

BEFORE THE  
NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH, KOLKATA

CA No. 908/2015  
CA No. 1114/2015  
In CP No. 60/2015

CORAM

Ms. Manorama Kumari  
Hon'ble Member (J)

*In the matter of the Companies Act, 1956 : Sections 235, 397, 398, 399, 402, 406 and 407*

*In the matter of : Kalyan Chowdhury*

..... Petitioners

*Versus*

*M/s. Bengal Chemist and Druggist Association & Ors*

..... Respondents

Parties on Record :

Mr. Arup Krishna Das, Advocate  
Ms. Jasmine Sheikh, Advocate

|  
| For the Petitioners

Mr. Aniruddha Mitra, Advocate  
Mr. Aniruddha Mitra, Advocate  
Ms. Aiman Abdullah, Advocate

| For the Respondents No. 2 & 4  
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Dates of Hearing

: 31st August, 2016 & 8th September, 2016

Date of Order

: 29<sup>th</sup> September, 2016

**J U D G M E N T**

The instant case is filed by Shri Kalyan Chowdhury, being one of the members, having Membership No. BRD/2687 of M/s. Bengal Chemists and Druggists Association, 12, Bonfield Lane, 1<sup>st</sup> Floor, Kolkata – 700 001, on 31-12-2015 under Section 397 read with Section 44 of the Company Law Board Regulation alleging certain acts of mismanagement by the Respondent Association along with six others.

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M/s. Bengal Chemists and Druggists Association, 12, Bonfield Lane, 1<sup>st</sup> Floor, Kolkata – 700 001 was incorporated on the 11<sup>th</sup> July, 1921 under the Indian Companies Act, 1913 known as M/s. Calcutta Chemist and Druggist Association and subsequently the name of the Company has been changed as M/s. Bengal Chemists and Druggists Association vide Government of West Bengal Memo No. 932-Com. Dated 11.04.1950 and a fresh certificate of incorporation consequent of change of name was issued on 11-07-1950 having its Registered Office at 10, Bonfield Lane, Kolkata – 7000 001. The main object of the Company is to develop and maintain friendly relationship amongst its members and all persons engaged in the trade and industry.

The facts of the case is that the petitioners being a Members of M/s. Bengal Chemists and Druggists Association, hereinafter referred to as the Company has the right to caste his vote in formation of the Zonal Committee of the respective Zone i.e. Asansol Zone.

The Memorandum of Association and the Articles of Association of the Company categorically states the formation of different District, Area and the Zonal Committee as well as the procedure of election of the Office bearers of the said Committee. The main object of the Association in short is to develop and maintain friendly relations amongst its members and all persons engaged in trade and industry.

The composition of the present Executive Committee consists of the President, Secretary, Treasurer and the General Member and the total members of the Asansol Zone of the respondent Company, M/s. Bengal Chemists and Druggists Association is 527.

The petitioner has also enclosed a photo copy of the Membership list along with the Company Petition which is marked as letter Ä-3".

It is alleged that as per the provisions of the Memorandum of Association and the Articles of Association as amended upto 2005, which is annexed by the petitioner and marked as Ä-2", the Annual General Meeting of the

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Company is to be held every year but in the Asansol Zone, the last AGM being 27<sup>th</sup> AGM was held on 28<sup>th</sup> June, 2012 and a Notification to that effect has been issued to the members and thereafter, no such AGM was called on even after the expiry of the 27<sup>th</sup> AGM and as such the Association did default in holding its 28<sup>th</sup> AGM to be held in the year June, 2013.

To support his contention, the petitioner annexed photo copy of the Notification of the holding of last i.e. 27<sup>th</sup> AGM, last audited report, Annual Income and Expenditure account; collectively annexed as Annexure Ä-4".

One Notification was, thereafter, issued on 18<sup>th</sup> June, 2014 convening the 28<sup>th</sup> and 29<sup>th</sup> AGM indicating to be held on 10<sup>th</sup> July, 2014 with a request to the members to attend the meeting to transact the business mentioned in the Agenda of the said Notification. The photo copy of the said Notification is also enclosed as annexure Ä-5" showing venue of meeting as Vivekananda Institute ( Durand Cinema Hall), Asansol.

It is alleged that In terms of Clause 32(a) of the Articles of Association of the company, as mended up to 2005, categorically states that with the prior permission of the Registrar of companies the Annual general Meeting may be convened in such place where the members are willing to have it convened with prior invitation at least before 3 (three) months of AGM but in the instant case the said AGM has been convened just after 22 days of the Notification which is contrary to the Rules mentioned in the Articles of Association of the Company.

As per the petitioner, in the matter of convening the 28<sup>th</sup> and 29<sup>th</sup> AGM, no bye-laws of the Memorandum of Association and the Article of Association has been followed, specially nothing has been submitted regarding the accounts of the previous year and the Committee Report was not read out and furthermore, the respondents in collusion with each other and with the Convener, selected the Office Bearers without following the process of Voting or casting of vote through Ballot and as such constituted the Committee which is illegal and arbitrary and should be cancelled. The petitioner(s), thereafter, sent a representation through his/their Ld. Advocate, Mr. Asim Kumar Ghatak on 3<sup>rd</sup> August, 2014 addressing to the respondents not to act on the basis of resolution taken in the said AGM held on 10<sup>th</sup> July, 2014 as the same is illegal, void and liable to be cancelled.

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The photo copy of the Representation dated 03-08-2014 is annexed herewith and marked with the letter "A-6".

The petitioner further alleged that vide its Notice dated 20<sup>th</sup> May, 2014, the respondent No. 3, General Secretary of the Company communicated that due to organisational disorder in Asansol Zone, the Executive Committee in its meeting held on 18-04-2014 has dissolved the Asansol Zone and nominated one Shri Amitabha Roy as the Convenor of the Asansol Zone but no meeting of the Executive committee was held on 18-04-2014 as alleged by the petitioner and as such the appointment of Shri Amitava Roy, as the Convenor of the Asansol Zone is illegal and glaring example of arbitrariness and as such the notice of holding the AGM issued by Shri Amitava Roy dated 10-07-2014 is itself bad in law and the same has no legal validity in the eye of law.

The photocopy of the Notice dated 20-05-2014 is annexed herewith and marked with letter "A-7".

The petitioner further submitted that the one fifth of the total members of Asansol zone have authorised the petitioner to move the petition before the Company Law Board, Kolkata in connection with mismanagement and arbitrary act committed in the AGM held on 10-07-2014.

The authority letter dated 02-08-2014 and the list of members and their membership Nos. Who have authorised the petitioner are annexed herewith and collectively marked as "A-8" in the Company Petition.

The petitioner also averred that the matter was not previously filed before any Court/Arbitration and/or is pending before any other Court.

The petitioner prayed for :

- a) For declaring the purported AGM held on 10-07-02014 as void and ultra vires as the same has been called by not giving three months' prior Notice as laid down in Clause 32(a) of the Articles of Association ;
- b) To declare that the formation of the Committee and selection of Office bearers of the said Committee on 10-07-2014 is illegal, arbitrary and in operative as the same has not been done by casting Vote of the members present in the AGM held on 10-0-7-2014 rather the respondents in collusion with each other formed the Committee and

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- c) the Office bearers of the same which is illegal and arbitrary and liable to be cancelled ;
  - d) To direct the respondent Company to call for AGM afresh after giving 3(three) months prior Notice and to constitute the Committee and Office bearers of the said Committee by the vote of the members by Ballot papers ;
  - e) To declare that appointment of Convenor Sri Amitava Roy as illegal, invalid and inoperative as no meeting held on 18-04-2014 by the executive Committee and as such said Sri Amitava Roy has no locus standi to call for holding AGM which is required to be called for afresh in accordance with the provisions of the Articles of Association of the Company ;
- To give direction for holding the election for election of Office bearers of the Asansol Zone under the supervision of the Tribunal
- f) To pass any other relief or relieves and order or orders.

In response to the Company Petition, one mr. Subodh Kumar Ghosh being Respondent No. 4 and being the Executive Committee Member of Respondent No. 1 had filed the reply on 28-07-2015 denying all the allegations of the petitioner made in the petition.

The Respondent No. 4 as above submitted that the petitioner has no locus standi to file the said petition and Company petition is not maintainable in the eye of law. He also submitted that the cause of action as alleged in the said petition is barred by limitation.

He submitted that the members of the Company is associated with a particular Zone depending upon the area of his business. Election is held in each Zonal Committee to select its Office bearers. In terms of Clause 26(a) of the Articles, the Zonal Committee members in turn elect the concerned District Committee members. There are 7 Zones including the Asansol Zone under Burdwan District Committee.





He further submitted that the elected members of all the District Committee elect the State Executive Committee. But this election of the Executive Committee has to be ratified by all the members in the AGM. Voting takes place in the AGM of all the members, in the event the elected Executive Committee is not elected once again, a new Executive Committee is formed as voted and elected in the AGM. This is done in terms of clause 32(b) of the Articles. Notice of AGM is given to all the members/share holders of the company

It is also averred in the reply to the petition that the AGM of the Company is held once in every year as per Clause 23 of the Articles of Association at the Office of the company at 12, Bonfield Lane, 1<sup>st</sup> floor, Kolkata and at present, there are 79 elected members of the Executive Committee.

The District/Zonal Committees formed under clause 26(a) shall have tenure of 2 years. Election of the office bearers of the District and Zonal Committees takes place after every 2 years in terms of clause 26(c)(i), 26(d), 26(d)(i) of the Articles of Association. At the end of every year meeting takes place only for passing accounts.

He further averred that the meeting at the District or Zonal levels are not AGM of the Company.

The Respondents further averred that in terms of clause 26(d)(ii) of the Articles, all disputes out of Zone or District Committees must be referred to the State Association for adjudication. Moreover, in clause 56(a) there is an arbitration clause, which is binding on all the members and in terms thereof all disputes arising between a member and the association needs to be referred to arbitration.

The respondents further averred that the petitioner does not have the requisite share holding and/or support and as such Company Application under Sections 397 and 398 of the Companies Act, 1956 does not lie.

The respondents also have taken the ground of non-joinder and misjoinder of the parties and prayed for dismissal of the Company Petition.

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The Ld. Lawyer on behalf of the respondent argued that after the nomination of Shri Amitava Roy, as Convenor of the Asansol Zone vide Notice dated 20-05-2014 issued by Respondent No. 3, election of Budwan District Committee had taken place some times on 21-08-2014. The members of the Asansol Zonal Committee including other Zonal Committee had elected the Burdwan members of the Burdwan District Committee and on or about 20-09-2014, the election of the Executive Committee at the State level took place. The Committee members of all the Districts have elected the Executive members. The AGM took place on 20-09-2014.

It is also averred by the Respondents that the Memorandum of Association and the Articles of Association have altered and has been amended upto 2014, whereas the petitioner is relying on Memorandum of Association and the Articles of Association of 2005.

The respondents have also enclosed the copy of the Memorandum of Association and the Articles of Association as amended upto 2014 and annexed as letter A and submitted that the meetings of the above Committees as also the Annual General meeting held on 10<sup>th</sup> July, 2014 was in accordance with the law and the Agenda of the meeting along with the date of all the meetings were intimated to various members by way of Book post communications and at no point of time protest was raised by the petitioner.

Heard both side at length on CP No. 60/2015 as well as CA Nos. 908/2015 and No. 1114/ 2015 together ; as all the CAs. are connected with and are to be decided on the merit of the Company Petition.

The issues involved in the case is that (i) 28<sup>th</sup> and 29<sup>th</sup> AGM as was held on 10<sup>th</sup> July, 2014 is without notice to the members as laid down in clause 32(a) of Articles of Association of the Company and (ii) the election of the office bearers of the said committee was done without casting of votes of general members in the AGM held on 10-07-2014.

On perusal of the record, it appears that the petitioner has relied on Memorandum of Association and the Articles of Association as amended upto 2005 and (i) clause No. 32 speaks that a general meeting will be held once in every year at such time by giving at least 21 days' notice to its members and not being more than 15 months after holding of the preceding General Meeting and at such place as the Committee shall fix. Any other

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general meeting during a year will be called Extra ordinary General Meeting. (ii) Clause 32(a) speaks that with the prior permission of the Registrar of companies, an AGM may be convened at any such place where the members are willing to have it convened with a prior intimation at least before 3 months' from the date of holding the AGM.

Whereas the respondents relied upon the Memorandum of Association and the Articles of Association as amended upto 2014.

On bare perusal and comparison of both the Memorandum of Association and the Articles of Association, 2005 as also of 2014 contain and reflect almost the same objects and terms.

The Memorandum of Association and the Articles of Association, as amended upto 2005 vis-a-vis, 2014 at clause 26(d)(i) speaks that Zonal/District/ Area Committee will hold their General Meeting with specific Agenda of election apart from usual agenda at least every 2 years within month May and June for the Zonal Committee and in the month July-August for the District/Area Committee. Such Committees may hold the General Meeting at later date with necessary permission from the Executive Committee and clause 32 of the Articles of Association of 2005 vis-a-vis of 2014 speaks that General Meeting will be held once in every year at such time by giving at least 21 days' notice to its members(not being more than 15 months after holding of preceding General Meeting) and at such place as the Committee shall fix. Any other General Meeting held during the year will be called Extraordinary General Meeting and clause 32(a) of the Articles of Association speaks that with the prior permission of the Registrar of companies, AGM may be convened at such a place where the members are willing to have it convened with prior notice of at least 3 months to the members.

Admittedly, as per the respondent's reply, 28<sup>th</sup> and 29<sup>th</sup> AGM of the Association Company was held on 10<sup>th</sup> July, 2014 by issuing notification showing the venue of meeting as Vivekananda Institute(Durand Cinema Hall), Asansol, as such Clause No. 32(a) of the Articles of Association as amended upto 2005 vis-a-vis 2014 is attracted.

*Attn*



From the records it appears that the Memorandum of Association and the Articles of Association is amended upto 2014 but the petitioner being a Member of the Bengal Chemist and Druggist Association is not aware with regard to the amendment of 2014 and filed the Company Petition sometime in the year 2015 taking resort the Articles of Association and the Memorandum of Association as amended up to 2005.

Even after the lapse of one year, the petitioner has never come with any application for the amendment and even after receiving the reply by the respondent in the form of affidavit wherein the Memorandum of Association and the Articles of Association as amended up to 2014 is annexed and marked as Annexure "A", the petitioner was sitting idle.

It is an established principle that every alteration of the Memorandum of Association and the Articles of Association be filed with the Registrar of Companies. The Respondents have also failed to explain and/or file any documents to show when the resolution was/were taken to amend the Memorandum of Association and the Articles of Association, as amended upto 2014 with due notice to member(s).

On the other hand, it is also found that the respondents have failed to show/prove and /or annexed any copy of the Notices of AGM which are issued to the petitioner which is mandatory as per their own Articles of Association as amended up to 2014.

Further, if there was any Annual General Meeting as stated above, it is mandatory to maintain the minutes of the said meeting.

In terms of Section 193 of the Companies Act, 1956, every Company has to keep a record of every proceeding of its general meetings, meetings of the Board of Directors and every meeting of the Committee of Board. These records of proceedings are called "minutes" which are required to be prepared within 30 days of conclusion of every such meeting. Each page of minutes must be initialled or signed and last page of minutes must be signed and dated by the Chairman of the concerned meeting.

A duly maintained minutes is regarded as substantive piece of evidence and the resolution passed in the meeting concerned, would have legal sanctity which has not been followed by the respondent(s).

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I have gone through the allegations levelled in the Company Petition, reply filed by the respondents, rejoinder submitted by the petitioner, arguments advanced by both side.

Having perused the documents placed on record, it is observed that the petitioner is one of the members of the Company and is entitled to make an application on virtue of sub-Section (1) of Section 399, which speaks viz. " any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

It is admitted by the respondents that the petitioner is the member of Bengal Chemist and Druggists Association. As per Articles of Association of the Company, 2005 as enclosed by the petitioner with the petition, at Clause No. 32 " A General Meeting will be held once in every year at such time by giving at least 21 days Notice to its Members (not being more than Fifteen months after the holding of the preceding General Meeting) and at such place as the Committee shall fix. Any other General Meeting hold during a year will be called "Extra Ordinary General Meeting" , and Clause 32(b) requires 3 months' notice which is as per the own record of the respondent.

The Articles of Association, as amended upto 2014 contains inter alia, the same Clause No. 32 as that of 2005 irrespective of its being amended in 2014 which has been annexed by the respondent and relied upon in his reply.

Thus in both the Memorandum of Association and Articles of Association of the Company whether it is of 2005 and/or amended as of 2014 provision of issuance of notice has been made mandatory and is binding upon the Company and its members.

Considering the pleadings, the documents/arguments and the legal decision as applied to the facts and circumstances of the case, I find that the petitioner has not been able to controvert to the contentions of the respondents and in the instant case the respondent has failed to show any document and/or correspondence which will establish and prove that due notice of 3 months' has been served upon the petitioner in respect of holding of Annual General Meeting on 10<sup>th</sup> July, 2014 as per Clause 32(a) of the Articles of Association, consequent upon which Committee was formed and Office bearers have been elected without casting of votes by the members in Asansol Zone.

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It is pertinent to mention herein that if there is any amendment made in the Memorandum of Association and in the Articles of Association by the respondent(s), then there must be resolution and the amendment be informed/ communicated to the Registrar of Companies which has not been done by the Respondent(s).

The respondents has totally failed to prove that they have followed the due process of law in holding the Annual General Meeting as stipulated in the Memorandum of Association and in the Articles of Association and that notices of the meetings have duly been served upon the petitioner/s as per Clause No. 32(a) of Memorandum of Association and the Articles of Association of 2005 vis-a-vis 2014 and the Executive Committee members were elected by way of casting the votes by the ordinary members.

The preconditions of holding the AGM have not been fulfilled as the respondent has failed to produce the proof of service of notice of the AGM held on 10-07-2014 to the members, attendance sheet of the said AGM and the minutes of meeting thereof.

This itself shows that meeting held on 10<sup>th</sup> July, 2014 is not as per the Memorandum of Association and Articles of Association as of 2005 vis-a-vis of 2014 and all the office bearers of the Executive Committee had been unilaterally elected which is prejudicial and against the interest of the member(s).

Though there is provision of referring the disputes between the parties for Arbitration as per Clause 56 of the Articles of Association of the Company; both of 2005 vis-a-vis of 2014 as amended upto date , but since this Court is for imparting equity and justice, hence the petition is partially allowed.

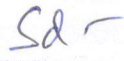
The respondent is hereby directed to convene the AGM afresh and form the Executive Committee following the due process of law as per the Memorandum of Association and the Articles of Association as amended upto date so as to regularise the Association and for the interest of its members including the petitioner, the list of which is annexed with the Company Petition as per Annexure - "A-3" as also to ensure that the petitioner and/or the members of the Company are not prejudiced.

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The CA No. 1114/2015 and the CA No. 908/2015 is also heard together with the CP No. 60/ 2015 as prayers are overlapping and those Company Applications stand disposed of with above observations.

No order as to cost.

  
MANORAMA KUMARI  
MEMBER(J)