

T.A. No. 02/2016  
(CA No. 134/2016)  
In  
TP No.06/397/398/GB/2016  
(CP No.287/2012)

Under Section 397/398 /402/406 of the Companies Act, 1956.

In the matter of

Ranjit Borthakur & Ors.

: Applicants/ Petitioners

VERSUS

W.G.Resorts Assam (P) Ltd & Ors.

: Non-applicants/ Respondents.

Order delivered on: 27.10.2017

Coram:

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

**ORDER**

**T.A. No. 02/2016 (CA No.134/2016)**

I had already heard Mr. D.Saikia, learned Senior Advocate assisted by Mr. R.Borpujari, learned Advocate appearing for the applicants/petitioners. Also heard Ms. M.Hazarika, learned Senior Advocate assisted by Ms. S.Khound, learned Advocate appearing for the respondent Nos.1-7 as well as Mr.K.K.Dutta, learned Advocate appearing for the respondent Nos. 11 & 12.

2 By this order, I propose to dispose of the present application same being TA No.02/2016 (corresponding to CA No.134/2016) arising out of TP No.06/397/398/GB/2016 (corresponding to CP No. 287 of 2012). In order to appreciate the background of the present proceeding, I find it necessary to have a look at the order dated 17.08.2017, rendered by the Hon'ble Gauhati High Court in Co. App. No. 01/2016.

3 For ready reference the said order dated 17.08.2017 is reproduced below:

"BEFORE

HON'BLE MR. JUSTICE SUMAN SHYAM

**17.08.2017**

*Heard Mrs.M.Hazarika, learned Senior counsel assisted by Ms.S. Khound, learned counsel appearing for the appellants. Also heard Mr. D.Saikia, learned senior counsel assisted by Mr. R. Borpujari, learned counsel representing the respondent Nos. 1,2,7,9 and 10. The remaining respondents have not appeared though served.*

*This appeal has been preferred under section 10(F) of the Companies Act, 1956 against the order dated 23.02.2016 passed by the Company Law Board, Kolkata Bench in C.A.No. 134/2016 arising out of company petition No.287/2012.*

*The respondent No.1 herein had filed company petition No.287/2012 before the Company Law Board under Sections 397, 398 read with section 402 of the Companies Act, 1956 alleging oppression and mismanagement against the respondents herein. In the said Company petition a miscellaneous application being C.A.No. 134/2016 was filed by the petitioner with a prayer to permit him to participate in the meeting of the Board of Directors of the appellant company through video conferencing or audio visual means in terms of section 173(2) of the Companies Act, 2013. By the impugned order dated 23.02.2016 the learned Judicial Member of the Company Law Board (as it was then) had posted the matter on 18.04.2016 by giving time to the present appellants to file reply and thereafter, for filing rejoinder in the matter before taking up the application for disposal. Aggrieved by certain observations made in the order dated 23.02.2016, the present appeal has been filed.*

*By inviting the attention of this Court to the impugned order dated 23.02.2016, Mrs Hazarika submits that although nothing has been decided by the learned Company Law Board in the matter, yet, the observations recorded therein is posing undue difficulties in conducting the affairs of the company inasmuch as the respondents by a misinterpretation of the observations recorded therein, are seeking to hold up the company on the ground of contempt, even though there is no such direction passed by the learned Company Law Board.*

*Opposing the said argument, Mr. Saikia, learned senior counsel appearing for the respondents, submits that the right of a director to participate in the meeting of the Board of Directors through any of the means provided under section 173(2) of the Companies Act, 2013, which includes participation through video conferencing facility and audio visual means, is provided by the statute and the company cannot deny the said right to any of the directors. In support of the aforesaid argument Mr. Saikia has relied upon Rule 3 of the Company (Meeting of Board and its Powers) Rules, 2014 to contend that the said provision is mandatory and must be followed by the company.*

*Mrs. Hazarika, on the other hand, submits that the aforesaid facility is merely optional as would be evident from a reading of Rule 3(a) and (b) of the Rules of 2014. Even assuming that the rules are to be treated as mandatory, even in that case, submits Mrs. Hazarika, that there is no proper facility or internet connectivity in the Resort of the appellants permitting operation of video conferencing or audio visual facilities by means of internet. Under the circumstances, the demand of the respondents/applicants cannot be carried out due to lack of technical feasibility.*

*I have considered the submissions made by the learned counsel for the parties and have also perused the materials on record.*

*At the very outset it would be necessary to quote the observations made by the learned Company Law Board which has prompted the appellants to prefer the present appeal:-*

*"Heard the counsel appeared for the respective parties. From the perusal of Section 173(2) of the Companies Act, 2013 it is clear that the participation of directors in a*

meeting of the board may be either in person or through video conferencing or other audio visual means. Therefore, the Companies Act, 2013 incorporated the said provision that the meeting of board of directors through video conferencing or other audio visual as an alternative mode by using the latest technology in the Act enabling the directors who may not be able to present in person can participate through video conferencing or audio visuals. In general and in compliance with the provisions of the Companies Act, the company cannot deprive the right of the director if he demands that the meeting should be conducted through video conferencing. I am not expressing any view on the merits of this Application at this point of time leaving open to the parties to complete the pleadings. The respondents may file counter to the application within a period of four weeks and serve copies on the other side. After receipt of reply, the petitioner may file rejoinder within a period of two weeks and serve copies on the other side. The CA is posted on 18.04.2016 at 10.30 a.m".

From a reading of the aforesaid observations, it is apparent that the learned Company Law Board has not finally adjudicated the contentions issues involved in the said application which is still pending disposal. The appellant is also yet to file its reply in the matter. Whether it will be technically feasible to provide video conferencing facility to the respondent No.1 is a matter of fact which has to be decided by the learned National Company Law Tribunal (NCLT), where the application is stated to be pending.

Section 10(F) of the Companies Act, 1956 permits this Court to entertain an appeal against an order of the Company Law Board only on question of law. Since nothing has been decided by the order dated 23.12.2016, I am of the view that no question of law arises in this appeal so as to enable this Court to exercise jurisdiction under section 1 of. The observations made by this Company Law Board, on the face of the record, appears to be tentative and merely a reiteration of the impressions that prima facie flows from a reading of the provision of the Act.

Be that as it may, since the CA No. 134/2016 is pending before the National Company Law Tribunal (NCLT), Guwahati, I deem it appropriate to dispose of this appeal with a request to the learned Tribunal to take up the application and pass a final order as may be justified in the facts and circumstances of the case. Facilitating the above, within four weeks from today the appellant company would file its response in respect of the prayer made in CA No.134/2016. Within four weeks thereafter, an attempt may be made to finally dispose of the C.A.No. 134/2016.

A copy of this order be produced before the learned NCLT, Guwahati for doing the needful.

The appeal is disposed of accordingly.

Sd/SUMAN SHYAM  
JUDGE"

This is how the present proceeding is before this Bench.

4 Mr. D.Saikia, learned Senior Advocate appearing for the respondents contends that the law in the form of Section 173(2) of the Companies Act, 2013 has bestowed upon the director of a company, an undisputable right to attend the meeting of the Board of Directors in any one of the following ways:

- 1). He may personally participate in the meeting of the board or
- 2). He may participate in the meeting through video conferencing or

3). He may participate in the meeting through other audio visual means.

5. However, such video conferencing or other audio visual means must be capable of recording and recognising the participation of the director(s) and also capable of recording and storing the proceedings of such meetings along with date and time.

6. In order to buttress the submission, so canvassed, my attention has also been drawn to the various provisions in the Companies (Meetings of board and its powers) Rules, 2014, (in short, the Rules of 2014), more particularly to the Rule 3, 3 (1) and 3(2), as well as Rule 3(b), Rule 3(c), Rule 3(d), Rule 3(e) and Rule 3(f) of the Rules of 2014 and same was done to contend that the rights, conferred on the directors of a company under Section 173(2) of the Act of 2013, is incontestable one. For ready reference, the said provisions are reproduced below:

*“ Rule 3 . Meeting of Board through video conferencing or other audio visual means. ---- A company shall comply with the following procedure, for convening and conducting the Board meetings through video conferencing or other audio visual means.*

*Rule 1). Every company shall make necessary arrangements to avoid failure of video or audio visual connection;*

*Rule 3 (2). The Chairperson of the meeting and the Company Secretary, if any, shall take due and reasonable care. —*

*(a). to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;*

*(b) to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;*

*(c) to record proceedings and prepare the minutes of the meeting*

*(d) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the of the company at least before the time of completion of audit of that particular year.*

*(e) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means: and*

*(f) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meetings.*

*Provided that the persons, who are differently abled, may make request to the Board to allow a person to accompany him”.*

*"Rule 3(a) : The notice of the meeting shall be sent to all the Directors in accordance with the provisions of sub-section (3) of section 173 of the Act".*

*"Rule 3(b) : The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means".*

*"Rule 3(c) : A Director intending to participate through video conferencing or audio visual means shall communicate his intention to the Chairperson or the Company".*

*"Rule 3(d): If the Director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangements in this behalf".*

*"Rule 3(e) : The Director, who desire, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year".*

*"Rule 3(f): In the absence of any intimation under clause (c), it shall be assumed that the Director shall attend the meeting in person".*

7. Mr. Saikia, learned Senior Advocate has again drawn my attention to the proviso to Section 173(2) of the Companies Act as well as Rule 4 of the Rules 2014 to contend that certain matters cannot be dealt with in any meeting of Board of Directors held through video conferencing and other audio visual means. The proviso to Section 173(2) of the Act of 2013 coupled with Rule 4 of the Rules 2014, further demonstrate that except the meetings, where the matters, covered by Rule 4 of the Rules of 2014, are scheduled to be dealt with, a director of a company is entitled to attend all other meetings of the Board in any one of the ways, so specified in Section 173(2) of the Act of 2013.

For ready reference, the proviso to Section 173(2) of the Act of is reproduced below:

*"Provided that the Central Government may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means"*

For ready reference, the provision of the Rule 4 of the Rule of 2014 is also reproduced below:

*"Matters not to be dealt with in a meeting through video conferencing or other audio visual means, ---- (The following matters shall not be dealt with in any meeting held through video conferencing or other audio visual means:-*

- (i) the approval of the annual financial statements;
- (ii) the approval of the Board's report
- (iii) the approval of the prospectus;
- (iv) the Audit Committee Meetings for (consideration of financial statement

*Including consolidated financial statement, if any, to be approved by the Board under sub-section (1) of Section 134 of the Act) and*

- (v) *the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover”.*

8. Therefore, when one reads all those provisions in law and the Rules framed there-under in juxtaposition, there cannot be any escape from the conclusion that the section 173(2) of the Act of 2013 and the Rules, 2014 have unmistakably conferred on the Director (s) of the companies an indisputable right to participate in a meeting of the directors in any one of the ways, so mentioned in Section 173(2) of the Act of 2013 unless such right(s) is covered by Rule 4 of Rules, 2014 ----argues Mr. Saikia, learned Senior counsel for the applicants .

9. In view of above, Mr. Saikia, learned Senior counsel urges this Tribunal to grant the reliefs, so prayed for in the application, particularly the relief at para 25 (c) of the application subject, off course, to fulfilment of the requirements as specified in Rule 3(e) of Rule 2014.

10. Such contentions were opposed to by Ms. M.Hazarika, learned Senior Advocate, appearing for the non-applicants/respondents on counts more than one. In first place, it has been stated that it is a settled proposition of law that the respondent is required to deny the allegation made in plaint quite specifically. Non-denial or evasive denial to the allegation in the plaint tantamounts to admission, vide Order VIII (Rule 4) or Order VIII (Rule 5) of the Civil Procedure Code (in short, “the CPC”).

11. In that connection, it has been pointed out that in its reply to the application in hand, the non-applicants/respondents, had introduced its own story to show that the directions in 173(3) of the Act of 2013 cannot be enforced in the case in hand. In support of such claim it has been stated that the headquarter of the company is situated well inside the well-known Kaziranga National Park, ( in short, “KNP”) which is the home , not only of various wild animals and birds--- aquatic or non-aquatic---- but ---also the home of large number of trees, plants of various types and sizes as well as flora which give KNP an unique shape, outline and formation and all these make KNP a very ideal habitat for quite a large number of wild lives of all norms and forms .

12. In view of above, over the years, some very dedicated efforts have been made from all concerned authorities, national as well as international, to ensure that KNP does not drop its pristine but unspoiled natural ambience ---despite--- latter being centre of enormous activities of various colours and contours, tourists and tourism being most the predominate of those activities. However, such measures come in a very big way in the installation / setting up too many modern scientific gadgets in and around KNP which also included the putting in place some very sophisticated up to date telecommunication equipment in the area aforesaid.

13. Further, it is a well-known fact that in every summer, a series of massive floods wreak KNP which leave in its wake a trail devastation for which most of the period during summer, it remains isolated for all purposes from rest of the country and the world as well. In such a scenario, it is not possible on the part of non-applicants/respondents to provide uninterrupted electronic facilities, so

specified in section 173(2) of the Act of 2013 as well as Rules framed there-under to applicants/petitioner throughout the year.

14. All those difficulties were incorporated in the reply filed by the non-applicants/respondents. However, there is absolutely nothing on record to show that such statements, made by the respondents-non-applicants in their reply, had ever been denied by applicants/petitioners. Since, such serious contentions were not disputed by the non-applicants/respondents, now, in view of the law laid down in *Order VIII Rule 4 and Rule 5 of the CPC*, it does not lie in their mouth to say that assertions, so made in the reply were not correct.

15. In view of above, this Tribunal is duty bound to conclude that there is no dependable telecommunication facility in and around KNP. Once it is found that there is no telecommunication facility in and around KNP, there would be hardly any scope for the Tribunal to direct the non-applicants/ respondents to extend the facilities, so specified in section 173(3) of the Act of 2013 as well as in the Rules framed under aforesaid provisions of law and on this count alone, the application in hand is, therefore, required to be rejected.

16. The proceeding in hand is also questioned on legal ground too. In that connection, it has been contended that a suave perusal of the section 173(2) reveals that the directions therein are not mandatory in nature. Rather they are directory and the use of the word "may" in such a section makes it more than clear. The well accepted canon of interpretation which says that the word "may" --- as against the word "shall" ----generally makes some directions / instructions/ orders optional lends more and more substance to such a conclusion.

17. However, final seal of approval to such conclusion comes from the provision, incorporated in Section 1.2.3 of the Secretarial Standard on Meetings of the Board of Directors (SS-1) ( in short, the Secretarial Standard), issued by Institute of Company Secretaries of India (in short ICSI). Said Section provides that any Director may participate through Electronic Mode in a meeting, if the company provides such facility, unless the Act or any other law specifically does not allow such participation through Electronic Mode in respect of any item of business.

*For ready reference, the said Section with note is reproduced below: -*

*Sec.1.2.3 " Any Director may participate through Electronic Mode in a meeting, if the company provides such facility, unless the Act or any other law specifically does not allow such participation through Electronic Mode in respect of any item of business".*

*" Director shall not participate through Electronic Mode in the discussion on certain restricted items, unless expressly permitted by the Chairman. Such restricted items of business include approval of the annual financial statement. Board's report, prospectus and matters relating to amalgamation, merger, demerger, acquisition and takeover. Similarly, participation in the discussion through Electronic Mode shall not be allowed in meetings of the Audit Committee for consideration of annual financial statement including consolidated financial statement, if any, to be approved by the Board, unless expressly permitted by the Chairman".*

18. According to learned Sr. Counsel appearing for the non-applicants, a conjoint reading of section 173(3) of the Act of 2013 and the section 1.2.3 of the Secretarial Standard, more particularly, the sentence "any Director may participate through Electronic Mode in a meeting, if the company provides such facility", firmly demonstrates that the provisions incorporated in Section 173(2) of the Act of 2013 is directory thereby leaving some options for the companies to deviate from the direction in the aforesaid law in appropriate cases.

19. Ms. M.Hazarika, learned Senior Advocate further submits that the facts and circumstances, so narrated in the reply, unmistakably show that the case in hand is one where deviation from the aforesaid law is wholly justified. Situation being such, the applicants herein cannot require the company to extend facilities, specified in Section 173(2) of the Act of 2013 to the applicants to enable them to attend the board meeting conducted at headquarter of the company at Kaziranga by availing of the aforesaid audio/video facilities.

20. All those contentions were however contested by Mr. Saikia, learned senior counsel stating that the arguments aforesaid were structured -----not on law, logic and facts--- but--- on surmise and conjecture. In regard to the alleged physical, environmental, ecological and topographical barriers of KNP, it has been stated that KNP is not only the pride of the State but same is the showcase exhibiting nature's unique and exceptional bounty to the country to the world.

21. All these make KNP one of the most sought after tourist spots in the world for which tourists from all over the world make a bee-line to visit the same during any time of the year. Since it becomes a very important tourist hub of the country, therefore, Govt., both at centre and State, have been doing everything possible to provide it with the best of infrastructure in all the spheres including telecommunication connectivity with the rest of the country as well as with the countries all over the world.

22. Being so, KNP today remains connected with the rest of the world throughout the year and same is done with the help of state of art instruments of all kinds which included the most modern and excellent telecommunication gadgets. Therefore, the claim of the non-applicants/respondents that Kaziranga remains disconnected from the world during most of time of the year is nothing but a pack of lies only. He, therefore, submits this Tribunal to reject the contentions, raised on this count.

23. In regard to the contention that since the applicants/respondents did not dispute the claim regarding alleged physical, environmental, ecological and topographical barriers of KNP, so incorporated in the reply, the applicants are barred from questing the veracity of such claims, it has been contended that even if such contentions in the reply were not denied---yet--- such failure on the part of the applicants/petitioners cannot come in the way of this tribunal taking judicial notice of such facts, provided such facts qualify to be graded as facts as contemplated in section 57 of the Evidence Act.

24. According to the Sr. Counsel, appearing for the applicants, the facts---- narrated herein before ---by the counsel appearing for the applicants/petitioners -----qua eminent and illustrious



physical, environmental, ecological and topographical conditions of the KNP----- quite powerfully demonstrate that facts regarding the status, uniqueness and matchlessness of KNP are so notoriously publicised that they are made well known---- not only to the people of the country--- but--- also to the people all over the world.

25 Since the facts about KNP are so well advertised, they undoubtedly acquire the status of the facts, as contemplated in section 57 of the Evidence Act and therefore, , such facts need no further proof from the side of the applicants/ petitioners. Being so, this Tribunal can certainly take the judicial notice ----not only of physical, environmental, ecological and topographical condition of the KNP--- but ---also of its robust infrastructures in the terms of connectivity, including *telecommunication facilities*.

26. Once this tribunal take the judicial notice of various facts pertaining to KNP, it would invariably find that Kaziranga remains well connected with the country and rest of the world throughout the year through different media including telecommunication. Therefore, failure on the part of the applicants/petitioners, no way gives an excuse to the non-applicants in establishing their claim that since Kaziranga remains isolated on all fronts from rest of the world for most of the part of the year, it is not possible for the non-applicants /respondents, a Kaziranga based company, to extend benefits of section 173(3) of the Act of 2013 to the applicants.

27. In regard to the contention that the prayer made in the application is also not legally tenable, it has been submitted that such contention has no truth in it at all. In that connection, it has been stated that the word "may" in section 173(3), over which the learned counsel for non-applicants had laid so much of importance, no way shows that section 173(3) is not mandatory. The word "may", in fact, nothing to do with the nature of the directions, mandatory or otherwise, so incorporated, in the aforesaid sub-section.

28. Quite contrary to it, such a word only shows the options, which a director of a company, has in matter of attending the meeting of the board of the directors. Such options, being i) he may attend the same personally or ii) he may attend the same through video conferencing or iii) he may attend such meeting through other audio visual means. Therefore, the word "may" be read in that context and nothing else. On reading the word "may" as aforesaid, one would find that the argument, advanced from the side of the non-applicant, is without any basis whatsoever.

29. In so far argument, based on sec. 1.2.3 of the Secretarial Standard, is concerned, it has been submitted that the said Secretarial Standard are guide lines, issued by ICSI. It is also a settled proposition of law that the guidelines, issued by various departments, are to be followed and if any deviation is required to be made from the course of action, prescribed there-under, the department deviating from the same must assign good and valid reason. But then, the guidelines, issued by various departments, do not have the force of law or Rules, framed there-under.

30. Since the section 173(3) of the Act of 2013 together with the Rules framed there-under makes the directions in section 173(3) mandatory ones, therefore, the guidelines, under consideration, which do not have the force of law or the rules, framed there-under, cannot come in the way of this

Tribunal granting prayer in application, preferred by the applicants/ petitioners. On all those counts, Mr Saikia submits this tribunal to overrule all the objections, raised from the side of the non-applicants/respondents.

31. I have considered the rival submissions having regard to the provisions of law and the Rules as well as the guidelines, relied on by the parties to support their respective stand. Before taking up other controversies for consideration, I find it necessary to focus my attention on the question ---if--- for the failure of the applicants to dispute the story of the non-applicants/ respondents in their reply qua physical conditions of KNP, this tribunal is to accept what is/are being stated by the non-applicants in their reply, regardless of the veracity of aforesaid claims.

32. It is true that Order VIII Rule 4 and Rule 5 of the CPC require that a defendant to a suit is required to deny the statement(s) made in the plaint specifically. It is also true that in the event of failure of the defendant to deny the claim(s), made in the plaint specifically, it would be presumed that such facts in the plaint are admitted by the respondent.

33. Such proposition of law is commonly known as the doctrine of non-traverse. Section 58 of the Evidence Act further states that facts admitted need not be proved. But then, aforesaid proposition of law is not an absolute one. It has some limitations as well. In this connection, one may look into the proviso to the Rule 5(1) of the CPC or for that matter, the proviso to section 58 of the Evidence Act.

34. Those two provisos, incorporated in CPC as well as the Evidence Act, carve out exceptions to the Rule, so incorporated in Rule 5(1) of the CPC or in section 58 of the Evidence Act. Those provisos quite specifically state that the Court may, in its discretion, require any fact, so admitted, to be proved ---since--- the admission of a fact is one thing, the proof of such a fact is another thing --- although ---most of the times, the admissions of fact(s) tantamount to proof of such facts.

35. Therefore, the doctrine of non-traverse has no application where averments in the plaint are untrue or where such averments are vague, unclear and inconclusive or where the facts stated in the plaint are completely inconsistent with facts which the courts are allowed to take judicial notice of or where the statements, rendered in the plaint, suffer from some other similar defects.

36. Being so, in those eventualities, only because of the fact that averments, made in the pleading of a party, are not denied by the opposite party thereto, it cannot be said that court has no other option but to accept what is /are being stated in the plaint regardless of the veracity etc. of the statements, so made in the plaint. In other words, in appropriate situations, the court may refuse to act upon the unconverted statements made in the plaint.

37. In such a scenario, let me consider how *far the argument, advanced from the side of the non-applicants*, contending that *since* the applicants/petitioners fail to repudiate the alleged deplorable condition of KNP, as narrated in the reply to the application, filed by the non-applicants/respondents, therefore, in terms of Order VIII Rule 5 of the CPC, such contentions in the

reply of the non-applicants are held to be admitted and ,therefore, to be treated as truthful ones , *is found tenable in law.*

38. One may note here that KNP has a long and chequered history. It begins its journey in late 18<sup>th</sup> century but was declared as Reserve Forest in 1908. However, over the years, it started having more and more feathers to its cap and has always been gaining more and more strength with the passage of time which became National Park in 1968 and was also declared as World Heritage Site and the Tiger Reserve in 1985 and 2006 respectively.

39. KNP has now been acclaimed as one of the most important tourist spots in the world providing enormous scope for very many scientific investigation and study besides entertaining people coming from the world over. All these demand authorities concerned to provide extraordinary infrastructures in all respects to KNP which include state of art telecommunication facilities so that it remains connected with the rest of the world throughout the year.

40. All those facts, I find, are so notoriously publicised that everyone in the country and elsewhere are well acquainted with all those facts. They, therefore, need no further proof of the same. In that view of the matter, in my very firm opinion, all the facts and circumstances concerning KNP, which were propagated before the Tribunal during the course of hearing, duly qualify to be graded as facts as contemplated in section 57 of the Evidence Act. Therefore, in my considered opinion, this Bench is duty bound to take judicial notice of those physical conditions of KNP.

41. I have also found that the Headquarters of the non-applicant/respondent No.1 Company, namely, W.G. Resorts(P) Ltd & Ors is situated in a place very close to KNP. Being so, the claim of the learned senior counsel appearing for the non-applicants/respondents that since there are no uninterrupted telecommunication facilities in the place where the headquarters of the company located, the non-applicants are not in a position to extend the facility specified in Section 173 (2) of the Act, 2013 to the applicants/petitioners is found to be without any substance and, therefore, the same is rejected.

42. This brings me to the question if the directions, incorporated in section 173(2) of the Act of 2013 are mandatory in nature. It may be stated here that the learned counsel appearing for the non-applicants/respondents arduously contends that the use of word "may" in Section 173(2) of the Act of 2013 clearly demonstrates that the directions, contained therein, are directory in nature. Further, the provisions incorporated in Section 1.2.3 of the Secretarial Standard fortify more and more the aforesaid conclusion.

43. Such a contention, as stated above, was strenuously opposed to by the learned counsel appearing for the applicants/petitioners--- since--- according to him, on proper appreciation of aforesaid provisions incorporated in section 173(2) of the Act, 2013 read with the Rules framed there-under, it would appear clear that the directions in the aforesaid section are mandatory in nature. Now, let me see whose contention stands to reason.

44. It is true that the word "may" has been used in Section 173 (2) of the Act of 2013. However, a careful perusal of the aforesaid provisions of law reveals that the word "may" in the said provisions of law, has nothing to do in signifying the nature of the directions, incorporated in such a provision. It, in my opinion, only shows that the Director of a company may attend the meeting of the Directors in any one of the three modes, prescribed therein. Therefore, the use of the word "may" needs to be considered in that context and nothing else.

45. However, more and more credence to such a conclusion come when one reads proviso to Section 173(2) of the Act of 2013 in juxtaposition with Rule 4 of the Rules of 2014 which prohibit the conducting of certain matters through video conferencing / other audio visual means. Such a perusal of the proviso to Section 173(2) and the Rules framed there-under leaves no manner of doubt that the directions in Section 173(2) of the Act are quite mandatory in nature.

46. I have already found that the learned Sr. counsel appearing for the non-applicants/respondents places enormous reliance on Section 1.2.3 (SS 1) of the Secretarial Standard in order to make out her point that the provisions of Section 173 (2) of the Act, 2013 is directory in nature. A cursory look in the aforesaid provisions gives an initial impression that the companies have some amount of option in extending the facilities specified in Sec. 173(2) to the directors who want to avail of such facilities.

47. But a deeper and closure look at 1.2.3 (SS 1) of the Secretarial Standard in the light of other law and Rules holding the field, would reveal that the argument, advanced from the side of non-applicants on this count is untenable in law. This is because of the fact that the Secretarial Standard is only a guideline and, therefore, it cannot be read in isolation.

48. Rather, same if required to be read alongside other laws and rules if any, holding the field in respect of which such guidelines are issued since it is an established law that the guidelines cannot override the provision of law or the rules framed there-under. Since we have already found that the directions incorporated in Sec. 173(2) as well as Rules framed there-under are mandatory ones, the provisions in the guidelines under consideration cannot have primacy over the law and rules aforementioned.


49. Being so, I have no hesitation whatsoever, in rejecting the arguments, advanced from the side of the non-applicants/respondents contending that the directions in Section 173 (2) of the Act, 2013 are only directory and, therefore, the non-applicants/respondents may deviate there-from in appropriate cases. As a corollary thereto, it is held that the provisions in section 173 (2) of the Act, 2013 are mandatory and, therefore, the companies are not permitted to make any deviation there from.

50. Resultantly, this proceeding is allowed accepting the prayer made in para 25 (c) of the application.

51. The non-applicants/respondents are directed to extend the facilities incorporated in Section 173(2) of the Act, 2013 to the applicants/petitioners, subject of course to his fulfilling the requirements specified in Rule 3(3)(e) of the Rules of 2014

52. The present proceeding is accordingly disposed of.

53. The Registry is directed to list the connected company petition for necessary order on 15.11.2017.

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

Samir