

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 17 of 2018

IN THE MATTER OF :

1. **Achintya Kumar Barua alias Manju Baruah,**
Village – Bochagaon, Kaziranga ... **Original Petitioner No. 2**
District – Golaghat,
Assam – 785109.
 2. **Marami Goswami Barua,** ... **Original Petitioner No. 3**
Village – Bochagaon, Kaziranga
District – Golaghat,
Assam – 785109.
 3. **Maan Singh Kharangi Barua,** ... **Original Petitioner No. 4**
Village – Bochagaon, Kaziranga
District – Golaghat,
Assam – 785109.
 4. **Sikha Barua,** ... **Original Petitioner No. 6**
R.G. Barua Road,
Guwahati, Kamrup,
Assam – 781024.
 5. **Baladev Barkakati,** ... **Original Petitioner No. 7**
Village – Bochagaon, Kaziranga,
District - - Golaghat,
Assam – 785109.
- ... APPELLANTS NOS. 1 TO 5**

Versus

1. **Ranjit Barthkur,**
House No. 5, B.P. Barua Road,
1st Bye-Lane, Narikalbari,
Guwahati, District – Kamrup (M),
Assam – 781024.
 2. **Radhika Barthakur,**
House No. 5, B.P. Baruah Road,
1st Bye-Lane, Narikalbari
Guwahati, District – Kamrup (M),
Assam – 781024.
- ... RESPONDENTS NOS. 1 & 2**

Present: Shri Sumant Bhushan, Advocate for the Appellants.

ORAL JUDGEMENT
8th February, 2018

A.I.S. Cheema, J.

Heard the learned counsel for the appellants. This appeal has been filed against the impugned order dated 27th October, 2017 passed by the National Company Law Tribunal, Guwahati Bench, Guwahati (hereinafter referred to as 'NCLT') in T.A. No. 02/2016 (CA No. 134/2016) in T.P. No. 06/397/398/GB/2016 (C.P. No. 287/2012).

2. It is stated that Respondent No. 1 moved application before the NCLT seeking facility of attending the Board meetings through video-conferencing. The petition was earlier filed under Sections 397 & 398 read with Section 402 of the Companies Act, 1956 ('Old Act' in brief). Respondent No. 1 claimed right to participate in the Board meetings through video-conferencing relying on Section 173(2) of the Companies Act, 2013 ('New Act' in brief). The matter had earlier come-up before the Company Law Board ('CLB') and being aggrieved by certain observations, the same was carried to the High Court of Guwahati. The Hon'ble High Court found that the appeal did not raise any question of law and sent back the matter. The same came up before the NCLT and hearing both sides, the NCLT allowed the application filed by Respondent No. 1 directing that the facility under Section 173(2) of the New Act should be made available.

3. Learned counsel for the appellants states that Appellants Nos. 1 and 3 are other Directors of the Company and the appellants have filed this appeal on behalf of the Company. According to the learned counsel,

the appellants are aggrieved as they have apprehension that when the original Petitioner participates in the meetings through video-conferencing, it would not be possible to ensure that nobody else is present from where the Original Petitioner would be participating. According to him, the Secretarial Standards on Meetings of the Board of Directors have considered this aspect and the Secretarial Standards have prescribed that such option under the provisions of the New Act and the Rules should be resorted to only when the facilities are provided by the Company to its Directors.

4. Learned counsel submits that sub-Section (2) of Section 173 of the Act is not a mandatory provision and it is not compulsory for the Company to provide such facility. He referred to Clause (e) of sub-Rule (2) of Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 (hereinafter referred to as 'Rules') to submit that the responsibility has been put on the Chairperson to ensure that no person other than the concerned Director is attending or having access to the proceedings of the meeting through video-conferencing mode or other audio-visual means. It is stated that when a Director resorts to availing facility of video conferencing, it would not be possible for the Chairperson to ensure that the Director is alone when participating from wherever the video call is made as the Chairperson would have no means to know as to who else is sitting in the room or place concerned.

5. We have gone through the judgement of the NCLT. We have perused provisions of Section 173 of the Act as well as the Rules referred. Going through the judgement of the NCLT, we find that these provisions have

been introduced under the Act of 2013 and following these provisions would be in the interest of the Companies as well as the Directors. It would not be appropriate to shut-out these provisions on mere apprehensions.

6. Section 173 of the New Act deals with Meetings of the Board of Directors. Sub-Section (2) of Section 173 reads as under :-

“Sec. 173 Meetings of Board —

(1) xxx xxx

(2) The participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time:

Provided that the Central Government may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means.”

7. The above provision is admittedly a new provision in this Act and it is stated that earlier there was no such facility provided in the Act.

8. The above proviso has laid down that the Central Government may provide by notification which matters ‘shall’ not be dealt with in a meeting through video-conferencing or other audio-visual means. The Central

Government has with reference to powers conferred under Section 173 and also other sections of Companies Act, 2013 vide Notification No. G.S.R. 240 (E) issued (through the Ministry of Corporate Affairs) on 31st March, 2014 [The Gazette of India : Extraordinary - Part II Section 3(i)] published the Rules, which have been enforced on 1st April, 2014. Rule 4 reads as under :-

“Rule 4. Matters not to be dealt with in a meeting through video conferencing or other audio visual means.— (1) The following matters shall not be dealt with in any meeting held through video conferencing or other audio visual means :-

- (i) the approval of the annual financial statement;*
- (ii) the approval of the Board’s report;*
- (iii) the approval of the prospectus;*
- (iv) the Audit Committee Meetings for consideration of accounts; and*
- (v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.”*

9. Thus it is apparent that the matters as specified above cannot be permitted to be conducted in Board of Directors meeting by video-conferencing or other audio-visual means.

10. It is argued by the learned counsel for the appellants that the use of the word “may” in the above Section 173(2) makes it clear that the provision is directory and not mandatory to be followed. We find that the

word “may” which has been used in this sub-Section (2) of Section 173 only gives an option to the Director to choose whether he would be participating in person or the other option which he can choose is participation through video-conferencing or other audio-visual means. This word “may” does not give option to the company to deny this right given to the Directors for participation through video-conferencing or other audio-visual means, if they so desire. In this regard, provisions of Rule 3 are material. The relevant portions of this Rule for deciding the present controversy may be reproduced as under :

“Rule 3. Meetings of Board through video conferencing or other audio visual means.— *A company shall comply with the following procedure, for convening and conducting the Board meetings through video conferencing or other audio visual means.*

- (1) *Every company shall make necessary arrangements to avoid failure of video or audio visual connection.*
- (2) *The Chairperson of the meeting and the Company Secretary, if any, shall take due and reasonable care —*
 - (a) *to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;*
 - (b) *to ensure availability of proper video conferencing or other audio visual equipment*

or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;

- (c) to record proceedings and prepare the minutes of the meeting;*
- (d) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year;*
- (e) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means; and*
- (f) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meetings.*

Provided that the persons, who are differently abled, may make request to the Board to allow a person to accompany him.

(3) (a) The notice of the meeting shall be sent to all the Directors in accordance with the provisions of subsection (3) of section 173 of the Act.

(b) The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio video means, and shall provide all the necessary information to enable the Directors to participate through video conferencing mode or other audio visual means.

(c) A Director intending to participate through video conferencing or audio visual means shall communicate his intention to the Chairperson or the Company Secretary of the company.

(d) If the Director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangements in this behalf.

(e) The Director, who desire, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year.

(f) In the absence of any intimation under clause (c), it shall be assumed that the Director shall attend the meeting in person.

(4) At the commencement of the meeting, a roll call shall be taken by the Chairperson when every Director participating through video conferencing or other audio visual means shall state, for the record, the following, namely :-

- (a) name;*
- (b) the location from where he is participating;*
- (c) that he has received the agenda and all the relevant material for the meeting; and*
- (d) that no one other than the concerned Director is attending or having access to the proceedings of the meeting at the location mentioned in clause (b).”*

11. Then there are other sub-Rules (5) to (12) of Rule 3 dealing with further aspects regarding holding of the meeting and drafting of minutes and circulation as well as recording in the Minute Book, etc.

12. It is clear that the Rules require that the company shall comply with the procedure prescribed for convening and conducting the Board meetings through video-conferencing or other audio-visual means. The Chairperson and Company Secretary, if any, have to take due and reasonable care as specified in Rule 3(2). The argument of the learned counsel for the appellant is that sub-Rule (2)(e) puts the burden on the Chairperson to ensure that no person other than the concerned Director is attending and this would not be possible for Chairperson to ensure in

video-conferencing. We do not find force in the submission as Rules, read as a whole are a complete scheme. Sub-Clause (4)(d) of Rule 3 puts responsibility on the Director participating also. The Chairperson will ensure compliance of sub-Clause (e) or Clause (2) and the Director will need to satisfy the Chairperson that Sub-Clause (d) of Clause 4 is being complied.

13. We find that the provision of Section 173(2) of the New Act read with these Rules as a progressive step. We have got so many matters coming up where there are grievances regarding non-participation, wrong recordings etc. In our view, Section 173(2) gives right to a Director to participate in the meeting through video-conferencing or other audio-visual means and the Central Government has notified Rules to enforce this right and it would be in the interest of the companies to comply with the provisions in public interest.

14. Learned counsel for the appellants tried to rely on the Secretarial Standard on Meetings of the Board of Directors to submit that the guidelines are that such participation can be done “if the Company provides such facility”. We find that such guidelines cannot override the provisions under the Rules. The mandate of Section 173(2) read with Rules mentioned above cannot be avoided by the companies.

15. Coming to the facts of the present matter, it can be seen that the NCLT took note of the fact that the Company in this matter had all the necessary infrastructure available. The learned Judicial Member took judicial notice of the physical condition of Kaziranga National Park and

found that the Company had no reason not to provide the concerned facility. The NCLT came to the conclusion that the provisions of Section 173 (2) of the New Act are mandatory and the companies cannot be permitted to make any deviations therefrom. The NCLT directed non-applicants before it to provide the facilities as per Section 173(2) of the New Act subject to fulfilling the requirements of Rule 3(3)(e) of the Rules.

16. We do not find any reason to interfere with the impugned order. The impugned order must be said to be progressive in the right direction and there is no reason to interfere with the same.

17. The admission of the appeal is denied. The appeal is disposed of. There shall be no order as to costs.

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

[Balvinder Singh]
Member (Technical)

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