

IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH, CHENNAI

**TCP No. 67/ 2016**

Under Sections 397, 398, 402, 111, 237, 210, 220, 260,  
291 and 292 of the Companies Act, 1956.

In the matter of

**P.M. Johnny & Anr.**

**Vs.**

**M/s. Seaqueen Builders Private Limited & 3 Ors.**

*Order delivered on 7<sup>th</sup> of December, 2017*


CORAM :

CH MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)  
S. VIJAYARAGHAVAN, MEMBER(TECHNICAL)

*For Petitioners : Mr. Chandramouli Prabhakar for Mr. R. Venkatavaradan*  
*For Respondents : Mr. T. K. Bhaskar, Priyadarshini, Akhil and Keerthi*

ORDER

**Per : CH MOHD SHARIEF TARIQ, MEMBER (J)**


1. Under adjudication is CP No.24/2011 that has been filed under Sections 397, 398, 402, 111, 237, 210, 220, 260, 291 and 292 of the Companies Act, 1956. There are 2 Petitioners and 4 Respondents. The 1<sup>st</sup> Respondent Company viz. M/s. Seaqueen 

Builders Private Limited, was incorporated on 02.01.1995 with CIN No. U45201KL2005PTC008520. The registered office of the 1<sup>st</sup> Respondent Company is situated at 32/2982 B, Sahrudaya Building, Ponnurunni, Vyttila P.O., Ernakulam- 682 019. The main objects of the 1<sup>st</sup> Respondent Company is to do real estate or property developers whether by development of land or in any other manner including filling of land, laying of roads and construction of buildings.

2. The Petitioner No. 1 is holding 59000 of shares in the 1<sup>st</sup> Respondent Company. The Petitioner No.2 is an ex-Director of the 1<sup>st</sup> Respondent Company and holds 1000 shares. They together hold 60,000 shares out of the 95,000 issued shares of the 1<sup>st</sup> Respondent Company as on 31.03.2008, representing 63% of the issued capital of the 1<sup>st</sup> Respondent Company. Therefore, they fulfil the requirements under Section 399 of the Companies Act, 1956, for filing this Petition.

3. Under challenge is the allotments made on 25.04.2008 and 11.08.2010. Besides this, the Petitioners have challenged the continuation of Respondent No.3 as Director and appointment of Respondent No.4 as Director of the 1<sup>st</sup> Respondent Company. The shareholding pattern of the 1<sup>st</sup> Respondent Company as on 30-9-2005 is reproduced as follows:-

Name	No. of shares	Percentage	Status in this Petition
K.J. Paul	25000 shares of Rs.10	26 %	Respondent No.2 37%
Bindu Paul	10000 shares	11%	
K.P. Augustine	1000 shares	1%	Petitioner No.2 63%
P.M. Johny	59000 shares	62%	
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95000 shares		100%	

The above shareholding pattern continued till 31.03.2008. The copies of the Annual Return as on 

30.09.2005 and 29.09.2007 are placed on the file and marked as annexure P5.

4. It has been alleged by the Petitioners that the majority capital has been contributed by them but, the majority directors on the Board viz., 2<sup>nd</sup> and 3<sup>rd</sup> Respondents resorted to various dubious ways and methods to keep away the 1<sup>st</sup> Petitioner, Mr. P. M. Johny who was the single largest shareholder and the 2<sup>nd</sup> Petitioner, Mr. K. P. Augustine who was a Director, from the affairs and management of the Company despite their having a collective shareholdings of 63% in the 1<sup>st</sup> Respondent Company. It has been further alleged that, the Minutes of the Meetings and Records are concocted, manipulated and falsified to favour the interest of the Respondents. In short, the Respondents are alleged to have misused their position as Directors, and are trying to usurp the majority stake from the Petitioners by making illegal and fake share allotments in their names without knowledge of the Petitioners to gain control over the 1<sup>st</sup> Respondent Company. The



allotments of shares which are under challenge are as follows:-

1.	<u>25.04.2008</u>		
	<i>K.J. Paul</i>	<i>25000 Shares</i>	
	<i>Bindu Paul</i>	<i>30000 Shares</i>	
	<hr/>		
	<i>Total</i>	<i>55.000</i>	
2.	<u>11.08.2010</u>		
	<i>K.J. Paul</i>	<i>420000</i>	<i>Shares</i>
	<i>Bindu Paul</i>	<i>30000</i>	<i>Shares</i>
	<hr/>		
	<i>Total</i>	<i>450000</i>	

As seen from the above that a total of 4,45,000 ( Four Lakhs Forty Five Thousand) shares and 60,000 ( Sixty Thousand) shares are stated to be illegally allotted in the names of 2<sup>nd</sup> Respondent Viz., Mr. K. J. Paul and the 3<sup>rd</sup> Respondent Mrs. Bindu Paul, who is wife of the 2<sup>nd</sup> Respondent, aggregating to a total of 5,05,000 ( Five Lakhs Five Thousand) shares. It is alleged that the shares allotment purported to have been made on 25.04.2008 and 11.08.2010 are the result of an afterthought of the Respondents for a collusive purpose

and were clearly ante-dated, because, no notice of Board Meetings has been given to the 2<sup>nd</sup> Petitioner, who was a Director on the dates of the share allotments. It is interesting to note that the second purported allotment of shares and the alleged cessation of office of directorship of the 2<sup>nd</sup> Petitioner were both taken on the same day i.e. 11.08.2010 to show as if the 2<sup>nd</sup> Petitioner was not a member of the Board at the time of the shares allotment. It has further been averred by the Petitioners that the share allotments were also vitiated by the infirmity of the Board that was incapacitated and incompetent to act on the alleged dates of shares allotment 25.04.2008 and 11.08.2010, because the 3<sup>rd</sup> Respondent Viz., Mrs. Bindu Paul not being among the first director appointed under the Articles of Association, was a retiring director and was due to retire by rotation at the Annual General Meeting of 2006 and 2008, pursuant to Article 28 of the Articles of Association, which is reproduced below:-

*"28. i. Except the first directors, the Directors shall be generally appointed by the company only in Annual General Meeting."*

*ii. Subject to the powers of the members to appoint or remove any director by passing an ordinary resolution in any General meeting, the first Directors appointed by virtue of these articles, are not liable to retire by rotation unless they became incapacitated to act as such due to legal, physical, social or medical reasons.*

*iii. The directors appointed by the company in General meeting shall retire at the second Annual General Meeting immediately following the Meeting in which they are appointed as directors. Such retiring Directors are, however, entitled to be re-appointed, unless they cannot be appointed as such for reasons mentioned in (ii) above."*

5. It has been stated that Mrs. Bindu Paul was initially appointed by the Board of Director on 02.01.1995 i.e. the date of incorporation of the Company. As an additional Director appointed by the Board, she was due to retire and sought re-appointment at the Annual General Meetings of 1996 because as per the article 28(iii), she was to retire at every 3<sup>rd</sup> Annual General meeting commencing from Annual General Meeting of 1996. As stated by the Petitioners, as per the Annual General Meeting 2006 and 2008 filed by the Company, Mrs. Bindu Paul has

not retired by rotation and sought re-appointment. For this reason, her continuation in office as director on the aforesaid share allotments, is illegal, invalid and is not binding on the 1<sup>st</sup> Respondent Company. Based on these grounds, the Petitioners stated that there was no validly constituted Board because Mrs. Bindu Paul's presence at the alleged meeting cannot be counted for quorum. As no notice was issued to the 2<sup>nd</sup> Petitioner when the allotments were made in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and due to the aforesaid illegal and improper shares allotment made on 25.04.2008 and 11.08.2010, the shareholding pattern of the Company has been grossly distorted in favour of Respondents 2 and 3, which can be shown as under:-

K.J. Paul	470000 shares	78.33%	} 90% RespondentNo.2 &3
Bindu Paul (W/o K. J. Paul)	70000 shares	11.67%	
K.P. Augustine	1000 shares	0.17%	} 10% Petitioners 1&.2
M.P. Johny	59000 shares	9.83%	
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Total                      600000 shares                      100%

Due to the above allotments, the shareholdings of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents suddenly increased from 37% to 90% and that of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners reduced from 63% to 10%. Thus, the majority was reduced to minority and the minority became the majority stake holders.

6. The Petitioners further averred that the Respondent No.4 Viz., Mr. K. A. Mathai was appointed as director of the Company on 22.01.2011 by the Board of Directors. The said appointment is in violation of article 28 (i) which stipulates that except the first Directors, Directors shall be generally appointed only at Annual General Meeting. Therefore, the appointment of Respondent No.4 is contrary to the Articles of Association. The said appointment has not been made as an additional director under article 23 which is evidenced by the fact that in the return of appointment (Form No.32) filed by the 1<sup>st</sup> Respondent Company (annexure P4), the designation of the



appointee is mentioned as “director” and not as “additional director”, that too, has been made by the incompetent Board because the Respondent No. 3 viz., Mrs. Bindu Paul’s, appointment was not valid in the eyes of law. Besides these, there are other allegations which the Petitioners say are oppressive, burdensome and harsh against them and are also against the interests of the 1<sup>st</sup> Respondent Company. The other allegations suggest that the Respondent Nos. 2 and 3 are involved in siphoning off the money from the accounts of the 1<sup>st</sup> Respondent Company, and the purported share application money was first syphoned away and then it has been shown in the accounts as the share application money of the 1<sup>st</sup> Respondent Company.

7. The Counter has been filed by the Respondents wherein the allegations levelled by the Petitioners have been denied. The allotment of shares in question dated 25.04.2008 and 11.08.2010 have been justified along with rights issue. The question has been raised about

the consent of the second Petitioner for joining as Petitioner for filing the Petition.

8. The Respondents stated in the Counter that Petitioner No. 2 did not attend Board Meetings held on 10.12.2009, 20.03.2010 and 19.06.2010 though notices were sent to him, as a result Petitioner No. 2 is said to have lost his Directorship due to operation of law with effect from 11.08.2010. It has been stated that the proof of dispatch of notices for the said Board Meetings has been enclosed.

9. The allegations have been made against the Petitioners being away from the scene for a long time, when the first Respondent Company was pursuing its business very vigorously, actively and profitably. It has further been averred in the counter that there is no agreement between the Shareholders for maintenance of parity in shareholding pattern and it has been stressed by the Respondents that the audited financial statement of the Company as on 31.03.2005 would show that the Respondent Nos. 2 & 3 have brought in

share application money to the extent of Rs.12,76,000/- and this money was lying to the credit of their respective accounts.

10. It has also been contended by the Respondents that due notices have been issued for the Board Meetings to Petitioner No.2 and for the Annual General Meetings to the Petitioners. But they have not attended the meetings.

11. It has been denied that the Petitioner No.2 had issued any cheque for an amount of Rs.7 lakhs on 26.06.2004. The answering Respondents further contended that since 1995 to 2008 the total contribution by the Petitioner No.2 is only Rs.3,50,000/- representing the face value of 35,000 Equity Shares held by him. Petitioner No. 1 did not contribute even a rupee to the Company.

12. The Respondents submit that the statement of the Petitioners that the Respondents had concocted, manipulated and falsified the minutes, records and


usurped the management is baseless and utter falsehood.

13. Having denied the allegations levelled by the Petitioners in the Petition, the Respondents contended that the Petitioners cannot suddenly lay claim to a share in the growth and prospects of the Company beyond their stake after having been in deep slumber all these years. The answering Respondents justified the continuation of Respondent No.3 as Director on the Board of the first Respondent Company stating that an inadvertent omission to put through a formality of retirement and re-appointment as specified in the Articles cannot be fatal to the Directorship of Respondent No.3. As there is no bar under the Companies Act to have the Directors appointed by the Board and such a Directors need not necessarily be additional Directors. Therefore, there is no legal infirmity or invalidity in the composition of Board of the first Respondent Company.



14. It has been pleaded by the Respondents that there is no malafide in the allotments under challenge as the same were made for proper purpose in good faith and the performance of the Company will show the result of such capital augmentation. The delay in filing returns could not establish that the allotments suffer from any infirmity so as to affect their legality or validity.

15. It has been denied that there was no Board Meetings and General Meetings to consider the increase in authorised capital and to approve of offering of equity shares on rights basis at the meeting of Board of Directors which was convened on 31.01.2011 to consider the allotment of shares on rights basis and after the decision of the Board the shares were offered to the shareholders including the Petitioners.

16. It has also been averred in the reply that there is no infirmity in the appointment of Mr. K.M.Mathai, i.e., Respondent No. 4. It has been stated that the alleged transactions had resulted in a profit of Rs. 18 crores is 



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false. In short, the allegations contained in the petition against the Respondents have been denied and the actions under challenge have been justified. The answering Respondents state that the purpose for filing the petition is collateral, i.e., intimidating the Respondents to extract some money.

17. Based on these grounds, the Respondents prayed for dismissal of the Petition, however at the end of the reply a suggestion has been made by the Respondents that they offer an exit to the Petitioners on the basis of an appropriate value of their shares i.e., 60,000 in the first Respondent Company i.e., alternatively the Respondents undertake to return Rs.6,00,000/- that stands invested by the Petitioners in the capital of the Company with simple interest @ 9% per annum with effect from 1995.

18. The petitioners have filed their rejoinder wherein they have rebutted the allegations levelled by the respondents in their counter. The details have been given with regard to wilful delay in filing the statutory

returns before the Registrar of Companies, different balance sheets are stated to have been filed with Income Tax and the RoC, concealing huge misappropriation of funds, fabrication of all evidences to show that the Board Meetings and Annual General Meetings (AGM) were held regularly, diverting company's funds under the guise of 'advance for land'. In relation to the Notice dated 2.9.2009 of 15th AGM and other notices claimed to have been sent under 'Certificate of Posting' from Edapally Post Office which is far away from the claimed registered office of the company. The 'Under Certificate of Posting' filed by the respondents as Annexures R29 Page 154 of the counter statement is stated as fabricated one which is conclusively proved from the fact that the postal seal is seen as dated 2nd September 2009 which is the closed holiday being "Thiru Onam".

19. The Petitioners have also referred to the statement made by the respondents in the counter wherein it has been mentioned that the Petitioner No.2 has not made

any such payment of Rs.7 lakhs, but the payment is evidenced by certified copy of bank accounts with Indian Bank of Petitioner No.2 and also the 1<sup>st</sup> Respondent company's bank accounts with State Bank of Travancore, Edapally. It has also been mentioned that the statement which has been made by the respondents that the authorized capital was increased from Rs.15 lakhs to Rs.60 lakhs on 29.04.2004 is false because the authorized capital was raised from Rs.12 lakhs to Rs.60 lakhs. The petitioners have also stated in the rejoinder that the statement made by the respondents that the amounts were brought in by Respondents No.2 and 3 is also false. The petitioners in their rejoinder have also rebutted the allegations levelled by the respondents with regard to non-availability of DIN of Petitioner No.2 and stated that the number was provided, but not used by the respondents.

20. In relation to the issue of maintainability of the petition, the petitioners in their rejoinder stated that the Petitioner No.2 has sent a consent letter dated

23.2.2011 that has been confirmed by him in his subsequent letter dated 15.03.2011 addressed to the Bench. Therefore, the fact that the said consent letter was received at Cochin on 21.02.2011 is evident from the copy of the postal cover and Track summary which is produced and marked as Annexure P29. Therefore, the allegation regarding the maintainability of the petition has been rebutted. It has also been stated by the petitioners in their rejoinder that Para 4 of the 'Compliance Report' for the year 2009-10 issued by the Practising Company Secretary on 30.08.2010 reads that the Board of Directors duly met 4 (four) times on 20.05.2009, 02.09.2009, 10.10.2009 and 20.03.2009 in respect of which meetings' proper notices were given and the proceedings were properly recorded and signed in the Minutes book maintained for the purpose. In the Report, there is no mention of Board Meeting on 10.12.2009 and 20.03.2010 as claimed by the respondents. Therefore, the allegation that the Petitioner No.2 was absent on three occasions of the Board Meetings is baseless and false. Therefore, the



provisions of Section 283(1)(g) of the Companies Act, 1956 would not be attracted because there were actually no Board Meetings held on 10.12.2009 and 20.03.2010.

21. It has also been averred by the petitioners in the counter that as per Form No.18 filed by the Company on 07.01.2001, the Company had changed its Registered office on 01.04.2010 from Pappali Building, Lissie Junction, Ernakulam to Sahrudaya Building, Ponnurunni, Vyttila P.O., Ernakulam. But the notice dated 02.12.2009, for the purported Board Meeting on 10.12.2009 is seen issued from the Registered Office at Ponnurunni, Vyttila, which is quite improbable and amounts to fabrication. The petitioners in their rejoinder, submitted that the fake share allotment dated 25.04.2008 and 11.08.2010 made at the back of the petitioner and the subsequent rights issue of shares dated 01.03.2011, the 2nd and 3rd respondents have unjustly amassed 1,33,500 additional shares and 1,80,000 additional shares respectively. The Petitioners 1 and 2 were not allotted any shares on



25.04.2008 and 11.08.2010 and consequently they did not get any rights shares on those shares. The clandestine share allotment dated 25.04.2008 and 11.08.2010 were made to tilt the shareholding pattern grossly in favour of 2nd and 3rd respondents thereby to reduce the petitioners to a minority who were till then holding the majority stake even according to the respondents.

22. It has been averred by the Petitioners in the rejoinder that Annexure R25 filed by the respondents is a Board resolution dated 25.04.2008 for the allotment of 55,000 shares in favour of 2nd and 3<sup>rd</sup> respondents. In this resolution, along with 2nd and 3rd respondents, one Mr. K.A. Mithai who is Respondent No.4 is added as an authorized signatory for signing share certificates, but he (K.A.Mithai) had never been associated with the Company previously including on 25.04.2008 when the share allotment was made. He claims to have been appointed as Director only on 22.01.2011 as per Form No.32 filed as Annexure P4 to

the main petition. This shows that the respondents have fabricated, concocted and falsified the records.

23. The Petitioners in their rejoinder rebutted the contentions of the respondents about their being financially weak, the petitioners stated that they are financially stable and capable of bringing in additional capital to the company as and when needed. The company has grown with the majority capital brought in by the petitioner and the respondents want to take undue advantage by reducing the petitioners' shareholding from majority to a minority by making allotments in their favour clandestinely. It has further been averred in the rejoinder that filing of annual accounts were delayed deliberately by the respondents to manipulate the records and incorporate therein false statement of claim on the application money pending allotment that was brought in by second respondent to the tune of Rs.7 lakhs. It has been alleged by the Petitioners in the rejoinder that huge diversion of funds from the company is the real secret behind the 2nd and 3rd respondents in investing huge money in the

share capital of the company and against which shares have been clandestinely allotted, as a large quantities totalling a sum of cash Rs.12,73,00,000/- was drawn from the accounts of the company and utilised by R2 himself.

24. It has further been alleged that the bank account of the company shows that a sum of Rs.1 Crore received from a Bombay firm/persons on 9.2.2008 was transferred to R2's bank account on the same day. Another instance of mismanagement as mentioned by the petitioners in the rejoinder is that the 1st Respondent company has given a corporate guarantee of Rs.10 crores to State Bank of Travancore for loans taken by the M/s. Sanathan Developers Private Ltd, a company in which the Managing Director of the 1st Respondent company is a Director and it is reported by the company that the guarantee has been satisfied on 25.06.2010. This is a sheer misuse of company's asset for personal benefits. In relation to the offer of exit by the respondents in their counter, the petitioners made counter exit offered to the respondents stating that

they are ready to pay compound interest @ 10% or the market value of the shares of the respondent as may be determined by an independent auditor.

25. The respondents have filed sur rejoinder denying all the allegations levelled by the petitioners in their rejoinder and pray to dismiss the petition on the grounds referred in their counter. In the light of the facts and circumstances involved in the case, the issues that could be framed are as follows :

i) *Whether the allotment of shares i.e. 5,05,000 in favour of Respondent Nos.2 and 3 in the Board Meetings purportedly held on 25.04.2008 and 11.08.2010 is legal and valid?*

ii) *Whether the continuance of Respondent 3, viz., Mrs. Bindu Paul as a Director of 1st Respondent company is legal and valid?*

ii) *Whether the appointment of 4th Respondent as a Director of the 1st Respondent company* ✓




*purportedly made on 27.1.2011 is legal and valid?*

iv) *Consequential Reliefs?*

26. In relation to the issue No.(i), the Petitioners would contend that on 25.04.2008 and 11.08.2010 a total of 445000 shares and 60000 shares were illegally allotted in the names of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively, who are spouses (aggregating in total 505000). No notice of Board Meetings had been given to the 2<sup>nd</sup> Petitioner viz., Mr. K. P Augustine, who was a Director on the dates of the share allotments. The relative returns of the allotments were filed belatedly on 25.06.2010 and 02.11.2010 respectively, which appears to be dubious, suspicious and afterthought. In reply, the Respondents would contend that the notice of Board Meetings dated 25.04.2010 was dispatched. However, there is no proof of service of the notice as there is no mention of the serial number of the meeting, time of the meeting and full address of the venue of the meeting. Further, the notes on the items of the agenda is also missing. Therefore, the



notice dated 11.04.2008 is held insufficient and invalid. Similarly, the Respondents would contend that the notice has also been dispatched on 31.07.2010 for Board Meeting held on 11.08.2010. There is no proof of service. Moreover, the notice has not been addressed to 2<sup>nd</sup> Respondent, instead it is addressed to 'all directors' and no notes have been attached with the notice pertaining to the items of agenda. Further, the notices dated 11.04.2008 and 31.07.2010 in relation to the Board Meetings dated 25.04.2008 and 11.08.2010 are stated to have been sent under 'certificate of posting'. The notices sent under 'certificate of posting' cannot be relied upon. In **Marble City Hospital and Research Centre Private Limited Vs. Sarabjeet Singh Mokha** reported in (2010) 155 CAS, 13(MP), the Hon'ble High Court of Madhya Pradesh held "*mere filing of postal certificate did not corroborate services of notice, when there is no collateral evidence like dispatch register showing payment of postage stamps and account books etc.*" In **M.S. Madhu Soodhanan & Anr. Vs. Kerala Kaumudi** ✓

**Private Limited**, reported in (2004) 9SSC 204, the Hon'ble Supreme Court while taking judicial notice, has observed that certificates of posting are notoriously, 'easily' available. Further, in **Shivkumar Vs. State of Haryana**, reported in 1994 (4) SCC 445, 447, it has been observed that *"it is not felt safe to decide the controversy at hand on the basis of the certificate of posting, as it is not difficult to get such postal seals at any point of time."* In the present case, the Respondents claimed that the notice dated 02.09.2009 of the 15<sup>th</sup> Annual General Meeting was sent under 'certificate of posting' of Edappally Post Office, which is far away from Registered Office of the 1<sup>st</sup> Respondent Company, (Annexure R29, page 154 of the counter statement). The postal seal is seen affixed on 02.09.2009, which was a closed holiday being "Thiruvonam" it suffice to support the arguments that notices sent under 'certificate of posting' are not to be relied upon for the reasons that the postal seals are easily available. All the notices sent by the 

Respondents are claimed to have been sent through same Post Office, which also raises serious doubts.

27. There is nothing on record to suggest that at any point of time, the Respondents, being Directors of 1<sup>st</sup> Respondent Company, have made disclosure to the shareholders regarding the share allotments made on 25.04.2008 and 11.08.2015, which they are obliged to do as part of their duty to act in good faith and make full disclosure to the shareholders regarding the affairs of the Company. In **Dale and Carrington Investment (P) Ltd Vs. P. K. Prathanpan**, reported in (2004) Vol. 122 CC 161, it has been laid down that fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a Company with utmost good faith, care, skill and due diligence and in the interest of the Company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all the matters relating to the Company.

28. The Respondents have never made disclosure of share allotments to the Petitioners. Not only this, it is an admitted fact that the returns pertaining to the share allotments in question have been filed belatedly. The non-filing of the returns or statements, well in time, amounts to the denial of right to the shareholders as they were not getting necessary information in time about the affairs and management of the Company. Therefore, it is an oppressive act and reveals mismanagement in the affairs of the 1<sup>st</sup> Respondent Company. This view is fortified by the ruling given in **Harshad Bhai B. Patel Vs. Bhagirath Construction Company (P) Limited**, reported in (2013) 117 CLA 52 (CLB).

29. The share allotments made on 25.04.2008 and 11.08.2010 in favour of the Respondent Nos. 2 and 3 and further issues of capital seem to have been made by the Respondents for creating a new majority due to which the existing majority shareholders were reduced to minority position. This is in breach of fiduciary duty and constitutes an act of gross oppression. In this



connection, reliance is placed upon the case of **Uma Pathak Vs. Eurasian Choice International Private Limited**, reported in (2004) 122 com cases 922. The actions of the Respondents with regard to increase of capital and issue of shares are solely with a view to gain control of the 1<sup>st</sup> Respondent Company which ultimately reduced the majority shareholders to minority status. The same constitutes an act of oppression on the part of the Respondents. This view is supported with the ruling given in **S. Vardarajan Vs. Udhayem Leasings and Investments Private Limited**, reported in (2005) 125 com cases 853.

30. It is an admitted fact that the Petitioners were holding 60,000 shares out of 95000 as on 31.03.2008 representing 63% of the issued capital of the 1<sup>st</sup> Respondent Company. The subsequent share allotments made on 25.04.2008 and 11.08.2010 in favour of the Respondent Nos. 2 and 3 aggregating 50,5000 has reduced the shareholdings of the Petitioners from 63% to 10% and sudden increase of the shareholdings of Respondent Nos. 2 and 3 from

37% to 90%. It is settled legal position that if further issue of shares results in conversion of majority into a minority, or creation of new majority, then, such issue of shares is not only in breach of fiduciary responsibilities but also a grave act of oppression against the existing majority. Therefore, the allotment of shares impugned in the Company Petition which have been made without proper service of notice with a view to gain advantage against the Petitioners being the majority shareholders of the closely held company is in breach of fiduciary obligation of the Directors which is neither in compliance with the legal requirements nor ensures the fair play and probity in corporate management. Thus, it amounts to an act of gross oppression. In view of this, the allotments made on 25.04.2008 and 11.08.2010 of 505000 shares to Respondent Nos. 2 and 3 is illegal. Therefore, the issue No.(i) is decided in favour of the Petitioners and against the Respondents.

31. In relation to the issue No.(ii), the Petitioners would contend that the 3<sup>rd</sup> Respondent viz., Mrs. Bindu Paul, not being among the First Directors appointed under the article was a retiring director and due to retire by rotation at the Annual General Meeting of 2006 and 2008 pursuant to article 28 of the Articles of Association of the 1<sup>st</sup> Respondent Company. For the sake of the convenience, the article 28 of the Articles of Association is reproduced as follows:-

*“28. i. Except the first Directors, the Directors shall be generally appointed by the Company only in Annual General Meeting.*

*ii. Subject to the powers of the members to appoint or remove any director by passing any ordinary resolution in any general meeting the first Directors appointed by virtue of these articles are not liable to retire by rotation unless they become incapacitated to act as such due to legal, physical, social or medical reasons.*

*iii. The Directors appointed by the Company in General meeting shall retire at the second Annual General Meeting immediately following the Meeting in which they are appointed as directors. Such retiring Directors are, however, entitled to be re-appointed, unless they cannot be appointed as such for reasons mentioned in (ii) above.”*



32. In fact, Mrs. Bindu Paul was initially appointed as additional Director by the Board as on 02.01.1995 i.e. the date of incorporation of the 1<sup>st</sup> Respondent Company. She was due to retire and seek re-appointment at the Annual General Meeting (AGM) of 1996. As per the article 28 (iii) of the Articles of Association mentioned above, she was to retire at every 3<sup>rd</sup> AGM commencing from AGM 1996. But, as per notices of the AGM 2006 and 2008 filed by the 1<sup>st</sup> Respondent Company, she has not retired by rotation and did not seek re-appointment. So her continuance in office as Director is illegal and invalid, which cannot be binding on the 1<sup>st</sup> Respondent Company. On this issue, the Respondents would contend that an inadvertent omission to put through a formality of retirement and re-appointment as specified in the Articles of Association cannot be a fatal to the directorship of 3<sup>rd</sup> Respondent viz. Mrs. Bindu Paul. In relation to the above, the legal position is that as per para 19 of the Articles of Association, Mrs. Bindu Paul is not the First Director. Therefore, her status can only



be that of the Director appointed by the Company in General Meeting, who shall retire at the second Annual General Meeting immediately following the meeting in which she is appointed as Director and is entitled to be re-appointed as provided under article 28 (ii) of the Articles of Association mentioned above. Therefore, Mrs. Bindhu Paul's continuation as director is contrary to the provisions of the Articles of Association of the 1<sup>st</sup> Respondent Company and the same is invalid for the reasons that Section 36 of the Companies Act 1956 makes the Articles of the company binding not only on the company but also members *inter se* covenanted by the Articles of Association of the 1<sup>st</sup> Respondent Company. Therefore, the Articles of Association constitutes a contract not merely between the shareholders and the company, but between the individual shareholders also. Thus, the articles are a source of power of the directors, who can as a result exercise only those powers conferred by the Articles. Any action that requires to be done as per the Articles of Association, if done contrary thereto would be *ultra*

*vires*. This has been laid down by Hon'ble Apex Court in **Smt. Claude Lila Parulekar Vs. M.S. Sakal Papers Private Limited and Ors.**, (decided on 18<sup>th</sup> March, 2005). Therefore, the continuance of 3<sup>rd</sup> Respondent viz., Mrs. Bindu Paul as Director of the 1<sup>st</sup> Respondent Company being contrary to the Articles of Association of the 1<sup>st</sup> Respondent Company, is illegal and invalid. This renders the Board below the requisite quorum as referred in the Articles of the 1<sup>st</sup> Respondent Company, and the 2<sup>nd</sup> Petitioner was not present as no valid notice for Board Meeting was issued to him, and there was only one Director i.e. Mr. K. J. Paul, i.e. the 2<sup>nd</sup> Director for the Board Meeting purportedly held on 25.04.2008 and 11.08.2010 which is below prescribed minimum i.e. two directors as provided under article 18 of the Articles of Association of the 1<sup>st</sup> Respondent Company. This also renders the share allotments made on 25.04.2008 and 11.08.2010 as illegal and null and void. This view is fortified by the ruling given in **Murari Mohan Kajriwal Vs. Shree Hanuman Cotton Mills Limited**, reported in (2014) 123 SCL, 341 (CLB).

Thus, the Board Meetings held without quorum as required by the Articles of Association of the 1<sup>st</sup> Respondent Company are bad in law and the appointments of additional Directors at such Board Meeting was also bad in law, as that failed to satisfy the test required by law as has been laid down in **Murari Mohan's** case (*supra*).


33. In relation to the issue No. (iii), the Petitioners would contend that the appointment of Mr. K. A. Mathai as Director was purportedly made by the Board on 22.01.2011 and not in Annual General Meeting. So, the said appointment is also in violation of Article 28(i) of the Articles of Association of the 1<sup>st</sup> Respondent Company. This appointment is not made as an additional Director under Article 23 of the Articles of Association as evidenced by the fact that in the return of appointment (Form No.32), the designation of the appointee is shown as 'Director'. In this connection, the Respondents would contend that the appointment of Respondent No.4 was in terms of Article 23 of the

Articles of Association of the Company read in conjunction with Section 260 of the Act, 1956, which is contrary to record and such contention stands rejected. The said appointment is made by a Board, that lacked proper quorum because there is only one Director viz. K. J. Paul. Therefore, the appointment of 4<sup>th</sup> Respondent in Board Meeting held on 22.01.2011 is illegal in law as has been held in Murari Mohan Kajriwal's (*supra*).

34. In the light of facts and legal position stated above, and the record placed on the file by the parties, the order follows as under:-

#### ORDER

The allotments of shares i.e. 5,05,000 in favour of the Respondent Nos. 2 and 3 made on 25.04.2008 and 11.08.2010 are declared illegal, and the same stand set aside.

The Board Meetings purportedly held on 25.04.2008 and 11.08.2010 are not tenable in the eye 




of law, the same are declared as illegal, and all decisions taken there at are set aside.

The EoGMs dated 22.01.2011 and rights offer dated 01.02.2011 are declared illegal, null and void and hence, are set aside.


The continuance of Respondent No.3 and appointment of Respondent No.4 are declared as illegal, null and void, and hence, set aside.

The 1<sup>st</sup> Petitioner is appointed as Managing Director of 1<sup>st</sup> Respondent Company and Mr. K. J. Paul is removed from the position of Managing Director, but he shall perform the duties as Director of the 1<sup>st</sup> Respondent Company. Consequently, the said Board of Directors is directed to rectify the Register of Members by restoring the shareholding pattern as on 30.09.2005 as shown under para 6(a) of the Petition.

Keeping in view the totality of circumstances and the intention of the parties, it is proposed to appoint an 

independent Auditor within three weeks of passing this Order, with the consensus of the Board of Directors comprising of 1<sup>st</sup> Petitioner and the 2<sup>nd</sup> Respondent, failing which, this Bench on mention by any of the Directors, shall appoint the independent Auditor out of the names, if suggested, by the parties, who (Independent Auditor) shall determine the true and fair value of the shares of 1<sup>st</sup> Respondent Company by taking into consideration three Financial Years w.e.f. 2011 onwards. Based on the said value, and keeping in view the shareholding pattern as on 30.09.2005, the first opportunity for purchase of shares of Respondents is given to Petitioner, failing which the Respondents shall purchase the shares of the Petitioner. This process shall commence after the submission of the report of the independent Auditor, who shall submit the same within four weeks from the date of his appointment, and shall get completed within the twelve weeks thereafter. Till this process is completed, there shall not be any change in the composition of the Board constituted by this Bench, and shareholding

pattern shall remain the same as on 30.09.2005. The fee of the independent Auditor shall be paid by the 1<sup>st</sup> Respondent Company which shall be fixed as per mutually agreeable<sup>d</sup> terms. Accordingly, the interim order, if any stands vacated. No order as to costs.

  
**(S.VIJAYARAGHAVAN)**  
MEMBER (TECHNICAL)  
PAM

  
**(CH. MOHD. SHARIEF TARIQ)**  
MEMBER (JUDICIAL)