

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH AT HYDERABAD**

C.P.No.08/59/HDB/2017
U/s 59& 62 of the Companies Act, 2013

In the matter of:

Lanka Venkata Naga Muralidhar
S/o(Late) Lanka Viswanadham
Residence: Flat 164, 6th Floor,
Sri Lanka Heights, East Marredpalli,
Secunderabad - 500026.

... Petitioner

Versus

1. M/S. Vestal Educational Services Pvt. Ltd
Registered Office: Vijaya Building,
Door No. 30-15-6/1, Mallela Sri Rama Murthy Street,
S.R. Puram, Vijayawada - 520002.
2. Ms. K.V.V. L. Kumari
W/o Kadimcherla Seethayya,
Director, Vestal Educational Services Private Limited
R/o: N- 17, II Floor, Malviya Nagar,
New Delhi - 110017.
3. Koruprolu Veera Venkata Subba Rao
Director, Vestal Educational Services Private Limited
R/o: 6-3-562/14/4, Vijaya Apartments,
Erramanzil, Hyderabad - 500008.
4. Mr. Nitin Sharma,
Director, Vestal Educational Services Private Limited
R/o. R-1/32, Vijay Vihar, Uttam Nagar,
New Delhi - 110059.
5. Mr. Dharendra Kumar Asri,
Director, Vestal Educational Services Private Limited
R/o: A-604, Gayatri Apartments,
Plot -9, Sector 9, Dwarka,
New Delhi - 110045.

... Respondents

Order pronounced on 1st January, 2018



CORAM:

Hon'ble Mr.Rajeswara Rao Vittanala, Member (Judicial)
Hon'ble Mr.RavikumarDuraishamy, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Mr. Deepak Bhattacharjee,
Senior Advocate with Mr.
VimalVasi Reddy & Mr.
Bhupesh,
Advocates

For the Respondent No. 1: Mr.K.V. Siva Prasad, Advocate

For the Respondent No.2: Mr. S. Chakrapani, Advocate

For the Respondent No.3: Mr. Mahesh Chamarthi,
Advocate

For the Respondent No.4: Mr. G.V. Gangadhar,
Advocate

For the Respondent No.5 : Mr. P. Venkata Ravi Sankar,
Advocate

Per: Rajeswara Rao Vittanala, Member (Judicial)

ORDER

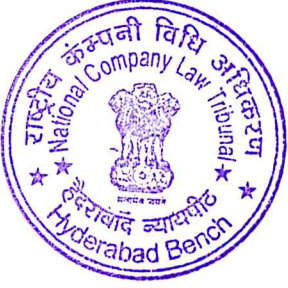
1. The Company Petition bearing CP No.8/59/HDB/2017 is filed by Mr. Lanka Venkata Naga Muralidhar against M/s. Vestal Educational Services Pvt. Ltd and 04 others, U/s 59 and 62 of the Companies Act, 2013, by seeking the following reliefs:
 - (a) To declare the respondent company's allotment of shares on 18th December, 2014 & 31st March, 2015 to the petitioner as null and void and contrary to Section 62 of the Companies Act, 2013;
 - (b) To direct the respondent company to rectify its register in relation to the allotment of shares to the petitioner between 18th December, 2014 & 31st March, 2015;



(c) To direct the respondent company to repay the amount due to the petitioner with interest @ 18% p.a.

2. Brief facts, leading to the filing present petition, which are relevant to the issue in question, are as follows:

- 1) M/s. Vestal Educational Services Pvt. Ltd (hereinafter referred to as "Company") was Incorporated as a Private Limited Company on 01.12.2006, under the provisions of the Companies Act, 1956. Its Registered office is situated at Vijaya Building, Door No. 30-15/6/1, Mallela Sri Rama Murthy Street, S.R. Puram, and Vijayawada-520002.
- 2) The petitioner is one of the shareholders of the Company and he had previously acted as one of its Directors from December 2006 to October 2011.
- 3) In order to raise funds for establishing infrastructure to run an educational institution, the then Board of Directors of the Company had decided to avail a term loan of Rs. 10,00,00,000/- (Rupees Ten Crores only) from the State Bank of India in 2009. Thereafter, State Bank of India, Industrial Finance Branch, Somajiguda, Hyderabad had sanctioned the said term loan of Rs. 10,00,00,000/- (Rupees Ten Crores only) on 31st March, 2009, for which the petitioner stood as one of the personal guarantors. However, the term loan has become a Non-Performing Asset (NPA) in the books of the State Bank of India in the year 2013 because of irregular/ non-payment of the installments.
- 4) Accordingly, the Company had entered into a compromise (One Time Settlement). Pursuant to



the compromise terms vide SBI, SAMB Branch letter No.611 dated 5th August, 2014, the loan amount was settled for Rs.5,50,00,000/- (Rupees Five Crores and Fifty Lakhs only) out of the total liability of Rs. 7,25,00,000/- (Rupees Seven Crores and Twenty-Five Lakhs only), which was to be paid by the Company in five installments as provided in the sanction letter.

- 5) However, the Company could not pay as per said settlement. When the Bank was threatening to cancel the OTS, the Directors of the Company had approached the petitioner in November, 2014 and had requested him to lend an amount of Rs. 1,54,00,000/- (Rupees One crore and Fifty Four Lakhs only) so as to enable them to repay the installments liable to be paid to the State Bank of India. Accordingly, the petitioner obliged the request of Directors of the Company, and thus deposited an amount of Rs.1,54,00,000/- (Rupees One crore and Fifty Four Lakhs only) through various remittance on different dates between the last week of December 2014 to March 2015 into the account of M/s Vestal Education Services Private Ltd. bearing a/c No. 00000030225170247 of State Bank of India, Panduragapuram, Visakhapatnam.
- 6) The petitioner had sent reminders to the Company and their representatives for the re-payment of amount lent by him along with interest but the same fell on deaf ears, and the Company had avoided paying the same on one pretext or the other. The petitioner also sent two legal notices on 3rd June, 2015 and 18th June, 2015 addressed to the Company and its Directors demanding the payment



of amounts as advanced by him, under Section 433 and 434 of the Companies Act, 1956. However, the notice as sent by the petitioner to the registered address of the Company was returned with an endorsement stating 'No such address in this door number H/R/S' by the postal authorities. However, the said notice was also addressed to the Directors of the Company, and it was received by one of the Directors namely Sri. Koruprolu Veera Venkata Subba Rao. Even after the receipt of the said notices, the Company had chosen not to issue any reply with regard to the same.

- 7) While things stood as such, the petitioner had received a letter from the Company, which furnished latest shareholding pattern in the Company as on 31st March, 2015. On verification of the same with the ROC documents, it was found by the petitioner that the amount of INR 1,54,00,000/- (Rupees One crore and Fifty Four Lakhs only) lent by the petitioner was converted into equity without his knowledge, intimation or authorization, which is in total violation of provisions of the Companies Act, 2013. And these shares were alleged to have been to him without any intimation or authorization or consent letter/share application form. It is stated that the petitioner had not made any request to allot the said shares and the Company had illegally, and with malafide intention to defraud and to avoid payment of the money owed to the petitioner had allotted the impugned shares allotments.
- 8) It is alleged that impugned allotments were an afterthought, after the petitioner started demanding repayment of his money as evidenced by



the fact that the Company filed its statements/return of allotment (PAS 3) to the Registrar of Companies only on 3rd July, 2015 vide SRN S38474375 and S38474326, which was way beyond the stipulated time period of 30 days stated in Rule 12 of Companies (Prospectus and Allotment of Securities) Rules, 2014.

- 9) It is stated that as soon as the Petitioner came to know of this alleged allotments, he immediately filed a complaint with the Registrar of Companies (ROC) Hyderabad on 12th August, 2015 seeking Redressal of the grievance. The Company vide its letter dated 6th January, 2016 addressed to the Deputy Registrar of Companies had perfunctorily replied to the petitioner's complaint stating that the allotment has been done on 18th December, 2014 as per the provisions of the Companies Act, 2013

Section 62(1)(a)(i) of the Companies Act, 2013 reads as follows:-

“The offer shall be made by notice specifying the number of shares offered and limiting a time not less than fifteen days and not exceeding thirty days from the offer within which the offer, if not accepted, shall be deemed to have been declined”.

It is stated that the Company had neither made any offer dated 18th December, 2014 nor had issued any notice to that effect to the petitioner or any of the shareholders of the company. The respondent company had also not filed any postal acknowledgments along with the reply to substantiate the purported letter of offer dated 18th December, 2014 being made.



Section 62 (2) of the Companies Act, 2013 clearly mandates that the notice referred under Section 62(1)(a)(i) shall be dispatched through registered post or speed post or through electronic post to all the existing shareholders at least before the opening of the issue.

The Company had also failed to file the necessary proof along with the reply filed with the Registrar of Companies. This clearly shows that the purported letter of offer dated 18th December, 2014 itself is an afterthought, which was created after the petitioner issued legal notices dated 10.06.2015 and 18.06.2015 to the Company demanding payment of Rs. 1,54,00,000/- (Rupees One crore and Fifty Four Lakhs only) which was given to the company as a loan exclusively to honor the Compromise (One Time Settlement) entered into with State Bank of India, SAM branch since the Petitioner was also a Personal Guarantor to the above said loan.



- 10) It is stated that Section 62 of the Companies Act, 2013 mandates acceptance to the purported Letter of Offer made by the Company. It is asserted that the petitioner has not given such acceptance and the Company has also failed to file any such proof of acceptance by the petitioner in its reply filed with the ROC.
- 11) It is stated that the petitioner transferred money to the Operating Account of the Company, and not to any special account opened for receiving the amounts relating to purported Rights Issue. Therefore, the contention of the Company that the petitioner transferred the money for the purported rights issue is totally baseless. It is alleged that

purported offer and the issuance of shares were done by the Company only to change the loan given by the petitioner to the Company as shares, so as to deny the petitioner his legitimate right to claim back the monies as advanced by him.

3. The Company petition is opposed by Respondent No.1 by filing a counter dated 10th August, 2017 through Mrs. KVV.L.Kumari, Director of the Company. The following are their main contentions:

- 1) The present Company Petition is not maintainable either in law or on facts, for the reason that the Petitioner herein being one of the Promoters and initial Directors and Subscribers to the Memorandum of Articles of Association of the Company cannot snub the other Co-Shareholders and Directors on the Board by filing frivolous and fictitious Petitions, which act amounts to abuse of Process of Law.
- 2) It is stated that the petitioner has not brought out circumstances under which he has lent a sum of Rs.1.54 Crores to the Company. The petitioner has not produced any Loan Agreement or obtained any Documentary Evidence including that of the Promissory Notes from Company to establish that impugned transaction is a Loan Transaction. And the allegations made by Petitioner are very vague and not supported with any cogent reasons.
- 3) It is contented that the petition is filed in month of December, 2016, that is nearly 1 ½ years from the date of allotment i.e. December, 2014. So Petition lacks bonafides, and thus it is liable to be rejected at the threshold without going into merits of the case and the Petitioner in abusing the process of Law.



4) It is stated that the Company is engaged in the Business of Establishment of Schools and Colleges at various Places in the State of Andhra Pradesh with its Registered Office at Vijayawada. In pursuit of its Business, the Company is running School and thereby imparting Quality Education to the Students. The Business of the Company cannot be equated with that of the Commercial Business being run by the other Companies. It is carrying on the Business, with a sole object to uplift the Society and thereby to contribute its share to achieve the Mission of Cent Percent Literacy and as such, the present Petition needs to be adjudicated keeping in view the cascading effect on the Company and its Student running in large number.



5) It is stated that in the Course of Business of the Company and also in order to impart quality Education to its Students and to develop necessary Infrastructure Facilities in the School, it has approached the State Bank of India, IFB Branch, Raj Bhavan Road, and Hyderabad for availing the Term Loan to the tune of Rs.10.00 Crores. And in terms of the Term Loan Sanction letter, the Promoters are under obligation to provide necessary Personal Guarantees and to provide Securities in the form of Immovable Properties towards Security for Repayment of Term Loan. Accordingly, the Petitioner had offered his Personal Properties held through one of his Companies namely M/s Annapurna Gardens Pvt Limited, Hyderabad viz., (1) Land Admeasuring 390 ' Sq.Yards situated in D.No.121, 122 of Ward No.13, Behind SBI, Sri VenkateswaraSwamy Temple Street, Gudur, Nellore

District (2) 50% Share in a Land Admeasuring 700 Sq.Yards situated in 48/1, 2, 3, 8P, 9, 10P, 11P, 49 and 125/5, 6, 7 of Gantlam Village, Denkada Mandal, Vizianagaram District (3) 50% Share in and another Land Admeasuring Ac.2.00 situated in Sy.No.807/5 & 806 of Valloure Village, Pedapadu Mandal, West Godavari District and (4) 25% Share in another Land Admeasuring AC.1.20 Cents situated in Sy.No.806 of Valluru Village, Pedapadu Mandal, West Godavari District. (for short “**Properties Offered as Security by the Petitioner**”)towards Security for Repayment of Loan in favor of SBI.



- 6) It is further submitted that due to Continuous and unabated Agitation against the Bifurcation of the State of Andhra Pradesh from the Year 2010 onwards, the Admissions into School being run by the Company has come down drastically, and such situation had continued for more than 4 Years. Most of the Students coming from Neighboring States have migrated to some other States due to continuous Agitation and as such, the Company was not able to pay the Installments in time resulting in Loan taken by the First Respondent Company declared Non-Performing Asset by Lending Bank besides taking necessary Steps to initiate Legal Proceedings in terms of SARFAESI Act. The Lending Bank has also filed an Original Application before the Debt Recovery Tribunal at Hyderabad, in which, the Petitioner is also one of the Respondents therein. In order to save the Educational Institution and also to avoid distress Sale of Immovable Properties offered as Security for repayment of Bank Loan by all the Promoters in respect of their

respective Properties, as aforesaid, the Promoters of the First Respondent Company have decided to Compromise with the Lending Bank resulting in Bank agreeing to settle the Loan Account under the Scheme of One Time Settlement (OTS) at Rs.5.50 Crores payable in 4 Installments by the First Respondent Company herein.

- 7) It is further submitted that the Board of Directors of the Company in its meeting held on 18th December, 2014 has decided to make equity call to all the Existing Shareholders for Subscription of shares on Right Issue basis to meet the Funds requirement of OTS payable to the Bank with a view to save the Educational Institution being developed by the Company and to get rid of the Loan and offered 85,00,000 equity shares at nominal value of Rs.10 each at par on proportionate basis.
- 8) It is stated all the Promoters of the Company including the Petitioner herein have brought their respective Amounts to save the Educational Institution being run by the Company and in that process, the Petitioner herein in order to save his Immovable Properties worth Crores of Rupees agreed to bring in the necessary Funds enabling the Company to pay the Bank dues. In the process, several deliberations and discussions held among the existing Shareholders of the Company wherein, it was categorically agreed that each of the Promoter shall bring in their proportion of the amounts into the Company and in consideration thereto, the Company shall Issue further Share Capital to the existing Shareholders in terms of Section 62 of the Companies Act, 2013.



In the light of above understanding, the Petitioner had invested a sum of Rs.1.54 Crores in the Company. Other Shareholders of the Company have also brought their respective amounts into the Company. Accordingly, the Company paid the entire amount towards repayment of Loan to the Lending Bank. It is stated that since the existing Shareholders have agreed for Issuance of Additional Share Capital, the procedure prescribed for Issuance of Additional Share Capital does not arise.

- 9) It is stated that the Shareholding Pattern of the Company before Issuance of Additional Share Capital as on 18th April, 2014 is as under:

SHARE HOLDING DETAILS AS ON 30.06.2009

Sl. No.	NAME	CATEGORY	NO. OF SHARES	SHARE HOLDING %
1	Mr.LVNMuralidhar	Director & Subscriber	80845	9.51%
2	Mr.B.V.Babu	Subscriber	5000	0.59%
3	Mr.K.Seethayya	Director	324888	38.23%
4	Mr.K.Srinivas	Director	86650	10.20%
5	Mr.M.Arun Kumar	Director relative	94930	11.17%
6	Mrs.K.V.Vijya Lakshmi Kumari	Director relative	7000	0.82%
7	Mr.Vivek Surya Krishna Ponnada	Director relative	25220	2.97%
8	Mrs.ODurgaDhana Lakshmi &Mr.O.Veerabhadra Prasad	Director relative	35295	4.15%
9	Annapurnna Capitals Pvt Ltd	Corporate	17615	2.07%
10	Annapurnna	Corporate	11115	1.31%



	Gardens Pvt Ltd			
11	Ganapathi Stocks Pvt Ltd	Corporate	5000	0.59%
12	Vestal Schools Pvt Ltd	Corporate	156307	18.39%
	TOTAL		849865	100%

So the Petitioner held 9.51% Share in the Company at the time of availing of Bank Loan, and as such he cannot claim to be Outsider

- 10) It is stated that in accordance with the Provisions of Section 62 and any other applicable provision(s), if any, of the Companies Act, 2013 (including any amendment thereto or re-enactment thereof), read with the Companies (Share Capital and Debenture) Rues, 2014, the Board of directors in its Meeting held on 24th January, 2015 issued and allotted 46,69,222 Equity Shares of Face Value of Rs.10/- each at par, on proportionate basis against total amount received from the Shareholders including the Petitioner , who has subscribed the Right Issue and remitted Share Application/Subscription Money in the Bank account of the Company through RTGS pursuant to offer Letter dated 18th December, 2014.
- 11) *It is stated that unsubscribed portion of right issue was again subscribed by some of the willing Shareholders including the Petitioner and remitted the Share Application money in the Bank Account of the Company through RTGS.* The Board of Directors of the Company in its Meeting held on 31st March, 2015 Issued and allotted 37,56,011 Equity Shares of Rs.10/- each at par in accordance with the provisions of Section 62(3) and any other applicable provision(s), if any, of the



Companies Act, 2013 (including any amendment thereto or re-enactment thereof), read with the Companies (Share Capital, and Debenture) Rules, 2014.

- 12) It is stated that Post allotment of Shares on 24th January, 2015 and also on 31st March, 2015, the Shareholding of each of the Shareholders of the Company including the Petitioner herein is as under:

Sl. No.	Name Of The Shareholders	Category	Share Holding % before Right Issue & Allotment	Shareholding (%) Post Allotment
1	K.V.Vijya Lakshmi Kumari	Director	0.14%	6.19%
2	K.Seethayya	Director's Relative	6.60%	16.43%
3	M.Arun Kumar	Director's Relative	1.93%	0.71%
4	Vestal Schools Pvt Ltd	Holding Co.	84.40%	60.62%
5	Annapurna Capitals Pvt Ltd	Corporate	0.36%	0.29%
6	Annapurna Gardens Pvt Ltd	Corporate	0.23%	0.08%
7	Ganpathi Stocks Pvt Ltd	Corporate	0.10%	0.04%
8	L.V.N.Murlidhar	Others	1.64%	12.14%
9	K.Srinivas	Others	2.16%	0.80%
10	O.DurgaDhana Lakshmi &O.Veerabhadra Prasad	Others	0.72%	0.26%
11	Vivek Surya Krishna Ponnada	Others	0.51%	0.19%
12	B.V.Babu	Others	0.10%	0.04%



13	M Vani	Others	0.41%	0.15%
14	Sandeep Daga	Others	0.27%	0.10%
15	Satish Purnanam	Others	0.44%	0.16%
16	K.V.V.Subba Rao	Director	0.00%	1.80%
	TOTAL		100%	100%

- 13) It is stated that shareholding percentage of the Complainant has been increased from 1.64% to 12.14%, and is more than to the 9.51% held by him as on 30th June, 2009 at the Time of availing the Term Loan for the Project.
- 14) It is stated that Board of Directors of the Company, in pursuant to the applicable provisions of Companies Act 2013, has offered, issued and allotted the Shares to its willing/existing Shareholders and has issued the necessary Share Certificates to all eligible Shareholders including the Petitioner herein in compliance with the Provisions of the Companies Act 2013 and necessary entries have been made in the Register of Members of the Company.
- 15) It is stated that Company, due to inadvertence, could not file the Return of Allotment in specified form PAS-3 in respect of 46,69,222 and 37,56,011 Equity Shares within time before the Registrar of Companies, Andhra Pradesh. However, the same was filed with the ROC on 3rd June, 2015 with Additional Fees and thus, the Company has complied with all applicable Provisions of the Companies Act. It is asserted that Equity Shares have been offered, Issued, and allotted to the willing Shareholders, after due compliance with the Applicable Provisions of the Companies Act 2013, and there is no default committed by the Company



regarding the allotment of Equity Shares to all the Existing Shareholders including the Petitioner herein.

16) Therefore, it is summed up that the amount in question paid by the petitioner cannot be treated as Debt as several disputed Questions of facts involved in the present Company Petition. The Petitioner is also holding Shares through his Companies namely (a) M/s Annapurna Gardens Pvt Limited (b) M/s Lastaki Management Consultants Pvt Limited who have filed winding up Petitions, under Section 433 and 434 of the Companies Act, vide C.P.No.237 of 2015 and C.P.No.239 of 2015, respectively before the Hon'ble High Court, and those are pending disposal even without admitting them, before the Court. And the Company is contesting those petitions.

17) So far as issuance of Mandatory Notice, as required under Section 62 (2) of the Companies Act, 2013, is concerned, it is stated that in view collective decision taken at the meeting of the Board of Directors of Company and the Petitioner has voluntarily remitted the amounts in question, there is no need to obtain specific consent from the Petitioner herein. It is an intention to snub the other Directors/Promoters of the First Respondent Company by abusing the Provisions of the Companies Act.

4. The Petitioner has filed rejoinder dated 14th September, 2017 to the above counter affidavit filed on behalf of the first respondent, by inter alia contending as follows:



- 1) It is stated that the amount lent by the petitioner was always meant to be a loan. The desperation of all the guarantors (including the Petitioner) can be seen from the fact that as and when the amounts were transferred by all the guarantors to the operating Bank Account of Vestal Educational Services Private Limited, they were immediately used for payment of the One Time Settlement amount with the State Bank of India. The usage of money in this manner is illegal and contrary to the provisions of the Companies Act, 2013, assuming but not admitting that Petitioner had given this money of Rs. 1,54,00,000/- towards subscription of shares.
- 2) It is denied that the petition is barred by limitation. As soon as the Petitioner came to know of the alleged impugned allotment, he immediately filed a complaint with the Registrar of Companies (ROC) Hyderabad on 12th August, 2015 seeking redressal of his grievance, and also approached this Tribunal which is competent judicial forum to adjudicate the issue as per Companies Act, 2013.
- 3) It is stated that after the first allotment, the petitioner's shareholding was 9.5% only, and he was never in a position to control the affairs of the Company. It was always the intention of the petitioner and the Company that the money being brought into the Company be treated as a loan. It is vehemently denied that the petitioner ever consented to the subscription of further issue of shares. There was never any offer nor any acceptance of further issue of shares as alleged by the respondent. In fact, the petitioner did not have



any knowledge of this illegal allotment of shares till July, 2015 i.e., till such time he received the revised shareholding pattern from Mr. Dheeraj K Asri, Director of the Respondent Company.

- 4) It is stated loan amount of Rs 1,54,00,000 (One Crore Fifty Four lakhs only) was raised by the petitioner, partly, by selling the Collateral Securities (after obtaining permission from the State Bank of India and partly by raising loans from friends and relatives. Once the petitioner has resigned as Director of the Company ie in October, 2011, he has just remained as a mere shareholder, and is not liable or responsible for any actions of the Company post his resignation. And the Petitioner owned only 9.5% after first dilution to the existing management, which got further diluted and now only owns 1.54% of the Company.
- 5) It is stated that as per Section 62(1)(a)(i) of the Companies Act, 2013, *“the offer shall be made by notice specifying the number of shares offered and limiting a time not less than fifteen days and not exceeding thirty days from the offer within which the offer, if not accepted, shall be deemed to have been declined”*. In the instant case, the Company herein had neither made any offer dated 18.12.2014 nor had issued any notice to that effect to the Petitioner or the shareholders of the Company. The Company had not filed any postal acknowledgments along with the reply to substantiate the purported letter of offer dated 18.12.2014 being made.
- 6) The Companies Act, 2013 clearly mandates that the notice referred under Section 62(1)(a)(i) shall be dispatched through registered post or speed post



or through electronic post to all the existing shareholders at least three days before the opening of the issue. The company had failed to file necessary proof along with the reply filed, as the purported letter of offer dated 18.12.2014 itself is an afterthought, which was created after the petitioner issued legal notices dated 10.06.2015 and 18.06.2015 to the Company demanding payment of Rs. 1,54,00,000/- which was given to the company as a loan.



Assuming without admitting, that there was a letter of offer dated 18.12.2014 by the Company, Section 62 of the Companies Act, 2013 mandates the acceptance to the purported letter of offer made by the company. The Company had failed to file any such proof of acceptance by the petitioner along with the reply filed herein. It is alleged that so called offer and issuance of shares were done by the Company in order to convert the loan amount into Company as shares illegally so as to defraud the petitioner of his legitimate amounts deposited by him into the account of the Company. The crux of the said Section of Companies Act, 2013 necessitates the Respondents to file/ explain the following:

- (i) Share Application Form of the Complainant;
- (ii) Letter of acceptance / renunciation / decline received from the applicants;
- (iii) Specific amounts as per the letter of offer were deposited by the shareholders of the company into the account of the company within the period of issue opening date and issue closing date.

- 7) It is stated that Company has failed to answer nor do they have any answer to the following questions, which arise in the present set of circumstances
- a. Whether there was a Letter of Offer issued to all the Shareholders of the Company.
 - b. Whether there was compliance of Section 62(2) of the Companies Act, 2013 by the Company which mandates that the notice referred under Section 62 (1) (a) (i) shall be dispatched through registered post or speed post or through electronic post to all the existing shareholders.
 - c. Whether there was a Share Application Form attached to the Letter of Offer.
 - d. Whether there were the share applications forms which were signed by the shareholders received by the Company and to what extent that the shareholders had applied for the shares.
 - e. Whether there are consent letters issued by the interested shareholders of the Company for the allotment.
 - f. Whether the specific amounts as per the letter of offer were deposited by the shareholders of the Company into the account of the company within period of issue opening date and issue closing date.
 - g. Whether there were any excess amounts being deposited by the shareholders of the Company and if there are any, then, whether the company had refunded the same or not.



- h. Whether there are any Letters of Renunciation by the Shareholders of the Company.
- i. If some of the shareholders had sent the letter of renunciation to the Company, then whether there was another Letter of Offer sent to the Remaining shareholders (by Registered Post, Speed Post or Electronics Post) who are interested for allotment of shares by the company.
- j. Whether there is a compliance of all the Provisions of the Companies Act, 2013 for the allotment by the Company

Admittedly, the Company neither explained/produced any evidence in support of above contentions nor have they produced any documents to substantiate their claim that the amount lent by the petitioner was for the “alleged” rights allotment share. It is therefore crystal clear that the Allotment of shares to the petitioner was done with the sole objective to defraud the Petitioner of his legitimate right to recover Rs.1,54,00,000/- from the Respondents.

- 8) The petitioner’s share is being consistently diluted and he currently holds only 1.54% in the Company. There was never an intention of the Petitioner to increase his shareholding in the Respondent’s Company and hence, there was no logical reason for him to increase his shareholding by subscribing to the rights issue as falsely claimed by the respondents. In fact, after 2009, there was no money invested by the Petitioner in the Respondent Company.



- 9) It is stated that the purported rights issue was an afterthought of the Company in order to evade repaying the petitioner. It is further evidenced by the fact that the Company filed its statements/return of allotment (PAS 3) to the Registrar of Companies only on 3rd July, 2015 vide SRN S38474375 and S38474326, which was way beyond the stipulated time period of 30 days stated in Rule 12 of Companies (Prospectus and Allotment of Securities) Rules, 2014. The Respondents have not offered any plausible explanation for this inordinate delay in filing the PAS-3. This clearly shows that entire documentation was created backdated to dupe the Petitioner of his legitimate right to claim the loan in question given to the Respondent Company.
- 10) It is further stated that there is a significant difference in the "*Extracts of the Minutes of Board Meeting*" filed by the Respondents in response to the petitioner's complaint to the ROC. "*In the Extracts of the Minutes of the Board Meeting*" filed with the ICSI, it was stated that the Respondent No.2 & Respondent No.3 did not participate in the quorum as they were not interested in the resolution. In their hastiness to manufacture documents and to cover up the issue, the respondents failed to realize that at the time of alleged allotment, only Respondent No.2 & Respondent No.3 were the only directors of the Company. There is no resolution for further issue of shares as it could not have been passed without their presence and authorization. Having realized their blunder, the respondents tried to cover up by



creating a back dated resolution (28.10.2014) appointing Respondent No.4 & Respondent No.5 as Additional Directors. As per the Articles of Association of the Company, it is only the Directors, who have the authorization to issue shares.

- 11) It is stated that the High Court is presently hearing winding up petitions related to the Respondent Company. It is strongly denied the allegation that the Hon'ble High Court came to a conclusion that no debt exists in those cases. It is unfathomable as to how the Respondents could make this type of wild statements. It is also submitted that this Case has no relevance to the one pending before the Hon'ble High Court. In their desperation to cover their tracks, the Respondents are mixing up many unrelated issues and presenting before the Hon'ble Tribunal to cover up their glaring errors and illegal allotments.
- 12) It is further stated that there can never be a waiver of statutory notice. Section 62 mandates "*the offer shall be made by notice specifying the number of shares offered and limiting a time not less than fifteen days and not exceeding thirty days from the offer within which the offer, if not accepted, shall be deemed to have been declined*". It is submitted that the petitioner had no knowledge of the issue of shares and hence there is no question of consent for issue of such shares illegally. The Petitioner never consented to such waiver and even otherwise such a mandatory requirement can never be waived.

5. Heard Mr. Deepak Bhattacharjee, Senior Advocate with Mr Vimal Vasi Reddy Advocates for the petitioner; Mr. K.V. Siva Prasad, Advocate for the Respondent No. 1, Mr.



S. Chakrapani, Advocate For the Respondent No.2; Mr. Mahesh Chamorthy, Advocate for Respondent No.3 :Mr. G.V. Gangadhar, Advocate For the Respondent No.4 Mr. P. Venkata Ravi Shankar, Advocate for the Respondent No.5. We have carefully examined all the pleadings of both the parties along with extant provisions of Companies Act, 1956/2013.

6. The case is listed for hearing on various dates for hearing viz: 10.02.2017, 03.03.2017, 22.03.2017, 10.04.2017, 27.04.2017, 11.05.2017, 06.06.2017, 20.06.2017, 30.06.2017, 02.08.2017, 14.08.2017, 01.09.2017, 18.09.2017, 26.10.2017, 14.11.2017, 30.11.2017, 20.12.2017. The case has been adjourned on the above dates at the request of the parties for one reason or the other either for the completion of the pleadings or for final hearing.
7. Mr. Deepak Bhattacharjee, Senior Advocate with Mr Vimal Vasi Reddy Advocates for the petitioner, while reiterating various averments/contentions made in the Company petition and rejoinder as briefly stated supra, has further submitted that it is not the case of respondents that the Company has not received the money in question from the petitioner but it is their case that the money is received for purpose of equity in the Company. Admittedly, the Company has not produced any piece of evidence to show that the money in question was received for allotment of shares except saying that the petitioner failed to get any agreement for loan/provisionary note etc in return. He has further submitted that the Company is bound by its Memo and Articles of Association, however, subject to extant provisions of Companies Act, 1956/2013. It cannot act and plead contrary to those provisions and the affairs of



Company should be conducted in accordance with law without any deviation. And there is a prescribed procedure under law for the Companies as to how to accept deposits/increase share capital/offer rights issue/powers of Board/conducting of meetings etc. When the Company did not dispute the receipt of money in question, it cannot justify it later without producing any piece of evidence. Admittedly, the petitioner is not associated with affairs of Company since October, 2011, when he has resigned as Director and continued as normal share holder.

He has relied upon the judgment of this Bench passed in C.P.No.20/75/HDB/2016 dated 7th July, 2017 in the case of Sri.Chavali Gayathri Praveen & Others Vs Sri.Lakshmi Prasanna Agro Industries Limited &Ors, which is also upheld by Hon'ble NCLAT in Company Appeal No.289 of 2017. He has submitted that facts and circumstances in that case are more or less similar in the present case, to the extent that monies deposited in the respective Companies are not in dispute and the Companies involved have tried to allot shares to depositors contrary to law, against their wishes.

8. Mr. K.V. Siva Prasad, Advocate for the Respondent No. 1, while reiterating various averments made in the reply, as briefly stated supra, has further inter-alia contended (which are also placed by way of written arguments dated 21.12.2017) as follows:

- 1) The Petitioner is one of the Shareholders of the Company and also continued as Director from December, 2009 to November, 2011. The Petitioner also stood as Guarantor for the repayment of loan taken from State Bank of India, besides offering his



various Personal Properties as Security in favor of the Lending Bank.

- 2) When the Company committed default in repayment of Loan in question, the Bank has initiated Legal Action to recover the Loan and at that point of time, the Petitioner herein has Lent a sum of Rs.1,54,00,000/- (Rupees One Crore Fifty Four Lakhs Only) to the Company between 23rd December, 2014 to 31st March, 2015. That, the Company instead of returning the said amounts, has allotted the impugned shares.
- 3) The Board of Directors of the Company in its meeting held on 18th December, 2014 decided to make equity call to all the Existing Shareholders for Subscription of shares on Right Issue basis to meet the Funds requirement of OTS payable to the Bank with a view to save the Educational Institution. Accordingly offered 85, 00,000 Equity Shares of Nominal Value of Rs.10/- each at par on Proportionate basis. In furtherance of the above decision, the Company has issued Offer Letters to all the Shareholders including the Petitioner herein, and the Petitioner herein is very much in receipt of the Offer Letter and out of all the Shareholders, some of the Shareholders namely (1) Sri.K.V.Vijya Lakshmi Kumari (2) Sri.K.Seethaiah and (3) Sri.K.V.V.Subba Rao have accepted the Offer, while another Shareholder namely M/s Vestal Schools Pvt Limited, Hyderabad have declined the Offer. **The Petitioner being in Receipt of the Offer Letter has given his Consent over the Phone and as such, the First Respondent Company has proceeded with the Allotment of Shares on the**



basis of Acceptance confirmed by the Petitioner herein, over the Phone.

- 4) It is stated that even in the Correspondence made to the Bank, it was specifically made a request to the Bank to the effect to Release the Properties of the Petitioner deposited with the Bank for Repayment of Loan and as such, the contention of the Petitioner that the amounts were lent to the Respondent Company is totally unsustainable. It is averred that Sale of Mortgaged Properties and Deposit of Sale Proceeds into the Bank is the express Understanding among the Promoters of the Company and on that understanding only, the Petitioner had invested the Sale Proceeds in all a sum of Rs.1.54 Crores in First Respondent Company. Further, the First Respondent Company is running in a Democratic Manner and any different treatment among the Promoters would cause serious impact on the very functioning of the First Respondent Company and as such, viewing from any angle, the stand taken by the Petitioner that (a) Amount Deposited in the First Respondent Company was towards Loan and (b) There has been a violation of Section 62 (2) of the Companies Act, is unsustainable and untenable and accordingly, the Present Company Petition is liable to be dismissed.
- 5) It is stated that shareholding percentage of the petitioner is increased from 1.64% to 12.14%, and is more than to the 9.51% held by him as on 30th June, 2009 at the time of availing the Term Loan for the Project. Due to inadvertence, the Company could not file the Return of Allotment in specified form PAS-3 in respect of 46,69,222 and 37,56,011 Equity



Shares within time before the Registrar of Companies, Andhra Pradesh. However the same was filed with the ROC on 3rd June, 2015 with Additional Fees and thus, the First Respondent Company has complied with all applicable Provisions of the Companies Act.

6) It is well settled position of law that mere violation of Mandatory Provisions does not render transaction Void, where there are provisions for Curative Measures under the Act.

7) It is stated that the Order passed by this Bench in C.P.No.20/75/HDB/2016 dated 7th July, 2017 in the case of Sri.Chavali Gayathri Praveen & Others Vs Sri.Lakshmi Prasanna Agro Industries Limited & Ors, which is upheld by Hon'ble NCLAT in Company Appeal No.289 of 2017 has no application to the facts of the present Case and are distinguishable on facts.

In that case, the Petitioners have made a Deposit of Rs.8.40 Lakhs with an understanding to get return of 13% Interest Per annum and the Company involved in the above said Case has specifically issued the Receipt treating it as Deposit and as such, there is a Documentary Evidence available with the Petitioners therein and the same is missing in the Present Case. Moreover, the Petitioners in the above said Case are outsiders, they are neither existing Directors nor Shareholders, but in the present case, the Petitioner is an Initial Director and Subscriber to Memorandum & Articles of Association of the First Respondent Company and further, the Petitioner either Directly or indirectly





holding 25% Share in the Respondent Company and as such, the ratio laid down in the above said Case has no Application to the facts of the Present Case and distinguishable on facts. In the cited case, the Company has extended the Deposits from time to time and later allotted the Shares and it has also specifically issued Deposit Receipts mentioning that it would pay Interest at 13% per annum. But in the Present Case, the Company has never acknowledged the Receipt of amount as Loan. Had the statement of the Petitioner to the effect that the amounts remitted in the form of Loan, he should have made a correspondence with the Company demanding the execution of Loan Agreement or the Payment of Interest. Mere assertion by the Petitioner that the Amounts remitted are Loan cannot be sustained in the absence of the Documentary Evidence.

- 8) It is further stated that even if Company has committed non-Compliance of the Provisions of the Section 62 (2) of the Companies Act, the same would not give any unfettered Right to the Petitioner to seek Cancellation of Allotment and consequent Rectification of Members Register. And for such violation, the concerned Authorities are entitled to levy Penalties at Rs.1, 000/- per day, till the time, default continues. It is asserted that nowhere in the Act, provides for Cancellation of allotment on account of Non-Compliance with the Provisions of Section 62 (2) of the Companies Act.
- 9) In the above circumstances, the learned counsel urged the Tribunal to dismiss the petition.
9. After perusing the pleadings of both the parties, the following issues arise for consideration by the Tribunal:



- (a) Whether the Company petition is maintainable under section 59 & 62 of the Companies Act 2013;
 - (b) Whether money Rs 1, 54, 000,00/-Paid by the Petitioner is towards the share Application money or as a loan;
 - (c) Whether the impugned shares are issued in accordance with law or not :
 - (d) If so, what is the relief, the petitioner is entitled for.
10. Before advertng to the above issues, the un-disputed facts are stated below:
- 1) The Company was incorporated under the Provisions of the Companies Act 1956 on 1st December 2006. As per Article 35 of the Articles of the Association of the Company, the First Directors are Mr. LVN Muralidhar (Petitioner) and Mr. B.Venkateshwara Babu. As per Article 46, the Directors, may, from time to time at their discretion raise or borrow or secure the Payment of any sum or sums of Money for the purpose of the Company's business and may secure the payment or repayment of such money by mortgage or charged upon the whole or any part of the Assets or any part of the Company present and future including its uncalled and unpaid Capital or not so charged.
 - 2) The Company has taken a term Loan of Rs10 Cr. on 21.03.2009 from SBI, Secunderabad and this Loan consequently became an NPA, as the Company defaulted in paying installments as agreed upon. Finally a Compromise was entered with the Bank vide its letter dated: 5th August 2014 by settling the Loan due of Rs 7.25 cr. for Rs5.50 cr. In order to obey the one time settlement, the Directors of

the Company approached the Petitioner to lend an amount of Rs 1, 50, 00,000/- so as to enable the Company to repay the Bank as per the settlement. The Petitioner, being one of the shareholders of the Company has deposited the said amount from time to time to the Account no: 30225170247 of the Company with the SBI through RTGS during 23/12/2014 to 31/03/2015.

- 3) The Petitioner continued as Director of the Company from December, 2006 to October, 2011 and thereafter, he remained only a shareholder by holding 1.64 %. The Company has taken Loan from the SBI on 21/03/2009 and the Loan became NPA in the year 2013. By that time, the Petitioner ceased to be a Director and not in the management of Company.
- 4) There is a **Shareholders Agreement** dated 10th November, 2008 executed by and Between M/s Vestal Educational Service Pvt Ltd (R1 Company) and the Promoters including the petitioners here in. Clause 3 deals with Management of the Company, and it inter-alia states that business and affairs of the Company shall be managed by its Board. Clause 9 deals with termination of the agreement and 10.4 deals with mode of issue of Notices; Clause 11 deals with Arbitration to settle the issues arising out of the agreement.

11. As per Section 59 of the Companies Act 2013, any person aggrieved by having become or ceased to be a Member of can approach Tribunal for Rectification of Register. Since Petitioner is aggrieved by the action of Company in registering his name for the impugned shares, the present petition can be filed and it is maintainable.



Sec 62 of the Companies Act 2013 deals with further Issue of share Capital. There shall be notice of offer and its acceptance by concerned party and the Company has to follow procedure prescribed under the AOA or Companies Act. And it is bounden duty of the Company to maintain proper records for every transaction, and it cannot simply accept money and deal with it as it likes. As stated supra, the Company has not followed the prescribed procedure u/s 62 of the Companies Act 2013 for the issue of impugned allotment of shares. Therefore, the Company petition is also maintainable under this section too.

12. The Board of Directors of the Company is empowered to make calls to shareholders to pay unpaid share amount shares of Company, failing which, shares can be forfeited and they can be sold or cancelled by passing appropriate decision by Board of Directors. The Issue of calls on shares and forfeiture in the instant Company are dealt with under Article 11 to 14 of Articles of Association. As per these Articles, Directors are empowered to make calls upon the members in respect of all the monies unpaid on their shares, failing which, Directors can forfeit those shares through the Resolution of the Board to that effect, and those shares can either be sold or cancelled. The main issue in the instant case, as discussed supra, is not calling upon the shareholders to pay the unpaid share capital. As stated supra, it is the money in question paid by the Petitioner to the Company to re-pay loan to its Banker and its repayment to the petitioner. In fact, whether the Company has given proper notices or not, to petitioner about the impugned allotment of shares cannot be main issue and clubbing together both the issues are not proper. Even if it is



accepted issue of notice offering impugned shares, admittedly, the petitioner has not given any consent for the alleged offer, and this is ultimately accepted by Company also by saying that the petitioner has conveyed his acceptance over phone. In fact, the Company has not produced any evidence with regard to issue of notice offering shares, and its acceptance of impugned shares by the petitioners. The contention of Company on 'phone acceptance' is not tenable in the light of strong denial by the petitioner, and it is hereby rejected. It is to be held that there is no offer and acceptance for the issue of impugned shares.

13. The documents filed by the petitioner shows that the Petitioner, on coming to know about the impugned allotment of shares, had lodged an Investor Complaint, on 12th August 2015 with the Registrar of Companies, Hyderabad for taking appropriate action against the Company. In addition, the Petitioner has also lodged a Complaint dated 17th December 2015, U/S 21 of the Company Secretaries Act 1980 with the Institute of Company Secretaries of India against Mr.Vikas Chandra Sharma, who is a Company Secretary for the Company. Accordingly, the Complaint was investigated by the Disciplinary committee and found there was a prima facie case made out against him inter alia pointing out that Company Secretary, while Certifying PAS-3, had failed to Verify the Following Documents/Records
- (i) Share Application Form of the Complainant.
 - (ii) Letter of Acceptance/Renunciation/Decline Received from the Applicants
 - (iii) Specific Amounts as per the letter of Offer were deposited by the share holders of the Company into



the Account of the Company within period of Issue Opening date and Issue closing date.

Accordingly, the Director (Discipline) vide his order dated 1st December, 2016 passed in DC No. 338 of 2015, interalia was of prima-facie opinion that the Company Secretary is deemed to be guilty of professional misconduct for not exercising due diligence while certifying above PAS3. In pursuant to this order, the Disciplinary Committee vide its order dated 16th January, 2017 passed in ICSU/DC/338/2015 decided to proceed further in the matter in accordance provisions of Company Secretaries Act, 1980.



14. The above facts and Circumstances clearly shows/establishes that the petitioner has paid 1,50,00000/- to the Company and the Company has failed to return the money as agreed upon, and, on the contrary, it had tried to establish a counter case that the money in question was deposited with the Company for issue of impugned shares. As stated supra, the Company Secretary also failed to scrutiny the relevant documents while filing PAS-3. The Company cannot put the petitioner to test to prove that the money in question was given as loan, after having accepted it. As stated supra, it is the responsibility of Company to disprove that the money in question was not taken as loan by producing relevant evidence, as the receipt of money is not at all in question/dispute. Therefore, the impugned allotment of shares is liable to be declared as illegal and void.
15. We have examined the judgment of this Bench passed in C.P.No.20/75/HDB/2016 dated 7th July, 2017 in the case of Sri.Chavali Gayathri Praveen & Others Vs Sri.Lakshmi Prasanna Agro Industries Limited &Ors, which is upheld

by Hon'ble NCLAT in Company Appeal No.289 of 2017. A common issue in both the cases is that money in question was accepted by the respective Companies but allotted shares without consent of parties by contending that money deposited was for issue of shares of the Companies. In the instant case, the only difference is that the petitioner was a Director for some time and thereafter continues as ordinary shareholders. Admittedly, the petitioner is not continuing at the helm of affairs of the Company once he ceased to be Director. Moreover, as stated supra, taking deposits by the Company and issue of shares/increasing share capital are different issues to be dealt with separately under provisions of Companies Act, 2013. By no stretch of imagination, either in law or facts, the money deposited by the petitioner can be treated as share application money as contended by the Company. In addition, the Company Secretary also failed to take care while submitting PAS-3 as stated supra. Therefore, the ratio cited in the above case is squarely applicable to the facts and circumstances of present case. On this ground also, the impugned allotment of shares to the petitioners are liable to be set aside with a declaration that the Petitioner is entitled for return of the money of Rs.1,50,00,000/-along with Interest. The Company petition deserves to be allowed in the interest of justice and to protect small investors and unwilling shareholders cannot be forced to accept the shares contrary to law. And shares of a Company have to be offered after duly following prescribed procedure under Memo and Articles of Association of the Company and extant provisions of Companies Act, 2013. All contentions raised by the Company to treat the impugned remittance of money as share application are not at all tenable, in view of the reasons stated supra and thus they are hereby rejected.

16. It is also relevant to point out here that the Company is having properties and running its normal business. When the petitioner did not want to continue at the helm of affairs of Company by resigning as Director and reducing his



shareholding to nominal ratio, he cannot be forced to take shares of the Company, contrary to law, and deprive his money deposited with the Company as Loan. Since the above money was remitted on various dates between 23.12.2014 to 31.03.15, interest has to be calculated from 1st April 2015 till the date of actual repayment at @ 12 % per annum (pa)

17. In the result, the Company Petition bearing CP. No 8/59/HDB/2016 is allowed with the following directions:

- 1) The impugned allotment of shares made on 18th December 2014 and 31st March 2015 to the Petitioner are declared as null and void ;
- 2) Consequently, directed M/s Vestal Educational Services Pvt. Ltd (referred to as Company) to rectify its Register with regard to impugned allotment of shares;
- 3) Hereby declared that amount of Rs.1,50,00,000/- remitted by petitioner with the Company as loan to the Company, Consequently directed the Company repay Rs. 1,50,00,000/ with Interest @ 12 % P.a calculated from 1st April, 2015 till date of actual payment
- 4) No order as to costs.



प्रमाणित प्रति

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केस संख्या
CASE NUMBER...CP.No.8/59/HDB/2017
निर्णय का तारीख
DATE OF JUDGEMENT...1-1-2018
प्रति तैयार किया गया तारीख
COPY MADE READY ON...2-1-2018

By. Regr./Asst. Regr./Court Officer/
National Company Law Tribunal, Hyderabad Bench

Sd/-

RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

Sd/-

RAJESWARA RAO VITTANALA
MEMBER (JUDICIAL)