

NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI

T.C.P No.54/(MAH)/2016
CA No.

CORAM:

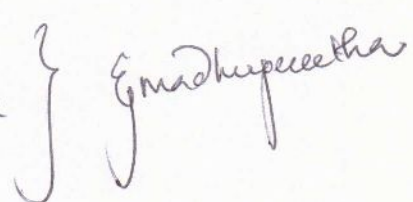
Present: SHRI M. K. SHRAWAT
MEMBER (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF
THE NATIONAL COMPANY LAW TRIBUNAL ON 25.08.2016

NAME OF THE PARTIES: Fluidda NV.

V/s.
M/s. Fluidda India Imaging Pvt. Ltd.

SECTION OF THE COMPANIES ACT: 397/398 of the Companies Act 1956
and 241/242 of the Companies Act, 2013.

S. No.	NAME	DESIGNATION	SIGNATURE
1.	MR. SAMEER PANDIT MR. MADHUTREETHA ELANGO 1/b M/S. WADIA GRANDY SO.	Advocates for PETITIONER	
2.	Vincent Jagtap 1/b Nirvanan Jagtap & Co	Advocate for Respondent No 2&3	

INTERIM ORDER

T.C.P. No. 54/397-398/NCLT/MB/MAH/2016

1. The above referred Company Petition is listed for hearing, Ld. Counsel from both the sides are present.
- 1.1 The expression "The Act" in this judgement refers to "Companies Act 2013".
- A) Arguments:
2. At the out-set, Ld. Advocate Mr. Sameer Pandit, representing the Petitioner has informed that there was a reference of EGM of 08.04.2016 in an Order passed by the

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Hon'ble Chairman CLB dated 06.04.2016. In that order Mr. Ajay Mehta, PCS was appointed as an observer. His report dated 12.04.2010 is on record. It was reported by the said observer that the Requisitionist and C.A of the Petitioner were present but from the Respondent side no member was present. So the said observer had commented that for want of Quorum the aforesaid meeting "parted" without transacting any business or any agenda. Ld. Advocate has narrated the background of the case as also the various dates of events took place in the past.

3. On one hand the Petitioner Vehemently Contested that the said meeting and the meetings held therefore were conducted as per the provisions of law more particularly Sec. 100(1); Sec. 100(2)(a); Sec. 100(4); and Sec. 103(2) (a)/(b) hence to be held as valid meeting. An alternate plea has also been made that by invoking the jurisdiction u/s. 98(1)(b) of the Act the Hon'ble NCLT can give ancillary directions as think fit including the direction to conduct a meeting.
- 3.1 However on the other hand the Ld. Advocate of the Respondent Mr. Vineet Jagtap has pleaded that the meeting called on 08.04.2016 was an Extraordinary General Meeting which was requisitioned as per the provisions of Sec. 100(2)(a) of Companies Act, 2013. Due to lack of quorum that meeting could not be held, as reported by the Observer. According to Ld. Advocate; thereafter, no meeting was ever requisitioned by the Board. His argument is that the meeting held thereafter on 15.04.2016 was not a validly held meeting hence the Resolution Passed in that meeting is required to be cancelled.
4. Having heard the submissions of both the sides and the Mentioning of the issue by the Petitioner's Advocate during the course of hearing the legal issue raised is required to be addressed being a substantial legal question having a direct bearing on the final order.

B) Sequence of Events:-

5. The sequence of events are summarised as under:-
 - a. That the Company i.e. Respondent No. 1, was incorporated with Two Directors, the Petitioner holding 80% of the Paid up Share Capital and Respondent No. 2 holding 20% of the Paid up Share Capital.

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- b. That vide a letter dated 27.01.2016 the Petitioner Company called upon the Board of Directors to convene an EGM u/s. 100 of the Companies Act, 2013 to appoint Mr. Sven De Wachter and Mr. Shantam Kumar to be appointed as Director u/s. 152(2).
- c. That an admitted factual position is that a meeting of Board of Directors was held on 10.03.2016 at Belgium attended by Mr. Jan De Backer and Mr. Samir Chandrashar Vinchurkar – Respondent No. 2. In that Meeting it was resolved that an EGM was to be convened on 08.04.2016 at Nasik.
- d. Respondent No. 2 in his Affidavit dated 14.07.2016 further to the Reply vide Paragraph number (f) has admitted that a notice dated 16.03.2016 was issued to him intimating the date of EGM to be held on 08.04.2016.
- e. In the meantime Company Petition No. 54/2016 was filed on 01.04.2016 and thereupon an interim order was passed on 06.04.2016 according to which Mr. Ajay Mehta, PCS, Mumbai was appointed as on observer.
- f. on 8th April, 2016 a meeting was held as reported by the observer Mr. Ajay Mehta; in his report dated 12.04.2016 duly placed on record. He has reported that Requisitionist was present but the other member was not present. He has further reported that, quote, “Accordingly, on account of want of Quorum for the meeting, at 2.35 aforesaid persons who were present at the meeting parted without transacting any business /agenda of the Meeting” unquote. In the said report (dated 12.04.2016) he has brought to the notice to CLB that on 11.04.2016 an e-mail was received from Mr. Samir Vinchurkar (Respondent No. 2). That e-mail is also on record wherein it was stated that due to personal reasons could not attend the EGM on 08.04.2016 at Gateway Hotel Nasik.
- g. On 12.04.2016 a notice of EGM to the Directors of Fluida India was issued intimating the date of EGM on 15.04.2016 at 2 pm at Gateway Hotel, Nasik was issued; signed by Mr. Jan De Backer; The notice was addressed to Mr. Samir Vinchurkar (Respondent No. 2) as well. A letter in this regard addressed to Mr. Samir is also placed on record. In the said notice dated 12.04.2016 the Agenda of the meeting to be held on 15.04.2016 was also laid down. In short as per Resolution No. 1, Mr. Sven De Wachter to be appointed as Director & Mr. Jan De Backer, Chairman/Director be authorised to file necessary forms/documents

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with Registrar of Companies, etc. As per resolution no. 2 one Mr Shantanu Kumar to be appointed as Director of the Company. An Explanatory Statement, pursuant to Section 102 of the Companies Act, 2013, dated 12.04.2016 is also placed as record.

- h. A meeting was accordingly convened on 15.04.2016; which was attended by the Authorised Representative of the Petitioner & auditors. However Respondent No. 2 did not attend. A resolution was passed to appoint Mr. Sven De Wachter & Mr. Shantanu Kumar as director.

C) Findings:-

6. The Controversy raised is whether the EGM held on 15.04.2016 was a valid meeting in terms of the provisions of Section 103(2) (a) or an invalid meeting in terms of Section 103(2)(b) of Companies Act, 2013. Further the controversy is that whether the EGM was validly "requisitioned" or not in terms of Section 100 of Company Act, 2013. Alternatively it has also been pleaded that under the circumstances the Tribunal is also empowered to exercise the power conferred u/s. 98 of the Companies Act, 2013.
7. On Careful examination of Section 100 of Companies Act, 2013 it is noticed that two situations are prescribed to call an EGM.
 - (a) One situation is as prescribed u/s. 100 (1) of the Act according to which the Board of Directors may call an EGM; whenever deems fit. For ready reference Section 100(1) is reproduced verbatim as under:-

"Section 100: "Calling of Extraordinary General Meeting"

1. *The Board may; whenever it deems fit, call an Extraordinary General Meeting of the Company. "*
- (b) The other situation in prescribed in Section 100 (2) of the Act when a "Requisition" is made by Members. On such Requisition the Board shall call an extraordinary general meeting. For ready reference Section 100(2) is reproduced verbatim hereunder"

"Section 100 of Companies Act, 2013 "Calling of Extraordinary General Meetings":

1. _____
2. *The Board shall, at the requisition made by:-*

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- (a) *in the case of a company having a share capital, such number of members who hold, on the date of the receipt of the requisition, not less than one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting;*
- (b) *in the case of a company not having a share capital, such number of members who have, on the date of receipt of requisition, not less than one-tenth of a total voting power of all the members having on the said date a right to vote,*

Call an extraordinary general meeting of the company within the period specified in subsection (4) ”

8. The distinction is clearly laid down in the statute unambiguously itself. Therefore it is hereby held that EGM can be held by two ways, One, by the Board of Directors, Two, by the members (Two Categories prescribed i.e. either having requisite share capital or having requisite voting power).
9. On plain reading it is clear that subsection (2) of Section 100 of the Act prescribes that the Board shall call an EGM if a requisition is made by members. In other words the statute has visualized a situation that in case the Board of Directors do not convene an EGM but the minimum prescribed Member consider it necessary to convene an EGM than a request in the form of “Requisition” can be made to the Board of Directors u/s.100 (2) to call an EGM.
10. Therefore a simple and humble interpretation of Section 100(1) and Section 100 (2) of the Act is that the Board of Director “Call” an EGM while Member ask the Board for “Requisition” of EGM. The two words used in the statute i.e. “Call” and “Requisition” are not inter-changeable. Rather both these terms are used in Section 100 and Section 103 with a different connotation.
11. Keeping this distinction in mind now this fact is to be examined that under the given circumstances whether the EGM was “Requisitioned” or the said EGM was “Called” by the Board of Directors. As per the admitted factual position, not challenged by the Respondent, a meeting was held on 10.03.2016 duly attended by both the Directors and resolved to hold an EGM on 08.04.2016. Rather it is important to place on record that Company Law Board, New Delhi Bench vide an order/ interim order had made an observation, quote “He further states that in the EGM proposed to be held on 08.04.2016 Respondent No. 2 has no objection if Mr. Ajay Mehta, Practicing Company Secretary,

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Mumbai as proposed by the Petitioner remains present and functions as an observer in that meeting.” unquote.

12. The Documents and evidences annexed to the Compilation demonstrates that a meeting of the Board was held which was duly attended by both the Directors. On account of the said admitted factual position it is hereby held that the Board had decided to “Call and extraordinary general meeting”. Consequent thereupon the EGM was held on 08.04.2016.
13. The next question, which is to be answered, is that in a situation of lack of quorum whether the meeting held on 08.04.2016 was “adjourned” or “cancelled”. To answer this question, the relevant provision of Section 103 of the Act is required to be examined; hence reproduced below:-

“Section 103 of Companies Act, 2013 “Quorum for meetings”

(1) _____

(2) *If the quorum is not present within half-an-hour from the time appointed for holding meeting of the company –*

(a) The meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine; or

(b) The meeting, if called by requisitionists under section 100, shall stand cancelled:

Provided that in case of an adjourned meeting or of a change of day, time or place of meeting under clause (a), the company shall give not less than three days notice to the members either individually or by publishing an advertisement in the newspaper (one in English and one in vernacular language) which is in circulation of that place where the registered office of the company is situated.”

14. On careful reading it emerges that the statute has again made a distinction, which is in line with Section 100 of the Act (Supra), between a Meeting convened at the behest of the Board or a meeting requisitioned at the behest of the members. The distinction is that if an EGM is called by the Board then in case of lack of quorum it stood “adjourned” (Refer-Section 103(2) (a) of the Act). On the other hand, if the EGM is requisitioned by the members, in case of lack of quorum it shall stand “Cancelled” (Section 103(2) (b) of the Act).

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15. In the light of the above discussion it is hereby held that the facts and circumstances of the case have demonstrated that the impugned EGM was called by the Board of directors and since it was convened at the behest of the Board hence due to lack of quorum on the appointed day the said EGM stood adjourned. Needless to mention, but for the sake of clarity; it is hereby held that since the impugned EGM was not requisitioned by the members hence due to lack of quorum on the appointed day it was not cancelled but stood adjourned. To summarise, if the EGM is called by the Board in the event of lack of quorum, the EGM gets adjourned. If the EGM is requisitioned by the Members, in the event of short of quorum, the EGM gets cancelled. As a consequence the meeting convened subsequently on 15.04.2016 is hereby held a valid meeting.
16. That since the main plea is disposed of hence the alternate plea at present needs no adjudication.
17. That once the Board meetings are validated through this judgement hence the Petitioner is not supposed to press for the copy of Statement of Bank accounts. Let the Company Petition be fixed for final hearing on 26.09.2016.

sd/-

M.K. SHRAWAT
Member (Judicial)

Dated: 25th August, 2016