**NATIONAL COMPANY LAW TRIBUNAL,**
**PRINCIPAL BENCH,**
**NEW DELHI.**

CP No.104 (MB)/2011

PRESENT: CHIEF JUSTICE MR. M.M. KUMAR
HON'BLE PRESIDENT

MR.S.K. MOHAPATRA
HON'BLE MEMBER (T)

Under sections 397/398 of the Companies Act 1956 and 241/242 of the Companies Act 2013.

And

In the matter of

Milind Dayaram Kapse & Ors. ..... Petitioners

Vs.

M/s. Den Nasik City Cable Network Pvt.Ltd. & Ors. ..... Respondents

**Present on behalf of the Parties:**

1. Mr. Saurabh Kalia, Advocate for the Petitioners
2. Ms. Samridhi Gogia, Advocate for the Petitioners
3. Mr. Abhinav Vasisht, Sr. Advocate for the Respondents.
4. Ms. Prachi Dhanani, Advocate for the Respondents.

**O R D E R**

**[ Order reserved on 27.09.2016 ]**

The present company petition has been filed under Section 397, 398, 399 and 402 of the Companies Act, 1956 by ten shareholders of M/s Den Nasik City Cables Network Private Limited, Respondent No. 1 Company. The Petitioners have sought the following relieves as per the amended petition:

(1) *Copies of Notice, Agenda and Minutes (including all corresponding agenda papers, related documents, drafts, statements, annexures, enclosures, notes and attachments) of all meetings of the Board of Directors of the company convened on and after June 26, 2008 as the aforesaid petitioner No.1 and Petitioner No.2 have not received the same from the company till date and hence not been able to attend any Board meeting.*

(2) *A copy of every balance sheet of the company placed before the Board of the Company for approval before signing and submission of the same to the auditors for their report thereon as the aforesaid Petitioner No.1 and Petitioner No.2 have not received the same from the company till date.*

(3) *Details of all payments made (including any remuneration, fees, benefits and perquisites) to any of the directors on the Board of the Company by the Company till date be made available to Petitioner No.1 and Petitioner No.2.*

(4) *Details of all payments made by the company as or by way of managerial remuneration including fees, benefits and perquisites till date be made available to Petitioner No.1 and Petitioner No.2.*

(5) *Details of all payments made to any of the Directors on the Board of the company till date by any other company, body corporate, firm or person in accordance with the companies Act, 1956 be made available to Petitioner No.1 and Petitioner No.2.*

(6) *Copies of all agreements, contracts and other similar arrangements entered into or proposed to be entered into by the company and placed before the Board or liable to be placed before the Board at any meeting or the Board of Directors or the company or generally for discussion or approval be made available to Petitioner No.1 and Petitioner No.2.*

(7) *Copies along with complete details of all agreements, contracts or other similar arrangements (including drafts thereof and other related documents and writings that are placed or liable to be placed before the Board for consideration or approval) entered into or proposed to be entered into by the Company with (a) any related party or (b) relative under Companies Act 1956 or (c) any other company in which any of the Directors on the Board of the Company or any shareholder of the Company or any of their respective relatives under Companies Act, 1956 is or has been or proposes to become a Director be made available to Petitioner No.1 and Petitioner No.2.*

(8) *Copies along with complete details of all agreements, contracts or other similar arrangements (including drafts thereof and other related documents and writings that are placed or liable to be placed before the Board for consideration or approval) entered into or proposed to be entered into by the Company with (a) its holding company or (b) its affiliate or (c) any affiliate of its holding company, be made available to Petitioner No.1 and Petitioner No.2.*

(9). *All the books of account and other books and papers of the company be made available for inspection to Petitioner No.1 in accordance with the Articles of Association of the Company.*

(10) *All the books of account and other books and papers of the company pertaining to the term and tenure of aforesaid Petitioner No.2 as a Director on the Board of the company be made available for inspection to the aforesaid Petitioner No.2 in accordance with the Articles of Association of the company.*

(11) *Copies of Notice, Agenda and Minutes (including all corresponding agenda papers, related documents, annexures, enclosures, drafts, statements, notes and attachments), in respect of all Annual General Meetings the company convened on and after June 26, 2008 be provided to each Petitioner in accordance with the provisions of the Companies Act, 1956. Be provided to each Petitioner in accordance with the provisions of the companies Act, 1956.*

(12) *A copy of every annual report of the company (including complete balance sheet, profit and loss account, all schedules thereto, the auditors' report, Directors' report and every other document required by law to be annexed or attached, as the case may be, to the balance sheet) be provided to each Petitioner in accordance with the provisions of the Companies Act, 1956.*

(13) *Copies of Notice, Agenda and Minutes (including all corresponding agenda papers, related documents, annexures, enclosures, drafts, statements, notes and attachments) in respect of all Extraordinary General Meetings the company convened on and after June 26, 2008 be provided to each Petitioner in accordance with the provisions of the Companies Act 1956.*

(14) *Details of all quotations, price lists and bids or tenders received by the company from all suppliers/ vendors of services or products and the basis on which decision for procuring the same from such suppliers was taken by Respondent Nos. 2 to 7 be provided to Petitioner No.1.*

(15) *Petitioner No.1 be allowed to enter the office premises and given full access to the statutory records, registers and financial records of the respondent No.1 Company and also provided copies of such records and documents.*

(16) *Respondents be directed to pay appropriate moneys as and by way of dividends to the Petitioners as monies have been*

*distributed to the respondents and other members through related party transactions in place and stead of dividend.*

*(17) Respondent No.8 be directed to submit a revised audit report in respect of financial years 2008-2009 and 2009-2010 incorporating auditors' observations in respect of related party transactions.*

*(18) Appropriate penalty, fines and other penal consequences be imposed on the Respondents in accordance with the applicable provisions of law.*

*(19) Such other and further orders as this Hon'ble Board deem fit and proper in the interest of justice to set aside the oppressions and mismanagement may be passed.*

*(20) A declaration confirming Petitioner No.1, Milind DayaramKapse as the continuing Managing Director of Respondent No.1 company.*

*(21) A declaration that Respondent No.5 be expelled from directorship of Respondent No.1 company and as such Respondent No.5 be restrained by an order of injunction to act as the Director of the respondent No.1 company.*

*(22) A declaration that Board Meeting dated 16th March 2013 be declared as invalid and void ab initio.*

*(23) Grant a permanent order and injunction restraining Respondents 2 to 7 from acting on the resolution dated 16th March 2013.*

*(24) Grant a permanent order and injunction declaring all acts and actions of Respondent No.1 company based on Board meeting dated 16th March 2013 be declared as invalid and void ab initio.*

**2.** The brief facts relevant to decide the controversy raised in the Company Petition are that M/s. Nasik Cable Networks, a partnership firm was formed on 11th July 2006 by Petitioner No.1 & 2 along with two other persons for conducting the business of cable network particularly in Nasik city. The registered address of the partnership firm was First Floor, Mayur Plaza, below Vignhar Hospital, Dwarka, Mumbai-Agra Road, Nasik – 422 001. Subsequently through a Business Transfer Agreement dated 01.04.2008, the assets of the partnership firm were transferred to Nasik City Cable Network Pvt. Ltd., a private company incorporated on 4th June 2007. M/s. Nasik City Cable Network Pvt. Ltd., purchased the office premises, bearing No.104, 106 and 107 on the first floor of the aforesaid Mayur Plaza building through a Deed of Conveyance dated 29.04.2008. M/s. Nasik City Cable Network Pvt. Ltd. had 47 shareholders including promoters Petitioner No.1 & 2. Respondent No.2 company offered a joint business proposal to M/s. Nasik City Cable Network Pvt. Ltd. and proposed to acquire 51% equity share in the paid-up share capital of Nasik City Cable Network Pvt. Ltd. Accordingly Share Subscription, Share Purchase, and Share Holders Agreement (SPA) dated 26th June 2008 was entered in between Nasik City Cable Network Pvt. Ltd. and Respondent No.2 company. As per clause 2.5 of Article 2 of SPA the name of Nasik City Cable Network Pvt. Ltd. was changed to Den Nasik City Cable Network Pvt. Ltd.(Respondent No.1) with 51% share in favour of Respondent

No.2 company and 49% shareholding with earlier 47 shareholders. The total number of shareholders of Den Nasik City Cable Network Pvt. Ltd. became 48. After coming into effect of the same SPA, the shareholding of the 10 petitioners in Respondent No.1 company became 14.22%. Petitioner No.1 & 2 were directors in Respondent No.1 company. Petitioner No.2 resigned as a director of Respondent No.1 company with effect from 10th May 2010. Respondent No.3 to 7 are directors of Respondent No.1 company and Respondent No.8 is the auditor of the said company. Respondent No.9 is a company named M/s. Den Discovery Digital Networks Pvt. Ltd. incorporated on 15th February 2013. It is pertinent to note that Respondent No.2 acquired 51% shareholding in Respondent No.9 company with effect from 25.06.2013 and has appointed Respondent No.4 as its nominee Director in Respondent No.9 company.

**3.** The Petitioners have filed the present petition alleging various acts of oppression and mismanagement against Respondents purportedly committed by them in the affairs of the respondent No. 1 company. According to the case of the petitioners, the main issues pertaining to the acts of oppression and mismanagement are as follows:

(i) Illegal holding of Extra-Ordinary General Body Meeting dated 16th March 2013 with *malafide* intention to enable transfer the business of Respondent No. 1 company to Respondent No.9 company in the grab of digitalization. The petitioner has also challenged the EOGM of Respondent No. 1 company held on 15th February 2016.

(ii) Fabrication of documents and Wrongful cessation of Petitioner No.1 as Director.

(iii) Non-allotment of dividend/profit to the Petitioners.

(iv) Non-issue of bonus shares to Petitioners.

(v) Siphoning of funds of Respondent No. 1 company through related party transactions and acts of mismanagement.

**4.** Having heard the parties and on perusal of the case records, our findings on the issues raised by the Petitioners are discussed in seriatum below.

**5.** One of the main contentions of the Petitioner is that EOGM dated 16.03.2013 was called on behalf of Respondent No.1 with *malafide* intention to create a record to show that shareholders of Respondent No.1 company decided to continue doing business in analogue mode only. It is alleged that on the basis of decisions taken in EOGM dated 16.03.2013 Respondent No.3 to 7 have transferred the business including the clients of Respondent No.1 to Respondent No.9 company. It is further alleged that just before the deadline of end of March 2013 for digitalization, the EOGM was stage-managed, pre-determined and held with *malafide* intention to transfer its business. It is the case of the Petitioners that the meeting was called at a last stage when it is impossible to act on digitalization. Learned counsel for the petitioners contended that all necessary licenses required for digitalization were not applied in the name of Respondent No.1 company, in violation of clause 5(10)(a) of the Share Purchase Agreement. It is also the case of the

Petitioners that no notice either physically or orally was ever served on them by Respondent No.1 company for the purported EOGM. It is also submitted that the minutes of the EOGM dated 16.03.2013 contains the signature of Respondent No.5 alone, and not countersigned by any of the shareholders attending the said EOGM and therefore the EOGM is fabricated and null and void. The Petitioners further allege that in the EOGM the shareholders were misguided that they would be required to invest approximately 40.52 crores for digitalization of cable network, when in fact, the digitalization work was already in existence. The petitioners have also contended that as per Article 8 of the SPA all investments on digital headend are to be born exclusively by R2, and other investments except digital headend should have been shared proportionately as per the shareholding of shareholders.

5.1) The Petitioners have also challenged the resolution passed in the recent EOGM dated 15.02.2016, mainly on the ground that the investment plan for Rs. 19 crore as stated in the alleged notice dated 08.02.2016 has not been given.

5.2) It is the case of the Respondents that despite knowledge, Petitioners failed to attend the EOGM held on 16.03.2013. It is contended that although Petitioner No.1 was a Director of Respondent No.1 company, he failed to attend any meeting of Respondent No.1 company after June 2008. It is further submitted that Petitioners have raised objections to the said meeting vide letter dated 15.03.2013, just one day prior to the EOGM. Respondent company in reply to the objection dated 15.03.2013 clarified to the petitioners that the EOGM is held in accordance with law and the Petitioners were free

to attend and raise their objections in the meeting. It is emphasized that despite clear knowledge of the meeting, the Petitioners preferred to remain absent.

5.3) Ld. Counsel for Respondents relied on the judgment in the case of *Surajmull Nagarmull Vs. Shew BhagwanJalan (1973) ILR Cal 207,* in which it was held that *"the object of the notice related provisions is to enable the shareholders a reasonable opportunity of participating effectively in the meetings of the company and if it is established that the shareholders had the necessary opportunity of participating in the meeting the object of statute is clearly served".* Ld. Counsel for the respondents further relied on the judgment rendered in the case of Parashuram Detaram Shamdasani Vs. Tata Industrial Bank AIR 1928 PC 180, and Maharani Lalita Rajyalakshami Vs. Indian Motor CO. (Hazaibag), AIR 1962 Cal 217, wherein it was held that *"if a shareholder is aware of the facts, it is not for him or her to complain of insufficiency of notice of a meeting".* Ld. Counsel, accordingly, emphasized that the aforesaid correspondence made on 15.03.2013 clearly shows that Petitioners had knowledge of the EOGM dated 16.03.2013 and therefore cannot complain about insufficiency of notice of the meeting.

5.4) In respect of EOGM dated 15.02.2016, the Respondents have contended that due notice to Members/shareholders were issued informing them about the earlier EOGM scheduled to be held on 28.12.2015 to discuss on the future business plans for implementation of digitalization of cable networks as per policy of Government. It is contented that the Petitioner had filed an application inter alia for restraining the Respondents to hold the said

EOGM scheduled on 28.12.2015. Subsequently vide order dated 23.12.2015, Company Law Board restrained the Respondents from holding the EOGM. The order dated 23.12.2015 was challenged before Hon'ble Bombay High Court, wherein with the consent of the parties the following order was passed on 04.02.2016:

*"(i) Respondent No.1 Company could hold EOGM after giving due notice to all the shareholders.*

*(ii) If any resolution was passed in the EOGM the Company would not act upon the same until further orders from the Hon'ble Board.*

*(iii) The Petition may be heard expeditiously subject to the convenience of the Hon'ble Board."*

In compliance of the High Court order, the Respondent No. 1 company again issued notice, including public notice in Newspapers, to all its shareholders informing them about the EOGM to be held on 15.02.2016 to discuss and pass necessary resolution in respect of future business plan for implementation of digitalization of cable net-work in phase-3 as per the policy of the Government. In addition, emails dated 09.02.2016 in this regard were sent to the Petitioners. Nevertheless except Mrs. Smita Gurudatt Kasture (Petitioner No.12), all other petitioners again failed to participate in the EOGM held on 15.02.2016 nor executed requisite proxy forms for their representation.

5.5) There is no dispute that petitioners had sent a letter to the company on 15.03.2013 just one day before the meeting. The first line of the letter states

that, *they were aware that an EOGM is scheduled to be held by the R1 Company on 16.03.2013.* This shows that the Petitioners had clear knowledge of the said meeting. Moreover in reply to the letter the Petitioners were asked to attend the meeting and to place their grievances in the meeting. However, Petitioners, having clear knowledge of the meeting, preferred not to attend the EOGM held on 16.03.2013. It has not even been denied that the Petitioner No.1, notwithstanding being a Director, has not attended any meeting of Respondent No.1 company after June 2008. When the Petitioners were aware of the meeting and preferred not to attend the same, it does not lie in their mouth to complain about the insufficiency of notice of the meeting.

5.6) Similarly it is seen that notice was given to the Petitioners in respect of EOGM held on 15.02.2016. Despite service except Petitioner No.12, other Petitioners did not participate in the EOGM held on 15.02.2016. With the consent of the parties Bombay High Court had allowed holding of the EOGM. Petitioners had not raised any concern before the High Court expressing their inability to attend the EOGM. There has been *suo moto* non-participation by Petitioners (except Petitioner No.12) in the important meeting of Respondent No.1 company, where future business plans of the company were scheduled to be discussed. Simply bald allegation of breach of fiduciary duty of Director without required involvement and participation cannot be appreciated. Adverse inference can be drawn against the Petitioners for their failure in participation and involvement in the discussion in company's future business plans.

5.7) The resolution of the EOGM dated 16.03.2013 was passed unanimously by the majority members/shareholders who attended the meeting. It was decided in the EOGM held on 16.03.2013 that shareholders of Respondent No.1 company were not willing to induct fresh funds to the company as they were not sensing viability in future business of Respondent No.1 and hence the shareholders had decided to continue business in analogue mode without expanding business of Respondent No.1 in digitalization. Similarly, it has also been resolved in the recent EOGM dated 15.02.2016 that Respondent No.1 company would not participate in digitalization and would continue to carry on business in analogue mode.

5.8) It is seen that the majority shareholders consistently long since 2013 have decided not to participate in the digitalization. The Court does not have the expertise to overturn the commercial decision consistently taken with open eyes by the majority shareholders. Business decisions taken consistently should not normally be interfered with. Petitioners neither participated nor were involved in the business decision of Respondent No. 1 company. They have not placed any plan/scheme on record with regard to carrying out business in digitalization, except remaining dormant in the affairs of the company. As per Government policy the process of applying and phase-wise shifting to digitalization are to be completed by end of March 2017. It is the shareholders who should decide and explore plans to carry on a particular business or not. Court cannot interfere in the business decision and therefore, ought not to compel them against their wish to carry on business in digital mode more so at this belated stage.

5.9) It is pertinent to note that Clause 8.1 of Article 8 of the Share Purchase Agreement dated 26th June 2008 stipulates that "*All further investments in the JVC, except Digital Headend (including the Digital Headend to be installed by Den at Nasik) shall be made by the existing shareholders and Den in the ratio of their share holdings in the JVC at the time of such investment. For every such investment the JVC shall issue fresh shares either at par value or at premium. If the existing shareholders are unable to make their shares of investments, DEN shall have the right to make such investments, the JVC shall issue shares to DEN, and the shareholding of the existing shareholders shall get diluted. Alternatively, subject to JVC, Board's approval, the JVC may raise/borrow funds from any nationalized/co-operative Bank, financial institutes etc, for such investment. Digital Headends shall at all time remain the exclusive property of DEN only. The revenue of the digital headend which is generated from existing setup area will be accounted in the books of JVC.*"

5.10) A perusal of the aforesaid provisions of SPA stipulates that all further investments in the Digital Headend (including the Digital Headend to be installed by Den at Nasik) shall be made by *R-2*. However except digital headend, all investments in Respondent No. 1 Company shall be made by the shareholders in ratio of their shareholding. In case the existing shareholders failed to invest in proportion of their shares, Respondent No. 2 shall have the right to make such investment. Therefore excepting investment in digital headend, in all other investments in Respondent No.1 company, existing shareholders have to invest and if they fail, then R2 has a right to make such investment but he cannot be compelled to make investment. The clause

further provides that alternatively with the approval of the Board of the Respondent No. 1 company, funds could be borrowed from any nationalized/ co-operative bank/financial institute etc. for such investment. In the present case, the shareholders decided not to invest and even decided not to create charge on the assets of Respondent No. 1 Company in order to raise funds. *Admittedly, in the EOGM dated 16.03.2013, the shareholders were not agreeable to infuse fresh funds as they did not see any future viability and the option of raising funds through borrowings and loan was also dismissed.*

5.11) It is the case of respondents that at the relevant time, both digital and analogue systems were in place simultaneously and Set Top Boxes were provided voluntarily to the subscribers for the purpose of offering them better clarity and benefit of viewing additional channels. However, the cost involved in digitalization as per Government notification includes majorly the price payable for acquisition of STB(s), digital equipments, upgradation of existing equipments and laying of cables, setting up of toll free call center, subscriber management system etc. It is contended that for shifting to digitilation additional investments in equipments and upgradation was required *interalie* to provide additional required channels and to adopt the other requirements of digitalization network. However investments in equipments and upgradation as per requirement were turndown as the shareholders of respondent No.1 company were not agreeable to infuse fresh funds and the option of raising funds through borrowing and loans was also dismissed. It is further submitted that as the Respondent No. 1 company decided not to go

for digitalization, Respondent No. 2 was left with no alternative but to invest in Respondent No. 9 company.

5.12) It is the case of Respondents that Respondent No.3 to 7 as Directors of Respondent No.1 company have been actively involved in the management of affairs of Respondent No.1 company. Whereas Petitioner No.1, though was a Director of the Company, has continuously failed to attend meetings since August 2008 and also has not been attending office since the year 2008 and has never concerned himself with the affairs of the company.

5.13) It is not in dispute that Respondent No.1 company has not till date applied for Digital Addressable System License (DAS License) for the purpose of carrying on business of cable network in Digital mode. It is also a fact that the shareholders of Respondent No.1 company unanimously decided not to opt for digitalization. Consequently as per unanimous decision of the shareholders, Respondent No.1 company did not apply for DAS License for the purpose of carrying on business of cable network in digital mode.

*5.14)* In connection with the allegation of petitioners that there has been violation of Clause 5. 10 (a) of Article 5 of the Share Purchase Agreement, as the DAS license was not applied in the name of Respondent No. 1 Company. The aforesaid clause provides that the existing shareholders, subject to prior consultation with Den, shall make all necessary applications for and obtaining requisite Government approvals. Needless to say that in the EOGM held in the year 2013 as well as in the year 2016, the shareholders of Respondent No. 1 Company consistently decided not to carry on network business in digitalization. In the line of the decision of the shareholders,

Respondent No. 1 Company continued with analogue business without applying for DAS License. The provision contains requirement of consultation with Den (R-2). However, the decision of JVA (R-1) is final. The decision of the shareholders is final and ultimately matters. Respondent No.2 or Directors of Respondent No.1 company cannot act contrary to the decision of the shareholders.

5.15) In respect of allegation regarding use of infrastructure and premises of Respondent No. 1 Company and consequently causing loss to Respondent No.1 company, necessity of audit of the accounts of Respondent No.1 Company has been discussed and allowed below, to safeguard the interest of Respondent No. 1 Company and its shareholders.

**6.** In connection with the fabrication of documents, Petitioners state that after taking inspection of the documents filed by Respondents with Registrar of Companies, it was seen that the annual returns in respect of financial years ended, 31st March 2008, 31st March 2009 and 31st March 2010 are shown to have been signed by Petitioner No. 1. The Petitioner No. 1 submitted that he has not signed any of these documents. Similarly, the Petitioner has stated that Balance Sheet of Respondent no. 1 Company for the financial year ending 31st March 2008, 31st March 2009 and 31st March 2010, filed with Registrar of Companies are shown to have been signed by Petitioner No. 1, when in fact none of them have been signed by Petitioner No. 1. Accordingly, it is submitted that Respondents have forged the signature of Petitioner No. 1 in the aforesaid documents.

6.1) In this regard Ld. Counsel for the Respondents have stated that the said documents have been signed by Respondent No. 5, and name of the Petitioner No. 1 appears only in his capacity as Director of Respondent No. 1 Company. The reply of Respondent in this regard is self-explanatory and Petitioners have failed to establish that the documents in question are fabricated.

6.2) As regard cessation of Directorship of Petitioner No. 1, it is submitted by the Respondents that the Petitioner No. 1 failed and/or neglected to attend any Board Meeting after August 2008, and in particular has failed and or neglected to attend Board Meetings held on 8th August 2008, 20th October 2008 and 23rd December 2008. Respondents referred to Exhibit E, F and G of the affidavit filed in Reply on behalf of Respondent No. 5 to establish that notice was duly served in respect of aforesaid Board Meetings. It is also stated that he has not obtained leave of absence from Board of Directors of Respondent No.1 Company for his repeated absence after August 2008. The Respondent submitted that under the provisions of section 283(g) of the Companies Act 1956, the office of Petitioner No. 1 as a director is deemed to have been vacated on account of Petitioner No. 1 not having attended three consecutive meetings of Board of Directors, without obtaining the leave of absence from Board of Directors of the Respondent No. 1 Company. The Respondent No. 5 has filed affidavit affirming that Petitioner No. 1 has not been attending office since the year 2008 and has never concerned himself with the affairs of the Company. The Petitioner has not denied the fact that he has not attended any Board meeting after August 2008. In that view of the

matter the prayer for declaring Petitioner No. 1 as continuing as Director of Respondent No. 1 Company cannot be acceded to.

**7.** Ld. Counsel for Petitioner further contended that respondent No.1 has not given any dividends/profits till date to the Petitioners. Petitioners further contend that the same money is not used for future expansion, but is taken away from Respondent No.1 Company and swindled away by showing bogus payments and expenditure to please other shareholders and partners. In this connection respondents have contended that it was decided by the board of directors of the company not to declare dividend on the ground that the money will be utilized for future expansion.

7.1) The Ld. Counsel for the respondents has placed reliance upon the case of *Mr. Vasudev P. Hanji &Ors. Vs. Ashok Ironworks Pvt. Ltd., 2008 145 Comp. Cases 717 and the case of Jaladhar Chakraborty &Ors. Vs. Power tools and Appliances Co. Ltd. &Anr., (1994) 79 Comp. Cases 505 ( Cal.),*in which it was held that " *declaration of dividend is left to the collective decision of the Board and its non-declaration cannot be termed to be an oppressive conduct".*

7.2) It is pertinent to refer here clause No.1 of Article 10 of S.P.A. which envisages as follows:

*"Annually, the JVC Board shall decide the amount of lawful profits to be retained in the JVC for expanding the operation of the JVC and the amount to be recommended for shareholders approval at the Annual General Meeting as dividend to be distributed to the parties in proportion to their respective shareholding in the JVC".*

*7.3)* It is a settled preposition of law that declaration of dividend is normally left to the collective decision of Board and non-declaration of dividend cannot be a sole ground of oppression. Needless to say that audit of the records of the Respondent no. 1 Company has been ordered as discussed below, which will take in to consideration as to whether the carry forward profit amount has been properly utilized in the best interest of the Respondent No. 1, company.

**8.** As regards non-issue of bonus shares to Petitioners it is submitted that in the minutes of EOGM dated 30.03.2009, bonus shares were issued to existing shareholders of Respondent No.1 company who were registered as members on 30.03.2009 in the proportion of 3.66 new equity shares for every one equity shares held by such member respectively. Respondent No.5 in reply dated 30.03.2012 has admitted that bonus share certificates were not issued to Petitioners for logistic reasons. It is also contended that Petitioners never requested Petitioner No.1 company for bonus share and that the Petitioners have raised this issue only in 2011 after a lapse of one year. In this respect Petitioners have submitted that they were not informed or were made aware of the issuance of bonus shares by Respondent No.1 company. They raised the issue in 2011 after having the knowledge of issue of bonus share by Respondent No.1 company. Respondents in their affidavits dated 30.03.2012 have clearly affirmed inter alia that *" The said share certificates pertaining to the said bonus shares are in the possession of the Respondents and the same shall be issued to the Petitioners at the earliest".* In that view of the matter, the Respondent No.1 company is directed to take steps to issue

the share certificates pertaining to the aforesaid bonus shares to the Petitioners within 30 days from the date of receipt of the order, if not already issued.

**9.** The other main allegation of the petitioners is that there has been siphoning of funds of Respondent No.1 company through related party transactions and the infrastructure and premises of Respondent No.1 company were misused causing loss to the company and its shareholders including the petitioners. It is submitted that in the process, Respondent No.3 to 7 have turned the Respondent No.1 company into a shell company.

9.1) Petitioners have shown that the address of Respondent No.9 company mentioned in the Interconnect Franchise Agreement, forwarded to Petitioner No.1 around April 2013, was that of the Respondent No.1 and the same was signed by Respondent No.5 as authorized signatory of Respondent No.9. In this connection respondents have contended that inadvertently in the ROC records the registered office of Respondent No. 9 company was recorded as 104, Mayur Plaza, which was subsequently rectified in the ROC records. There is thus no dispute that Registered Office of Respondent No.9 was initially shown as 104, Mayur Plaza. The Petitioners therefore submit that the Respondents have allowed Respondent No.9 to use the infrastructure of Respondent No.1 viz, optic Fibre, cables, nodes, amplifiers and office premises being Office Nos. 104, 106 and 107 which is the property owned by Respondent No.1. Ld. Counsel for the petitioners emphasized that although the digital head end was shifted to Room No.105 in Mayur Plaza, the other infrastructure and accessories owned by Respondent No.1 viz. Optical fibre

trunk cable, 8 numbers of 16 feet dish antennas installed on the terrace of Mayur Plaza and owned by Respondent No.1, EDFA transmitters, optical nodes etc. continued to remain the property of Respondent No.1. The precise contention of Petitioners is that Respondent No.9 was doing business from the premises owned by Respondent No.1 Company and was earning profit at the cost of Respondent No.1 Company. The Respondents have admitted in their affidavit in reply dated 22.10.2014 that equipment's as at Exhibit A were shifted from Respondent 1 premises to Room No.105 in the same Mayur Plaza. This prima facie shows that Respondent No.9 was at least using the premises of Respondent No.1 before such shifting. Such use of premises of respondent No. 1 without consideration naturally would have caused loss to respondent No.1 company. Similarly the earlier registered address of Respondent No.9 company recorded as Room no 104 Mayur Plaza buttresses the contention of use of premises of Respondent No. 1, which cannot be lightly overlooked. It is also pertinent to note here that although the digital headend installed in Room No.104, 106 and 107 of premises in Mayur Plaza was exclusive property of Respondent No. 2, but as per the SPA *the revenue of the digital headend which is generated from existing setup area will be accounted in the books of JVC*, that is in accounts of Respondent No. 1 Company. In the facts audit of the account is necessary to find out whether relevant revenue generated from the existing set up area was duly accounted in the books of respondent No. 1 company and whether any rent/consideration was received for use of premises and infrastructure, if any, of Respondent No. 1 company.

9.2) In connection with the assets of Respondent No.1 company, Respondents have affirmed that, "*when the original headend was set up in 2008 all parties acted in accordance with clause 8.1 i.e. investment for headend was made by Respondent No.2 and all other investments towards calling, setting up of local sites for receiving such cables and carrying the signal to the customers was borne by Respondent No.1 company*". Audit of the accounts of Respondent No.1 company since the year 2008-09 (during which SPA executed) will show which assets including Set up boxes belong to Respondent No.1 company and which of those assets have been purchased solely by Respondent No.2 and as such are its exclusive property.

9.3) Petitioners have also made several allegations of siphoning of funds of Respondent No.1 company through related party transactions.

9.4) It is submitted that Nasik City Cable Broadband Services (P) Pvt. (NCCBSPL in short) was not in existence when resolution was passed by Respondent No.1 company on 10.07.2008 to give full cable T.V. maintenance and lane maintenance contract to NCCBSPL. It is further emphasized that while assigning the contract no tenders were invited nor was there any agenda giving reasons for entering into such maintenance contract. Admittedly M/s. NCCBSPL was incorporated later on 9th August 2008. This clearly raises a doubt in respect of the purported contract to a non-existing company. It has not been disputed that the registered address of NCCBSPL is that of Respondent No.5. Similarly, it has not been disputed that Jagdish Danaj and Dilip Salve the Directors of NCCBSPL are both shareholders in Respondent No.1 company. Petitioners have placed on record that the maintenance cost

of Rs.42,40,000 paid by Respondent No.1 to NCCBSPL for the period 10.04.2009 to 31.03.2010 is almost 4 times more than the cost of Rs. 12 lakhs for purchasing the said cables.

9.5) It is also the case of petitioners that EOS Multilink (EM) was incorporated on 27.05.2013 and Gemini Digital Services (P) Ltd. (GDSPL) was incorporated subsequent to the filing of the present company petition. It is placed that the electricity bill of the EM shows the residential address of Respondent No.5. Similarly the office address of GDPSL is that of residence of Respondent No.5. Respondent No. 5 in his affidavit of Reply dated 30th March 2012, has made false statement that *"Pertinently none of the directors/shareholders/members of Respondent No. 1 Company are directors/shareholders and/or members in the Network Managers and therefore the question of such transactions being related party transactions does not arise"*. Whereas it was shown that various members/shareholders of the Respondent No. 1 company are members/shareholders of Network Managers. Petitioners have also shown that as per bank statement of Independence Co-operative Bank , 23 out of 47 shareholders of Respondent No.1 have received payments in inter-related party transactions ( page 233 of COD Part-1, read with pages 69-71). The shareholders who have received payments are at sl. No. 1, 2, 5-9, 11, 12, 14-23, 25-27, 41 at page 69-71. There has been several other specific allegation of siphoning of funds through related party transactions of respondent No.1 company. Respondent simply contented that the MOU and other related party transactions were done with knowledge and consent of Directors of the company. However supporting

company resolution or adequate and specific justification for such related party transactions have not been placed on record.

9.6) In reply to allegations of the petitioners regarding siphoning of funds by commercial transaction/agreements with related parties, it is submitted by respondents that all payments were made through cheque, duly accounted and hence all transactions were transparent. Such transactions were with due approval of Board resolution of Respondent No.1 company and there has not been any breach of provisions of Companies Act 1956. The respondents have also admitted in their affidavit that Respondent No.1 company have virtually ended as it continued to operate only in non DAS area and that the digitalization process has caused tremendous loss to Respondent No.1 company. When it has been admitted that a profit making company has lost its substratum and when the respondents have claimed that accounts of the company have been properly maintained as per law there should not have been any objection in the inspection of audit of the accounts of Respondent No.1 company.

9.7) The Petitioners have also submitted that respondents have turned Respondent No.1 company into a shell company. It has been shown that during the financial year 2011-12 a sum of Rs. 2,68,00,000 and during the financial year 2012-13 a sum of Rs.2,94,00,000 were shown as spent towards corporate and management support services. However as per clause 5.11 of Article 5 of S.P.A. Respondent No.1 company was supposed to pay only Rs. 2 lacs per month to Respondent No.2 company in respect of corporate and management services provided by Respondent No.2 company to Respondent

No.1 company. The Petitioners have also pointed out that as per balance-sheet of Respondent No.1 company, a huge expenditure was made under technical support charges like Rs.3,07,50,000 in the year 2008-09 and Rs. 3,40,00,000 in the year 2009-10, Rs. 3,70,00,000 in the year 2010-11 and Rs.1,20,00,000 in the year 2011-12. It is further pointed out that an aggregate expenditure under all the heads as shown in the balance-sheet during the period from 2008 to the year 2014 comes to Rs.68,55,63,747 which appears exaggerated and disproportionate. The Petitioner accordingly prayed that it is necessary in the interest of justice that all the books of accounts maintained by Respondent No.1 are scrutinized by an independent Auditor appointed by this Tribunal.

9.8) The Petitioners have also referred to the special resolution dated 18.10.2013 passed by Respondent No.1, whereby Rs. 10,00,00,000/- (Rupees ten crores) loan was sanctioned in favour of Respondent No.9 company for commercial purpose. This was countered by Respondent with the submission that the same was never acted upon and that no amount whatsoever was disbursed thereunder. Even though the resolution was not acted upon, prima facie it is evident that an attempt for diversion of advantage from Respondent No.1 to Respondent No.9 was at least intended.

9.9) Petitioners also pointed out that invoices for the months of May 2013 and June 2013 (at page 150, 151 and 152 of COD-III), were wrongly raised by Respondent No. 9 to the LCOs (Existing clients of Respondent No. 1 Company), whereas the JV between R2 and R9 was entered subsequently on 25.06.2013. Admittedly, prior to such JVA executed in June 2013, R-9 had

no connection with Respondent No. 1 and Respondent No. 2 Company. Therefore R-9 could not have raised bills/invoices for the period prior to June 2013, which prima facie shows such transactions and dealings leading to wrongful loss to Respondent No. 1 Company.

9.10) The Petitioners have shown several instances in support of the contentions that the infrastructure and premises of Respondent No. 1 Company have been used for without any consideration and there has been mismanagement in the affairs of Respondent No. 1 company. That apart several relevant instances of siphoning of funds of Respondent No. 1 Company have been projected which cannot be overlooked out rightly, in the absence of adequate and specific explanation from Respondents. If the accounts of the Company have been properly maintained, there is nothing to be afraid of in the scrutinisation of its accounts and no prejudice will be caused to Respondents. In the facts, audit of the accounts of the Respondent No. 1 Company appears to be necessary in the interest of the Company and its shareholders.

**10)** Having considered the rival submissions and upon careful analysis of the documents filed by the parties in support of their respective allegations and counter allegations, we have come to the conclusion that there appears financial irregularities in the company which is prejudicial to the interest of the company. However, all the loss to the company on account of financial irregularities can be ascertained by an appointment of an Independent auditor who may conduct the audit of the company from the financial year 2008-09 and onwards to find out the exact loss caused to the company on

account of siphoning, related party transactions and other misdeeds, committed by Directors of the Company. As it is expert job we have not entered in details of allegations except few samples to conclude that there is prima facie case of financial mismanagement. Auditor shall enquire into the loss, if any, caused to the company and such loss, to be recovered from the party whoever is found responsible, from his/their personal resources and the amount so recovered will be paid to the Company. Respondent No.3 to 7, Directors of Respondent No.1 company are directed to provide inspection of accounts and records of Respondent No.1 company to the Auditor and also to the Petitioners who are shareholders of Respondent No.1 company. The auditor shall give opportunity of hearing to both the parties. Respondent No. 3 to 7 directors of Respondent No.1 company are directed to assist the auditor and furnish relevant documents as and when asked for. The auditors shall fix their remuneration in consultation with the Respondent No. 1 Company, to be paid by Respondent No. 1 Company. In case of any difficulty in implementation of the directions, liberty is given to file appropriate application before this Tribunal.

**11.** In the light of aforesaid discussions M/s Price Water Cooper is appointed as an independent auditor, who shall comply the aforesaid directions and submit its report within three months.

C.P. No. 104/2011 is partly allowed, accordingly, without any order as to cost.

Order Pronounced in Open Court on 31st January, 2017.

S/D

01.2017

CHIEF JUSTICE M.M. KUMAR
PRESIDENT

S/D

S.K. MOHAPATRA
MEMBER(T)