679

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CORAM : Shri V. P. Singh, Hon'ble Member (J)

Company Petition No.49/2016

In the matter of :
The Companies Act, 1956 / Companies Act 2013
And
In the matter of :

Sections 235, 397,398,399,402,406 and 407 of the Companies Act 1956, and Sections 58 and 59 under the Companies Act, 2013
And
In the matter of :
Goldstar Enclave Private Ltd., a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 26, Strand Road, Kolkata – 700 001, presently at 8, Old China Bazar Street, 1st floor, Room no.101, Kolkata – 700 001
And
In the matter of

1. Devinder Singh Shant, Kolkata
2. Jasjit Pal, Kolkata
3. Neelu Singh, Kolkata, all three above working for gain at 26, Strand Road, Kolkata- 700 001;

....**Petitioners**

-Versus-

1. Goldstar Enclave Private Ltd., Kolkata
2. Deepak Kumar Daga, Kolkata
3. Kanak Mall Banthia,Kolkata
4. Randhir Kumar, Kolkata
5. Dipak Kumar Rathi, Kolkata
6. Aztec Conglomerate Private Limited, Kolkata
7. ACP Financial Consultants Private Ltd., Kolkata
8. Champalal Jaichandlal Private Ltd., Kolkata
9. Cornation Traders Private Ltd., Kolkata
10. Corus Steel Private Ltd., Kolkata
11. Diksha Suppliers Pvt. Ltd., Kolkata
12. Epoch Mercantile Private Ltd., Kolkata
13. Ghilomanuddin Saudagar, Kolkata
14. Goodview Vintrade Private Ltd., Kolkata
15. Janpack Suppliers Pvt. Ltd., Kolkata

16.Kushal Infotech Pvt. Ltd., Kol.
17.Lemongrass Dealtrade Pvt. Ltd., Kol.
18.Mahadev Tradecom Pvt. Ltd.,Kol.
19.Maharaja Vanijya Pvt. Ltd., Kolkata
20.Matribhumi Commodities Pvt. Ltd., Kol.
21.Maximum Financial Advisory Pvt. Ltd., Kol.
22.Minerva Textiles Pvt. Ltd., Kolkata
23.Ontime Merchandise Pvt. Ltd., Kolkata
24.Proper Dealcom Pvt. Ltd., Kol.
25.Ramdeo Business Pvt. Ltd., Kol.
26.Ranjeet Singh, New Delhi
27.Ridhi Sidhi Commotrade Pvt. Ltd., Kolkata
28.Shanti Dealers Pvt. Ltd., Howrah
29.Shree Tulsi Realty Pvt. Ltd.,Kolkata
30.Silverpoint Infratech Pvt. Ltd., Howrah
31.Solty Suppliers Pvt. Ltd.,Kolkata
32.Suryodya (India) Pvt. Ltd., Kolkata
33.Sunraj Comtrade Pvt. Ltd., Kolkata
34.Manav Sales Pvt. Ltd., Kolkata
35.Subham Cements Pvt. Ltd., Kolkata
36.Seabird Abasan Pvt. Ltd., Kolkata
37.Subdhan Merchants Pvt. Ltd., Kolkata
38.Chinmoy Ghatak, Kolkata
39.Derasary Kishan Kumar, Kolkata.

.... **Respondents**

Counsels on Record :

1. Mr. Jishnu Chowdhury, Advocate] For Petitioners
2. Ms. Swapna Choubey, Advocate]
3. Mr. Sristi Barman Roy, Advocate]
4. Mr. Siddhartha Sharma, Advocate]

1. Mr. Saunak Sengupta, Advocate]
2. Mr. S. Nigam, Advocate] For Respondent nos 3,33 and 38

Date of Pronouncing the Order : 12.07.2017

ORDER

The petitioners have filed C.P. 49/2016 complaining of several acts of oppression and mismanagement perpetrated by respondents in relation to affairs of Goldstar Enclave Pvt. Ltd.

Brief facts of the case are that Goldstar Enclave Private Ltd. (hereinafter referred to as the 'Company') was incorporated on 27th May, 2011. The Petitioners were promoters and original subscribers to the Memorandum and Articles of Association of the company and initially the Petitioners controlled 100% shareholding in the said Company. In the year 2011, the Petitioner No.1 considering the viable business opportunities in acquiring and promotion of the said cinema hall premises in the constructed areas invested in the Company, arranged for funds through companies and entities for the purpose of acquiring the said Globe premises.

Since the year 1990, Shri Meghraj Daga who was a Chartered Accountant and partner of a firm called S.M. Daga & Co., was very closely associated with the Petitioner. M. R. Daga was closely associated with Petitioner no.1 and was also Financial and Tax Consultant of the Petitioner in addition to being the statutory auditor of the Company since its inception, by virtue of which the Petitioners had reposed complete faith and trust in M.R. Daga in connection with all their financial matters. M.R. Daga firm was also statutory auditor of the company since the inception of the company. R2 is the son of late Shri M.R. Daga who is also a Chartered Accountant who also became close and trusted Advisor to the Petitioners in relation to all financial matters.

In order to acquire the Globe Cinema premises, the Petitioners and M.R. Daga agreed to participate in a joint venture and in order to acquire globe premises from its owners whereby Petitioners would acquire 50% of the premises in the name of the company Goldstar Enclave Private Ltd. and the balance 50% would be acquired in the name of Dhansri Abasan Private Ltd. (hereinafter referred to as Dhansri), which was a company owned and controlled by Daga family and the Jain family. The acquisition of Globe premises was made by a deed of conveyance dated 9th July, 2011 whereby the company at the time of acquisition of the said Globe premises, was owned and controlled by the Petitioners and Dhansri was owned and controlled by Daga and Jain family. Both the parties were equal partners in the said premises. At all material times, the

Petitioners held and controlled 100% shareholding in the Company and were also the only directors of the company. The Petitioner Company, Goldstar needed funds for which the Petitioners caused allotment of shares, wherein 9,66,600 equity shares of Rs.10/- each were allotted in favour of the Petitioners on 20th January, 2012. In addition to this allotment of 9,47,000 equity shares of Rs.10/- each at a premium of Rs.90/- per share to R6 to R32 on 31st January, 2012. Pursuant to the said allotment of shares, the Petitioners jointly held 50% shares in the company and also continued to be the only directors. In 2013, Mr. M.R. Daga died and R2 replaced M.R. Daga as the Financial Advisor to the Petitioners.

The Petitioner has also contended that 9,90,000 equity shares of Rs.10/- each were further allotted in favour of P1 and P2 at the board meeting of the Company held on 15th March, 2013, which increased the total shareholding of the Petitioners in the Company to 67.49%.

The only business of the Company was and is dealing with the construction and sale of shops and rooms in the land/premises of Globe Theatre, 50% of which belonged to the Company. Several shops and rooms at the said premises were sold to third parties jointly by the Company and Dhansri, in view of their equal joint share in the same. The consideration received in such regard was also equally distributed between the Petitioners and Dhansri. The Petitioner contended that the 9,90,000 shares which were allotted to P1 and P2, were illegally cancelled on 15th March, 2013 and 6,65,000 shares held by the P2 and P3 in the company were illegally shown to be transferred to R33, who was never a shareholder or connected to the company in any manner. R2, R3 and R4 and R5 were all allegedly appointed as directors of the company on 26th March, 2014. P2 and P3 were shown to have allegedly resigned as directors on 2nd April, 2014. P17 allegedly was removed as director on 4th September, 2014. Moreover, the registered office of the company was also allegedly shifted on 31st July, 2014 and large percentages of shares held by R7 to R32 were allegedly shown to have transferred to R34 to R37.

The Petitioner contended that consequently the Petitioner's shareholding in the Company had been illegally brought down from approximately 67% as on 15th March, 2013 to less than 17% and the Petitioners had been allegedly removed or shown to have ceased to be the directors of the company. The Petitioners have further alleged that all these acts were done at the instance of R2 by manipulating and forging documents.

The Respondents have denied the allegations of the Petitioners and have contended that it was the Petitioners who did not raise any objection in relation to shifting of the registered office. The Respondents have also denied this fact that the share capital of the company is Rs.3,91,36,000/- divided into 39,13,600 equity shares of Rs.10/- each. R2 has claimed that subscribed and paid up share capital of the company is Rs.1,92,36,000/- divided into 19,23,600 equity shares of Rs.10/- each. R2 has also denied and disputed that the shareholding of the Petitioners represents 67.49%. R2 has further claimed that the present shareholding of the Petitioners is only 16%.

R2 has further stated that on 23rd February, 2012 in the EOGM, Clause 6 of the Articles of Association has been amended and by virtue of amendment in Clause 6 of the Articles of Association, a right of pre-emption has been given to existing shareholders of the company, and by this provision, no shares can be offered to a person who at the date of offer did not hold the equity shares of the company. The Respondents have further contended that the alleged allotment of 9,90,000 equity shares of the Company was made ignoring the right of pre-emption, which was guaranteed under Clause 6 of Articles of Association. The Respondents have further stated that alleged allotment of 9,90,000 equity shares in favour of Petitioners on 15th March, 2013 is contrary to Clause 6 of the Articles of Association of the company. As such the illegal allotment was not given effect. The R2 has denied this fact that he is incorrectly claiming himself as director of the company. He has further denied that the R38 and R39 have acted in collusion with R2. He has stated that his father was having his firm M/s. S.M. Daga & Co. which have rendered professional services in the usual course of its business.

R2 has further stated that the digital signature is a personal and confidential file and digital signature is never kept with the auditors as it is the personal responsibility of the director concerned to protect and preserve his or her digital signature. R2 has contended that the Petitioners have contributed only a sum of Rs.97,66,600/- in respect of 9,76,660/- equity shares whereas the other shareholders namely, R6 to R32 had subscribed by contributing Rs.9,47,00,000/- by applying for the shares of the company at a premium of Rs.90/- per share. The contribution of the Petitioners was very insignificant as compared to contribution of other shareholders being the R6 to R32. The Respondents have further stated that the entire Globe Cinema project was brought to a standstill by virtue of vindictive, obstructive and malafide approach adopted by the Petitioners. Knowing fully well that their financial stake in terms of money invested in R1 Company vis-a-vis Globe Cinema is only 9.35% as compared to the contribution of the R6 to R32 which was 90.65%. The Respondents have denied all the averments of the petitioner.

The Petitioners have claimed that 9,90,000 shares were allotted to them on 15th March, 2013 which was illegally cancelled by the Respondents. Petitioners claim that on 15th March, 2013, board meeting of the company was held and it was resolved to allot 9,90,000 shares to P1 and P2. This allotment was done to capitalise funds already brought in by the Petitioners in the Company and which was lying with the Company as share application money. Therefore, the value of the allotment was Rs.99 lakhs. The Petitioner claims that he had brought in sums far in excess of Rs.99 lakhs in the company which was reflected as share application money pending allotment. In support of the claim of the alleged allotment, the Petitioners have laid emphasis on the fact that Form 2, which was filed before the Registrar of Companies on 5th April, 2013.

This document shows that on 15th March, 2013, 9,90,000 shares each were allotted for which Form 2 was filed with the ROC, which also bears the digital signature of R2, Dipak Kumar Daga as Chartered Accountant. The Respondents had disputed the said allotment of 9,90,000 shares in favour of Petitioners. The Petitioners have contended that alleged cancellation of

allotment of shares is wrongful, oppressive and illegal because the allotment was allegedly cancelled at a purported board meeting held on 8th April, 2013. The Petitioners claim that on 8th April, 2013, P1, P2 and P3 were the only directors of the company at that time. They alleged that no such board meeting was ever convened or attended by them and they further claimed that no such resolution or minutes of board meeting has been disclosed by the Respondents in their proceedings. The Petitioners have also laid emphasis on the fact that the cancellation of shares could only be done by applying the procedure prescribed under section 100 of Companies Act, 1956, which can be done only by the Hon'ble High Court. The Petitioners have also laid emphasis on the fact that in spite of the allotment of shares in their favour on 15th March, 2013, shares were not reflected in the annual return or financial statement of the company for the year 2012-13 because R-2 in his capacity as Chartered Accountant was handling all such compliance work of the company and he abused his position of trust and acted wrongfully in collusion of R-30, who was the statutory auditor of the company.

The Respondents have argued that amended Clause 6 of Articles of Association of the Company was effective since 23rd February, 2012 whereby pre-emption clause was allegedly introduced by which existing shareholders of the company would have to be given an offer to subscribe to the allotment in proportion to their existing shareholdings. On this basis, Respondent has argued that the alleged allotment was made in violation of the Clause 6 of the Article of Association of the company.

The Petitioners have contended that on 23rd February, 2012 no such amendment in Articles of Association was passed in the alleged EOGM and they had no notice of convening the same because at that point of time, Petitioners were the only directors of the company.

In support of the above claim, the Petitioners have also laid emphasis on the Form 66 along with the compliance certificate filed by M/s. Acharya S.K. &

Associates, Company Secretary. On perusal of the alleged Form 66 and compliance certificate, it appears that in compliance certificate, Company Secretary has only mentioned that one extra ordinary general meeting was held during the financial year. There is no mention of alleged EOGM dated 23rd February, 2012. The Petitioners claim that in the compliance certificate, the EOGM which is mentioned is relating to EOGM dated 20th June, 2011, which was held for increasing authorised share capital. On this basis, the petitioner claims that no EOGM took place on 23rd February, 2012, wherein Articles of Association was amended.

The Petitioners have further argued that the alleged amended Clause 6 of the Articles of Association is being mentioned below "where at any time subsequent to the first allotment of shares in a company, it is proposed to increase the subscribed capital of the company by issue of new shares, then, subject to any directions to the contrary which may be given by the company in general meeting, such new shares shall be offered to the persons, who at the date of the offer are holders of equity shares of the company, in proportion, as nearly as circumstances admit, to the capital paid on those shares at that time." On the basis of above Articles of Association, the Petitioners claim that alleged amendment incorporated on 23rd February, 2012 and 9,90,000 shares, which were allotted to the Petitioners on March 15,2013 is not covered by such provision because it was the first allotment in favour of the petitioner. This clause only affects the future allotment, i.e. allotment made after first allotment. Since impugned allotment of 9,90,000 shares comes in first allotment, therefore, these shares could not have been cancelled on the above basis. The Petitioners have further laid emphasis on the fact that allotment of shares becomes effective immediately upon passing a resolution to that effect. In fact, R2 himself filed the Form 2 with RoC certifying the alleged allotment of 9,90,000 shares on April 05, 2013. Return of the said allotment, i.e. in the Form 2 could have been filed only after the allotment is made.

The Petitioners contended that shares once allotted could have been cancelled only under the provision of section 100 of Companies Act, 1956 which provides for reduction of share capital of a company including when such shares are cancelled. The Petitioners have claimed that the money, which was in lieu of the said allotment, was never returned to P1 and P2. The Petitioners have also contended that in any event, the purported balance-sheet for the financial year 2012-13 was purportedly filed with RoC only 15th April, 2014, i.e. more than a year after the financial year ended on 31st March, 2013. The Petitioner claims that the financial statements were intentionally filed late because the alleged illegal act of cancellation of shares will come to the knowledge of the Petitioners.

The Petitioners claimed that the appointment of R2 to R4 as directors of the company on March 26, 2014 is wrongful and illegal and liable to be set aside on the basis that on 26th March, 2014, P1 to P3 were the only directors of the company and no board meeting was convened or held on 26th March, 2014 to appoint R2 to R4 as directors in the company. The Petitioners have also contended that in the Form DIR-12, the email ID of R2's firm being smd.roc@gmail.com is provided against "e-mail id of the company". The Petitioners contend that this practice has been adopted by R2 in all the Forms challenged in the Petition and such practice has been adopted with the obvious intention of preventing the Petitioners from coming to learn of the illegal acts of Respondents. There is no apparent reason or justification to provide the e-mail ID of a Chartered Accountant firm in a statutory Form where the e-mail ID of the company itself has been requested. The Petitioners claim that purported DIR 12 bears the alleged digital signature of P-1 but he did not use his digital signature to upload such Form and the same has been misused by R2, who was at all material times in possession of the digital signatures of P1 to P3.

Petitioners have further claimed that they never resigned as directors of the company and there is no logical explanation or reason for P2 and P3 to resign as directors. It is also pertinent to mention that Form DIR-12 was filed on 9th

September, 2014 after a delay of nearly six months, after alleged appointment of R-2 to R-5 as directors.

P1 claimed that he never received notice regarding his removal from directorship. The Form DIR-12, which was filed after removal of P1 as director was filed with e-mail id of R2. The Respondents have failed to explain as to why Form DIR-12 was not filed with company's e-mail ID. Petitioners claimed that removal of P1 from directorship on the ground that he has misused and siphoned off the funds of the company is without any basis.

Respondents have claimed that Petitioners' shareholding is only 16% in the company on the basis of assertion made by the petitioner, his shareholding was 67.49%. Thus, prima facie it appears that Petitioners' majority shareholding has been reduced to the extent of about 16%. It also appears from the fact that in spite of 50% contribution by late Shri M.R.Daga all the directors of the company Goldstar were petitioner nos. 1 to 3 during the life time of late Shri M.R.Daga. It is also undisputed that M.R. Daga, the father of R2 was Chartered Accountant and was having the firm S.M.Daga and Co. and after the death of late Shri M.R.Daga, R2, who is also a Chartered Accountant succeeded him. Petitioners also claim that R2 has misused his position of being Chartered Accountant, misused the trust reposed in him and he with collusion of other Respondents had manipulated the alleged resignation of P2 and P3 from directorship and further cancellation of shares allotted in favour of Petitioners and removal of P1 from directorship and all these activities resulted in complete ousting of Petitioners from management and control of the company and Petitioners, who were majority shareholders, became a minority shareholder in the company. On the above basis, the Petitioners have filed the petition under Section 397 and 398 of the Companies Act, 1956 on the ground of oppression and mismanagement by Respondents.

In this case, petitioner has argued that on the basis of record, he has proved that the return of financial year 2011-12 was filed belatedly in the year 2014 by the Respondents intentionally. Petitioners have also claimed that in this

case he has filed the copy of document DIR-12 which shows that after appointment of R2, R3 and R4 as directors and removal of petitioner no.1 from directorship and alleged resignation of Petitioners nos.2 and 3 from directorship, copy of document DIR-12 was filed belatedly and that too with the e-mail id of R2, whereas the said return should have been filed immediately and that too with the e-mail id of the company. The Petitioners claim that the said manipulation has been done simply to prevent that this information should not reach to the Petitioners.

The Petitioners have mainly contended that regarding the cancellation of 9,90,000 shares on 8th April 2013, which were allotted to P1 and P2 in the Board Meeting of 15th March 2013 where P1, P2 and P3 were present, and additionally Form 2 was also filed on 5th April 2013 which had been certified by R2 himself. The Petitioners contended that the Respondents claimed to have cancelled the shares in a board meeting of 8th April, 2013 for which the Petitioners had never received any notice for or any minutes were produced to show the said cancellation.

The Petitioners contended that at that point of time, the Petitioners were the only directors of the Company, and they had never convened any meeting. The Petitioners further contend that shares once allotted in a Company can only be cancelled under the provisions of Section 100 of the Companies Act, 1956, and any cancellation of shares would require confirmation by a special resolution by the shareholders as well as application to the High Court and upon the High Court sanctioning such cancellation. The Petitioners have contended that the Respondents have claimed that the 9,90,000 shares had been cancelled by P1, P2 and P3 themselves in the board meeting of 8th April, 2013 upon receiving a complaint from R8 who was the shareholder and to which the Respondents had allegedly furnished a forged letter whereby P1 had replied saying he would look into the complaint.

The Petitioners contended that the alleged affidavit of P1 before the Magistrate regarding cancellation of 9,90,000 shares is also a manufactured

document as P1 was not aware of it. The Petitioners further contended that the balance sheet of 31st March, 213 is of little consequence as the same had been prepared by R2 and audited by R38 who is incidentally the statutory auditor for R34 to R36 companies, which belong to R2. The Petitioners further contended that their signatures on the aforementioned balance sheet are forged and the same had been filed after more than a year on 15th April, 2014. Moreover, the Petitioners contend that the said balance sheet also reflected the shares which had been transferred by R12 and R29 to R34 on 8th April, 2013, which indicated to an alleged manipulation.

The Petitioners have submitted regarding the alleged transfer of 4,30,000 shares by P2 to R33 and transfer of 2,35,000 shares by P3 to R33 were never done by them and their signatures on the share transfer deeds are forged. The Petitioners contended that R33 did not hold any shares prior to the alleged transfer by P2 and P3 since there was a restriction in Article 8 (1) for transfer of shares to a non-member unless unanimously approved by the Board of Directors.

The Petitioners contended that since they were the only directors of the Company at the relevant point of time, they could not have made the transfer and no minutes of any such meeting effecting the said transfer has been disclosed. The Petitioners further contended that no consideration for transfer of such shares had been paid by R33 and the purported considerations shown for sum of Rs.45 Lakhs to P2 and Rs.23.5 Lakhs to P3 were actually return of loans given by P2 and P3 to R33, which have been reflected in balance sheet of R33 for the year 2011-12 and 2012-13. The Petitioners further contended that no reason had been show for the transfer of shares of P2 and P3 at par value, and that too for a part of the shares held by them, reducing themselves to a minority position.

The Petitioners further submitted on the issue of resignation of P2 and P3 effected on 3rd April, 2004, which was allegedly illegal. The Petitioners contend that they never signed the resignation letters dated 2nd April, 2014 and that they

were forged documents. The Petitioners contend that the Form DIR-12 was also filed by the Respondents after five months of resignation on the 9th September, 2014. The Petitioners further submitted on the issue of the alleged removal of P1 on 24th September, 2014 that no proof of service of special notice to P1 under Section 115 of the Companies Act, 2013 had been furnished and even the explanatory statement did not give any reason for removal of P1, which was never received by the Petitioners either.

The Petitioners further submitted on the issue of appointment of R2, R3 and R4 on 26th March, 2014 and subsequently the appointment of R5 was allegedly illegal. The Petitioners contended that at the time of the appointment of R2, R3 and R4, they had not approved their appointments. The Petitioners contended that R2, R3 and R4 could only be appointed as additional director in a board meeting and cannot be appointed as regular directors, except in general meeting. The Petitioners further contend that the agenda of general meeting on 24th September, 2014 did not show any agenda for appointment of R2, R3 and R4 as directors. The Petitioners contend that P1 continued to sign as a director on behalf of the Company in documents and letters addressed to the statutory authorities even on 22nd September, 2014 and even after alleged notice of removal dated 2nd September, 2014 was given.

R1 has highlighted in its written notes that the concept of issuing of shares was completely different from the concept of allotment. The Respondent contends that it is only when an allotment is communicated to the prospective shareholders that it becomes completed contract the agreement is not sufficient to make the applicant a member, there must be an entry in the register of members. The Respondent went on to contend that shares are said to be issued to an allottee when the allottee has become complete master of the shares and further when the certificates are actually issued and also when the shareholders are put in complete possession of the shares.

The Respondents further submitted that an actual issue cannot be complete only on resolution to allot shares. The Respondent contends that it is

evident from the fact that the share application money shown in balance sheet for the year 2013 was converted into loans and advances during the subsequent years.

R3, R8, R34 and R37 through their written notes have submitted that their shareholding in the Company was 28.08% and amounted to Rs.5,40,00,000/-, which was significantly more than that of the Petitioner. The Respondents contended that R12, R21, R28, R29, R31 and R32 have sold and delivered the physical share certificates to R34 who then lodged it before R1 and has received back duly transferred shares which are lying in its possession. The Respondents have disputed and denied all allegations of the Petitioners levelled against the Respondents.

The Respondents have alleged in their submissions that R34 prior to incorporation of the Company had advanced sums on several occasions to "Seven Star Enterprise" which was the proprietorship firm of P1. The Respondents contended that the Petitioner had approached the Respondents for investing in the Company with a proposal that such investment would be converted into equity shares and assured that the money infused would be treated at par with promoter's contribution, and therefore the Respondents have submitted that neither the Company nor its promoters had the required funds to buy the property in question. The Respondents further contended that the Petitioners had falsely alleged that R6 to R32 were the nominees of the Petitioners and had no independent investment or stake or were holding shares in trust for the Petitioners in the Company.

The Respondents contended that the issuance of 9,90,000 shares was illegal and consequently void as no effect was given to the purported issuance and allotment of shares and hence the question of Petitioners claiming any right in respect of the same did not arise. The Respondents further contended that the accounts for the year ending 31st March, 2013 had been signed by P1 and P3 and the same did not reflect the issuance of 9,90,000 equity shares which were

allotted to the Petitioners. The Respondents have further contended that they have invested a greater sum of money than the Petitioners in the Company.

On the basis of the pleadings of the parties following questions arise for the decision of the case:

1. Whether the cancellation of 9,90,000 shares was valid and as per the statutory provisions as enshrined in the Companies Act?
2. Whether the transfer of 6,65,000 shares by P2 and P3 to R33 was a valid transfer?
3. Whether the appointment of R2, R3 and R4 on 26th March, 2014 and subsequently the appointment of R5 was valid?
4. Whether the resignation by P2 and P3 from the Board of Directors and removal of P1 from the Board of Directors was valid?

In the light of the aforementioned circumstances, the contention of the Petitioner that the cancellation of 9,90,000 shares allotted to P1 and P2 in the board meeting of 15th March, 2013 can be discussed in the light of the statutory provisions relating to conducting a valid meeting of the Board of Directors of the Company. The allotment of shares has not been contested by either of the parties. However, the Board Meeting held on the 8th of April 2013 to cancel the allotted shares has been contested by the Petitioners.

The essential pre-requisite of conducting a valid board meeting is the serving of a valid notice and production of minutes of the meeting. At the time when the meeting of 8th April, 2013 was called, the Petitioners were the only directors of the Company and they have not admitted to holding of any such board meeting. Section 173 and Section 174 of the Companies Act, 2013 contemplates the pre-requisites for holding a valid board meeting and the requirement for quorum for the meetings of the Board.

In the case of Capricorn Oil Ltd. vs. Ratan Mohan Sarda [2012] 113 SCL 395 (Cal), majority was turned into minority by management group by allotting shares to its own people without calling meeting or offering corresponding shares

to promoter's group or other shareholders, was held as an act of oppression. The CLB held that the issue of further shares by one group of shareholders by taking advantage of its managerial position to denude other group of shareholders of its majority control is grave act of oppression.

In the case of Dale & Carrington Invt. (P) Ltd. and Another vs. P.K. Prathapan and Others, (2005) 1 SCC 212, it was discussed that..."no copy of the notice intimating Suresh Babu about the meeting of the Board of Directors and asking him to attend the same, has been placed on record to show that Suresh Babu was informed about holding of the meeting in question. Thus neither a copy of a notice convening the Board meeting nor the log book mean to record signatures of Directors attending the meeting of the Board of Directors were produced. In the absence of these documents and any other proof to show that a meeting was held as alleged we are unable to accept that a meeting of the Board of Directors was held on 24th October, 1994. If no meeting of the Board of Directors took place on that date, the question of allotment of shares to Ramanujam does not arise. We are inclined to believe that photocopy of the minutes of the alleged meeting dated 24th October, 1994 produced by appellants, is sham and fabricated. The alleged allotment of additional equity shares of the company in favour of Ramanujam is, therefore, wholly unauthorized and invalid and has to be set aside.

The Hon'ble Supreme Court in Dale and Carrington Investment (P) Limited v. P.K. Prathapan and Others (2005) 1 SCC 212, further held that if a member who holds the majority of shares in a company is reduced to the position of minority shareholder by an act of the company or by its board of directors maladies, the said act must ordinarily be considered to be an act of oppression to the said member.

Therefore, omission to give notice of meeting was held to be oppression. Not sending notices to shareholders/directors and passing resolutions thereat is held oppressive to members and constitute mismanagement of Companies.

The allotment of shares is a conclusive proof of issuance of shares as opposed to the Respondents' contention that actual issue cannot be complete only on resolution to allot shares. According to R1's submissions where the Respondent relied on the Calcutta High Court judgement reported in AIR 1967 Cal 560, the allotment of 9,90,000 shares did not amount to allotment of shares, and in any event could not and did not amount to issuance of shares, particularly as the capital account of the company had not been credited with the value allegedly paid by the Petitioners for the same.

The aforementioned case relied on a decision of the Hon'ble Supreme Court reported in AIR 1964 SC 250 in which a distinction was made between allotment and issuance of shares. In the judgment it was held that allotment of shares precedes all issues. Allotment of shares means appropriation of unissued shares to a specific number of persons. Issue of shares is something distinct from allotment and in some subsequent acts whereby the title of the allottee becomes complete.

However, in the present Petition, it is clear that the Respondents had called for a board meeting to cancel the 9,90,000 shares so allotted to the Petitioners which was not as per statutory compliances. The cancellation of the shares presupposes its allocation despite the meaning the Respondents may have attributed to the concepts of allotment and issue of shares. Therefore, the said cancellation of shares is held to be invalid.

The reliance placed by the Respondents on the alleged amendment to Article 6 is wholly misplaced. Even assuming without admitting that Article 6 was amended as alleged, the allotment of 9,90,000 shares was not and could not have been in violation of the same. This is due to the alleged amended Article 6, which, inter alia, provides as follows:

> *"6. ....(b) Where at any time subsequent to the first allotment of shares in a company, it is proposed to increase the subscribed capital of the company by the issue of new shares, then, subject to any directions to the*

contrary which may be given by the company in general meeting, and subject only to those directions:-

i) Such new shares shall be offered to the persons, who, at the date of the offer, are holders of the equity shares of the company, in proportion, as nearly as circumstances admit, to the capital paid up on those shares at that date;

ii) the offer aforesaid shall be made by notices specifying the number of shares offered and limiting a time not being less than fifteen days from the date of offer within which the offer, if not accepted will be deemed to have been declined; ....."

It is clear that the alleged amended Article 6 is to apply only to allotments **after the "first allotment"**. Only two possible consequences follow:-

- If the alleged amendment made on February 23,2012 has prospective effect, then the allotment of 9,90,000 shares made on March 15,2013 is exempted from such provision, being the "first allotment", and is not in violation.
- If the alleged amendment has retrospective effect from the date of incorporation of the company, then the allotment of 9,66,000 shares made in favour of R6 to R32 on January 31,2012 [being an allotment made after the "first allotment" dated January 20,2012 in favour of petitioners], is void, being in violation of the alleged amended Article 6 as no offer was made to P1,P2 or P3 at the time of such allotment to subscribe to the additional shares.

There is no third possibility apart from the two mentioned above. In either of the aforesaid two situations, the allotments made in favour of the petitioners on January 20,2012 and March, 2013 are not affected or hit by the alleged amended Article 6.

Respondents have not dealt with this issue at all in either their affidavits or in the course of oral submissions.

Therefore, it is clear that R has manufactured a story regarding alleged amendment to Article 6 as an afterthought for the sole purpose of justifying the illegal cancellation of allotment of shares made in favour of P1 and P2 on March 15,2013.

Respondent has also disclosed an alleged purported to have been affirmed by P1 before the Metropolitan Magistrate, Kolkata (at page nos. 186 to 189 of R1's Reply). In such alleged affidavit, P1 purportedly apologizes for the mode of allotment dated March 15,2013, and allegedly admits that the same was in violation of amended Article 6 and also allegedly sought a pardon in such regard. The affidavit is a forged document and P1 has not executed or signed such affidavit (at pages 982 to 1006 of Petitioners' Rejoinder to R1's Reply). Petitioner has contended that the witness to such affidavit, i.e. Mr. Anubrata Dhar, Advocate was unknown to P1 and the contents of the affidavit, which was allegedly affirmed on 29.04.2014, i.e. more than a year after the allotment in question, are absurd and he has not affirmed this affidavit. This affidavit was a manufactured document and was never mentioned or disclosed by Respondents at any point in time prior to August, 2016. In any event, the said purported affidavit will be of no consequence as P1 cannot confirm an illegal act of cancellation of shares.

The Respondent, in this context, averred to the effect that the allotment was never given effect to and was never valid is also wholly baseless and is liable to be rejected. Respondent has cited, in this regard, a decision of the Hon'ble Calcutta High Court in AIR 1967 Cal 560, which has been overruled by the decision of the Hon'ble Supreme Court in AIR 1970 SC 1750= (1970) 2 SCC 80. It is a settled law that an allotment is effective immediately upon passing of a resolution to such effect and is not dependent on any other or further act or deed. More so, the R2 himself filed the Form 2 with ROC, certifying the allotment on April 5, 2013. As per section 75 of the Companies Act, 1956, a form or return of allotment can be filed only after an allotment is made.

The Hon'ble Supreme Court in the decision reported in AIR 1970 SC 1750 = (1970) 2 SCC 80 has categorically held that issuance of share certificates and/or entering of name of allottee in Register of Members is not a condition precedent for an allotment to be effective (AIR 1970 SC 1750 paras 6 to 11). In the instant case, a valid Board Meeting was held on March 15, 2013 and resolution was passed by all three directors of the Company, i.e., P1 to P3 unanimously for allotment of shares. As per section 113 of the Companies Act, 1956 share certificates can be issued much after allotment of shares has taken place and therefore, issuance of share certificates is not a relevant factor to determine as to whether an allotment has been made.

Petitioners have further stated that Respondent's argument that the consideration money of the allotment was not capitalised or added to the share capital of the company and that there was no question of reduction of share capital is wholly misconceived. It has already been mentioned above that allotment of shares is made and is effective immediately upon a resolution to such effect being passed and does not depend on any entry made in the financial statement of the company. The Board's Resolution dated 15th March, 2013 specifically provided that the funds money for the allotment be transferred to Share Capital Account (page no.128 of the Petition). R2 has argued that the petitioners have not denied signing the balance sheet for 2012-13 and that the petitioners have allegedly accepted cancellation of allotment. This argument of the R2 is baseless and liable to be rejected. Moreover, R2 was looking after all compliance related work of the company including filing of returns and statements, has deliberately manipulated the balance-sheet by wrongfully and deliberately not showing the allotment. The petitioners cannot suffer due to the wrongful act of R2 or any incorrect entry in financial statements of the company. The petitioners used to sign most of the papers and statements presented to them for signature by R2 and used to trust R2 completely in good faith and there was no cause to suspect R2 who was a practising Chartered Accountant to commit any misdeeds. However, the purported balance-sheet for 2012-13 was purportedly filed with ROC only on April 15, 2014 i.e., more than a year after the financial year 2013-

14. The petitioners categorically stated that this was obviously to prevent the petitioners from coming to know of the illegal facts of the respondents. Such balance-sheet was allegedly audited by R38 and was filed with ROC under certification of R39. R38 and R39 are both acting in collusion with R2. In fact, R38 was of the auditor of, inter alia, R34 to R36 where R2 and/or his close associates including R3 to R5 are involved in management. There is also another serious discrepancy in the balance-sheet for 2012-13 as the shares which were allegedly transferred by R12 and R29 to R34 on 08.04.2013, are somehow shown in the balance-sheet as on 31.03.2013, which shows clear manipulation of the balance-sheet and subsequent preparation of the same by R2.

Petitioners have alleged that the respondents have also not dealt with the point regarding the alleged cancellation of allotment as to how on April 8, 2013, a complaint was received from a shareholder, P1 replied to such complaint and also managed to somehow cancel the allotment made to himself on the very same day. There is no explanation on this aspect by Respondent.

The Petitioners contended that shares once allotted in a Company can only be cancelled under the provisions of Section 100 of the Companies Act, 1956, which essentially requires confirmation by a special resolution by the shareholders as well as an application to High Court and on the High Court sanctioning such cancellation. Therefore, the cancellation, as contended by the Respondents to have been carried out only in a board meeting is null and void. The contentions of the Petitioners of alleged manipulation of the balance sheets of the Company which were made by R2 also cannot be ruled out at this juncture as the allotment of the 9,90,000 shares had not been reflected on the balance sheet as on 31st March, 2013. The cancellation of the 9,90,000 shares is therefore null and void as it had not been carried out according to the statutory norms.

The Petitioners in the present Petition have denied having transferred any shares to R33. The Respondents however contended that P2 and P3 have transferred 6,65,000 shares to R33. The Petitioners have contended that their

signatures on the share transfer deeds were forged and furthermore, the Articles of Association of the Company forbids transfer of shares to non-members unless unanimously approved by the Board of Directors of the Company, which could not have been possible as at the relevant point of time, the Petitioners were the only directors of the Company. Moreover, the Petitioners have contended that no consideration for such transfer of such shares had been paid by R33 to the Petitioners and the purported consideration so shown amounting to Rs.68.50 Lakhs to P2 and P3 were the returns of loans given by P2 and P3 to R33, which have been reflected in the balance sheet for the year 2011-12 and 2012-13. Such a transfer has reduced the Petitioners to an insignificant minority. Since the share transfer deeds had been signed allegedly by the Petitioners and the same signatures have been contested as forged by the Petitioners, owing to the lack of any proof or piece of evidence furnished by the Petitioners to prove the aforementioned contention of forgery, the contention of the petitioner cannot be accepted in this regard. It is important to mention that respondent nos.2 to 5 have stated that 4,30,000 shares held by petitioner no.2 and 2,35,000 shares held by the petitioner no.3 have been transferred to Respondent no.33 on 31st August, 2013. It has been admitted by the petitioners in para 43(a) of the petition that the said transfer of 6,65,000 shares had been reflected in the annual return filed by the company in respect of Annual General meeting held on 30th September, 2013. The annual return was filed on 15th April, 2014 and the said return contains signature of petitioner no.1 and 3. The signature of petitioner nos.1 and 3 appear at page 543 to 551 and at page 555 of the petition. In this context, it is relevant to note that petitioner nos.1 and 3 have not expressly denied their signatures in the said Annual Return, as appears from para 43(d) of the petition where it has been stated that "from the copies of the Annual Return for the financial year ended 31st March, 2013 and the balance-sheet for the year ended 31st March, 2014 which are available on the MCA portal, it appears that the petitioners have signed these documents. The petitioners did not remember having signed these documents and cannot be sure". From the above, it is clear that the petitioners have not denied their signatures on these documents and the petitioners have

also failed to give any documentary evidence to prove that the alleged signature on these documents are forged.

It has been further admitted by the petitioners in para 37 of the petition that both the petitioner nos.2 and 3 signed diverse documents and papers and did so using different pens. Having all trust in Respondent no.2, the petitioner no.3 signed all documents and papers. The petitioners never conceived that the respondent no.2 would obtain signatures of the petitioners on the documents which are prejudicial to the petitioners and it did not reflect the true and correct position. It is pertinent to mention that annual return filed for the year 2012-13 clearly discloses the factum of transfer of the said 6,65,000 shares by the petitioner nos.2 and 3 in favour of respondent no.33. But the petitioners have not given any explanation as to why such transfer was not challenged by the petitioners. It is relevant to note that provisions of section 85B(2) of the Evidence Act, 1872 provides that any proceedings, involving secure electronic signature, the Court shall presume unless contrary is proved that, secured electronic signature is affixed by the Subscribers with the intention of signing and approving the electronic records. Therefore, it cannot be believed that the signature on these documents are forged and fabricated. Thus, it is held that transfer of 6,65,000 shares by P2 and P3 to R33 was a valid transfer.

The resignations tendered on behalf of P2 and P3 dated 2nd April 2014, have been contested by the Petitioners as forged documents as have been annexed at Pages 395 to 401 of the main Petition. The Petitioners contended that there was no reason behind such resignation and therefore such resignation letters are baseless and forged. Moreover, the Petitioners contended that the Form DIR-12 was filed only on 9th September, 2014 which was five months after the resignations had been allegedly tendered by the Petitioners. Such a delay in filing the said form was allegedly a proof of foul play on the part of the Respondents, according to the Petitioners. The petitioners have claimed that it is wrong to allege that P2 and P3 have resigned. Petitioners further alleged that letters of resignation dated 2nd April, 2014 are forged documents.

It is pertinent to mention that petitioners filed an I.A. no.46 of 2016 for production/inspection of the original documents but respondent initially refused to allow inspection and production of document. In the circumstances, adverse inference would have to be drawn against the respondents in respect of genuineness of such documents. The petitioners have relied on the law laid down by the Hon'ble Supreme Court in AIR 1968 (SC) page 1413 and further on 2016 (12 SCC page 566).

It is pertinent to mention that after completion of the argument of the petitioners' Counsel, the ld. Counsel for the Respondent permitted the documents to be inspected only when the petitioners have claimed benefit of section 114(g) of Indian Evidence Act, 1872 and claimed that adverse inference should be drawn against the Respondents.

In the said resignation letter, no reason has been assigned for resignation. It is unbelievable that the promoter of the company who was having all the Directors from the same family will without any reason resign from the directorship of the company. It is undisputed fact that petitioner no.1 and late Shri Meghraj Daga was having very good relationship of mutual trust and Shri Meghraj Daga was Chartered Accountant and statutory auditor of the company. It cannot be ruled out that certain signed documents might have been in the possession of R2 for compliance of certain formalities and these papers have been further converted into alleged resignation letters.

The petitioners have stated that P2 and P3 never resigned as Directors, which has been shown to have allegedly resigned as directors of the Company on 3rd April, 2014 pursuant to alleged resignation letters dated 2nd April, 2014, though resignation letters were never signed by P2 and P3. This story of resignation has no logical explanation or reason. These are forged documents.

The respondents have failed to justify the alleged appointments of R2 to R5 as Directors and also the wrongful cessation of P2 and P3 as Directors.

P-1 was allegedly removed as a Director at an A.G.M. of the company on 24th September, 2014. However, no such AGM was held and no resolution was or could have been passed to remove P1. The alleged removal of P1 is bad in law and wrongful. P1 never received any such notice issued by R8 under section 115 of the Companies Act, 2013 and no proof of receipt of the same has been disclosed by the respondent and no reasons whatsoever given in such notice to justify removal of P1 as Director has been received.

Further, no such notice convening AGM on 24th September, 2014 was never received by P1,P2 and P3 and no proof of receipt of such notice has been disclosed by the Respondent. However, there is no reason for such removal were mentioned even in such notice. There is also no allegation in the Explanatory Statement regarding any siphoning of funds. Therefore, such allegations are clearly afterthought. The alleged signatures are forged signatures.

Respondents have argued that an AGM was allegedly held on 24th September, 2014 where nine members were present, wherein it was resolved that P1 would be removed as a Director of the Company. As the petitioners did not receive any such notice, hence did not attend the same.

The petitioners have submitted that the whole story of the Respondents regarding alleged removal of P1 is manufactured and concocted. Respondent has given the reason for removal as the P1 has allegedly misused and siphoned of the funds of the company, which is contrary to the materials on record and allegations of the Respondent.

The petitioners have further contended that P1 had admittedly signed and issued several cheques for and/or on behalf of the company with the knowledge of Respondent even after 2nd September, 2014 (the date of the alleged notice convening AGM to remove P1).

The petitioners have submitted that it is also an admitted position that after 2nd September, 2014, P1 had been corresponding with several statutory

authorities including Kolkata Municipal Corporation on behalf of the Company, to the knowledge of R2, including signing of joint letters with P1 representing the company and R2 representing Dhansri (at page 628 to 636 of the petition). If Respondents' argument had any basis, in the light of the imminent removal of P1 as Director, there is no explanation as to why P1 was allowed to conduct the affairs of the company. Moreover, in these letters addressed to several statutory authorities, R2 does not represent the Company in any way and in fact, signs only on behalf of Dhansri, whereas P1 assumes responsibility for and signs on behalf of the company.

Respondents have argued P1 was removed due to alleged misappropriation by him of the company's fund, which have been routed by P1 to his own proprietorship concern by the name of Seven Star Enterprise and this was the reason for removing P1 as director. Such argument of the Respondents is vague, without particulars, baseless and liable to be rejected.

Petitioners have submitted that P1 has never misappropriated any funds of the company and there is no document or evidence to show any such misappropriation. Even in the alleged notice and explanatory statement for the AGM of 24th September, 2014, wherein P1 was allegedly removed as director, there is no allegation whatsoever of any misappropriation of siphoning of funds by P1. Therefore, such allegations are clearly afterthought and have been manufactured by Respondent.

Petitioners have contended that the Respondents have only referred to transactions involving a sum of Rs.3.47 crores between the company and Seven Star Enterprise. All transfers of money made to Seven Star Enterprise were in ordinary course of business and at arm's length. Seven Star Enterprise has an import license which the Company or Dhansri do not have. Due to this, the Company had caused several equipment for installation at Globe premises) to be imported through Seven Star Enterprise, which is admitted by the Respondent, and payments were made to Seven Star Enterprise for such import.

(Bills at pages 1032 to 1039 of the Petitioners' Rejoinder to Reply of R1). Further, sums of Rs.25 lakhs and Rs.3 lakhs were paid to Seven Star Enterprise as advance for payment to various vendors for further purchase of machineries and for equipment to be installed at the Globe Premises. In addition, R. 1 crore approximately was paid to other vendors for supply of equipment at the Globe premises (bills at pages 1040 to 1055 of Petitioners' Rejoinder to Reply of R1). A chart containing particulars of payments made to Seven Star Enterprise and others has been annexed at page 1056 of the petitioners' Rejoinder to Reply of R1.

The issue relating to the removal of P1 from the Board of Directors of the Company as contended by the Petitioners is hereby held to be illegal for the want of proper statutory procedure. P1 was removed on 24th September, 2014 from the Board of Directors however; no proof of special notice to P1 under Section 115 of the Companies Act, 2013 has been furnished. In addition to this, no reasons for such removal have been mentioned in the explanatory statement. There is no proof of the aforementioned explanatory statement or the notice of the meeting, whereby P1's removal had been effected, being served upon the Petitioners. Moreover, the Annexure at pages 628 to 636 of the main Petition shows P1 representing the Company and signing as director on behalf of the Company in documents and letters addressed to the statutory authorities as late as on 22nd September, 2014 and even after the notice of removal dated 2nd September, 2014 was served upon the Petitioners, as has been contended by the Respondents.

The issue regarding the appointment of R2, R3 and R4 on the 26th March, 2014 and subsequently the appointment of R5, which has been alleged by the Petitioners to be illegal, has been contended by the Respondents as legal and according to statutory norms. The Petitioners who were the directors of the Company at the relevant point of time have denied having appointed the aforementioned Respondents. Additionally, the appointment of the aforementioned Respondents had been done on the 26th March, 2014 and the

form for the appointment had been filed on 9th September, 2014 as has been annexed from Pages 323 to 325 of the main Petition, which reflects a significant delay in filling the requisite forms.

Additionally, the Respondents had been appointed as regular directors instead of as additional directors and were set to retire on the last date on which the next general meeting was required to be held after their appointment on 26th March, 2014. Moreover, the agenda or the minutes so disclosed of the general meeting held on the 24th September, 2014 did not show any agenda or resolution for appointment of Respondents as directors.

Respondent has argued that R2 to R4 were allegedly appointed as Directors of the company on March 26, 2014. Such appointment of R2 to R4 as Directors is wrongful and illegal and liable to be set aside.

a) The purported From DIR12 was also filed only on 9th September, 2014 after a huge delay of nearly 6 months after the appointments were allegedly made.

b) It has also been alleged in the Reply affidavit of R1 that R2 to R4 were appointed as Directors after P2 and P3 expressed intention to resign as Director. However, in the reply of R3,R8,R34 and R37, it has been alleged that R2 to R4 were allegedly appointed Directors prior to P2 and P3 expressing their intention to resign. Therefore, the respondents are not even sure of their own stand which shows that the whole story of resignation of P2 and P3 and appointment and R2 to R4 as Directors is manufactured.

c) Again, R4 allegedly resigned as a Director on January 21, 2015 and that R5 was appointed as Director on 22nd January, 2015. As usual, the e-mail ID of R2 is given instead of e-mail ID of the company as advised in the form and the digital signature of R2 was allegedly used for such purpose. Since R4 was never validly appointed as Director, there is no question of R4 resigning as Director. The alleged appointment of R5 as Director is also illegal. Moreover, the

petitioners did not have notice of any meeting for appointment of R5 and in the absence of the petitioners, no person could have been appointed as a Director.

In the light of the aforementioned, the appointment of R2, R3, R4 and subsequently R5 as directors is illegal and not according to the statutory provisions relating to the same.

ORDER

The Petition is partly allowed. The cancellation of 9,90,000 shares is held to be invalid and therefore, the Petitioner's shareholding remains as it was on 15th March, 2013. The transfer of shares by P2 and P3 is held valid. The removal of Petitioner No.1 is hereby held to be null and void and the Respondents are directed to reinstate him to the Board of Directors of the Company. The resignation of P2 and P3 are hereby held as invalid. The appointment of R2, R3, R4 and subsequently R5 to the board of directors is set aside as they were carried out in violation of the statutory norms. Accordingly, the respondents are directed to file the requisite e-Forms with the Registrar of Companies, West Bengal, as per the Companies Act, 2013 and the relevant rules notified thereunder. It is to be made clear that the respondents can appoint Directors after following due procedure under the Companies Act, 2013 and the relevant rules notified thereunder subject to the condition that both the parties will have proportionate representative in the Board and management of the Company in terms of their shareholdings.

Company Petition no.49/2016 is accordingly disposed of.

No order as to costs.

Sd/-
(Vijai Pratap Singh)
Member (J)

Signed on this, the 12th day of July, 2017