NATIONAL COMPANY LAW TRIBUNAL: ALLAHABAD

Company Petition 35 of 2004
Dated the Wednesday, 7th day of December, 2016
Coram: Mr. V.S.R. Avadhani & Mr. H.P. Chaturvedi
(Judicial Members)
(In the matter of Bharat Cold Storage Pvt. Ltd)

Between

1. Prem Kumar Rastogi S/o Shree Giriraj Dharan
2. Smt. Pratibha Rastogi w/o Shree Prem Kumar
3. Shree Devesh Kumar S/o Shree Prem Kumar
4. Shree Lokesh Kumar S/o Shree Prem Kumar

.....Petitioners

AND

1. The Bharat Cold Storage Pvt. Ltd.,
2. Harsha Kumar S/o Shree Arya Kumar Rastogi
3. Yash Kumar S/o Shree Arya Kumar Rastogi

...Respondents

Petition under sections 397 and 398 read with Sec. 402 of the Companies Act, 1956

The above Petition along with unregistered Company applications came before us for hearing on several days and finally on7.11.2016 in the presence of *Shri Shubham Aggarwal*, Advocate for the Petitioners and of *Shri Anil Kumar*, Practicing Company Secretary for the Respondent No. 1 and nobody appeared for the other Respondents and having stood over for consideration till this day, the Bench delivers the following

ORDER

(Per Mr. V.S.R. Avadhani, Judicial Member)

1. The Company Petition is heard along with the un-registered Company Application for amendment of the Company Petition. Though the Company Application was filed in the year 2010, it has been coming along with the Company Petition and nobody has taken initiative to mention the same for disposal, except when this Bench posted the Company Petition for final hearing. However, as agreed by both sides, the Company Petition and Company Application are heard together, particularly because the facts in issue to be considered are very much common.

The core reliefs claimed in the Company Petition are –

1. To remove Respondents 2 and 3 or any other person appointed by the Respondents as Director of the Respondent No. 1 Company, namely, Bharat Cold Storage Pvt. Ltd;

2. Cancel the allotment and issue of 5000 shares to the majority shareholders;

3. Cancel the transfer of 3400 shares earlier allotted in the name of Swami Dayal, Sunder Lal, Bhagwati Prasad Rameshwar Singh and Ram Asray Pandey;

4. Direct the Company to pay to the petitioners the amount of sale of petitioners' shares and dividends collected on those shares together with interest @ 15% p.a. which is lying to the credit of suspense account;

5. Direct the company to amend its articles of Association for providing proportional representation of members for appointing Directors of the Company;

6. Direct the Respondents 2 and 3 to reimburse the Company (i) interest recoverable from Giriraj Udyog Ltd., (ii) the amounts withdrawn by the Respondents 2 and 3 from the company by manipulated repairs and maintenance expenses since the year ending 31.12.1982 and short collected storage rent;

7. In the amendment Petition referred supra, the Petitioners have further claimed the relief to cancel the allotment of 40, 000 equity shares to Giriraj Udyog Ltd.

The other ancillary or supplementary reliefs are not extracted to maintain succinctness of the order.

2. The Petitioners' group and the Respondents' group are family members and there are several particulars pleaded regarding family arrangement, separation of management of certain business houses owned by the family and partition of jewellery etc which are not germane for the discussion. Suffice it to state simply that, since 1976, the management of the Company was given to the Respondents' group after the expiry of Shri Arya Kumar.

Initially the authorised and paid up capital of the Company was 15 lacks of Rs. 100 per share out of which the Petitioners' group held 5250 shares; and later the capital of the company was raised to 20 lacks. The Petitioners' claim is that they could not subscribe for the rights issue as their funds were blocked by the Company in the shape of unpaid Deposits. After the Respondents filed their Reply, it was brought on record that by holding an EGM on 19.01.2002, the authorised capital was raised to 60 lacks and the 40000 new shares were allotted to Giriraj Udyog, which is a company controlled by the Respondents' group. It has then been contended by the Respondents that the Petitioners' holding in the Capital of the Company falls below 10% and under Sec. 399 of the Companies Act, 1956, they have no qualification either in terms of capital or in number of members and so the CP is not maintainable.

3. Consequent upon that Reply, the Company Petitioners filed the Application for amendment of the CP asserting that they have no notice of EGM, and the allotment of newly issued shares to Giriraj Udyog without offering to the members and this decision is not supported by any Board Resolution and is contrary to Articles of Association and is unsustainable. On those grounds the Petitioners have sought to amend the Company Petition by inserting relevant pleas as to the non-issuing of notice of EGM, and the illegality of issuing of new shares contrary to

Articles of Association of the Company besides pleading to set aside the allotment of new shares to Giriraj Udyog. The Respondents have filed their reply to the Application for Amendment. It has been contended that the issuing of new shares is according to law, that proper notice was given to the Petitioners and that the application is belated. It is this application that has also been coming for consideration along with the Company Petition.

The Petitioners have also filed another application to add the new Registered address of the Respondent No. 1 Company and also to add Sh. Shyam Dixit, Sh. Vipin Kumar Dixit, and Shri Atul Kumar Dixit, who are the new directors of the Company and served notices on the new directors and filed proof affidavit into the Office on 15.9.2016 but the new Directors did not enter appearance. After the CP record is transferred to this Bench from the CLB, the Office has issued notices to all the parties on record afresh and thereupon the Petitioners are appearing through *Sh. Subham Aggarwal*, Advocate and *Sh. Anil Kumar* entered appearance for the Company. The other Respondents neither appeared nor represented so far. In as much as the attributions of mismanagement or acts of oppression to the management are ultimately culminated in interdicting procedure adopted by the Company, the juristic person, we find that there is sufficient representation by *Sri Anil Kumar* representing the Company, to enable us to dispose of this Petition of the year 2004.

Besides that the Respondents have also filed another application taking a preliminary objection as to the maintainability of the CP on the ground that the Petitioners did not qualify the test of Sec 399 of the Act. In this application also, the Petitioners filed their reply. *Sh. Subham Aggarwal*, Ld Counsel for the Petitioners and *Sri Anil Kumar*, PCS for the Company have agreed that all the pending applications also may be disposed of along with the Company Petition.

We will deal with the key controversy of increasing the share capital from 20 lacks to 60 lacks and allotting the 40000 new shares to Giriraj Udyog, a family company in which the Respondents' group had majority interest and control. We will also refer to relevant pleadings and documents at the appropriate parts of the discussion.

4. **Question No. 1:** Whether the issue of additional 40000 shares is not legal and valid?

This issue assumes importance in the light of the plea taken by the Respondents on the maintainability of Petition under Sections 397 and 398 of the Act, on account of not having one tenth of the issued share capital of the Company as postulated by Sec. 399. The Petitioners' contention is that the enhancement of share capital from rupees 20 lacks to 60 lacks divided by equity shares of Rs. 100 each and allotment of additional 40000 shares to Giriraj Udyog is illegal, because the EGM alleged to have been held on 19.01.2002 was without notice to all the members including the Petitioners and that allotting the shares to Giriraj Udyog exclusively without offering to all the members, is illegal and contrary to the Articles of Association and therefore on the issued 20, 000 shares of Rs. 100 each for the issued capital of 20 lacks, the

Petitioners' holding of 5250 shares is 26.25% which qualifies them to file the Petition under Sections 397 and 398 of the Companies Act, 1956.

The Respondents argue that notice of EGM was sent to the Petitioners and all other members under Certificate of Posting (vide Annexure A of Reply paper Book) and it is sufficient compliance of Sec.53 of the Act. It is argued by the Respondents that the Petitioners were never in the habit of participating in the meetings of the Company and they have deliberately failed to attend the EGM on 19.01.2002. It is the submission of *Sh. Anil Kumar*, PCS appearing for the Respondent No. 1 that as on the date of filing the CP, the issued Capital of the Company was 60 lacks, and the Petitioners' holding of 5250 shares comes to less than one tenth and so, the Petition is not maintainable as per Sec. 399 of the Act.

5. In view of the above pleas and arguments, two questions will confront us for rejoin, namely,

(i) Whether the Notice of EGM dated 19.1.2002 was served on the Petitioners? And

(ii) Whether the increasing of share capital and issuing 40000 new shares to the Giriraj Udyog is malafide and amounts to act of oppression?

As a prelude to our discussion on the above material questions, we have to bear out as to on what date the qualification of share holding has to be computed for the purpose of sec. 399 in order to maintain a petition under Sec. 397 and 398. Sec. 399 prescribed the below qualifications for maintaining a petition under Sec. 397 and 398.

> ***Section 399 - Right to apply under sections 397 and 398:*** (1) The following members of a company shall have the right to apply under section 397 or 398:-
>
> (a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less or any members or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;
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> (b) In the case of a company not having a share capital, not less than one-fifth of the total number of its members.
>
> (2) For the purposes of sub-section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.
>
> (3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.
>
> (4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorize any member or members of the company to apply to the[1][Tribunal] under section 397 or 398, notwithstanding that the requirements of clause (a) or clause (b), as the case may be, of sub-section (1) are not fulfilled.

> (5) The Central Government may, before authorising any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the[1][Tribunal] dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

The section is self descriptive. The requirements in the case of a company having share capital, a Company Petition for reliefs under Section 397 and 398 can be filed by not less than 100 members; or in the alternative, by one member who is having one tenth of equity. If in any case, these two qualifications are not satisfied, the Central Government may permit the person to file Petition. It is nobody's case that the Central Government have accorded permission to the Petitioners in the absence of requisite qualification either in terms of share holding or numerical strength of members.

6. A Division Bench decision of Karnataka High Court in ***Vijayan Rajes vs. MSP Plantations (P) Ltd***[1] is relevant in this context. The division bench while considering the domain of qualifications under section 399 made the following observation at para 32 of the report.

> "On authority it had been established that for the purpose of examining as to whether the petitioning members qualified for maintaining a petition under section 399, the question to be looked into was as to whether the petitioners constituted the requisite number of members or they had the requisite shareholding in the company prior to the acts complained of. If the date of presentation of the petition had to be looked into in a technical way, it could defeat the very purpose of the legislative enactment of sections 397 and 398...." (*Emphasis added by us*)

In the light of the above precedent which is binding on this Tribunal in the absence of any ruling to the contrary from the Apex Court or Appellate Tribunal, we shall decide whether by 19.01.2002 there were certain acts of oppression complained of by the Petitioners. It is useful to impart ourselves the scheme of oppression and mismanagement ingrained in sections 397 and 398 before delving upon the obscure circumstances and facts of the case presented before us.

7. To understand by an act as 'oppressive', it should be harsh and burdensome and only based on fact, it can be construed as to whether the acts of majority are 'harsh' and 'burdensome'. It does not take much learning or much legal art to see that a petitioner to be successful under Section 397 has to make out a case for just and equitable winding up.(See: *Sangramsinh P. Gaekwad v/s Shantadevi P. Gaekwad*[2]) If that case cannot be made out, if the facts fall short of the case upon which the Tribunal, which is a court of equity, feels that the company should be wound up on just and equitable grounds, then and in that event no relief can be had by the petitioners in regard to Section 397.

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[1] (2010) 98 SCL 383 (Kar)
[2] (2005) 11 SCC 314

Every act complained of may not be oppressive in real terms. The classic annotations made by a Division Bench of Calcutta High Court in *Bagri Cereals Pvt Ltd vs. State*[3] are widely read. The Bench said:

> "In a Petition under Sec. 397 of the Act it is left to the court on the facts of each case as to whether there exists any oppression which calls for action. There is statutory definition of what oppression is but the fact remains it must be shown that the conduct is oppressive and the events shall have to be shown in such a manner so as to evince a consecutive set of facts which would render the court to come to a conclusion that the company is being conducted in a manner oppressive to some members of the company. The conduct shall have to be burdensome, harsh and wrongful. It is now well settled principle of law that isolated act by itself may not support the inference that there was a malafide intention or that the act can be termed to be as such oppressive or burdensome. It is further to be noted that a mere lack of confidence would not bring home the charge of harsh and wrongful act neither it can conclusively prove an oppression of a minority by the majority. There must be an existing element of lack of probity or fail dealing to a member in the matter of his rights as a shareholder."

Defining the expression 'oppression', the Apex Court in *Sangramsinh P. Gaekwad v/s Shantadevi P. Gaekwad*[4] remarked thus:

> "The expression 'Oppression' complained of, thus, must relate to the manner in which the affairs of the company are being conducted and the conduct complained of must be such as to oppress the minority members. By reason of such acts of oppression, it must be shown that the majority members obtained a predominant voting power in the conduct of the company's affairs."

In *Halsbury's Laws of England*,[5] it is stated:

> "1011. Conduct amounting to oppression. In this context, "oppressive" means burdensome, harsh and wrongful. It does not include conduct which is merely inefficient or careless. Nor does it include an isolated incident: there must be a continuing course of oppressive conduct, which must be continuing at the date of the hearing of the petition. Further, the conduct must be such as to be oppressive to the petitioner in his capacity as a member: whatever remedies he may have in respect of exclusion from the company's business by being dismissed as an employee or a director, he will have none under the provisions relating to oppression."

In *Shanti Prasad Jain vs. Kalinga Tubes Ltd., etc.*[6] referring to *Elder* Case, it was ardently held that the conduct complained of must relate to the manner of management of the affairs of the company and must be such so as to oppress a minority of the members including the petitioners qua shareholders. The court, however, pointed out that that law, however, has not defined what oppression is for the purpose of the said section and it is left to court to decide on the facts of each case whether there is such oppression.

8. The above legal erudition is ample to steer us to evaluate the material on record to appreciate the facts, in order to find out the

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[3] 2001 (105) CompCas 465 (Cal)
[4] (2005) 11 SCC 314
[5] 4th Edition, Volume 7, para 1011
[6] [1965] 2 SCR 720

element of oppression that qualifies the test of law. There is adequate material on record to show that the terms between the both the groups are not affable long prior to 19.1.2002.

The Petitioners have deposits with the Company and they were not repaid and the Petitioners filed Petitions under sec. 58A before the Company Law Board which passed the order on 26.7.1990 (Annexure 12) and only when the Petitioners filed Criminal application in the Court of Chief Judicial Magistrate, the deposits were repaid in 1997. (Vide para 19 (a) of the Petition). To this allegation, in the Reply at page 18, the respondents stated that-

> "It is submitted that the deposits as mentioned by the petitioners was not paid as the same were to be paid when the petitioners would withdraw the petition, since the petitioners failed to withdraw the petition, the Respondents did not pay the deposit. It is submitted that upon the withdrawal of complaint, the respondents made the payments to the petitioners in 1997"

The above passage does not indicate as to which 'petition' that had to be withdrawn by the petitioners. We have read in detail the Order of the CLB dated 26.7.1990 available at page 62 of the Petitioners' Paper book. It reads:

> "...in the interest of the amicable settlement among the members of the same family, I do hereby order that the amount due to the applicant depositors shall be paid in six equal installments, the first installment being paid on 1.1.1991. Soon thereafter interest accrued and due on the deposits shall be paid in four quarterly installment, the first such installments being payable in the quarter following the last payment of the installment of the principal amount due. Shri Prem Kumar, representing Shri Lokesh Kumar and Sh. Debesh Kumar, agree and undertake that they shall, within seven days of the receipt of the first installment of principal due, file an application before the High Court withdrawing the winding up petition. In case this not done, the company shall be at liberty to stop payment of subsequent installments..."

9. Therefore, the Petitioners had to withdraw the Winding-up Petition pending in High Court, only on receipt of first installment of the deposit repayment. It is not the case of the Respondents that they have paid the first installment on or before 1.1.1991 but still the Winding up petition was not withdrawn. There is thus no justification in not repaying the deposit on the pretext of withdrawal of the Petition in High Court. It seems to be only a subterfuge. This incident shows the motivated efforts of the Respondents' group to cause inconvenience to the petitioning group. This fact may have, no doubt, in isolation to the other circumstance, not amount to oppression by majority on the minority but this would help us understand foundational facts of oppression.

There are episodes of Petitioners' approaching the CLB for directions under sec. 219 of the Act to the Respondents to furnish balance sheets and other record for the years ending 31.3.1984 to 31.3.1993 (Vide Orders of CLB in CP 4/219/94CLB and 2/219/94CLB dated 8.12.1995 available at page 69 of the paper book).It is only on the representation that documents are supplied to the Petitioners during pendency of the CP, the above petitions were disposed off by the CLB.

Our view that the terms between the two groups have not been harmonious for a long time, before the subject EGM on 19.1.2002 is sustained by the admitted fact that the Petitioners 1 and 2 have resigned to the office of Directors of the Board on 21.8.1983 itself. And it is specifically alleged in the Petition that after their exit, the Respondents have adopted the practice of not sending the notices, balance sheets etc. this allegation is corroborated by the fact that the Petitioner had to approach the CLB for directions under sec. 219 of the Act, as referred above.

10. The above material, which remains non contradicted, is sufficient to observe that both parties are on warring path before 19.01.2002 and much water had flowed under bridge by the time of alleged EGM. However, in spite of hostility, the Respondents' group cannot abuse the law and procedure in the management of affairs of the company. If that was resorted to, it can safely be deduced that they wanted to garner majority to take absolute control of the Company. In the back drop of these ill-feelings between the parties, we have to scrupulously analyze the material whether the notice of EGM held on 19.01.2002 was served on the Petitioners.

In page 20 of the Reply to the CP, the respondents have pleaded:

> "The petitioners state that the Authorised Share capital has been increased from Rs. 20, 00, 000/- to Rs. 60, 00, 000/-. The notice of which was sent to the petitioners who chose not to attend to the meeting. It is further submitted that the shares are fully paid up and the company has accordingly received Rs.40, 00, 000/- from M/s Giriraj Udyog Ltd."

Challenging the above plea, the Petitioners in their rejoinder have asserted as follows:

> "III. The petitioners further state Notice for increasing the Share Capital of the Company by creating 40000 shares and holding Extra Ordy. General Meeting of the members for passing the resolutions as per Annexure A of the reply was never received by the petitioners. In fact the notices were never dispatched to the petitioners and other shareholders. The certificate of posting, copy annexed as Annexure-I is a fraud on the minority being bogus. The notices were allegedly dispatched only to 25 shareholders by UPC whereas the Company has 63 shareholders. It has not been stated how the notices were served to the other members".

While extracting the schedule of events, the Petitioners' Counsel Sh. *Shubham Aggarwal* has assertively argued that holding the EGM, allotting new shares to *Giriraj Udyog*, payment of calls on the shares by allottee are completed hastily within 10 days and this would throw any amount of distrust on the bonafides of the transaction and to suspect that the EGM is a contrived affair.

The argument of *Sh. Anil Kumar*, PCS for the Respondents is that sending notice of meeting under Certificate of Post is valid under Sec.53 of the Act and there is presumption of service and it is for the Petitioners to establish non-service to rebut the presumption.

11. In retort to the above argument, some excerpts from *M. S. Madhusoodhanan and others vs. Kerala Kaumudi (P) Ltd and others*[7]

[7] (2004) 9 SCC 204

relied upon by *Sh. Subham Aggarwal*, ld. Counsel for the Petitioners are given below.

> "95... The notice (Ex.R-35) was required to have been served on all the members of the company either by post or personally in terms of Article 108 or Section 53 of the Act. The second imperative for a special resolution to be validly passed is that notice of the general meeting must be 'duly' given. The mode of service of notice on members has been provided for under Article 108 which is similar to Section 53 of the 1956 Act in all material respects. The two modes envisaged are personal service and service by post. There is no other mode envisaged."

> "118. This general rule regarding certificates of posting has not been changed under Section 53 of the Companies Act. Although it does provide that if a document is sent by post in the manner specified. "Service thereof shall be deemed to be effected". The word "deemed" literally means "thought of" or, in legal parlance "presumed".

> "123. Consequently, the words "shall" presume" in Section 53(2) means a rebuttable presumption which the Court must raise provided the basic facts namely the due posting of the document is proved, the onus being on the addressee to show that the document referred to in the certificate of posting was not received by him."

> "125... In the present case, the certificate of posting is suspect. Assuming that such suspicion is unfounded it does not in any event amount to conclusive proof of service of the notice on Madhusoodhanan or on any of the other addresses mentioned in the certificate as held by the Division Bench..."

Therefore, the legal position settled by the Apex Court on the import of the presumption envisaged by Sec. 53 of the Act is that if the sending of notices under Certificate of Posting is doubtful, presumption cannot be raised. In view of this proposition, we have verified the relevant documents propounded by the Respondents regarding sending of notice to Petitioners.

12. Annexure A (Colly) at page 39 indicates that notices were sent UCP to 25 members. Serial numbers 16 to 18 thereof are the Petitioners 1 to 4 respectively. A total postage of Rs. 18/ is affixed thereon and postal seal shows that it was posted on 19.12.2001. When there are 63 members admittedly, how the notice was sent to 25 members only is not answered. Further, the earlier incidents which we are going to refer hereafter did not arouse confidence in the bonafides of the premise of sending notices under Certificate of Posting.

In para 19 (b) of the Petition, the Petitioners have pleaded that after their resignation to the Board in 1983, and particularly post 21.4.1984, the respondents stopped sending statutory notices to the petitioners regarding EGM and AGM and started obtaining bogus UPC receipts year to year to show that they had dispatched the notices and accounts every year. Therefore, it is averred, the Petitioners requested the respondents to send the notices and accounts by person or by registered AD and also sent a Money Order for Rs. 100 on 15.09.1987 for that purpose; but the Respondents refused to accept the said Money Order. Again, Petitioners sent a Pay Order for Rs. 200/- on 10.11.1998

for sending notices and accounts by Registered Post and that was received by the Respondents, yet, they failed to send notices by Registered post. Consequent upon the failure of the Respondents to send notices etc by Registered Post as desired by the Petitioners, they have filed two Company Petitions No. 4/219 and 2/219 on the file of CLB. In their reply to the allegations in Para 19 (b), the Respondents have made a general denial and they have not made any specific denial about the request of the Petitioner to send notices by Registered Post and about sending the Money Order and the Postal Order for Rs. 100 and Rs. 200 respectively; nor did they made any specific assertion of complying with the demand.

That means, in our considered opinion, the Respondents have earlier failed to send the notices by Registered Post to the Petitioners in spite of specific request followed by payment of necessary charges. It is pertinent to note from a reading of Sec. 53 of the Act, a member has an option to intimate the Company to send the documents by Registered Post or under Certificate of Posting. In the case on hand, on earlier occasions prior to the notice in question, the Respondents have never honoured the request of the Petitioners to send the notices by Registered Post. Their conduct, therefore casts a shadow of doubt on the bonafides of sending the Notice dated 19.12.2001 for the EGM of 19.01.2002 under Certificate of Posting. In view of the hostility between both the groups, we find strongly that the notice of EGM dated 19.01.2002 was not served on the Petitioners.

13. The second question is whether the increasing of share capital and issuing 40000 new shares to the Giriraj Udyog is malafide and amounts to act of oppression?

We do not want to end up with the finding of non service of notice of EGM on the Petitioners, devoid of reference to the other circumstances which will multiply our doubts on the truth and bonafides of the issuing of notice in question, as it seems, the resolutions said to have been adapted at the EGM are contrary to the Articles and procedure. The notice said to have been sent to the Petitioners contains the following resolution for the approval.

> "(1) Resolved that the authorised share capital of the Company be increased from Rs. 20, 00, 000/- (Twenty lacks only) to Rs. 60, 00, 000/- (Rs. Sixty lacks only) by creation of 40, 000 (Forty thousands) Equity shares of Rs. 100/- each ranking pari passu with the existing Equity Share and that clause V of the Article of Association of the Company be altered accordingly.
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> (2) Resolved further that the new shares be and are hereby approved to be disposed off by the directors as they think fit in the best interest of the Company"
>
> (3)....."

The above resolution which was adapted by the EGM on 19.1.2002 has to be checked up in the light of Articles of Association of the Company. The Copy of Articles of Association of the Company is filed by the Respondents with their Reply. Page 53 contains Article 7 dealing with 'Further issue of Capital by Directors" It is extracted for ready reference.

> "7.In the absence of determination to the contrary made by the Company in General Meeting as provided by Articles 55 and 56 hereof, where the Directors decide to increase the Capital of the Company by the issue of further shares, such shares shall, before issue be offered to such persons as at the date of the offer are entitled to receive notices from the Company of General Meetings in proportion, as nearly as the circumstances admit, to the member of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered and limiting a time within which the offer is not accepted, will be deemed to be declined, and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the Directors may dispose of the shares declined or deemed to be declined in such manner as they think most beneficial to the Company" (Emphasis supplied by us)

14. There is absolutely no whisper by Respondents as to how Article 7 is ignored by them. The Resolution adapted in the EGM was as mentioned in the notice. When the process of allotment of new shares was left to the Directors as per the resolution of EGM, there shall be a meeting of the Board, to decide as to how the new shares have to be allotted; and then adhering to Article 7, offer should have been made to the members who are entitled to the notice of meeting; and in case they decline to subscribe within the prescribed time, then, the new shares have to be allotted to the others.

The portion of Article 7 on which emphasis is laid by us denotes that offer of shares should be extended to all the persons. Either in the Reply or in the arguments submitted on behalf of the Respondents, there was no justification put forth on the conscious violation of Article 7. It is also important to note that it is not the case of the Respondents that either before or after EGM, there was Board meeting, first to decide to increase the share capital and secondly, to allot the additional shares in pursuance of the resolution at the EGM. Had there been any such meeting of the Board, the Respondents would have produced the copy of minutes. Withholding that vital document would only compel us to infer that no such Board meetings were held.

15. In *Dale & Carrington Investment (P) Ltd. and another vs. P.K. Prathapan and others*[8], before the Supreme Court the appellant argued that because Articles of Association gave absolute power to the Board of Directors regarding issue of further share capital and therefore, the decision of the Board of Directors cannot be challenged. The Court did not accept this contention and held that –

> "In our view, this argument has no merit because...Secondly, assuming for the sake of argument that meetings of the Board of Directors did take place the manner in which the shares were issued in favour of Ramanujam without informing other shareholders about it and without offering them to any other shareholder, the action was totally mala fide and the sole object of Ramanujam in this was to gain control of the Company by becoming a majority shareholder...." (Vide: paragraph 12 of the Report)

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[8] (2005) 1 SCC 212

16. Then, we shall turn to allotment of 40, 000 shares to *Giriraj Udyog*. Giriraj Udyog is a company owned by the Respondents as majority shareholders and the Petitioner asserted in para 8 © of the Petition that the Respondent No.1 Company lent funds to Giriraj but not charging interest as shown in the balance sheets for over 15 years. There is no denial of this statement. Therefore, by allotting 40000 shares to the Company owned by Respondents, undoubtedly the Respondents are getting majority control on the Respondent No. 1 Company. There is no reason why the share capital of Respondent Company was increased from 20 lacks to 60 lacks. Very interestingly, all the calls are completed and 40000 shares became fully paid up within 10 days. Though issuing of shares is a rightful act technically, the Supreme Court in *Dale* case (supra) held that:

> "However, in India in view of Sec. 81 of the Companies Act, such a right cannot be found for sure. However, the test to be applied in such cases, which requires the court to examine as to whether the shares were issued bona fide and for the benefit of the company, would import such considerations viz., as to the pre-emptive right of all shareholders to participate in further issue of shares, in case of private limited companies under the Indian law. Existence of right to issue shares to one Director may technically be there, but the question whether the right has been exercised bona fide and in the interest of the company has to be considered in the facts of each case and if it is found that it is not so, such allotment is liable to be set aside."

At paragraph 27, the Apex Court further remarked:

> "Reference has been made to the case of *Piercy vs. S. Mills & Co. Ltd*, where Directors, who controlled merely a minority of the voting power in the company allotted shares to themselves and their friends not for the general benefit of the company, but merely with the intention of thereby acquiring a majority of the voting power and of thus being able to defeat the wishes of the existing minority of shareholders. It was held that, even assuming that the Directors were right in considering that the majority's wishes were not in the best interests of the company, the allotments were invalid and ought to be declared void. It follow from this case that the exercise by Directors of fiduciary powers for purposes other than those for which they were conferred is invalid..."

17. As we said earlier, the Respondents failed to place on record either by minutes of the Board meeting or before this Bench in their pleadings as to the necessity of enhancing the capital and what were the advantage and the benefit accrued to the Company generally by such increase. If they wish for funds for improving the capacity of the Cold storage, or for integration of the business, to enhance the operations of the company, the Respondents would have recovered the amount due from Giriraj Udyog instead of hurriedly enhancing the share capital and issuing the share to the same entity Giriraj Udyog, who is enjoying the interest free loan from the Company for more a decade. Therefore, we find that the increasing the share capital and issuing additional shares to Giriraj, who is no other than a company owned by the Respondents, is not bonafide, but on the other hand, it demonstrates malafide of the Respondents to gain control over the Respondent No. 1 Company which amounts to oppression of the other share holders including the Petitioners.

18. For the aforesaid reasons, we sum up our conclusions on Question No. 1 as below:

1) Notice of EGM dated 19.01.2002 was not served on the Petitioners;

2) There was no meeting of the Directors preceding the EGM, to decide for increasing the share capital of the company from 20 lacks to 60 lacks;

3) There was no meeting of the Directors of the Board after the EGM, to decide how the 40000 shares have to be allotted;

4) The allotment of 40000 shares to Giriraj Udyog without offering to all the members is contrary to Article 7 of the Articles of the Company;

5) There is no general benefit of the Company ensued on allotment of 40000 shares to Giriraj Udyog exclusively; on the other hand, the Respondents alone are benefited by this increase of share capital and allotment of shares to their own entity;

6) The allotment of 40000 shares to Giriraj Udyog is malafide with the obvious intention of reducing the shareholding of the Petitioners to below one tenth and to reduce them to minority and to enable the Respondents to gain majority holding in the share capital of the Company which is per se an act of oppression;

19. **Question No. 2:** Whether there are other acts complained of will establish oppression and mismanagement?

The Company Petitioners have further narrated quite a few other instances to explicate how the Company was mismanaged right from 1976. Those details are also not of much relevance but will be referred in short.

Apart from the attribution of acts of oppression either on 19.01.2002 or prior thereto that has been reflected in the EGM by reducing the petitioners to minority, the petitioners made the allegations of mismanagement. There are certain acts of mismanagement alleged in several paragraphs of the Company Petition which are detailed summarily as below:

1) Financial mismanagement in the year 1978 deposits were raised from Sunder Lal, Shyam Dayal, Bhagwati Prasad, Rameshwar Singh and Ram Asray Panday and in 1979 the company had issued 3000 equity shares against their deposits who have common address of Mr. Saxena, Advocate and Tax Practitioner.

2) There were disputes in the family and consequently the respondents have resorted to financial indiscipline and irregularities and suffered losses by paying a sum of Rs. 1.60 Lacks to the Bank towards seasonal loan limit though there was no stock of potato. In 1982 the Income Tax department made certain remarks against the petitioner No.1 on account of the irregularity committed by the Respondents. In March, 1983 respondents have stored potato in the Company's Cold Storage, which was purchased by using unaccounted money.

3) It has also been pleaded that respondents 2 and 3 sold the stocks of Giriraj Limited which were under pledge to Oriental Bank but failed to account for the sale proceeds of 20 lacks rupees in the year in 1982. In the year 1983 Late R.A. Kumar Rastogi and the respondent have stolen

the minutes books of Giriraj Ltd and of the respondent company and forged the minutes to remove the petitioners from the Board of Giriraj that had resulted in the petitioners filing petitions before the High Court and during hearing in the Supreme Court Mr. Justice P.K. Goswami was appointed arbitrator to determine the share value of petitioners which was assessed at 1.03 Crores (vide Annexure-IX).

4) The failure of repayment of deposits to the petitioners, failure of the respondents to deliver the notices and balance sheets in spite of requests (as discussed in the earlier part of this order); fraudulent increase of the share capital, change of auditors, failure to hold Annual General Meeting for the year 1982 misusing the funds of the company towards repairs and maintenance of fixed assets which was unnecessary and getting income fraudulently in the name of Agricultural income from plantation, violation of Section 217 to the Companies Act, violation of Section 227, 4A, fraud in shortage rent collection, appropriation of excess rent collected under High Court orders, in spite of concessions given by the State Government to the Cold Storage Industry, fraudulent reporting in the balance sheets or several acts of mismanagement alleged by the petitioners.

20. Having gone through the entire material on record we find it difficult to accept these allegations as mismanagement particularly because for most of the time the petitioners were on the Board of Directors till they resigned in August, 1983; and subsequently they have approached CLB, High Court and other Forums to ventilate their grievances. But they have never raised the acts of mismanagement and oppression on the grounds now highlighted by them till this CP is filed in the year 2004. The complaint of mismanagement and other acts of oppression except the oppression demonstrated by the EGM dated 19.01.2002 are eclipsed by afflux of time, latches and acquiescence. Therefore, we find these acts of mismanagement and oppression cannot form sustainable grounds to interdict the functioning of the company at this point of time. This point is therefore concluded against the petitioners.

21. **Question No.3:** What is the appropriate relief that can be granted?

We shall refer to the main reliefs claimed by the Petitioners and our findings thereon as below, based on the findings recorded above.

1) *Remove the Respondents 2 and 3 and other persons appointed as Directors by them*: In 2007, the Respondents 2 and 3 have ceased to be Directors of the Board. Respondents 2 and 3 were directors of the Company besides Mr. Abhishek Kumar Rastogi, as admitted by the Respondents also in their reply at page 8 filed before CLB on 7.9.2007. It seems, the Petitioners filed an application challenging validity of sale and transfer of shares by ex-Directors and their group to outsiders. In the said petition, it is stated that on 18.2.2008 before the CLB, the Respondents' Counsel has represented that ex-directors namely Harsha Kumar and Yash Kumar and their group has already sold their shares in the Company. The petitioners have stated in this regard in that application that:

> "That though the respondent's counsel did not specify but it is presupposed that election of new Directors and resignation of old

directors namely Harsha Kumar & Yash Kumar must have happened simultaneously..."

The petitioners alleged in that application that the sale of shares by Respondents 1 and 2 is void and it is a fraudulent sale. Whether or not that sale is fraudulent, the fact remains is that the Respondents 1 and 2 ceased to be Directors during pendency of the Company Petition and therefore, this relief for their removal became infructuous.

2) *Cancel allotment of 5000 shares to majority share holders:* These 5000 shares represent the new shares added to the equity holding of the Company by increasing the authorised and paid up capital from 15 lacks to 20 lacks and the shares are issued on rights basis. Though the date when the rights issue was declared by the Company is nowhere mentioned by both sides, it is an admitted fact by both parties. The Petitioners stated in the Petition para 19 (c) that after his resignation to the Board the Company had issued rights shares of 5000 and the petitioners could not subscribe to those shares as their deposit of 1.80 lacks was not repaid by the Company and therefore the taking of 5000 shares by the Respondents is illegal.

The ground to declare the allotment of 5000 rights shares as illegal is not on account of any fraud played by the Respondents in issuing those shares or non-extending of offer to the Petitioners but on account of the personal financial problem faced by them. Inability of the Company to repay the deposit is different thing and subscribing to the Right shares is a different thing. Both cannot be confused. Therefore this relief cannot be granted by the Tribunal.

3) *Cancel 3400 shares allotted to Shri Swami Dayal and 4 others:* According to para 12 © of the Petition, these shares were allotted in the year 1978 against the money in the deposit of the company, belonging to those 5 persons. It is pertinent to note that the Petitioners' group was on Board as Directors till August 1983 and in that way they are parties to the decision taken by the Board to allot shares to Swami Dayal and others. They are therefore estopped from contending otherwise. That relief is rejected.

4) *Direct the Respondents to pay the amount due to them in the suspense account of the Company:* In para 19 (o) the Petitioners have averred that in the balance sheet of FY 1989, a sum of Rs. 8.599 lacks was shown under the head 'other creditors' including suspense account. That paragraph sans any more details as to the amount pertaining to the Petitioners. The relief prayed for also does not indicate the quantum of amount to be refunded to the Petitioners by the Company. Therefore, the Tribunal cannot grant this relief without substantial data before it, placed by the Petitioners. The relief is therefore, rejected.

However, the Petitioner are at liberty to make a representation to the Company for payment of the amount, if any due, as per the Balance sheets of the Company from year to year and the Company will take appropriate decision in that regard and if that decision is adverse to the Petitioners, they will approach appropriate forum for relief.

5) *Direct the Company to amend Articles of Association for providing proportional representation:* The Articles of Association is a contract

between the members subscribing to the Company's equity; and the Tribunal, within the powers conferred on it while adjudicating the Petitions under Sections 397 and 398 of the Act cannot flippantly deal with any prayer to direct amendment of Articles. Now the Respondents 2 and 3 are not on the Board and the Tribunal cannot foresee any tribulations between the two groups in the management of the Company in future. For the only single established act of oppression of increasing the capital from rupees 20 lacks to 60 lacks without notice to members, the Tribunal cannot conclude that in future also the same sort of oppressive acts would continue derailing the affairs of the Company. Therefore we find that it is not a fit case, on facts, to give any direction for amendment of Articles.

Even on the ground of equity also we are to hold such relief cannot be granted. For over a long period of time, the Petitioners are continuing with the alleged acts of oppression, to say, at least from 1978 and on earlier occasion when they felt to have been oppressed, never approached the forum for getting amendment of Articles for their proportionate representation on the Board. Thus, due to delay and latches on their part, the relief as sought for is refused. However, this finding of ours does not preclude the Petitioners or any other member of the Company to move a proposal by issuing notice to the Board and then the Board will follow the procedure under Sec. 31 of the Companies Act, 2013.

6) *To direct reimbursement of interest from Giriraj Udyog*: Under this head of relief, the acts of manipulation of repairs and maintenance expenses of the company are relating to the years prior to December 1982 and continued till filing of the Petition in 2004. But, there is no material placed before us to substantiate the plea of the Petitioners, as contained in Paragraphs 19 (g) and (r) of the Petition. On mere allegations, the Tribunal cannot award reimbursement, unless fraud, manipulation etc are established.

7) *Cancel the allotment of 40, 000 equity shares made in favour of Giriraj Udyog Ltd.:* In view of the findings recorded in the earlier paragraphs on this question, we hold that the relief is entitled to be granted as the allotment of such shares is without issuing notice of EGM dated 19.1.2002 to all the members including the Petitioners' group and without any decision taken by the Board and contrary to Article 7 of the AOA of the Company; and this is resorted to with a malafide motive of reducing the Petitioners' group to minority and to gain absolute control over the Company by the Respondents' group.

22. **Result:** In view of the above findings, the Petition is partly allowed as follows:

(a) That the allotment of 40, 000 equity shares to Giriraj Udyog in pursuance of the minutes of EGM dated 19.1.2002 is illegal and void and therefore it is set aside;

(b) The Company is directed to convene a Board Meeting and take decision as to whether the share capital can be increased from rupees 20 lacks to 60 lacks or any other sum;

© That if the Board decides in that regard, let a EGM shall be convened by issuing notice as per the provisions of Companies Act, 2013 and the

Rules applicable there under, by Regd. Post acknowledgement due to all the members who are entitled to notice as on the day of Board Meeting;

(d) The Company shall take immediate steps to settle the account of share money paid by the Giriraj Udyog for 40, 000 shares vis-à-vis the money due from Giriraj Udyog if any as per the Account Books of the Company as on the day;

(e) The Petition in relation to all the other reliefs, be and hereby dismissed.

(f) All the unregistered applications including the Application for amendment are considered and disposed off accordingly and they stand merged in this order;

(g) Each party shall bear their respective costs of proceedings.

Typed to dictation by Law Clerk, corrected and pronounced in open court on this the Wednesday 7th day of December 2016

V.S.R.AVADHANI (JUD MEMBER)

H.P. CHATURVEDI (JUD MEMBER)