IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

T.C.P. No. 44/397-398/2015

Under section 397-398 of the Companies Act, 1956

In the matter of
Ace Oilfield Supply Inc. & Anr.
....Applicants

v/s.

Oil Tools International Services Pvt. Ltd. & Ors.
....Respondents

Order delivered on: 03.10.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Adv. Vivek Kohli, Adv. Anusha Singh, Adv. Hemant Telkar.

For the Respondent: Shri. Rahul Narichania, Sr. Counsel, Mr. Phiroz Colabawala, Adv., Mr. Prathamesh Kamat, Adv. Mr. C.S. Anshul Bhatt, PCS - for R1-R4, Mr. Rahul Chitnis, Adv. & Ms. Vidya Nair, Adv. for R5.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Order pronounced on 18.09.2017.

It is Company Petition filed u/s 397-398 of Companies Act 1956 by the P 1 & 2 against R1 Company namely Oil Tools International Services Pvt. Ltd. and other Respondents stating that other Respondents conducting the affairs of R1 Company prejudicial to the interest of the Petitioners, hence this Petition with following reliefs:

1. To restrain R2-4 from consolidating the shareholding of R1 Company and declare the Form-2 filed with RoC regarding further allotment of shares to R2-3 and R5 as null and void.

2. To declare Form No-5 filed by the Respondent increasing the authorized share capital of R1 company from 1 crore to 2.5 crores and null and void.
3. To declare Form No-32 regarding vacation of office by P2 and appointment of R5 as additional director with effect from 06.02.2014 and the alleged Board Resolutions dated 12.12.2013 and 14.12.213 as null and void and reinstate P2 as director on the Board of Directors of R1 Company.
4. To remove R2-R4 from the Board of Directors of R1 company.
5. To initiate proceeding against R2-R4 u/s 625 of the Companies Act 1956.
6. To direct that any resolution passed by R1 company either in the Board meeting or the General meeting be subject to the approval of the Petitioners.
7. To restrain the Respondents from conducting the meetings of the directors of R1 Company in the absence of P2 and from passing any board resolution thereafter.
8. To direct that no resolution be passed without affirmative vote of the Petitioners.
9. To rectify the register of members of R1 Company on the basis of annual returns of the company filed with RoC for the Financial Year 2012-13 and
10. To pass such other orders as this Bench may deem fit and proper in the facts and circumstances of this case.

Brief facts of the Case:

R1 Company was incorporated on 02.01.2005 with two shareholders i.e. R2 and one Ms. LizyBabu holding 7,500 shares each and they continued for some time as first directors of R1 Company to carry out the business of manufacture, export, import and trade in the tools and the machineries used in oil and gas exploration. Subsequently, on resignation of Ms. LizyBabu on 18.7.2005, her shares were transferred to R3.

2. First Petitioner namely Ace Oilfield Supply Inc. is a company of United States of America, having its registered office at Texas having a renowned name in the business of steel and allied products across the world. P-1 is majority shareholder of R1 Company holding 84.98% shares. P-2 namely Paul Douglas Waters is director in R-1 Company on behalf of P-1 whereby, since he is authorized to act on behalf of P-1, this Petition has been instituted through Paul Douglas showing P1 and P2 as Petitioners.

3. Initially R1 Company continued with the shareholding as below mentioned for sometime:

Period	Name of the Shareholders			
2005-06	Ace Oilfield Supply Inc. (P1)	Alberta Ltd.	Hightly Corpn.	Ajit Venugopal (R2)
	232320 (34.99%)	232269 (34.98%)	99553 (14.99%)	99700 (15.01%)

4. Over a period of time, the shareholding of Alberta Ltd., Hightly Corporation has transferred over to P-1, consequently, the director appearing on behalf of other companies resigned from the company, in the result, finally by 2010-11, only two shareholders left in the company i.e. Ace Oilfield Supply Inc. and Ajit Venugopal (R2) group has 15.01% as against 84.98% held by Ace Oilfield Supply Inc. At the same point of time, it was expressly agreed between the Petitioners and Respondents that while ownership and control of R1 Company would lie with P1, whereas day to day affairs of R1 would be managed by R2-4 under due intimation to and prior approval from the Petitioners. The Petitioners further mentioned that they not only invested money as capital but also invested money by way of giving loan valued around USD13,29,471. The understanding between two groups is that P-1 will procure high quality raw material from across the world and supply the same to R1 and R1 will in turn process raw material into final product which is used for exploration of oil and gas. After such manufacturing, R1 Company would export them to P1, then P1 would invest time and resources to trade the final products in the market by which R1 is entitled to the processing charges for the above manufacturing. While doing so, P1 has incurred huge expenditure to

meet day to day expenses of R1 Company and also salaries of the employees of R1 Company as reflected in the audited balance sheet filed for the year 2012-13. But it is noteworthy that payments come from P1 have not been properly accounted for by R2-4.

In the meanwhile, P1 received a demand notice dated 28.2.2015 from the Respondents claiming an alleged sum of USD593,605 towards certain alleged invoices raised by them. Since the business arrangement between R1 and the Petitioner being R1 required exporting final product to the Petitioners, the Petitioners would trade the same as final product in market. To meet the formalities in the customs, the Custom invoices are issued whenever product has been sent to P1 so as to comply with the export norms. This kind of arrangements could not be treated as liability against the Petitioner, because P1 is nothing but holding company of R1 Company. On the contrary, these respondents failed to honor their obligations in respect of the loan amount of USD 1,329,471 due and payable till date, instead of paying interest over this loan; R2-4 with an intention to defraud the Petitioners regularly induced the Petitioners to issue waiver letters towards the interest payable under the said loan agreement. One of the reasons for incurring loss in the company is, these respondents failed to do manufacturing activities, the inventory coming into the company as raw-material has remained idle. It is imperative to conduct quality control of the manufactured goods before the same is sent for shipment, for which the Petitioners sent an email for conducting a quality control. Since functioning of R1 was not running smoothly, the Petitioners carried out inspection of statutory records lying with RoC, wherein they shocked to learn that R2-3 on 20.12.2013 under the signature of R2, on 28.11.2013, passed ordinary as well as a special resolution for increase of authorized share capital. Not only that, these respondents have gone ahead and filed Form-5 notifying increase of share capital to RoC concerned. But no notice has been sent to the Petitioners in respect to the extra ordinary general meeting held for increase of authorized share capital. On inspection, the petitioners have further noticed that Form-2 also filed under the signature of R2 showing allotment of 10,000 shares each to R2 and R3 through a board resolution 12.12.2013 and also an

allotment of 18,16,158 shares to an outsider namely Mr. Gopakumar (R2) through a board resolution 04.12.2013, which is not permissible under law as well as articles of association. Above this, these respondents filed Form 32 showing as if board resolution was passed on 23.01.2014 for intimating RoC about cessation of the office of director by P2 under section 283 1 (g) of Companies Act 1956 retrospectively w.e.f. 14.12.2013. They have also filed another Form 32 regarding appointment of R5 as additional director of R1 company w.e.f. 06.02.2014. To justify all these oppressive acts, the Respondents have unilaterally altered Memorandum of Association and Articles of Association to include their acts, including increasing authorized share capital.

5. The Petitioners submit that R2-4 have mismanaged the affairs of R1 in a manner prejudicial to the interest of P1 diluting its shareholding from 84.98% to 22%, making allotment in a private company to an outsider at par without any notice to the Petitioners herein, altering the Memorandum of Association and Articles of Association of R1, removing P-2 as director and appointing an outsider as director of R1 Company behind the back of the Petitioners whereby, these petitioners have sought the reliefs as mentioned above.

6. To which R2-4 and R5 filed replies independently, all this story came out when R1 Company on 28.02.2015 issued legal notice to P-1 for the recovery USD 5,93,605 from P1, these Respondents submit that the petitioners, instead of clearing the liabilities, set up this case as counter blast to the legal notice issued on 28.02.2015. The respondents submit that the Petitioners ignored R1 and its operations by refusing to fulfill its obligations in respect to bringing sufficient business, by which, R1 accumulated huge losses year to year, in a situation like this, R2-4, in order to bail out R1 from this financial difficulty, has gone for rights issue for bringing in capital, thereby the respondents submit, this necessity of funding to R1 Company could not be clouded with an allegation that the respondents made allotment to themselves to reduce the shareholding of P-1, this reduction is only a consequential outcome in pooling funds to R1 Company by allotment as well as credit facility from R5, therefore

this bonafidely done allotment cannot be seen as an act oppressive to one of the shareholders of R1 Company.

The respondents further submit that main modus operandi of the Petitioners is to become part of Indian companies as a shareholder and project themselves operating as foreign arm of the Indian company to deviate profits and cheating the investors/shareholders in India and also diverting the revenue department by not paying dues to Govt. of India, the creditors, suppliers, and employees who are Indian citizens. These respondents have also submitted that this P2 as a director and also presently continuing as shareholder in Interdril (Asia) Ltd. was robbing the company, banks, employees, tax depts., and revenue of India. They further submit that R1 and P1 has entered into loan agreement dated 15.4.2006 and also further amending in 2011, where R1 has received an amount of USD6,68,731 from P1 as External Commercial Borrowing (ECB) for business purpose of R1. Since P1 was substantial shareholder of R1 and being aware of the critical financial condition of R1, P1 has never demanded any interest on loan given by it. P-1 has in fact agreed that interest towards loan would be decided as and when R1 financial condition has become resolved and therefore P1 has never demanded any interest on any loan amount.

7. The Petitioners have breached mutual trust by using the credentials of R1 for the benefit of P1 in USA which is against American Petroleum Institute (API) norms and conditions. They further submit that P1 tried to deviate customers of R1 to extort revenue payable to Govt. of India and selling non-operating machineries.

8. The Respondents further submit that R1 received notice u/s 92CA(2) of IT Act, 1961 for issue relating to the transfer pricing, for which when respondents communicated to the petitioners to provide details of invoices of products sold by P1, but the Petitioners always used to promise R1 that P1 would give details of the customers but never cooperated to fulfill the requirements or compliance of the several statutory departments ranging from

Central Excise, customs, RBI, IT authorities, banks, and other statutory boards. These petitioners always kept on promising that new orders would come but no business happened as promised by the Petitioners. The Petitioners used to delay payment of dues towards R1, which in fact, resulted in dragging the company into losses. Since R1 Company was not doing well, it was several times discussed that a new investor was required to revive the business, therefore, today, the Respondents submit, it could not be said that the Respondents brought in a new investor without putting it to the Petitioners. For the Petitioners were reluctant to pump in more capital, R2-4 were unable to fund the losses for they being only 15% shareholders of the company, as there was no go, R1 Company went for the rights issue and made allotment of shares to R5, for R5 agreed not only to invest into the capital of the company but also to provide loan to the company. Since losses were as on 31.03.2013 accumulated to ₹5.2crores, R2-4 allotted shares to R5 by themselves getting their shareholding diluted from 15.2% to 4.39%, therefore, the Petitioners should not and ought not to have made this allegation that P1 shareholding alone was diluted. As P-2 remained absent to the board meeting dated 22.7.2013, the offer letter as per the calendar was couriered on 26.7.2013 notifying the decision of going for rights issue to the Petitioners. Since the Respondents already sent a detailed calendar of events with specific agenda items with respect to rights issue mentioning that the offer period was specifically set to begin from 28.11.2013 to 12.12.2013, authorized capital was increased on 28.11.2013 by passing an ordinary resolution for alteration of the Memorandum of Association to increase the authorized share capital and also passing special resolution for alteration of Articles of Association in a duly convened meeting. The respondents expecting P2 would attend the board meeting held on 30.8.2013 to approve the financials and discuss the bad condition of R1 but P2 remained absent, despite notified about holding meeting. Again on 27.11.2013 sent another letter to P2 for the proposed rights issue for which EOGM to be held on 28.11.2013. The respondents submit that the allotment made to R5 is legally valid because every time whenever any transactions happened in the company, it was notified to the Petitioners herein, therefore it could not be said that allotment made to R5 is invalid. R5 infused

loan of over 8.5crores, whereas R2&4 infused only 2crores as loan. Since R5 infused considerable chunk of money, naturally the person infusing money would demand for a position in the board, accordingly, R2-4 appointed R5 as director in the board of R1 Company.

As to cessation of P2 as Director of the company, the respondents submit that P2 did not attend any meeting from April 2010 onwards till January 2014, it is a known proposition of law whenever a director remains absent for 3 consecutive meetings, such director would be ceased to continue as director as envisaged u/s 283(1G) of the Companies Act, 1956. For P2 remained consecutively absent for three board meetings, he deemed to have vacated office, the same has been recorded in the resolution and reported to RoC stating that P2 ceased to continue as director of R1 as prescribed u/s 283(1)(g) of Companies Act, 1956.

9. The respondents further submit that they have clearly intimated the dates of board meetings to the petitioners in advance via courier dated 18.03.2013, therefore, they deny the allegation of not sending notice of EOGM to P1. R1 has couriered the notice of the EOGM on 26.07.13 to the Petitioners thereby since two shareholders i.e. Respondents 2&3 participated and cast their votes in favor of the resolutions, such resolutions are valid. The Respondents further deny the allegations of not sending notice for the board meeting held on 12.12.2013, because R1 sent the calendar of board meetings and general meetings to be held in financial year 2013-14 to P2 through courier on 18.03.2013, thereby no occasion arose for again sending another notice to the board meeting held on 14.12.2013.

10. In view of the same, the Counsel for the Respondents submit that Respondents have not conducted affairs of the company prejudicial to the interest of the petitioners, whereby this petition is liable to be dismissed.

On hearing the submissions, the Petitioners' counsel and the respondents counsel, the points drawn out for consideration are as follows:

1. **Whether or not increase of authorized share capital is prejudicial to the interest of the Petitioners.**

2. **Whether or not bringing an outsider as a shareholder is in violation of the Articles of Association and constitution of Private Limited Company.**

3. **Whether or not notices have been served upon the Petitioners as prescribed under law and whether or not sending calendar of events far before holding such meetings amount to effective service against the petitioners as prescribed under law.**

4. **Whether or not allotment of shares to R-2, 3 and R-5 is prejudicial to the interest of the Petitioners.**

5. **Whether or not removal of P2 as director of the company under section 283(1) (g) of Companies Act, 1956 is prejudicial to the interest of P1.**

6. **Whether appointment of R5 as director of the company is prejudicial to the interest of the Petitioners or not.**

7. **Whether alteration of Articles of Association by R2-4 is prejudicial to the interest of the Petitioners or not.**

Now let us take up issues one after another to find out as to whether the petitioners have proved their case or not.

Point # 1: Whether or not increase of authorized share capital is prejudicial to the interest of the Petitioners.

11. Looking at the facts of the case, it appears that principally there are only two shareholders; one is P1 having 84.98% shareholding, two R2 has some shareholding independently and some shareholding jointly along with R3 aggregating to 15.02% shareholding, therefore, essentially there are two shareholders with an arrangement among them to carry on the functioning of this private limited company, that is P1 and R2. P1 is a majority shareholder, holding 84.98% shares in the company, whereby normally whenever any board meeting or general meeting is held in the company, it will be construed as wish of the majority. But peculiarity in this case is, P1 though majority shareholder has come out with complaint stating that minority shareholder conducting the affairs of the company acted prejudicial to the interest of the majority. Of course, in India, no difference whether the petitioner is minority or majority, but in England, minority alone is entitled to file petition in the case of oppression and mismanagement. Therefore, majority is also permitted to seek

remedy when affairs of the company are being dealt with causing oppression to the majority shareholders. It is not the case that the Petitioners left the management entirely in the hands of R2-4 – P2 was acting as director on behalf of P1, therefore, whenever any decision is taken in a company, majority decision will prevail over minority. Per contra, here in this case the R2-4 went ahead in diluting P1 shareholding from 84.98 (brute majority) to abysmal low of 15.02% and removed P2 as director of the majority. Will there be any thing more oppressive than this?

12. According to the Respondents, a Board Meeting was held on 04.10.2013 to resolve to hold EOGM on 28.11.2013 for alteration of Memorandum of Association and Articles of Association and for increase of authorized share capital from one crore to two crore fifty lakhs by sending a notice to the Petitioners, on the contrary, the Petitioners submit no notice was sent to the Petitioners and no courier receipt was filed by the Respondents to prove that holding a board meeting was intimated to the Petitioners. Since the Respondents have not filed any proof showing a notice was sent intimating the Petitioners to hold a Board Meeting on 04.10.2013 to propose an EOGM to be held on 28.11.2013 for increase of authorized share capital, it can be safely inferred that Board Meeting was held on 4.10.2013 without any notice to the petitioners.

13. To justify their argument, the respondents relied upon section 53 of Companies Act 1956 to say that since the petitioners do not have any registered office in India, they sent calendar of events for the year 2013 to the Petitioners enabling them to appear to the respective meetings without remain waiting for an independent notice to each of the meetings scheduled to be held in R1 company in the year 2013-2014. To which the Petitioners' counsel submits that whenever any meeting is held, either Board meeting or General meeting, duty is cast upon the persons holding meeting to send the respective notice with Agenda items as prescribed under Companies Act. Since no such notice has been received by the Petitioners, sending a calendar of events cannot be called as service of notice upon the Petitioners.

Assuming an intimation has gone to the Petitioners through a calendar of events, by going through this calendar of events, it nowhere reflects that a Board meeting was scheduled to be held on 04.10.2013, therefore even if this calendar of events is taken into consideration, then also it could not be said that it is a notice already notified to the Petitioners that an Agenda was taken out for holding Extra Ordinary General Meeting for increase of authorized share capital. Moreover, since P2 was admittedly continuing as a director of R1 company as on 4.10.2013, unless notice is sent to P2 for holding Board Meeting on 4.10.13, no board meeting could be held on 4.10.13 without notice to P-2, therefore this act of not sending notice to P2 is not only invalid but also prejudicial to the interest of P1, majority shareholder.

When the Petitioner and R2-4 working together for more than six seven years without any difficulty in communicating business happening in the company, that too in e-mail era, what had become such a big impediment for these respondents not to send notices to the Petitioners at least by e-mail, if not, by post? These respondents have not shown making any such effort to ensure that intimation is reached to the Petitioners. When date was not given for holding board meeting, how a director could be expected to know that there would be a general meeting for increase of shareholding without an approval in the board meeting. P1 is not a small shareholder having 10-15%, whether it is an ordinary resolution or a special resolution, without P1's approval nothing could happen in any general meeting. Therefore these Respondents being minority shareholders hardly holding above 15% shareholding could not have held the meeting with an excuse that they already intimated calendar of events to the petitioners. It is on equitable and legal considerations abominable. When Section of law categorically mentioned how a notice of agenda has to be given and how much time before notice to be issued is made clear, and then meeting held on 04.10.2013 without notice to P1 will not get any validity. This mandate, especially when unfairness is writ large, cannot be compromised to saying since the petitioners do not have registered address in India, they need not serve notice u/s 53 of Companies Act 1956. By looking at the correspondence between the respondents and P1, it appears that P1 has e-mail address as well as a website in its name. These Respondents have not made

any effort to send notice to the petitioners through this mode. Laws and compliance thereof, has to be understood contemporarily, can these Respondents explain away not serving notice upon the petitioners on the ground since the petitioners have no registered office in India, they are under no obligation to serve notice upon the petitioners. In any event, holding a meeting without giving notice to the Petitioners is invalid, not sending a notice though e-mail address is available indicates that respondents consciously did not send notice to the petitioners with malafide intention to suppress the fact of holding Board Meeting and EoGM from the notice of the Petitioners is clearly oppressive in nature thereby holding such a meeting is hereby declared as oppressive in nature.

14. As to Extra Ordinary General Meeting slated to be held on 28.11.2013 in pursuance of the board resolution dated 04.10.2013, the respondents' Counsel submits that in addition to the calendar of events of Financial year 2013-14, on 27.11.2013, a reminder letter was sent to P2 regarding holding AGM to remind the Petitioners that EOGM was going to be held on 28.11.2013. The answer from the Petitioners' side to this belated reminder is, this reminder reached to them on 02.12.2013 i.e. almost 3-4 days after meeting was held. Had there been any intention to these respondents to send notice to the petitioners on time, what prevented them to send this notice immediately after Board Meeting held on 04.10.2013? More than one month fifteen days left in between, they did not admittedly send any notice, perhaps, to ensure that it should not reach to the Petitioners in time, so that they could not attend to the meeting on 28.11.2013. This notice was not sent by e-mail. It was sent by post from India to America one day before the meeting. Could anybody believe that a postal notice would reach to US from India on the very next day? Would anybody expect that a man living in America, even if it is assumed that it was reached on 27.11.2013, would be able to reach to the meeting scheduled to be held on the very following day? All these actions of the respondents can in clear terms sound that these respondents applied every trick of the trade to ensure that Petitioners do not to attend the meeting dated 28.11.2013.

15. Since these Respondents held Board Meeting without calling one of the directors representing majority of the shareholding of the company and general meeting was held without any notice to the Petitioners for increase of authorized share capital, the increase happened in the EOGM held on 28.11.13 **is hereby held as invalid**.

Moreover, though it has been categorically mentioned u/s 172 of the Companies Act, 1956, every notice shall specify the place and the day and hour of the meeting and shall contain a statement of the business to be transacted there at by sending it 21 days before the date of meeting, sending of calendar of events not giving particulars, place and the day and hour of the meeting and the statement of the business to be transacted as mentioned u/s 172 would never become a notice u/s 172 of the Companies Act, 1956.

Point # 2: ***Whether or not bringing an outsider as a shareholder is in violation of the Articles of Association and constitution of Private Limited Company.***

16. R1 is a private limited company incorporated long before R-2 came in contact with the Petitioners. It need not be said separately what is meant by a private company, four elements that make a private company different from public limited company, that is – restriction of right to transfer of shares, limiting the number of its members to 50, prohibiting any invitation to the public to subscribe for any shares in, or debentures of, the company, prohibiting any invitation or acceptance of deposits from persons other than its members, directors or their relatives. These being the elementary principles that are followed in a private limited company; it is obvious that subscription of shares by an outsider is prohibited. Here in this, case allotment was made to an outsider i.e. R5, violating the mandate to be followed by private limited company.

17. According to Article 5 of Articles of Association of R1 company, Board is authorized to increase the subscribed capital of the company by way of allotment of further shares, subject to the provisions of section 81(1A) of

Companies Act, 1956, the Board shall issue such shares in the manner set out in section 81(1) of the Act.

18. If we read section 81, it is a section deals with rights issue for allotment of shares offering them to the holders of the equity of the company in proportion to the capital paid up on those shares as on the date of subscription, if any of the existing shareholders, failed to respond to the offer of allotment within 15 days from the date of notice, then it can be deemed as declined by such existing shareholder/s, meaning thereby, these shares could be issued to the remaining existing shareholder/s, this section 81(1) does not deal with as to the procedure to be followed if such shares are to be issued to outsider.

A separate sub-section has been carved out as section 81(1A) saying that if such shares are proposed to be offered to any person/s, whether or not those persons are covered under sub-section 81(1), a special resolution has to be passed for allotting those shares to a person other than the persons covered under sub section 81(1). Of course, under sub section 81(3), it has been said that this proposition is not applicable to a private limited company. But, for it has been specifically incorporated in the Articles of Association of this company that it requires to pass special resolution, if shares are allotted to an outsider, application of section cannot be found fault with, but for doing the same, the company has to mandatorily follow that procedure. That being the scenario, for allotment of shares to R5, the company ought to have passed a special resolution for allotment of shares to R5, since it is the case of the respondents that shares were allotted to R5 in a Board Meeting held on 14.12.2013 allotting 18,16,158 shares to R5 at par, it can never be an allotment as stated under section 81(1) (A) of the Act 1956. The blunder that has committed by the company is, R5 being an outsider, first shares should not have been issued, if at all any such issue has happened for Articles permitting such allotment of rights issue subject to section 81(1A), the company ought to have passed a special resolution for allotment of shares to R5. For no such special meeting was held and no such special resolution was passed, allotment of shares to R5 is not only bad in law for it has reduced the shareholding of majority to

abysmally low, it is prejudicial to the interest of the Petitioners. Thereby allotment to outsider is hereby held as invalid.

Point # 3: ***Whether or not allotment of shares to Respondent No. 2, 3 and Respondent No. 5 is prejudicial to the interest of the Petitioners.***

19. After increase of authorized share capital, a board meeting was held on 12.12.2013 for allotment of 10,000 shares each to R2 and R3 and subsequently filed Form-2 reflecting allotment of shares to R2 and R3 on 26.12.2013, the Petitioners say, for which also no notice was given to the Petitioners. Since shares are being issued at par, without notice to the remaining existing shareholder, it would be not only invalid but also prejudicial to the interest of the Petitioners. Hence this allotment is also declared as bad for the reasons below:

Common point that is answerable to the above two points is necessity of funds, it does not mean that if funds are required to cater the needs of the company, the Respondents are at liberty to raise funds by not giving notice to the petitioners, when such notice has not been given, notwithstanding the necessity of funds to the company, such allotment has to be declared invalid, because increasing capital, allotment of shares and further deplorable issue is issuing shares on par without notice to a person having around 85% shareholding in the company, all this is unfair and bad in law. When increase of authorized share capital itself is bad, the question of allotment of shares would not arise.

It is to be noted that P2 was shown as removed u/s 283(1)(g) far after alteration of Memorandum of Association and Articles of Association, increase of authorized share capital and allotment of shares to R2 & R3. Therefore, even according to the Respondents, since P2 was holding director position, notwithstanding whether representing majority or not, holding a meeting without notice to one of the directors amounts to bad in law.

If really the case of the Respondents is, the Petitioners not responding to the offer, allotment should have been done on premium, without taking valuation into consideration, without giving an opportunity to the existing shareholder, if any allotment is made at par, it could only be understood that allotment is for the gain of the persons getting shares at the cost of dilution of shareholding of other shareholders, here it is the Petitioners.

The ground the respondents raised for allotment of shares is that the company needs fund to carry on the functioning of the company. But the ground of necessity of funds cannot become a ground to avoid issuing notice to the petitioners, by seeing the conduct of the Respondents; it appears that the intention of the respondents is primarily for diluting the shareholding of the P1.

20. In view of the reasons aforementioned the allotment made to R2 and R3 is bad in law and prejudicial to the interest of the Petitioners.

Point # 4: *Whether or not removal of P2 as director of the company u/s 283(1) (g) of the Companies Act, 1956 is prejudicial to the interest of P1.*

21. The case of the Petitioners is that in the Board Resolution dated 30.01.2014, P2 is shown as vacated office on the basis that P2 has not attended a single board meeting since April 2013 till January 2014, but to say that thing, the Respondents filed Form-32 showing as if P2 vacated office u/s 283 basing on a resolution allegedly held on 23.01.2014 saying that P2 was not associated with the company w.e.f. 14.12.2013. By looking the notice, extract of resolution and Form 32, this Bench has noticed the following anomalies:

a. R2-R4 themselves filed a letter dated 23.01.2014 stating that Board had proposed the rights issue of shares for the required amount of financial assistance to the company for want of working capital and day to day activities of the company operation and also since P2 had not been attending to a single meeting (Board and General) since April 2013 till date, considering the provisions of section 283 (1)(g) of

Companies Act, 1956, the board has taken woeful decision to vacate P2 from the Board of R1 Company on the basis of not attending the board meeting by P2 in continuation of three consecutive meetings and within 3 months of period by enclosing Board Meeting notice dated 30.01.2014. In the notice enclosed to this letter, it shows that meeting would be held on 30.01.2014 on four Agenda items; one - to confirm the minutes of the previous meeting, two - to take a general view of the performance of the company, three - to consider and note vacation of office by Mr. Paul Douglass Waters, four - any other business with the permission of the Chairman. Since the respondents themselves filed these documents authenticity of the documents need not be doubted therefore, it has to be taken that according to the respondents meeting was to be held on 30.01.2014.

b. In this notice, it has not been mentioned to what meetings P2 has not attended, it has not mentioned when those meetings were held.

c. When it comes to Form-32 filed by R2, it appears as if Board Meeting was held and resolution was passed on 20.03.2014 with a confirmation that P2 is not associated with the company w.e.f. 14.12.2013.

d. The outcome of all these documents is, according to the notice sent by R2 to the Petitioners on 23.01.2014, meeting should have been held on 30.01.2014, whereas in Form-32 it was shown as meeting held on 23.12.2013. Which one is to be taken as correct, meeting on 30.01.2014 or meeting on 23.12.2013? It is not that Petitioners generated these documents; the author of both documents is R-2 only. Since R2 himself is not certain on which date meeting was held, this Bench has to consider that the Respondents failed to prove that a Board meeting was held to pass a resolution for invoking section 283(1)(g) to show deemed vacation of P2 as director of the company.

e. We believe to find out the rigors of 283(1)(g), it is essential to read the particular section which is as follows:

"Section 283 (1): the office of a director shall become vacant if -

(g) he absents himself from three consecutive meetings of the Board of Directors, or from all meetings of the Board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board;

....."

22. On reading this section, to invoke this section, the said director must remain absent (1) for three consecutive meetings of the Board of Directors held or (2) from all meetings of the Board for a continuous period of three months (3) in either of the cases, the time period must be more than three months (4) it must be mentioned in those resolutions in which meetings he remained absent without obtaining leave of absence from Board.

23. In the notice sent by R2, it has not been mentioned to how many meetings this director was absent and what dates meetings were held, whether notice has been sent to the Petitioners for all those meetings or not. It has not also been mentioned, whether those meetings period is more than 3 months or not and it has also not been mentioned whether leave has been sought or not? Unless and until all these details are given, proof is placed, the Board of Directors are not supposed to invoke Section 283 to arbitrarily terminate the office of the Director under the cover of section 283(1)(g). By seeing this exercise made by these Respondents, it appears fraud is writ at large in removing the Petitioner as director of R1 company henceforth we hereby hold that such removal is bad in law. Accordingly, this Bench hereby declares holding of such meeting is bogus because the date of meeting in the notice purportedly sent to P2 is different from the date shown in Form-32, therefore Form 32 filed showing P2 vacated office as invalid.

24. There is an argument saying that removal of director will not become a complaint in the case of oppression and mismanagement, but in a case like this, where P2 has been appointed as representative of P1 to protect the interest of P1, especially in a company like this where only two shareholders are present, it cannot be brushed away saying it is a directorial compliant when a director representing majority shareholding is removed as director.

Point # 5: ***Whether or not appointment of R5 as director of the company is prejudicial to the interest of the Petitioners?***

The same discussion made in the above case is applicable here as well because already allotment of shares to R5 itself is when said bad, the company being private company, for there being no valid notice to the petitioners, especially to P2, in appointing R5 as director, appointment of R5 as director of the company, his appointment as director is also declared bad.

Point # 6: ***Whether alteration of Articles of Association by Respondents 2-4 is prejudicial to the interest of the Petitioner No. 1 or not?***

25. For this Bench having already held that holding an extra ordinary general meeting on 28.11.2013 without notice to P1 is invalid, the alteration of Memorandum of Association and Articles of Association in said meeting automatically would become invalid, therefore, alteration of Memorandum of Association and Articles of Association is hereby declared as invalid and prejudicial to the interest of P1.

Point # 7: ***Whether this Bench has jurisdiction to pass orders under 1956 Act?***

26. The point for discussion is as to whether the Companies Act, 1956 is applicable or the Companies Act, 2013 is applicable to adjudicate the cases instituted under 397-398 of Companies Act, 1956 before advent of Companies Act, 2013.

27. Normally, an action is bound by law in existence as on date because people are expected to be bound by the law in existence as on date, a new law subsequently come cannot be applied retrospectively unless it is explicitly stated as retrospectively applicable. This principle has been elaborated in the following paras to hold that 1956 law is applicable to these proceedings but not Companies Act 2013.

28. Section 434 of new Act is constituted primarily for transfer of pending proceedings, from CLB and other forums to NCLT, the provision straight away dealing with repeal and savings of old Act is section 465 of the new Act, not section 434 of new Act.

29. Under section 465 of new Act, sub section-1 deals with repeal of the Companies Act 1956 and the Registration of Companies (Sikkim) Act 1961 (please take note that it is a state Act), subsection-2 of the Act deals with savings given to the old Act in respect to the acts done and litigation pending from the acts emanated from the old Act with a rider of subject to the provisions of the new Act, so it can't be said that savings given in subsection-2 are fully free from the new Act, but the silver lining is sub-section-3 of the section says that the matters mentioned in sub-section (2) of 465 of the new Act shall not be held to prejudice the general application of Section-6 of the General Clauses Act, with regard to the effect of the repealed enactments.

30. Since Section-6 of the General Clauses says that the repeal shall not affect any legal proceeding pending immediately before passing new enactment, the acts or offences ante to the new Act will be governed by the repealed enactment. For it has been said whatever said in subsection 2 shall not be held to prejudice the general application of Section-6 of the General Clauses Act with regard to the effect of repeal of the repealed enactments as if the Registration of Companies (Sikkim) Act 1961 were also a Central Act. Here it shall not be confused by seeing induction of Registration of Companies (Sikkim) Act, this was added to say that this Act also be treated as Central Act, because General Clauses Act is applicable to Central Acts alone. It is slightly ticklish, at least to me, to understand that whether it is applicable to all repealed enactments or only to Registration of Companies (Sikkim) Act, but on proper reading, it would be clear that this Sikkim Act is mentioned to clear that though it is a state Act, it is to be deemed as central Act so as to bring it under the operation of General Clauses Act, because General Clauses Act governs central Acts only.

31. There are a few things important to know before saying that that the acts happened before passing new enactment are governed by old Act, here it is Companies Act 1956.

32. When a Statute is dealing with substantive rights, it is settled proposition that every Statute is prima facie prospective unless it is expressly

or by necessary implication made to have retrospective operation. The retrospective operation cannot be taken to be intended unless that intention is manifested by expressed words or necessary implication. And there is a subordinate rule to the affect that a Statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary.

33. So the general principle is whenever any Statute dealing with substantive rights cannot have any retrospective effect unless it is expressly mentioned but when retrospective operation is for the benevolence of the parties, such retrospectivity cannot be said as invalid, normally this retrospective operation is to cure the acknowledged evil for the benefit of the community.

34. As to procedural laws are concerned, they are presumed to be retrospective unless construction is textually inadmissible but when procedural enactment intervenes with vested rights of the parties, there, retrospectivity cannot be given effect.

35. The classification of the Statute as either substantive or procedural does not necessarily determine whether it will have retrospective operation or not, it is the effect of the new Act on the past events, that is determinative to decide the application of retrospective operation. Normally when it adversely affects the person, then, old Act will remain in force, when it is for the benevolence of the community, then new Act could be applied to the past events. Here the Test of fairness is to apply to see as to whether such an enactment adversely affects the rights of the parties or not.

36. In Mohd. Abdul Sufan Lascar v. State of Assam (2008) 9 SCC page 33, the Supreme Court applied this principle saying that there cannot be any retrospective operation in the given case. In this case, the point is that before 23.5.2006, section 324 of IPC was compoundable with the permission of the court, but by the advent of Criminal Procedure (Amendment) Act 2005, it was made non-compoundable. This predicament was resolved by the Supreme

Court saying there can't be any retrospective operation over the offences occurred before 23-5-2006, therefore it is hereby held that it could be dealt with under old dispensation.

37. Accordingly, this point is decided that these proceedings are bound by 397-398 of Companies Act, 1956 but not by Companies act 2013.

The Counsel for R1-R4 relies upon two citations in between ***Punj Jarnail Singh v. Bakshi Singh*** - (AIR 1960 Punj 455 (Paras 15 and 21), ***Narandas Munmohandas & Ors. v. The Indian Manufacturing Co. Ltd.*** – (AIR 1953 Bombay 433) to say that in a private company when number of members do not go beyond 50, every joint shareholder shall be treated as a single member for the purposes of the definition thereby R 2&3, though joint shareholders they have to be treated as individual members, this principle indeed against the basic proposition of Companies Act, any way since that distinction will not bring to turn the case in favor of the Respondents, we hereby hold that this ratio is not applicable to the Respondents.

The Counsel for R1-R4 relied upon ***R. Khemka v. Deccan Enterprises Pvt. Ltd.*** (1998) 5 Comp LJ 258 (AP), to say that the burden of proof lies on the person who alleges non-receipt of statement. Therefore, since the Petitioners have stated notice has not been received by them, it is their duty to prove that notice has not been received by the Petitioners. Since it is proved beyond doubt that the Respondents avoided timely sending notices to the petitioners, this ratio is not applicable to this case.

The Counsel for R1-R4 relied upon ***Hanuman Prasad Bagari & Ors. v. Bagaress Cereals Pvt. Ltd. & Ors. ((2001) 4 SCC 420),*** to say that the Petitioner must make up a case for Winding up of the company on just on equitable ground otherwise no relief shall be granted. When the Majority of the company is put to sufferance, the petitioners being in all respects in a position to wind up this Company, since such winding up would unfairly prejudice the petitioners, following orders are passed, the ratio being squarely applicable to

say that this Bench has come to an opinion that ground is established it is just and equitable to wind up the company.

The Counsel for R1-R4 relied upon ***Bharat Bhushan v. H.B. Portfolio Leasing Ltd. (74 Comp. Cas, Delhi, page No. 20)*** to say that failure to attend three consecutive Board Meetings, there is no need to give notice to director on board resolution for saying absence of a director for three consecutive meetings will become automatic vacation of directorship. Here in this case for the Respondents failed to prove that P-2 failed to attend three consecutive meetings after notice has been given by the company, this citation is not applicable to uphold removal of P2 as director.

The Counsel for R1-R4 relied upon ***Ms. Hardeep Kaur & Ors. v. Thinlac Enterprises Pvt. Ltd. & Ors. (Vol. 122 Comp. Cas page No. 944 (CLB))***, to say that there is no illegality in issuing further shares when company needs money for payments. We have already answered this point if meeting is held for fund requirement, it is not that Respondents are entitled to hold meeting without notifying it to the petitioners. Even for raising funds by allotment, first notice is to be given to every shareholder, thereafter it must be proved that the company has need to raise funds for the functioning of the company. None of this is followed by the Respondents; hence this ratio is not applicable to this case.

The Counsel for R1-R4 relied upon ***Rahul Shah & Ors. v. Avi Sales Pvt. Ltd. ((2008) 141 Comp. Cas 505 CLB)***, to say that when sufficient reason has not been given for filing a Petition after a delay of three years, it has to be considered that Petitioner has not come with clean hands, in case any director has been removed after due notice then it has to be taken as tacit consent of such director about his removal from the Board. The factual situation is not akin to the facts of the above case, and this petitioner did not keep quite after knowing these facts, P2 complained various authorities, therefore it can't be equated to a case three years' delay happened, moreover gross injustice done to the petitioner having 85% shareholding in the company.

38. In view of the reasons aforesaid given, we hereby hold that the conduct of respondents in dealing with the affairs of R1 Company is oppressive against the Petitioners and prejudicial to the interest of P1, therefore, by invoking section 402 of the Companies Act, 1956 this Bench hereby directs as follows:

1. That P1 being a majority shareholder, P1 through P2 shall take over the management of the Company on restoration of P2 as director of the company and with liberty to the petitioners to appoint more members as directors of R1 Company within 15 days from the date Order is made available. R2-R4 will not continue as directors after 15 days from the date of delivery of this Order and they shall not pass any Board Resolution without approval of P2.
2. A forensic audit is to be conducted from 01.04.2013 till date to find out as to whether funds come to R1 Company as stated by the Respondents or not? To conduct audit, M/s. Shah & Gutka are hereby appointed as Auditor with remuneration proportionate to their shareholding of the petitioners and R2-4 in the ratio of 85:15. The Auditor can fix remuneration of him depending on the volume of work involved in this case.
3. The Petitioners shall provide exit to R2 to R4 on fair valuation taking 31.03.2017 as cut-off date. The valuation of the shares shall be conducted by the same auditor after forensic report has been given by the Auditor.
4. After ascertainment of infusion of funds from R5, loans given by the shareholders, utilization of the same and company funds and siphoning of funds if any from 31.03. 2013 till date, R1 Company, as per the report given by the auditor, shall refund the funds actually infused by R5 either in the form of share capital or in the form of loans within three months from the date valuation of share value and after preparation of forensic audit report. If such payment is not made within three months as stated above, the petitioners shall pay interest @10% over the amount payable to R5 after completion of three months as stated above.

Accordingly, this Company Petition is disposed of.

Sd/-
V. NALLASENAPATHY
Member (Technical)

Sd/-
B. S.V. PRAKASH KUMAR
Member (Judicial)