NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH: GUWAHATI

T. P. No.25/397/398/GB/2016
(C.P. No.992 of 2011)

Under Section: 397/398 of the Companies Act, 1956

In the matter of:

Deba Kumar Hazarika & others ... Petitioners
-versus-
Assam Chemicals & Pharmaceuticals (P) Ltd.,
& others ... Respondents

Order delivered on: 08.03.2018

Coram:

Hon'ble Mr. Justice P. K. Saikia, Member (J)

APPEARANCE FOR THE PARTIES

For petitioners	Mr. A.K.Shrivastava, Advocate Mr. A. Baruah, Advocate
For petitioner No.18	Mr. H.S. Kalsi
For Respondent No.3 and 4	Mr. Aanjan Kumar Roy, FCS & Mr A.K. Choudhury, Advocate
For Respondent No.6 to 10, 13 and 14	Mr. Anirban Das, Advocate
For Respondent No. 11, 12 & 15	Mr. R. K. Mitra , Advocate
For Respondent No. 15	Mr. D. Goswami, Advocate & Mr S.S. Roy, Advocate
For Respondent Nos.11 & 12	Mr R. Sarmah

ORDER

Per Hon'ble Mr. Justice P. K. Saikia, Member (J):

This petition has been filed under section 397 and 398 of the Companies Act, 1956 (in short the "Act of 1956") seeking the following reliefs: -

> *"(i) To direct the company as well as the office of the ROC not to give effect in the Company's records on fraudulent issue of 6,715 Nos. of equity shares and declare those shares as null and void, illegal and not binding on the company and treat those shares were never issued by the Company;*
>
> *(ii) To declare all the Resolutions fraudulently passed by the respondent without the approval of the existing shareholders as null and void and not binding on the company to treat those Resolutions has never been passed in the shareholders' Meeting of the company along with consequential relief as your Lordship deem fit and proper in the ends of justice.*
>
> *(iii) To issue necessary direction for regulation of the conduct of the Company's affairs in future along with consequential relief as your Lordships deem fit and proper in the ends of justice;*

2. The facts necessary for appreciation of the disputes in the present petition, as are narrated in the petition aforesaid in short are that M/s. Assam Chemical and Pharmaceutical (P) Ltd., is a Private Limited Company incorporated on 13-03-1946 under the erstwhile Companies Act, 1930, subsequently covered under the Companies Act, 1956 (hereinafter referred to as the "Company").

3. The initial authorized share capital of the company was Rs.3.00 lacs of 300 nos. of equity shares of Rs.1,000/- each. The authorized capital of the company had been enhanced from time to time and as on 14-11-2009, the authorized capital of the company was Rs.5.00 lacs consisting of 5000 equity shares of Rs.100/- each.

4. The paid up capital of the company was Rs.300720/- of 3072 nos. of equity shares of Rs.100/- each as per annual report of the company as on 31-03-2009. Out of the aforesaid equity shares, 600 nos. of equity shares were held by the Government of Assam, the same being 20% of the total shareholding and the remaining 2472 nos. of equity shares were held by the shareholders and the employees of the company.

5. Though, the registered office of the company was initially at A. K. Azad Road, Gopinath Nagar, Guwahati 781 016 however, due to some ongoing disputes between the shareholders and the then Managing Director of the company, D. N. Singh, the registered office of the company was shifted to Shantipur Road, House No.16, near Pragjyotish College, Guwahati 781 009, vide board resolution dated 05-01-2010.

6. The company ---- which was incorporated in 1946 with the objects, specified in the Memorandum of Association (in short, MOA) --- has been doing its business with great reputation over a very long period of time. The products, manufactured by the company, had always been sold like hot cakes which indicate the goodwill and popularity which the company enjoyed over the years.

7. However, in the month of July, 2009, a series of news items were published in various local newspapers reflecting that the company under the stewardship of D. N. Singh, the then Managing Director, since deceased, has been conducting the business of the company in a manner which purportedly violated various Laws and Rules holding the field which are put in place for ensuring good governance of the company.

8. In that connection, it has been stated that on 22-07-2009, the Asomiya Khabar published a story of evasion of entry tax and Assam VAT by the company which was stated to be to the tune of Rs.12.00 lacs and Rs.1.00 lacs respectively. Owing to such evasion of taxes, concerned authorities had imposed penalty and therefore, the company had to pay the Government of Assam an amount to the tune of Rs.20.00 lacs from the coffer of the company as being tax and penalty imposed thereon.

9. Around the same time, The Amar Asom, The Janasadharan, The Edin, The Dainik Janambhumi, The Dainik Agradoot, The Aaji and The Aamar Asom published stories about the company being run in a wanton manner. In the news reports, so published, it was alleged that the management of the company misappropriated a considerably big amount of money from the coffer of the company which in fact resulted in oppression and mismanagement in running the affairs of the company.

10. When the shareholders of the company came to know about the mismanagement of the company and also about the misappropriation of huge funds of the company by said D. N. Singh (who was arrayed as respondent No.5 in the present petition and would be described hereinafter as R-5 as well) through the aforesaid news reports, they sent a requisition to the company together with a proposal urging the latter to convene an Extra Ordinary General Meeting (EOGM , in short) of the shareholders at the registered office of the company.

11. Said EOGM was sought to be convened in order to discuss and ascertain the allegations circulated in the newspapers aforesaid and also demanding immediate removal of the then Managing Director of the company (in short, MD) on the ground of his alleged misappropriation of company's funds and also for mismanagement of the affairs of the company. A copy of the requisition No. Nil dated 03-10-2009 was also annexed with the petition as Annexure-G.

12. On receipt of the requisition from the shareholders, R-5, the Managing Director of the company, issued notice dated 21-10-2009 convening the EOGM of the shareholders on 14-11-2009 in the registered office of the company. Accordingly, the EOGM was held on 14-11-2009 which was attended to by all the shareholders. However, R-5 did not attend the same, and that too, without seeking any permission there-for from the authorized authority.

13. Said meeting was convened under the supervision of the District Administration –since ----- the conveners of the meeting apprehended that some of the shareholders, close to R-5, might cause serious law and order situation on the aforesaid date. The said meeting was, thereafter, conducted under the chairmanship of Mr. H. K. Das (petitioner No.4 and P-4 in short). The shareholders discussed the agenda in the notice and took resolution to remove the then MD, D. N. Singh from the office of MD as well as director of the company with immediate effect.

14. The shareholders by majority decision had also appointed Mr. Deba Kumar Hazarika (petitioner No.1 and P-1 in short) as director of the company with effect from 14-11-2009, in place of D. N. Singh (R-5). A copy of the resolution of the EOGM held on 14-11-2009 was also handed over to the respondents vide letter dated 16-11-2009 and the same was delivered at the registered office of the company. Under the aforesaid letter, R-5 was requested to handover charge of the company, since he had ceased to be a Director/MD of the company on and from 14-11-2009. (Copy of the letter dated 16-11-2009 was annexed with the petition as annexure- L).

15. However, instead of handing over the charge, the R-5 started avoiding the new office bearers of the company and refused to hand over charge to the newly constituted Board of Directors (In short, BOD). However, the cahoots, who supported the R-5 informed that the Additional District Judge, Kamrup, Guwahati had rendered an order on 13-11-2009, restraining the company from holding any EOGM on 14-11-2009.

16. However, on making necessary enquiry, the shareholders came to know that the Additional District Judge, Kamrup had passed an order in Misc. (Arb.) Case No.527/2009 on 13-11-2009 restraining the requisisionists who urged the company to convene an EOGM from adopting any resolution on agenda No.2 of the notice dated 21-10-2009.

17. It may be noted here that the agenda No, 2 of the notice dated 21.10.2009 proposed the removal of the respondent No.5 from the office of director as well as MD of the company. However, the said order was bad in law—since--- such an order was passed without giving opportunity to the petitioners to oppose the prayer in Misc. **(Arb.) Case No.571/2009**, wherein the plaintiffs therein, amongst other sought for the following reliefs: -

> *"(i) Declaring the Resolution No.2 of the notice dated 21.10.2009 is illegal, bad in law and is liable to be set aside;*
>
> *(ii) Restrain the opposite party its men, agents, servants etc. from holding the Extra-Ordinary General Meeting as far as resolution No.2 of the notice dated 21.10.2009 is concerned;*
>
> *(iii) Stay the operation of the resolution No.2 of the notice dated 21.10.2009*
>
> *(iv) and/or be pleased to pass such other order/orders as to your honour may deem fit and proper."*

18. However, the said suit was subsequently dismissed on withdrawal on 01-03-2011 and the injunction order passed on 19-11-2009 stood vacated.

19. The newly constituted Board of Directors filed necessary returns to the Registrar of Companies (ROC), Shillong intimating the latter about the removal of the respondent No.5 from the office director /MD of the company as well as the appointment of Deba Kumar Hazarika (petitioner No.1) in the Board of Directors, in compliance of the directions in the resolution passed by the shareholders in the EOGM held on 14-11-2009.

20. On 25-11-2009, the newly constituted Board of Director by majority vote adopted a resolution under the chairmanship of the Government Nominee Director, Shri Bipul Das, in which Deba Kumar Hazarika was appointed as MD of the company with effect from 25-11-2009. In the meantime, Sri Bhupen Chandra Kalita (P-2) was also appointed as director of the company on following the prescriptions of law and mandate in the charters of the company. The appointment of P-1 as MD and P-2 as director of the company had also been communicated to the ROC, Shillong by submitting Form No.32.

21. Although R-5, DN Singh was duly conveyed all those decisions, he instead of handing over his charge of the offices and rendering necessary assistance to the newly constituted Board of Directors, started creating hurdles and obstacles in running the affairs of the company smoothly. Since R-5 was creating all hurdles and difficulties in running the affairs of the company, the shareholders of the company convened another EOGM under the supervision of the District Magistrate, Kamrup, Guwahati on 05-01-2010 at the registered office of the company to transact the business, specified in the agenda of the EOGM and in such EOGM, the removal of the R-5 from the offices aforesaid was confirmed.

22. The EOGM, attended by majority shareholders further forbade R-5 from conducting the affairs of the company with further warning that any activities resorted to by the R-5 after 14.11.2009 would not be binding on the company and that R-5 would be personally responsible for such activities. However, despite, he being warned as above, R-5 paid no heed to such directions. In such a situation, the BOD resolved to shift the registered office temporarily from A. K. Azad Road, Gopinath Nagar, Guwahati 781 016 to Santipur Main Road, House No.16, near Pragjyotish College, Guwahati 781 009.

23. Thereafter, the respondent No.5 with mala fide intention had circulated frivolous and fabricated news in the local daily newspapers, namely, The Dainik Assam on 27-03-2010 and The Assam Tribune on 22-05-2010, declaring that R-5 is the Managing Director of the company and its registered office remains at A. K. Azad Road, Gopinath Nagar, Guwahati 781 016. Such fabricated news items were circulated only to mislead the people dealing with the company and the public, which resulted in serious loss of reputation and goodwill which the company had earned by decades of hard work and labor.

24. Even thereafter, the respondent No.5 had most illegally opened a current account in the name of the company in Industrial Co-operative Bank Ltd, Lakhtokia Branch, S. S. Road, Guwahati – 781 001 and started transacting business of the company through such an account. For such illegal conduct on the part of the respondent No.5, a case was filed and the same is under investigation at this moment.

25. However, the misdeeds resorted to by the respondent No.5 did not stop there, since he had illegally altered the company's records and documents in order to remove Deba Kumar Hazarika and Bhupen Ch. Kalita from the office of the Managing Director and Director of the company respectively.

26. In the meantime, the respondent No.5 tampered the documents in the office of the ROC, Shillong and, thereafter illegally and in an unauthorized manner issued 1455 nos. of equity shares of Rs.100/- each to the respondent No.5 himself and to his associates without consent of all the existing shareholders of the company as required under the Article of Association (AOA, for short). Such fact was

immediately referred to the Bureau of Investigation of Economic Offences for taking necessary action against R-5.

27. Even thereafter, R-5 without approval of the majority shareholders fraudulently removed the petitioner Deba Kumar Hazarika from the office of Managing Director of the company and equally illegally got himself appointed as Managing Director of the company. Thereafter, he illegally altered all the relevant records in contravention of the provisions of the Companies Act, 1956.

28. During the pendency of the Company Petition No.972/2010, before the Company Law Board (CLB), Kolkata, the authorized capital of the company was increased from Rs.5.00 lacs to Rs.10.00 lacs of Rs.100/each and the relevant provisions in MOA and AOA were altered. What is, however, surprising and astonishing as well is that all these were done in total violation rules and procedures framed in that regard and also in keeping majority shareholders in complete dark since at no point of time, the majority shareholders were informed about any proposal seeking increase of the authorized capital from Rs.5.00 lacs to Rs.10.00 lacs.

29. Thereafter, the respondent No.5 illegally and fraudulently issued 6575 nos. of fully paid equity shares of Rs.100/- each in his name and in the name of his supporters (1455 nos. of shares on 20-02-2010 and 5260 nos. of shares on 15-09-2010) and most illegally filed return of allotment to the office of the ROC, Shillong which were done in complete contravention of the provisions of law.

30. R-5, thereafter resigned from the post of Managing Director w. e. f. 16-02-2011 and inducted one Sri Madhav Das as being MD of the company, in a purported Board Meeting held on 16-02-2011 which is evident from the records of the ROC, Shillong. However, such induction Sri Madhav Das as being MD is illegal, since the same has been done on forging the records of the company.

31. Being so inducted, Sri Madhav Das had been illegally occupying the post of Managing Director of the company and had prevented the duly constituted Board of Directors of the company in carrying out the affairs of the company in accordance with law. In such a situation, Sri Deba Kumar Hazarika along with 19 others had preferred this present petition before learned CLB, Kolkata alleging oppression as well as mismanagement running the affairs of the company.

32. The learned Counsel for the petitioners has submitted the following decisions in support of the case of petitioners: -

1. Nibro Ltd. Versus National Insurance Co. Ltd., Reported in AIR 1991 Delhi 25, 1991 70 Compcas 388 Delhi, 41 (1990) DLT 633
2. Hind Overseas Pvt. Ltd. Versus Raghunath Prasad Jhunjhunwalla, Reported in 1976 AIR 565, 1976 SCR (2) 226
3. V.P. Rangaraj Versus V. B. Gopalakrishnan & ors. Reported in 1991 2 Scale 1135/ 1992 0 AIR(SC) 453
4. Musselwhite Vs. C.H. Musselwhite & Son Ltd., reported in (1962) 32 comp. cas. 804 (CD.)
5. Dale & Carrington Investment (P.) Ltd. vs. P.K. Prathapan, reported in (2004) 54 SCL 601 (SC)

6. Life Insurance corpn. of India Vs. Escorts Ltd., reported in (1986) 59 comp.cas. 548 (SC)

33. The notice of the proceeding was served on the respondents. They entered appearance and contested the proceeding alleging several infirmities in petition both factual and legal and therefore, prayed for dismissal of the petition. First, it was alleged that the petition is not maintainable since same persons were arrayed as both petitioners as well as respondents.

34. The respondents also claimed that most of the facts incorporated in the petition were not incorrect, false and misleading. They also contended that the petition suffers from enough legal infirmities and lacuna which invariably required the CLB to dismiss the same. Initially on hearing the parties, learned CLB, Kolkata came to the conclusion that the petition is maintainable, despite the defects pointed out in the frame-up of the petition.

35. In due course, the parties have exchanged their pleadings and thereafter, the learned CLB, Kolkata came to the conclusion that the petition is not maintainable since it suffers from serious infirmities in the frame up of the petition. It also held that the petition was structured on falsehood and fabrication and its main aim was to put the respondents in trouble. On such ground, the learned CLB, Kolkata dismissed the petition.

36. Against such dismissal order dated 20-03-2014, the petitioners preferred an appeal under Section 10F of the Companies Act, 1956 before the Hon'ble Gauhati High Court. The Hon'ble High Court on receipt of the appeal filed under section 10F of the Companies Act, 1956 issued notice to the respondents and on hearing both the parties, was pleased to allow the appeal vide its order dated 09-05-2016 in comp. appeal No.3/2014.

37. It may be stated here that in comp. appeal No.3/2014, the Hon'ble Gauhati High Court had framed as many as 9 (Nine) issues, on law points for consideration. They are as follows: -

> *"1. Can there be an arbitration agreement between the shareholders on one hand and the Managing Director, Directors or Managers on the other hand given the mandate of Company Law Board under Section 402 (d) of the Companies Act, 1956?*
>
> *2. Whether the Arbitration Court has jurisdiction to decide the right of shareholders to appoint or remove director from the Board irrespective of the fact of existence of an arbitral award as such or otherwise?*
>
> *3. Whether the Company Law Board failed to exercise its jurisdiction vested under Sections 397, 398 and 402 of the Companies Act, 1956?*
>
> *4. Whether the Company Law Board has any right to review its own order?*
>
> *5. Whether the Hon'ble High Court has jurisdiction to entertain and hear an appeal under Section 10F of the Companies Act, 1956, arising out of refusal of the Company Law Board to exercise the jurisdiction vested in Sections 397 and 398, read with Section 402 of the Companies Act?*
>
> *6. Whether majority shareholders have legal and proprietary right to exercise in appointing and removing Directors to control and manage their Company?*

7. Whether shareholders holding 28% of the paid up capital in the Company has right to remove and appoint Directors, who were removed and appointed by majority shareholders holding 64% of shares?

8. Whether the outsiders other than the existing shareholders of the Company, who were allotted shares on 20.02.2010 and 15.09.2010 were entitled to members of the Company given the prohibition of allotment and transfer of shares to outsiders as per Article 28 of the Articles of Association of the Company?

9. Whether allotment of shares on 20.02.2010 and 15.09.2010 to the minority shareholders holding 28% of shares of the paid up capital of the Company to the exclusion of majority shareholders including the State of Assam (which is supposed to be holding 25% in the paid up capital of the Company as per Article 51 of the Articles of Association for all time to come otherwise remaining their rights) are invalid and void ab initio?

38. While issue Nos. 3, 4 and 5 were answered in favour of the appellants/petitioners, the other issues were remanded to the learned CLB, Kolkata for taking decision thereon in accordance with prescription of law.

39. The Hon'ble Gauhati High Court also found that the allottees of 6715 equity shares were not made parties to such a proceeding, although their interest is likely to be affected by any orders passed by the learned CLB, Kolkata in the aforesaid proceeding and in such circumstance, the Hon'ble High Court had directed the appellants/petitioners to issue newspaper advertisement to bring to the notice of the allottees of 6715 equity shares about the pendency of the company petition under consideration, requiring them to respond to the allegations in such petition. The relevant part of the aforesaid order of the Hon'ble High Court is reproduced below: -

"27. In the light of the above discussion, impugned order of the Company Law Board dated 20.03.2014 cannot be sustained and is accordingly set aside and quashed. Matter is remanded back to the Company Law Board, Kolkata Bench for fresh decision on merit in Company Petition No.992/2011. As a measure of abundant caution, appellants may be permitted to issue newspaper advertisement to bring it to the notice of the allottees of 6715 equity shares of the company about Company Petition No.992/2011 to be heard afresh by the Company Law Board, Kolkata Bench. Consequently, the questions of law framed except question Nos. 3, 4 and 5 are returned unanswered awaiting adjudication on merit. In view of the foregoing discussions question Nos. 3, 4 and 5 are answered in the affirmative, negative and in the affirmative respectively."

40. During the pendency of the proceeding before the Hon'ble High Court, the Company Act, 1956 has been repealed and the Companies Act of 2013 was brought into existence. Under the Act of 2013, institution of Company Law Board stood abolished and in its place National Company Law Tribunal (NCLT) came into force.

41. Since, NCLT was brought into existence in place of CLB, the cases pending before the learned CLB, Kolkata --which were triable by the NCLT Bench at Guwahati---were transferred for disposal in accordance with prescription of law.

42. On receipt of this proceeding by this Bench, as required under the Order dated 09-05-2017 in Comp. Appeal No.3/2014, this Bench required the petitioners to issue advertisement requiring the

allottees of 6715 equity shares, to appear before this Bench and to file reply/objection if any, against the prayer made in the petition under consideration.

43. Being so required the respondents No.6 to 15 appeared before this Bench and filed reply to the prayer made in the petition. It may be noticed that during the hearing of the proceeding, the petitioner No.18 wanted her name to be deleted from the cause title of the petition and the same was accepted and as such, her name stands deleted from the cause title of the proceeding as being the petitioner in the present proceeding.

44. The respondent No.3 and 4 having filed reply denied and disputed most of the allegations in the company petition. It has firstly been submitted that the company petition has been founded on malicious reports against the respondent No.5, which were fabricated by none other than the petitioners themselves, particularly petitioner No.1 and petitioner No. 10 and were communicated to various newspapers for circulation so that subsequently, those news reports could be made basis of some false and frivolous litigation against the persons in charge of management of the respondent company to get them out of management. Since, very basis of the petition was false, the petition under consideration is required to be dismissed on this count alone.

45. The respondents did not dispute that the petitioners made a requisition to the respondent Company on 03-10-2009 seeking calling of EOGM purportedly for removal of the respondent No.5 from the offices of director and Managing Director of the respondent Company. On receipt of such requisition, the respondent No.5 issued notice dated 21.10.2009 calling an EOGM on 14-11-2009.

46. However, since such EOGM was aimed at removing the respondent No.5 from the posts aforesaid most illegally, the respondent No.5 on invoking a arbitration clause in a connected agreement, approached the Civil Court and also secured an order restraining the petitioners, their men, servants, agents from deliberating on agenda item No.2 in the notice dated 21-10-2009. More importantly, such injunction order was duly communicated to the petitioners in time.

47. Despite such injunction order having been served on the petitioners well in time, the petitioners in total disregard to the directions rendered in the injunction order dated 13-11-2009 in T. S.(Arb.) No 571 of 2009, not only made deliberation on agenda item No.2 of the notice dated 21-10-2009, but also adopted the resolution removing the respondent No.5 from the offices of the director/Managing Director of the respondent Company with immediate effect. But the resolution dated 14.11.2009 is bad and non-est. in law since it was adopted on in total disregard of direction rendered by a court of competent jurisdiction.

48. Since the resolution, adopted in the EOGM on 14-11-2009 is profoundly illegal and non-est in law, therefore, no Court should pass any order to enforce such a resolution inasmuch as it would tantamount to perpetuating more and more illegalities / irregularities on the shareholders, who always wanted to be governed by the Rules and procedures holding the field --- instead of--- whims and caprice of those who illegally wanted to be in the management of the company, they being the petitioners herein .

49. According to the R-3 and R-4, the appointment of the petitioner No.1in the EOGM held on 14.11.2009 was illegal for reasons more than one. In that connection, it was stated that no casual vacancy did occur in the office of the director of the company on 14.11.2009. In spite of there being no casual vacancy in the office of the directors of the company on 14.11.2009, the petitioner was appointed against a casual vacancy which is said to have occurred on 14.11.2009.

50. Such appointment was illegal since the appointment of petitioner No. 1 as director of the respondent company was made in complete disregard to the directions in Section 284(5) read with section 284(2) of the Act of 1956. Section 284(2) and 284 (5) of the Act of 1956 require the company to circulate special notice among the shareholders of the company well in advance so that the actual stake-holders can deliberate upon the appointment of a person as important as director of the company.

51. It is also the case of the respondents that the appointment of the petitioner No.1 as MD is also illegal since the Board Meeting held on 25-11-2009 did not have requisite Coram for adopting a resolution for appointment of the petitioner No.1 as Managing Director of the company since-- on that day-- there were only two directors on the Board though as per Article 64 of the AOA, the Coram of the Board meeting was 3.

52. According to the respondents No.3 and 4, there was an EOGM of the shareholders of the company on 02-03-2010 and in that EOGM, the petitioners No.1 and 2 were removed from their offices and Form 32 in regard to cessation of the petitioners No.1 and 2 as being directors of the company had been duly sent to the ROC, copy of which was attached with the company petition as Annexure Z. Quite importantly, said meeting was conducted strictly in accordance with the requirements of law and, therefore, the allegation that the petitioners were wrongly removed from their offices as well as the allegation that the documents in the office of the ROC were illegally tampered is without any basis whatsoever.

53. According to R-3 and R-4, all the allegations in the petition are based on past acts or actions. In other words, the petition is founded on all stale and dead claims. It is a settled position of law that the petition under Section 397/398 of the Act cannot be premised on past acts or actions. As the petitioners have based their petition only on past acts/ actions, this bench ought to have thrown the petition at the very threshold.

54. It has been submitted that in a petition under Section 397/398, the petitioner needs to make out a case for winding up of a company on just and equitable reason. But then, the petitioners must also establish that winding up of the company would prejudicially affect the petitioners. However, the allegations in the petition, even if, accepted on their face value, miserably fail to make out such a case.

55. The dispute projected through the company petition is nothing but a dispute between two sets of directors aspiring to manage the affairs of the company to the exclusion of another. However, it has repeatedly been held that the directorial dispute cannot form subject matter of the proceeding under Section 397/398. Only civil court ---and ---not CLB---could entertain such dispute(s). On this count also, the present petition is liable to be dismissed.

56. The respondents' claim that the petitioners having illegally usurped the management of the company, issued letters to its bankers requiring them to freeze all the accounts in the name of the company. Since, the bank accounts in the name of the company were made inoperative, the respondents were left with no alternative but to increase the authorized capital of the company and also to issue fresh shares to the persons/shareholders, who are interested in having such shares offered from the side of the company. But all these were done just to prevent the company from disintegrating Therefore, no offence can be taken either for increase of authorized capital of the company or for the allotment of 6715 nos. of shares on 20-02-2010 and 15-09-2010.

57. Regarding violation of Article 28 of the AOA in issuing shares to some outsiders on the aforesaid dates, it has been contended that the petitioners themselves became the shareholders of the company not on following the prescription in the AOA but on disregarding such mandate in the AOA. Therefore, the petitioners cannot be allowed to approbate one thing at one point of time and re-approbate same thing at another point of time.

58. Mr. Anjan Kumar Roy, FCS further submits that the present petition was filed with sole motive of illegally usurp the management of the respondent company in disguise of a petition under Section 397/398. In S. P. Jain Vs Kalinga Tubes case, it has been held that when dominant intention of the petitioner is to grab the management in disguise of a petition under Section 397/398, such petition is required to be dismissed at the very threshold.

59. The learned legal representative for respondent Nos. 3 & 4 has submitted the following decisions in support e of the various claims, he canvasses before the Bench during the course of arguments: -

1. S.P. Jain v. Kalinga Tubes Ltd., reported in 1965 AIR 1535, 1965 SCR (2) 720
2. Palghat Exports Pvt. Ltd. V. T.V. Chandran and Ors. reported in 1994 79 compCas 213 Ker.
3. Bagree Cereals (P) Ltd. & Ors Vs. Hanuman Prasad Bagri and Ors., Reported in 2001 105 compLJ 397 Cal
4. Hind Overseas Pvt. Ltd. Vs. Raghunath Prasad Jhunjhunwala and Anr., reported in 1976 AIR 565, 1976 SCR (2) 226
5. Hon'ble High Court of Delhi decision in CO. A(SB) 39/2012 (Reivera Builders Pvt. Ltd. Vs. Vijay Kumar Sekhri & Ors.) decided on 02/07/2012
6. Hon'ble Delhi High Court decision in CO. A (SB) 9/2011 (Charanjit Khanna and Ors.Vs. M/S Khanna Paper Mills Ltd. and Ors.). Decided on 20/04/2011
7. Hon'ble Andhra High Court decision in Manoj Kumar Kanuga and 3 Ors. Vs Marudhar Power Pvt. Ltd. and 18 Ors. Decided on 23/04/2013
8. Hon'ble Calcutta High Court decision in Hanuman Prasad Bagri & ors. Vs. Bagrees Cereals Pvt. Ltd. & Ors. Decided on 14/01/2009
9. Supreme Court of India decision in M.S.D..C Radharamanan Vs. M.S.D. Chandrasekara Raja and Anr., decided on 14/03/2008
10. Supreme Court of India decision in Hanuman Prasad Bagri & ors. Vs. Bagress Cereals Pvt.Ltd. & Ors. decided on 27/03/2001

11. (CLB) Kolkata in C. P. No. 136 of 2014 decision in Jyoti Kumar Arya & Ors. Versus Prabhat Zarda Factory (India) Pvt. Ltd. decided on 18/11/2014

60. The respondents No.11 and 12 having filed joint reply in the form of affidavit have challenged the proceeding initiated by the petitioners on several counts. Many of the allegations against the proceeding, in fact, are mere repetition of the allegations made by the respondent No. 3 and 4. Therefore, I refrain from repeating those allegations here. However, they claimed that it is not correct to say that on 20.02.2010 and 15.09.2010, shares were allotted to outsiders only.

61. Rather there were enough materials on record to show that on the aforesaid dates, shares were issued to existing shareholders too. Such revelations, coupled with the fact the petitioners too made entry to the respondent No.3 Company as shareholders thereof only on violation of prescription in the aforesaid article of the AOA of the respondent No.3 Company require this Tribunal to over throw the entire proceeding. For ready reference, para 3 (ii) of the reply is reproduced below: -

> *"3) That at the outset, before submitting the para-wise reply to CP 992/2011, I say as follows,*
>
> *(i) .....*
> (ii) *The petitioners have alleged, inter alia, in CP 992/2011 that the shares allotted to the answering respondents are illegal and liable to be declared as void. The said allegation has been made on the ground that the answering respondents were not existing shareholders at the time of the impugned allotment which allegedly is in violation of Article 28 of the Articles of Association of the RESPONDENT NO.3 company. I say that the petitioners themselves were allotted shares when they were not the existing shareholders of the RESPONDENT NO.3 Company, which fact has been completely suppressed in CP 992/2011. That the petitioners and the answering respondents are similarly placed, so far as the legality or illegality of their shareholding is concerned, Hence, on the basis of the ground taken by the petitioners, the entire shareholding of the petitioners are also liable to be declared as null and void. Consequently, CP 992/2011 is liable to be dismissed. A Statement showing the allotment and transfer of shares to petitioners has been attached as EXHIBIT- 4 TO 20."*

62. It is also their case that the dispute that has been projected through the petition under consideration, does not qualify to be a dispute as contemplated in Section 397/398 of the Act of 1956. Such a contention can be found in Para 3 (ii) and 3 (iv) of the reply. It is also the case of the respondents No.11 and 12 that the disputes in question are in the nature of dictatorial disputes and it is repeatedly held that dictatorial dispute cannot be made a subject matter of a proceeding under section 397/398 of the Act of 1956.

63. These two respondents also contended that the petitioners No.1 and 2 were dismissed from their services of the respondent No.3 Company under the resolution adopted by the Board Meeting held on 18-10-2008 which was attended to by the petitioner No.2 who duly consented to the said resolution. Therefore, the petitioner No.2 is estopped from disputing the removal of the petitioner No.1 and 2 from the service of the respondent No.3 Company. The minutes of the Board Meeting held on 18-10-2008 is annexed as Exhibit-21 to their reply.

64. It is again contended that the petitioner No.1 was also subsequently removed from the office of the directorship of the company under the resolution adopted in the EOGM held on 24-01-2009, which was chaired by the petitioner No.4. Said EOGM was also attended by the petitioner No. 4 and the petitioner 7 and they had accorded their consent for removal of the petitioner No.1 from the directorship of the respondent No.3 Company. That being so, the petitioner No.4 and 7 are also estopped from disputing the removal of the petitioner No.1 from the directorship of the respondent No.3 Company.

65. The Hon'ble Gauhati High Court had also in its order dated 09-05-2016 in Co. App No.03/2014 in Para 23 concluded that the disputed projected through the company petition under consideration is nothing but a directorial dispute and, therefore, the same cannot be made a subject matter of section 397/398 of the Act of 1956.

66. The respondent No.15, having filed separate reply, has disputed the various contentions made in the company petition under section 397 and 398 of the Act of 1956. However, most of the allegations, he hurled against the petitioners are repetition of the allegations made by the respondents No.3and 4 and respondents No.11 & 12. However, the respondent No.15 further contended that the allegations of siphoning of funds of the respondent No.3 Company as well as the allegations of avoiding payment of tax, resulting in slapping of notice from the side of the concerned authority are also totally baseless.

67. That apart, the respondent No.15 further contended that the allegation of non-payment of entry tax and VAT cannot be a ground for presenting a petition under section 397/398 of the Act of 1956. For ready reference, the relevant part of the reply of the respondent No.15 is reproduced below: -

> *"11. ..... It is also evident that the above CP 992/2011 does not disclose any specific allegation of mismanagement. It would also be pertinent to mention that the said news items raised issues of "entry tax" and Value Added Tax ("VAT", hereinafter). So far as "entry tax" is concerned it was an issue with the entire industry in Assam and not an issue created by RESPONDENT NO.5 as alleged. So far as issue of VAT is concerned, those are normal operational issues of a company of the nature and stature of the RESPONDENT NO.3 Company. I say that the above issues of "entry tax" and VAT cannot be a ground for making a petition under oppression and mismanagement."*

68. In support of the contentions, he advanced before this Bench, the learned counsel for the respondent No.15 too relied on following decisions: -

1. The decision of the Hon'ble Kerala High Court in Palghat Exports Pvt. Ltd. (M.F.A. no. 65 of 1993)
2. 2. P. Ramkumar (M.F.A. No. 64 of 1993) Versus T.V. Chandran and ors,decided on 26/05/1993 .
3. The decision of the Hon'ble Calcutta High Court in Babulal Madhavji Varma V. New Standard Coal Co. Pvt. Ltd. & ors decided on 24.11.1966.
4. Rajasthan state Industrial Development and Investment Corporation and Another versus Diamond & Gem Development Corporation Limited and another, reported in 2013 5 Supreme Court Cases 470

5. Chatterjee Petrochem (India) Pvt. Ltd. Versus Haldia Petrochemical Limited and ors, reported in 2011 10 Supreme Court Cases 466
6. Shri Ravindra Kumar Sharma Versus The State of Assam and Ors, reported in (1999) 7SCC 434
7. Subash Hastimal Lodha and Another Versus Manikchand Promoters and Developers P. Ltd. And Ors. Reported in (2007) 140 Com Cas 512 (CLB)
8. Hanuman Prasad Bagri and Ors versus Bagress Cereals Pvt. Ltd. And Ors., reported in (2001) 4 Supreme Court cases 420
9. Shanti Prasad Jain V. kalinga Tubes Ltd. etc., reported in AIR 1965 Supreme Court 1535 (V 52 C 260)
10. Needle Industries (India) Ltd. and Ors Versus Needle Industries Newey (India) Holding Ltd. and Ors. Reported in (1981)3 Supreme Court Cases 333.

69. The respondent No. 6/7/8/9/10/13/14 too contested the case projected through the petition under consideration having filed reply but I have noticed that the reply, they submitted, is, in fact, the repetition of the replies, already filed by other sets of respondents. Therefore, I find it not necessary to reproduce the reply in this order. However, I would also address their reply whenever same become necessary to explain properly their stand on a particular point.

70. But then it needs to be stated here that they harped upon certain points quite arduously. One of such point was to the effect that since the R-5 had died during the pendency of the proceeding, since his legal representative(s) were not brought on record within time, permitted under the law-- although the death of R-5 was well known to the petitioners-- the proceeding against the R-5 got abated after the expiry of the period of limitation fixed in that regard.

71. According to the respondent Nos. 6/7/8/9/10/13/14, on the abatement of the proceeding against R-5, this proceeding become untenable in law against the rest of the respondents inasmuch as all the allegations in the petitions were directed against the R-5 and none one else, more so, when the petitioners failed to bring on record his legal representative(s) in time. Therefore, this Tribunal is duty bound to dismiss the proceeding in hand on this count alone.

72. He further contended that since the petitioners are found coming to the court with very dirty hands seeking equitable reliefs there- from, in the term of the law, laid down in various judgments including the decision in Laxmi Raj Shetty and another Versus State of T. N., Reported in 1988 AIR (SC) 1274, this Bench is duty bound to dismiss the present proceeding on this count alone, more so, when such a petitioner forfeits his right to have his grievances' heard and decided on merit.

73. Mr. A Das, the learned Counsel for respondent Nos. 6 to 10 & 13 and 14 has submitted several decisions to strengthen the contentions, he advanced during the course of arguments. Such decisions are as follows: -

1. Laxmi Raj Shetty and another Versus State of T. N., Reported in 1988 AIR(SC) 1274: 1988 2 Crimes(SC) 107: 1988 Croly 1783: 188 2 JT 180: 1988 1 Scale 931: 1988 3 SCC 319: 1988 1 SCC(Cri) 633: 1988 3 SCR 706: 1988 0 Supreme (SC) 326:
2. Keshrimal Jivji Shah & another Versus Bank of Maharashtra & ors, Reported in 2004 3 AIIMR 214: 2004 4 BomCR 842: 2004 3 CivCC 375: 2004 3 MhLJ 893: 2004 0 Supreme (Mah) 630:
3. Hanuman Prasad Bagri & Ors. Versus Begress Cereals Pvt. Ltd. & Ors. Reported in 2001 0 AIR (SC) 1416:
4. Lourdu Mari David Versus Louis Chinnaya Arogiaswamy, Reported in 1996 (0) AIJ-SC 15716.
5. Ruby General Hospital Limited Versus Kamal Kumar Dutta, Reported in 2006 129 CC 1: 2005 0 Supreme (Cal) 222.
6. M.S.D.C. Radharamanan Versus M.S.D. Chandrasekara Raja & Anr. Reported in AIR 2008 Supreme Court 1738.
7. Lohia Properties (P)Ltd. Versus Atmaram Kumar, Reported in 1993 5 JT 223: 1993 3 Scale 453: 1993 4 SCC 6: 1993 0 Supreme (SC) 668; 1993 2 UJ 528:
8. Gujarat State Road Transport Corporation Versus Ramanbhai Prabhatbhai & Another, Reported in 1987 0AIR (SC) 1690: 1987 2 JT 384: 1987 1 Scale 1027:
9. Rajeev Kumar and Another Versus State of U. P. and Ors. Reported in 2006 1 ADJ 306: 2006 1 AWC 34: 2005 0 Supreme (All) 2448:
10. M.C.D. Versus State of Delhi & Anr., Reported in 2005 0 AIR (SC) 2658: 2005 0AIR(SCW) 2882

74. I have heard the arguments, advanced by the learned counsel/legal representatives appearing for the party/parties, they represent. It may be stated here that the Hon'ble High Court while rendering the judgment in Comp. Appeal No.3/2014had decided as many 3 questions of law while leaving the rest to be decided by the learned CLB. Further, Hon'ble High Court also directed the CLB to hear the matter afresh after giving concerned, an opportunity of hearing. Since as many as 6 issues of law are left to be decided by this Tribunal, before deciding the rival controversies herein, I propose to address the question of law, already framed by Hon'ble High Court.

Issue no 1

75. In a long chain of judgments, it has been held that Section 397/398 of the Act is a Code in itself. Therefore, it excludes the jurisdiction of all other Courts or Tribunals in respect of the matters, covered there-under. More importantly, under Section 402 of the Act of 1956, the CLB, a statutory authority, has been given wide amplitude of powers to address any grievance, established in accordance with law in a proceeding under section 397/398 of the Act of 1956.

76. Therefore, in respect of matters, covered by 397/398 of the Act of 1956, there cannot be any arbitration agreement. Neither is it possible to confer jurisdiction on the arbitrator to exercise powers under section 402 of the Act of 1956 which are exercisable only by CLB in a proceeding u/s 397/398. This issue is accordingly decided.

Issue No 2

77. CLB repeatedly held that a company draws all its powers and authorities from the shareholders who come together to form a company. Therefore, they have every right to participate in the management of the affairs of the company which they have generally done through a body which is known as Board of directors. Since the BOD has to manage the affairs of the company on behalf the shareholders and since such a body has to exercise the powers, conferred /imposed on it in accordance with prescriptions of law and mandates in the MOA and AOA, the shareholders have unquestionable right to appoint or remove the directors of the company.

78. Such right has found legislative recognition in form of Section 255 of the Act of 1956, corresponding section 152 of the Act of 2013. Since the appointment and removal of the directors of the company are governed by statutory provisions in the Companies Act which not only prescribes a mechanism for removal or appointment of the directors but also constitutes a authority to decide dispute(s) arising out of appointment or removal of the directors of the company, it is beyond the competence of the civil court to entertain such matters.

Issue no. 6

79. In view of our discussion in issue No.1, it is found that the majority of the shareholders have legal and propriety right to remove or appoint director to control and manage the affairs of the company.

Issue No.7

80. This issue relates to the question whether shareholders holding 28% of the paid-up capital in the company has right to remove and appoint Directors who were appointed by majority shareholders holding 64% paid-up capital in the company. We have already found that the directors are appointed and removed by the shareholders in the general meeting of the company and such appointment or removal is done by competent and qualified shareholders who constitute simple majority in the meeting which is summoned to appoint or remove directors.

81. Therefore, even if a director is appointed by shareholders holding 64% of paid-up capital in the company, he can be removed by shareholders holding 28% of paid-up capital in the company --provided ---- in the meeting which is so summoned to remove such a director, such shareholders constitute majority of the voters who are competent to vote. In other words, the majority shareholders who are competent to vote in a particular meeting can remove any director—although-- such person was appointed by the voters whose aggregate shareholdings were much more than the shareholdings of the majority voters who remove such a director from the office in a particular meeting subsequently. This issue is answered accordingly.

Issue No.8

82. This issue relates to the question whether the outsiders other than the existing shareholders of the Company, who were allotted shares on 20.02.2010 and 15.09.2010, were entitled to members of the Company given the prohibition of allotment and transfer of shares to outsiders as per Article 28 of the Articles of Association of the Company. In view of rival submissions on this question, I propose to discuss this issue at appropriate time and place.

Issue No.9

83. In this issue we are to consider whether allotment of shares on 20.02.2010 and 15.09.2010 to the minority shareholders holding 28% of shares of the paid up capital of the Company to the exclusion of majority shareholders including the State of Assam (which is supposed to be holding 25% in the paid up capital of the Company as per Article 51 of the Articles of Association for all time to come) are invalid and void ab initio. I have proposed to discuss such an issue as and when I consider the other disputes between the parties hereto in this proceeding on merit.

84. But it needs to be stated here that Article 51 of the AOA does not impose any condition on the company that the shareholding of the State of Assam cannot be brought down to 25% for all times to come. A perusal of Article 51 of the AOA makes such position more than clear.

85. We have already found the contesting respondents have attacked the petition under consideration on several grounds and such grounds can be considered under the following heads: -

(A)

Whether in seeking relief from this Tribunal, the petitioners came with clean hands.

(B)

Whether the petitioners could bring on record sufficient materials to require this Bench to conclude that the allegations of oppression and mismanagement are established satisfactorily?

(C)

Whether petition under consideration is allegedly hit by several legal infirmities of extremely serious nature and such legal infirmities, now, unmistakably require this Bench to dismiss the proceeding in hand.

(A)

86. In order to bring home the charge that the petitioners in approaching the Tribunal in seeking reliefs under Section 402 of the Act do not come with clean hands, the respondents have referred to several allegations. Now, let us see, how far such allegations stand to reason. The respondents alleged that in the petition under Section 397/398, the petitioners contended that they came to know about a

series of serious illegalities resorted to by the BOD with respondent No. 5 at the head in running the affairs of the company from various newspaper reports which I have alluded to hereinbefore.

87. However, such allegations, according to the respondents, are nothing but blatant lie. In that connection, it has been stated that the information aforesaid, was not collected by the concerned newspapers authorities from their own sources. Quite contrary to it, authors of those allegations, which were published in the newspapers were the petitioner No.1 and 10 since they not only fabricated such reports but also furnished such information to the various newspapers for wide publication/circulation so that such newspaper reports could subsequently be made foundation of a proceeding under Section 397/398. Therefore, the very allegation that the petitioners including petitioner No1 and 10, came to know about the alleged misdeeds of the respondents only from the reports in the newspaper is nothing but a pack of lies only.

88. I have considered such submissions in the light of the materials available on records, more particularly, the averments made in the written statements and the documents annexed therewith and found reason to conclude that the news, items which were circulated in various newspapers, referred to above, were, in fact, manufactured by the petitioner Nos.1 and 10. Since those two petitioners had manufactured those information and also communicated such information to those newspapers, therefore, the allegation to the fact that the petitioners, at least the P-1 and P-10, came to know about the various allegations, incorporated in the petition, from various newspapers only, is found to be statements, laced with profound lies.

88A. However, it needs to be stated here that there is no concrete evidence on record to show that all other petitioners were aware of the fact that the P-1 and P-10 having manufactured such reports forwarded the same to the newspaper authorities for publication in their respective paper. Situations being such, on the materials on record, perhaps, it would be too unfair to condemn all the petitioners for the illegalities, committed by the P-1 and P-10.

89. The respondents arduously claimed that the respondent No.5 approached the Principal Civil Judge, Guwahati on invoking an arbitration clause in the connected agreement seeking a direction therefrom to forbid the petitioners from making any discussions on item No.2 in the notice dated 21-10-2009, in the EOGM, convened on 14-11-2009.

90. On such approach, the Civil Judge, Guwahati was pleased to pass an order restraining the petitioners from making any discussions on item No.2 in the notice dated 21-10-2009 in the EOGM convened on 14-11-2009 vide order dated 13-11-2009 in Misc. (Arb.) No 571/2009. The said order was immediately conveyed to the company and all office bearers including the petitioners.

91. However, in spite of such injunction, being passed by the Civil Judge, Guwahati and despite such injunction being communicated to the petitioners well in time, the petitioners not only made discussions on item No.2 in the notice dated 21-10-2009 in the EOGM, held on 14-11-2009 but also took

a resolution removing the respondent No.5 from the post of the Director/Managing Director of the company.

92. These speak loud and clear that the petitioners had no regard whatsoever to the order passed by Court in exercise of power conferred on it. Said episodes also demonstrates that petitioners coming to this Tribunal with dirty hands----- since ------the one of the important pillars of the present proceeding is the resolution adopted in the EOGM held on 14-11-2009. This itself is a ground for which the present petition is liable to be dismissed.

93. I have considered such submissions having regard to the arguments advanced from the side of the petitioners. Though the petitioners made a feeble attempt to dispute the aforesaid claim, more particularly, the allegation of their being served with the notice, issued from the office of the Principal Civil Judge on 13-11-2009, yet, the materials on record, more particularly, the letter dated 14-11-2009(Annexure XIII to the reply of respondent No. 6 to 10, 13, 14), unmistakably demonstrates that the order was duly communicated to the petitioners.

94. In spite of that, they have taken a resolution on item No.2 in total violation of directions of the Civil, Judge, Guwahati rendered in order dated 13.11.2009 in Misc. (Arb.) No 571/2009. Such episodes were never made known to this Tribunal by the petitioners incorporating such information in the petition under consideration. Since the injunction order in Misc. (Arb.) No 571/2009 has some bearing on the dispute in the present proceeding and since it was not made known to this Tribunal by the petitioner, such conduct on the part of petitioners now requires me conclude that in approaching this Tribunal, the petitioners never came with clean hands.

95. The respondents again claimed that in the notice dated 21-10-2009, there were only two matters to be discussed in the EOGM convened on 14-11-2009. More importantly, the notice did not indicate any possibility of discussion on any third item in the aforesaid EOGM, convened on 14.11.2009. However, despite there being no agenda on appointment of the petitioner No.1 in the resultant vacancy, caused for removal of the respondent No.5 as director of the company, in the said meeting, the petitioner NO.1 was appointed as one of the directors thereof.

96. Referring to section 284 (2) and section284 (5) of the Act of 1956, it has been submitted that just like removal of director from his office before expiry of his tenure/term, the appointment of the new director in the resultant vacancy, warrants wide circulation thereof amongst the shareholders of the company and same is done by the way of special notice. The directions in section 284 (2) and section284 (5) are held to be mandatory in a catena of decisions.

97. But, in the case in hand, as stated above, no special notice intimating appointment of the petitioner No.1 as director of the company was ever circulated amongst the shareholders of the company. The violation of mandates in above provisions of law firmly shows that there was an ulterior motive on the part of the petitioners in removing the respondent No.5 from the office of director and

MD of the company and such ulterior motive was nothing else but to gain the dominant role in running the affairs of the company.

98. I have analyzed such allegations in the light of the facts brought on record and found that it is true that a special notice is also required for appointment of a new director in place of the resultant vacancy caused for removal of the respondent No.5 before expiry of his term in the office of director of the company. But no such notice was ever circulated amongst the shareholders of the company as required under the law, more particularly Section 284(5) read with section 284 (2) of the Act of 1956.

99. It is worth noting here that during the course of arguments, the learned counsel appearing for the petitioner contended that the petitioner No.1 was not appointed on invoking the provisions of Section 284(5) of the Act of 1956. Rather, he was appointed under some other provisions of the Act, aforesaid. I have considered such submissions in the light of the statement made in the pleadings and also in the documents annexed therewith.

100. On perusal of those records, more particularly, Annexure – J to the petition, it is found that the petitioner No.1 was appointed as director of the company in the EOGM held on 14-11-2009-- not under any other provisions of law ------ but--- under the provision of Section 284(5) of the Act of 1956. Such disclosures again certain to extent shows that the petitioners too did not come to the Court with clean hands.

101 The respondents strenuously contended that the petitioner No.1 and 10 were employees of the company ----but--------- they were dismissed from services for their resorting to conduct as an employee of the company, which was against the interest of the company in general and against the shareholders in particular. Such an episode assumes great importance in ascertaining the bona fide of the petitioners in preferring the present petition since the materials on record firmly demonstrate that the petitioners, more particularly petitioner No.1 and 10, wanted to be directors/MD of the company.

102. The directors of the company occupy a fiduciary position in relation to management of the affairs of the company. In other words, directors are the trustees of the company and, therefore, they are to conduct themselves in such a way that trust, reposed on them, does not get eroded at any point of time. However, the petitioner No.1 and 10 despites being punished for their resorting to illegalities, as being employees of the company, aspired to be the director/MD of the company. Such conduct is unacceptable, more so, when they chose to withhold such vital information in the petition under consideration.

103. I have considered such allegations in the light of materials available on record and found that the respondents have produced before the Bench enough materials to show that they were employees of the company but, the company had dismissed them from services. Such dismissal order attains finality. Therefore, in my opinion, the petitioners were duty bound to disclose such episodes in their petition, since they made claim to the office of the director/MD of the company. Therefore, non-disclosure of such information is certainly one more testimony of the petitioners not coming to the

Bench with clean hands.

104. In view of what I have discussed herein before and what have emerged therefrom, I am of the pinion that in coming to the tribunal by the way of present petition seeking various reliefs, the petitioners, more particularly petitioner No. 1 and petitioner No.10 never came with clean hands. This question is accordingly decided.

(B)

105. The respondents have arduously contended that the allegations made in the petition does not disclose even a prima facie case for continuation of the proceeding in hand —much less— such allegations making out a case where the Court needs to conclude that the problems highlighted in the petition disclose a situation which not only justifies the winding up of the company on just and equitable consideration ---but also---- shows that such winding up would prejudicially affect the petitioners.

106. Such contention was, however, resolutely disputed by the petitioners alleging that they have documented enough materials on record to show that the BOD, piloted mainly by respondent No. 5, had misappropriated the PF fund and also evaded payment of taxes to the concerned authority over a long period of time which are prolific testimonies of respondents mismanaging the affairs of the respondent company. In support of such contention, the petitioners have relied on various newspaper reports which were annexed with the petition under consideration.

107. Now, let us see, which sides of the story is correct. On the perusal of record, it is found that the petitioners have heavily relied on the newspaper reports to bring home the allegation of misappropriation of PF Contribution and evasion of taxes. But it is a settled proposition of law that newspaper reports are secondary evidence and therefore, such newspaper reports are inadmissible in law unless such reports get graduated to the status of primary evidence.

108. It is not in dispute that the petitioners did make no effort to convert those secondary evidences to primary one. Nor did the petitioners produce any other material to justify non-payment of PF Contribution to the concerned authority or evasion of taxes. In other words, in order to substantiate the allegation of misappropriation of fund and evasion of taxes, the petitioners completely relied on newspaper reports which, as stated above, are found to be secondary evidence only and therefore, cannot laid the foundation of the allegations, aforementioned.

109. The respondent had also questioned the legality of the allegations aforesaid contending that they have already questioned the correctness of slapping of notice on the respondent company by the concerned department demanding VAT etc. from the former. In that regard, they have initiated a proceeding as well which are awaiting adjudication. Such assertions from the side of the respondents are not denied by the petitioners.

110. Since the challenging of the notice demanding taxes etc. from the respondent company has not been disputed, it can safely be concluded that the aforesaid contentions from the side of respondents are corrected and truthful. In the face of such revelation, it is too early to conclude that the respondents

had evaded the payment of taxes or that they had defalcated PF contribution. Such revelations, in turn, require me to conclude that the allegations of respondents misappropriating of PF contribution as well as evasion of taxes remain far from being established.

111. So situated, let us see how far other charges, hurled at the respondents to make out the case of oppression and mismanagement, stand substantiated in view of materials on record. Before one can address the above contention, it needs to be ascertained *if all the allegations in the petition are directed against the respondent No. 5 and none other.* Such a question arises because the respondents all along arduously contend that the allegations, incorporated in the petition, are directed against the respondent No. 5 and the respondent No. 5 only.

112. In order to address such a controversy, I find it necessary to have a look at the petition under consideration. A perusal of the same reveals that in their petition, the petitioners categorically contended that the respondent No. 5 and his cahoots had done series of illegalities/irregularities of enormous proportion in running the affairs of the company. A deeper and closer look at the petition also reveals that the companions of respondent No. 5, more particularly Sri Madhav Das, had allegedly extended all help and cooperation in committing alleged illegalities which resulted in oppression as well as mismanagement in running the affairs of the company.

113. The narration, recorded in various paragraph of the petition, more particularly, paragraph XXIX, XXX and XXXI would make such position clear. Therefore, the contention that all the allegations are only against the respondent No. 5, is not correct. For ready reference, paragraph XXXI is reproduced below: -

"xxxi. that the respondent No. 5, having mala fide intention and to deceive the other shareholders, resigned from the post of the Managing Director as reflected in the ROC records w.e.f 16/02/2011 and a stranger naming one Sri Madhab Das has been appointed as the Managing Director of the Company by a board Meeting dated 16/02/2011 and ROC records have been tempered showing forged issue of new shares without the knowledge of the other existing Shareholders of the Company. Sri Madhab Das, the stranger, forcible occupying the office of the Managing Director of the Company and Misusing Company's property and funds by illegal means for which he has no right in the company. Presently, Sri Madhab Das continuing the office of the Managing Director forcibly using goon and filing malicious petitions and illegal litigations including contempt of court before the courts against the new board of Directors having no jurisdiction to try company matter and that to only to harass the present Board of Directors, so that they might be out of the company's day-to-day affairs. The petitioners are not in a position to manage the affairs of the company smoothly due to the ongoing restraints and the company sustaining irreparable financial losses caused by the illegal acts of respondent No. 5 and Sri Madhab das. Further, respondent No. 5 is still continuing to be the Director in the Board of Directors of the Company and miss-using the company's funds and property by illegal means. Besides, news was published in "The Assam Tribunal" dated 24th May, 2011 stating the stranger naming Sri Madhab das to be the Managing Director of the company."

114. *But* then, one more question arises and such question arises for the fact that said Madhab Das has not been arrayed as one of the respondents although several serious allegations were hurled at him from the side of the petitioners. In fact, he was one of the authors of so many misdeeds, catalogued in the petition under consideration. Since he was not arrayed as party respondent, can he still be regarded as one of the respondents herein? My answer to such a query is an astounding "yes".

115. I have already found that when D. N. Singh, since deceased, was arrayed as R- 5, It is not in dispute that D. N. Singh resigned from the office of MD with effect from 16-02-2011 whereas; the present proceeding was filed 12-10-2011 which clearly shows that on the date of filing of the present proceeding, D.N. Singh was not the MD of the company. There is also no quarrel over the fact that said Sri Madhav Das was appointed as MD of the company with effect from 16-02-2011 and has been working as above even on the date of presentation of petition under consideration and beyond.

116. A perusal of the cause title of the petition again reveals that the MD of the respondent company was arrayed as R-4. When above disclosures are read together with various averments in the petition, more particularly, the averment made in Paragraph XXIX, XXX and XXXI of the petition, it would appear more than clear that the R-4, who is described as MD of the company, in the cause title of the petition, is none other than aforesaid Sri Madhav Das who was alleged to the author of most of the allegations in the petition as well as the documents annexed with the petition, the annexure ZB, ZF, ZG are in particular. Situation being such, it is not correct to say that all the allegations in the petition are directed only against the respondent No.5.

117. Even if we assume for the sake of argument for a moment that all the allegations in the petition were targeted at the respondent No. 5 who was MD of the company during most of the time under consideration--- yet then------- there are plethora of materials on record to conclude that R-5 as being the MD of the company ----conducted affairs of the company--- not for himself alone--- but ---for the other directors as well who were on the board during the time under consideration and therefore, the other directors of the BOD , which was headed by the respondent No. 5 are vicariously liable for the alleged illegal acts/conducts of the MD of the company who was admittedly the R-5 during the time relevant.

118. In this connection it would be apposite to understand the inter se relationship between the company, Board and MD. The position, status and authority of the MD qua company and BOD depend upon the authority which appoints him and so also the powers which were conferred on him at the time of appointment as such. Since section 2 (26) of the Act of 1956 speaks about mode of appointment of MD as well as his power, I find it necessary to have a look into the aforesaid provision of law.

For ready reference section 2(26) of the Act of 1956 is reproduced below: -

> *(26) "managing director" means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of directors or, by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called:*
>
> *Provided that the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within substantial powers of management:*

Provided further that a managing director of a company shall exercise his powers subject to the superintendence, control and direction of its Board of directors;"

119. I have found that section 2 (26) of the Act of 1956 clearly states that MD of the company is entrusted with substantial power of management to run the affairs of the company. However, such substantial power of management does not include the power to do administrative acts of a routine nature meaning thereby that the MD is entrusted with the duty of doing important and serious business in managing the affairs of the company.

120. Now, let us see if the charters of the respondent company, they being MOA and AOA, make any provision for appointment of MD of the company. On a perusal of the AOA, it is found that Article 62 of the AOA authorizes the BOD to appoint a director as MD of the company. Record reveals that the Board in exercise of such power, conferred on it under Article 62 appointed D.N. Singh as MD of the respondent company. Therefore, on perusal of the AOA in the light of materials on record, it is found that while the respondent company is the principal in relation to BOD and MD, the BOD and MD are its agent and sub-agent respectively.

121. It is a settled law that the principal is bound by the acts/conducts of the agent and sub-agent so long they are doing their duties in accordance with the terms of employment. In that view of the matter, the respondent company or for that matter, the BOD are also bound by the acts/conducts of MD on the application of principal -agent relationship to them and also in view of vast powers conferred on the MD under Section 2(26) --- unless and until --off course----they succeed in disowning those acts/conducts, which are attributed to the MD and which were found to be illegal and beyond the terms of their employment.

122. In our instant case, the other directors of the BOD, headed by D.N. Singh, had never questioned the alleged illegalities committed by R- 5. Quite interestingly, they supported each and every conduct of R-5 which is alleged to be illegal. That being the position, there cannot be any escape from the conclusion that all the members of the BOD, headed by R-5, are equally responsible for such irregularities/ illegalities allegedly committed by such a respondent in discharging the affairs of the company. In the teeth of such revelations, it needs to be concluded that the contention that all the allegations in the petition were directed only against the only R-5 is found to be totally untenable in law and on facts.

123. It is in those backdrops; let me consider if the other allegations, hurled at the respondents, could make out the charge of oppression and mismanagement in running the affairs of the company. In that connection, I find it necessary to ascertain if the petitioners are successful in establishing the allegations that the respondents had conducted the affairs of the company in violation of various laws holding the field as well as the mandates in MOA/AOA.

124. It may be stated here that the petitioners have claimed that in running the affairs of the company, the respondents had committed various illegalities/irregularities. Some of those illegalities are: (i) the respondents had increased the authorized capital of the company and also

issued further shares to outsiders in violation of mandates in MOA and AOA, (ii) They removed the petitioner No1 and 2 from the posts of director /MD without following the prescription of law, (iii) They deceitfully rectified the documents pertaining to ROC and (iv) The respondents fraudulently opened new account in the bank in the name of the company.

125. It may be noted here that the respondents did not deny the allegation that they had increased the authorized capital of the company on 16.09.2010—**or**—they had allotted further shares on 20.02.2010 and on 15.09.2010 **or** that they removed the petitioner No1 from the post of director /MD and the petitioner No.2 from the post of director of the company. They also did not dispute the rectification of the documents pertaining to ROC. It is also not their case that they did not open new account in the bank in the name of the company.

126. But they tried to justify each of such allegations contending that the various irregularities/illegalities of enormous proportion, committed by the petitioners, had forced the BOD headed by the R-5, to increase the authorized capital of the company or to allot further shares or to remove the petitioner No1 from the post of director /MD and the petitioner No. 2 from the office of director of the company. They also contended that under compulsion, they had to rectify the records pertaining to ROC or to open new account in the bank in the name of the company but all those acts were done strictly in accordance with the requirements of law.

127. In regard to removal of the petitioner No. 1 from the post of director and MD as well as the removal of the petitioner No.2 from the post of director of the company, it has been submitted by the respondents that the petitioners had removed the R-5 from the post of the director and MD of the company on the basis of resolution, adopted by the some of the shareholders of the company in the EOGM, held on 14.11.2009.

128. But such resolution was totally illegal and non-est in law since such a resolution to remove the R-5 from the post of director and MD of the company was adopted on 14.11.2009 in complete disregard to the lawful direction of the court of law requiring the petitioners not to make any discussion on the item No. 2 in the Notice dated 21.10.2009. Since the very removal of the R-5 from the office of the director and MD of the company was profoundly illegal and non -est in law, one can very well conclude that legally and technically, the R-5 continued to be the MD of the company even after 14.11.2009.

129. Since the R-5 continued to hold the office of the director and MD of the respondent company for all purposes even after 14.11.2009, one cannot but conclude that no casual vacancy ever occurred in the office of the director of the company on 14.11.2009 requiring the shareholders in the EOGM, to fill such post by the petitioner No. 1 immediately. Since the removal of the R-5 was found to be illegal and non-est in-law, all subsequent appointments including the appointment of P-1 as director of the company on 14.11.2009, his appointment as MD of the company on 25.11.2009 as well as the subsequent appointment of P-2 as director of the company were all illegal and equally non-est in law.

130. In that view of the matter, the removal of the petitioner No.1 from the post of the director as well as MD of the company on 02-03-2010 and the removal of the petitioner no. 2 from the post of director on 02-03-2010 are nothing more than mere formality. Such revelation--- according to the respondents---becomes a clear proof of the action of the respondents in removing the

petitioner No.1 from the office of the director on 02-03-2010 as well as the removal of the petitioner No.2 from the office of the director on 02-03-2010 not at all being illegal or contrary to law.

131. Even if one assumes for the sake of argument for a moment that a casual vacancy in the office of director of the company occurred on 14.11.2009 as alleged by the petitioners --, yet then – such appointment of petitioner No.1 as director of the respondent company on 14.11.2009 was bad and void in law –since--- such appointment was made in total disregard to the prescriptions in 284(2) and 284 (5) of the Act of 1956.

132. I have considered such submissions from the side of the respondents having regard to materials on record and found that it is true that the petitioners did remove the R- 5 from the office of the director and MD of the company under the resolution adopted on 14.11.2009 –although-- under the order dated 13.11.2009, rendered by civil court, in Misc. (Arb) No.571/2009, they were restrained from doing so. But then, question-- is --does such an illegal act on the part of the petitioners empower the respondents too to correct such illegalities on their own?

133. Before addressing the above query, it needs to be remembered that a party to a dispute cannot assume the role of a judge. He needs to leave such a dispute to the jurisdictional judicial authority for adjudication of the same in accordance with law -----instead of taking upon himself the duty of adjudicating such a matter-- inasmuch as ---such a course of action is fraught with danger of enormous size and dimension which could even throw the entire society to a great turmoil and chaos.

134. In the setting of the disputes herein, one would also do well to remember the time tested adage which proclaims that one who tries to correct one wrong with another wrong, in fact, unknowingly invites wrong with more devastation. However, unfortunately, the respondents were hell bent in repeating unfailingly what the adage, aforesaid explicitly forbids to do ----since --- instead of rushing to the authority concerned complaining such illegalities and also seeking appropriate relief there-from, the respondents took upon themselves the job of correcting the aforesaid alleged illegalities by adopting reverse resolutions on 02-03-2010 and on 02-03-2010 **which**, as stated above, are found to be as good or worse as the removal of R-5 from the office of the director and MD of the company on 14.11.2009 by the petitioners in violation of the court order.

135. Once it is found that the actions of the respondents in removing the petitioner No1 from the offices of the director and MD on 02-03-2010 and the petitioner No.2 from the office of the director on 02-03-2010 are illegal, there cannot be any escape from the conclusion that the correcting the records of ROC by sending fresh Form 32 in favor of the respondent No 5 from the side of the respondents is equally bad and unsustainable in law.

136. However, more and more materials on record relied behind the above conclusion of mine. In that connection, it may be stated that if one carefully reads the pleadings of the respondents, he would find that the R-5 got extremely upset and disturbed on receiving the requisition from the shareholders of the company seeking the convening of an EOGM to discuss his removal from the post of director and MD of the company and that is why he rushed to the court by way of an

application and also succeed in securing an order restraining the petitioners from making any discussion qua removal of the R-5 from the posts aforesaid .

137. Since the R-5 took an extra-ordinary step to question the calling of a EOGM by the majority shareholders of the company which considered to be bedrock of corporate democracy, he is duty bound to carry the disputes over the calling of EOGM on 14.11.2009 to their logical conclusions in order to vindicate his claim that everything was not hunky dory in calling EOGM from side of the petitioners on 14.11.2009. Unfortunately, the R-5 abandoned the aforesaid proceeding halfway as is evident from the order dated 01.03.2011 in Misc. (J)Case No.590/2009 (in Misc. (Arb) 571/2009). Such a conduct, in my opinion, makes two things absolutely clear.

138. First, the R-5 did not have a right cause in the aforesaid proceeding to pursue to the last which is why he discarded it midway. Secondly and more importantly, such conduct is also prolific testimony to the fact that R-5 approached the court by way of application aforementioned only to scuttle the democratic process of doing the business of the respondent company in accordance with prescriptions of law. Such revelations, in my opinion, to a great extent nullify the case of the respondents, structured on the claim that the resolution dated 14.11.2009----- being illegal and non-est in law---- gives no right whatsoever to P-1 and P-2 to hold their posts in the company even for a moment.

139. Perhaps, that is the reason as to why the Hon'ble High Court too did not take seriously the case of the respondents premised on taking resolution on item No 2 of the notice dated 21.10.2009 in complete disregard to the order of the court rendered on 13.11.2009 in Misc. (Arb) No.2009 under which the R-5 stood removed from the post of director and MD of the company ---- which is well evident from the judgment dated 09.05.2016 in Com. Appl.03/2014.The relevant part thereof is reproduced below: -

> *"In any case on withdrawal of the civil suit, the injunction order automatically stood vacated on 01.03.2011. Therefore, there was no bar at all for the Company Law Board to examine the grievance raised by the appellants in the company petition on merit."* (para 23)

140. It is worth noting here that following the decision of Hon'ble Apex Court in Life Insurance Corporation of India v. Escorts Ltd. AIR 1986 SC 1370, the learned CLB, Chennai, in case of N. Thirumurthy vs Sree Pavithra Steel (P) Ltd., reported in (2014) 123 SCL 70 (CLB) held that convening, holding and conducting a proposed extra ordinary general meeting cannot be restrained just because of the fact that the applicant may be removed from the directorship of the Company.

141. Such restrain, if allowed, would hit the very concept of the corporate democracy which is the guiding factor in running the affairs of the company. Sadly, in approaching the civil court by way of Mise (Arb.) 571/2009, the R-5 resorted to a conduct which is strongly condemned by the CLB in N. Thirumurthy (supra) which further demolishes the case of R-5 which was, as stated above, primarily structured on the alleged illegality in adopting the resolution dated 14.11.2009 in violation of the order of the court under which the R-5 stood removed from the posts aforesaid.

The Hon'ble Apex Court in Life Insurance Corporation of India (supra) held as follows: -

"Thus, we see that every shareholder of a company has the right subject to statutorily prescribed procedural and numerical requirements to call an EGM in accordance with the provisions of the Act, he cannot he restrained from calling a meeting and he is not bound to disclose the reasons for the resolutions proposed to be moved at the meeting nor are the reasons subject to judicial review.

The Life Insurance Corporation of India, as a shareholder of Escorts Ltd., has the same right as every shareholder to call an EGM of the company for the purpose of moving a resolution to remove some directors and appoint others in their place. The Life Insurance Corporation of India cannot be restrained from doing so nor is it bound to disclose its reasons for"

142. The above conclusion of mine draws more and more support, if one views the disputes under consideration from a still different angle. Our discussions hereinbefore, now, firmly show that the petitioner No.1 was appointed as director /MD and petitioner No. 2 was appointed as director of the company by a large section of shareholders of the company and therefore, rightly or wrongly, their appointments, as above, had the patronage of the majority of the shareholders who are held to be the real master as far as appointment/removal of directors of the company is concerned.

143. Therefore, before the removal of those office bearers of the company, at least a sincere attempt ought to have been made from the side of the respondents to associate such shareholders with the process of removal of those two petitioners from their posts. But there is nothing on record to show even remotely that respondents had ever made any effort whatsoever to show that they tried to get those shareholders associated with the process of removal of the P-1 and P-2 from their offices.

144. Instead, they felt secured taking shelter under the plea that since the very act of removing R-5 from the post of director and MD in violation of the order of the court is illegal and non-est in law, therefore, such a resolution was wholly incompetent to oust R-5 from the posts, he held on 14.11.2009 and consequently, all the appointments, subsequent to the removal of the R-5, are equally and not –est in law. Sadly, enough, such a plea is already held to be wholly unequal to the task of taking the wind out of the sail of petitioners. Our foregoing discussion makes such position absolutely clear.

145. Viewed from this angle, it would appear clear that in the removal of the P-1 and P-2 from their posts, the respondents paid no respect whatsoever to the laws/rules and procedures dealing with appointment and removal of the directors and therefore, such removals are found to be totally untenable in law. The removal of the P-1 and P-2, in the facts and circumstances of the case in hand, further demonstrate that they were so removed from their posts with the sole object of gaining control in the management of the company.

146. In a long chain of judgments including the judgment in Arun Kumar Mehta Vs Ganesh Commercial Co. Ltd. (2006) 134 Com Cases 500, it has also been held that removal of the director in violation of Rules and procedures framed in that regard tantamount to denial of natural justice and, therefore, such removal is to be declared null and void. Further, when such removal is made with the object of gaining control in the management, such removal became proof of oppression being perpetuated upon the persons targeted by such removal. In that connection, one may look into the decision in ***Ms. Varshaben S. Trivedi v. Shree Sadguru Switch Gears (P) Ltd. (2013) 116 CLA 153 (CLB).***

147. Now, let us see how far the alleged illegal increase of authorized share Capital of the Company as well as alleged illegal issuance of fresh shares on 20-02-2010 and 15-09-2010 are found tenable in law and on facts. The respondents did not dispute that they increased the authorized share Capital Company. Nor did they deny the issuance of fresh shares to some existing shareholders as well as to some complete outsiders on the dates aforesaid. But they strenuously argued that the various wrongdoings and misdeeds on the part of the petitioners had forced the respondents to do the aforesaid deeds.

148. In support of their contention that the respondents were forced to increase authorized share capital of the company and were also forced to issue fresh shares on the dates, mentioned above, it has been painstakingly canvassed before me that immediately after illegally usurping the offices of MD and director of the company, the petitioners forced the banker of the company to freeze all the accounts in the name of the company in the bank.

149. Such sudden and unexpected freezing of the accounts of the company in the bank threw the company to a tizzy making it almost impossible for the BOD with the respondent No.5 at the top to carry forward even pretty day to day business. In such morbid situations, said BOD was forced to increase authorized share capital of the company and also to issue fresh shares on the dates, mentioned above. Therefore, one cannot find fault for increasing the authorized share capital of the company and also for issuance of fresh shares on 20.02.2010 and 15.09.2010.

150. Unfortunately, such contentions advanced from the side of the respondents carry no weight whosoever. This is because of the fact that had the respondent company been in such dire and dreadful situation, it ought to have run for cover and knock the doors of the concerned authority, legally competent to address the grievances of the respondents, occasioned by sudden and abrupt freeze of the accounts in the name of the company.

151. Surprisingly enough, instead of rushing to the appropriate authority, they took the extreme steps in the form of increase of authorized capital of the company and also to issue fresh shares to the persons some of whom were strangers to the company on the dates of issuance of such shares although some of those fortunate allottees were existing shareholders too. Such revelations, however, become tale tell testimonies of increasing the authorized capital of the company and so also the issuance of further shares on 20.02.2010 and 15.09.2010 most illegally and most unlawfully.

152. The claim of increase of authorized share capital of the company or the issuance of fresh shares on 20.02.2010 and 15.09.2010 are found unsustainable for another very valid reason too. Since the respondents persistently claimed that the company fell into a death trap following the freezing of the all the accounts in the name of the company, it became a bounden duty on the part of the respondents to establish such dire financial position of the company by bringing on record the relevant financial documents of the company during the period under consideration.

153. But then, the respondents did not do anything in that direction to establish its financial position during the time under consideration. Their failure to do so, and that too, without assigning any reason therefor is fatal-----more so ----when it was the specific and explicit case

of the respondents that they had to increase the authorized share capital of the company and also to issue fresh shares on 20.02.2010 and 15.09.2010 reeling under enormous financial difficulties.

154. In the teeth of such revelations, I have no other option but to conclude that the contention that BOD--- with respondent No. 5 in the helm of affairs -----had to increase the authorized capital of the company and also to issue fresh shares on 20.20.2010 and 15.09.2010 on facing some problems of insurmountable nature ---caused by none other than petitioners---- is a story which glaringly lacks in substance.

155. The petitioners also claimed that issuances of shares on 20.02.2010 and 15.09.2010 are illegal since shares were issued on those days in total disregard to the prescriptions in Article 28 of the AOA. So situated, let us see if there was violation of Article 28 of the AOA in issuance of further shares on the dates stated above. The Article 28 of the AOA runs as follows: -

> *"Save as provided in the Articles or unless all the members for the time being of the Company agree, no shares shall be transferred or issued to a person who is not a member of the Company so long as a member is willing to purchase the same at a fair value"*

156. I have already found that issuance of shares on 20.02.2010 as well as the issuance shares on 15.09.2010 and so also issuance of shares to some outsiders on the dates aforesaid are not in dispute. In other words, the allegation of issuance of shares to some outsiders in violation of mandate in Article 28 of the AOA remained un-rebutted.

157. But then, the respondents claimed that over the years, it becomes a habit for the company to issue shares to the outsiders, and that too, without the concurrence of all the existence shareholders. The fact that the petitioners themselves were admitted as the shareholders of the Company without following the prescriptions in Article 28 makes such a conclusion inevitable. Such practice, according to respondents, has diluted the conditions, enumerated in the Article 28 of the AOA, to the extent of securing the consents of all the existing shareholders before issuance of shares to the outsiders.

158. The respondents also contended that since the petitioners themselves became the shareholders of the Company only on violating the provisions of aforesaid Articles, therefore, now, it does not lie in their mouth to contend that the issuance of shares in violation of Article 28 is illegal and therefore, same is unsustainable in law. This is because of the fact that a person cannot be allowed to approbate one thing at one stage and re-approbate the same thing at another stage.

159. It is true that a person cannot be allowed to approbate and re-approbate same thing at different points of time --but then--- such a principle has no application to the problem, now, we are seized with--- since---- the question here is not what had been the practice of the company in issuance of shares but the question is whether MOA and AOA can be flouted. In that connection, I also find it necessary to look into provisions of Section 36 of the Act of 1956 which has huge bearing in understanding the dispute under consideration and also in finding a solution thereof. For ready reference, Section 36 of the Act of 1956 is reproduced below: -

> *"36. EFFECT OF MEMORANDUM AND ARTICLES (1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles. (2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company."*

160. On considering the law, laid down in section 36 from various angles, it is found that section 36 makes the MOA and AOA----- two very fundamental and basic documents of the company ----to be sacrosanct and inviolable under any circumstances. Being so, claim of the respondents that long practice of allowing someone to be shareholder of the company without following the prescription in Article 28 makes a clear dent in the requirement specified in Article---- - is found to be a claim wholly without any merit.

161. It is worth remembering here that an act or conduct which is otherwise illegal or unlawful cannot become lawful and legitimate only because of the fact that such illegal act or conduct had been in vague over a long period of time. In that connection it is worth noting what the Hon'ble Allahabad High Court had said in the case of Pradeep Kumar Arora and Anr. Vs State of U. P. and Ors. reported in 2005 (5) AWC4731All, 2005 (2) ESC809(All). For ready reference, the relevant part of the judgment is reproduced below: -

> *"71. ..... Even if, we have passed a wrong Order, we have a right to rectify for mistake, but no litigant has a right to blackmail the Court and therefore, the Court is not bound to pass wrong Order again and again."*

162. Further, the plea of the respondents that the petitioners cannot be allowed to question the issuance of shares in violation of Article 28 of the AOA on 20.02.2010 and 15.09.2010---- since they too became shareholders of the company only on violating the prescriptions in Article 28 of the AOA---- needs to be rejected for reasons more than one. It is true that the petitioners were allowed to become the shareholders of the company without following the mandate of the Article 28.

163. But then, record reveals that such allotments were made in distant past. The various charts, annexed with the replies from the side of the respondents, make it very clear. However, till date, no one-- who could have questioned such allotments ---had initiated any proceeding questioning the allotment of shares to the petitioners in violation of mandate in Article 28. Such a revelation only serves to show that the persons who were entitled to question such allotments of shares to the petitioners chose not to rake up such issue in time.

164. Rather, they chose to sleep over the same for a pretty long period of time. Therefore, such a matter cannot be allowed to be agitated after the elapse of such a long period, and that too, in a proceeding which was initiated--- not by the respondents ---but---- by the petitioners instead. This is, in my opinion, another compelling reason as to why challenge to the issuance of shares to petitioners, made in distant past, is required to be turned down.

165. Our foregoing discussions now very firmly reveal that in conducting the affairs of the company, the respondents, more particularly the BOD, headed by the R-5, had ruthlessly violated both the fundamental documents of the company, such documents, being MOA and AOA. *In ABP*

(P) Ltd. vs. United News India (2008) 142 Com Cases 688, it has been held that issuance of shares in violation of the AOA itself is an act of oppression.

166. In *S.M. Ramakrishna Rao Vs Bangalore Race Club Ltd (1970)40 Com Case 674 (Mys)*, it has also been held that violation of MOA too is an act of mismanagement. Such revelations leave no manner of doubt that the allegation from the side of the petitioners that the affairs of the company are being run in a manner which is quite burdensome, harsh and wrongful has been established beyond any shadow of doubt.

167. One may note here that ordinarily; the company needs to issue new shares to the shareholders in proportion to their existing shareholdings. Now, let me see if such requirements were followed in allotment of shares on the dates aforementioned. In that connection, I find it necessary to look at the chart at Annexure ZC which gives comparative statements as to the shareholdings of shareholders /persons as on 14-11-2009, 20-02-2010 and 15-09-2010.

168. For ready reference, the chart, the authenticity of which has been not questioned by the respondents, is reproduced below: -

Sl. No.	Name(s) of Shareholders	Shares held as on 14.11.2009	ISSUED DURING PENDENCY OF Misc. (Arb.) Case No.571/09		Total Nos. of Shares held
			Share held as on 20.02.2010	Share held as on 15.09.2010	
01	Deep Narayan Singh	**220**	**200**	**1600**	**2020**
02	Madhab Das	**20**	**200**	**500**	**720**
03	**Rajendra Nath Rajbongshi**	**75**	**30**	**100**	**205**
04	**Anup Kumar Deka**	**30**	**50**	**150**	**230**
05	Bimal Sarma	**50**	**200**	**150**	**400**
06	Tapan Chandra Bhuyan	20	100	300	420
07	**Ashim Sarma**	**NIL**	**50**	**200**	**250**
08	Rajani Das	75	50	100	275
09	**Rabin Kumar Das**	**NIL**	**50**	**200**	**250**
10	Kanak Das	20	100	100	220
11	Ajit Deka	75	100	500	675
12	**Tilak Chandra Das**	**Nil**	**50**	**NIL**	**50**
13	**Munindra Haloi**	**NIL**	**20**	**50**	**70**
14	**Dipak Kalita**	**NIL**	**20**	**50**	**70**
15	Sarat Chandra Kalita	05	Nil	10	15
16	**Pratul Bhuyan**	**Nil**	**100**	**100**	**200**
17	Pranab Das	70	Nil	300	370
18	Kalyan Kumar Das	150	100	100	350
19	**Amiya Kalita**	**Nil**	**20**	**Nil**	**20**
20	Joydeep Bhuyan	10	15	Nil	25

21	**Tilak Deka**	**Nil**	**Nil**	**500**	**500**
22	**Dinesh Das**	**Nil**	**Nil**	**250**	**250**
		820	1445	5260	7535

169. A bare perusal of the chart above, unmistakably demonstrates how ruthlessly the requirements of law as well as the prescription in Article 28 of the AOA were thrown to the wind in allotment of new shares to some existing shareholders as well as to outsiders on 20-02-2010 and on 15-09-2010. Such unbelievably partisan allotments of new shares to some existing shareholders and outsiders on the aforesaid dates speak nothing else but company being run in accordance with the whims and fancies of BOD which was piloted by the respondent No. 5.

170. Such tales once again become more and more proof to the fact that the main motive of the respondents in increasing the authorized capital of the company as well as in allotting new shares to some existing shareholders and new persons on 20.02.2010 and 15.09.2010, was to gain majority, albeit, illegally. *In Archana Gupta vs. Suntech Infratech Pvt. Ltd., reported in (2012) 106 CLA 283 (CLB),* it was held that when main object of allotment of shares was to gain majority, such allotment unmistakably constitutes a clear case of oppression.

171. The conducts of the respondents in running the affairs of the respondent company is found untenable for some other reasons as well. In that connection, one may look in to several letters, written by Govt. of Assam (which held 25% shareholding in the company before the company besets by a series of disputes aforesaid), more particularly the letter dated 11.05.2011 and letter dated 31-03-2011. Said letters show the degree of oppression and mismanagement committed by the respondents in running the affairs of the respondent company. For ready reference, the letter dated 11-05-2011 is reproduced below:

"GOVERNMNENT OF ASSAM
OFFICE OF THE COMMISIONER OF INDUSTRIES & COMMERCE, ASSAM
UDYOG BHAWAN: GUWAHATI-21

Dated Guwahati the 11th May/2011

No. CI &C(V)/191/2010/173

To:
The Principal Secretary to the Govt. Assam
Industries & Commerce Department, Dispur

Sub: Filing of Form No. 32

Ref: (1) My letter No. CI &C(V)/191/2010/17332 dt. 31.3.2011

(2) Letter No. 70/3634 dated 6.4.2011

Sir,

With reference to the above mentioned subject I would like to inform you that I had requested the Managing Director of M/S Assam Chemical & Pharmaceutical Pvt. Ltd. to file Form No.32 as I have

been designated as a Govt. Director of the Industry Department, Govt. of Assam which is holding 600 shares (a copy of the letter is enclosed)

However, the Director vide their letter No. 70/3634 dated 6.4.2011 has informed that the State Govt.'s 600 equity shares about 6 % of the total shares of 9787 and hence filing of Form No. 32 does not arise.(copy of the letter enclosed) The means of increase of total shares from 3072 to 9787 thereby reducing the Govt. share from 25% to 6% is only known to the Company as I have not been invited no aware of any such meeting where the shares have been increased which is in contravention of the Article of Association as well as the Companies Act, 1956. As per the provisions of the Article of Association of M/s Assam Chemical & Pharmaceutical Pvt. Ltd., clause-53 page-15, the shareholding of the Govt. Nominee Director is not at all binding to its percentage. As stated in the aforesaid letter presently, the Industry Department, Govt. of Assam is holding 6 % shares in the said company. But, all of a sudden, without the knowledge of the Govt. Nominee Director, the said shareholding is reduced to 6%.

Furthermore, under no circumstances the existing shareholdings of the Industry Department, Govt. of Assam cannot be reduced from 20% to ^% without the consent/knowledge of the Govt. Nominee Director. As such, the Managing Director of M/s Assam Chemical & Pharmaceutical Pvt. Ltd. may be directed to regularize the filing of FOR<-32 in the name of Sri Bipul Das as Govt. nominee.

Yours faithfully,
(BIPUL DAS)
Joint Director (Extn)
O/O the Commissioner of Industries & Commerce,
Assam, Guwahati-21"

172. However, the respondents claimed that such letters cannot be looked into in the present proceeding –since-- state of Assam is not a party in the proceeding under consideration. However, such an argument is liable to be rejected being found unsustainable in law. It is true that the Govt. of Assam is not a party to this proceeding. But then, there are enough materials on record to show that the Govt. of Assam, being the shareholder, of the company, took active interest in the affairs of company and also demanded correction of some of the alleged illegalities, committed by the management, headed by the R-5 in running the affairs of the company.

173. Further, one must not be oblivious to the fact that the respondents did not dispute the fact that the State of Assam was holding 20% shareholding in the company till the outbreak of the disputes under consideration. There is no quarrel over the fact that the shareholding of the State of Assam was reduced to 6% after the allotments of shares on 20.02.2010 and on 15.09.210. However, the respondents did not find it necessary to bring on record something to show that there was no wrong whatsoever in reducing the shareholding of the state of Assam from 20% to 6% on 15.09.2010 – although--- the petitioners all along claimed that such lowering in the shareholding of State of Assam was done in profound violation of the prescription of law and mandates in MOA and AOA and that such illegalities were done only with the object of illegally gaining the control of the management of the company.

174. In view of such revelations, I feel inclined to hold that despite state of Assam not being a party to this proceeding, the letters aforesaid cannot be ignored—since-the facts recorded in such letters are found to be in tandem with the allegations incorporated in the company petition --and – since-- every bit of information therein has huge bearing in ascertaining the allegations which were hurled at the respondents.

175. Resultantly, the letters aforesaid further fortify my view that the shareholding of State of Assam or for that matter, the shareholdings of the petitioners were reduced in profound violation of the

prescription of law and mandates in MOA and AOA, and all those were done only with the object of illegally gaining the control of the management of the company.

176. In view of discussions, made herein before, I have found reasons to decide the Issue No.8 in negative and against the respondents and issue No 9 in affirmative and in favour of the petitioners which I accordingly do.

Whether the present proceeding also suffers from several serious legal infirmities as alleged by the respondents?

(a)

177. The respondents alleged that the proceeding in hand suffers from several serious legal infirmities which render the entire proceeding under consideration untenable in law. All those alleged infirmities were alluded to hereinbefore. Since the respondents have questioned the maintainability of present proceeding on various grounds, I propose to consider such allegations one after another and the allegation that this proceeding is premised on past and past actions alone which cannot provide the fulcrum of a proceeding under Section 397/398 is first taken up for consideration.

178. The respondents strenuously argued that the allegations, incorporated in the petition under consideration took place well before 2010 but the instant proceeding was filed only on 12.10.2011. More importantly, all those allegations in the petition are past acts or actions without having any continuous effect and, therefore, in terms of law laid down in Section 397/398, the past conducts/acts cannot be made the basis of a proceeding under section 397/398 of the Act of 1956.

179. Such contention was disputed by the learned counsel for the petitioners who claim that though the alleged illegal acts/conducts, incorporated in the petition occurred prior to 2010 -----yet ---------almost all those alleged illegal acts carry continuing effect and as such, the argument to the effect that all the allegations in the petition are nothing but stale claims are patently incorrect. In that connection, the issuances of shares on 20.02.2010 and 15.09.2010 in total violation of Article 28 of the AOA are referred to.

180. On considering the submissions, advanced on this score, I have found that the contention from the side of the respondents that the present proceeding is based on past acts and past acts alone is not correct and true. One may note here that CLB has consistently taken the view that in matter of illegal allotment of shares, a single act carries continuing effect. This is because of the fact that the shareholder, aggrieved, continues to suffer from illegal allotment of shares till such wrong is rectified.

181. Since in our case in hand, the petitioners have established without any shadow of doubt that the issuances of shares on 20.02.2010 as well as on 15.09.2010 were done in total violation of the mandate in Article 28 of the AOA, in view of the law laid down in ABI (P) Ltd. (supra), it needs to be concluded that this proceeding is not bad for being based on all stale and past claims as alleged by the respondents.

182. Further, I have also found that the authorized capital of the company was increased from Rs.5 lakhs to Rs.10 lakhs on 16.09.2010 in violation of the mandates in MOA and AOA. Since the issuance of the shares in violation of the AOA tantamounts to oppression with continuing effect, on the same analogy, it needs to be concluded that the increase of authorized capital in violation of commands in the MOA is equally an oppressive act with continuing effect. Such revelation further fortifies my view that the present proceeding cannot be said to be based on stale and past acts/actions

(b)

183. The learned counsel/legal representatives appearing for the respondents categorically claim that relief under Section 402 of the Act of 1956 cannot be made available to the petitioners unless he establishes the three conditions, specified in Section 397 of the Act of 1956. The conditions so referred to in Section 397 are: -

> *i) The petitioner must establish that the affairs of the company are being conducted in a manner prejudicial to the public interest or in a manner oppressive to any member or members,*
>
> *ii) The petitioner must also show that the affairs of the company are being conducted in such a way that the winding up of the same is the only solution.*
>
> *iii) The petitioner must also establish that winding up of the company would affect adversely the petitioner.*

184. According to the respondents, the petitioners had completely failed to make out those conditions, so specified in section 397 in the case under consideration. However, such contentions, on the part of respondents, were disputed by the learned counsel appearing for the petitioners arguing that there are enough materials on the record which overwhelmingly demonstrate that all the requirements of section 397 of the Act stands fulfilled in letter and spirit in the present proceeding.

185. I have considered such submissions having regard to the materials on record as well as laws holding the field. On making such an exercise, it is found that the materials produced from the side of petitioners have empathetically established that the subject matters herein are the disputes between the two sets of directors--- or--- for that matter ---between two sets of shareholders.

186. But then, disputes, aforesaid, are so damaging and harmful that such disputes have dragged again and again two sets of directors ----nay ---- two sets of shareholders or for that matter, the company itself to various courts / tribunals since the eruption of such disputes in 2009 which, in turn, threatened to bring the company itself to a grinding halt. Situations being such, it needs to be concluded that all the conditions, so, enumerated in section 397, necessary for initiation/continuance of a proceeding u/s 397, stand fully established.

187. In the case of Needle Industries (India) Ltd. (supra), the Hon'ble Supreme Court held that in a proceeding under section 397 of the Act of 1956, the learned CLB has power to grant relief, even if, the oppression is not made out. However, the discussions which I have indulged in hereinbefore unmistakably evince that the petitioners have proved oppression and mismanagement in running the affairs of the company under consideration.

(c)

188. Referring to the provisions in the Specific Reliefs Act, it has been submitted on behalf of the respondents that in a proceeding U/s 397/398, it is the bounden duty of the petitioners to describe appropriately and accurately the reliefs, sought for, in a proceeding. Unless the reliefs, sought for, are accurately and appropriately described in the petition, the Bench may refuse to grant any relief --even if-- the petitioners succeed in showing some illegalities having been committed by the respondents in running the affairs of the company during the period under consideration.

189. In support of such contention, it has been submitted that the reliefs, prayed for in the petition under consideration are so unclear, so indistinct and so vague that it would not be possible for the Bench to grant any relief there under --even if--- this Bench-- for one reason or other------ wants to extend some reliefs to the petitioners in this proceeding. This shortcoming alone --- in the facts and circumstances of the proceeding in hand--- now--- requires this Bench to reject the entire petition --- argues Mr. A.K. Roy, the learned legal representative appearing for the respondent Nos.3 & 4.

190. The respondents have found some other fault in seeking reliefs in the proceeding in hand. In that regard, it is being pointed out that if one reads the cause title of the present proceeding, he would find that the proceeding under consideration is a proceeding only under section 397/398 of the Act, 1956. The fact that the petitioners had paid fees only in respect of the relief under section 397/398 of the Act of 1956 makes such a position quite clear.

191. However, when one looks at the reliefs, sought for, the relief No.1 in particular, he would also find that though the cause title of the petition did not give any inkling about it being a petition under section U/s 111 of the Act –yet---the petitioners had prayed, of course, quite vaguely a relief which can be made available only in a proceeding under section 111 of the Act of 1956---and that too-- when the petitioners thereto had paid the required fees there-for which is, unfortunately, not the case in the present proceeding. This is one more reason as to why the present petition needs to be over thrown.

192. Before addressing aforesaid allegations, I find it necessary to have a look at the reliefs, sought for, in the present proceeding. On considering the reliefs, sought for, in the present petition alongside the various averments, made in different parts of the petition, including the cause title thereof, it is found that it is true that there are some infirmities in the petition in describing the provisions of law under which the present petition was filed. It is equally true that there are some shortcomings in describing the reliefs, sought for, in the proceeding under consideration.

193. However, a deeper and closer scrutiny of the petition in the light of statements, made in documents, annexed with the petition, would, also reveal that the present petition is, in fact, a petition under Section 397/398 read with section 111 of the Act of 1956. Such a perusal of the petition again shows that the petitioners herein have also prayed for reliefs not only under Section 397/398 but also under Section 111 of the Act of 1956. Therefore, the allegation that the present proceeding is liable to be dismissed allegedly for suffering from the defects aforesaid cannot be upheld.

194. It is worth noting that in a catena of judgments, various courts of the country including the Hon'ble Apex Court repeatedly held that a proceeding cannot be dismissed only for failure of the petitioner to quote/misquote the provision of law in the petition. Similarly, such a proceeding cannot be rejected only for the inability of the petitioner to seek appropriate relief in such a petition. If necessary,

the court would rise to the occasion and would mould the relief (s) depending on the demand of the situations.

195. Such decisions were founded on the principle that the technicalities of law must not be allowed to cost the cause of justice-- provided ---the proceeding is otherwise tenable in law as well as on facts. Since the petitioners have successfully proved the allegations of oppression and mismanagement in the present proceeding, the above infirmities in describing the reliefs, sought for in the present proceeding, in my opinion, cannot be allowed to overthrow the proceeding under consideration.

(d)

196. The respondents had attacked the petition under consideration alleging that the present proceeding is not maintainable in view of pendency of Title Suit No.302 of 2010, now, pending before the Civil Court at Guwahati and such an argument was founded on the contention that the subject matters in the suit before the Civil Court and the subject matters in the present proceeding are fundamentally one and same. However, said argument was strongly disputed by the petitioners alleging that matters in dispute in the present proceeding and matters in dispute in the suit before the Civil Court are constitutionally different. Being so, said civil suit cannot pose any threat to the maintainability of present proceeding.

197. Now, let us see whose argument carries conviction. It may be stated here that on being removed from the Office of the director and MD of the company, the R-5 had approached Civil Court by way of T.S.No.04/2010 seeking, amongst other things, a decree declaring the resolution dated 14.11.2009 under which the R-5 stood removed from the Offices aforesaid was null and void. In that suit, respondent company was the only defendant. In due course, said suit was decreed on admission vide judgment and decree dated 26.10.2010.

198. Subsequently, the petitioner Nos.1 & 7 instituted another suit questioning the legality/propriety of the judgment and decree rendered in T.S.No.04/2010 alleging that the decree in T.S.No.04/2010 was a nullity in law since said decree was rendered in complete violation of the various rules and procedures holding the field. Equally importantly, such decree was rendered in violation of the principle of natural justice too. Such a suit was registered as T.S.No.302/2010 and now awaits adjudication.

199. According to the respondents, the very basis of the present proceeding is the resolution, adopted in EOGM held on 14.11.2009 under which the R-5 was removed from the post of director and MD of the company and petitioner No.1 was appointed as Director of the company in place of R-5. But then, the resolution dated 14.11.2009 too, to a great extent forms the subject matter of T.S.No.302/2010 as well. Therefore, this Bench must not engage itself to adjudicate the matter which is also subject matter of Civil Court, more so, when such a suit was instituted well before the institution of present proceeding.

200. The above being the claims and counter claims, let us first see if the subject matter in the present proceeding and the subject matter in T.S.No.302/2010 are one and the same. My desire to find a reply to the query above caused me to go through the petition under consideration which, in turn, reveals that in the petition, the petitioners had alleged that R-5 in league with his cahoots committed a series of serious irregularities and illegalities in running the affairs of the company.

201. Such illegalities and irregularities range from evasion of tax, defalcation of company's contribution to the Provident Fund authorities—to-- unauthorized increase of authorized capital of the company, from unauthorized issuance of shares ---to ---removal of Directors/Managing Director of the company, from fabrication of false documents to facilitate the illegal occupation of the various posts of the company by respondent No.5 and his associates etc. But then, the subject matter before the Civil Court is whether the judgment and decree in T.S.No.04/2010 was obtained by R-5 on playing fraud on the court.

202. Though the resolution dated 14.11.2009 in some way or other had some connection with the dispute in T.S.No.302/2010 –yet-- only for such connection of resolution dated 14.11.2009 with the T.S.No.302/2010, it cannot be said that the dispute under consideration before this Bench in this proceeding and dispute before the Civil Court in T.S.No.302/2010 are one and same. In other words, despite some matters in both those proceeding being common, it cannot be said subject matters in both the proceeding are very identical. Being so, I have no difficulty in rejecting the allegation that present proceeding is not maintainable in view of pendency of T.S.No.302/2010.

203. It may be stated here that the reliefs, sought for, in the present proceeding, are of such nature that this Bench alone -- to the exclusion of all other judicial authorities--- --could grant such reliefs on invoking the power, conferred on it under Section 402 of the Act of 1956, But then, the Civil Court is wholly incompetent to grant such reliefs in the suit pending before it. Such revelation is one more proof of T.S.No.302/2010 having no bearing on the maintainability of the proceeding under consideration.

204. The question whether the matter before the CLB in a proceeding under Section 397/398 and the matter before the Civil Court can be one and same, and if so, whether the proceeding before the CLB is required to be stayed had come up for consideration in M.S.D. Chandrasekar Raja Vs. M/s. Jayabharath Textiles Pvt. Ltd. and M.S.D.C. Radha Ramanan, reported in [2013]181CompCas472(Mad). On considering the various laws holding the field, Hon'ble Madras High Court came to the conclusions which are as follows: -

> *"74. A careful perusal of the parties who are before the Company Law Board as well as the Civil Court and a comparison of the reliefs sought both before the Civil Court and before the Company Law Board would show that some of the reliefs sought before both forums, as between the same parties, overlap a little. For instance, before the Civil Court, the son is seeking a partition, apart from other reliefs. Before the Company Law Board, the father is seeking a partition of the land, building and machinery in the company. Therefore, on the surface of it, it may appear that the parties are seeking identical reliefs before different forums.*
>
> *75. But, I cannot lose sight of one important thing. The power of the Company Law Board under Sections 397 and 398, are very wide. The reliefs that would be granted by the Company Law Board under Section 402 of the Companies Act, 1956, are very wide. As a matter of fact, what a Civil Court could do after a very long journey in the form of a preliminary decree for partition, a final decree and the actual division of properties, is something that the Company Law Board cannot do. But, what the Company Law Board can do under Section 402, is something that may even put an end to the civil dispute, on completely different terms. For instance, the Company Law Board can always pass an order giving an exit option to any one of the two warring parties, namely, the father or the son. In such an event, at least the company will not be put to any more dispute or hardship. The just and equitable clause contained in Section 402(g) is too wide to find a solution to the long dispute that the father and son have*

had for more than a decade. This will at least alleviate the sufferings of the company, if not the sufferings of the individuals behind the company. Once this is done, at least a portion of the dispute pending before the Civil Court will get terminated and a possible solution for the resolution of the civil dispute may appear in the distant horizon.

76. If looked at from the above angle, it would be clear that the issues directly and substantially arising for consideration before both forums cannot be said to be the same. As a matter of fact, the whole purpose of Sections 397 and 398 read with Section 402 is to put an end to acts of oppression and mismanagement, so that the smooth running of the company is ensured. The purpose of Section 402 is not to put an end to the dispute between individuals, but to keep the company insulated from such individual disputes. The focus of the Company Law Board under Section 402 is on the smooth running of the company and the provision of a protective gear to the company, to save it from the onslaught of individuals fighting among themselves. Therefore, the issues arising directly and substantially before the Civil Court and the Company Law Board cannot be said to be the same, so as to warrant a stay of the proceedings.

205. The above decision of Hon'ble Madras High Court in M.S.D. Chandrasekar Raja (supra) leaves no manner of doubt that the present proceeding is maintainable despite pendency of a title suit before the Civil Court and in spite of some matters herein is incidentally connected with matter before the Civil Court in T.S.No.302/2010.

(e)

206. The respondents urged the Bench to dismiss the company petition alleging that the present proceeding cannot be allowed to continue after the death of R-5 who admittedly died during the pendency of the present proceeding, more so, when such facts were within the knowledge of the petitioners. Since the petitioners did not take any step in time to substitute the R-5 with his legal representative(s), the present petition stood abated on the expiry of the period, so prescribed under the law for bringing the LRs of the deceased respondents on record.

207. Such contentions were opposed to by the petitioners alleging that argument on this score was structured more on surmise than on law ----since ---neither the facts on record nor the law holding the field supports the arguments, so advanced from the side of respondents. Let us see how far above contention from the side of respondents is found tenable in view of facts on records and law holding the field. But before addressing such a question, we are to ascertain if all the allegations in the present proceeding are only against R-5.

208. It is found evident from my foregoing discussion that the contention to the effect that all the allegations in the present proceeding, are directed against the R-5 and R-5 only, and none else, has already been scrutinized in great detail and it was found that such a contention was far from the truth and therefore, said contention deserves no further reiteration here. Suffice it to say that the allegations herein are directed against other persons as well who have been facing trial in the present proceeding.

209. So situated, let us see if on the death of respondent No.5, the present proceeding stood abated as alleged by the respondents. Such a question arose before the Hon'ble Allahabad High Court *in the case of J.K. Investment Trust Ltd. and others Vs. Muir Mills Company Ltd. and*

others reported in AIR 1961AL 1413. In such a proceeding, a petition under Section 397/398 of the Companies Act 1956 was filed against the Company and 7 others seeking various reliefs including removal of some directors from their office. Respondent No.5 therein, however, died during the pendency of the proceeding.

210. Thereafter, a petition was filed for bringing on record as many as 5 (five) persons who are said to be personal heirs and legal representatives of the respondent No.5 therein. Such application was opposed to by the proposed heirs and they did so mainly on the ground that cause of action giving rise to the petition did not survive on the death of deceased predecessor. Therefore, there is no question of heirs of respondent No.5 being impleaded as party respondents in the aforesaid proceeding. Being faced with such situation, the Hon'ble Allahabad High Court framed as many as 3 questions one of which runs as follows: -

> "Whether in a proceeding like the present instituted under Section 397 and 398, it is permissible to implead the hairs of deceased Director and proceed against them".

211. Such as question was answered by the Hon'ble High Court in the following manner: -

> *"7. It will be noticed that the intention of the Legislature in enacting the sub-section was to arm the Court with full powers if it was of opinion that the situation mentioned in Sub-section (1) of Section 398 had arisen. But the powers so widely conferred could be utilized only to bring to an end the situation which had already arisen or to prevent the matter complained! of or apprehended continuing in future. If the section stood alone it could not be possible under its provisions to enforce some past liability of a director which may have arisen on account of his act, omission or negligence. That is why it became necessary to enact Section 406 and to provide in it that even in relation to an application under Section 397 or 398, Sections 539 to 544, both inclusive, shall apply in the form set forth in Schedule XI. As the special excludes the general, this necessarily implies that if in proceedings under Section 397 or 398, it becomes necessary to enforce the past liability of a director recourse must be had to the provisions of Sections 539 to 544 in their amended form and without having recourse to those sections it is not possible under the general powers of Section 398 to enforce that liability. We are, therefore, thrown back to the provisions of Sections 539 to 544 and it is only by the application of those provisions that the liability of the respondent No. 5 as a director could be enforced in the present proceedings. So far as those sections are concerned, as we have stated above, it is settled that the liability can be enforced only against a living director and not against his heirs or legal representatives after his death. It is, therefore, not possible to accept the argument of the learned! counsel for the applicant that the heirs of the deceased Sri Hari Shanker Bagla can be brought on record and proceeded against in these proceedings without having recourse to Section 406 or the provisions of the sections mentioned therein".*

212. Similar question has also come up before the High Court of Delhi in *Rajender Nath Bhaskar and another Vs. Bhaskar Stone Ware Pipe (P) Ltd.* and others reported in (1990) 68 Com Case 256 (Delhi). The Hon'ble Delhi High Court too concurred with the finding of the Hon'ble Allahabad High Court in the case of J.K. Investment Trust Ltd. (supra). Such decisions leave no manner of doubt that in a proceeding under Section 397/ 398, it is not permissible to implead the heirs of legal representative of deceased Director and to continue the proceeding against them.

213. It is worth noting that the Hon'ble Andhra Pradesh High Court in case of *Nalam Satya Prasad Rao and others Vs. Vinipamula Lakshmi Dara Sihma Sastri and others, reported in (1991) 70 Com Case 303 (AP)* also held that on the death of one of the respondents, a petition under Section

397/398 cannot be dismissed –provided---- that other persons who allegedly perpetuated oppression on the petitioners in league with deceased respondent are already on record. In the aforesaid proceeding, the alleged oppressive acts were directed --not only-- against the deceased Managing Director --but also-- against his wife and sons, who were already on record on the date of death of the deceased respondent. In such a scenario, it was held that petition under section 397 and 398 was maintainable.

214. Coming back to our case, it is found that one Sri Madhab Das, who seemed to have been arrayed as respondent No. 4 in the present proceeding, has been working as MD of the Company on and from 16-02-2011, when the R-5 had resigned from the post of MD of the company. Sri Madhab Das, who allegedly partnered with the R-5 in perpetuating oppression on the petitioners, has been working as above till the date of filing of the present petition and beyond. In view of our foregoing discussion, therefore it needs to be concluded that on the death of R-5, this preceding cannot be dismissed, as prayed for by the respondents.

(f)

215. The respondents have forcefully contended that the disputes which have been projected through the petition under consideration are nothing but directorial disputes and therefore, such disputes cannot form the substratum of a proceeding under section 397/398 of the Act. The aggrieved party, if any, may approach civil court seeking appropriate relief. In that connection, my attention has been drawn to the observation made by Hon'ble High Court in Comp Appl. No.03/2014. It is worth noting that Hon'ble High Court in Comp Appl. No.03/2014 opined that the dispute in the company petition is in the nature of a directorial dispute.

216. A close examination of the same from various angles would, however, reveal that disputes herein did not remain a directorial disputes simpliciter. It travelled far beyond the parameters of simple directorial disputes --since ----there are enough materials on record to show that such disputes had gone to such a pass when two sets of directors of the company did everything possible to annihilate the other including the initiation of series of legal proceedings before various legal fora which even threatened to bring the entire affairs of the company to a grinding halt.

217. The fact that during the period under consideration, there were two sets BODs, each set of which claimed itself to be the only legally constituted BOD of the company, the fact that each set of such BOD was found functioning from two different locations taking contradictory decisions thereby causing extremely awkward situation in running the affairs of the company and the fact that one set of BOD had taken steps even to freeze the accounts in the name of the company overwhelmingly show the magnitude of disharmony between two sets of shareholders or for that matter two sets of BODs.

218. In this connection, one may look into the decision of *CLB, New Delhi in Suresh Kumar Sanghi Vs Supreme Motors Ltd, reported in (1983)54 Comp.cas235 (Delhi)*. In Suresh Kumar Sanghi (supra), CLB, Delhi held that where serious infighting among the directors of the company caused serious prejudice to the company and its stakeholders, the provisions of section 398 of the act of 1956 were attracted. Similar view was taken in the case of Sishu Ranjan Das vs Bhola Nath Paper House Ltd (1983) 53Comp

Cas 883. In the face of such revelations, I am to conclude that the disputes under consideration no longer remains a directorial dispute as alleged by the respondents.

219. In Kumar Tekriwal vs. Unique Construction (P) Ltd. reported in (2009) 147 Com. Cas 737, it has been held that a directorial complaint can be subject matter of a proceeding under Section 397/398 of the Act of 1956 provided the company in question is a company in the nature of quasi-partnership. In the present proceeding, there are enough materials to conclude that the company herein is a company in the nature of quasi partnership. In that view of the matter, the present proceeding is maintainable even if one assumes for the sake of argument that the disputes in question are a directorial dispute.

(g)

220. The respondents also claim that the petition under consideration is a composite petition since the petitioners had sought reliefs not only in respect of accusation U/s 111 but also in respect of accusation U/s 397/398 of the Act of 1956 in a single petition. Law does allow a person to file a composite petition --but then-- he is to pay separate fees for each of such reliefs. However, in the present proceeding, the petitioners had paid fees for relief qua accusation U/s 397/398 of the Act. He paid no fees in respect of relief u/s 111 of the Act of 1956 which is fatal—according to the respondents.

221. It may be stated here that it is no longer res Integra that non-payment of fees cannot be made a ground to reject a suit. When it is found that no fee was paid in respect of some reliefs, sought for, the court is to realize such fees before granting the relief, sought for. On application of such a principle to this proceeding, it is found that it would be entirely inappropriate to dismiss the present proceeding only for non-payment of fee in respect of relief under Section 111, if the proceeding under consideration is otherwise found tenable in law.

(h)

222. The respondents, particularly the respondent No.3 and 4 further contended that the purported Board Meeting held on 25-11-2009 in which the P-1 was appointed as MD of the company, was invalid in law--- since--- the Board did not have the requisite quorum to appoint P-1 as MD of the company inasmuch as on that date, only 2 directors, entitled to participate in the board meeting, they being P-1 and P-2, remained present although Article 64 requires that quorum of the board meeting is three (3). In this connection, my attention has been drawn to Article 64 of the AOA. For ready reference, Article 64 of the AOA is reproduced below: -

> *"64 Any of the three Directors including the Managing Director present in the meeting shall constitute a quorum."*

223. However on a careful perusal of the record, it is found that the Board Meeting, held on 25.11.2009, was attended to by Mr. Bipul Das (purported to be Govt. Nominee), Mr. D. K. Hazarika (P-1), Mr. Bhupen Ch. Kalita (P-2), and one Mr. Sarat Ch. Kalita. According to the learned representative appearing for the respondent No.3 and 4, Mr. Bipul Das and Mr. Sarat Ch. Kalita, had no locus standi to remain present in the Board Meeting as director of the company. In that connection, my attention has been drawn to the Article 51 which says that the Government of Assam as long as holds not less than 25 % of the paid up capital of the company, it would be entitled to have 2 nominee directors in the BOD.

224. Since on 25.11.2009, its paid up capital in the company was less than 25%, the Govt. of Assam cannot have any nominee director in BOD of the company which means that Mr. Bipul Das (purported to be Govt. Nominee) had no legal right to remain present at the Board Meeting, held on 25.11.2009. In respect of Mr. Sarat Ch. Kalita, it was submitted that on 25.11.2009, he was not all a director of the respondent company.

225. However, such an argument is founded neither on law nor on fact. We have already found that the respondents had most illegally brought down the shareholding of the Government of Assam from 25 % to 6% which was bitterly criticized by the Government of Assam in its letter dated 31.03.2010 (A-ZB at page 276) and letter dated 11.05.2010 (A-ZB at page 280). Since the shareholding of the Government of Assam was illegally brought down 6%, such illegal reduction in the shareholding of the Government of Assam can have no adverse effect on the right of the State as far as its representation in the BOD is concerned.

226. Even otherwise, the above contention from the side of respondents is required to be rejected. The Article 64 of the AOA cannot be read to mean that once the paid up capital of the Government of Assam comes down to 25%, it would automatically be divested to have any representative in the BOD. In my opinion, what such an Article says is that in such an eventuality, the State of Assam could not have two nominee directors in the Board meaning thereby that even if the paid up capital of the Government of Assam comes down to 25%, it would still retain is right to have one nominee director in the Board.

227. Therefore, even if, one considers that Mr. Sarat Ch. Kalita had no locus standi to remain present in the Board Meeting held on 25-11-2009, there were 3 other directors, competent to be present in the board meeting aforesaid, they being P-1, P-2 and Mr. Bipul Das (Govt. nominee) and therefore, any resolution adopted in such a meeting cannot be called into question for being adopted in violation of the conditions in Article 64 of the AOA. Resultantly, the above allegation too cannot escape being found unsustainable in law.

(i)

228. One may note here that the respondents had also claimed that the appointment of the petitioner No1 on 14.11.2009 was illegal since such appointment was done in complete violation of direction in 284(5) read with 284(2) of the Act of 1956 and on the basis such allegation, it was submitted that the appointment of petitioner as the director of the company needs to held as illegal and untenable in law. Such a plea, in my opinion, is not acceptable.

229. I have found that the petitioner No.1 was appointed as director of the company on 14.11.2009. But despite elapse of several years in between, the respondents choose not to initiate any proceeding questioning such appointment till date. Since the respondents did not initiate appropriate proceeding seeking removal of the petitioner No1 from the post of director of the company well in time, such a claim became a stale one long back and therefore same cannot be allowed to rake up in a proceeding which was initiated not by the respondents but by the petitioners.

230. We have found that learned counsel/ learned legal representatives appearing for the respondents have relied on series of judgments in support of their respective case. I have considered such decisions in the light of materials on record and found that some of the decisions, relied on by the

respondents, to some extent support some of their contentions qua infirmities in the case of petitioners, such as, the petitioners coming to the court with somewhat dirty hands or some parts of their case their case being based hearsay evidence etc.

230A. But then, the infirmities, so pointed out by the respondents in the petitioners' case get slips to total insignificance when one compares such infirmities with the illegalities committed by the respondents in running the affairs of the company. Therefore, such infirmities on their own could cause no serious harm to the case of the petitioners. However, most of the decisions, relied on from the side of respondents, could hardly advance the cause which respondents tried to propound in the present proceeding case. Therefore, in the facts and circumstances present case, in my considered opinion, such decisions could not turn the table in favor of the respondents.

231. Now, the question is whether or not the petitioners are entitled to any reliefs, sought for. Such a question creeps up –since-- we have already decidedly found that in seeking reliefs in present proceeding, the petitioners did not come before this Bench with clean hands. However, our forgoing discussions also demonstrate that the respondents are also guilty of coming to the court with dirty hands. However, when one compares the illegalities committed by the parties hereto, he would find that the hands of the respondents are more soiled than that of the petitioners.

232. Our forgoing discussion has made such position absolutely clear and therefore, same needs no further restatement here. Suffice it to say, the very act of R-5 in rushing to the court seeking an injunction order to foil the holding of EOGM of the shareholders, called on14.11.2009, (which is considered to be extremely essential for corporate democracy) had triggered a series of serious acts and counteracts, initiated by the parties hereto, which unfortunately almost threw the company out of gear.

233. Most importantly, the illegalities committed by the respondents were so huge and enormous that such illegalities reduced shareholders with 64% shareholding in the company to hopeless minority on 15.09.2010 and all these were done in complete disregard to the prescription of law as well as inviolable directions in MOA and AOA. What is equally important to note is that in such illegal exercise of powers, the respondents had changed the composition of BOD in such a way that the voice of shareholders who together held 64% of the shareholding in the company on 14.11.2009 got muzzled forever.

234. In the result, this petition is allowed with the following conditions: -

a) The resolutions, adopted in the EOGM held on 02.03.2010 under which the petitioner No.1 was removed from the post of Director and MD and petitioner No.2 was removed from the post of Director of the respondent company, are declared illegal, null and void.

b) The resolution, adopted in the Board meeting held on 14.11.2011 under which the respondent No.5 was appointed as MD of the respondent company, is declared illegal, null and void.

c) The issuances of further shares on 20.02.2010 to some existing shareholders and outsiders are declared illegal, null and void.

d) The resolution adopted in EOGM held on 06.09.2010 enhancing authorized capital of the respondent company from 5000 to 10000 is declared illegal, null and void.

e) Issuances of further shares to some existing shareholders and outsiders on 15.09.2010 and on any other dates, if any, subsequent thereto, are also declared illegal, null and void.

f) The resolutions adopted in the EOGMs, held on 14.11.2009, Board meeting 25.11.2009, are restored.

g) The shareholdings of the shareholders /members in the respondent company as it was on 14.11.2009 are restored.

h) The respondent company shall normally function from its registered office.

i) All the actions, taken by the BOD, headed by Petitioner No.1 are declared valid and stand protected.

j) All the actions, taken by the BOD, headed by R-5 and R-4, to the extent they are inconsistent with the actions, taken by the BOD, headed by the Petitioner No.1 or to the directions, rendered hereinabove, are declared invalid and bad in law.

k) However, the declarations, aforesaid, would not in any way affect the transactions, which the BOD, headed by R-5 and R-4 may have entered into with third party.

l) In view of aforesaid directions, the ROC, Shillong is directed to make necessary amendments in the ROC records in the MCA 21 Portal.

m) The management of the respondent company is directed to manage the affairs of the company strictly in accordance the prescriptions of laws/Rules holding the field as well as mandates in the MOA and AOA of the company.

n) The management of the respondent company is further directed to do all the needful including the holding of EOGM as when required to ensure the corporate democracy in running the affairs of the company.

235. Further, the company is directed to refund the money, collected from the persons on the dates aforesaid, within a period of six months from the date of receipt of the copy of the order, and that too, with simple interest @ 10% annually rest from the date of purported purchase of such shares till the repayment of such money in full.

236. The petition is, accordingly, disposed of. The parties are directed to bear their own costs.

237. Copies of this order be furnished to all concerned.

238. Before I part with the case, I want to make it clear that the observations/decisions which I have made here are made in the context of the disputes in the present proceeding and therefore, such observations/decisions would have no bearing upon the disputes/controversies in any other connected suits/proceeding pending before the other court (s).

Sd/-

Member (Judicial)
National Company Law Tribunal
Guwahati Bench: Guwahati.

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