

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU

(Through Physical Hearing / VC mode [Hybrid])

ITEM No.01
C.P. No.18/BB/2024

IN THE MATTER OF:

M/s. MIH Edtech Investments B.V. & Ors. ... Petitioners
Vs.
M/s. Think & Learn Pvt. Ltd. & Ors. ... Respondents

Order under Sections 241-242 of Companies Act, 2013

Order delivered on: 16.07.2024

CORAM:

SHRI ASHOK KUMAR BHARADWAJ
HON'BLE MEMBER (JUDICIAL)

PRESENT:

For the Petitioners : Shri Sudipto Sarkar, Sr. Adv.,
Shri Satish Parasaran, Sr. Adv.,
Shri Gaurav Chopra, Sr. Adv. with
Advs. Shankh Sengupta, Ms. Tine Abraham,
Shri Yogesh Singh, Ms. Manasa Sundarraman,
Shri Sujoy Sur, Shri Rangam Sharma,
Ms. Prarthna Bathija, Ms. Neha Dhavalikar,
Shri Shreyash Sharma, Shri Shiram Singhania,
Shri Shubh Arora, Shri Roahan K.,
Shri Subnang Nair, Ms. Akshaya R.,
Shri Reshab B. i/b Trilegal

For the Respondent No.1 : Shri Dhyan Chinnappa, Sr. Adv. with
Dr. Rishab Gupta, Advs. Manmeet Singh,
Shri Sairam Subramanian, Ms. Saloni Shah,
Ms. Isho Gupta, Ms. Ashika Jain, Ms. Priyanka
Ajjannavar, Ms. Nidhi Bajaj & Mr. Vikram Unni
Rajagopal i/b Saraf & Partners

For Respondent Nos.2-4 : Shri K.G. Raghavan, Sr. Adv. with
Dr. Rishab Gupta, Advs. Manmeet Singh,
Shri Sairam Subramanian, Ms. Saloni Shah,
Ms. Isho Gupta, Ms. Ashika Jain, Ms. Priyanka
Ajjannavar, Ms. Nidhi Bajaj & Mr. Vikram Unni
Rajagopal i/b Saraf & Partners

For the Respondent No.5 : Dr. Rishab Gupta, Adv.

ORDER

Per: Ashok Kumar Bharadwaj, Member (Judicial)

1. Present is a reference made to undersigned in terms of the provisions of Section 419(5) of the Companies Act 2013, as the Members of the Bench, while examining the Interim Prayer in C.P. No.18/BB/2024 differed with each other on the point, as to whether:-
 - (i) Rights issue can proceed in accordance with letter issued by the Respondent No.1 to its shareholders on 27.01.2024, both, before and after increase in authorized share capital if any allotment is over and above authorized share capital,
 - (ii) The expenses related to the salaries of all employees and day to day expenses of the Respondent No.1 Company, namely rent, electricity, water, statutory compliance costs can be met from the funds/money in relation to Rights issue received should be kept in escrow account.
 - (iii) The copies of the Audited P&L Accounts, Balance Sheets accompanied by Auditor's Report, Minutes of AGM and Board Meetings of the R-1 Company can be provided to Petitioners in accordance with law.
2. Para 9 of the order dated 26.06.2024, authored by learned Members Judicial and para 18 of the order of even date authored learned Member Technical reads as under:

“...9. In view of the functional deadlock, due to the divergent and discordant between the Parties and the hardship faced by them, and considering all the submissions made by the learned Senior Counsels and the learned Counsels for both the sides and perusing the materials on record, during the pendency of this matter, in addition to the directions given by this Bench vide Order dated 27.02.2024, we hereby direct as under:

 - (i.) *Respondent Nos.1 to 5 are directed not to alienate, encumber or otherwise while dealing with the Respondent No.1 Company's assets, shareholding et all in any manner till the pendency of this Company Petition;*
 - (ii.) *Status quo with respect to Respondent No.1 Company's Shareholding pattern prevailing as on 27.01.2024 be maintained;*
 - (iii.) *The Rights Issue can proceed in accordance with the letter issued by the Respondent No.1 to its Shareholders on 27.01.2024;*

- (iv.) *Any allotment of shares over and above the Authorized Share Capital of the Respondent No.1 should only be carried out after such Authorized Share Capital has been increased in accordance with the provisions of the Law;*
- (v.) *Any funds received by the Respondent No.1 in relation to the Rights Issue can be used for the Respondent No.1 Company's Capital needs provided all necessary safeguards viz.,*
 - (1) *The funds / money in relation to the Rights Issue received shall be kept in an Escrow Account;*
 - (2) *The said Escrow Account should be operated by one of the Directors and one of either the CFO / CEO of the Respondent No.1;*
 - (3) *All expenses relating to Salaries of all the employees and day-to-day expenses of the Respondent No.1 Company, namely, rent, electricity, water, statutory compliance costs, be met from the above Escrow Account under the supervision of the Advisory Council of the Respondent No.1.*

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"...18 In view of the functional deadlock, due to the divergence and discord between the Parties and the hardship faced by them, and considering all the submissions made by the learned Senior Counsels and the learned Counsels for both the sides and perusing the materials on record, during the pendency of this matter, in addition to the directions given by this Bench vide Order dated 27.02.2024, we hereby direct as under:

- (i.) *Respondent Nos.1 to 5 are directed not to alienate, encumber or otherwise deal with the Respondent No.1 Company's assets, shareholding et al in any manner till the pendency of this Company Petition;*
- (ii.) *Status quo with respect to the Respondent No.1 Company's shareholding pattern prevailing as on 27.01.2024 be maintained;*
- (iii.) *Considering the extent of shareholding of the Petitioner Companies in Respondent No.1 Company, the reliefs in para (v) - (i.), (ii.), (iii.) which are related to provision for Audited P&L Accounts, Balance Sheets accompanied by Auditor's Report, Minutes of AGM and Board Meetings of the R-1 Company are hereby allowed with a direction to the R-1 Company to provide the same to the Petitioners in accordance with Law. But the same is not allowed for its Group Companies/Subsidiaries and AESL as requested in the prayer since they are separate legal entities.*

3. Nonetheless, the legal proposition noted in the common order passed by the Members of the Bench, which they deemed apt for being referred to Hon'ble President for the opinion of Third Member are as under:

- (i) *Whether in the facts and circumstances of the case, the Tribunal is entitled to modify its first Interim Order dated 27.02.2024 subsequently?*

(ii) *If so, whether the Tribunal can modify the first Interim Order dated 27.02.2024 granting reliefs to the Respondents on suo-motu basis without there being any request for the same ?*

4. On 27.02.2024 when C.P.No.18/BB/2024 came up for consideration before the Division Bench, after hearing of the Counsels of the parties, the Division Bench passed an interim order and also reserved the matter for passing the order on the interim relief after receipt of the brief note from the counsels for the parties. Paras 11 and 12 of the said order reads as under:

“...11.Considering all the submissions made by the Learned Senior Counsels for both the sides and perusing the materials on record, we hereby direct the following:

(i) Since the Ld. Senior Counsel for the Respondent has already given undertaking that there will be no allotment of shares without increasing the Authorised Share capital of the Respondent No.1 Company as per the provisions of law and the funds/money received from the rights offer will be kept in a separate account and will not be used for any purposes, the funds received by the Respondent Company in respect to the rights issue should be kept in a separate Escrow account and it should not be withdrawn till the disposal of this matter;

(ii) The Respondent Company No.1 is to consider the extension of the closure date of the right issue so that the rights of the Petitioners with regard to the making of application for shares under their rights entitlement does not get prejudiced.

12. Since there are multiple Interim reliefs which has been sought by the Petitioners, the Learned Senior Counsels of both the sides are directed to file brief note along with cross reference of page numbers for the documents etc. which they referred during the hearing, in not more than 8-10 pages within three days from today duly serving the copy on the other side. The matter is reserved for passing of order on the Interim Reliefs requested, after the receipt of the same.”

5. However on 03.04.2024, the Division Bench passed an order that as both the learned Member Judicial and learned Member Technical have difference of opinion regarding grant of interim relief, the matter need to refer to Hon’ble President for appointing the Third Member for deciding the matter of passing interim orders. The paras 1 and 2 of the order dated 03.04.2024 reads as under:

“1.Today the matter was listed for pronouncement. Vide order dated 27.02.2024, certain interim directions were given by this Tribunal and the matter was reserved for Orders for granting of interim reliefs based on the arguments of the Parties. Subsequently, while preparing the Order it is observed that both the Judicial Member and Technical Member had difference of opinion with regard to grant of interim reliefs, and therefore decided that the instant matter be referred to the Hon’ble President for appointing the Third Member for deciding the matter of passing of Interim orders.

2. The Registry is directed to take steps for referring the matter to the Hon’ble President for appointing the Third Member.

6. Subsequently, on 04.04.2024 after considering the submissions made by the counsels for the parties, the Division Bench reiterated the directions contained in order dated 27.02.2024. Para 5 of the order dated 04.04.2024 reads as under:

“...5.Considering the aforesaid submissions, we reiterate that the directions given vide Order dated 27.02.2024 and in CA No.38 of 2024 dated 28.03.2024 have to be followed scrupulously. In the meanwhile, issue Notice to all the Respondents in CA No.44 of 2024. Ld. Counsels for the Respondents in CA No.44 of 2024 are directed to file their objections within 10 days. Further, the Respondents in main Petition are also granted 10 days’ time to file their objections, after duly serving the copy on the other side. Rejoinder, if any, may be filed within a week thereafter.....”

7. In the meantime, Contempt Petition No.06/2024, alleging disobedience of the order dated 27.02.2024 *inter alia* was preferred. At the same time, C.A. No.71 of 2024 and C.A. No.72 of 2024 were filed by General Atlantic Singapore TL Pte. Ltd. seeking injunction against the offer letters dated 11.05.2024 and 13.05.2024 and further issuance of shares in furtherance of the said letters, as also questioning the action undertaken by the Respondent Nos.1 to 5 in violation of the Tribunal’s order dated 27.02.2024. In terms of the order dated 06.06.2024, the Division Bench issued notice in Contempt Petition No.06 of 2024 and deferred the hearing in C.A. Nos.71 and 72 of 2024 to 11.06.2024.
8. On 12.06.2024, the Division Bench examined the C.A. No.72 of 2024 and restrained the Respondents from going ahead with the Rights issue referred to in C.A. till the disposal of C.P. No.18/BB/2024. The view

taken to pass the interim order was that the issue would be violation of the order dated 27.02.2024 alleging of disobedience of which a C.P. had been preferred. Paras 14 to 16 of the order dated 12.06.2024 are read as under:

“....14. The matter regarding the issue raised in C.A No.72 of 2024 is primarily for violation of order dated 27.02.2024 including the allotment of shares on 02.03.2024 and utilisation of funds out of the Escrow account. It is noticed that the same issue is also raised in the contempt petition No.06 of 2024 in which the Tribunal has given two weeks’ time to the Respondents to file their reply and the matter is listed on 04.07.2024. Accordingly, the contention raised in C.A No.72 of 2024 will be considered along with the Contempt Petition.

15. After going through the prayers, in this application and also on the facts that when the matter regarding first Rights Issue is pending before this Tribunal for consideration; the subsequent Rights Issue during the pendency of the Company Petition i.e. CP No. 18/BB/2024 comes very much in the purview of this Tribunal for necessary orders.

16. Therefore, in the present facts and circumstances of the matter, this Tribunal directs that the Respondents are restrained from going ahead with the present rights issue which is in progress till the disposal of this application, and the main CP No. 18/BB/2024. The Respondents are further directed to keep the amounts collected so far since opening of the second rights issue in relation to this offer in a separate account which should not be utilised till the disposal of the main petition CP No. 18/BB/2024. Further, status quo with regard to existing shareholders and their shareholding shall be maintained till the disposal of the main petition CP No. 18/BB/2024.

9. In the meantime, when the order dated 03.04.2024 was brought to the notice of the Hon’ble President, his Lordships did not find the same in consonance with the provisions of Section 419(5) of the Companies Act 2013. Thus, the Division Bench passed the order dated 20.06.2024 recalling the order dated 03.04.2024. The order dated 20.06.2024 reads as under:

“1. Heard the Ld. Counsel for the Petitioner and Ld. Sr. Counsel for Respondent No.1 & Respondent No.5.

*2. In the order dated **03.04.2024**, this Tribunal in the above matter has recorded that there was a difference of opinion between Member (Judicial) and Member (Technical) with regard to the grant of Interim reliefs.*

Accordingly, it was decided that the matter be referred to the Hon'ble President, NCLT for appointing the Third Member for deciding the issue and the Registry was directed to take steps for referring the matter to the Hon'ble President.

3. However, the respective views of the Member (Judicial) and Member (Technical) has not been brought out in this order dated 03.04.2024, neither the points of difference of opinion was spelt out.

4. Accordingly, it is decided to recall the order dated 03.04.2024 for carrying out the necessary modification mentioning the specific points of difference of opinion to be sent to the Hon'ble President under Section 419 (5) of the Companies Act, 2013.

*List the matter on **26.06.2024.**"*

10. Then on 26.06.2024, the Members of the Bench authored separate orders. The contents of paras 1 to 8 of the separate orders are same. However, the interim orders passed by them could be different to the extent that when the learned Member Judicial viewed that the Rights issue can proceed in accordance with letter issued by Respondent No.1 to its shareholders on 27.01.2024, the allotment of shares over and above the authorized share capital of the Respondent No.1 should only be carried out after increase of authorized share capital in accordance with law and funds received by Respondent No.1 in relation to Rights issue can be used to meet the expenses relating to salaries of all employees, day to day expenses of the Respondent No.1 Company, namely, rent, electricity, water, statutory compliance costs, after keeping the funds in Escrow Account. There was also no unanimity with the direction contained in para 18(iii) of the order dated 26.06.2024, passed by learned Member Technical. Nevertheless, neither the learned Member Technical recorded any finding, specifically as to why he did not agree to directions contained in para 9(iii) to (v) of the interim order authored by learned Member Judicial nor learned Member Judicial recorded any finding for not concurring with the direction contain in para 18(iii) of the separate order authored by learned Technical Member on 26.06.2024. Here it would be necessary to note that the direction

contain in para 18(i) and (ii) of the order authored by learned Member Technical and in para 9(i) & (ii) of the order authored by learned Member Judicial are same. The said directions reads as under:

“.....18. In view of the functional deadlock, due to the divergence and discord between the Parties and the hardship faced by them, and considering all the submissions made by the learned Senior Counsels and the learned Counsels for both the sides and perusing the materials on record, during the pendency of this matter, in addition to the directions given by this Bench vide Order dated 27.02.2024, we hereby direct as under:

- (i) Respondent Nos.1 to 5 are directed not to alienate, encumber or otherwise deal with the Respondent No.1 Company’s assets, shareholding et al in any manner till the pendency of this Company Petition;*
- (ii) Status quo with respect to the Respondent No.1 Company’s shareholding pattern prevailing as on 27.01.2024 be maintained”*

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“...9. In view of the functional deadlock, due to the divergent and discordant between the Parties and the hardship faced by them, and considering all the submissions made by the learned Senior Counsels and the learned Counsels for both the sides and perusing the materials on record, during the pendency of this matter, in addition to the directions given by this Bench vide Order dated 27.02.2024, we hereby direct as under:

- (i) Respondent Nos.1 to 5 are directed not to alienate, encumber or otherwise while dealing with the Respondent No.1 Company’s assets, shareholding et all in any manner till the pendency of this Company Petition;*
- (ii) Status quo with respect to Respondent No.1 Company’s Shareholding pattern prevailing as on 27.01.2024 be maintained;*

11. To appreciate the cause for difference of opinion by learned Member Technical with the direction contained in para 9(iii) to (v) of the order passed by the learned Member Judicial, one need to fall back on para 4 of the referral order, which reads as under:

....4. In view of the above, we are of the opinion that the Hon’ble President be requested to constitute a Bench by the appointment of the 3rd Member as envisaged in Section 419 (5) of the Companies Act, 2013 read with Rule 60 (3) of the NCLT Rules, 2016 to consider the following legal points:

- i) Whether in the facts and circumstances of the case, the Tribunal is entitled to modify its first Interim Order dated 27.02.2024 subsequently?*
- ii) If so, whether the Tribunal can modify the first Interim Order dated 27.02.2024 granting reliefs to the*

Respondents on suo-moto basis without there being any request for the same?”

12. From the aforementioned it is clear that the learned Member Technical perceived that the direction containing in para 9(iii) to (v) of the order passed by learned Member Judicial amount to modification of interim order dated 27.02.2024 and that too without there being any request for doing so. When the learned Counsel for the Petitioner Nos. 1, 2 & 3 emphasised that the direction contain in para 9(iii) to (v) of the order passed by learned Member Judicial amounts to modifying the interim Order dated 27.02.2024, the learned Senior Counsels for the Respondents Nos.1 and 2 to 4 submitted that the order dated 27.02.2024 was only ad-interim order and it is the order dated 26.06.2024, which can be considered as interim order. Nonetheless, the counsels for the parties were *ad idem* that it is not open to Third Member to go into merits/ grounds, with reference to which the learned Members of the Division Bench passed the interim orders and these are only the questions, which are referred for the consideration of Third Member which need to be answered.
13. I heard the counsels for the parties at length and examined their rival contentions. When a company needs additional capital and keeps voting rights of the existing shareholders proportionately balance, it issue Rights shares, it is called so, as it gives the existing shareholders a pre-emptive right to buy new shares at a price less than market price. The Rights issue is an invitation for the existing shareholders to buy new shares in proportional to their existing shareholders. According to Section 62(1) of the Companies Act, 2013, procedure for issue of Rights shares is as follows:
- (i) Convening the first Board Meeting and passing resolution for issuing the Right shares. Rights issue does not require the approval of shareholders.
 - (ii) Issuance of offer letter on the passing of the resolution. The letters for offer is issued to all shareholders and the same is sent to them through registered post or speed post. A window of period

of 15 to 30 days is given to shareholders to accept the offer. If the offer is not accepted within the specified time, the same is perceived as declined;

(iii) Filing of MGT-14;

(iv) Receipt of application;

(v) Convening the second Board Meeting for allotment of shares writing 60 days;

(vi) Filing of Form PAS-3 within 30 days;

(vii) Issue of share certificate.

14. Regarding offering of Rights of issue, the Petitioner alleged violation of procedure laid down in Section 62 of the Companies Act as also the availability of head rooms. The Petitioners also pleaded that issuance of Rights shares would reduce their shareholding and would amount to oppression of minority shareholders. To press the C.P., the Petitioners also raised several other grounds. Nonetheless, since the Counsels for both the parties were *ad idem* on the issue that the 03rd Member should only confine his opinion to the issues referred for his consideration, I refrain from delving deep into the issue on merit including the one as to “whether an issue which will arise for disposal of final relief should be determined as interim relief.”

15. The interim order refers to an order issued by Court during the pendency of the litigation. It is generally issued by the Court to ensure *status quo*. The scope for such orders to be issued by the Court is explained by “*actus curiae neminem gravabit*” which means that an act of the Court shall prejudice to no one. Therefore, to ensure that none of the interests of the parties to the litigation are harmed, the Court may issue an ad-interim order. The interim orders may have different tenor. They may be restraining or directive. The interim order may also be conditional. It is *stare decisis* that the interim relief which is in the nature of final relief should not be granted. Conversely, it may also be viewed that no such interim relief which amounts to determining the lis finally should not be granted. In the matter of *State of U.P. versus Ram Sukhi Devi* in (W.P. No.3334/2002(SS)) decided on 24.06.2002, the

Hon'ble Supreme Court ruled that the final order sought in the writ petition should not be granted as interim measure. In the present case, whether by way of the interim orders, leave could be granted to Respondents to issue Rights shares, even by increasing the authorized share capital, need to be addressed. But again, as the issue referred for my determination is limited, I refrain from commenting upon the same. These are the Petitioners, who approached the Tribunal for relief and as an interim measure, this Tribunal may either grant the interim relief in the nature of restraining or directive or nix the same orders, but it is not required to pass specific direction, clarifying that the Respondents can go ahead with the act, which is sought to be restrained by the Petitioners, as an interim measure.

16. Normally, I could have agreed with the plea raised by the learned Senior Counsels for the Respondent Nos.1 & 2 to 4 that during the disposal of the interim prayer, this Tribunal may pass interim order contrary to the ad-interim order and the same may not be perceived as modification of interim order. But the interim order passed subsequent to ad-interim order should be an order dealing with the interim prayers/relief sought and not an order having bearing on ad-interim order. If the order passed by the Court/Tribunal disposing of the interim prayer touches upon the ad-interim order then it is not an independent order and one cannot avoid from having the semblance that the interim order amounts to modification of an ad-interim order. Here I am not trying to prosper that the ad-interim order cannot be modified or the order of disposal of interim prayer cannot be contrary to ad-interim order. It can always be so, but then either the ad-interim order should indicate that the same is in operation till disposal of interim prayer or the guidelines laid down by the Hon'ble Supreme Court in *High Court Bar Association, Allahabad versus State of U.P. & Ors.* are satisfied or the Court/Tribunal should indicate justification for altering ad-interim order.
17. In the present case, as can be seen from the interim prayer reproduced in para 5 of the separate order passed by learned Member Technical and learned Member Judicial, there is no interim prayer in terms of

which direction is sought for permitting the Respondents to offer Rights issue even by enhancing the authorized share capital. The relief sought in Clause (o), (p), (q) and (r) of the interim prayer is to restrain the Respondents from allotting shares pursuant to Rights issue on 27.01.2024. While examining the prayer and passing the interim order, the Division Bench could either restrain the Respondents from acting upon the letter dated 27.01.2024 or reject the interim prayer.

18. Here, a reading of interim order dated 27.02.2024 and order dated 26.06.2024 authored by learned Member Judicial would reveal that the directions contained in para 9(iii) to (v) of the order are not the independent disposal of interim prayer, but are modification of the order dated 27.02.2024. At the cost of repetition, paras 10 and 11 of the order dated 27.02.2024 and the directions contained in para 9 (iii) to (v) of the order dated 26.06.2024 authored by learned Member Judicial put in juxtapose as under:-

Order Dated 27.02.2024	Order dated 26.06.2024 authored by learned Member Judicial
<p><i>10. On the other hand, the Ld. Senior Counsel for the Respondents No. 2 to 4 again gave an undertaking that there will not be any allotment of shares without increasing the Authorized share capital as per provisions of the Page 6 of 7 Companies Act and further the amount/funds collected in respect of the rights issue will be kept in a separate Bank account and will not be withdrawn for any purposes of the Company. On the basis of this undertaking, the Ld. Senior Counsel appearing for the Petitioner No.1 stated that this undertaking given by the Ld. Senior Counsel was acceptable to him with regard to his pleadings in the matter.</i></p>	<p><i>9(iii) The Rights Issue can proceed in accordance with the letter issued by the Respondent No.1 to its Shareholders on 27.01.2024; 9(iv) Any allotment of shares over and above the Authorized Share Capital of the Respondent No.1 should only be carried out after such Authorized Share Capital has been increased in accordance with the provisions of the Law; 9(v) Any funds received by the Respondent No.1 in relation to the Rights Issue can be used for the Respondent No.1 Company's Capital needs provided all necessary safeguards viz., (1) The funds / money in relation to the Rights Issue</i></p>

<p>11. Considering all the submissions made by the Learned Senior Counsels for both the sides and perusing the materials on record, we hereby direct the following:</p> <p>(iii) Since the Ld. Senior Counsel for the Respondent has already given undertaking that there will be no allotment of shares without increasing the Authorised Share capital of the Respondent No.1 Company as per the provisions of law and the funds/money received from the rights offer will be kept in a separate account and will not be used for any purposes, the funds received by the Respondent Company in respect to the rights issue should be kept in a separate Escrow account and it should not be withdrawn till the disposal of this matter;</p> <p>(iv) The Respondent Company No.1 is to consider the extension of the closure date of the right issue so that the rights of the Petitioners with regard to the making of application for shares under their rights entitlement does not get prejudiced.</p>	<p>received shall be kept in an Escrow Account;</p> <p>(2) The said Escrow Account should be operated by one of the Directors and one of either the CFO / CEO of the Respondent No.1;</p> <p>(3) All expenses relating to Salaries of all the employees and day-to-day expenses of the Respondent No.1 Company, namely, rent, electricity, water, statutory compliance costs, be met from the above Escrow Account under the supervision of the Advisory Council of the Respondent No.1.</p>
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19. After reading the aforementioned orders conjointly, no one can say that the direction contained in order dated 26.06.2024 authored by learned Member Judicial amounts to independent direction and not modification of the order dated 27.02.2024.

20. Now with regard to the issue as to whether the Courts/Tribunal can modify an interim order, there can be no two opinions that an interim order can always be modified/varied but same can be modified only when the party in whose favour the order is passed, deliberately prolong the proceedings either by seeking adjournments on unwarranted grounds or by remaining absent when the main case is called just to take undue advantage of the interim order OR the Court finds that the order is obtained by suppressing the material facts OR misrepresentation OR there is a material change in the circumstances requiring interference with the interim order passed earlier. Such is the view taken by the Hon'ble Supreme Court of India in the matter of *High Court Bar Association, Allahabad versus State of U.P. & Ors. with Special Leave Petition (Crl.) nos.13284-13289 of 2023 and Criminal Appeal.. Diary No.49052 of 2023 in Criminal Appeal No.3589 of 2023* passed on 29.02.2024 (ibid). Para 15 of the said order reads as under:

"....15.The High Courts are always empowered to vacate or modify an order of interim relief passed after hearing the parties on the following, amongst other grounds:-

- a) If a litigant, after getting an order of stay, deliberately prolongs the proceedings either by seeking adjournments on unwarranted grounds or by remaining absent when the main case in which interim relief is granted is called out for hearing before the High Court with the object of taking undue advantage of the order of stay;*
- b) The High Court finds that the order of interim relief is granted as a result of either suppression or misrepresentation of material facts by the party in whose favour the interim order of stay has been made; and*
- c) The High Court finds that there is a material change in circumstances requiring interference with the interim order passed earlier. In a given case, a long passage of time may bring about a material change in circumstances. These grounds are not exhaustive. There can be other valid grounds for vacating an order of stay...."*

21. In the present case, while modifying the interim order, the learned Member Judicial could not indicate any of the such circumstances, as are enumerated in para 15 of the abovementioned of the judgments of the Hon'ble Supreme Court of India. Besides, we may not be oblivious of the fact that the interim order passed on 27.02.2024 was passed on

undertaking given by the learned Senior Counsels appearing for the Respondent Nos.2-4, which was explained by the learned senior Counsel for the Petitioner No.1. A party cannot be absolved from the undertaking unless it/they specifically applies for discharge from the same on account of the drastic change of the circumstances. In the matter of *S.M.S. Udyog Ltd. versus Flistex Magnetics Ltd. in I.A. No.468/2001* in Suit No.1563/1995 decided on 03.02.2024 by the Hon'ble High Court of Delhi, it could be viewed thus:-

"...28. On a totality of consideration of the police complaint, the successive affidavits, the contentions adopted from time to time as recorded in the various order sheets, and also the absence of any application by the defendant seeking discharge from the undertaking on account of the drastic change of circumstances, this Courts gets a clear impression that the defendant is trying to take the Court for a ride..."

22. Thus, the order dated 26.06.2024 authored by learned Member Judicial in a way amounts to altering a consent order which is based on the undertaking given by some of the parties in the case. Such modification is not permissible.
23. I may also be not oblivious of the fact that after orders dated 27.02.2024 and 03.04.2024, the Division Bench passed order dated 04.04.2024 reiterating the direction given in terms of the order dated 27.02.2024. Thereafter, alleged defiance of the order dated 27.02.2024 led to filing Contempt Petition No.06 of 2024 in which notice was issued on 06.06.2024. Subsequently, on 12.06.2024, relying upon the interim order dated 27.02.2024, this Tribunal issued interim direction dated 12.06.2024 in C.A. No.72/2024, restraining the Respondents from going ahead with the Rights issue in question, till the disposal of the main petition viz. C.P.No.18/BB/2024. Here it would not be out of context to note that, the Members of the Bench differed on passing the interim order on 03.04.2024, but on 04.04.2024, they continued interim order dated 27.02.2024, thus, they had semblance that the disposal of interim prayer would be independent of order dated 27.02.2024.
24. Thus, I am of the view that in the facts and circumstance of the case, the Tribunal should not have modified its first order dated 27.02.2024, unless the circumstances referred to in para 15 of the judgment of the

Hon'ble Supreme Court in *S.M.S. Udyog Ltd. versus Flistex Magnetics Ltd.* (supra) could be satisfied. The point stated in para 4(i) of the referral order dated 26.06.2024 stands answered accordingly.

25. As far as the point/proposition contained in Clause (ii) of para 4 of the Order dated 27.02.2024 is concerned, it is *stare decisis* that the interim order passed by the contesting parties should not be modified, without giving sufficient opportunities of being heard to the parties in whose favour the interim order is passed. The aggrieved party can always apply for vacating/modifying the interim order on available grounds. In the present case, while considering the interim prayer, finally the Division Bench has to either accept or reject the same, but, it cannot modify, the interim order dated 27.02.2024, based on undertaking given by the learned Senior Counsel on behalf of Respondent Nos.2 to 4, without there being any request for the same. As it can be seen from the referral order passed by the Division Bench, it is perceived that the interim order required to be passed was on merit of the interim relief sought for and not regarding continuance or modification of the interim order dated 27.02.2024. Para 2 of the referral order reads as under:

"...2. However, the matter was reserved for passing further orders on multiple Interim reliefs sought for and both the sides were directed to file Brief Notes. Accordingly, the following directions have been given in the two Interim Orders authored by the Members; which are separately attached with this order:

K. BISWAL, MEMBER (JUDICIAL)

- (i) *Respondent Nos.1 to 5 are directed not to alienate, encumber or otherwise while dealing with the Respondent No.1 Company's assets, shareholding et all in any manner till the pendency of this Company Petition;*
- (ii) *Status quo with respect to Respondent No.1 Company's Shareholding pattern prevailing as on 27.01.2024 be maintained;*
- (iii) *The Rights Issue can proceed in accordance with the letter issued by the Respondent No.1 to its Shareholders on 27.01.2024;*
- (iv) *Any allotment of shares over and above the Authorized Share Capital of the Respondent No.1 should only be carried out after such Authorized Share Capital has been increased in accordance with the provisions of the Law;*
- (v) *Any funds received by the Respondent No.1 in relation to the Rights Issue can be used for the Respondent No.1 Company's Capital needs provided all necessary safeguards viz.,*

- (1) *The funds / money in relation to the Rights Issue received shall be kept in an Escrow Account;*
- (2) *The said Escrow Account should be operated by one of the Directors and one of either the CFO / CEO of the Respondent No.1;*
- (3) *All expenses relating to Salaries of all the employees and day-to-day expenses of the Respondent No.1 Company, namely, rent, electricity, water, statutory compliance costs, be met from the above Escrow Account under the supervision of the Advisory Council of the Respondent No.1.*

MANOJ KUMAR DUBEY, MEMBER (TECHNICAL)

- (i) *Respondent Nos.1 to 5 are directed not to alienate, encumber or otherwise deal with the Respondent No.1 Company's assets, shareholding et al in any manner till the pendency of this Company Petition;*
- (ii) *Status quo with respect to the Respondent No.1 Company's shareholding pattern prevailing as on 27.01.2024 be maintained;*
- (iii) *Considering the extent of shareholding of the Petitioner Companies in Respondent No.1 Company, the reliefs in para (v) - (i.), (ii.), (iii.) which are related to provision for Audited P&L Accounts, Balance Sheets accompanied by Auditor's Report, Minutes of AGM and Board Meetings of the R-1 Company are hereby allowed with a direction to the R-1 Company to provide the same to the Petitioners in accordance with Law. But the same is not allowed for its Group Companies/Subsidiaries and AESL as requested in the prayer since they are separate legal entities...."*

26. It is also seen from the order dated 26.06.2024 authored by learned Judicial Member, the directions are issued in addition to the order dated 27.02.2024. Thus, the plea raised on behalf of Respondent Nos.1 & 2 to 4 that the final disposal of interim prayer was inclusive and was after considering the order dated 27.02.2024 is not even in consonance of the order dated 26.06.2024 authored by learned Judicial Member. At the cost of repetition, the relevant excerpt of para 9 of the order dated 26.06.2024 authored by learned Judicial Member is reproduced below:

"...9. In view of the functional deadlock, due to the divergent and discordant between the Parties and the hardship faced by them, and considering all the submissions made by the learned Senior Counsels and the learned Counsels for both the sides and perusing the materials on record, during the pendency of this matter, in addition to the directions given by this Bench vide Order dated 27.02.2024, we hereby direct as under:"

27. Also, the Hon'ble Supreme Court of India in the matter of *High Court Bar Association, Allahabad versus State of U.P. & Ors.* (supra) ruled that an interim order passed cannot be vacated without giving sufficient opportunity of being heard to the party in whose favour for interim order had been granted. Para 35 of the said order reads as under:

"...35. An interim order passed after hearing the contesting parties cannot be vacated by the High Court without giving opportunity of being heard to the party whose prayer for interim relief has been granted. Even if interim relief is granted after hearing both sides, as observed earlier, the aggrieved party is not precluded from applying for vacating the same on the available grounds. In such a case, the High Court must give necessary priority to the hearing of applications for vacating the stay, if the main case cannot be immediately taken up for hearing. Applications for vacating interim reliefs cannot be kept pending for an inordinately long time. The High Courts cannot take recourse to the easy option of directing that the same should be heard along with the main case. The same principles will apply where ad-interim relief is granted. If an ad-interim order continues for a long time, the affected party can always apply for vacating ad-interim relief. The High Court is expected to take up even such applications on a priority basis. If an application for vacating ex-parte ad interim relief is filed on the ground of suppression of facts, the same must be taken up at the earliest..."

28. In the present case, the order dated 27.02.2024 was passed after hearing the counsels for the parties and the order specifically indicated that the further interim order was to be passed specifically on meritable relief which was sought by the Petitioner. It is nowhere indicated in the order that the direction contained in para 11 of the said order were to be considered for modification, while disposing of the interim prayer finally. In the circumstances, I am of the view that, in the facts of the case this Tribunal cannot modify the interim order dated 27.02.2024 passed by it, *suo-motu* without there being any request from Respondents to discharge them from the undertaking or for modifying the same.

29. Thus, the answers to both the points referred for consideration of undersigned are in Negative. Let the matter be placed before the Division Bench for appropriate orders in terms of the majority view.

30. **The reference stands disposed of.**

Sd/-
(ASHOK KUMAR BHARDWAJ)
THIRD MEMBER (JUDICIAL)