

Mr. M. Appayya & Ors vs Mr. M. Chandra Sekhar Rao & Ors on 5 December, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

TA No. 10 of 2021
(Company Appeal (AT) No. 184 of 2019)
&
(I.A. No. 2765 of 2020)

[Arising out of Order dated 06th June, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) in Company Petition No. 217/241/HDB/2018]

IN THE MATTER OF:

1. Mr. M. Appayya
1-10-208, Ashok Nagar
Hyderabad - 500020 ...Appellant No.1
2. Mrs. M. Mrinalini
1-10-208, Ashok Nagar
Hyderabad - 500020 ...Appellant No.2
3. Mr. M. Sai Sudhakar
1-10-208, Ashok Nagar
Hyderabad - 500020 ...Appellant No.3
4. Mrs. M. Srilatha
1-10-208, Ashok Nagar
Hyderabad - 500020 ...Appellant No.4
5. M/s Polygon Refractories Private Limited
H.No. 1-10-114, Ashok Nagar
Hyderabad - 500020 ...Appellant No.5

Versus

1. Mr. M. Chandra Sekhar Rao
1-10-208, Ashok Nagar
Hyderabad - 500020 ...Respondent No.1
2. Mr. M. Nagaraja Rao (Deceased)
78-4-33/1, Gandhipuram - 3
Syamala Nagar, Rajahmundry - 533103 ...Respondent No.2
- 2A. Mrs. M. Nagachandrika
W/o Late Mr. M. Nagaraj Rao

TA No. 10 of 2021 (CA (AT) No. 184 of 2019)
1-10-114/2, Ashok Nagar
Subbamma Nilayam, Ashok Nagar

1 of 24

Hyderabad - 500020 ...Respondent No.2A

2B. Mr. M. Rama Krishna
S/o Late Mr. M. Nagaraj Rao
1-10-114/2, Ashok Nagar
Subbamma Nilayam, Ashok Nagar
Hyderabad - 500020 ...Respondent No.2B

2C. Ms. M. Sravani
D/o Late Mr. M. Nagaraj Rao
Raheja Vistas, Raheja Viharj 902
Chandavali, Powai, Mumbai
Maharashtra - 400072 ...Respondent No.2C

3. Mr. Bhaskar Sharma
1-10-114/1, Ashok Nagar
Hyderabad - 500020 ...Respondent No.3

4. Mr. M. Sai Krishna
1405, Agate Block, My Home Jewel
Mandinaguda, Chanda Nagar
Hyderabad - 500049 ...Respondent No.4

5. Mrs. M.M. Lalitha
1-10-208, Ashok Nagar
Hyderabad - 500020 ...Respondent No.5

6. Mrs. M. Mallika
1-10-114/1, Ashok Nagar
Hyderabad - 500020 ...Respondent No.6

7. Mr. M. Venkata Chaitanya
1-10-208, Ashok Nagar
Hyderabad - 500020 ...Respondent No.7

8. Mr. Kasthurirangansundaresan
S/o Mr. S. Kasthurirangan, Aged 50 Yrs.
R/o #406, Land Mark Residency
Domalguda, Hyderabad - 500029 ...Respondent No.8

9. Mr. Venkata Satya Sesha
Suryanarayana Rao
S/o Late Shri N.S. Prabhakar Rao

TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 2 of 24
R/o Plot No. 232B, Road No.6
Samathapuri Colony, New Nagole
Hyderabad - 500035 ...Respondent No.9

Present:

For Appellant : Mr. Anshuman Sharma, Advocate

For Respondents : Mr. S. Chidambaram, CS for R-1 to R-4

J U D G M E N T

(Virtual Mode) (05th December, 2022) KANTHI NARAHARI, MEMBER (TECHNICAL) Preamble:

The Present Appeal is filed under Section 421 of the Companies Act, 2013 against the Order dated 06th June, 2019 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad in C.P. No. 217/241/HDB/2018 whereby the NCLT allowed the Company Petition filed by the Respondents herein by passing the directions as made in para 48 of the order.

Brief Facts:

Appellant's Submissions:

2. Aggrieved by the aforesaid order the Respondents therein preferred the present Appeal.

3. Mr. Anshuman Sharma Learned Counsel appeared for the Appellants submitted that first and foremost that the target Company i.e. M/s Polygon Refractories Pvt. Ltd. which was incorporated on 13.09.1982 is a family TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 3 of 24 owned Company. The entire equity of the Company is held by the brothers namely viz. Appellant No.1, Respondents No.1 to 3 and Mr. M.V. Ramana Rao and their respective wives and their children. There is no outsider holding any shares in the Company. Further, the Appellant No.1, Respondents No.1 to 3 and their family members have lived in the same house sharing a common kitchen for more than 30 years.

4. The Learned Counsel submitted that the Respondents filed the Company Petition before the NCLT, Hyderabad under Sections 241, 242, 59, 62 of the Companies Act, 2013 seeking the following reliefs:

a) Set aside the allotment made on 25.03.2017 and direct consequent rectification of member's register of the R-1 Company;

b) To declare the Extra Ordinary General Meeting conducted on 23.03.2017 as illegal and the resolutions passed there at do not bind the Company and its shareholders;

c) Declare that the board meetings held on 28.02.2017 and 25.3.2017 are illegal and the resolutions passed there at do not bind company and its shareholders.

5. The Learned Counsel submitted that every instance of increase of share capital and allotment of shares i.e. on 18.02.2013, 15.09.2013 and 25.03.2017 was discussed by the family members informally at the family meeting. It is submitted that as per the AGM conducted on 30.09.2011, the TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 4 of 24 Appellant's percentage of shareholding is

23.44% and the Respondents No.1, 2, 3, 4, 5 and 6 are 7.99%, 8.94%, 2.04%, 7.05%, 8.6% and 1.41% respectively.

6. However, the Board of Directors in its meeting held on 18.02.2013 have allotted 14,000 shares of Rs.100/- each to the following members against the loan received from them during the year 2011-12:

Mr. M. Appayya (A-1) 2000 shares amount paid Rs. 2 lacs Mr. M. Sai Sudhakar (A-3) 2000 shares amount paid Rs.2 lacs Mr. M. Sai Krishna (R-4) 6000 shares amount paid Rs.6 lacs Mr. M. Venkata Chaitanya (R-7) 2000 shares amount paid Rs.2 lacs Mr. M. Srilatha (A-4) 2000 shares amount paid Rs.2 lacs

7. It is submitted that although some shares have been allotted to the Appellant in the aforesaid allotment, however the shareholding of the Appellant reduced from 23.44% to 18.89%. Again, the Board of Directors in the meeting held on 15.09.2013 have allotted 5,000 shares of Rs. 100/- each to the 4th Respondent. By virtue of the said allotment the percentage of shareholding of the 1st Appellant reduced from 18.89% to 16%. Thus, it is evident that the 1st Appellant's shareholding in the Company has been reduced from 23.44% to 16%.

8. It is submitted that on 23.03.2017, the Company conducted an EGM increasing the Authorised Share Capital from Rs.50,00,000/- to 70,00,000/- . Further, 30,000 equity shares of Rs.100 each in the Company were allotted TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 5 of 24 to the Appellants No. 1 to 4 and Respondent No.7 respectively. The shareholding pattern of the Company from 2012 to 2017 is as follows:

a) As on 31.03.2012 the shareholding of the Appellants was 74%.

b) As on 31.03.2013 the shareholding of the Appellants reduced to 58.56.

c) As on 31.03.2014 to 31.03.2016 the Appellants shareholding was 49.73%.

d) As on 31.03.2017 after the allotment was made in EOGM dated 23.03.2017 the shareholding of the Appellants increased to 72.81%.

9. Whereas, the shareholding of the Respondent as on 31.03.2012 was 21.95%. As on 31.03.2013 the shareholding of the Respondents increased to 32.34%. As on 31.03.2016 the shareholding of the Respondents increased to 42.54% and as on 31.03.2017 the shareholding of the Respondents reduced to 22.33%.

10. From the aforesaid shareholding pattern, it is evident that as on 31.03.2012 the Appellants shareholding was 74% in the Company.

11. It is submitted that as the Company does not have the working capital limit with any banks in order to meet the working capital requirements, the Company was receiving loans and advances

from Directors and Shareholders i.e. from the family members itself. As a customary practice adopted by the Company over the years that the Company allotted shares as against the TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 6 of 24 loans and advances received. The loans and advances received by the Company since 2013 is as follows:

- a) A sum of Rs. 11,50,000/- received from 4th Respondent during 2012-13.
- b) A sum of Rs. 8,00,000/- received from 1st Appellant during 2013 to 2016.
- c) A sum of Rs. 6,00,000/- received from 2nd Appellant during 2014.
- d) A sum of Rs. 15,00,000/- received from 3rd Appellant during 2016.
- e) A sum of Rs. 50,000 received from 4th Appellant during 2013.
- f) A sum of Rs. 50,000 received from 7th Respondent during 2013.

12. As stated above, a sum of Rs. 6,00,000/- received from 4th Respondent to meet the working capital requirement the 4th Respondent has been allotted 6000 shares in the EGM held on 18.02.2013. By virtue of said allotment the 4th Respondent shareholding increased from 7% to 24.84%.

13. The Learned Counsel submitted that the advances received from the Appellants was utilized by the Company to meet the deficit finance as the Company had no means of paying back the said advances. Adopting the previous practice, the share capital of the Company has been increased and shares have been allotted to the shareholder who have advanced the money to the Company. By virtue of allotment made on 25.03.2017 the combined shareholding of the Appellants No. 1 to 4 has gone up to 72.81% as against 74% which was held by them as on 31.03.2012. The increase in authorised TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 7 of 24 share capital and paid-up capital was not for self-aggrandizements or for gaining control over the Company but was purely for commercial need of the Company.

14. The Learned Counsel submitted that the Respondents have tried on many occasions to Oppress the Appellants with regard to the working capital of the Company. A special notice dated 12.06.2019 under Section 115 of the Companies Act, 2013 has been issued by Respondents No. 1, 2 and 4 making a requisition under Section 169 read with Section 100 of the Companies Act to the Board of Directors of the Company to conduct an EOGM with the agenda to remove the Appellants No. 2 and 3 as Directors of the Company. The said move is to oppress the Directors of the Company.

15. The NCLT has not taken into consideration the actions of the Respondents which are oppressive in nature and they have acted against the paramount interest of the Company repeatedly and have failed to infuse required capital in the Company. The Learned NCLT without taking into consideration the aforesaid facts set aside allotment of 30,000 shares, however, failed to issue any directions with regard to treatment of Rs. 20,00,000/- which were deployed in the rise of share

capital of the Company.

16. The Learned Counsel in the Grounds of Appeal specifically adverted to principle of estoppel, family company, non-application of mind etc. The Learned Counsel also relied upon various judgments in support of his TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 8 of 24 contention. He prayed this Tribunal to set aside the impugned order dated 06.06.2019 in CP No. 217 of 2018 and restore the position of the shareholding of the Company as on 25.03.2017.

Respondent's Submissions:

17. Sh. S. Chidambaram Learned Company Secretary appearing for the Respondents submitted that the Respondent filed the Company Petition with the prayers to set aside the allotment made on 25.03.2017 and declare the EOGM conducted on 23.03.2017 and declare board meeting held on 28.03.2017 and 25.03.2017 are illegal and the resolution passed there at do not bind Company and its Shareholders. The Appellants in the present Appeal made contradictory averments with respect to list of dates and events.

It is submitted that the Company was incorporated by Mr. M.V. Ramana Rao father of Respondent No.4 and Mr. G. Rama Lingewara Rao and not by the 1st Appellant as contended. Further, the allotment of 14,000 shares and 5,000 shares made on 18.03.2013 and 15.09.2013 was not raised by the Respondents in their Company Petition and the said allotment were not under challenge.

18. It is submitted that the Company is a family Company wherein the only sons of late M. Poornachandra Rao are having shares namely the Respondent No.1, 2, 3 and father of Respondent No.4 and the Appellant who controls 100% shares along with family members. The main object of the Company is manufacture and dealing in Refractories and it is a clear TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 9 of 24 understanding that all the properties and the business shall be shared in equal proportion between the brothers. It is submitted that prior to the impugned shares allegedly allotted on 25.03.2017 the undisputed shareholding pattern in the Company is as follows:

"The Respondents No. 1 to 6 were holding 50.3% and the Appellants No. 1 to 4 were holding 49.7%."

19. Thus, the Respondents were majority shareholders prior to impugned allotment. It is submitted that as per Section 62 of the Companies Act, 2013 which deal with further issue of shares which includes the Private Limited Companies and the Appellants have not complied with the mandatory provisions of Section 62 of the Companies Act, 2013 while allotting shares to themselves and to the exclusion of contesting Respondents and their family members. Hence, it is a grave act of oppression as well as violation of Section 62 of the Companies Act, 2013.

20. It is submitted that two Annual General Meetings were conducted on 30.09.2016 and 28.09.2017 without giving notice to the contesting Respondents. The Appellants mere bald denial about the issue of notice did not refute this allegation in their counter affidavit to original CP, hence,

it is admitted position that no notices were issued to contesting Respondents. It is submitted that pursuant to the allotment of shares only promoters are the beneficiaries and the allotment is contrary to the alleged special resolution passed on 23.03.2017. Further, the Company does not carry out any TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 10 of 24 operations and its only factory was closed from February, 2017. However, in the explanatory statement for the purported EGM notice the reasons for allotment stated regarding ongoing capital expenditure, working capital requirement, improving manufacturing capacity and enhancing infrastructure capacity. However, there is a contradictory act on the part of the Appellants with regard to allotment of shares to the existing shareholders.

21. The Learned Company Secretary submitted that it is the specific allegation of the Respondents in the Company Petition that none of the contesting Respondent received notice of EOGM. On this ground the NCLT set aside the increase in authorised share capital and allotment of shares to the Appellants. The Appellants contend that the Company taken advances and loans from the allottees right from 13.11.2013 to 29.09.2016, but no prior approval was obtained by way of a special resolution as per Section 62(3) of the Companies Act, 2013.

22. The Learned Company Secretary further submitted that the Appellants contend that they were in control of 72% of the paid-up share capital and by virtue of the purported allotment their shareholding restored to their percentage as per the practice of the Company is arbitrary and illegal. As on the date of incorporation of the Company the Appellants did not own a single share in the Company and on the same logic, they should not hold any shares in the Company.

TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 11 of 24

23. It is further submitted that the Appellants were minority shareholders as per the Annual Returns for the year 2004 and 2009, the Appellants were holding 16.93% whereas the Respondents were holding 83.07%. While so, as on 24.03.2017 the Appellants were holding 49.7% and the Respondents holding 50.3%. However, after the purported allotment the Appellants shareholding increased to 72.81% whereas the Respondents shareholding reduced to 27.19%.

24. It is submitted that the undisputed shareholding pattern as on 24.03.2017 is to be taken into consideration. However, the Appellants in an oppressive manner allotted shares to themselves and increased their percentage from 49.7% to 72.81%. Due to mercy of other 4 brothers the Appellant family became shareholders and the Appellants by manipulating the records over the years increased their shareholding pattern.

25. The Company Secretary reiterated that since no prior approval has been obtained from shareholders by way of special resolution as mandated under Section 62(3) of the Companies Act, 2013, impugned allotment made on 25.03.2017 is illegal and bad in law.

26. It is submitted that the Learned NCLT rightly passed the order and no interference is called for. The Appeal is devoid of merits and liable to be dismissed.

Analysis / Appraisal:

27. Heard the Learned Counsel appeared for the respective parties, perused the pleadings, documents and citations relied by them. After hearing the parties, the issue that arise for consideration is whether the Appellants have made out any case calling interfering with the decision of the NCLT.

28. Upon filing of Company Petition being No. 217 of 2018 by the Respondents herein under Section 241, 242, 59 and 62 of the Companies Act, 2013 before the NCLT, Hyderabad Bench, the Learned NCLT allowed the said Company Petition by passing the following directions:

"(a) that Extra Ordinary General Meeting conducted on 23.03.2017 as illegal and consequentially the resolutions passed there at as null and void and do not bind the Company and its shareholders.

(b) That the Board Meeting held on 28.02.2017 and 25.03.2017 as illegal and the resolution passed there at do not bind company and its shareholders.

(c) The 1st Respondent Company is directed to rectify the register by cancelling shares allotted to Respondents 2-6 in pursuance of resolution passed in the EGM dated 23.03.2017 stands restored.

(d) The allotment of shares in favour of Respondent No.2 to 6 in pursuance of Board resolutions of Respondent No.1 company dated 25.03.2017 is set aside.

TA No. 10 of 2021 (CA (AT) No. 184 of 2019)

13 of 24

(e) That the shares held by shareholders prior to impugned allotment i.e. 25.03.2017 stands restored."

29. The grievance of the Respondents in their Company Petition before the NCLT, Hyderabad Bench, was that the company has increased the Authorised Share Capital in an EOGM held on 23.03.2017 from 50 lacs to 70 lacs and further a special resolution was passed in the said EOGM for allotment of 30,000 equity shares and the said shares were allotted to the Appellants whereby the Respondents groups shareholding become 26.39% from 50.3% and the Appellants who were minority shareholders have become majority due to the impugned allotment of 30,000 equity shares. The Respondents contend that several fabricated forms were filed by the Appellants. The main grievance of the Respondents is that the Respondents have not received any notice either for the Board Meeting or the General Meetings including the purported EOGM held on 23.03.2017.

30. Having aggrieved by the said allotment of 30,000 equity shares to the Appellants, the

Respondents filed the above Company Petition before the NCLT, Hyderabad Bench seeking the following reliefs:

"a) Set aside the allotment made on 25.03.2017 and direct consequent rectification of members' register of Respondent No. 1 Company.

b) Declare that Extra Ordinary General Meeting conducted on 23.03.2017 is illegal and the resolutions passed there at do not bind the Company and its shareholders.

TA No. 10 of 2021 (CA (AT) No. 184 of 2019)

14 of 24

c) Declare that the Board Meetings held on 28.02.2017 and

25.03.2017 are illegal and the resolutions passed there at do not bind company and its shareholders.

d) Any other order(s) as deem fit by this Hon'ble Tribunal in the interest of justice."

31. The Learned Counsel for the Appellants contend that it is not the first time that the shares have been allotted to the members of the Company in the EOGM held on 23.03.2017 as alleged by the Respondents herein, however, on previous occasions the Board of Directors of the Company in the meeting held on 18.02.2013 have allotted 14,000 shares of Rs.100 each to the following members against the loan received from them during the year 2011-12:

Name of Allottee	No. of shares allotted	Total amount paid (Including premium)
M. Aappayya	2000	Rs.2,00,000
Appellant No.1 Dr. M. Sai Sudhakar	Appellant No.3	2000
Rs.2,00,000	M. Sai Krishna	Respondent No.4
6000	Rs.6,00,000	M. Venkat
Cheitanya	Respondent No.7	2000
Rs.2,00,000	M. Srilatha	Appellant No.4
2000	Rs.2,00,000	Total
14,000	Rs.14,00,000	TA No. 10 of 2021 (CA (AT) No. 184 of 2019)

15 of 24

32. It is further contended that the Board of Directors of the Company in the meeting held on 15.09.2013 have allotted 5000 shares of Rs.100/- each to Mr. M. Sai Krishna (4th Respondent herein). It is submitted that by virtue of above two allotments the shareholding of the 1st Respondent in the Company has reduced to 16% from 23.44%.

33. Further the Learned Counsel for the Appellant contend that the EOGM held on 23.03.2017, the Company increased its Authorised Share Capital from 50,00,000 to 70,00,000 and allotted 30,000 equity shares to the Appellants No.1 to 4 and Respondent No.7 herein. It is further contended that it is the customary practice of the Company to increase the share capital in a formal manner and all members were allowed to advance investment towards the company in order to increase the share capital. The Appellants No.1 and 3 on multiple occasions invested in the company in order to revive it and to save it from liquidation. In a similar circumstance, the Appellants have invested in the company since the Company did not have any funds to meet its day-to-day expenses and it was a deficit, accordingly, the Appellants advanced the amounts and the Company utilised the said amount for the benefit of Company. As the Company had no means of paying back the said

advances, adopting the previous practice, the share capital of the Company has been increased and shares have been allotted to the shareholders who have advanced money to the Company. By virtue of allotments made on 25.03.2017 the combine shareholding of the Appellants No. 1 to 4 have gone TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 16 of 24 up to only 72.81% as against 74% which was held by them as on 31.01.2012. The Learned Counsel for the Appellants contend that the increase in Authorised Share Capital and Paid-Up capital was not for self- aggrandizement or for gaining control over the Company but purely dictated for the commercial needs of the Company.

34. We have perused the shareholding pattern of the Company from which it is undisputed that prior to allotment of 30,000 shares, the Appellants were holding 49.7% whereas the Respondents Groups were holding 50.3%.

35. The whole dispute is with regard to holding of purported EOGM on 23.03.2017. The Company issued notice dated 28.02.2017 calling for the EOGM to be held on 23.03.2017 at 10 a.m. at the registered office of the Company to transact the special business i.e. (1) increase of Authorised Share Capital under Section 61 of the Companies Act, 2013 from 50,00,000 to 70,00,000 by creation of 20,000 equity shares of Rs.100/- each ranking parri passu with the existing equity shares and the said resolution is an ordinary resolution. Clause 2 of the said notice emphasised amendment to Articles of Association reflecting the increase of the Authorised Share Capital as Rs.70,00,000/- divided into 70,000 equity shares of Rs.100/- each. Further, Clause 3 of the notice emphasises "further issue of equity shares, whereby the Board was empowered to issue and allot up to 30,000 equity shares of Rs.100/- each to the Promoters and others aggregating to Rs. 30,00,000/- only. The said resolution was to be passed as a special TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 17 of 24 resolution. Further, an explanatory statement issued which refers to the increase of Authorised Share Capital and issue of equity shares. The grievance of the Respondents is that the shareholders of the Company have not received the notice for the EOGM as mandated under the Companies Act and in absence thereof convening and holding the EOGM on 23.03.2017 is illegal and void.

36. The minutes of the EOGM dated 23.03.2017 shows that the Company increased its Authorised capital from Rs.50,00,000/- to 70,00,000/- by creation of 20,000 equity shares of 100 each ranking parri passu with the existing shares and Clause V of the Memorandum of Association and Article 5 of the Articles of Association be altered accordingly. As a special resolution passed in the said EOGM, the Company authorised the Board to allot 30,000 equity shares each to the promoters and others (as per valuation report of the valuer under provisions of the Act) aggregating to Rs.30,00,000.

37. The Respondents contended that the Company is a private company and the shares are to be allotted to the existing members / shareholders in proportion to their shareholding, however, the shares have been allotted to only to 5 members excluding the other shareholders, is per se illegal. It is contended that the loans and advances from the Appellants are also illegal for the reason that no prior approval obtained by way of special resolution as per Section 62(3) of the Companies Act.

TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 18 of 24

38. It is not in dispute that the Company is not in operation and no manufacturing is taking place as per the averments made by the Respondents and there is no denial by the Appellants. Further it is contended that the Company has only valuable land of 4 acres worth Rs.20 crore and in such a situation when the Company is not in operation, there is no need of funds, hence no loans need to be taken from the Appellants. The Company made the allotment in the pursuant to the Board Meeting held on 25.03.2017 to the following members:

1. Mr. M. Appayya (A1) 8,000 shares=Rs.8,00,000
2. Mrs. M. Mrinalini (A2) 6,000 shares=Rs,6,00,000
3. Mr. M. Venkata Chaitanya (76) 500 shares=Rs.50,000
4. Mrs. M. Srilatha (A4) 500 shares=Rs.50,000
5. Mr. M. Sai Sudhakar (A3) 15,000 shares=Rs.15,00,000 Total 30,000 shares = Rs.30,00,000

39. In the EOGM held on 23.03.2017 it is mentioned that the company as a special resolution will issue and allot upto 30,000 equity shares of the Company. Further, it is stated that the said allotments are to be made to the promoters and others. Whereas in the Board Meeting dated 25.03.2017 by way of ordinary resolution the Company offered and allotted 30,000 shares to only the 5 members but not all the existing members / shareholders of the Company. From the perusal of special resolution which was passed in an EOGM held on 23.03.2017 in terms of Section 62 of the Companies Act, 2013, it was resolved to issue and allot 30,000 equity shares of Rs. 100/- each to the promoters and others, however, in the Board Meeting held on TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 19 of 24 25.03.2017 the shares have been allotted to only 5 members, ex-facie contradictory, and this Tribunal is of the view that it violates the mandatory provisions the Companies Act.

40. Since the Company issued and allotted shares pursuant to Section 62 of the Companies Act, 2013, the said provision same is relevant to refer. Section 62 deal - "Further issue of share capital":

"Sub-section (1) thereof read as under:

Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered:

(a) to persons who, at the date of the offer, are holders of equity shares of the Company in proportion, as nearly as circumstances admit, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions namely:

(i) the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days [or such lesser number of days as may be prescribed] and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;

(ii) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (i) shall contain a statement of this right;

TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 20 of 24

(iii) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of Directors may dispose of them in such manner which is not disadvantageous to the shareholders and the company;"

41. The above provision of law is clear that if a company intend to increase its share capital by issue of further shares, such shares shall be offered to the existing members in proportion to their shareholding and by sending a letter of offer. In the present case, this Tribunal does not find any substantial proof that the notices have been issued for convening the EOGM to all the Members and issued any letter of offer to the existing shareholders for subscribing to the shares in proportion to their shareholding. In such a situation, the allotment of shares exclusively made to certain group by excluding the other members leads to dilution of shareholding of the members whom the shares were not offered and allotted. Thereby the said allotment causes the reduction in shareholding of the other shareholders whom the shares have not be allotted, is detrimental to the interest of the said shareholders the said act is an oppressive.

42. It is contended that the company is a family company and is a quasi- partnership is concerned even though the company is a family-owned company and the entire equity is held by the family members, the law as applicable with regard to further issue of share capital and allotments of TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 21 of 24 shares cannot be violated. Further, the principles of natural justice need to be followed more particularly in a family owned / run company.

43. Further, it is mandatory to issue a notice calling for the EOGM as per Section 100 of the Companies Act and a notice calling for the Annual General Meeting is mandatory under Section 101 of the Companies Act, 2013. This Tribunal does not find any proof of documents with regard to issuance of notice either to the EOGM or AGM to the members in accordance with law. In absence issuance of notice calling for any meeting is illegal and violation mandatory provisions of law.

44. The NCLT dealt in detail with regard to the allegations made in Company Petition and the relief sought by the Respondents / (Petitioners therein). The Learned NCLT at para 38 of the impugned order categorically observed that "the Respondents have not placed any evidence on record to prove that notice of EGM was served on petitioners. So, convening on EGM on 23.03.2017 and if any

decision is taken in the EGM is not valid since Respondent utterly failed to establish that notice of EGM was served on the Petitioners."

45. As discussed (supra) it is mandatory to offer to the shares to the existence shareholders in proportions their shareholding and this Tribunal does not find any document to establish that the company issued letter of offer to the existing shareholder for offering the shares for subscription. The TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 22 of 24 NCLT at para 32 observed that "there is no proof to show that offer is made to the petitioners for purchasing the shares. No proof that such an offer is made to any of the Petitioners to purchase the shares. There is also no valuation report to value the shares of the Company."

46. The Respondents in their Company Petition before the NCLT challenged the allotment of shares on the ground that the allotment made is illegal and no notices have been issued for the meetings and no offer was made to the existing shareholders.

47. The Tribunal has dealt in detail with regard to the relief sought by the Respondents / Petitioners and allowed the prayers of the Respondents and set aside the impugned allotment made on 25.03.2017 consequent to the EOGM held on 23.03.2017.

48. This Tribunal having gone through the documents and the relevant provisions of law is of the view that the Company has not complied with the law with regard to allotment of shares to the existing shareholders and also has not followed the mandatorily requirement of notice calling EOGM. The stand of the Company is that since it is a family Company and the decisions are taken in an informal manner by the members and no formal notices were required to be issued in view of the closely held family company.

49. Be that as it may, between the equity and law, the law will prevail. In the present case, the NCLT and this Tribunal is firm opinion that the TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 23 of 24 company has not followed the principles of natural justice by issuing notice for the EOGM and issue letter of offer to the existing shareholders of the Company for allotment of shares.

50. This Tribunal comes to a resultant conclusion that the order passed by the NCLT dated 06.06.2019 is a well-reasoned order and need no interference. Accordingly, the issue is answered against the Appellants. Conclusion:

51. The Appellants fail to make out any case, either on law on or facts. The Appeal sans merit. Accordingly, the same is dismissed. No order as to costs. The interim order passed by this Tribunal dated 29.07.2019 stand vacated. Applications, if any, pending stand closed.

[Justice M. Venugopal] Member (Judicial) [Kanthi Narahari] Member (Technical) pks TA No. 10 of 2021 (CA (AT) No. 184 of 2019) 24 of 24