

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****COMPANY APPEAL(AT) NO.148 OF 2018**

(ARISING OUT OF JUDGEMENT AND ORDER DATED 8.3.2018 PASSED IN T.P. NO.25/397/398/GB/2016 (EARLIER NUMBERED AS CP NO.992/2011 BY NATIONAL COMPANY LAW TRIBUNAL, GUWAHATI BENCH, GUWAHATI)

IN THE MATTER OF:**Before NCLT****Before NCLAT**

Assam Chemical & Pharmaceutical
Pvt Ltd,
A.K. Azad Road,
Gopinath Nagar,
Guwahati 781016

3rd respondent1st appellant

2. The Managing Director,
Assam Chemical & Pharmaceutical
Pvt Ltd,
A.K. Azad Road,
Gopinath Nagar,
Guwahati 781016

4th respondent2nd appellant**Versus**

01. Shri Deba Kumar Hazarika,
Citizen Apartment,
1st Floor,
D-Type, Six Mile,
Guwahati -781022.

1st Petitioner1st Respondent

02. Sri Bhupen Chandra Kalita,
S/o Late Mukunda Ram Kalita,
Jonakpur,
Birubari,
Guwahati 781 016

2nd Petitioner2nd Respondent

03. Sri Pankaj Dutta Sarma,
R/o Dr. Bhabendra Nath
Thakuria Path,
Santipur Hill Side (East)
Guwahati 781 009

3rd Petitioner3rd Respondent

04.Sri Hiranmoy Kumar Das, R/o Kalitakuchi, 2 Nos. Birkuchi, H.No.847, Milanpur, Guwahati-781071	4 th Petitioner	4 th Respondent
05.Sri Atul Chandra Baishya, At Rudreswar, North Guwahati, Guwahati 781031.	5 th Petitioner	5 th Respondent
06.Sri Amiya Kumar Das, At-Kamakhya Gate, A.T. Road, Guwahati 781 009	6 th Petitioner	6 th Respondent
07.Sri Sarat Chandra Kalita, At Santipur Hill Side, Mathura Nagar, Guwahati 781009	7 th Petitioner	7 th Respondent
08.Sri Naba Kanta Deka, At Village Boragaon, P.O. Dorakahara Dist Kamrup.	8 th Petitioner	8 th Respondent
09.Sri Tulumani Sarma, At Village & PO Makhibaha, Distt. Nalabari, Assam.	9 th Petitioner	9 th Respondent
10.Sri Bijoy Deka, At Joyanagar, East Goshala, Guwahati 781011	10 th Petitioner	10 th Respondent
11.Sri Dilip Bora, At Rudreswar, North Guwahati Guwahati 781031.	11 th Petitioner	11 th Respondent
12.Sri Dipak Chandra Kalita, At Village-Kotalkuchi, P.O. Kamarkuchi Distt. Nalbari, Assam	12 th Petitioner	12 th Respondent
13.Sri Bipul Kumar Sarma, At-Village & P.O. Bagurihati, Distt. Nalbari (Assam)	13 th Petitioner	13 th Respondent

14. Sri Khagen Bhuyan,
S/o Late Hemeswar Bhuyan,
C/o Late Bhumidhar Bhuyan,
Bye-Lane-4,
H.No.14, P.O. Silpukhuri,
Guwahati 781003. 14th Petitioner 14th Respondent
15. Sri Dulal Chandra Baruah,
S/o Late Kular Kanta Baruah,
Silsakoo, North Guwahati,
Distt. Kamrup (Assam). 15th Petitioner 15th Respondent
16. Sri Rubul Goswami,
S/o Late Jogendra Chandra Goswami,
At-Santipur Hill Site (West),
Bhutnath Path,
Guwahati 781009 16th Petitioner 16th Respondent
17. Sri Pradip Baishya,
S/o Late Upen Baishya,
At-Hatigaon,
Sarudhar Gogi Path,
Opp Little Flower School,
Guwahati 781038 17th Petitioner 17th Respondent
18. Smt Rumima Das,
W/o Late Dinesh Kumar Das,
At-M.B. Enclave,
Flat No.302, F.C. Road,
Uzanbazar,
Guwahati 781001 19th Petitioner 18th Respondent
19. Shri Rajendra Nath Rajbongshi,
S/o Late Dandinath Rajbangshi,
R/o Bhagawat Dham,
Hill Side, Near Kalimandir,
Jyotishree Nagar,
Saukuchi,
Guwahati 781034 Proforma Respondent
20. Shri Anup Kumar Deka,
S/o Late Bipin Chandra Deka,
R/o Usha Nagar,
Pragati Path,
Barbari Chowk,
Hengrabari,
Guwahati 781036 Proforma Respondent

21. Shri Kanak Ch Das,
S/o Late Bheluram Das,
R/o Village & PO Dadara 781104
Distt Kamrup. Proforma Respondent
22. Shri Ajit Deka,
S/o Sri Khargeswar Deka,
Vill & PO Balisatra, P.S.
Kayan, Distt. Kamrup Proforma Respondent
23. Sri Rajani Das
S/o Srikanta Dass
Village: Jajaibari,
P.O. Nankarbhoria,
Distt. Nalbari
Assam. Proforma Respondent
24. Shri Madhab Das,
S/o Late Bheluram Das,
R/o Village & P.O. Dadara,
Distt. Kamrup Proforma Respondent
25. Shri Ashim Sarma
S/o Latge Dwijen Ch Sarma,
R/o Village Katkuchi,
P.O. Dubi,
Distt Barpeta
Pin 781325 Proforma Respondent
26. Sri Dipak Kalita,
S/o Late Mahendra Kalita,
Village & P.O. Ulubari,
Nalbari, PS & Distt,
Nalbari, Nalbari 781339 Proforma Respondent
27. Shri Muniindra Haloi,
S/o Tasil Haloi,
Vill & PO Panigaon,
Distt. Nalbari
Nalbari 781303 Proforma Respondent
28. Shri Tapan Chandra Bhuyan
S/o Late Praneswar Bhuyan
Vill & P.O. Gopalpur
P.S. Rangia, Distt Kamrup
Rangia 781354 Proforma Respondent

Present: Mr. Gourab Banerjee, Sr. Advocate with Mr. Rajan Raj, Ms Raka Chatterjee and Mr. Subhro Prakash Mukherjee, Advocates for Appellants.

Mr. Akhilesh Kr Shivastava, Mr. Abhijit Barvah and Ms Sunita Mukhopadhyay, Advocates

JUDGEMENT

MR. BALVINDER SINGH, MEMBER (TECHNICAL)

The present appeal has been preferred by the appellants under Section 421 of the Companies Act, 2013 against the impugned order dated 8.3.2018 passed in T.P. No.25/397/398/GB/2016 (Earlier number as CP No.992/2011) passed by the National Company Law Tribunal, Guwahati Bench at Guwahati whereby the company petition filed by the original petitioners was partly allowed.

2. The brief facts of the case are that the 1st appellant company is a private limited company incorporated on 13th March, 1946 under the erstwhile Companies Act, 1913 and subsequently covered under the Companies Act, 1956. As on 31.3.2009 the paid up capital of the company was 3072 equity shares of Rs.100/- each out of which 600 equity shares were held by the Govt of Assam and remaining 2472 equity shares were held amongst the shareholders of the company, including some of its employees and ex employees. It is stated that the registered office of the company initially was at AK Azad Road, Gopinath Nagar, Guwahati but due to the dispute between the shareholders and the then Managing Director, Sri Deep Narayana Singh, Original Respondent No.5, the registered office of the company was shifted to Santipur Main Road, House No.16, Near Pragiyotish College, Guwahati by a Board Resolution dated 5.1.2010 vide Resolution No.4.

2. However, in the month of July, 2009 a series of news items were published in various local newspapers reflecting that the company under the stewardship of DN Singh, the then Managing Director, Original Respondent No.5, since deceased, has been conducting the business of the company in a manner which purportedly violated various laws and rules holding the field which are put in place for ensuring good governance of the company. The shareholders sent a requisition to the company together with a proposal urging Mr. D.N. Singh, original Respondent No.5, to convene a EOGM of the company. Accordingly, EOGM was held on 14.11.2009 attended by all shareholders. However, Mr. D.N. Singh, original Respondent No.5, did not attend the same, and that too, without seeking any permission therefor from the authorised authority. EOGM was conducted and Mr. D.N. Singh was removed from the Managing Directorship and directorship of the company and 1st respondent was appointed as director in place of original Respondent No.5. The original Respondent No.5 was asked to hand over charge but he was avoiding. However, original Respondent No.5 informed that Addl. District Judge, Kamrup, Guwahati had rendered an order on 13.11.2009, restraining the company from holding any EOGM on 14.11.2009. However, on making necessary enquiry, the shareholders came to know that the Addl Distt Judge in Misc (Arb) Case No.527/2009 dated 13.11.2009 had restrained the requisitionists from adopting any resolution on agenda No.2 of the Notice dated 21.10.2009. The Agenda Item No.2 of the Notice dated 21.10.2009 proposed the removal of the original Respondent No.5. Later on the suit was dismissed on withdrawal on 1.3.2011 and injunction order passed stood vacated. The newly constituted Board filed necessary returns to the ROC, Shilling. Later

on 1st respondent was appointed as Managing Director of the company w.e.f. 25.11.2009. Another EOGM was held under the supervision of the District Magistrate, Kamrup, Guwahati on 5.1.2010 to transact the business, specified in the agenda of the EOGM and the removal of original Respondent No. 5 was confirmed.

3. After that the original Respondent No.5 started circulating frivolous and fabricated news in the local daily newspapers and opened a Bank account in the name of the company and started transacting business of the company through such an account. In the meantime, the original Respondent No.5 tampered the documents in the office of ROC Shillong and illegally and in an unauthorised manner issued 1455 nos of equity shares of Rs.100/- to himself on 20.2.2010 and to his associates without consent of all the existing shareholders of the company. Original R5 without approval of the majority shareholders fraudulently removed the 1st respondent from the office of Managing Director and illegally got himself appointed as Managing Director of the Company. Later on the authorised capital of the company was increased from Rs.5 lacs to Rs.10 lacs of Rs.100/- each. Original R5 then issued 6575 nos of fully paid equity shares of Rs.100/- in his name and in the name of his supporters (1455 nos of shares on 20.2.2010 (Page 264) and 5260 nos of shares on 15.9.2010 (Page 280)) and filed return of allotment to the office of ROC Shillong. Later on original R5 resigned from the post of Managing Director w.e.f. 16.2.2011 (Page 474) and inducted one Sri Madhav Das as being MD of the company (Page 474). Therefore, the 1st respondent alongwith 19 others preferred company petition before CLB Kolkata alleging oppression as well as mismanagement running the affairs of the company.

4. Notice was issued to the Respondents (appellants herein) who appeared and contested the proceeding alleging several infirmities in petition both factual and legal and prayed for dismissal of the petition. They also stated that the petition is not maintainable.

5. After hearing the parties the NCLT passed the order dated 8.3.2018.

The relevant portion of the order is as under:-

“234. In the result, this petition is allowed with the following conditions:-

- a) The resolutions, adopted in the EOGM held on 02.03.2010 under which the petitioner No.1 was removed from the post of Director and MD and petitioner No.2 was removed from the post of Director of the respondent company, are declared illegal, null and void.***
- b) The resolution, adopted in the Board Meeting held on 14.11.2011 under which Respondent No.5 was appointed as MD of the respondent company, is declared illegal, null and void.***
- c) The issuances of further shares on 20.02.2010 to some existing shareholders and outsiders are declared illegal, null and void.***
- d) The resolution adopted in EOGM held on 06.09.2010 enhancing authorized capital of the respondent company from 5000 to 10000 is declared illegal, null and void.***
- e) Issuances of further shares to some existing shareholders and outsiders on 15.09.2010 and on any other dates, if any, subsequent thereto, are also declared illegal, null and void.***
- f) The resolutions adopted in the EOGM, held on 14.11.2009, Board Meeting 25.11.2009, are restored.***
- g) The shareholdings of the shareholders/members in the respondent company as it was on 14.11.2009 are restored.***
- h) The respondent company shall normally function from its registered office.***
- i) All the actions, taken by the BOD, headed by Petitioner No.1 are declared valid and stand protected.***
- j) All the actions, taken by the BOD, headed by R-5 and R-4, to the extent they are inconsistent with the actions, taken by the BOD, headed by the Petitioner No.1 or to the directions, rendered hereinabove, are declared invalid and bad in law.***
- k) However, the declarations, aforesaid would not in any way affect the transactions, which the BOD, headed by R-5 and R-4 may have entered into with third party.***

- l) In view of the aforesaid directions, the ROC, Shillong is directed to make necessary amendments in the ROC records in the MCA 21 Portal.**
- m) The management of the respondent company is directed to manage the affairs of the company strictly in accordance the prescriptions of laws/Rules holding the field as well as mandates in the MOA and AOA of the company.**
- n) The management of the respondent company is further directed to do all the needful including the holding of EOGM as when required to ensure the corporate democracy in running the affairs of the company.”**
- 235. Further the company is directed to refund the money, collected from the persons on the dates aforesaid, within a period of six months from the date of receipt of the copy of the order, and that too, with simple interest @10% annually rest from the date of purported purchase of such shares till the repayment of such money in full.”**

6. Being aggrieved by the said order dated 8.3.2018 the appellants have filed the present appeal praying therein the following reliefs:-

- a) set aside and quash the impugned order dated 8.3.2018 as being contrary to law.
- b) Pass such other and further order(s) in favour of the appellants as may be deemed fit and proper in the facts and circumstances of the case.

7. Appellants stated that the profits of the company have consistently increased and the rates of dividend paid to the shareholders including the respondents have also increased and that none of the creditors etc of the company have showed any grievances against the appellant management of the company. Appellants further stated that it is wrong that the affairs of the company are being conducted in such manner which is prejudicial to company's interest, its creditors, public etc and the petition under Section 398 of the Companies Act, 1956 is not maintainable.

8. Appellants stated that adverse media reporting was being done at the instance of 1st and 10th respondent as mentioned in the said reports itself. Appellants further stated that the termination of the services of the 1st and 10th respondent for anti-company activities was concealed in the company petition. Appellants further stated that the services of 3rd, 11th and 13th respondents were also terminated by the Board of Directors under the late Mr. D.N. Singh, original Respondent No.5, was also concealed. Appellants stated that the respondents had not approached the Tribunal with clean hands, therefore, the respondents should not have been granted any relief.

9. Appellants have stated that the Hon'ble High Court of Guwahati in his order dated 9.5.2016 has stated that CP No.992/2011 is mainly a fight between 1st respondent and Original Respondent No.5, Mr. D.N. Singh for the post of Managing Director and it is nothing to do with a case of oppression and mismanagement under Section 397/398 of Companies Act, 1956. Appellants stated that no evidence has been submitted by the respondents in support of oppression and mismanagement. The allegation of tax evasion is speculative and no evidence has been

10. Appellants stated that NCLT in para 80 of the impugned order has itself reiterated the settled proposition of law that directors are appointed and removed by competent and qualified shareholders who constitute simple majority in the general meeting of the company which is summoned to appoint or remove directors.

11. Appellants stated that the allegations in the company petition have been levelled against the original Respondent No.5, Mr. D.N.Singh, who died during the pendency of the company petition and the original petitioners

failed to bring his legal representatives on record within the prescribed period of limitation, the company petition stood abated.

12. Appellants stated that the company petition filed by 19 shareholders holding 680 shares constitutes 22.13% of the paid up capital which is not at all a majority group. Appellants further stated that it cannot be said that further issue of shares led to the majority being converted to minority as it is evident that even prior to the issue of shares the Respondents herein were never in majority.

13. Appellants stated that it is settled law that directorial complaints cannot be entertained in a petition under Section 397/398 of the Act unless it is composite complaint and is in the case of a company which is in a nature of quasi partnership. In the facts of the present case, it is clear that the company cannot be said to be a quasi partnership.

14. Appellants stated that the respondents cannot claim any relief leading to rectification of register of member under Section 397/398 of the Companies Act, 1956 when an alternative remedy is available under Section 111 of the Companies Act, 1956.

15. Appellants stated that due to the freezing of the Bank accounts on the basis on the complaint of respondents the company needed fund for its operation and hence the Company raised money by issue of shares to its members on 20.2.2010 and 15.9.2010. Appellants stated that the action of the appellants comes within the dictum of the Hon'ble Supreme Court in ***Needle Industries (India) Ltd Vs Needle Industries Newey (India) Holding Ltd AIR 1981 SC 1298*** being a bonafide exercise of powers by the Board of

Directors in the best interest of the company and thus is legal, valid and proper.

16. Reply has been filed on behalf of the Respondents. Respondents has stated that the NCLT passed the impugned order dated 8.3.2018 strictly within the scope of terms of reference as determined by the Hon'ble High Court Gauhati vide its final judgement and order dated 9.5.2016 in Appeal No.3/2014 arising out of the final order dated 20.3.2014 passed by the Learned Company Law Board, Kolkata Bench, Kolkata.

17. Respondents stated that the appellants have failed to frame any question of law on the ground that the NCLT has exceed its jurisdiction or the terms of reference set by the Hon'ble High Court of Gauhati vide its final order dated 9.5.2016. Respondents further stated that the appellants have failed to raise any question/point of law that Rule of Law has not been applied correctly to the fact situation of the case or that a judicial precedent has not been adhered to or violated. Respondent stated that the appellant has also failed to raise any question of vitiated facts in their appeal.

18. Respondents stated that the 2nd appellant is not the Managing Director of 1st appellant company at any point of time and it is also denied that 2nd appellant has 1020 shares in the 1st appellant company. Respondents stated that except 3072 initial shares rest all the allotments at any point of time by the 1st appellant is fraud against the majority shareholders of the appellant company.

19. Respondents stated that no order is passed against any person in a Petition under Section 397 and 398 of the Companies Act, 1956 read with identical provisions of Section 241 and 242 of the Companies Act, 2013 much

less against a dead person in as much as a Petition of Oppression and Mismanagement is a representative suit and orders are passed to regulate the affairs of the Company in the best interest of the Company and its stakeholders and as such the contentions are absurd.

20. Respondents denied that 1st to 10th Respondent ever hatched a plan to grab the Management of 1st appellant company or started to defame the then Managing Director, Mr. D.N. Singh, original Respondent No.5.

21. Respondents denied and disputed that they gave a notice dated 3.10.2009 for calling and convening an EOGM with ulterior motive. Respondents stated that Mr. D.N. Singh committed a fraud against the majority shareholders of the appellant company as well as the said Court of Additional District Judge by filing Misc (Arb) Case No.571/2009 in as much as there cannot be any arbitration agreement between the shareholders on one side and the Board on the other as the same would tantamount to waiving the most basic legal rights of shareholders to appoint and remove the directors as envisaged in the Companies Act and as such the same is inconsistent under Company Law Jurisprudence. Respondents further stated that the provisions of Section 242 of the Companies Act, 2013 specifically rules out possibility of any such agreement between the shareholders and the Board.

22. Respondents denied and disputed that there was any order handed over to the Chairman of the Meeting dated 14.11.2009. Respondents denied and disputed that 19 members present did not vote in view of Stay Order dated 13.11.2009. Respondents further stated that no such pleadings were made before the Learned Company Law Board or the Hon'ble High Court.

23. Respondents stated that the appeal filed by the appellants is wholly frivolous, vexatious, misconceived, not tenable in law and made in gross abuse of the process of this Hon'ble Tribunal and as such the same are liable to be dismissed in limine with costs.

24. Rejoinder has been filed on behalf of the appellants. Appellants stated that 1st respondent has filed a Power of Attorney dated 21st March, 2018 authorising one Ms Suhita Mukhopadhyay and one Mr. Akhilesh Kumar Srivastava to act not only on his behalf but on behalf of 2nd to 18th respondents as well. However, no power of attorney or other document has been filed before the Appellate Tribunal which authorizes 1st respondent to act on behalf of 2nd to 18th Respondent. It is stated that 15th Respondent has sold his shareholding in the 1st appellant company on 20.5.2018 and yet the reply affidavit under reply has purportedly been filed on behalf of the 15th respondent as well which is further indicative of the fact that the 1st respondent is acting without authorisation of all/any of the 2nd to 18th respondent.

25. Appellants stated that the appeal is maintainable. Appellants stated that the NCLT has erred materially both in fact and law in deciding upon the issues framed by the Hon'ble High Court at Guwahati in Comp. Appeal No.3/2014 under S. 10F of the Companies Act, 1956.

26. Appellants stated that they have framed many facts in issue and question of law which conclusively demonstrate that the NCLT has erred in passing the impugned order both in fact and law resulting in miscarriage of justice.

27. Appellants denied that appellants have failed to raise any questions/points of law that rule of law has not been correctly applied to the fact situation of the case or a judicial precedent has not been adhered to or violated by the NCLT in passing the impugned order. Appellants stated that appellants have framed many facts in issues and questions of law as well as raised several grounds which conclusively demonstrate that rule of law has not been correctly applied to the fact situation of the case or a judicial precedent has not been adhered to or violated by the NCLT in passing the impugned order.

28. Appellants stated that appellants have framed many facts in issue and questions of law which conclusively demonstrate that the NCLT has erred in passing the impugned order both in fact and law resulting in miscarriage of justice. Appellants stated that the NCLT has erred materially both in fact and law in deciding upon the issues framed by the Hon'ble High Court at Guwahati in Comp. Appeal No.3/2014 under Section 10F of Companies Act, 1956.

29. Appellants stated that 2nd appellant was appointed as Additional Director of 1st appellant on 30.1.2010 and his appointment as Director was ratified by the shareholders in the AGM held on 5.5.2010 which was attended by the majority shareholders of the 1st appellant. 2nd appellant was appointed as Managing Director of the Company in Board Meeting held on 25.5.2013 which was attended by other directors and the appointment of 2nd appellant as Managing Director is as per Article 62 of the Articles of Association and the 2nd appellant is the bona fide owner of 1020 equity shares. Appellants stated that there has been no fraud in allotment of shares by the 1st appellant and

neither has the NCLT vide its final order dated 8.3.2018 ever given any finding about any fraud in allotment shares by the 1st appellant.

30. Appellants stated that 1st respondent joined company in the year 1991 and 10th respondent joined the company in the year 2003. During the employment these persons became shareholders of the company. These respondents in association with 10 to 12 terminated and retired employee shareholders hatched a conspiracy to grab the management of the company. These said respondents started planting false news in the media and on the basis of the false news made a requisition under Section 169 of the Companies Act, 1956 to the Company to convene an EGM for passing a resolution for the removal of Mr. D.N. Singh as Managing Director of the company. The said respondents group started to defame the company and its Managing Director by affixing posters in the office/factory and spreading false news in the media. Further the appellants have reiterated the statements made in the appeal.

31. We have heard the learned counsel for the parties and perused the record.

32. Learned counsel for the appellant argued 1st and 10th Respondent manufactured newspaper reports which formed the very basis of the alleged oppression and mismanagement.

33. Learned counsel for Respondents argued that no reporting in media has been admitted as any evidence and as such the contentions are misleading and fraud against this Appellate Tribunal. Learned Counsel for the Respondents further argued that no petition of oppression and mismanagement can be filed under Companies Act on the basis of media reporting.

34. We have heard the arguments of the parties and perused the news item published in the newspapers. We observe that media reporting as such has nothing to do with the petition filed for oppression and mismanagement.

35. Learned counsel for the appellant argued that in the Board of Directors Meeting of 1st appellant company on 18th October, 2008 in which 2nd respondent, Director of 1st appellant, was present, voted in favour of the termination of services of 1st respondent and 10th respondent. However, 1st respondent continued to be on the Board of Director. This fact was never disclosed in the petition.

36. Learned counsel for the Respondents argued that termination of employment has nothing to do with a petition of oppression and mismanagement even if that may be the only reason to file an oppression and mismanagement case. Learned counsel for the respondents argued that nothing relevant was concealed from the NCLT and the matter claimed by the appellants to have been concealed have no relevance in an oppression and mismanagement.

37. We have heard the parties on this issue. We find that the 1st and 10th respondents were terminated from the services of 1st appellant as an “employee” which has nothing to do with the shareholding of 1st and 10th respondent and with the case of oppression and mismanagement.

38. Learned counsel for the appellant argued that Civil Judge in Misc Arb No.571/209 passed an injunction order on 13.11.2009 prohibiting any discussion on item No.2 in the agenda notice dated 21.10.2009, which was duly conveyed to the company and all concerned. Learned counsel for the appellant further argued that in the said order the Court restrained the

respondents from making any discussions on Item No.2 in the notice dated 21.10.2009 in the EOGM convened on 14.11.2009. The said order was immediately conveyed to company, Respondents and all office bearers. Learned counsel further argued that inspite of this orders, the respondents not only made discussions but also took a resolution removing Late Mr. D.N. Singh, original Respondent No.5, from the post of Director/Managing Director.

39. Learned counsel for the Respondents argued and denied that any order dated 13.11.2009 was handed over to the Chairman of the Meeting dated 14.11.2009 or that the proxy of the State of Assam acknowledged the stay order dated 13.11.2009 or that the shareholders were informed of any such stay order well before the Meeting dated 14.11.2009 or that 19 members did not vote on the said item in view of the said stay order or that the respondents went ahead with voting on Item No.2 in contempt of court. Learned counsel for the Respondents further argued that the said Meeting was held under the supervision of an Executive Magistrate appointed by District Magistrate. Learned counsel for the Respondents further argued that no such contentions were raised before the Learned Company Law Board or the Hon'ble High Court, Gauhati and as such the said is a sinister design to improve on their pleadings and a fraud against this Hon'ble Appellate Tribunal.

40. We have heard the parties on this issue. We have also perused the impugned order and copy of the order dated 13.11.2009. NCLT in its paras 93 and 94 has observed as under:=-

“93. I have considered such submissions having regard to the arguments advanced from the side of the petitioner. Though the

petitioners made a feeble attempt to dispute the aforesaid claim, more particularly, the allegation of their being served with the notice, issued from the office of the Principal Civil Judge on 13.11.2009, yet, the materials on record, more particularly, the letter dated 14.11.2009 (Annexure XIII to the reply of Respondent No.6 to 10, 13, 14), unmistakably demonstrates that the order was duly communicated to the petitioners.

94. In spite of that, they have taken a resolution on Item No.2 in total violation of directions of the Civil Judge, Guwahati rendered in order dated 13.11.2009 in Misc (Arb) No.571/2009. Such episodes were never made known to this tribunal by the Petitioners incorporate such information in the petition under consideration. Since the injunction order in Misc (Arb) No.571/2009 has some bearing on the dispute in the present proceeding and since it was not made known to this Tribunal by the petitioner, such conduct on the part of petitioners now requires me conclude that in approaching this Tribunal, the petitioners never came with clean hands.”

In view of the above observations/conclusion of the NCLT, we observe that the decision taken in the EOGM held on 14.11.2009 in respect of Item No.2 is not legal.

41. Learned counsel for the Appellant argued that 1st respondent and 7th respondent had no locus as Directors as they were appointed at the EOGM on 14.11.2009 de hors the agenda and in violation of Section 284 of the Companies Act, 1956. Learned counsel for the appellant argued that there

were only two agenda items for the Meeting dated 14.11.2009 and the discussions on Item No.2 was stayed by the Court.

42. Learned counsel for the Respondents argued that they admit that there were only two agenda for the said Meeting dated 14.11.2009, however, the shareholders had proposed only agendum i.e. for removal of Late D.N. Singh from the position of the Director of the Company whereas the proposal to remove 2nd respondent from the directorship was proposed by the Board, which has no authority to propose for removal and as such the same was a fraud against the majority shareholders and the company. Learned counsel for the Respondents argued that there was no violation of provisions of Section 284 of the Companies Act, 1956 or its applicability itself in the appointment of 1st respondent. Learned counsel for the Respondents further argued that General Meeting has power to appoint a Director without any agenda under Section 255 of the Companies Act, 1956. Learned counsel for the Respondent further denied that 1st respondent was appointed in a casual vacancy or the concept of casual vacancy has any applicability in case of Private Limited Companies.

43. We have heard the parties and perused the impugned judgement. In its judgment, NCLT in paras 128, 129 and 130 (Page 141) has held as under:-

“128. But such resolution was totally illegal and non-est in law since such a resolution to remove the R-5 from the post of director and MD of the company was adopted on 14.11.2009 in complete disregard to the lawful direction of the court of law requiring the petitioners not to make any discussion on the Item No.2 in the Notice dated 21.10.2009. Since the very removal of the R-5 from

the office of the director and MD of the company was profoundly illegal and non-est in law, one can very well conclude that legally and technically, the R-5 continued to be the MD of the company even after 14.11.2009.

129. Since R-5 continued to hold the office of the director and MD of the respondent company for all purposes even after 14.11.2009, one cannot but conclude that no casual vacancy ever occurred in the office of the director of the company on 14.11.2009 requiring the shareholders in the EOGM to fill such post by the petitioner No.1 immediately. Since the removal of the R-5 was found to be illegal and non-est in law, all subsequent appointments including the appointment of P-1 as director of the company on 14.11.2009, his appointment as MD of the company on 25.11.2009 as well as the subsequent appointment of P-2 as director of the company were all illegal and equally non-est in law.

130. In that view of the matter, the removal of the petitioner No.1 from the post of the director as well as MD of the company on 2.3.2010 and the removal of the petitioner No.2 from the post of director on 2.3.2010 are nothing more than mere formality. Such revelation-according to the respondents-becomes a clear proof of the action of the respondents in removing the petitioner No.1 from the office of the director on 2.3.2010 as well as the removal of the petitioner No.2 from the office of the director on 2.3.2010 not at all being illegal or contrary to law.

Since we have already observed that the removal of the R-5 in Meeting dated 14.11.2009 is not legal, therefore, the subsequent appointment of 1st and 2nd respondent is also not legal.

44. Learned counsel for the appellants argued that the Meeting dated 25.11.2009 (Page 239) held by the Board of Directors is contrary to the order of the Learned ADJ dated 19.11.2009 (Page 218, Annexure N, Vol II of Respondent).

45. Learned counsel for the Respondent argued that the holding of Board of Directors Meeting on 25.11.2009 is admitted except the contention that there was any violation of the Order dated 19.11.2009 as alleged.

46. We have heard the parties and perused the record. We have perused the order dated 19.11.2009 of ADJ passed in the matter of Deep Narayan Singh Vs Assam Chemical & Pharmaceuticals Ltd. In the said order dated 19.11.2009 the learned ADJ has ordered as under:

“Considering the facts and circumstances of the case, the Opposite Parties are directed not to give effect to the resolution (Item No.2) passed in Extra-ordinary General Meeting of the Opposite Party No.1 (Assam Chemicals & Pharmaceutical Pvt Ltd) held on 14.11.2009 regarding removal of the petitioner as its Managing Director of the Assam Chemical & Pharmaceutical Pvt Ltd, till next date.”

We have already observed in the previous para that the removal of the R-5, Mr. D.N.Singh is not legal and the subsequent appointment of directors in the said Meeting dated 14.11.2009 is also not legal. We also observe from the Company Petition filed by the Respondents before the NCLT, they themselves have stated in para (XV) at page 180 of the Appeal Paper Book, **“that the Addl. District Judge, Guwahati, without giving an opportunity to the petitioners to be heard in person, passed an interim order dated**

Section 9 of the Arbitration & Conciliation Act, 1996 restraining operation of Resolution No.2 of the notice dated 21.10.2009 in connection with the removal of the respondent, Sri Deep Narayana Singh, by order dated 13.11.2009 and 19.11.2009.” It clearly shows that there was restraint order from the Hon’ble Court and the Respondents herein should have acted upon it. Therefore, we observe that the appointment of 1st respondent as Managing Director passed in that Meeting dated 25.11.2009 is not legal and also when we have already observed that removal of R-5, Mr. Deep Narayan Singh is not legal.

47. Learned counsel for the appellant argued that purported Assam Government nominee Mr. Bipul Das was never appointed a Director and could not have been unilaterally appointed by Assam Government under Article 51 which permits it to appoint 2 directors as long as it held shares above 25%, whereas as on 14.11.2009 and 25.11.2009, Assam Government share was around 19%. Learned counsel for the Respondents argued that the NCLT erred in holding that the percentage has come down to 6%, which was a subsequent event. Therefore, the conclusion drawn by NCLT is also erroneous when it holds that Assam Government can have one nominee director. Therefore, there was no quorum at the Board Meeting dated 25.11.2009.

48. Since we have already observe that the appointment made in the Meeting dated 14.11.2009 and 25.11.2009 are not legal, therefore, this issue is immaterial.

49. Learned counsel for the appellant argued that the issue of further shares at the Board Meeting dated 20.2.2010 and further issue at the Board

Meeting dated 15.9.2010 have been declared illegal, null and void. Learned counsel for the Appellant argued that a total of 6715 shares were allotted by the Company after increase in authorised share capital on 6.9.2010. Learned counsel for the appellant argued that because the Respondents illegally usurped the management of company and issued letters to its bankers requiring them to freeze all the accounts of the company, therefore, the appellant were left with no alternative but to raise capital. Appellants also argued that they also approached Gauhati High Court but it took seven years to finally get the required relief. Learned counsel for the appellant argued that Article 28 (Page 226) permits non-members if there is no member willing to purchase shares at fair value. Learned counsel for the appellant further argued that the findings of the NCLT that the increase of authorised share capital on 6.9.2010 at the EOGM is contrary to the MOA and AOA, and it was oppressive, is simply incorrect as there is no violation of MOA or AOA increasing the authorised share capital.

50. Learned counsel for the Respondents argued that with mala fide intention the original Respondent No.5, Mr. D.N. Singh, has illegally and fraudulently allotted 6715 nos of fully paid equity shares of Rs.100/- of the company (Page 264 and 280) in his name and in the name of his supporters, to deceive the existing share holders, converted the majority share holdings to minority share holding and also filed Return of Allotment in the office of the ROC in contravention of the provisions of law. Learned counsel for the Respondents further argued that R-5, Mr. Deep Narayana Singh resigned from the post of Managing Director as reflected in the ROC record w.e.f. 16.2.2011 and appointed Mr. Madhab Das as Managing Director of the

company w.e.f. 16.2.2011. Learned counsel for the Respondents argued that this all has been done in a Board of Directors Meeting held on 16.2.2011 (Page 34).

51. We have heard the parties on this issue. We observe that the appellant had approached Hon'ble Gauhati High Court in 2010 and the Hon'ble High Court passed order dated 24.7.2017 (Page 167-169 of Rejoinder) allowing the appellant to operate the Bank account. We observe that due to internal disputes within the Management, the bank account being suspended for operation, the company was in financial crises. In these circumstances the need for raising funds through issue of equity shares cannot be held to be unreasonable. There is also force in the argument of the Learned counsel for the Respondent that these shares have been issued to the appellant himself and his supporters. It cannot be said that it is fair allotment of shares. We observe that even if the company was in need of funds, the new equity shares should have been issued in a fair manner to the existing shareholders on pro-rata basis as per their holding in the company.

52. Additional shares have been allotted who rightly have been continuing in the Management and the funds raised have been utilised by the company almost more than 8 years now. The impugned order asking for refund of the amount of allotted shares with simple interest @ 10% annually rest from the date of purported purchase of such shares till the repayment of such money in full as ordered will severally put the company into financial problem and to carry out these orders it may have to issue more shares to the existing shareholders so as to raise its finances. Even for meeting this financial needs the company may have to issue shares again to raise finances. Instead to

taking the option of refund and raising the money it would be desirable if the shares allotted are distributed to the rightful shareholders in the proportionate they were holding shares as on 14.11.2009.

53. It has been observed in the earlier paragraphs that Mr. D.N. Singh, original Respondent No.5, was continuing as Managing Director as no casual vacancy occurred to fulfil it by appointing any body else. It is also observed in the earlier paragraphs that a Resolution dated 2.3.2010 was adopted in which original petitioners (1st and 2nd respondent herein) were removed as Director/Managing Director of the company. It is formality. In the light of it the conclusion has been drawn that Resolution dated 2.3.2010 in which original petitioners (1st and 2nd respondent herein) have been removed from the post of Director/Managing Director and Director, that these are illegal, null and void is a wrong decision reached by NCLT which cannot be upheld.

54. Further there is no resolution dated 14.11.2011 on record to suggest that R-5 (Original Respondent No.5) was appointed as Managing Director of the Company. The appellant has stated in his appeal at Page 95 (Para xlviii) that ***“para 234(b) of the impugned order is based on incorrect facts as no Board Meeting ever took place on 14.11.2011 and further Late Mr. D.N.Singh (Respondent No.5 in the Company Petition) had resigned from the service of the company on 15.2.2011 itself. Thus, there was no question of Late Mr. D.N. Singh (Respondent No.5 in the Company Petition) having been appointed as Managing Director of the Company on 14.11.2011 and there is nothing in the record to suggest the same.”***

Respondents also in its reply at Para 73 (Page 33) has not touched this issue. Therefore, we can draw the conclusion that original Respondent No.5, Mr. D.N. Singh, is continuing as Director and Managing Director till he resigned.

55. Going through the complete material on record what appears to us is that this company being company of employees is being run by the employees. While the present parties before us are rival groups who continue to claim right to Management and continue to assert rights against each other and have created various confusions relating to the incidents and facts. The confusion gets reflected even in the impugned order. It appears to us that this company which appear to be running well needs to be protected from internal group rivalries. It appears to be in the interest of justice that we appoint an Administrator so as to set things straight.

ORDER

56. In view of the above observations and directions the impugned order dated 8.3.2018 is set aside. We pass the following order:-

1. The decision taken at the EOGM dated 14.11.2009 removing original R-5 as Director and Managing Director of the Company is set aside and the appointment of 1st Respondent, Shri Deba Kumar Hazarika, as Director is held illegal.
2. The further decision taken at the Board of Directors Meeting dated 25.11.2009 appointing Mr. Deba Kumar Hazarika, 1st respondent, as Managing Director of the company is set aside.
3. Existing Board of Directors stand suspended. Shri Anil Kumar Dubey, Company Secretary, Todi Mansion, 22 Madan Mohan Talla

Street, Kolkata (Mobile No.9883039240) is appointed as an Administrator with immediate effect for a period of six months to manage the company and complete the below mentioned process. If the process is not completed within six months, then the Administrator can seek extension for the same from NCLT. The company will pay a sum of Rs.1 lac per month to the Administrator. The Administrator can take secretarial assistance of his own for which the actual reimbursement will be done by the company. The company will also reimburse to the Administrator actual TA, stay and other expenses, if any.

4. 6715 shares issued by the original Respondent No.5, Mr. D.N. Singh on 20.2.2010 and 15.9.2010 shall be re-allotted by the Administrator as under:-

- i) These shares shall be first offered to the then shareholders of the company as on 14.11.2009 on pro-rata basis on the price at which they were allotted on the above dates of 20.02.2010 and 15.09.2010. The offer shall be made by the Administrator adopting the procedure as in Section 62 of the Companies Act, 2013 as far as may be. The then existing members who come forward to accept such shares shall pay the earlier allottees the money through the Administrator.
- ii) The exercise may be completed by the Administrator within a period of three months from the date of this judgement.
- iii) The new shareholding pattern as would then emerge will be reported to the ROC.

5. After completing the above process, the Administrator will hold EOGM and reconstitute the Board of Directors so as to run the company.
6. Appellants and Respondents will cooperate with the Administrator.
7. Interim order, if any, passed by this Appellate Tribunal is vacated.
8. Registry is directed to send a copy of this order to all concerned.
9. Copy of this order be sent to Administrator immediately.

(Justice A.I.S. Cheema)
Member (Judicial)

(Balvinder Singh)
Member (Technical)

New Delhi
Dated: 28-5-2019

Bm