NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH AT GUWAHATI

C.P. No.18 of 2017

Under Section: 241/242/244 of the Companies Act, 2013

In the matter of

Dr. Jakir Hussain ... Petitioners

-versus-

Gauripur Hospital Pvt. Ltd. ... Respondents

Order delivered on 30 -11-2017

Coram:

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

For the Petitioners : Mr. Siddharth Sancheti, Advocate

For the Respondents : Mr. Abdus Sattar, Advocate
Mr. H. K. Baruah, Advocate

ORDER

This application under Section 241, 242 and 244 of the Companies Act, 2013 (in short, the "Act of 2013") has been filed by the Petitioner herein, against (1) Gauripur Hospital Pvt. Ltd., (2) Mr. Itesh Bordoloi, (3) Mr. Reazul Hussain, (4) Mrs. Jayashree Borobordoloi, (5) Ms. Bonti Bordoloi and (6) Mr. Hemanta Kakaty, hereinafter referred to as the respondents No.1, 2, 3, 4, 5 and 6 respectively, alleging that the respondents have conducted the affairs of the respondent No.1 company in gross violation of the provisions of the Act of 2013 and the Rules framed thereunder as well as the Articles of Association (in short "AOA").

2. The petitioner further claims that for the running of the affairs of the respondent No.1 company in the aforesaid manner, detrimental to the interest of all concerned, the petitioner stands subjected to enormous oppression which, in turn, also resulted in huge mismanagement of the affairs of the respondent No.1 company. Therefore, the petitioner has approached this Tribunal by way of the present petition, seeking various reliefs incorporated therein.

3. The facts, so narrated in the petition, in short, are that Gauripur Hospital Pvt. Ltd. (R-1 Company) is a company duly incorporated under the relevant provisions of the Companies Act, 1956 having its Registered Office at C/o. Lower Assam Hospital & Research Centre Chapaguri, North Bongaigaon, Assam. The authorized share capital of the respondent No.1 company is Rs.1.5 Crores divided into 1,50,000 equity shares of Rs.100.00 each. The total issued, subscribed and paid up share capital of the company is Rs.72.00 lacs divided into 72,000 equity shares of Rs.100.00 each fully paid up.

4. The R-1 company was incorporated on 07th January, 2009 with the main objects of establishing, running, managing etc. hospitals, dispensaries, clinics and other establishments for providing medical services in all its branches by all available means to the public in general. The principal and ancillary objects of the R-1 company are incorporated in its Memorandum of Association (MOA) and Articles of Association (AOA). The petitioner is one of the promoters of the R-1 Company and had taken great pain in bringing into existence of the company aforesaid.

5. In due course, the petitioner was allotted 9,500 equity shares of Rs.100.00 each, thereby as on 31-03-2016 his shareholding in the respondent No.1 Company stands at 30.159%. The petitioner was one of the directors of the R-1 **Company since its incorporation. In** 2010, the R-1 Company took a loan and availed of cash credit facility from Assam Gramin Vikash Bank Ltd., G. S. Road, Guwahati, Assam by creating charge on immovable and movable assets of the R-1 Company. The petitioner too stood as a guarantor undertaking to repay the loan, which was so availed of by the R-1 Company, in accordance of repayment schedule.

6. In paragraph IX of the petition, it is stated that in 2015, there was a change in the composition of the Board of Directors of the company. In that connection, it has been stated that the respondents No.4, 5 and 6 were first appointed as Additional Directors in the Board. Subsequently, some of the shareholders and Directors of the R-1 company, they being Sriram Sarma, Sridam Das and Naba Kumar Basumatary, had disposed of their shares in the R-1 Company and also resigned from the posts of Directorship of such a company.

7. The shares, so disposed of by Sriram Sarma, Sridam Das and Naba Kumar Basumatary were acquired by respondents No.4, 5 and 6 respectively and they, thus, became shareholders of the company concerned and in due course, respondents No.4, 5 and 6 became the full-fledged Directors of the respondent company as well. After their induction into the Board of Directors of the company, they started misusing their position as Directors thereof. Such allegations are incorporated in paragraphs IX and X of the petition. For ready reference, those paragraphs in the petition are reproduced below: -

"IX That since the incorporation of the respondent No.1 Company, no major changes or re-shuffle of the Board ever happened but in the year, 2015, changes were done in the Board of the respondent No.1 Company whereby the respondent No.4, 5 and 6 were appointment (sic.) appointed as the additional directors of the Company later confirmed in the shareholders meeting on cessation of then the existing three directors of the Company, namely Sridam Chandra Das, Sriram Sharma and Sri Naba Kumar Basumatary. The equity shares hold by the ceasing directors were brought by the incoming directors in the following manner:

SL.NO.	*NAME OF THE SHAREHOLDER*	*NUMBERS OF SHARES TRANSFERRED*	*NAME OF THE PURCHASER*
1	*Sriram Sharma*	*13,250*	*Mrs. Jayshree Bordoloi*
2	*Sridam Ch. Das*	*13,250*	*Mr. Hemanta Kakati*
3	*Sri Naba Kumar Basumatary*	*13,250*	*Mrs. Bonti Boro*

X. That with the incoming of new director on board, the way the respondent No.2 to 6 started to run the Company the way the Company started to run and managed were completely opposite to the interest

of the Company and that the petitioner being one of the Directors on Board and the petitioner as first director of the Company was not pleased with the working of the Board as majority of the Directors being respondent No.4 to 6 were either close family members or the relatives of the respondent No.2, who started to run the respondent No.1 Company in a very unethical manner and against the long established process of the respondent No.1 Company."

8. In the meantime, the petitioner received a *letter dated 29-04-2016* from the *respondent No.2* wherein it was stated that one of the shareholders of the company, she being Smti Bonti Gogoi (respondent No.5), sent a special notice dated 28.04.2016 U/s 169 of the Act of 2013 to the respondent No 1 company proposing to remove the petitioner from the Board of directors of the company informing further that the proposal in the said special notice U/s 169 of the Act of 2013 would be placed in the meeting of Board of Directors, scheduled to be held at the registered office of the company on 09-05-2016.

9. For ready reference, the aforesaid notice dated 28.04.2016 from Smti Bonti Gogoi (R-5), which is stated to be special notice u/s 169 of the Act of 2013, is reproduced below:-

"I Bonti Gogoi holding 13250 equity shares in your Company hereby give notice, pursuant to Section 169 of the Companies Act of my intention to remove Mr. Jakir Hussain, a Director of your Company. *Being a government employee, I believe he is unable that the petitioner is a government employee petitioner will not be able to perform his duties competently and also his interest might clash with th4e business affairs of the company. Therefore, it will be beneficial for the company to remove him from the office of the Directorship"*

10. The petitioner again submits that in convening the Board Meeting on 09.05.2016, the respondents did not follow at all the directions rendered in section 173 (3) of the Act of 2013. Section 173 (3) of the Act, amongst other things, deals with calling of meeting of the Board and same clearly requires that a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every Director at his address registered with the company and such notice shall be sent by hand or by post or by electronic method.

11. However, in the case in hand, the petitioner was never served with any notice of such Board meeting which was purportedly convened on 09.05.2016 although law in the form of section 173(3) of the Act makes it obligatory on the part of the Board to send 7 days' notice to all the Directors of the company. Such conduct of the respondents demonstrates that no Board meeting was ever convened on 09.05.2016 to discuss the matters in the notice dated 28.04.2016, much less adoption of any resolution in that meeting summoning an Extra Ordinary General Meeting (in short, EOGM) to discuss the removal of the petitioner from the Board of Directors on 02-07-2015

12. For ready reference, section 173(3) of the Act of 2013 is also reproduced below: -

"173. Meetings of Board. —

(1) .....

(2) .....

(3) A meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means:

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting:

Provided further that in case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any".

13. On the basis of such purported Board meeting, a notice dated 09.05.2016 was drawn up and same was communicated to the petitioner under the letter dated 09.05.2016 which was dispatched to postal department on 09.06.2016 wherein it was stated that an EOGM proposed to be held on 02-07-2016 and the petitioner could make his representation against the proposal seeking his removal from the Board of Directors of the company on or before 02-07-2016, so that said representation could be read out before the EOGM, scheduled to be held on 02-07-2016 for the consideration of the shareholders of the company and also for their taking necessary decision thereon. For ready reference, said letter s reproduces below:-

GAURIPUR HOSPITAL PRIVATE LIMITED

CIN: U43201AS2009PTC008904
CENTRE, EMAIL ID: agarwalar @rediffmail.com
Phone No: 09435021241 Assam

LOWER ASSAM HOSPITAL & RESEARCH
CHAPARGURI, NORTH BONGAIGAON,
BONGAOGAON-783380

Date: 09.05.2016

Mr. Zakir Hussain
Gauripur, W No. 4,
Near Birla Building,
Dhubri, Gauripur-783331 (Assam)

Dear Sir,

With due regards, this is to inform you that the Company has received "special notice" from one of the shareholder of the company, pursuant to section 169 of the Companies Act, 2013 proposing your removal from the office as Director. The proposed resolution, which will be placed at the Extra Ordinary General Meeting scheduled to be held on Saturday, 2nd Day of July, 2016, at the registered office of the Company at 4 pm and a copy of such special notice is enclosed for your consideration.

Pursuant to the provisions of Section 169 of the Companies Act, 2013, you can make representations for your removal as the Director at the Extra Ordinary General Meeting or before, so that your representations may be read out at the Extra Ordinary General Meeting to be held on 02.07.2016

Yours faithfully,

For Gauripur Hospital Private Limited

(Iresh Bordoloi)
Managing Director
(DIN: 02414706)
Encl: Copy of special notice

14. However, the grounds, so communicated through the letter dated 09.05.2016 were wholly unfounded and, therefore, the petitioner prepared a detailed representation dated 02-07-2016, inter alia disputing the grounds on which he was sought to be removed from the directorship of the company. In his letter, he had categorically explained that his dual roles do not result in clash of duties since his role as physician of a government hospital and his role as one of the directors of the respondent no. 1 company are quite diverge and different in tone and tenor. Therefore, there was no possibility whatsoever for clash of his duties as government medical practitioner with his duties as a director of the company. The fact that he had never been drawing any salary from the company aforesaid makes such a conclusion inevitable.

15. The petitioner claims that as advised in the notice dated 09.05.2016, he came to the registered office of the company on 02-07-2016 and found no one in the office of the company to transact the business, notified through the notice dated 09.05.2016. Therefore, he could not present his representation before the EOGM on the aforesaid date. Since no EOGM was held on 02.07.2016, he was expecting to get further notice about the re-scheduled EOGM to transact the business notified in the notice dated 09.05. 2016.

16. However, he never got any notice from the respondents and as such, he tried to contact the company to know the fate of the EOGM which was scheduled to be held on 02-07-2016, but not convened on that date. In that connection, he visited the office of R-1 Company on 02-07-2015. However, he was prevented from inspecting the records of the company. Having found no other way out, he engaged a professional to help him know about the fate of the aforesaid EOGM.

17. The professional so engaged, visited the Ministry of Corporate Affair's website and found that on 02-07-2016, the petitioner was removed from the office of the Director of the company in view of the ordinary resolution adopted in the EOGM allegedly held on 02-07-2016. Since no such EOGM was ever held on 02-07-2016, therefore, such a meeting existed on books only and being so, same cannot have any legal validity whatsoever and decision, so taken therein, cannot bind him in any manner whatsoever.

18. The petitioner further contends that even if one assumes for the sake of argument for a moment that an EOGM as alleged was conducted on 02-07-2016—yet--- such meeting cannot have any legal validity since it was conducted in total violation of prescription of law, so rendered in section 115 of the Act. In that connection, it has been stated that the law in form of section 115 of the Act makes it obligatory on the part of the company to serve a special notice on the Director who is sought to be so removed before the expiry of his term.

19. Law also requires that such notice may be given by such number of members holding not less than 1% of total voting power or holding shares of which aggregate sum is not exceeding Rs.5.00 lacs. For ready reference, section 115 of the Act of 2013 is reproduced below: -

> *"115. Resolutions requiring special notice. —Where, by any provision contained in this Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to*

the company by such number of members holding not less than one per cent. of total voting power or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed."

20. Coming back to the case, it is found that **no notice**, as required under section 115 of the Act of 2013, seeking removal of the petitioner from the Board of Directors was ever sent to the petitioner. Rather, the shareholder of company served the company with a notice under section 169 of the Act of 2013 which deals with the procedures for the removal of the Director before the expiry of the period of his office. According to the petitioner, since proceeding under consideration, was initiated on very wrong footing, it lacks the very substratum even to drift for a moment.

21. Since the very basis of the proceeding in question is found faulty and illegal, there cannot be any escape from the conclusion that the resolution in question on the basis of which the petitioner stood removed from the Board of Directors, is equally faulty and illegal. On all those allegations, the petitioner has prayed that all the reliefs which he had prayed for in the proceeding in hand, including the relief in the form of setting aside of the resolution under which he stood removed from the office before the expiry of his term be granted

22. Notice of this proceeding was served upon the respondents. The respondents, having filed reply, contested most of the claims projected by the petitioner through the petition aforementioned. In their reply, it has been stated that R-1 company **was incorporated on 07th January, 2009.** and petitioner along with 4 others were its first Directors having subscribed an equal number of shares in the Company. In due course, respondent No.2 was appointed as Managing Director of respondent No.1 Company and has since been looking after the affairs of the company apart from performing duty as physician in the aforesaid Hospital.

23. However, since petitioner had been showing interest in all round developments of R-1 company, therefore, having regard to the enthusiasm, shown by the petitioner in carrying out the object of the company, the company was pleased to offer him the post of Medicine Specialist in the R-1 company vide letter dated 02.10.2010 (vide Document 'F'). Such offer was, however, subject to the conditions that the petitioner has to discharge his duty as whole time medical practitioner of the company and that he would not practice in medicine as being the member of any other health establishment.

24. Such conditions were attached to the appointment since the R-1 company was designed to sub-serve the interest of the people, more particularly, the downtrodden sections of the society at least possible cost and since the petitioner needs to attend duty in the hospital from 09-00 AM to 05-00 PM. All those conditions were accepted by the petitioner and in that connection, he executed a declaration form dated 0210.2010 (vide Document 'H') wherein the petitioner, amongst other things, had also declared that on such a date, he has not been working in any other health establishment.

25. Thereafter, the petitioner was allowed to serve the R-1 company as Medicine Specialist and said fact had also been verified by the Joint Director of Health Services, Dhubri who is supposed to be the custodian of the records of all the government medical practitioners in the district of Dhubri. In that

way, the petitioner had been working as medicine specialist in the R-1 Company till 2015 and used to receive remuneration regularly in the form of consultation fees from the patients.

26. However, in 2015, the respondent No.5 came to know that the petitioner has been working as a Government Doctor and, therefore, vide special notice dated 28.04.2016 (vide Document 'A' annexed with the reply), informed the Board of Directors of the R-1 company that the petitioner is a Government employee and, therefore, petitioner is required to be removed from the office of Directorship since his *dual roles* had, in fact, seriously prevented him from discharging duties in both the establishments aforesaid.

27. On receipt of the said notice, a meeting of the Board of Directors was proposed on 09-05-2016 for which notice dated 29-04-2016 and the agenda thereof were prepared and notice dated 29-04-2016 along with the agenda were dispatched to the postal department on 30-04-2016. The petitioner duly received the notice but did not attend the meeting on 09-05-2016. Therefore, the Directors, present in the meeting, adopted a resolution proposing the removal of the petitioner from the Board of Directors and also convened an EOGM of the shareholders for that purpose on 02.07.2016.

28. Thereafter, as required in the meeting of the Board of Directors, a notice dated 09.05.2016 was prepared and said notice in the form of letter dated 06.06.2016 was delivered to postal department on 10-06-2016 which was evidently delivered to the addressee on 14-06-2016 intimating him about the convening of EOGM scheduled to be held on 02-07-2016. In the aforesaid notice, it has been stated that the petitioner, if so desires, may submit representation, if any, against such resolution before the company on or before the aforesaid date for consideration of the same in accordance with the requirement of law.

29. Said notice was served on the petitioner as is evident from the materials on record and also from the admission of the petitioner himself in the petition under consideration. But then, once again, the petitioner failed to submit any representation against his proposed removal from the Board, much less his remaining present in the meeting for the purposes stated above. In such a scenario, the shareholders of the company had to discuss the removal of the petitioner in his absence and had to adopt a resolution to that effect. Being so, there is no infirmity whatsoever in removing the petitioner from the Board of Directors of the Company with effect from 02.07.2016.

30. In regard to the contention that, the directions of Section 115 of the Act were not followed at all, in instituting the proceeding seeking removal of the petitioner from the office of the Director before the expiry of his term, it has been submitted that one of members of the company while triggering the proceeding aimed at removal of the petitioner from the Board of Directors wrongly quoted section 169 of the Act instead of section 115 of the Act. However, for all practical purposes, said notice is a notice under section 115 of the Act of 2013.

31. It is a settled law that the substance, not the form that determines the fate of case or proceeding. In a long chain of decisions rendered by various High Courts and Apex court of the country makes it more than clear. Since the special notice dated 28.04.2016 meets all the requirements of Section 115 of the Act of 2013, only for quoting a wrong Section on it, notice dated 28.04.2016 does not cease to be

notice under Section 115 of the Act. The learned counsel for the respondents therefore, urges this Bench to reject such argument, aimed at derailing the proceeding seeking removal of petitioner from the Board of Directors.

32. In regard to the allegations that notice aforesaid was addressed to the Board of Directors and not the Company, it has been submitted that such infirmity no way can come in the way of invalidating either the process triggering the proceeding under Section 169 or nullifying the resolution adopted in the EOGM held on 02.07.2016 under which the petitioner stood removed from the office of the Director and that too before expiry of his term.

33. In that connection, it has been submitted that the Company is a juristic person and therefore, it can act only through some human agency or agencies. Since the affairs of the Company is conducted by Board of Directors on day to day basis and since shareholders of the Company assembled not so frequently, it is quite appropriate on the part of respondent No.5 to address the special notice to the Board of Directors of the Company ---------- argues Mr. A. Sattar, learned counsel for the respondents

34. In regard to the contention that no Board Meeting was conducted on 09.05.2016, my attention has been drawn to the notice dated 29.04.2016 as well as Postal Receipt dated 30.04.2016 (which are annexed to the reply as Document "D" and Document 'C' respectively) to contend that argument, canvassed on this count, is wholly without any substance. Such Documents---according to the respondents --- have established beyond any shadow of doubt that requirement of Section 173(3) has been followed in letter and spirit. In that connection, it is being submitted that law in the form of Section 173(3), among other things, requires the respondents-company to deliver to the Postal Department the notice with appropriate address for onward transmission to the petitioner.

35. The petitioner having filed the rejoinder, stuck to his earlier position and also contended that the allegations from the side of the respondents are structured on falsehood and lies. In that connection, it has been submitted that the petitioner did execute the Document –H at page 17 of the reply. But, when he executed the aforesaid Document, the line to the effect "*I also declare that I am not working in any other health establishment*" was not there.

36. The said line was inserted subsequently in the declaration above and the same was done only to make the conduct of the petitioner illegal and unlawful so that, at some point of time, convenient to the respondents, necessary legal proceeding can be initiated, so that the respondents could get rid of him. The fact that the petitioner was known to be the government medical practitioner to the respondents since the time of incorporation of the respondent company makes such conclusion inevitable.

37. The petitioner further submits that the contention of the respondents that there was a Board Meeting on 09-05-2016, wherein a resolution was adopted for his removal as well as their contention that pursuant thereto, an EOGM was also held on 02-07-2017, wherein an ordinary resolution was adopted removing him from the Directorship of the respondent No.1 company, are nothing but bundles of lies only. In that connection, it has been pointed out that respondents had sent to the petitioner two sets of notice, qua convening of EOGM on 02.07.2016. The first set of notice dated 09.05.2016 was

delivered to the Postal Department on 09.06.2016 whereas the second set of the same notice *"but dated 06.06.2016"* was delivered to the Postal Department on 10.06.2016.

38. Similarly, there is evidence to show that two sets of resolutions adopted in the EOGM on 02.07.2016. While the first set of notice which was sent to the ROC was signed by all the shareholders present in the EOGM but same was not dated. However, the resolution adopted in the EOGM which was annexed with the reply as Document-I shows that the said resolution was not only signed by all the shareholders but it was also dated by all the shareholders present in the meeting. Such drastic and serious contradictions in the notice dated 09.05.2016 as well as in the resolution dated 02.07.2016 devastatingly demonstrate that the respondents have resorted to enormous illegalities in initiating a proceeding seeking removal of the petitioner from the Board of Directors.

39. Since the respondents have resorted to huge illegalities in initiating the proceeding under consideration, which were detailed herein before, this proceeding is liable to be dismissed on those grounds alone. This is because of the fact that the parties to a proceeding, under the Companies Act are to approach the Tribunal with clean hands, reason being the reliefs which the Tribunal is to make available to the deserving party are equitable in nature and therefore, the party who approaches the Tribunal with dirty hands must return therefrom with empty hands.

40. In trying to refute all those allegations, the respondents have contended that all the infirmities, pointed out by the petitioner, in notices convening EOGM on 02.07.2016 or in the resolution, adopted by the shareholders of the company , in the EOGM held on 02.07.2016, are too minor and too insignificant to require this Bench to conclude that said resolution is untenable in law in view of aforesaid infirmities , more so , when there is overwhelming evidence on record to show that the respondents had taken all measures to ensure that the notice of EOGM is properly served on the petitioner and more so, when the petitioner himself admitted that he received the notice pf EOGM requiring him to remain present in EOGM at the time and place notified in the notice itself.

41. In support of his contentions that the provisions in section 115 as well as in section 169 (2) and 169 (3) of the Act, 2013 are quite mandatory in nature as well as the contention that the violation thereof invites serious consequences which could invalidate the entire proceeding aimed at removal of a director from the Board before the expiry of his term, the petitioner has relied on the following decisions: -

(1) AIR 2001 SC 1416 -Hanuman Prasad Bagri and Others Vs Bagress Cereals Pv. Ltd. & Ors.

(2) (1996) (86) Compcas 842 - Bhankerpur Simbhaoli Beverages P. Ltd. & Another Vs Sarabhjit Singh & Ors.

(3) 1977 (47) Cmopcas 92 - Bennet Coleman & Co. Vs Union of India & Ors.

42. I have considered the rival submissions having regard to the materials on record and the decisions relied upon by both the parties. On perusal of record, it is found that while trying to refute the allegations, hurled at him, the petitioner attacked the case of respondents on several counts. But, out of all those allegations, two allegations, so canvassed from the side of the petitioner, have enormous bearing on the outcome of the present proceeding and hence, those two allegations are taken up first for consideration.

(1) *(a)Under the law, a special notice of resolution is required for removal of a Director from the office before the expiry of his term. Section 115 of the Act of 2013 deals with procedures relating to special notice. On the other hand, what the company would do on receipt of the special notice of resolution seeking removal etc. of the Director of the company are being described in section 169 of the Act. However, in the case in hand, no notice u/s 115 of the Act was ever served on the company seeking initiation of a proceeding for removal of petitioner from the Board of Director.*

1) *(b) Rather, the member concerned instead of serving a notice under section 115 of the Act, chose to serve on the company a notice U/s 169 of the Act which, as stated above, prescribed the procedures to be followed on the receipt of the special notice of resolution but same has nothing to do with the initiation of proceeding for removal of petitioner from the Board of Directors. Since no special notice under section 115 of the Act was ever served on the company, on this count alone, the resolution removing the petitioner from the Board of Directors is required to be set aside.*

(2) *No Board meeting was convened on 09-05-2016. Nor did the respondents convene any EOGM on 02-07-2016. According to the petitioner, all the papers, produced before the Tribunal, to show that a meeting of Board of Directors was convened on 09-05-2016 as well as an EOGM was convened on 02-07-2016, are all forged and fabricated documents. Those infirmities had already been pointed out by the petitioner, which this Bench had already detailed herein before and all those infirmities firmly demonstrate the truth of the aforesaid claim from the side of the petitioner.*

43. For the convenience of discussion, I find it necessary to address above two allegations before taking into consideration other allegations and counter allegations, raised by the parties to this proceeding. Coming to the first allegation above, it is found that over the years, various courts including the Hon'ble Apex Court of the country repeatedly held that the substance, and not the form, should decide the fate of a case or proceeding. If the content is found correct, the defects in form may not be sufficient to derail a proceeding unless such defects cause prejudice to the parties against whom such a proceeding is initiated.

44. In this connection, I may profitably peruse the decision of Hon'ble High Court of Patna in State of Bihar -Vs-. Hardwar Pandey reported in 1978(26) BLJR803.The relevant part of the judgment is reproduced below for ready reference: -

The submission of the learned Counsel for the opposite party is correct in regard to the objection of the counsel for the petitioner that the petition filed in the lower court by the opposite party is purported to have been filed under Section 451 of the Code. The substance of the petition and not its form is the material thing and the orders cannot be set aside on the ground that the petition has been incorrectly described. I regard to the submission that the accused would tamper with the prosecution evidence and the orders amount to an interference with the course of investigation, suffice it to say that if tampering is feared due to the knowledge of the opposite party in regard to the contents of the documents seized, then the copy of the inventory itself has already provide the instrument and materials to the opposite party and, therefore, there can be no harm in the documents being inspected and if the inventory is either cryptic or suffering from deliberate concealment of details, then the inventory itself is contrary to law and thus inspection would not in any way add to the risk of tampering. In fact, by resisting the inspection of the documents the prosecution is rendering itself liable to extreme suspicion. The orders of the court also do

not amount to interfering with the investigation because the court is not in any way directing or obstructing the process of investigation or interfering in the manner in which the prosecution proposes to deal with the documents nor is it in any way trying to obstruct the course of investigation. In my view, therefore, the orders do not call for any interference.

45. Very similar view was rendered by Hon'ble Apex Court in Jeet Mohinder Singh Vs. Harminder Singh and Anr. reported in (2004)6SCC26. The relevant part of the judgment is reproduced below for ready reference: -

Though the nomenclature of an application is really not material and the substance is to be seen, yet it cannot be said that a party shall be permitted to indicate any provision and thereafter contend that the nomenclature should be ignored. Duty is cast on the parties to properly flame their applications and indicate the provisions of law applicable for making the application. Nomenclature may not be normally material. But there is a purpose in indicating the nomenclature in a clear and precise manner. Though it is the substance and not the form which is material but as indicated above, that cannot be a reason to quote an inappropriate provision of law and then say: Don't look at the nomenclature" The care and caution which is required to be taken cannot be diluted to absurd limits.

46. Coming back to the instant case, it is found that the respondent No.5 had served a notice on R-1 company on 28.04.2015 seeking removal of petitioner from the Board of Directors, for his indulging in some activities which are said to be prejudicial, not only to the interest of the respondent No.1 company, but also to the government hospital where he has been reportedly working as physician over a long period of time. But then, the respondent No.5 quoted such a notice to be a notice u/s 169 of the Act instead of section 115 of the Act.

47. However, a careful scrutiny of the notice dated 28.04.2016 reveals that said notice in no uncertain term demonstrates the intention of R-5, same being removal of the petitioner from the board of directors and also disclosed the grounds on which such removal was sought for. Thus, the notice dated 28.04.2016 seeking removal of a Director from the Board of Directors before the expiry of his term gives all the information which are required to be furnished to the company under the law laid down in Section 115 of the Act of 2013.

48. More importantly, on the basis of such a notice, the company did initiate a proceeding for removal of the petitioner from the Board of Directors. In that view of the matter, in my considered view, the notice aforesaid, satisfied the legal requirements for initiation of proceeding under section 115 of the Act although the said notice was shown to have been issued u/s 169 of the Act of 2013, more so, when Hon'ble High Court of Patna in State of Bihar (supra) categorically held that the substance, and not the form, would decide the fate of a particular proceeding or case.

49. This brings me to the allegation that no Board meeting on 09.05.2016 and no EOGM on 02-07-2016 were conducted as alleged by the petitioner. I have already found that the petitioner claims that

there is nothing on record to show that the petitioner was ever served with notice dated 29-04-2016 requiring him to remain present in the meeting of the Board of Directors, scheduled to be held on 09-05-2016. Since, the respondents could not produce any document showing service of notice on him, for the purpose aforementioned, one needs to conclude that the claim of the respondents that a Board meeting was convened on 09-05-2016 is nothing but packs of lies only.

50. I have considered such submissions in the light of the materials on record as well as arguments, advanced on this count, from the side of the respondents. It is true that there is nothing on record to show that notice dated 29-04-2016 was ever served on the petitioner. But then, one must not overlook the fact that law in the form of section 173(3) of the Act requires the Board to send at least 7 days' notice to every director of the company *"at his address registered with the company"* and such notice may be sent *"by hand delivery or by post or by electronic means"*.

51. Being so, law requires the Board of Directors to send the notice to the Directors, in any one of the modes, so specified in section 173(3) of the Act. Said Section further shows that if the notice with proper address (address *available with company*) is delivered to the postal department, it would be presumed that the notice reached the destination in time. However, such presumption, being a rebuttable presumption, can, of course, be rebutted by producing some kind of evidence, although, the standard of proof is not that high, as in the criminal cases, where, the prosecution is to prove the charges against the accused beyond all reasonable doubt.

52. In the instant case, it is found that the respondents have claimed that a notice in a sealed cover was delivered to the postal department on 30-04-2016 quoting the address of the petitioner as is available at the registered office of the respondent company. A copy of postal receipt confirming the delivery of such notice to the postal department for service on the petitioner was annexed at page 12 of the reply (Document- C). Further the copy of the said notice has also been produced and the same was annexed with the reply at page 10(Document- B).

53. On perusal of the Document –B, alongside, Document –C, in the light of averments made in the pleadings of the parties, more particularly, reply filed by the respondents, it is found well apparent that the respondent company had properly delivered the notice as contemplated in section 173(3) of the Act, to the postal department on 29-04-2016 for onward transmission to the addressee in the address which was made available with the registered office of the respondent company.

54. Such materials on record, in absence of any evidence to the contrary, require me to conclude that a notice was duly served upon the petitioner, requiring him to remain present in the meeting of the Board of Directors, scheduled on 09-05-2016, to discuss the subject in the letter dated 28.04.2016. In view of above, I am to hold that the allegation that no Board meeting was held on 09-05-2016 in order to discuss the allegation in the letter dated 28.04.2016 seeking adoption of a resolution for removal of the petitioner from the Board of Directors of the company is found to be without any substance.

55. In regard to the allegation that no EOGM was held on 02-07-2016, it is found that the petitioner has heavily relied upon several alleged infirmities in the documents pertaining to aforesaid EOGM which I have narrated in great detail hereinbefore. Therefore, the same needs no further reinstatement here. Suffice it to say, the discrepancies--- according to the petitioner--- firmly show that no EOGM of the company was convened on 02.07.2016 --much less-- such an EOGM adopting a resolution to remove the petitioner from the Board of Directors of the respondent company.

56. As far as the alleged infirmities in the special notice are concerned, the respondents have contended that they had sent notices to the petitioner on two occasions, such occasions being, *09-06-2016* and *10-06-2016*. The notice dated 09-05-2016 along with a copy of notice dated 28.04.2016 was delivered to the postal department on 09-06-2016 whereas the notice dated 06-06-2016 was delivered to the postal department on 10-06-2016. According to the respondents, special notice was sent to the petitioner on those two occasions only to ensure that the petitioner got due notice of the EOGM convened on 02.07.2016.

57. One may note here that there are enough materials on record to show that the petitioner has received the notice along with a copy of notice dated 28.04.2016 well ahead of EOGM scheduled on 02-07-2016. The claim of the petitioner that he had prepared a representation for being presented in the EOGM scheduled on 02-07-2016, makes such a position more than clear. But then, it is not known as to why the respondents had waited for about 9 days to deliver to the postal department the special notice dated 29-05-2016. One should again grope for reason as to why the second notice was delivered to the postal department on the very next day.

58. Such timings coupled with the fact that there is noticeable over-writing on the date of second special notice (*the date of second notice being 06-06-2016 with over-writing on the date of notice),* together with absence of any clear explanation as to why there was several days' delay in dispatching the first special notice to the postal department or why the second special notice was delivered to

postal department on the very next date raise some suspicions about the authenticity of the special notices, more particularly the special notice dated 06-06-2016 and such suspicions occur, the notice aforesaid having been admittedly received by the petitioner notwithstanding.

59. So situated, let me see if, the documents showing the convening of EOGM on 02.07.2016 are also doubtful. The minutes of EOGM, which was relied *on by the respondents*, as Document –I at page 18 of the reply shows that the said minutes was signed and dated by all the shareholders, who reportedly remained present in the meeting on 02-07-2016. On the other hand, the minutes of the same EOGM, (*copy of which was obtained by the petitioner from the portal of ministry concerned and was made part of the petition at page 96/97*) shows that though the said minutes was signed by all the shareholders, present, but the same was not dated.

60. The respondents made no serious effort to explain as to why such discrepancies occurred in the minutes of the EOGM purportedly held on 02-07-2016. But, on being required by the Bench, the respondents have submitted the register containing "the minutes of the meeting of the Board of Directors of Gauripur Hospital" (respondent No.1) for the period from 17-04-2015 to 31-03-2017. Such register of minutes of meeting also shows that the minutes of EOGM, held on 02.07.2016 were signed by all the shareholders present in the meeting but same was not dated.

61. The above revelations clearly show that the minutes of the EOGM which was recorded in the register aforesaid as well as the minutes of the EOGM, *which was sent to ROC concerned*, (*copy of which was obtained by the petitioner from the portal of ministry concerned and was made part of the petition at page 96/97*) *were not dated* but *signed by all the shareholders present at the EOGM*. However, the minutes of the said EOGM, produced from the side of the respondents during trial of this proceeding were not only signed but it, as stated above, dated as well.

62. Thus, there cannot be any escape from the conclusion that the respondents had prepared two sets of Minutes of meeting for the same EOGM, held on 02.07.2016. But then, why the respondents had to prepare two sets of Minutes of meeting for the same EOGM remained wholly unexplained which certainly raise a good deal of suspicion not only about the authenticity of those Minutes of meeting of but also about the EOGM purportedly held on 02.07.2016. Such suspicion gets strengthened more and more from the claim of the petitioner that when he went to the office of R-1 Company on 02.07.2016, he had found it closed.

63. It is in these backgrounds; let me consider the allegation that the petitioner too secured the job of Medicine Specialist in the R-1 company on practicing fraud upon the R-1 Company and its office bearers. I have already found that there is no dispute over the fact that the petitioner was offered the post of Medicine Specialist in the hospital of the respondent No.1 Company on 02-10-2010, *vide Document-F*. It is also not in dispute that being offered such appointment, he accepted such offer and joined in the post aforesaid on the same day vide *Document-G*. There is also no quarrel over the fact that on 02-10-2010, the petitioner had been on the pay roll of the Government of Assam doing duty as medical officer.

64. The respondents further claim that in course of time, the respondents secured a declaration from the petitioner to the effect that he had not been working in any other health establishment. The respondent No.1 Company also secured a declaration from the petitioner to the effect that he has been serving in the respondent's hospital with effect from 02-10-2010. Such a declaration was further verified by the Joint Director of Health Services, Dhubri vide Document-H. For ready reference, Document-H is also reproduced below: -

DECLARATION FORM

I, Dr. Jakir Hussain, Qualification M.D.(Med) Resident at Gauripur do hereby declare that I am serving as Consultant in Gauripur Hospital Pvt. Ltd., a Nursing Home situated at Gauripur w.e.f. 2/10/2000, I also declare that I am not working in other health establishment.

(Sd/- illegible)
Proprietor

(Sd/- Dr. Jakir Hussain)
Sign

Verification Authority

Managing Director
Of nursing home

(Sd/- illegible)
Joint Director of Health Services,
Dhubri

65. It is also the case of the respondents that on 02-10-2010, they did not know the fact that the petitioner has been working as a government physician. However, on receipt of the letter dated 28-04-2016, from one of the shareholders, they came to know that the petitioner has been a government medical practitioner. Under the service law, a physician, in the payroll of the government health establishment, cannot work as such in a private health establishment. What is important is that, in the event of a government doctor, being found doing the job in any private hospital, as a full timer, as in case of the petitioner, the doctor concerned, could be even held responsible for dereliction of duty.

66. What is equally important is that, in such an eventuality, even the private hospital---- which allows a doctor in the payroll of government health establishment to discharge duty in such establishment as a physician ---- could even be held responsible for unfair medical practices which may land the private hospital in a web of series of problems including cancellation of its license which may also lead to closure of the hospital. In such an appalling scenario, the respondents were forced to initiate action against the petitioner, more so, when he made a false declaration to the effect that on the date of his appointment, he has not been engaged as physician in any other health establishment.

67. The petitioner, however, did not dispute the execution of Document-H on 02.10.2010. But he strongly claims that on 02.10.2010, he did not make any declaration that he had not been doing duty as physician in any other health establishment on such a date. Unfortunately, Document-H was subsequently fabricated to incorporate the line "*I also declare that I am not working in any other health establishment*" Therefore, no reliance, whatsoever, can be placed on such a false and fabricated document. Rather, the respondents should be taken to task for fabricating a part of genuine document to create some claims in their favor which, however, exist at no point of time.

68. His further claim was that he executed the Document-H on the request of respondent No.2 since the petitioner was told him that a declaration in the form of Document-H is required for securing the license to open and operate respondent No.1 Hospital. Believing such request from the side of respondent No.2 to be genuine and honest, he executed the Document-H, more so, when the petitioner himself was one of the promoter/directors of the respondent No.1 Company. Unfortunately, subsequent events show that the respondents caused him to execute the Document-H with some ulterior motive only.

69. I have carefully considered submissions advanced from the side of the parties to the proceeding having regard to the materials on record. But before considering other contentions, let me consider the allegation that the respondents had fraudulently incorporated the last line in the declaration, vide Document-H. A suave perusal of the Document-H prima facie does not give an impression that the last line thereof was inserted subsequently –since--all the factors, such as, makeup of the Document-H, the arrangement of lines, the spaces in between the lines, the spaces in between the last line and signatures of the executants thereof and configuration of the words in the said document etc strongly suggest that the last line was already there in the Document-H when same was signed by the petitioner on 02.10.2010.

70. But then, more and more facts on record have rallied behind the above conclusion of mine. There cannot be any dispute over the fact that the last line in the Document-H is so harmful to the petitioner that it threatens to spoil his career as a physician completely. Therefore, anyone who finds his carrier is going down the drain for such a damaging statement in the Document-H, and that too, for no fault of his own, he would do everything possible to correct such wrong, and that too, at the earliest possible opportunity. If one believes the version of the petitioner in the present proceeding, then, he would find that petitioner came to know about the alleged fabrication of Document- H in the middle of the month of October, 2017.

71. Unfortunately, till date, the petitioner does not do anything to bring to book the culprit who allegedly fabricated a part of an otherwise the genuine document by incorporating therein a statement having enormous consequences of both civil and criminal nature which, in turn, threatens to throw his carrier as a physician to great danger –although---- in similar situation---- a normal man would have risen to the occasions in order to bring the culprit to the book. Such a conduct on the part of the petitioner does not augur well to advance his claim that the last line in the Document-H was incorporated subsequent to his executing said document, of course, without the line aforesaid.

72. The claim of the petitioner that the last line was incorporated in the Document -H behind his back and without his knowledge sounds pretty bizarre for other reason as well. As stated above, the petitioner did not dispute execution of the Document -H, of course, without the last line which runs as "*I also declare that I am not working in any other health establishment*". He also did not dispute the claim that the Document -H was duly verified by the Joint Director, Health Services, Dhubri.

73. On a careful perusal of the Document-H, I have found that it consists of two parts. The first part relates to the appointment of the petitioner as Medicine Specialist in Gauripur Hospital (R- 1 Company). The second part relates to his holding any post in Government Health Establishment --since ---the petitioner purportedly made a declaration in Document-H to the effect that as on 02.10.2015, he had not been working as physician in Government Health Establishment. Being so, in so far first declaration in the Document-H is concerned, no verification from the Joint Director, Health Services, Dhubri is necessary -*inasmuch as* –verification of such declaration can be done by the respondent company only.

74. But then, it is not the case in respect of declaration, so made in the last line of the aforesaid document--------since--------- the verification of the declaration made in the last line of the Document-H which runs "*I also declare that I am not working in any other health establishment*" can be done only by

the Joint Director, Health Services, Dhubri and none else. This is because of the fact, as has been pointed out by the learned counsel for respondents, and quite rightly so, that all the particulars regarding the government physicians working in the district of Dhubri are available only with the Joint Director, Health Services, Dhubri.

75. In my considered view, the Document-H bereft of the last line, gives no scope whatsoever to the Director, Health Services, Dhubri to verify of contents thereof. It was the last line in the Document-H which makes it obligatory on the part of the Joint Director, Health Services, Dhubri to certify the truthfulness of the aforesaid declaration. Therefore, the very fact that verification of the Document-H by the Joint Director, Dhubri unmistakably demonstrate that the all-important last line which was very much there in the document in question when it was admittedly signed by the petitioner on 02.07.2010 as well as by the Joint Director, Health Services, Dhubri on or about 02.07.2010.

76. One may note here that the petitioner claims that the respondents --- respondent No.2 in particular, knew that on the date of appointment, the petitioner was government doctor and despite knowing all such facts, the respondent No. 2 offered the post of Medicine Specialist in the hospital of respondent No.1. Therefore, if the petitioner committed any wrong in accepting the offer of appointment, made to him, the respondents are equally guilty of such wrong, therefore, they should not/cannot be allowed to take advantage of their own wrong/misdeeds.

77. It is true that nobody should be allowed to take advantage of his own wrong doing. But then, it is equally true that one who takes some benefits from others wrong doing, knowing very well that the benefit he receives is not at lawful, the later cannot be allowed to turn the table on the former taking advantage of the former's mistake or wrong doing. Therefore, the petitioner cannot be heard saying that since the respondents themselves offered him the post of Medicine Specialist in the hospital at Gauripur, knowing very well that the petitioner was a government physician petitioner on such a date, (*a claim which cannot be adjudicated upon in this proceeding*), the petitioner cannot be removed from the office of Directors of the company.

78. One may note here that the petitioner claims that he never / ever receives any salary from the respondent No.1 and as such, it cannot be said that he is an officer in pay role of the respondent No.1. Such a claim is also found to be far from the truth. I have found that there is indisputable evidence on record to show that the petitioner had received remuneration in the form of fees from the patients who

he attended to at the hospital. Such a fact, in turn, makes the claims of the petitioner that he has never been in the employment of the respondent No. 1 hospital more and more unworthy of reliance.

79. The petitioner also claims that he executed the Document -H when he was told that such a declaration was required by the respondent No.1 to obtain license etc. from the authority concerned which he honestly believed to be true and correct. However, such a claim as well as his claim that the respondents knew on the date of his appointment that the petitioner was government doctor instead of advancing the cause of his claims in the present proceeding make such claims more and more unreliable since all those claims, in fact, run counter to the basic fabrics of the case of the petitioner.

80. Even one assumes for the sake of argument that the last line in Document-H was inserted later, even then, the petitioner cannot get himself extricated from the mess which he was in for making the other declaration in the Document-H. We have already found that on the date when the petitioner had executed the Document-H, he was already in government job. The Service Rules specifically bar a government employee from engaging himself in any other job whether private or public, unless, he obtains some permission from competent authority on following the prescription under the Rules and procedures.

81. But then, there is absolutely nothing on record to show that the petitioner had ever approached the authority concern seeking permission to get engaged in the Hospital aforesaid as its Medicines Specialist------ much less his showing any permission allowing him to practice as above in the said hospital. This is nothing but a serious dereliction of duty on the part of the petitioner. Such revelations are more and more prolific testimonies to the fact that in approaching this Tribunal, the petitioner never came with clean hands.

82. Some more factors make the claim of the petitioner herein totally unsustainable in law. There is evidence on record to show that the distance between the two hospitals where the petitioner had admittedly been discharging his duties are situated at places far away from each other, to be precise, they are separated by a distance of about 50 KMs. What is important to note is that the roads connecting those hospitals are said to be always in shatters and therefore, one needs several hours to go back and forth between those places.

83. . The respondents claim that as per duty schedule, the petitioner was to work at their hospital at Gauripur from 8 am to 5 pm. The duty hours in the government hospital at Kokrajhar may be similar. Therefore, one would be hard pressed to comprehend as to how the petitioner could manage to attend

his duty around the same time of the day in two different hospitals situated at places separated by a distance of 50 KMs. This is one more forceful testimony of the petitioner's doing duty his perfunctorily in the Government hospital at Kokrajhar. Same is also proof his doing duty equally casually in the hospital of the respondent No.1.

84. All these revelations, have now established beyond any shadow of doubt that the petitioner has never approached this Tribunal with clean hands seeking equitable relief. Rather, his hands are found to be dirty and on this count alone the present proceeding is liable to be dismissed in the terms of law laid down in long chain of judgments including decisions of Hon'ble Apex Court in the case of Lourdu Mari David And Ors. vs. Louis Chinnaya Arogiaswamy and Ors., reported in 1996 SCR (4) SUPP 540. For ready reference, the relevant part of the judgment is reproduced below: -

> *"It is settled law that the party who seeks to avail of the equitable jurisdiction of a Court and specific performance being equitable relief, must come to the Court with clean hands; In other words the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief."*

85. In MCD Vs State of Delhi reported (2005) 4 SCC 605, the Hon'ble Apex Court has gone to the extent of saying that a person who resorted to falsehood in presenting petition / case / application, does not even deserve hearing of his case on merit. The relevant part of the judgment is also reproduced below: -

> *"Since the High Court has disposed of the criminal revision without giving an opportunity of filing counter affidavit to the counsel for the MCD and that the respondent did not disclose the fact in the criminal revision filed before the High Court that he has also been convicted in another criminal case No. 202 of 1997, the judgment impugned in this appeal cannot be allowed to stand. We, therefore, have no hesitation in setting aside the order impugned and remit the matter to the High Court for fresh disposal strictly in accordance with law."*

85. It is a settle principle of law that a party is expected to divulge in its pleading all those facts, necessary for disposal of a proceeding. Non- disclosure of necessary fact or facts in the pleading of a party may expose such a party to charge of suppression of materials facts. In *our forgoing discussion, it is* found that the petitioner did not disclose some very vital information having enormous implication of the outcome of the case in hand. He chose to disclose such facts, only when same are brought before the Bench by the respondents in their reply.

86. In other words, the petitioner wants this proceeding to be adjudicate upon without bring on those very vital facts on record. In the teeth of such revelations, I am also of the opinion that the petitioner is also guilty of suppression of materials fact which again disentitled the petitioner from claiming any relief whatsoever from this Bench. Therefore, on this count too, the proceeding in is liable to be rejected.

87. In view of above, I am constrained to hold that none of the decisions, relied on by the petitioner, is found applicable to the case in hand.

88. In the result, the present proceeding is dismissed. However, considering the facts on records, I leave the parties to bear their own costs.

89. The registry is directed to return the respondents the register of the minutes of Board meetings in due course of law.

Sd/-

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

Dated, Guwahati, the 30th November, 2017