NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH: GUWAHATI

C.P. No.19/140(1)/140(4)/GB/2017

Under Section 140(1)/140(4) of the Companies Act, 2013

In the matter of:

N. C. Karnany & Co.,
Chartered Accountants,
Karnani Circle, Dewal Road,
Jorhat – 785001, Assam

… Petitioner

Versus

New Timonhabi Tea Co. Pvt. Ltd.,
Seuni Ali, A. T. Road,
Jorhat – 785 –1, Assam & another

… Respondents

Order delivered on 22-11-2017

Coram:

HON'BLE MR. JUSTICE P.K. SAIKIA, MEMBER (JUDICIAL)

For the Petitioner	:	Mr. Biman Debnath, CS
		Ms. Richa Agarwal, CS
For the Respondents	:	Mr. Narayan Sharma, CS [R-1]

O R D E R

1. Heard Mr. Biman Debnath, CS and Ms. Richa Agarwal, CS appearing for the petitioner. Also heard Mr. Narayan Sharma, CS appearing for the respondent No.1.

2. This application under Section 140(1)/140(4) of the Companies Act, 2013 (in short the "Act of 2013") read with Rule 78 of the National Company Law Tribunal Rules (in short the "Rules of 2016") has been preferred by N. C. Karnany & Co., a firm of Chartered Accountants, hereinafter referred to as the petitioner against M/s. New Timonhabi Tea Co. Pvt. Ltd., hereinafter referred to as (the respondent No.1") seeking various reliefs incorporated therein, which I would refer to at appropriate place.

3. The facts which have emanated from the petition aforementioned, in short, are that the respondent No.1 company appointed the petitioner herein, as statutory auditor of the respondent No.1 company (in short, R-1) for the financial year (in short, FY) 2014-15 in the AGM held on 26.09.2014 and in that connection, filed notice of such appointment in Form GNL-2 along with other related documents with Registrar of Companies, Shillong (in short, ROC, Shillong) in course of time.

4. Thereafter, petitioner was again appointed as statutory Auditor of R-1 company for a block of 4 (four) years and same was done at the AGM, held on 26.09.2015 which started from the conclusion of AGM for financial year 2014-15 held on 26-09-2015 and was to remain valid till the conclusion of AGM to be held for the financial year 2018-19. The notice of such appointment in Form ADT-1 along with other related documents was also furnished to the ROC in due course.

5. However, the respondent No.1 company without any intimation to the petitioner appointed M/s. A. B. Sharma & Co. (hereinafter referred to as the "respondent No.2") as statutory auditor of the respondent No.1 company in its Board Meeting held on *20-10-2016*. Unfortunately, such appointment was made before expiry of the term of appointment of the petitioner company, which is highly illegal

since in doing so, the R-1 company had completely thrown to the wind the requirement of law incorporated in section **140(1)** in the Act of 2013 which **prescribes the method** for removal of statutory auditor from the office before the expiry of its term.

6. In that connection, it has been submitted that for removal of statutory auditors before expiry of its term, a company needs to **adopt a special resolution in the AGM** and also needs to obtain approval of the Central Government for removal of such statutory auditor before expiry of its term. Further notice is required to be served on the statutory auditor---- who is sought to be removed from the office before expiry of the term--- giving him an opportunity of being heard against the proposal seeking his removal from the auditor ship of the company.

7. Regrettably, in the present case, all those formalities/procedures were given a go by. Only *on 13-02-2017*, the petitioner received an email from Mr. L. N. Choudhary, one of the directors of the respondent No.1 company, stating that the company had decided to appoint a Guwahati based Auditor Firm as being statutory auditor of the company for the current financial year, same being 2015-16 and, therefore, the petitioner was requested to send its resignation letter at the earliest.

8. In that connection, it has been also stated from the side of the petitioner, that since the respondent No.2 company was appointed as statutory auditor of the petitioner company for the year 2016-17 on 20-10-2016, the respondent No.1 could not have legally issued any notice on the petitioner on 13-02-2017 requiring the latter to resign from the office of the statutory auditor of the respondent company inasmuch as such letter seeking resignation of the petitioner from the office of the statutory auditor of the respondent No.1 company ought to have been sought for well before the appointment of the respondent No.2 firm as statutory auditor of the respondent company.

9. But then, on *12-04-2017*, the petitioner received another letter dated 03-04-2017 from the respondent No.2 company stating that since it had been appointed as statutory auditor of the respondent No.1 company, therefore, it was required to obtain No Objection Certificate from the petitioner to enable it to accept the appointment, offered by the respondent No.1 company. The said letter was replied to by the petitioner in the following manner: -

> *"please note that we were appointed as auditor in the financial year 2014-15 for five years i.e. up to financial year 2018-19. We have not received any communication from M/s. New Timonhabi Tea Co. Pvt. Ltd. for removal from the office of the statutory auditor for financial year 2016-17.*
> *This is for your information."*

10. Subsequently, on 08-05-2017, the petitioner firm received another email from Mr. L. N. Chaudhary, one of the directors of the respondent No.1 company stating as follows: -

> *"We wish to inform you that in accordance with the provisions of section 139 read with rule 3(7) of the Companies Act, 2013, the shareholders of the Company in the Annual General Meeting of the Company held on* 28th September, 2016 *have revealed not to ratify your appointment / re-appointment as statutory Auditor of the Company. Accordingly, you have vacated the office as statutory Auditors of the Company with effect from the date of last Annual General Meeting. M/s. A. B. Sharma & Co., Chartered Accountants have since been appointed as our statutory Auditors."*

11. According to Ms. Richa Agarwal, CS, appearing for the petitioner, the communication, made through the email dated 08-05-2017 is untenable in law since the petitioner company has purportedly removed the petitioner from the office of the statutory auditor of the respondent company in complete violation of law and rules framed thereunder holding the field in question.

12. In view of the above, the petitioner company has prayed for the following reliefs: -

a) Declare that the removal of the petitioner firm as auditor of Respondent no.1 Company as illegal;
b) Declare that the appointment of the Respondent No.2 firm as auditor of Respondent No.1 Company as illegal;
c) Direct the Respondent No.1 Company to change its auditor under section 140 of the Companies Act, 2013;
d) Declare the petitioner firm as Auditor of Respondent No.1 Company.

13. Notice of this proceeding was served on all the respondents. The respondents entered appearance and having filed reply contested the claim of the petitioner made in the petition

aforementioned. In their reply, the respondents have questioned the intent and conduct of the petitioner in preferring the petition under consideration. They further submit that the petition is not maintainable for being filed in total violation of various provisions of relevant law and rules framed thereunder.

14. The grounds, structured on the intent and conduct of the petitioner, in resisting the present proceeding has been incorporated in para 2.1 to 2.6 of the reply, submitted by the respondents. For ready reference, those paragraphs are reproduced herein below: -

> *"2.1 With respect to Paragraph 4 save and what are matters of record, rest all the contentions are denied and disputed. The auditor in the instant case vacated their office in accordance with the provisions of Section 139 read with Rule 3 (7) of the Companies Act 2013. The instant case is filed with mala fide intention to create obstacle in smooth functioning of the Company and jeopardize the statutory compliances by the Company.*
>
> *2.2 The instant case demonstrates the difficulties which a peeved statutory auditor can create for a company, if he is ceased of his office. Having knowledge of detailed working of the company, he can misuse the same, resort to exploitative complaints, and initiate malicious litigation as in the present case to prevent the company from functioning or implementing decision and other compliances.*
>
> *2.3 Being Statutory Auditor of the Company for almost last 25 years they knew it very well that by the month of August the Company gets all its accounts audited and by September every year it holds Annual General Meeting which is a statutory requirement under Section 96 of the Companies Act, 2013.*
>
> *2.4 A detailed list of dates of Audit Report for past 10 years are annexed at Annexure 1* ***(Marked "A1")*** *to this petition whereby this Hon'ble Tribunal can make out when the audit is completed by the Statutory Auditors who were none other than the petitioner themselves.*
>
> *2.5 Had the petitioner intent was bona fide and in the interest of justice they could have approach this Hon'ble Tribunal long back when the Company finally communicated to them on 8th May 2017. However, before this communication also there were communications made to them and are in record.*
>
> *2.6 Now, when the new Statutory Auditor has already completed the Audit process and company was slated for its AGM in September month, this petition was filed with a mala fide intention to create obstacles in mandatory statutory compliance by the company with regard to holding of Annual General Meeting and filing of Income Tax Return."*

15. The respondents also questioned the maintainability of the present proceedings adding that the proceeding in hand has been filed well beyond the period of limitation. In that connection, the respondents have heavily relied on the averments made in paragraph 2.7 and 2.8 of their reply. For ready reference, such paragraphs are also reproduced herein below: -

> *"2.7 The doctrine of limitation being based on public policy, the principles enshrined therein are applicable and writ petitions are dismissed at initial stage on the ground of delay and latches. In the instant case, the Petitioners were not vigilant but were content to be dormant and chose to sit on the fence till Audit got completed for financial year 2016-17.*
>
> *2.8 Therefore, the plea of the petitioner that there is no time limit prescribed under Section 140(4) is untenable and has to be interpreted in the right perspective and taking into consideration interpreted in the right perspective taking into consideration the provisions of Section 96 of the Companies Act and time given to a Company for filing of Income Tax Return under the provisions of Income Tax Act."*

16. The respondents have also contended that the petition in question suffers for not being filed in accordance with the requirement of law. In this connection, it has been pointed out that the legal representative of the petitioner company who have presented the petition, did not have the requisite authority from the side of respondent No.1 company to present the application before this Tribunal, and, therefore, on this count too, the proceeding in hand requires to be rejected.

17. It is also the case of the respondents that the petitioner was not removed from the office auditor of the company on invoking of the provisions of section 140(1) of the Act of 2013. Quite contrary to it, the petitioner was removed from the aforesaid office on invoking the provisions of section 139(8) of the Act of 2013 r/w Rule 3 (7) of the Rules of the Companies (Audit and Auditors) Rules, 2014 (in short, the Rules of 2014) which deals with filling up the vacancy in *the office auditor which was occasioned by a situation which was termed in law "casual vacancy".*

18. According to Mr. N. Sarma, CS appearing for the petitioner, under the Companies Act, 2013, a vacancy in the office of the auditor may occur in three eventualities. They are –

(a) Resignation/death of the auditor
(b) Non-ratification of the appointment of the auditor in the AGM by the shareholders,
(c) Removal of the auditor as per the provisions contained in section 140 of the Act of 2013.

19. When a company has to change its auditor on resignation or death of the existing auditors or for non-ratification of the appointment of auditor in AGM, the company is required to follow the procedure rendered in section 139(8) of the Act of 2013 read with Rule 3 (7) of the Rule of 2014 since the vacancies which occur for the aforesaid reasons are casual vacancies. In that event, the company is not required to follow the prescription in section 140 of the Act of 2013, which takes care of vacancies (which occur before the expiry of the term of statutory auditors), which are not casual in nature.

20. In the present case, a vacancy –which is undoubtedly casual in nature--- had occurred in the office of the statutory auditor before the expiry of the term of said auditor following the refusal of the shareholders of the company to ratify the appointment of the petitioner as being the statutory auditor of the company for the block of 2015-16 to 2018-19 in the AGM held on 20.09.2016. In such a scenario, the Board of directors had to invoke section 139(8) of the Act of 2013 r/w Rule 3 (7) of the Rule of 2014 in order to appoint the respondent No.2 herein as statutory auditor till the conclusion next of AGM.

21. Therefore, there cannot be any fault in the appointment of the respondent No. 2 to the office of the statutory auditor of the respondent company following the refusal of the shareholders of the company to ratify the appointment of the petitioner as the statutory auditor of the respondent company for the remaining period. In the face of such revelations, all the allegations levelled against the removal of the petitioner from the Office of the auditor of the company are found to be wholly without any substance. Therefore, they urged the Bench to dismiss the petition.

22. The petitioner having filed rejoinder reiterated its earlier position. In its rejoinder, it has also submitted that it is not the conduct of the petitioner but the conduct of the respondents themselves which shows that the respondents had never approached this Tribunal with clean hands. Rather, they have sought to project the facts on record in such a way that this Tribunal cannot see the actual facts in proper perspective. In support of such contention, it has been reiterated that at no point of time, before the alleged removal of the petitioner, the respondent No.1 found it fit to intimate the petitioner about the developments leading to adoption of resolution in the so-called AGM held on 20-09-2016.

23. The alleged appointment of the respondent No.2 as statutory auditor of the respondent No.1 company in place of the petitioner and all other connected incidents were never made known to the petitioner, depriving them from presenting their case before the authority concerned at appropriate time. The provisions incorporated in Section 101 of the Act of 2013 which deals with the procedure for holding general meeting of the company makes it obligatory on the part of the Company to provide an opportunity to the auditor who is sought to be removed before the expiry of his term.

24. In that connection, it has been pointed out that since the statutory auditors of the company are required to discharge duties which have enormous implications in the affairs of the company as well as all the stake holders connected with proper running of the company, therefore, the auditors cannot be removed from their office by the companies at their sweet will. Therefore, removal of auditor from his office without giving him an opportunity of being heard is mismatched with the provision of law which deals with appointment and removal of auditor from office before the expiry of his term.

25. The petitioner has relied on the following decisions in support of its claim: -

(i) Order of NCLT, Hyderabad Bench, rendered in the case of SPC & Associates Vs DVAK & Co. and NISC Export Services Pvt. Ltd. in CP No.21/140/HBD/2016.

(ii) *Judgment of the Hon'ble Delhi High Court in the case of M. S. Kabil Vs Union of India & Ors. Rendered in WP(C) No.14341 of 2005 and CM APPL 10758/2005*.

26. On the other hand, respondents too relied on some decisions in support of their case and they are as follows: -

(i) *Decision, rendered by Hon'ble Punjab & Haryana High Court on 14-09-2017 in Paramjeet Singh Vs Shiromani Gurudwara Parbandhak (CWP No.20901 of 2017)*

(ii) *Decision, rendered by Hon'ble Supreme Court on 29-09-2011 in Civil Appeal No.7588 of 2005 (M/s. Royal Orchid Hotels Ltd. & Anr. Vs Jayarama Reddy & ors.) –*

(iii) *Decision, rendered by learned Company Law Board on 15-04-2008 in Company Petition No.42 of 2004 (Smt. Lily Utpal Vs Shiva Cemetech Pvt. Ltd. & Ors.)*

27. I have considered the rival submissions having regard to the materials on record as well as laws holding the field in question. I have already found that the petitioner claims that its purported removal was done by the company in exercise of the power, conferred on it, under section 140 (1) and 140(4) (i) of the Act of 2013 which, in fact, prescribes a special procedure for the removal of the statutory auditor from the office of the auditor of the company before the expiry of the term of appointment. However, in removing the petitioner, respondents honoured such procedures ----not in observance ---but in violation instead.

28. But then, according to the legal representative appearing for the respondents, following the refusal of the shareholders of the company to ratify the appointment of the petitioner as statutory auditor of the respondent company, a casual vacancy occurred automatically in the office of the auditor and in such a scenario, the board of directors of the respondent No.1 company had to appoint the respondent No. 2 as statutory auditor of the *company for the period up to the conclusion of next AGM* on invoking the power, conferred on it u/s 139(8) of the Act , 2013.

29. Since the respondents rely on section 139 (8) and since the petitioner relies on section 140(1) and section 140(4)(I) of the Act of 2013 to support their respective stand, I find it necessary to have a look at the provisions, contained in section 139 (8) as well as section 140(1) and section 140(4)(i) of the Act of 2013. For ready reference, the aforesaid provisions of law are reproduced below: -

*"**139. Appointment of auditors***

(1) Subject to the provisions of this Chapter, every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at such meeting shall be such as may be prescribed:

Provided that the company shall place the matter relating to such appointment for ratification by members at every annual general meeting:

Provided further that before such appointment is made, the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor:

Provided also that the certificate shall also indicate whether the auditor satisfies the criteria provided in section 141:

Provided also that the company shall inform the auditor concerned of his or its appointment, and also file a notice of such appointment with the Registrar within fifteen days of the meeting in which the auditor is appointed.
Explanation. —For the purposes of this Chapter, "appointment" includes reappointment."

(2) ----------
(3)----------
(4)----------
(5)----------

(6)----------
(7)----------
(8) Any casual vacancy in the office of an auditor shall—

(*i*) in the case of a company other than a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India, be filled by *the Board of Directors within thirty days*, but if such casual vacancy is as a result of the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next annual general meeting;

(*ii*) in the case of a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India, be filled by the Comptroller and Auditor-General of India within thirty days:
Provided that in case the Comptroller and Auditor-General of India does not fill the vacancy within the said period, the Board of Directors shall fill the vacancy within next thirty days."

"140. Removal, resignation of auditor and giving of special notice

(1) The auditor appointed under section 139 may be removed from his office before the expiry of his term only by a special resolution of the company, after obtaining the previous approval of the Central Government in that behalf in the prescribed manner:

Provided that before taking any action under this sub-section, the auditor concerned shall be given a reasonable opportunity of being heard."

(*2) The auditor who has resigned from the company shall file within a period of thirty days from the date of resignation, a statement in the prescribed form with the company and the Registrar, and in case of companies referred to in sub-section (5) of section 139, the auditor shall also file such statement with the Comptroller and Auditor-General of India, indicating the reasons and other facts as may be relevant with regard to his resignation.*

(3) If the auditor does not comply with sub-section (2), he or it shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

(4) (i) Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed, except where the retiring auditor has completed a consecutive tenure of five years or, as the case may be, ten years, as provided under sub-section (2) of section 139.

(ii) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

(iii) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so, —

(a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and

(b) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company,

and if a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting:

Provided that if a copy of representation is not sent as aforesaid, a copy thereof shall be filed with the Registrar:
Provided further that if the Tribunal is satisfied on an application either of the company or of any other aggrieved person that the rights conferred by this sub-section are being abused by the auditor, then, the copy of the representation may not be sent and the representation need not be read out at the meeting.

(5) Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either suo motu or on an application made to it by the Central Government or by any person concerned, if it is satisfied that the auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors:

Provided that if the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place:

Provided further that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under section 447.
Explanation I.—It is hereby clarified that the case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its director or officers.
Explanation II.—For the purposes of this Chapter the word "auditor" includes a firm of auditors.

"140(4) (i) Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed, except where the retiring auditor has completed a consecutive tenure of five years or, as the case may be, ten years, as provided under sub-section (2) of section 139."

30. Section 140(1) of the Act of 2013 which, amongst other things, deals with removal of auditor etc. says that an auditor appointed under section 139 of the Act of 2013 can be removed from his office before the expiry of his term only by a special resolution of the company, adopted by it in its General Meeting. But then, the prior approval of the Central Government is also necessary for such removal of the auditor. Additionally, the auditor concerned is required to be given a reasonable opportunity of being heard.

31. However, section 139 (8) of the Act of 2013 provides that in case of casual vacancy in the office of auditor, the aforesaid procedure need not be followed. In such a case, the Board of Directors or the Comptroller & Auditor General of India ----as the case may be ------may fill such vacancy within the statutory period, specified in section 139(8) (i) and 139(8) (ii) of the Act of 2013 respectively. In that view of the matter, section 139(8) is an exception to the law laid down in section 140(1) of the Act of 2013.

32. According to the respondents, following non-ratification of the appointment of the petitioner by the shareholders of the company in the AGM, held on 28.09.2016, a casual vacancy automatically occurred in the office of the auditor which was duly filled by the Board of directors of the company (*a claim which was, however, strenuously disputed by petitioner*). Therefore, I find it necessary to know what the term "casual vacancy" actually means.

33. It may be stated here that neither the Companies Act, 2013 nor the Companies Act, 1956 defines the term "casual vacancy". Therefore, it would be appropriate to know how such a term has been defined in various dictionaries. *The Oxford Dictionary defines "casual" term in the following manner*: -

"*CASUAL: Relaxed and unconcerned or done or acting without sufficient care or thoroughness."*

The Chambers English Dictionary defines the term "casual" as under: -

"CASUAL: happening by chance or showing no particular interest or concern."

On the other hand, Webster's English Dictionary defines the term "casual" as follows: -

"CASUAL :not showing effort or strainor or seeming to be without plan or method or effortless"

(i) Falling, happening or coming to pass without violation and without being foreseen or expected; accidental, fortuitous, coming by chance; as, the party have casual meeting

34. A perusal of definitions of the term "casual" in various dictionaries prima facie shows that the term "casual" means something which is accidental in nature or something which occurs without being foreseen or expected. In that view of the matter, a vacancy in the office of statutory auditor in the company which occurs for the death of the incumbent auditor is unquestionably a casual vacancy --- since --------such vacancy occurs without being foreseen or expected. Quite importantly, legislature themselves categorise the vacancy in the office of the auditor which occurs for resignation of the statutory auditor as casual vacancy.

35. Now, the question is whether the vacancy which occurs for non ratification of the appointment of the auditor by the shareholders of the company in the AGM tantamounts to casual vacancy as contemplated in section 139(8) of the Act. As stated above, the parties to the proceeding here took drastically opposite stances on this score. The legal representative, appearing for the petitioner, claims that the act of non--- ratification of the appointment of the auditors by the shareholders of the company in the AGM is an intended and premeditated act and as such, such an act cannot be bracketed as accidental or unexpected one.

36. This is more so, in case of *joint family company*, like the one in hand-- since ----in such companies, the number of the shareholders are few who know each other very well and most of the times, they, therefore, take decision(s) on some matters after some informal discussions amongst themselves. Being so, the decision (s), so taken by the shareholders of the company in the AGM, are nothing but calculated and pre-determined ones and, therefore, such decisions are far from being accidental or unexpected.

37. Therefore, once it is found that the act of non- ratification of the appointment of the auditors by the shareholders of the company in the AGM is a deliberate and intentional act, there cannot be any escape from the conclusion that the vacancy which occurs for non- ratification of the appointment of the auditor by the shareholders of the company is not a casual vacancy and in that event, a statutory auditor cannot be removed from office before the expiry of his term under the garb of casual vacancy.

38. Does such a contention carry any conviction? However, before addressing this key query, I find it necessary to know whether the phrase "*non- ratification of the appointment of the auditors by the shareholders of the company in the AGM*" and the word "*resign*", so used in section 139(8) of the Act of 2013 have something in common as far as casual vacancy as contemplated in section 139(8) of the Act is concerned and if so, whether such commonality put the *aforesaid phrase* and the word "*resign*", in the same category qua casual vacancy as **understood** in section 139(8) of the Act.

39. This is because of the fact that the similarity or dissimilarity between those phrase/word would certainly help the tribunal in understanding the actual features of the *aforesaid phrase* qua nature of vacancy which occurs for non- ratification of the appointment of the auditors by the shareholders of the company in the AGM----since ------- the Act of 2013 itself declares the vacancy-- which occur--- on the resignation of the auditor -------- to be a casual vacancy.

40. However, in order to know the similarity between the phrase "*non-ratification of the appointment of the auditors by the shareholders of the company in the AGM*" and the word *"resign "or "resignation",* one needs to know the true meaning of the term "resign". Since the Act did not define such term, I find it necessary to know as to how such a term has been defined by different dictionaries. The Oxford dictionary defines term "resign "---as

"no object Voluntarily leave a job or office.
'he resigned from the government in protest at the policy'

1.1 *with object Give up (an office, privilege, etc.)*
'four deputies resigned their seats'

1.2 *Chess End a game by conceding defeat without being checkmated.*
'he lost his Queen and resigned in 45 moves'

2 ***resign oneself to*** *Accept that something undesirable cannot be avoided.*
'she resigned herself to a lengthy session'

'he seems resigned to a shortened career'

2.1 *archaic Surrender oneself to another's guidance.*
'he vows to resign himself to her direction''

41. The Chambers 21st Century Dictionary defines such a term in the following manner: -

"resign from a job, post etc. to give up employment or an official position
Give up to admit defeat
Give oneself up to surrender
Give oneself up to something to devote oneself to (a cause etc.)
Give someone or something up to surrender or handover (a wanted person, a weapon etc.)
Give something up 1. To renounce or quit (a habit etc.) 2. to resign from or leave (a job etc.)
Give up doing something to stop making the effort to achieve it.
Give up trying to talk sense to them"

42. A careful perusal of the definition of the term "resign ", so rendered in the aforesaid dictionaries, clearly shows that the term "resign" or for that matter, the term "resignation" firmly evinces that resign/ resignation are the result of some intended or expected act(s) on the part of the person who resigns from some job or official position. In that view of the matter, in so far as the person resigning from some job/post is concerned, the act of resignation cannot be said to be accidental or unexpected.

43. However, such is not the case as far as the company is concerned. When a company appoints someone as an auditor of the company, the company or for that matter the management of the company never expect such an auditor to resign midway his term. Rather it is quite but natural for the company to expect that such statutory auditor would continue in the post at least till the expiry of his term. In that view of the matter, the resignation of the auditor during the currency of his appointment is an unintended or unexpected event on the part of the company and therefore, in so far as the company is concerned, the vacancy, so occurred on the resignation of the auditor, is a casual vacancy.

44. So situated, let us see *if the non-ratification of the appointment of the statutory auditor by the shareholders in the AGM* can also be called as a casual vacancy as claimed by learned legal representative appearing for the respondents. The petitioner, however, claims that *the act of non-ratification of the appointment of the statutory auditors by the shareholders in the AGM* is a calculated or intended act on their part and therefore, the vacancy *--which occurred for non-ratification of the appointment of the auditor by the shareholders in the AGM ---*cannot be treated as a casual vacancy.

45. I have considered such submissions and found that though the Board of directors are to conduct the day to day business of the company in accordance with the prescriptions in the MOA and AOA as well as in the Companies Act and the Rules there -under *---yet ---*on many other matters, the company needs to conduct its various business on being guided by decisions, adopted in the AGM/ EOGM which are, in fact, the decisions of the majority shareholders.

46. Therefore, theoretically and technically, it may not always be possible for all the shareholders to know beforehand what decision or decisions would be taken by the majority shareholders in the AGM of the company although they may be knowing each other very intimately over a long period of time. In that view the matter, the decisions, taken in the AGM, may be unintended or unexpected on the part of all shareholders of the company.

47. Even if one assumes for sake of argument for a moment that the shareholders are aware of some of the decisions to be taken by the shareholders of the company in the AGM *---yet then---* it cannot be presumed legally that the company is aware of such decisions *–since--* under the law, a company is a legal entity which is quite distinct and different from the identities of the constituents

which form such a company. Therefore, the prior knowledge of shareholders about some decisions, taken in the AGM, cannot be counted as prior knowledge of the company on such matters.

48. Therefore, *the non-ratification of the appointment of the auditor or auditors by the shareholders in the AGM* cannot be treated as intended or expected act of the company. Being so, I am to hold that the non-ratification of appointment of auditors by the shareholders in the AGM is a casual act and the vacancy, so occurs, is certainly a casual vacancy as contemplated in law. Therefore, there cannot be any objection in bracketing *the vacancy which occurs for non-ratification of appointment of auditor by the shareholders in the AGM as well as the* vacancy that occurs for resignation of the auditor in same group since both vacancies are very similar vis-a-vis the casualty which occasions such vacancies.

49. This brings me to the question whether any opportunity is required to be given to the petitioner before his appointment being not ratified by the shareholders of the company in the AGM. It is a settled principle of law that no one should be condemned without he being heard and this basic principle is required to be followed in all the proceedings regardless to the fact as to whether or not, such an arrangement has been made by law under which such a proceeding is being conducted.

50. But then, giving such an opportunity becomes indispensable in the case in hand. This is because of the fact that in the present proceeding, a statutory auditor of the company was removed from office on the ground of his appointment being not ratified by the shareholders of the company. It is no gainsaying that the statutory auditors are to discharge duties independently without being browbeaten by management of the Company since the duties, they discharge, have enormous influences and implications on multiple stakeholders including good governance of the affairs of the company.

51. The Act, therefore, tries to ensure in every possible way that the auditor does not become a puppet in the hands of the Directors of the company. Therefore, a detailed and comprehensive procedure has been incorporated in the Act itself for appointment as well as for the removal of the auditor before the expiry of his term. In that view of the matter, providing an opportunity to the auditor who is sought to be removed before the expiry of his term on the ground of non-ratification of his appointment by the shareholders of the Company is sine qua non.

52. Now, let us see if the Act of 2013 makes any provisions for providing any opportunity of being heard to the auditors whose appointment has not been ratified by the shareholders of the Company. The legal representatives appearing for the respondents contend that in case of removal of auditor for non-ratification of appointment of auditor by the shareholders in the AGM, no such opportunity is required to be given since the vacancy occurred for non-ratification is nothing but a casual vacancy and in case of casual vacancies, the provision of 140 (1) of the Act of 2013 is made wholly inapplicable.

53. It may be noted here that the respondents arduously claim that the appointment of the petitioner as being statutory auditor of the company was not ratified by the shareholders in the AGM of the Company held on 20.09.2016. Such a claim requires me to go through the provision in the Act which deals with convening of the general meeting of the company. The said provisions can be found in Section 101 of the Act of 2013. For ready reference, section 101 is reproduced below: -

> *"**101. Notice of meeting***
>
> *(1) A general meeting of a company may be called by giving not less than clear twenty-one days' notice either in writing or through electronic mode in such manner as may be prescribed:*
>
> *Provided that a general meeting may be called after giving a shorter notice if consent is given in writing or by electronic mode by not less than ninety-five per cent. of the members entitled to vote at such meeting.*
>
> *(2) Every notice of a meeting shall specify the place, date, day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting.*
>
> *(3) <u>The notice of every meeting of the company shall be given to—</u>*
> *(a) every member of the company, legal representative of any deceased member or the assignee of an insolvent member;*
> *<u>(b) the auditor or auditors of the company; and</u>*

(c) every director of the company.

(4) Any accidental omission to give notice to, or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting."

54. Thus, section 101 of the Act unmistakably enjoins upon the Company, among other things, to give notice of the AGM-- in a manner, very well prescribed in the Act itself --- to certain categories of individuals/person / entities/ office bearers, so specified in Section 101(3) of the Act itself. The auditor is one of the individuals/authorities/ legal entities, so mentioned in aforesaid provisions of law. What is important to note is that section 101 of the Act also requires that a general meeting of a company is to be called by giving not less than clear twenty-one days' notice.

55. In that connection, I have also perused Section 146 of the Act which runs as follows: -

146. Auditors to attend general meeting -

All notices of, and other communications relating to, any general meeting shall be forwarded to the auditor of the Company, and the auditor shall, unless otherwise exempted by the Company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting and shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

56. A conjoint reading of Section 101(3) and Section 146 of the Act reveals that the auditor has an indefeasible right to be present in each and every AGM in order to place his views vis-à-vis the duties, assigned to him, under the law. More importantly, failure to carry out the directions in section 139 to 146 exposes the defaulters to several serious consequences including punishment in the form of imprisonment in view of provisions incorporated in Section 147 of the Act.

57. The disclosures aforesaid, now, require me to conclude that a statutory auditor must be provided with an opportunity of being heard before his appointment in the office being not ratified by the shareholders of the company in the AGM **---since----** the arrangements made in section 101 of the Act of 2013 are mandatory in nature **---and--- since -----**the violation thereof, as stated above, calls for serious consequences for the defaulters. Our foregoing discussion has made it more than clear and same needs no further reiteration here.

58. In view of what we have discussed herein before, it is now apparent that both under the law as well as under the principle of natural justice, a company is required to give the statutory auditor an opportunity of being heard in the AGM before his appointment being not ratified by the shareholders of the company before the expiry of his term and the violation of such law and principle of natural justice would undoubtedly make the removal of the statutory auditor unsustainable in law.

59. Coming back to the case, I have found that it is not in dispute that the petitioner was appointed as statutory auditor of the respondent company in the AGM, held on 26.09.2015 for block of four years starting from financial year 2015 -2016- to 2018 -2019. It is also not in dispute that the shareholders of the company refused to ratify the appointment of the petitioner in the AGM held on 28.09.2016. There was no quarrel over the fact that the petitioner was not invited to the AGM, held on 28.09.2016, requiring him to place its view on the matters to be transacted there including the matter relating to the ratification or non –ratification of its appointment in the AGM.

60. However, the respondents arduously claim that the requirements of section 101 of the Act were not followed since the vacancy--- which occurred for his appointment, being not ratified by the shareholders in the AGM held on 20.09.2016--- is a casual vacancy and as such, no notice-- as contemplated in section 140(1) ---- is required to be given to the petitioner. However, our foregoing discussion vividly shows that such a plea has no backing whatsoever of either law or logic –since--- law in the form of section 101 of the Act makes it obligatory on the part of the Board to give notice of the general meeting of the company in a prescribed manner to the auditor of the company which must also contain a statement of business to be transacted at such meeting. But all those requirements of law were ruthlessly violated by the Board in the case in hand.

61. On yet another count, the contention of the respondents is found untenable in law. The respondents consistently and painstakingly contended that following the refusal of the shareholders of the company to ratify the appointment of the petitioner in AGM held on 20.09.2016, a casual vacancy did occur in the office of statutory auditor of the company, therefore, in view of arrangements, made in

section 139(8) of the Act, the board of the directors had to appoint another statutory auditor for *the period up to the conclusion of next AGM.*

62. However, in their reply, they also took a stand that on 13-02-2017, the respondents had sent a letter to the petitioner seeking its resignation from the office of the auditor of the company which was admittedly not responded to by the petitioner. Even thereafter, on 03-04-2017 the respondent No.2 had sought for NOC from the petitioner. The petitioner--- according to the respondents--- replied such a letter from the respondent No.2 refusing to give NOC -- sought for---- stating that it would continue to work as auditor of the company for *the period up to the conclusion of AGM* for FY 2018-19.

63. Unfortunately, such a stand, taken by the respondents in their reply, runs completely counter to the main claim of the respondents that following the refusal of the shareholders of the company to ratify the appointment of the petitioner, *a causal vacancy did automatically occur automatically in the office of the auditor* which required the Board of directors of the company to appoint the respondent No.2 as statutory auditor for the period up to the conclusion of next AGM. Such contradictory stances on the part of the respondents instead of advancing the cause of the respondents make their aforesaid claim more and more vulnerable.

64. These apart, the claim of the respondents--- that--- on being required by Mr. L. N. Choudhary, one of the directors of the respondent No.1 company, under the letter dated 13.02.2017, the petitioner refused to tender its resign from the office of the statutory auditor of the company ---is found untenable in law for yet an another reason as well. This is because of the fact that the Act of 2013 or the Rules, framed there-under gives no authority, whatsoever, to the company or Board thereof or its office bearers to demand resignation letter from the statutory auditor before the expiry of his term unless the procedures, prescribed in section 140, are fully complied with which again demolishes an already badly battered the case of the respondents beyond any process of reparation.

65. So situated, let us see if the present proceeding is hit by law of limitation and also by the principle of delay and latches as claimed by Mr. Sharma, PCS appearing for the respondents. In that connection, Mr. Sharma, PCS contends that on 13-02-2017, the respondents had sent a letter to the petitioner requesting it to submit its resignation as being statutory auditor of the Company. However, over a long period of time, the petitioner remained silent and as such, the respondent entertained an opinion--- and quite legitimately-----that the petitioner was no longer interested in continuing as statutory auditor of the Company.

66. In such a scenario, the respondents Company, having found no other way out, decided to appoint respondent No.2 as statutory auditor of the Company. However, when respondent No.2 had sought for No Objection Certificate (NOC in short) from the petitioner, only then, the latter informed the respondent No.2 that the petitioner was appointed as statutory auditor of the Company for the Block from 2015-16 to 2018-19 and it continues to remain so till the expiry of such a period. Even thereafter, instead of approaching the R-1, the petitioner rushed to the tribunal by the way of the application under consideration in the month of September,2017 seeking reliefs aforementioned.

67. **Since** the petitioner did not respond to the letter of the R-1 in time, **since** such a silence on the part of the petitioner had led the R-1 to conclude that the petitioner was no longer interested to continue as statutory auditor of the company , **since** on the basis of such assumption, R-1 had already appointed the R-2 so as to prepare the statutory report of the company in time **and since**, in the meantime, the R-2 had also submitted its audited report in respect of the R-1 company on accepting such appointment, **the petitioner** is prevented both under the law and under the principle of delay and latches from filing the proceeding in hand before the tribunal.

68. Such contention was, however, opposed to by the petitioner stating that the argument on this count was structured more on fiction and fancy than on law, logic and facts. In that connection, it has been submitted that the respondents cannot take shelter under the plea that the proceeding in hand is barred by limitation for the petitioner's not preferring the petition under consideration in time **since** the petitioner had approached this tribunal seeking the reliefs at the earliest possible opportunity questioning the various conducts of the respondent company including their competency to seek its resignation before the expiry of its term.

69. In so far allegation of proceeding in hand being hit by the principle of delay and latches is concerned, it has been submitted that it is not correct to say that present proceeding is hit by the principle aforesaid. In support of such contention, it is argued that though the law of limitation and the principle of the principle of delay and latches work towards the same goal, same being barring the aggrieved person in seeking relief from judicial forum after certain period *-- --yet-----*their areas of

operation are wholly different with result that none of them are not allowed to operate in the field earmarked for other.

70. According to the petitioner, the petition in question is clearly governed by the Limitation Act 1963 in view of law laid down in section 433 of the Act 2013 which made the limitation Act applicable to the proceedings initiated under the Act of 2013. More importantly, the petitioner has preferred the petition well within the time, specified in the Act of 1963. Therefore, the allegation that present proceeding is also hit by the principle of delay and latches is wholly without any substance ---argues the legal representative, appearing for the petitioner.

71. I have considered the rival submissions having regard to the materials on record as well as the law holding the field including the law of limitation. A careful perusal of the limitation Act reveals that it is based on the maxim that *interest republicae ut sit finis litium* which means that interests of the state require that a period should be put to litigation. Unlimited and perpetual litigations disturb the peace of the society and leads to disorder and confusion. The prime object of the statute is to make the litigant public vigilant in perusing their rights and also to prevent harassment to the opposite party by bringing stale claims before the legal forum.

72. On the perusal of the Act of 2013, it is found that the Act of 2013 itself does not prescribe any period of limitation in respect of the various proceedings initiated there-under. However, Section 433 of the Act of 2013 says that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceeding or appeals before the Tribunal or the Appellate Tribunal, as the case may be. In that view of the matter, the Limitation Act is made applicable to the proceedings, initiated under the Act of 2013.

73. On perusal of the Act of 1963, it is found that schedule, attached to the Limitation Act, prescribes different periods of limitation for different kind of suits/petitions/applications etc. But the application (*which mean petition as well, vide definition of application in section 2(b) of the Act*) for which no separate period of limitation is provided elsewhere in 3rd Division (Applications) of the Schedule, attached to the Limitation Act 1963, such application would be governed by the period of limitation, as stated in Article 137 of the Schedule.

74. Said Article says that the period of limitation for any application covered by said Article would be 3 years from the date of accrual of cause of action. I have also found that the petition in question does not come under any of the Articles from Article 1 to Article 136 meaning thereby that the petition in hand is one which is covered by Article 137 and in that case, the period prescribes for initiation of legal proceeding, as stated above, is 3 years from date of accrual of cause of action. Since, the present proceeding was presented before the tribunal on 12-09-2017, it needs to be held that this proceeding was not barred by law of limitation.

75. One may note here that the respondents have also contended that the proceeding under consideration is also barred by the principle of delay and latches. It needs to be stated here that when a suit/ petition/application ----as far as law of limitation is concerned -----is governed by the Act of 1963, no other Act or Acts -------*not even the principle of delay and latches*----------can be allowed to prescribe a period, different from the period, so stipulated in the Act of 1963.

76. However, there may be many proceedings, particularly the proceedings before the tribunals or other Quasi –Judicial tribunals, to which the Limitation Act has no application since it is well settled that the Limitation Act is applicable to suits/ petitions / applications etc which are instituted before the courts only ---and ---*not before the Quasi –Judicial tribunals*----notwithstanding the fact that such bodies are also vested with certain specified powers which law confers only on Civil or Criminal Courts.

77. But then, it does not mean that since the limitation Act has no application to the proceedings before the tribunal or other quasi judicial bodies, the aggrieved person (s) can approach such tribunals according to their convenience or sweet will. That has never been the case since in all those cases, the principle of delay and latches would come to occupy the space to determine if the applicant /petitioner approaches the legal forum well in time and would, therefore, bar the lethargic and indolent relief seekers from getting any relief from the tribunal or other quasi -judicial bodies after certain period from the date of accrual of cause of action.

78. This is because of the fact that the principle of delay and latches, like the law of limitation, is based on public policy which requires that a person with good causes of action should pursue them with reasonable diligence, and that too, within the reasonable time. Therefore, even in cases where the

limitation Act has no application, the aggrieved person (s) is expected to knock the doors of legal forum within a reasonable period of accruing of the cause of action.

79. In this connection, it may be stated that the Limitation Act is not applicable to a proceeding U/S 33C (2) of the Industrial Dispute Act 1947. Similarly, law of limitation was held to be not applicable to the proceedings, filed before the Company Law Board (in short, CLB). No limitation has been prescribed for filing a writ petition against any executive action. But then, whenever such proceedings are filed with inordinate unexplained delay, those authorities dismiss such proceedings and they always do so on invoking the principle of delay and latches in approaching the legal forum.

80. Since I have already found that the present proceeding under the Act of 2013 is clearly governed by the Limitation Act, 1963 and since the said proceeding is also held not being barred by any provisions of the Limitation Act, there cannot be any escape from the conclusion that the allegation in the proceeding under consideration is barred by the principle of delay and latches is nothing but a claim wholly without any substance.

81. The respondents have contended that the legal representative has no authority to present the proceeding in hand and in that connection, it has been submitted that the Board of Directors had never authorized the legal representative to present the petition and, therefore, on this count alone, the present proceeding is liable to be dismissed. I have considered such submissions in the light of the materials available on record and found that the legal representative was duly authorized by the Board of Directors to present this petition before this Tribunal and, therefore, allegation, mounted on this count, is found to be without any substance.

82. I have already found that the respondents have questioned the intent and conduct of the petitioner in preferring the petition under consideration on grounds more than one which I have narrated herein before. But, our foregoing discussion has, now, made it more than clear that it is the not the conduct and intent of the petitioner but the conducts and intents of the respondents instead in removing the petitioner from the office of the statutory auditor before the expiry of its term which are shrouded by a thick cloud of suspicion, doubt and qualm which, in turn, makes such removal entirely unlawful.

84. It is a settled proposition of law that the conduct of the parties is a very relevant factor to be considered in the equitable proceedings under *Sections 397/398*. *In Sri Kanta Datta Narasimharaja Wadiyar v. Venkateshwar Real Estates Private Ltd. (1991) 3 Comp. LJ 336 (Kara) : (1991)72 Comp Cas 211 (Karn),* it was held that the petitioner seeking equitable relief must come with clean hands and good conduct, failing which the petitioner would constitute a gross abuse of the process of the Court, and the petitioner is not entitled for any relief *under Sections 397 and 398*. Same principle is equally applicable to a proceeding under section 140(1) and 140(4) of the Act of 2013.

85. Resultantly, I am constrained to hold that the failure on the part of the respondents to give any opportunity to the petitioner against the non ratification of its appointment by the shareholders of the company in the AGM, held on 28.09.2016 resulted not only in violation of the principle of natural Justice-- but ----such a failure threw to the wind the requirements of law, so enshrined in section 101 of the Act of 2013. Similarly, their conduct in seeking resignation letter from the petitioner under the letter 13.02.2016 is also found to be equally untenable in law.

85. Consequently, this proceeding is allowed declaring that –

(i) *The removal of the petitioner firm as auditor of the Respondent no.1 Company is illegal;*

(ii) *The appointment of the Respondent No.2 firm as auditor of the Respondent No.1 Company is equally illegal and, therefore, unsustainable in law.*

(iii) *The petitioner firm is restored to the position which it occupied before its alleged removal from the office of auditor of the respondent company and shall continue as the Auditor of the Respondent No.1 Company till the expiry of its term ---unless --- in the meantime, it is removed following the prescriptions of law.*

(iv) *The parties are left to bear their respective costs.*

86. The Registry is directed to send copy of the order to all concerned.

Sd/-
Member (Judicial)
National Company Law Tribunal,
Guwahati Bench: Guwahati

Dated, Guwahati the 22nd November, 2017
Deka/22-11-2017