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NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

C.P. No. 53/241-242/NCLT/AHM/2017

Coram: **Present: Hon'ble Mr. BIKKI RAVEENDRA BABU**
MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 12.06.2017

Name of the Company: Bindeshkumar Balvantbhai Thakkar
V/s.
The Registrar of Companies & Ors.

Section of the Companies Act: Section 241-242 of the Companies Act, 2013

S.NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	PATHIK ACHARYA	Advt.	Pet.	
2.	KIRAN SHAH	C.A.	Resps. 2 to 5	

ORDER

Learned Advocate Mr. Pathik Acharya present for Petitioner. Learned FCA Mr. Kiran Shah present for Respondents no. 2 to 5.

Order pronounced in open Court. Vide separate sheet.

12.6.17

BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

Dated this the 12th day of June, 2017.

NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

C.P. No. 53/241, 242, 245/NCLT/AHM/2017

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER JUDICIAL

(Date: 12th June, 2017)

In the matter of:

Bindeshkumar Balvantbhai Thakkar,
Aged about 47 years, Indian,
Ex-Director/Shareholder of
Arihant Dye Stuff Private Limited,
Residing at 33/A, Dipmala Bungalows,
Nr. Cadila Bridge, Nr. Avanti Apartment,
Ghodasar, Ahmedabad. ... Petitioner

Versus

1. The Registrar of Companies,
ROC Bhavan,
Opp. Rupal Park Society,
Behind Ankur Bus Stand,
Naranpura, Ahmedabad-13.

2. M/s Arihant Dye Stuff Private Limited,
C/1/121, GIDC Estate, Phase-I,
Vatva, Ahmedabad – 382445.

3. Malay Shaileshbhai Shah,
Aged adult, Indian,
Director of M/s Arihant Dye Stuff Pvt. Ltd.,
Residing at 3/C, Kameshwar Vihar
Co-Op. Society, Kailash Colony,
132, Ring Road, Satellite,
Ahmedabad – 380015.

4. Jigisha Malay Shah,
Aged adult, Indian,
Shareholder of M/s Arihant Dye Stuff Pvt. Ltd.,
Residing at 3/C, Kameshwar Vihar
Co-Op. Society, Kailash Colony,
132, Ring Road, Satellite,
Ahmedabad – 380015.

5. Alka Shailesh Shah
Aged adult, Indian,
Shareholder of M/s Arihant Dye Stuff Pvt. Ltd.,
Residing at 3/C, Kameshwar Vihar
Co-Op. Society, Kailash Colony,
132, Ring Road, Satellite,
Ahmedabad – 380015. .... Respondents

FINAL ORDER
(Date:12.06.2017)

1. By this petition under Sections 241, 242 and 245 read with Sections 100, 101, 102, 115 and 169 of the Companies Act, 2013, the petitioner is challenging his removal as Director of the second respondent company without following the procedure laid down under the provisions of the Companies Act, 2013.

2. The petitioner was a partner of a partnership firm by the name Arihant Color Chem. On 26.07.2013, the third respondent joined as a partner in the partnership firm, Arihant Color Chem, by executing a new partnership deed. The object of admitting the third respondent into the partnership firm was to stabilize the business of the partnership firm, which was, by then, facing financial difficulties. The third respondent showed interest to take over the partnership business and formed a company by name Arihant Dye Stuff Private Limited (2nd respondent) on 16.09.2013. On 1st February, 2014, a memorandum of understanding was executed between the petitioner and other partners of M/s Arihant Color Chem. The main purpose of the said MOU was to convert the partnership business into a private limited company. Subsequently, on 01.04.2015, shareholding pattern was decided among the partners and Shareholders' Agreement was entered into. The petitioner was taken as a shareholder of the second respondent company and he was allotted 15% of shares of the second respondent company. The petitioner and his partner handed over the possession, control and management of the erstwhile partnership firm to the third respondent out of confidence. The assets of the partnership firm, at the time of handing over

According to the petitioner, he was working sincerely for the business of the second respondent company. Respondents no. 3 to 5, by making false allegations against the petitioner, threw him out from the company with a view to snatch the business of the petitioner. It is the case of the petitioner that he was busy in arranging the marriage of his friend's son, which was scheduled on 14th February, 2017. In the meantime, to the surprise of the petitioner, he received a notice, sent on 30th January, 2017, from the second respondent company stating that an Extraordinary General Meeting of the company was scheduled to be held on 11.02.2017 for passing a resolution to remove the petitioner as Director of the company by invoking Section 169 of the Companies Act, 2013. The said notice was received by the petitioner on 31.01.2017. In the said notice, the petitioner was asked to make representation against the proposed resolution for his removal within 9 days. The allegation made against the petitioner was that he had given instruction to one of the creditor banks for the change of signature of the signing authority and produced resolution by forging the signature of the third respondent. According to the petitioner, the said allegation was a baseless allegation. In fact, it was only the third respondent, who was authorised to sign and administer all financial affairs of the company as per the Shareholders' Agreement. No bank will accede to the request of the petitioner for change of signature for any transaction. The petitioner gave a detailed reply to the members of the company. The petitioner was required to read out the said explanation in the EOGM. The petitioner requested to postpone EOGM since the marriage function of his friend's son was scheduled on 14th February, 2017. The petitioner also requested the respondent to give opportunity of personal hearing. But to the shock and surprise of the petitioner, on 15th February, 2017, the petitioner

indicating to the petitioner that he should not enter into the property. The petitioner made a representation to the first respondent on 23.02.2017 against his illegal removal, but the first respondent did not respond. The resolution removing the petitioner as Director of the second respondent company was passed without following the procedural law and in violation of the principles of natural justice. The petitioner stated that he is having 15% share capital and he has got a right of voting in the EOGM, which was curtailed. According to the petitioner, EOGM can be called by giving not less than 21 days' advance notice or through electronic mode. But, in this case, by giving less than 21 days' notice, EOGM was called for. According to the petitioner, the second respondent company was required to take consent of 95% of the members of the company for calling EOGM by giving notice shorter than 21 days and the petitioner was denied the opportunity of personal hearing. The removal of the petitioner as Director, according to the petitioner, is against the Shareholders' Agreement and the MOU dated 1st February, 2014. As per the Shareholders' Agreement, the party which appointed the Director can only remove him and not otherwise. It is also stated in the said Shareholders' Agreement that when there is a conflict between the terms of the Agreement and the Articles of Association, the terms of the Agreement would prevail.

3. Respondents no. 2 to 5 filed reply stating that the petitioner, in connivance with Shri Girishbhai Amratbhai Patel, forged the signature of the third respondent by misusing the letterhead of the second respondent company and furnished a forged resolution to The Kalupur Commercial Co-operative Bank Ltd. and got changed the instructions for signature on

forged signature of respondent No.3, and correspondence exchanged by respondents Nos.2 and 3 with The Kalupur Commercial Co-operative Bank Ltd. According to the respondent, the above said documents go to show that the petitioner committed fraud with the company. Thereafter, the third respondent came to know that the officers of The Kalupur Commercial Co-operative Bank Ltd. are also hand in glove with the petitioner and Shri Girishbhai Amratbhai Patel. In spite of written requests by the respondents, the officers of The Kalupur Commercial Co-operative Bank Ltd. did not transfer the amount standing to the credit of the second respondent company to the bank account of the company with HDFC Bank. Therefore, according to the respondent, when the company lost confidence in the petitioner and Shri Girishbhai Amratbhai Patel, the respondents resorted to the provisions of the Companies Act to remove the petitioner and Shri Girishbhai Amratbhai Patel as Directors to protect the interest of the company, its Directors and shareholders. Article 32 of the Articles of Association of the second respondent company provides only for notice of seven days. Article 33 of the Articles of Association of the second respondent company says that the quorum for the General Meeting is only two members. The company has given due notice of seven days as per the provisions of the Act. The notice for EOGM was received by the petitioner on 31.1.2017 and the meeting was convened on 11.2.2017. Respondents no. 3, 4 and 5 gave requisition on 20th January, 2017 for calling Special General Meeting under Section 169(2) read with Section 115 of the Companies Act, 2013 for removal of the petitioner and Shri Girishbhai Amratbhai Patel. The petitioner, having received the notice, gave written submissions, but did not choose to remain present in person. The company considered the representation of the petitioner and, thereafter, removed the petitioner and Shri

4. It is stated in the reply that in view of Section 5(9) of the Act, other provisions of Section 5 are not applicable to the Articles of Association of a company registered under any previous company law unless amended under the present Act. As per the provisions of Section 178(1)(ii), a private company, which was registered prior to 2013, on its own regulations regarding length of period of notice for calling meeting, is bound by its regulations. In view of Section 170(1)(ii) read with Section 5(9), the second respondent company has followed the provisions in the Articles of Association regarding length of period of notice and, therefore, there is no violation of the provisions of the Act. As per the say of the respondents, the petitioner tried to cause damage to the reputation of the company by giving notice to the shareholders and customers of the company by making allegations and requesting them not to deal with the company. The shareholding pattern of the second respondent company has not been changed. It is stated in the reply that the company has only removed the petitioner and Shri Girishbhai Amratbhai Patel as Directors because they have acted in a manner detrimental to the interest of the company. According to the respondents, the second respondent company has given assurance to HDFC Bank that it will not deal with any other bank except HDFC Bank. In spite of that, the petitioner and Shri Girishbhai Amratbhai Patel have committed breach of the assurance given to HDFC Bank by the company and its Directors and, thereby, they made efforts to siphon away the funds to the tune of Rs.70 lakhs by depositing the same in the account of the company with The Kalupur Commercial Co-operative Bank Ltd., which was dormant, by getting it activated with the help of forged documents. As per the say of the respondents, the account with The Kalupur Commercial Co-

the respondents, after the removal of the petitioner as Director, he instigated the workers of the company and the customers against the interest of the company. The respondents stated that there are no grounds for invoking the provisions of Section 241 of the Companies Act. According to the respondents, mere removal of the petitioner as Director is not an act of oppression as no material change has been effected in the company.

5. In the rejoinder, the petitioner stated that the respondents did not make any complaint alleging that the petitioner forged their signatures before the issuance of notice for his removal. It is stated in the rejoinder that when there is inconsistency between the Articles of Association and the provisions of the Companies Act, 2013, the provisions of the Companies Act would prevail over the Articles of Association in view of Section 6 of the Companies Act. The petitioner also stated that, as per Item No.32 of the Articles of Association, consent is required to be taken of 75% of the members of the company for giving notice to the Director. The petitioner denied the allegation that he siphoned away funds of the second respondent company to the tune of Rs.70 lakhs. The petitioner also denied the allegation that he instigated the workers to file false complaint against the respondents. According to the petitioner, his removal without following the established procedure and without giving opportunity to him amounts to oppression and mismanagement. The petitioner stated that Section 170(1)(ii) of Companies Act, 1956 is not applicable to the present case as the new Act was notified and came into force only on 12.09.2013 and the second respondent company was incorporated on 16.09.2013. According to the petitioner, the respondents did not produce any proof to the effect that the petitioner had

6. In the sur-rejoinder, the respondents stated that Sections 3, 4, 5, 6, 7, 9, 10 and 11 of the Companies Act, 2013, which pertain to formation, incorporation and registration of the Companies, came into force with effect from 1.4.2014 and the second respondent company was incorporated on 16.9.2013. It is also stated in the sur-rejoinder that Section 5(9) of the Companies Act provides that the company registered prior to the coming into force of the new Act will be governed by the old Act of 1956. The second respondent company was registered before 1.4.2014 and, therefore, for calling EOGM, the company has to follow the Articles of Association of the company. As per the Articles of Association of the Company, the EOGM has to be called giving only seven days' notice. It is also stated in the sur-rejoinder that there is no compulsion for appointing another Director in place of a person who was removed as a Director and it is only optional. According to the third respondent, as per the Master Data downloaded from the website of the Ministry of Corporate Affairs, even after the removal of two Directors, there are two Directors. According to the respondents, the second respondent company never produced any resolution before The Kalupur Commercial Co-operative Bank for making the dormant account of the company into operation. According to the respondents, the petitioner forged the signature of the third respondent and prepared a resolution of the second respondent company by using the stationery of the second respondent company, which was in possession of the petitioner and produced the same before the bank, behind the back of the respondents. The respondents stated that, after the petitioner was removed as Director of the company, he started giving threats to the third respondent and also gave false complaint to

According to the respondents, the petitioner issued legal notice to HDFC Bank on 18.4.2017 making serious allegations against the company and its Directors.

7. The following points emerge for consideration in this petition: -

(i) Whether notice dated 30th January, 2017, issued by the company to the petitioner for the EOGM dated 11.02.2017 was a valid notice or not?

(ii) Whether sufficient opportunity was given to the petitioner to represent his case before the EOGM or not?

(iii) Whether there are valid grounds for the removal of the petitioner as Director of the second respondent company?

Point no. (i)

8. The controversy in this case is whether it is necessary to issue 21 days' clear notice for conducting EOGM of the second respondent company or whether 7 days' notice is sufficient for conducting the EOGM of the second respondent company.

9. The notice for the EOGM scheduled to be held on 11.2.2017 was issued by the company on 30th January, 2017. Admittedly, it was received by the petitioner on 31st January, 2017. Therefore, between the date of receipt of notice and the date of EOGM, there were 12 days. Even if the date of receipt of notice or date of notice is excluded, there were 11 days. Article 32 of the Articles of Association of the second respondent

"32. Any General Meeting may be called by giving to the members clear seven days' notice or a shorter notice than of seven days, if consent is accorded thereto by members of the Company holding not less than 75% of the paid up share capital of the Company and it shall not be necessary to annex any explanatory statement to the notice."

In the case on hand, there is clear seven days' notice. If a shorter notice than seven days was to be given, then the question of taking consent of members of the company holding not less than 75% of the paid up capital of the company would arise.

10. Section 101(1) of the Companies Act, 2013 says that a General Meeting of a company may be called by giving not less than clear 21 days' notice either in writing or through electronic mode in such manner as may be prescribed, provided that a General Meeting may be called after giving shorter notice, if consent is given in writing or by electronic mode by not less than 95% of the members entitled to vote at such meeting.

11. It is the contention of the learned counsel for the petitioner that in view of Section 101 of the Companies Act and in the absence of consent in writing by 95% of the members entitled to vote at the General Meeting, there must be 21 clear days' notice and, therefore, the EOGM held on 11th February, 2017 is invalid. It is also the contention of the learned counsel for the petitioner that in view of Section 6 of the Companies Act, Section 101 of the Companies Act which provides 21 days' notice for calling General Meeting would prevail over the notice period provided

12. It is the contention of the learned counsel for the respondent that in view of Section 5(9) of the Companies Act, nothing in this section applies to Articles of Association of a company registered under any previous Company Law unless amended under this Act. Learned counsel for the respondent pointed out that the second respondent company was registered on 16th September, 2013 under the provisions of the Companies Act, 1956. Therefore, unless the company choose to amend its Articles of Association, the other sub-sections of Section 5 are not applicable in view of sub-section (9) of Section 5. It is also contended by the learned counsel for the respondent that there is a saving clause in Section 6. Section 6 reads save as otherwise expressly provided in the Act, the provisions of the Act shall prevail over the Articles of Association. In view of the fact that Section 6 says that save as otherwise expressly provided in this Act and in view of sub-section (9) of Section 5, it cannot be said that the provisions of the Companies Act would prevail over the Articles of Association of a company registered under the Companies Act, 1956. Here it is pertinent to mention that Sections 5, 6 and 7 of the Companies Act, 2013 came into force with effect from 1.4.2014, but not by the date of registration of the second respondent company.

13. A close reading and understanding of the provisions of Section 5, including sub-section (9) and Section 101 of the Companies Act, 2013 and the Articles of Association of the second respondent company would make it clear that in order to call an EOGM of the second respondent company, what is required is 7 days' notice and not 21 days' notice, as contended by the learned counsel for the petitioner. In that view of the matter, it is held that the notice dated 30th January, 2017,

Point no. (ii)

14. Principles of natural justice require that sufficient opportunity must be given to the petitioner, who is sought to be removed as a Director, before his removal. The opportunity does not necessarily mean a personal hearing. In ***M.P. Industries Ltd. v. Union of India, AIR 1966 SC 671***, it was observed by the Honourable Supreme Court that :

"The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation would effectively meet the requirements of the principles of natural justice."

In the case on hand, the petitioner, having received the notice, sent a written representation. The company thought it fit that written representation of the petitioner was sufficient and there was no need for personal hearing of the petitioner. It is stated by the company that only after considering the representation of the petitioner and after considering the misdeeds of the petitioner, he was removed as Director of the company. Therefore, there is no violation of principles of natural justice in the case of the petitioner while removing the petitioner as Director.

15. Now, coming to the reason stated by the petitioner for not attending the EOGM, it is the say of the petitioner, vide paragraph 4.6 of the petition, that it was due to the marriage of his friend's son, which was scheduled to be held on 14.2.2017

was to take place on 14.2.2017. The petitioner did not file any documents to show that the marriage of his friend's son was scheduled to be held on 14.2.2017. It is the view of this Tribunal, that the marriage of friend's son might not come in the way of the petitioner in attending an EOGM, in which it was proposed to remove him as a Director. The reason stated by the petitioner for not personally attending the EOGM on 11.2.2017 is not a valid reason. Therefore, it is held that sufficient opportunity was given to the petitioner before passing the resolution for his removal in the EOGM held on 11th February, 2017.

Point no. (iii)

16. The immediate reason for the removal of the petitioner from the directorship of the second respondent company was that the petitioner and Shri Girishbhai Amratbhai Patel submitted a resolution to The Kalupur Commercial Co-operative Bank Ltd. forging the signature of the third respondent. A perusal of the said resolution presented before The Kalupur Commercial Co-operative Bank shows that it was resolved that among the petitioner, Shri Girishbhai Amratbhai Patel and the third respondent, any two are authorised to operate the account of the second respondent company with The Kalupur Commercial Co-operative Bank Ltd. It has been the case of the petitioner from the beginning that the function of dealing with finance, accounts and operation of the bank accounts was entrusted only to the third respondent. As against that, the purported resolution dated 24th May, 2016, intends to give authorisation amongst the three Directors, i.e. the petitioner, Shri Girishbhai Amratbhai Patel and the third respondent, to any two Directors. It is the case of the third respondent that the petitioner and Shri Girishbhai Amratbhai Patel, sailing

Company amounts into that account instead of HDFC Bank, which provided loan to the company. These facts are available in the documents attached to the reply. There is an arrangement as well as guidelines of the Reserve Bank of India that, if any commercial bank gives loan to a company, such company shall not operate account or accounts in any other bank except the bank which provided loan to the company. In fact, HDFC Bank also wrote a letter to The Kalupur Commercial Co-operative Bank requesting to close the account of the company and transfer the amount to HDFC Bank, quoting the circulars of the Reserve Bank of India. Therefore, the purported resolution dated 24th May, 2016 given to The Kalupur Commercial Co-operative Bank Ltd. is obviously to enable the petitioner and Shri Girishbhai Amratbhai Patel to operate a dormant account of the second respondent company with The Kalupur Commercial Co-operative Bank Ltd., which is against the understanding that the company had reached with the HDFC Bank, which provided loan to the company. Therefore, by any stretch of imagination, it cannot be said that the said resolution was presented to the bank by the respondents because it was not at all beneficial to them and it was going against their powers to operate the account without the concurrence of the petitioner and Shri Girishbhai Amratbhai Patel. Therefore, the reason for the removal of the petitioner is bona fide and based on substantial grounds.

17. In view of the above discussion, it is held that there are bona fide and sufficient reasons for the removal of the petitioner as Director of the second respondent company.

decision, the questions for determination were whether dispute under Sections 397, 398 read with Section 102 of the Companies Act, 1956 was capable of referring to arbitration or not; and whether the judgment of a foreign court is binding on the Company Law Board or not. In that judgment, there were also findings regarding the powers of the Company Law Board under Section 402 of the Companies Act. The facts in this case are different from the facts in the above said judgment.

19. Learned counsel for the petitioner relied upon another decision of the Honourable Supreme Court in ***Kamal Kumar Dutta & Another v. Ruby General Hospital Ltd***. In that judgment, it was held that in view of the amendment to the Companies Act in 1991, Letters Patent Appeal was not available on the judgment of the learned Single Judge. In that judgment, the facts disclosed that the Managing Director was removed from his post and, in his absence, shareholding has been increased to the detriment of the Managing Director, who did everything for the company. In those facts, it was held that the removal of Managing Director was an act of oppression. But, in the case on hand, the removal of the petitioner as Director is based on substantial ground, namely, trying to operate the dormant bank account against the interest of the company by presenting forged resolution of the company.

20. Learned counsel for the petitioner relied upon the judgment of the Delhi High Court in the case of ***General Commerce Ltd. and Another v. Apparel Export Promotion Council, reported in 1990 69 CompCas 159***, which deals with the requirement of proxy and the rules relating to it vis-a-

the petitioner contended that the terms of Shareholders' Agreement, which are not part of the Articles of Association and not inconsistent with the Act, can be enforced. In this context, it is necessary to refer to the Shareholders' Agreement in this case. Clause 12.5 of the Shareholders' Agreement deals with banking transactions and approval of payments. It says that the banking accounts shall be operated with the signature of the representative from MSS, who shall operate the banking accounts in accordance with detailed guidelines for such operational matters as may be decided in the meeting of the Board of Directors of the company from time to time. This term in the Shareholders' Agreement authorises only the third respondent to operate the bank accounts. But the action of the petitioner in trying to operate the bank account is against the term in the Shareholders' Agreement.

21. Coming to the Board of Directors, the relevant clause is 9.1(b). No doubt, it says that each party shall be entitled to terminate appointment of any Director nominated by them and to nominate another person in his place. This does not mean that a Director who is acting against the interest of the company cannot be removed by following the procedure laid down under the Articles of Association and the applicable provisions of the Companies Act. This term in the Shareholders' Agreement is not included in the Articles of Association. The decision relied upon by the learned counsel for the petitioner is altogether on different facts. In the case on hand, on the ground that the petitioner presented a false resolution before The Kalupur Commercial Co-operative Bank Ltd., he was removed. Therefore, this contention is not available to the petitioner in this case.

Ltd., reported in 2000 100 CompCas 66 CLB. In that judgment, it is held that removal of Director could be considered as an act of oppression only if it is established that the same was done either with a mala fide intention or with some ulterior motive. In that judgment, reference was made to the judgment of the Board in *Atmarain Modi v. ECL Agrotech Ltd. (1999) 98 CompCas 465 (CLB).* In the said decision, in which principles of partnership were applied, it was held that the removal of the petitioner therein as a Director in a General Body meeting on the ground that he had taken away one of the major customers of the company to his own newly incorporated company was not an act of oppression as he had acted against the interest of the company. In the case on hand also, the petitioner acted against the interest of the company and the action of the respondents in removing the petitioner as Director is a bona fide action. Therefore, even if it is a partnership turned out to be a company, the removal of the petitioner as Director is justified. Moreover, it is settled law that single act of removal of Director may or may not amount to act of oppression.

23. In view of the above findings on points 1 to 3, the petitioner is not entitled to any relief in this petition. In the result, this petition is dismissed. There is no order as to costs. The Application IA 79/2017 is closed.

12.6.17

BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

Pronounced by me in open court
on this 12th day of June, 2017.

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