

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) No.272 of 2017**

[Against the order dated 17.05.2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in TP No.197/397-398/NCLT/AHM/2016 (NEW) C.P. No.16/397-398/CLB/MB/2012 (Old)]

**With**

**Company Appeal (AT) No.273 of 2017**

[Against the order dated 17.05.2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in TP No.10/397-398/NCLT/Ahm/2016 (New) [C.P. 86 of 2010 (old)]

**IN THE MATTER OF:**

1. Hasmukhlal Madhavlal Patel  
174, Satyagrah Chawani  
Sector – 7, Satellite Road,  
Jodhpur, Ahmedabad  

...Appellant No.1  
(Original Respondent No.2)\*
  
  2. Dilipkumar Madhavlal Patel  
174, Satyagrah Chawani  
Sector – 7, Satellite Road,  
Jodhpur, Ahmedabad  

...Appellant No.2  
(Original Respondent No.3)\*
- Vs.
1. Ambika Food Products Pvt. Ltd.  
National Highway NC 8A  
Rajoda Post Bavla  
District Ahmedabad, Gujarat  

...Respondent No.1  
(Original Respondent No.1)\*
  
  2. Manish Vipinchandra Patel  
8, Manichandra Society Vibhag – 1  
Surdhara Circle, Drive in Road  
Ahmedabad  

...Respondent No.2  
(Original Petitioner No.1)\*

3. Krunal Vipinchandra Patel  
8, Manichandra Society Vibhag – 1  
Surdhara Circle, Drive in Road  
Ahmedabad  
...Respondent No.3  
(Original Petitioner No.2)\*
4. Kiritkumar Ochachhavlal Sheth  
67, Surdhara Bunglows,  
Nr. Sal Hospital Surdhara circle  
Drive in Road  
Ahmedabad  
...Respondent No.4  
(Original Respondent No.4)\*
5. Ashwinkumar Kiritkumar  
Ochachhavlal Sheth  
67, Surdhara Bunglows,  
Nr. Sal Hospital Surdhara circle  
Drive in Road, Ahmedabad  
...Respondent No.5  
(Original Respondent No.5)\*
6. The Registrar of Companies  
Opp. Rupal Park, Nr. Ankur Bus Stand  
Naranpura, Ahmedabad  
...Respondent No.6  
(Original Respondent No.6)\*

\* As in TP 197 of 2016

- Cause title in both Appeals is same.

**Present: Shri Ashok Mehta, PCS and Shri Shwetank Sailakwal, Shri Yash Agarwal, Shri Vijay Assudani and Shri Pradeep Tiwari, Advocates for the Appellants**

**Shri Malak Bhatt and Ms. Sonali Malik, Advocates for Respondents Nos.2 and 3**

**Shri Sujeet Gupta, Shri Anmol Tayal and Shri Vikas Agarwal, Advocates and Shri Rameez Ahmed, CS for Respondent Nos.4 and 5**

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

**A.I.S. Cheema, J. :**

Both these appeals have been filed by original Respondent Nos.2 - Hasmukhlal Madhavlal Patel and 3 - Dilipkumar Madhavlal Patel against

the same impugned order dated 17.05.2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (“NCLT”, in short). In the NCLT, TP 197/2016 (new) CP 16/2012 (old) was filed by Manish Vipinchandra Patel and Krunal Vipinchandra Patel (Original Petitioners 1 and 2). Before this petition was filed earlier, Company Petition TP 10/2016 (new) (CP 86/2010) (old) had been filed by Kiritkumar Ochachhavlal Sheth (Respondent No.4 in T.P. 197/2016). Both the Company Petitions raised grievances of oppression and mismanagement. The NCLT disposed both the Company Petitions by common Judgement. Parties have been referred in the Judgement in the manner in which they were arrayed in TP 197/2016. We will also refer to them in the same manner as arrayed in TP 197/2016 and as indicated above against names of parties of CA 272/2017.

2. The parties have been referred by the NCLT also by their group names and which may be reproduced as under:-

<b>Sl. No.</b>	<b>Parties</b>	<b>Group Name</b>	<b>Arrayed as</b>
1.	Manish Vipinchandra Patel and Krunal Vipinchandra Patel	VP Patel Group	Original Petitioners 1 & 2
2.	Hasmukhlal Madhavlal Patel and Dilipkumar Madhavlal Patel	HM Patel Group	Original Respondents 2 & 3
3.	Kiritkumar Ochachhavlal Sheth and Ashwinkumar Kiritkumar Ochachhavlal Sheth	Sheth Group	Respondents 4 & 5

3. Sheth Group filed the Company Petition TP 10/2016 earlier on 28.10.2010. VP Patel Group filed TP 197/2016 in February, 2012. NCLT

has treated TP 197/2016 as the main matter and referred to the cases put up by the parties accordingly.

Petitioners claimed before NCLT that the Original Respondent No.1 Ambika Food Products Private Limited is a private limited company with authorized share capital of Rs.1 crore consisting of Rs.10 lakhs equity shares each of Rs.10/-. The paid up share capital is also the same. The petitioners claimed that the shareholdings of the parties were as follows:-

- |    |                |   |        |
|----|----------------|---|--------|
| 1) | HM Patel Group | - | 30.80% |
| 2) | VP Patel Group | - | 24.20% |
| 3) | Sheth Group    | - | 45%    |

4. The Original Petitioners and Sheth Group claimed before NCLT that earlier the three groups were running the company smoothly but later on differences came up. Three groups decided to amicably settle the accounts and separate the business. Consequently, Sheth Group and Vipinchandra Patel (father of Original Petitioners), who was functioning as Director, resigned from posts of Directors on 11.04.2009. Original Petitioners and HM Patel Group continued on the Board of Directors. The parties had earlier decided to settle the accounts of Sheth Group. However, after resignation of the Sheth Group, Respondents 2 and 3 (hereafter referred as contesting Respondents or Appellants) continued with oppressive acts as mentioned in the petition. The Petitioners came to know that Respondents 2 and 3 unilaterally submitted forms 5 and 23 on 12.02.2010 with Registrar of Companies without conducting meetings to increase

authorized share capital. The Petitioners sent letter dated 18.12.2009 (Volume II page 389) to Registrar of Companies to mark the Company as disputed company. Petitioners with the support of Sheth Group gave Resolution on 22<sup>nd</sup> February, 2010, under Section 169 of the Companies Act, 1956 (old Act – in short) for removal of Respondents 2 and 3 from the posts of Directors. Requisition dated 23.02.2010 was given to call EOGM on 05.03.2010. Notice was given on 23.02.2010 to contesting Respondents. Public notice of EOGM was also given in newspapers on 25.02.2010. In the EOGM dated 05.03.2010, Respondents 2 and 3 were removed as Directors. The Petitioners and Sheth Group have made allegations of siphoning also against contesting Respondents.

5. Original Petitioners claimed before NCLT that after the EOGM dated 05.03.2010, Sheth Group filed TP 10/2016 (CP 86/2010) in collusion with HM Patel Group.

6. Original Respondent No.4 who filed TP 10/2016 claimed before the NCLT that it was rather the HM Patel Group and VP Patel Group who were working against the interest of the Company. The Petitioners had filed Special CA 6090/2010 before High Court of Gujarat which came to be later on withdrawn. Although contesting Respondents had been ousted as Directors, there was still time to control the affairs of the Company.

7. Original Petitioners claimed that they and Vipinchandra Patel were guarantor of the Company and had given personal property as security for

facilities availed from Bank of Baroda. Original Petitioners had received notice from DRT for recoveries.

8. The Original Petitioners in their petition prayed that the Registrar of Companies should be directed to take on record the forms submitted by them regarding removal of Respondents 2 and 3 as Directors. They sought setting aside of resolutions, deeds, acts done by contesting Respondents after 05.03.2010 the date of E.O.G.M. called by them. They also wanted that the forms submitted by contesting Respondents relating to increase of authorized share capital should be set aside. Other reliefs were also claimed. Sheth Group also in their petition claimed removal of contesting Respondents and that the increase of authorized share capital should be restrained. Further reliefs were also claimed.

9. In the NCLT, the contesting Respondents 2 and 3 claimed that the Original Petitioners had earlier filed Special CA 6090/2010 before High Court of Gujarat claiming similar reliefs which were withdrawn and thus the petition was not maintainable. It was also claimed that the T.P. 197/2016 was not maintainable as the Petitioners had not filed reply in the petition filed by Sheth Group. These contesting Respondents claimed that it was rather they who were looking after the whole business of the Company. The Original Petitioners and Sheth Group had illegally taken possession of the records, properties and assets of the Company and were obstructing the contesting Respondents. They claimed that the Petitioners and Sheth Group were acting in oppressive manner. They claimed that

Original Respondent No.2 had given personal guarantee to banks for financial assets of the Respondent Company and DRT had issued notice to Respondent No.2. These Respondents gave particulars before the NCLT as to the manner in which they were conducting the business claiming that Vipinchandra Patel, father of Original Petitioner No.1 was generally a spectator of the business affairs of the Company. He was rather looking after the business of Ambika Rice Mills. In short it has been claimed that the business of Respondent No.1 Company was developed by them. Contesting Respondents further claimed that in 2008-2009, Sheth Group had taken away more than Rs.98.72 lakhs from the Company. Further allegation in the nature of siphoning of money by Sheth Group were made for the year 2008-2009. These contesting Respondents claimed that the Original Petitioners and Sheth Group prepared frivolous notice on 23.02.2010 for removal of contesting Respondents from Board of Directors and on 22.02.2010 they falsely informed the banks regarding disputes to mark the bank accounts as disputed. They had accordingly moved the Registrar of Companies also. These Respondents submitted particulars regarding financial transactions done by them. It was claimed that there was shortage of funds in the Company and the Company through Respondent No.2 approached Bank of Baroda on 20.11.2009 to provide further loans. The Bank by letter dated 24.11.2009 asked the Company to maintain good, debt, equity ratio and to increase the share capital. The matter was discussed in the Board meeting and it was decided to increase further capital. Notice was given on 24.12.2009 to shareholders to consider

increase in the share capital. There was meeting of shareholders on 27.01.2010. From 9<sup>th</sup> February, 2010 to 12.02.2010 allotment of shares was completed and relevant forms were filled up. The Petitioners were aware of the ongoing discussions and need of the Company and allotment of further shares. The Original Petitioners and Sheth Group without complying the provisions of Companies Act illegally removed contesting Respondents from the Board of Directors.

10. The contesting Respondents further claimed before NCLT that on 4<sup>th</sup> March, 2010 arbitrators as mentioned were appointed for distribution of the properties of the Company and the document executed on this count was signed by the father of Petitioner No.1 as well as Petitioner No.2 and contesting Respondents as well as Respondent No.5 for the 3 groups. These Respondents claimed that the arbitrators had given their decision on 18.07.2010 regarding the properties and the properties of Respondent No.1 Company were to be handed over to the present contesting Respondent Nos.2 and 3. The decision was signed by Vipinchandra Patel, the father of petitioners, the contesting Respondents as well as the Original Petitioners. There was compromise and accordingly Special CA 6090/2010 came to be withdrawn. There was yet another document dated 14.01.2011 executed between the parties regarding distribution of the properties in dispute between the parties. Contesting Respondents thus claimed before the NCLT that by virtue of the legal authority and settlement between the parties, Respondent No.1 Company belongs to them. These Respondents



claimed that as on the date of filing of the petition, the shareholding of the groups was as follows:-

- |    |  |   |        |
|----|--|---|--------|
| 1. | Sheth Group (Original Respondents 4 and 5)       | - | 23.68% |
| 2. | HM Patel Group (Original contesting Respondents) | - | 63.58% |
| 3. | VP Patel Group (Original Petitioners)            | - | 12.74% |

This shareholding was claimed on the basis of further issue of share capital.

12. In the rejoinder, the Original Petitioners denied claims of the contesting Respondent regarding the manner in which the share capital was increased and share allotted. They claimed that they did not have any notice of such developments. They claimed that no share had been offered to them. The Petitioners and Sheth Group both claimed that they had written letters on 07.01.2010 and 08.01.2010 to the Company enclosing Demand Draft seeking that every communication should be sent to them by Registered Post with acknowledgement due. The Demand Drafts were deposited by Company in its accounts. Although they had made a request for notices by Registered Post acknowledgement due no such notice with acknowledgement due were sent. They claimed that contesting Respondents only made a show of sending of notices. When some of the envelopes were opened they contained papers in respect of working of the Company and not regarding Extraordinary General Meeting. They could show such envelopes. It was thus claimed that the contesting Respondents

had committed fraud as the envelopes did not contain the alleged notices of EOGM.

13. Considering the rival cases put up by the parties, the NCLT framed following points for consideration:-

- “(i) Whether dismissal of CA 39 of 2011 would have any effect on the reliefs prayed in CP 16 of 2012?
- (ii) Whether filing of CP 16 of 2012 by VP Patel group without filing their reply in CP 86 of 2010 is valid or not?
- (iii) Whether increase in paid up share capital from rupees one crore to rupees two crores in the EOGM dated 27.01.2010 is an act of oppression or not?
- (iv) Whether removal of respondents 2 and 3 as Directors of the company in Extra Ordinary General Meeting held on 05.03.2010 is valid or not?
- (v) What is the outcome of financial irregularities alleged by all the three groups of shareholders in both these petitions?”

14. NCLT recorded reasons. NCLT found that vide CA 39/2011, the Original Petitioners had moved the Company Law Board seeking directions for the Registrar of Companies to take on record Form - 32 filed on 9<sup>th</sup> March, 2010 relating to removal of contesting Respondents. The Company Law Board had dismissed the said CA on 16.08.2011 observing that it did

not want to entertain the said CA at the stage concerned. Thus, NCLT found that it was only an Interim Order and dispute regarding removal of Respondents 2 and 3 was not yet finally decided.

15. This finding below point (i) is not disputed before us. The finding regarding point No.(ii) by the NCLT was also in negative and even this aspect is not disputed before us. Even otherwise we find no error on these counts.

16. As regards point No.(iii), the NCLT gave reasons to come to a conclusion that the acts of the Respondents 2 and 3 relating to increase of share capital in the EOGM dated 27.01.2010 could not be said to be act of oppression. It was of the view that the increase in the share capital and allotment of shares by itself were not acts of oppression of the rights of the shareholders viz the VP Patel Group and the Sheth Group. As regards point No.(iv) relating to removal of contesting Respondents from the post of Directors in the EOGM held by the Petitioners on 05.03.2010, the NCLT gave reasons and referring to Section 169 of the old Act found that the removal of contesting Respondents was not valid.

17. NCLT observed (in para 91 of the impugned order) that there were no established acts of oppression and mismanagement but that the financial irregularities alleged require examination by Auditors. In the interest of the Company and in the interest of 3 groups of shareholders, NCLT directed that the increase in the share capital was valid and binding

on all the shareholders but that the allotment of shares needs to be made to all the existing shareholders as on 18.12.2009 in proportion to their shareholdings and in case any of the shareholders is not willing to subscribe for additional shares then those shares shall be allotted to other shareholders taking their option again proportionate to their shareholding. NCLT set aside the removal of Respondents 2 and 3 as Directors. It gave further directions of audit of accounts for Financial Year 2009 – 2010 and steps to be taken when the report of Auditor becomes available. It appointed M/s. A.R. Sulakhe & Co. of Ahmedabad as Auditors. Directions were also given regarding appointment of independent valuer A.S. Gupta & Co. of Ahmedabad to assess fair value of shares as on the date of filing of the petition. It directed that pending completion of the entire process, there shall not be any alienation of properties both movable and immovable of the Respondent No.1 Company. It was further directed that pending completion of the entire process as per the orders of the NCLT, there shall not be any allotment of shares or transfer or sale of shares except as indicated. Further incidental directions were also given.

18. Against the impugned order, the Original Respondents 2 and 3 have filed these 2 appeals as there were 2 Company Petitions in NCLT. Their main grievance is that when it was found that EOGM held on 27.01.2010 was legal and valid and not an act of oppression, in that case giving of right to shareholders of the Company as on 18.12.2009 to subscribe to the shares as illegal and once the allotment has been done there cannot be

re-allotment of the shares. Reference is made to the Arbitration Agreement between the parties to claim that the entire disputes have already been settled and could not have been reopened. When CP 6090/2010 had been withdrawn, the reliefs as sought by the Petitioners could not have been granted. When siphoning and embezzlement was found in 2005 – 2006, direction of audit from 2009 - 2010 was not proper. Thus, the Appellants – Original Respondents 2 and 3 want impugned order modified where it directs giving option to the shareholders as on 18.12.2009 to subscribe. The Appellants also want that the audit of accounts should be from 2005 - 2006. They want that the arbitral award dated 18.07.2010 and 14.01.2011 should be complied by the parties.

19. Counsel for the Appellants – Original Respondents 1 and 2 have submitted that although the NCLT observed that oppression and mismanagement except some financial irregularities was not established, the NCLT has sufficient powers to pass appropriate orders. Referring to the Impugned Order, it is stated that the present Company is a private limited company and under old Section 81(3) private companies were excluded and thus it was not necessary for these Appellants to make specific offer of new shares, however, according to him the record shows that the Appellants – Respondents 2 and 3 had offered the shares to all existing shareholders so that they could subscribe. According to the counsel on increase of authorized share capital, once the shares have been offered to the existing members, legally it cannot be directed that the shares should

be offered again. The learned counsel referred to Board Meeting dated 09.02.2010 to state that as the other groups in the Company did not take up the offer, Board of Directors allotted the shares as can be seen in the resolution. It is stated that after the meeting, Form – 5 was submitted to the Registrar of Companies but it could not be recorded as the Company had been marked as Company in dispute. According to the learned counsel, the Respondents of the appeals cannot challenge the findings which are in favour of the present Appellants. It is argued that the NCLT found that Section 160 of the old Act had not been complied and so removal of the Appellants was set aside. The Respondents have not filed appeal and so this finding should be treated as final.

20. The PCS (Practicing Company Secretary) for the Appellant in CA 273/2017 adopted the argument of the learned counsel for the Appellant in CA 272/2017 and submitted that the various forms submitted to RoC were pending due to the Company in dispute.

21. It has been argued on behalf of the Original Petitioners that record shows that the Appellants – Original Respondents 2 and 3 issued notice of EOGM along with offer to subscribe for new shares presuming that the attempt to increase shareholding would be passed. It is stated that such procedure is not permissible. According to him, the Original Petitioners had asked contesting Respondents to send communication by Registered Post AD and keeping in view Section 53 of the old Act, it was necessary for Respondents 2 and 3 to send communication by Registered Post AD. This

was not done and thus, according to the counsel, there was no notice of the EOGM. It is further argued that Original Respondents 2 and 3 had issued notice offering existing members to subscribe for new shares in the ratio of 1:1 but the forms submitted by members of HM Patel Group show that they calculated in advance and applied for new shares beyond the ratio of 1:1. The counsel submitted that this is not the correct procedure and the correct procedure is that after the new shares are offered in the ratio of existing shares, the unsubscribed shares are required to be thereafter again offered to other members. It has been argued that these Original Petitioners had also filed the appeal against Impugned Order but it got dismissed as time barred. The counsel submitted that although their appeal has been dismissed as time barred, they are entitled to question all the findings recorded in the Impugned Order.

22. Counsel for Original Respondents 4 and 5 (Sheth Group) submitted that NCLT did not consider if notices of all the Board Meetings and EOGM were duly sent and served. Although the Sheth Groups was not now part of the Board of Directors, the learned counsel for these Respondents still raised question regarding notice of Board Meeting dated 08.12.2009.

23. Learned counsel for Original Respondents 4 and 5 submitted that if the Articles of Association relating to division of capital and General Authority (Page 199 of paper book) are seen, they are required to be read along with Section 81 of the old Act and if after increase of authorized share capital, new shares have not been picked up, it was necessary to

again offer the same to remaining members. It is stated that the record showing that person holding 20 shares from HM Patel Group picked up 98,000 shares and was allotted the same. This according to the counsel was not presumable and the Impugned Order rightly directed that allotment of shares in respect of increased share capital shall be made to all the existing shareholders as on 18.12.2009. Thus, according to him, the appeal should not be allowed.

### **Increase in Share Capital**

24. Having heard counsel for both sides and on perusing the documents, we proceed to first consider the dispute with regard to EOGM dated 27.01.2010 relating to increase of share capital.

25. On this count, firstly, there is letter dated 8<sup>th</sup> December, 2009 (Appeal Volume I – Page 66) sent by Original Respondent No.2 - Hasmukhlal Madhavlal Patel to the Directors convening meeting on 18<sup>th</sup> December, 2009 with Agenda Item No.4, being - to consider increase in authorized share capital of the company from Rs.1 crore to Rs.2 crores. The Agenda refers to letter dated 24<sup>th</sup> November 2009 (Page 65) received from Bank of Baroda advising the company to increase share capital to minimum level of Rs.2 crores with reference to the proposal for term loan.

Then there is Notice/Letter from the Respondent Company to the shareholders (page 68) attaching copy of notice of Extra Ordinary General Meeting of shareholders as approved by Board of Directors on 18.12.2009,



informing that the EGM is scheduled on 27.01.2010. The Notice informs the shareholders that as decided in the Board Meeting, Company has proposed to issue further shares to existing members in the ratio of 1:1 and, therefore, interested members would be required to exercise their rights on or before 5<sup>th</sup> February, 2010. The Notice states that it was “Advance intimation” and eligibility to apply for shares will be subject to approval of the increase in authorized share capital by the shareholders in EGM on 27.01.2010. The Notice records that application form to apply for shares, is attached with the letter.

26. Then there is Notice to Directors (Page 69) dated 24.12.2009 attaching the agenda papers of meeting of Board of Directors to be held on 27<sup>th</sup> January, 2010 itself. Agenda and copy of the Notice of EOGM to shareholders was stated to be attached and the Notice states:

“Further, we would like to inform you that as decided in the last Board Meeting, Company has proposed to issue further shares to its existing members in the ratio of 1:1 and therefore, interested members of the Board, who are also share holders of the Company are requested to make payment on or before, 5<sup>th</sup> February, 2010, so as soon as Authorised Share Capital is increased. Application Form for applying shares is attached with this letter.”

Agenda shows this meeting of Board of Directors was scheduled at 3.00 PM on 27.02.2010.

With the Appeal at page – 72, is the Minutes of the EOGM dated 27.01.2010 held at 11.00 AM which shows increase in the share capital. At page – 74 are the Minutes of meeting of Board of Directors on the same date of 27.01.2010 taking note that the authorized share capital has been increased. Another Resolution is that as per Notice already circulated last date of receipt of applications for allotment of the increased shares was 5<sup>th</sup> February, 2010 and thus, scheduled the next meeting on 9<sup>th</sup> February, 2010. Copy of Board Meeting dated 09.02.2010 is in CA 273 of 2017 at Page - 137.

27. We will deal with the question of allotment of shares separately. Here the question is whether this increase in share capital can be upheld or (as the Petitioners want) it should be held as illegal. In this regard, what appears is that the Original Petitioners VP Patel Group and Sheth Group initially took a stand that no notices were issued of the EOGM. They appear to have sent letters dated 07.01.2010 and 08.01.2010 to the Company claiming that communication to them should be sent not merely by Registered Post but it should also be with Acknowledge Due. Obviously, these dates were subsequent to the Notice of EOGM dated 24.12.2009, copy of which is at page – 68. Thus merely because they subsequently sent letters seeking communication by Registered Post Acknowledgement Due, it would not be sufficient to find fault with communications already sent.

28. It appears later the VP Patel Group and HM Patel Group before NCLT took up stand that the postal covers sent did not contain papers of Notice but they contained some other communications relating to the company. Thus in effect they tried to claim before the NCLT that the HM Patel Group was playing fraud. However, as the impugned order shows, the learned NCLT had taken up the contention on these grounds and although it was demonstrated before the NCLT that on opening the envelope cover, it had some papers other than Notice of EOGM, NCLT found that bare perusal of the envelopes which were being shown, it could be seen by naked eye that they were once opened and again sealed. Looking to such approach of these litigants, we will not like to trust their contentions that they did not get notice of the EOGM.

It appears that on 18.12.2009, in Board Meeting there was a decision taken to go to EOGM for increase in authorized share capital. Original Petitioner No.1 – Manish Vipinchandra Patel sent off a letter on 18.12.2009 itself to the Registrar of Companies (Volume II – Page 389) and raised various grievances with the Registrar of Companies and also inter alia mentioned that original Respondent No.2 - Hasmukhlal Madhavlal Patel and Original Respondent No.3 - Dilipkumar Madhavlal Patel may increase authorized share capital and allot shares to them. The learned NCLT rightly referred to such correspondence and the instance in NCLT to conclude that the Original Petitioners did have knowledge about the increase in authorized share capital which was being proposed. The NCLT

found that the sending of Notices by Registered Post was sufficient compliance and it concluded that the VP Patel Group and Sheth Group had chosen not to attend the EOGM in spite of knowledge. NCLT concluded that the Extra Ordinary General Meeting was held complying provisions of the Companies Act and the Articles of Association and Resolution regarding increase of authorized share capital was passed. The learned NCLT took note of the letter of the Bank of Baroda dated 24.11.2009 and the circumstances as to why it was necessary to increase the share capital. NCLT took note of the sequence of the events as to how the Original Respondent No.2 had approached Bank of Baroda for additional finance and the Bank of Baroda vide letter dated 24.11.2009 suggested increase in paid up share capital because of which the EOGM was required to be called. The NCLT thus found that the increase in the share capital was justified and the increase in the share capital was done after following due procedure.

29. We do not find that there is error in these conclusions drawn by the learned NCLT. Thus, on this count, we do not wish to interfere.

**Removal of Original Respondents 2 and 3 from posts of Directors**

30. The other dispute raised is regarding removal of Original Respondents 2 and 3 from the posts of Directors. The Resolution on this count appears to have been passed by the Petitioners (Appellants) with the assistance of the Sheth Group in EOGM dated 5<sup>th</sup> March, 2010. This removal of the contesting Respondents 2 and 3 has been set aside by the

learned NCLT. The Original Petitioners came up with a grievance that in spite of Resolution taken by them in EOGM, the Form 32 submitted by them to ROC was not accepted. In fact, they had themselves earlier moved the ROC on 18.12.2009 (Page 389) because of which ROC was treating the Company as in dispute.

31. Regarding this removal of Original Respondents 2 and 3, although Original Petitioners were part of the Board of Directors, they appear to have given requisition on 22.02.2010 (Page 235) along with draft Resolution (Page 236). They appear to have on the same day sent off letter to Banks to suspend withdrawal. The requisition (Page 235) dated 22<sup>nd</sup> February, 2010 from the Petitioners to the Board of Directors claimed that they were giving special Notice of their intention to propose the attached Draft Resolution (Page 236) as ordinary resolution for removal of Original Respondents 2 and 3 as Directors of the Board and that pursuant to the provision of Section 169 of the old Act they proposed to conduct Extra Ordinary General Meeting on 5<sup>th</sup> March, 2010. They requested the Board of Directors to do needful to give effect to the Special Notice. It appears that they also published in newspapers (Pages 239 and 240) the calling of the EOGM on 05.03.2010. The Minutes of the said EOGM dated 5<sup>th</sup> March, 2010 have been filed (Page 251).

32. The learned NCLT referred to Section 169 of the old Act to find fault with this procedure adopted by the Petitioners. The NCLT observed as under:

“It is clear from the material on record that, without calling any Board Meeting to consider the requisition for removal of respondents 2 and 3 as directors, straight away Extra Ordinary General Meeting was convened on 05.03.2010. Section 169 of the Companies Act, 1956 says that, “The Board of Directors of a company shall, on the requisition of such number of members of the company as is specified in sub-section (4) forthwith proceed duly to call an extraordinary general meeting of the company”. Therefore, when it is mandatory that Board of Directors of the Company shall call Extra Ordinary General Meeting on the requisition given by required number of members, calling of Extra Ordinary General Meeting by one of the Directors without convening a Board Meeting and without passing any Board Resolution, it is not valid convening of Extra Ordinary General Meeting.”

33. Sub-Section (6) of Section 169 of the old Act provided that if the Board does not, within 21 days from the date of deposit of a valid requisition in regard to any matters, proceed duly to call a meeting for the consideration of those matters on a day not later than 45 days from the date of the deposit of the requisition, the meeting may be called by the requisitionists themselves. Although the Petitioners were part of the Board of Directors, the requisition (Page 235) of special notice for removal of Directors was given by the Original

Petitioners as shareholders. It is not that any Board Resolution as such had been passed. In such circumstances, looking to the reasonings recorded by the learned NCLT and considering the provisions of Section 169 as mentioned above, we do not find that the decision recorded by the learned NCLT that removal of Respondents 2 and 3 was not valid, could be found fault with. Thus we do not interfere on this count also.

### **Efforts at Compromise**

34. It appears that the groups have been struggling between themselves and have tried to mutually settle disputes also. At page - 87 of Appeal, there is translation (which appears with infirmities of translation) of some document dated 4<sup>th</sup> March, 2010 (this will be subsequent to the above stated EOGM dated 05.03.2010) which was signed by Vipinchandra Patel - the father of Original Petitioners and the Original Petitioners as well as Original Respondents 2 and 3 and Original Respondent No.5, Ashwinkumar on behalf of his family appointing what is translated as “arbitrators” for “just distribution between whosoever partnership for these properties”. The properties referred in the initial part relate to the Respondent Company, Ambika Food Products Pvt. Ltd. and some “Shree Ambika Rice Mills”. Then it appears that some arbitrators resigned and then there is another document (Appeal - page 94) with the translation reading something like “Distribution Agreement of joint property of three

sons of Madhavlal Damodardas Patel”. This document is dated 18.07.2010 and at page – 102 shows to have been signed by Original Petitioners and Original Respondents 2 and 3 as well as Vipinchandra Patel. The arbitrators and advisors also appear to have signed. The contesting Respondents 2 and 3 claim on the basis of this document that the Respondent Company has come to them.

These documents may be efforts between some or the other groups of the Company to settle between them. Company as such does not appear to be party, nor Company as such appears to have accepted or adopted the documents. Then there appears to be compromise pursis dated 11.08.2010 (paper book page 112) and Order passed in the Special Civil Application No.6090 of 2010 by the Hon’ble High Court of Gujarat at Annexure – A/13 (Page 113) regarding the compromise between the Original Petitioners and contesting Respondents 2 and 3. In the compromise pursis, these parties recorded consents regarding working of the bank account, the compromise note which was arrived at between the parties “without prejudice to the rights and contentions of the parties”.

35. The Hon’ble High Court appears to have given instructions to the HDFC Bank and the petition before High Court was disposed of without expressing opinions on merits. If the Special Civil Application 6090 of 2010 (Page 117) is seen, it appears to have been filed by the Original Petitioners seeking directions for the ROC to



take on record Form No.32. Even if such petition was withdrawn, we do not find that it created bar for the Petitioners in the matter before NCLT.

36. There is yet another document dated 14.01.2011 (Page 135) with the translation claiming that it is “Draft of distribution regarding land properties and rice mill of joint partners of Village Bavla”. The first party is shown as Original Respondents 4 and 5 and second party is shown as Original Respondents 2 and 3 and the third party is shown as Vipinbhai Madhavlal Patel. At page – 141 of the Appeal is a communication dated 01.03.2011 from two persons claiming themselves to be, what is translated as “arbitrators with consent of all” seeking certain compliance from these parties. We are not commenting on nature of these documents which claim to be regarding efforts before “arbitrators”.

37. In spite of such documents being shown, the parties continue to make allegations and counter allegations against each other with regard to the EOGM called by Respondents 2 and 3 on 27.01.2010 and the EOGM called by the Original Petitioners on 05.03.2010 and whether or not the allotment of shares after the increase in share capital was correct or not. The arguments of the Appellants (Original Respondent Nos.2 and 3) to rely on above documents dated 18.07.2010 and 14.01.2011 and on that basis to set aside the Impugned Order directing distribution of increased share capital,

cannot be accepted as neither Company was party to them nor Company adopted them and question of oppression and mismanagement can be decided only by NCLT, which has much broader Jurisdiction to take decisions with regard to interest of Company.

### **Allotment of Shares on increase of Share Capital**

38. Now we proceed to discuss the dispute regarding allotment of shares in respect of increased share capital on its merit. It has been argued by the learned counsel for the Appellants (Original Respondents 2 and 3) that the learned NCLT in concluding part of para 78 of Impugned Order observed “therefore, increase in share capital and allotment of shares itself is not an act of oppression of the rights of the other shareholders viz VP Patel Group and Sheth Group.” It is argued that once having made such observation, the NCLT erred in its operative Order para – 92(a) where it was directed that the allotment of shares in respect of increased share capital shall be made to all the existing shareholders of the Company as on 18.12.2009 in proportion to their shareholding. According to the learned counsel for Appellants – the Original Respondents 2 and 3, this part of the impugned Order needs to be set aside as well as the directions for valuation of shares. Against this, the learned counsel for the Respondents in Appeal submitted that apart from their challenge in NCLT to the increase in share capital, they had

questioned the manner in which the increased share capital was allotted, and so Impugned Order on that count may not be disturbed.

39. If the impugned Order is seen, in para – 68 point No.(iii) taken up was “Whether increase in paid up share capital from rupees one crore to rupees two crores in EOGM dated 27.01.2010 is an act of oppression or not?”. Thus the point raised was not regarding allotment of share capital increased. In the paragraphs that followed, the learned NCLT discussed the documents regarding increase of share capital and in para – 78 took up discussion regarding sequence of events because of which increase in share capital became necessary and in that context dealt with the case of the contesting Respondents that from 09.02.2010 till 12.02.2010 allotment of shares was completed and relevant forms were filed with Registrar of Companies and again reverted to the question of knowledge of the Sheth Group and VP Patel Group regarding increase in share capital and concluded the point No.(iii) which it had taken up for discussion by observing that increase in share capital and allotment of shares by itself are not an act of oppression of rights of the other shareholders. There does not appear to be any discussion regarding the allotment of the shares. In the operative order, NCLT directed in para – 92(a):-

“(a) In view of the findings on point No.3 it is held that increase

in the authorized share capital of company from rupees one crore to two crores is valid and binding on all the shareholders. However, the allotment of shares in respect of increased share capital shall be made to all the existing shareholders of the company as on 18.12.2009 in proportion to their shareholding. In case if any shareholder is not willing to subscribe for additional shares, then those shares shall be allotted to other shareholders taking their options again proportionate to their shareholding.”

40. Act of decision that shares will be allotted in ratio of 1:1 by considering the likely increase, by itself may not be oppressive, but the manner in which the allotment is actually done may be illegal and thus oppressive. Although there is no specific discussion finding fault with the manner of allotment of shares in respect of increased share capital, this direction in final Order of the NCLT is not without basis in the records. The learned counsel for Respondents in Appeal, referred to the documents filed by the Appellants (Original Respondents 2 and 3) with Company Appeal (AT) 273 of 2017. Reference is made to Page – 149 to 162 in that Appeal as the application form which had been submitted by members of the HM Patel Group. It has been argued that these documents are application forms of applicants to get equity shares allotted in the Respondent Company pursuant to the decision taken by the Board of Directors in the meeting held on 18<sup>th</sup> December, 2009 which would be

before EOGM. These forms are dated 4<sup>th</sup> February, 2010 and if these documents are seen, they show that the applications were not in the ratio of 1:1 but much much beyond that. It is argued by Respondents in Appeal, that example would be the form submitted by Disha Ben, wife of Original Respondent No.2 having just 20 equity shares applying for 98,000 equity shares. It has been argued by the learned counsel for Respondents 2 and 3 in this Appeal that these members of the HM Patel Group calculated in advance and applied so as to consume the whole of increased share capital, anticipating in advance that they can get it. It has been argued by the learned counsel for Respondents 2 and 3 in Appeal (Original Petitioners) that in this regard the Articles of Association need to be seen. The counsel referred to the Articles of Association (Page 198 of CA 274 of 2017) and referred to the “General Authority” mentioned (at page – 199) which reads as under:

“General Authority

Wherever in the Companies Act, 1956 it has been provided that the Company shall have any right, privilege or authority or that Company can not carry out any transaction unless the Company is so authorised by its Articles then in that case, Articles hereby authorise and empower the Company to have such rights, privilege or authority and to carry out such transaction as have been permitted by the Companies Act, 1956.”

41. It has been argued that in view of this Article of Association applicable to the Respondent Company, Section 81 of the old Act would be applicable and even if the Original Respondents 2 and 3 had issued notice in anticipation for the members to apply for shares on increase of share capital (which was till that point of time still to be decided) the offer could not have been of more than 1:1 and the right procedure would have been that after the share capital was increased claims of 1:1 should have been considered and only thereafter the unsubscribed portions could be offered.

42. Learned counsel for the Respondents Nos.2 and 3 in Appeal referred to Judgement in the matter of **“Dale & Carrington Invt. (P) Ltd. and Another versus P.K. Prathapan and Others”** (2005) 1 SCC 212, to submit that even if it was to be said that Section 81 of the old Act did not apply, the burden would be still higher on the Original Respondents 2 and 3 (Appellants) to demonstrate that they did not abuse their position when allotment of shares was taken up. According to him, good faith in the matter of allocation of shares after the increase in share capital is missing. We find that although the act of increase in the share capital can be upheld, the distribution of shares on increase of the share capital is defective. In anticipation of increase in share capital, even if applications in proportion to shares already held could be made, unsubscribed shares could be disposed only after there is decline to accept the share offered. For this, there could not have been applications in anticipation.

The learned counsel for the Appellants (Original Respondents 2 and 3) referred to para 172 of the Judgement in the matter of **“Sangramsinh P. Gaekwad and Others versus Shantadevi P. Gaekwad (Dead) Through LRs and Others”** (2005) 11 SCC 314 to argue that only one pre-emptive offer is required to be made which is otherwise to be accepted or not at all. We find, in the facts of present matter that proper and legal procedure for distribution of the additional shares after increase in share capital has not been properly followed and thus, the Board Resolution dated 9<sup>th</sup> February, 2010 (Page 137 of CA 273 of 2017) regarding allotment of increased share capital cannot be upheld. Thus it cannot be said that the offer as made was legally executed. NCLT rightly directed allotment of shares in respect of increased share capital to be made to all existing shareholders of the Company as on 18.12.2009.

43. Looking to the submissions, we find substance in what the learned counsel for Original Petitioners is submitting. Thus, although the learned NCLT did not record in so many words as to why it was directing that the allotment in respect of increased share capital still needs to be made, there is no reason why we should interfere with the above direction of NCLT in para – 92 (a) of the impugned order.

44. One of the arguments raised by the learned counsel for the Appellants (Original Respondents 2 and 3) is that NCLT directed audit of accounts from 2009 – 2010 on the basis of allegations regarding siphoning but the Order shows that NCLT noted there were allegations of siphoning

even for period earlier than 2009-2010. In this regard, Impugned Order shows NCLT considering the grievances of the parties in paragraphs – 36 to 41 and in paragraphs – 85 to 88. It considered the grievances and observed need of audit. Considering the grievances made by parties and observations of NCLT, audit of the accounts may be done since 2008 – 2009. The impugned Order needs to be modified only to that extent.

45. For the above reasons, we pass the following order:-

**Order**

In the impugned Order in directions Para – 92(c), instead of words “financial year 2009 – 2010”, we substitute the words “financial year 2008 – 2009”.

Rest of the directions given by NCLT in the impugned Order para – 92 are maintained.

Both these appeals are disposed accordingly.

No orders as to costs.

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

[Justice Bansi Lal Bhat]  
Member (Judicial)

New Delhi  
2<sup>nd</sup> April, 2018

*/rs/nn*