in these appeals. The disputes qua Respondent No.5 shall then rest at that stage. The forensic audit directed by NCLT will then be done for other Respondents. However, if the original petitioners, for any reason, do not pay back the funds infused by original R5 within the above period, Company should be liable to pay interest if the auditor later finds that amounts are liable to be refunded as per directions (iv) of the impugned order, in which case the three months clause put by the NCLT deserves to be deleted, ad directions modulated.

29. Hence for above reasons we pass the following order:

i) CA(AT) No.338 of 2017 is disposed in terms of Order being passed in CA(AT) No.338/2017. Parties to bear their own cost.

ii) CA(AT)No.338 of 2017 is partly allowed. Direction No.(i) to (iii) of the impugned order passed by NCLT Mumbai are maintained.

iii) In place of Direction No.(iv) recorded by NCLT, following direction is given:

"iv(a) The original petitioners may ascertain from records infusion of funds by R5 towards loan given by the original R5 to the company and funds infused for purchase of shares, and utilization and refund the

amount within two months from the date of the order in this appeal. The shareholding issued to R5 stands quashed.

b) In case original petitioners No1 and 2 for any reasons do not act as per iv(a) supra, it is directed:-

After ascertainment of infusion of funds from R5, loan given by the shareholders, utilisation of the same and company funds and siphoning of funds, if any, from 31.3.2013 till date, R1 company, as per the report given by the auditor, shall refund the funds actually infused by R5 either in the form of share capital or in the form of loans, within three months from the date of forensic audit report, with interest @ 10% per annum from the date of filing of the company petition in NCLT, Mumbai. The shareholding issued to R5, stands quashed.

30. In view of the above order, both the appeals are disposed of accordingly. Interim order passed, if any, is vacated. No order as to costs.

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

(Balvinder Singh)
Member (Technical)

New Delhi
Date: 09 -3-2018

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