

**4 SCOB [2015] HCD 12****HIGH COURT DIVISION  
(STATUTORY ORIGINAL JURISDICTION)**

COMPANY MATTER NO. 254 OF 2013

**Shamsur Rahman, S/O Md. Amir Hossain of House : 36, Flat- C3, Road No. 3, Dhanmondi, Dhaka- 1212 represented by its Managing Director.**

..... Petitioner .

Mr. Tanjib-ul Alam, Advocate with  
Mr. Mohammad Hasan Habib, Advocate  
.... For the Petitioner .  
Mr. Sarder Alamgir Ahmed, Advocate  
.... For the Respondents.Heard on: 16.4.2015, 19.4.2015,  
30.4.2015, 26.5.2015, 15.6.2015,  
16.6.2015 and 19.6.2015.

Judgment on: 2.8.2015

VERSUS

**Zhang Yu, S/O Mr. Zhang Shaofeng, Of House No. 66, Road No. 7, Block-H, Banani, Dhaka- 1213 and others.**

..... Respondents.

**Present :****Mr. Justice Syed Refaat Ahmed****Company Act, 1994****Section 20 & 87(2)**

It is also found that attempts at the EGM held on 20.11.2013 to introduce changes in Article 14, thereby, facilitating the induction of the Respondent No.3 as a director, were equally unwarranted in law and irregular in form. Notably further, this EGM was held upon notice on 10.11.2013 to adopt a special resolution, thereby, falling far short of the statutory twenty-one days' notice requirement mandated under Section 87(2) of the Act. That in turn exposes the Company to violation of Section 20 of the Act that authorizes alteration of the Articles by special resolution but only by necessary adherence to the notice period requirement of Section 87(2). ...(Para 18)

**Relationship between the Articles and the law:**

The Articles, as a negotiated constituent document of the Company, in turn must correspond to a higher authority which is the law itself. Indeed, it is this indivisible relationship between the Articles and the law and the fact of such Articles being the outcome of careful negotiation by free will and for business expediency executed by subscribers of the memorandum that clothes the Articles with an essential binding nature. ...(Para 22)

**Judgment****Syed Refaat Ahmed, J:**

1. This Application under Section 43 of the Companies Act, 1994 ("Act") pertains to competing shareholding interests in Shinglong Water Purifier Manufacturing Co. Ltd., the Respondent No. 4, Company. The said Company was incorporated in 2011 with an authorized capital of Taka 3,00,00,000/- (Taka Three Crore) divided into 3,00,000 (Three

Lac) ordinary shares of Taka 100/- each. At the time of the Company's incorporation there were two subscribers of the Memorandum i.e., the Respondent No. 1 Mr. Zhang Yu and the Respondent No. 2 Ms. Zhang Yuying who agreed to subscribe to a total of 2,000 ordinary shares of Taka 100/- each in the following manner:

Sl	Name of Subscriber	No. of shares subscribed
1	Zhang Yu	1,600
2.	Zhang Yuying	400

2. On 23.1.2012 the Board of Directors (BOD) passed a resolution approving the transfer of 400 ordinary shares of the Respondent No. 1 to the Petitioner upon the Respondent No. 2 having declined to purchase the same. A further resolution was passed in the said meeting whereby the Petitioner was appointed as the new Director of the Company. Accordingly, the Company submitted a *Form-117: Instrument of Transfer* evidencing the transfer of shares, *Form-IX* recording the Petitioner's consent to act as director and *Form-XII: Particulars of Directors etc.* updating the particulars of directors before the pro forma Respondent Registrar, Joint Stock Companies and Firms ("RJSC"). The Respondent No. 1 also filed an affidavit evidencing the transfer of 400 ordinary shares to the Petitioner.

3. It also transpired that the Respondent No. 2 offered the other members in writing her entire 400 ordinary shares citing personal difficulties for stepping down as a director. The Petitioner accepted the offer and subsequently at the BOD meeting of 12.2.2012 a resolution was passed approving such transfer to the Petitioner. The Petitioner was further appointed as the new Managing Director in place of the retiring Respondent No. 2 vide another resolution passed at the same meeting. Accordingly, the Company submitted a *Form-117* evidencing the transfer of the said shares and an updated *Form-XII* before the RJSC. The Respondent No. 2 also filed an affidavit evidencing the transfer of 400 ordinary shares to the Petitioner.

4. It is against this backdrop that on 7.10.2012 the Respondent No. 1 and the Petitioner entered into an Agreement whereby the Respondent No. 1 agreed to "rent" the Company factory to the Petitioner for a period of five years beginning 1.11.2012 for a monthly rental payment of Taka. 5,20,000/-. It was also agreed in Clause 3 of the Agreement that upon expiry of a five-year term the Respondent No. 1 shall transfer all his shares in the Company to the Petitioner.

5. Given the above developments, the Petitioner is said to have been rather alarmed by subsequent turn of events evident in the Petitioner's discovery that the Respondent No. 1 had on 29.11.2013 submitted online returns before the RJSC being two *Forms- XII*, two *Forms-117* and one *Form-VIII* consequent upon a purported transfer by the Petitioner of 400 shares.

6. Of the two said *Forms-XII*, the Petitioner detects in one a record of his purported resignation from his directorship due to the disputed transfer of his entire shareholding interest on 10.10.2013. In the other *Form-XII* there is a discordant, and dubious, assertion by the Petitioner's reckoning of his resignation from the post of Managing Director but continuing as existing director. Further, one *Form-117* shows that the Petitioner has transferred 400 ordinary shares to the Respondent No. 1 whereas the other *Form-117* shows

that the Respondent No. 1 has transferred the said 400 shares to Respondent No. 2, i.e., Ms. Zhang Yuying who had left the Company after selling all her shares to the Petitioner. Moreover, a *Form-VIII* was also submitted specifying that a special resolution was passed on 20.11.2013 to alter Article Nos. 14 and 21 of the Company's Articles of Association to bring these in line with the information contained in the aforementioned *Forms-XII* and *Forms-117*. The Petitioner further discovered that the Respondent No. 1 again on 30.11.2013 made statutory filings without these being backed up by any BOD resolutions. Accordingly, a *Form- 117* shows that the Respondent No. 1 transferred 1,200 ordinary shares to Respondent No. 3, Mr. Zu Yang and in *Form-IX* it is shown that Mr. Yang has consented to act as director. Furthermore, the Petitioner is shown in a *Form-XII* as having resigned as Managing Director on 10.10.2013 and the Respondent No. 3 appointed in his place as the new Managing Director. The Petitioner submits that the purported transfer of shares vide *Forms-117* as above indicated in the statutory filings are unlawful and have no validity in the eye of law in that the purported transfers have not been approved by the BOD as required under the law and the Articles of Association.

7. Moreover, it is submitted that the said purported transfers of shares are misconceived and have no legal effect in as much as under Section 38 of the Act, the Company is authorized to register a transferee of shares only upon receipt of a valid Instrument of Transfer *inter alia* duly executed by the transferor of shares. That element of execution is absent in the present case given that the Petitioner denies having ever executed any such instrument transferring 400 shares in favor of the Respondent No. 1. Rather, it is contended, the entire purported transfer took place without the Petitioner's knowledge. Resultantly, the Petitioner prays for the Company's share register to be rectified in the following ways:

- (i) deleting the entry recording the transfer of 400 ordinary shares of the Petitioner to the Respondent No. 1;
- (ii) deleting the entry recording the transfer of 400 ordinary shares from the Respondent No. 1 to Respondent No. 2;
- (iii) deleting the entry recording the transfer of 1,200 ordinary shares from Respondent No.1 to Respondent No. 3; and
- (iv) deleting the name of Respondents No. 2 and 3 as shareholders of the Company.

8. It is noted that the Petitioner through a Supplementary Affidavit of 13.7.2014 has filed the stamped copies of the two *Forms 117* dated 23.1.2012 and 12.2.2012 in evidence of the transfer by the Respondent No. 1 and the Respondent No. 2 respectively of 400 shares each to the Petitioner (Annexures- 'M' and 'M-1'). An Affidavit-in-Opposition dated 1.4.2014 filed on behalf of the Respondent Nos. 1-4 bears the Respondents' initial stance that on 12.2.2012 the Respondent No. 2 did indeed transfer 400 shares to the Petitioner while emphatically denying that the Respondent No. 1 ever transferred an initial 400 shares to the Petitioner on 23.1.2012. In this regard, documents in evidence of such transfer filed by the Petitioner are claimed to be false, forged and fraudulent. The Respondent No. 1 alleges that the Petitioner obtained his signature on the relevant *Form 117* as well as on an Affidavit dated 25.1.2012 by misrepresentation and practicing fraud upon him. It is also asserted that the Agreement of 7.10.2012 was executed by the Respondent No.1 upon the Petitioner's instigation and influence and that its status as an agreement of sale is now wholly questionable. Notably, the Petitioner has all along maintained that on 7.10.2012, the Respondent No. 1 and the Petitioner entered into the Agreement whereby the Respondent No. 1 agreed to hand over the operations of the Respondent No. 4 Company to the Petitioner for a period of 5 years starting from 1.11.2012 in return of a monthly payment of Tk. 5,20,000/-. It was also agreed in Clause 3 of

the Agreement that upon expiry of the five-year term computed from the date of commencement of the Agreement, the Respondent No. 1 shall transfer all his shares in the Company to the Petitioner. The Respondent No. 1 asserts on the contrary that he transferred 1,200 shares on 10.10.2013 in favour of the Respondent No. 3 upon due consideration paid “*and, hence this transfer has acted upon*”. The Affidavit-in-Opposition in sum total declares, therefore, that the Respondent No. 1 remains the owner of 400 shares, the Respondent No. 3 of 1,200 shares, thereby, leaving the Petitioner in possession of only 400 shares in the Company.

9. A volte-face, however, by the Respondents on factual and legal issues in this case is noted with the filing of the Affidavit-in-Opposition of the Respondent No. 3 of 1.5.2015. In the absence of any clear reason precipitating such about turn, there is noted in this regard the concomitant departure from the scene of the learned Advocate Mr. Mohammad Abdul Karim as the initially appointed Counsel for the Respondent Nos. 1-4 and the appointment afresh of Mr. Sardar Alamgir Ahmed as Counsel for the Respondent No. 3. This Affidavit-in-Opposition filed not only seeks to diminish, albeit by contradictory statements, the extent of the Petitioner’s shareholding in the Company but also curiously wittingly or unwittingly to defeat the claim of the Respondent No. 3 himself as an existing shareholder in the Company.

10. Referring to a Search Report dated 5.5.2015 from the RJSC the Respondent No. 3 highlights three share transfer *Forms -117* showing a transfer on 23.1.2012 by the Respondent No. 1 of 100 shares in favour of the Petitioner, by the Respondent No. 2 of 400 shares in favour of the Petitioner on 12.2.2012, (thereby, bringing the Petitioner’s total interest to 500 shares), and by the Respondent No. 1 of 1,200 shares on 10.10.2013 in favour of the Respondent No. 3. These declarations by Mr. Xu Yang, Respondent No. 3 comes with the significant caveat that the transfer of 1,200 shares in his favour by Mr. Zhang Yu, Respondent No. 1 was in fact never registered. It is in that context that in this Supplementary Affidavit the Board of Investment (BOI) is assigned a role as looms large to deny the Respondent No. 3 his shareholding interest. It is submitted that all the *Forms-117* above-referred along with a *Form XII* were submitted to the RJSC without prior BOI permission and, therefore, in breach of an ostensible mandatory requirement imposed on a 100% Foreign Private Investment Company as the Respondent No. 4, Company. The Respondent No. 3 contends, therefore, that such efforts at transferring shares being unlawful and void the instant petition under Section 43 of the Act is not maintainable at all. It is averred that as per the BOI-imposed terms and conditions of the Company’s BOI registration letter it was incumbent upon it to secure prior permission from the BOI for transferring ownership and relocating its factory (which apparently wasn’t done) and as such all transfers of shares witnessed in this case are to be deemed unlawful and void. In adopting such a stance, a conflict is, therefore, introduced in this case between the BOI regulatory régime and that established under the Act.

11. In response the Petitioner’s general assertion, evident in an Affidavit-in-Opposition of 9.6.2014, is that the position adopted by the Respondent No. 3 of shares in the Company not permitting of transfer without prior BOI approval is false and misleading. In this regard the Petitioner asserts that the law relating to the transfer of shares is provided for squarely in the Act. It is submitted, accordingly, that the transfers of shares, both by the Respondent Nos. 1 and 2, in favour of the Petitioner were effected in due compliance with the Act’s provisions and the Company’s Articles of Association. Given further that there are no requirements in the Act for obtaining prior approval from the BOI, according to the Petitioner, the question of the transfers of shares in favour of the Petitioner not being effective does not resultantly arise

at all. The Petitioner views with some concern, therefore, the Respondents' attempts at misleading and misdirecting the Court by referring to non-existent legal requirements.

12. Considering the above facts and circumstances, it is to be noted at the outset that the Respondents' positioning vis-à-vis this case has involved a sifting through a series of arguments marked by prevarication. Resorting to evasion and equivocation the tendency has been, particularly on the part of the Respondent No. 3, to evade the governing issues of law and delve instead into matters irrelevant or unrelated to the case in hand. The Respondent No. 3, acting as an attorney for the Respondent No. 1 has, accordingly, made far-fetched arguments by sheet anchoring his case on an ostensible absence of the BOI's prior consent to explain away the stark irregularity otherwise apparent in all acts initiated by the Respondent No. 1 to deprive the Petitioner of his full beneficial and legal entitlement to the 800 shares as transferred in 2012 and as evident in Annexures-'M' and 'M-1'. Indeed, the BOI angle has been overplayed to such an extent by the Respondent No. 3 as to wholly deny even the legality of the transfers, otherwise admitted, of shares by the Respondent No. 1 to the Respondent No. 3 himself.

13. This development in the proceedings has placed on this Court an essential task, therefore, to revisit the essentials of a valid transfer of shares envisaged under the law and, consequentially, to remind the Respondents of the primacy to be accorded to such law as endorsed by the Company's constituent documents like its Articles of Association, relative to any imposition made by any other regulatory régime otherwise as so emphasized by the Respondents.

14. The fundamentals of companies law dictate that by its very nature a private company as the Respondent No. 4 Company is governed by restrictions on the right to transfer shares. In other words, a private company would do well to pay heed to the notion of transfer of shares taking place with due regard to preemptive rights exercisable by existing shareholders, i.e., their right of first refusal of an offer of shares made. That notion finds place in the Act in Section 2(1)(q) defining a private company as one in which the right to transfer its shares is restricted by its Articles. The significance attached in Section 2(1)(q) to the restriction being endorsed in a company's Articles of Association readily acknowledges the status of the Articles as an agreement binding the relationship between a Company's members within the boundary of the law. Terms of such agreement negotiated by the subscribers of the memorandum and binding on subsequent members of a company, in the case of a private corporate entity, will invariably subject transfers of shares to a right of preemption. Article 8 of the Company's Articles is no exception in this regard and reads thus:

*"8. Subject to the approval of the Board of Directors Shares may be transferred at any time by a member to his/her (spouse or children only) on his/her lineal descendants and suposeu only, Transfer to any other person other than those mentioned shall have to be made or registered by prior approval of the board of Directors. Any member desirous to sell or transfer his shares shall first offer the same in writing to the existing members at a fair negotiated price settled by the transferee and the Directors. If within seven days of such offer none of the existing members are wiling to accept the offer the transferor may sell or transfer the share to any body outside the existing members. The executor, administrator of heirs of a deceased member shall be recognized by the Company as having title to his/her shares on giving thereof sufficient proof to the satisfaction of the Directors of the Company."*

(Emphasis added by this Court)

15. It cannot be gainsaid that the right of preemption per se and the restrictions set out in Article 8 above are equally of strict application. Deconstructing Article 8, it is not difficult to ascertain that a clear restriction has been imposed upon a transfer of shares to an outsider or non-member when any existing member is willing to purchase at a fair negotiated price settled by the transferee and the directors. It necessarily follows that Article 8 aptly anticipates a permissible transfer to an outsider (e.g., in the position of the Respondent No. 3 in this case) only upon the BOD's inability to find a member willing to acquire the shares within the stipulated period of seven days computed from the date of offer. The rule of thumb here is, and as noted, for example, in *Satyanarayana Rathi vs. Annamalaiar Textiles Pvt. Ltd.* reported in 1999 95 *CompCas* 386 *CLB* thus:

“Any transfer of shares of the company shall be in strict compliance with the articles of association, failing which the transfer will be violative of the provisions of articles and such transfer is liable to be set aside.”

16. This judicially entrenched ratio is found in various precedents cited by the learned Advocates for the Petitioner Mr. Tanjib-ul Alam and Ms. Farhana Khan being, notably, *Cruickshank Company Ltd. And Anr. Vs. Stridewell Leather Pvt. Ltd.* reported in 1996 86 *CompCas* 439 *CLB* and *Hurst vs. Crampton Bros (Coopers) Ltd. and others* reported in [2002] *EWHC* 1375 (*Ch*).

17. Notwithstanding the Respondents' constantly shifting grounds to deny the Petitioner beneficial and legal entitlement to the claimed 800 shares in the Company, this Court upon a perusal of all Affidavits and documents placed and a consideration of submissions before this Court, accordingly, finds that

- (a) the Respondent No. 1 validly transferred 400 shares to the Petitioner in January, 2012;
- (b) there was no valid transfer of 1,200 shares to the Respondent No. 3 per se; and
- (c) the regulatory requirements defining the Company's relationship with the BOI do not, in the facts and circumstances, take any precedence over the provisions of the Act and the Articles to nullify all acts of transfer of shares in the Petitioner's favour.

18. This Court further finds that all acts done at the initiative of the Respondent No. 1 in supersession of and to negate the transfer of 400 shares by himself in January, 2012 favouring the Petitioner evident in the Annexure-‘M’ duly stamped *Form-117: Instrument of Transfer of Shares* has been an exercise in irregularity not sanctioned in law. Thus, for example, a purported transfer of the Petitioner's 400 shares to the Respondent No. 3 evident in Annexure-‘N’ on the face of it is irregular by not having been executed by the transferor. Of some significance is the ostensible approval granted by the BOD to such transfer at its meeting of 10.10.2013. A perusal of the minutes of that meeting reveals that the same was conducted in violation of Article 18 as mandates a quorum of two directors for a BOD meeting. In this instance, evidently, it was the Respondent No. 1, who was the sole driving force behind the resolution adopted at that meeting purportedly aimed at securing the Petitioner's departure as a director and the contemporaneous induction of the Respondent No. 3 as an ostensible shareholder-director beneficiary of freshly transferred 1,200 shares. This whole exercise of swapping directors in the persons of the Petitioner and the Respondent No. 3 is found to be without any sanction in law. That being the case, it is also found that attempts at the EGM held on 20.11.2013 to introduce changes in Article 14, thereby, facilitating the induction of the Respondent No.3 as a director, were equally unwarranted in law and irregular in form. Notably further, this EGM was held upon notice on 10.11.2013 to adopt a

special resolution, thereby, falling far short of the statutory twenty-one days' notice requirement mandated under Section 87(2) of the Act. That in turn exposes the Company to violation of Section 20 of the Act that authorizes alteration of the Articles by special resolution but only by necessary adherence to the notice period requirement of Section 87(2).

19. Having initially alleged fraud and misrepresentation in the transfer of shares of the Respondent No. 1 to the Petitioner on 23.1.2012 and the fraudulent affixation of signature by the Respondent No. 1 on an Affidavit of 25.1.2012, it is noted that the Respondents have acted further to their discredit by attempting to salvage the legality of such transfer process but only to the extent of 100 shares transferred by the Respondent No.1 in favour of the Petitioner by filing the Annexure-'H' series documents by a Supplementary Affidavit dated 10.5.2015.

20. It is resultantly found that there is nothing in the Respondents' case that has in any way undermined the credibility and the veracity of the contents of the *Form-117: Instrument of Transfer of Shares* (Annexure-'M' of the Petitioner's Supplementary Affidavit dated 13.7.2014). This *Form-117*, which is a true copy of the original, gauged against requirements of the law in Section 38 of the Act, i.e., due stamping, signatures of the transferor and transferee as well as those witnessing such transfer, proves to be sufficient in law. Though the date of the BOD's approval appears to be missing in this Annexure- 'M' document, it has been established to the satisfaction of this Court that minutes of the BOD meeting of 23.1.2012 categorically record the transfer of 400 shares by the Respondent No. 1 to the Petitioner (Annexure-'B-1'). Furthermore, the *Memorandum of Transfers* on the reverse of the Share Certificate pertaining to the 1,600 shares held in the Company by the Respondent No. 1 attests further to 400 of such shares numbering from 1,201 to 1,600 being transferred on 23.1.2012 in favour of the Transferee Petitioner. The *Memorandum* further attests to the Respondent No. 1 consequentially remaining entitled to a balance of 1,200 shares of the Company.

21. The requirements under Section 38(3) of the Act for a valid transfer of shares are of a submission of a duly stamped and executed *Form-117* delivered to the company for registration along with the share scrip. The Annexure-'M' *Form-117* of 23.1.2012 is found to answer fully to these statutory requirements. There is, therefore, found nothing that can now deter such transfer by entering the Petitioner's name against the said 400 shares in the Company's register as per Section 43 of the Act.

22. It is noted that the Respondents' attempts at having this Court nullify *all* transfers of shares, including those to the Petitioner, have seen to the introduction of an additional facet to this case, i.e., the role of the BOI in validating such transfers through prior permission. It is this Court's view that, and as satisfactorily argued by the learned Advocate for the Petitioner Mr. Tanjib-ul Alam, the BOI's role of whatever nature and degree is a matter extraneous to the Act in general and its operation in the facts and circumstances as a condition precedent for a valid transfer of shares in one wholly alien to Section 38 of the Act. Indeed, this Court finds, any imposition of such requirement by the BOI may jeopardize or negate the Company's registration with BOI but cannot necessarily invalidate a transfer or indeed its subsequent registration under Sections 38 and 43 respectively of the Act. Regulatory requirements as these, the Respondents will appreciate, are necessarily addressed to an entity like the Respondent No. 4 Company but the transfer of shares is a matter *inter se* the shareholders as governed by the Articles. The Articles, as a negotiated constituent document of the Company, in turn must correspond to a higher authority which is the law itself. Indeed,

it is this indivisible relationship between the Articles and the law and the fact of such Articles being the outcome of careful negotiation by free will and for business expediency executed by subscribers of the memorandum that clothes the Articles with an essential binding nature (*Hemlata Saha vs. Stadmed (P) Ltd.* reported in *AIR 1965 Calcutta 436 [V 52 C 81]*).

23. Even given the compelling and mandatory dictates of the law as endorsed by the Articles in this case, the learned Advocates for the Petitioner Mr. Alam and Ms. Khan remind this Court that the Respondents through their prevarication and equivocation at various stages in these proceedings had lost sight of the essential judicial dictate that no one must be permitted to take advantage of their own wrongs. Indeed, the Appellate Division in *Secretary, M/o Public Works vs. Momtaz Begum & another* reported in *10 MLR (AD)2005, 23* emphasized thus:

*“We are not oblivious of the legal maxim “Commondum Ex Injuria Sua Nemo Habera Debet” i.e. no person ought to have advantage from his own wrong.”*

24. The BOI angle so belatedly introduced by the Respondents in this case appears, therefore, as no more than an afterthought and a device for covering-up the illegality committed by the Respondent No. 1 in denying the Petitioner’s entitlement to the 400 shares transferred to him and in further seeking a transfer of 1,200 shares to the Respondent No. 3. Section 2(1)(q) of the Act read with Article 8 of the Articles incorporating the rule of preemption are found, accordingly, to cumulatively deprive the Respondents the benefit of such illegality. Indeed, the Respondent No. 1 was always subject to a clear restriction curtailing his right to transfer his shares to the Respondent No. 3 in the manner that he did. This Court finds that such purported transfer of interest and title was in clear violation of the law and the Articles and always open to challenge, as indeed endorsed in the *Hurst vs. Crampton Bros Case*, at the Petitioner’s instance an Application as this.

25. There are additional transactions in shares in this Matter that have merited this Court’s attention. First, the Petitioner questions the validity of the transfer of 400 shares purportedly by himself to the Respondent No. 1 ostensibly through a *Form-117 Instrument of Transfer* (Annexure ‘N’ to the Petitioner’s Supplementary Affidavit) procured online from the Respondent No. 5, RJSC’s website. While the Petitioner denies outright the fact of such transfer, the Respondents notably have not positively acknowledged or submitted on the fact of such transfer. Moreover, though the transfer is declared in the *Form-117* to have been approved by the BOD at the meeting held on 10.10.2013, the minutes of that BOD meeting (Annexure- ‘B series’ of the Respondents’ Affidavit in Opposition) do not attest to any such transfer or indeed the BOD’s approval of the same. Second, a *Form-117* of 10.8.2013 (Annexure- ‘E-(2)’) indicates the reemergence of the Respondent No. 2 as a shareholder for the first time since she divested herself of all equity participation in the Company upon transfer of her 400 shares to the Petitioner on 12.2.2012. The Court is shown a transfer of 400 shares by the Respondent No. 1 to the Respondent No. 2, accordingly, on 10.8.2013 with the BOD’s approval accorded on the same date. This copy of the *Form-117* procured online by the Petitioner is considered along with two *Forms-XII: Particulars of Directors* dated 29.11.2013 (Annexures- ‘E’ and ‘E-1’) also collected online. The *Form-XII* in Annexure- ‘E(1)’ records the Petitioner’s resignation as a Managing Director but continued status as director as of 10.8.2013 with the contemporaneous appointment of the Respondent No. 2 as a newly appointed director/Managing Director. The competing *Form-XII* of the same date in Annexure- ‘E’ records the cessation of the Petitioner’s directorship due to a transfer of his entire shares on 10.10.2013. Notably, however, there is no evidence on record of the transfer of the Petitioner’s entire share holding interest in anybody’s favour on 10.10.2013.



26. In the bare minimum the *Form-XII* in Annexure-‘E-1’ attests to the Petitioner being an existing shareholder as of 10.8.2013 notwithstanding his purported resignation from the post of Managing Director. If that is the case it is not readily understood how the Respondent No. 2, an outsider non-member since February, 2012 could readily been re-inducted into the membership of the Company by a transfer of shares from the Respondent No. 1 without the Petitioner being granted the first right of refusal to acquire those shares. Here also there appears to be a blatant disregard of the right of preemption. The learned Advocate for the Petitioner Mr. Tanjib-ul Alam questions not only the authenticity and the veracity of the contents of the documents above in Annexures- ‘E’, ‘E-1’ and ‘E-2’ but also highlights the fact of these transaction being actually recorded in the Company’s books and the register of shares and being reflected ultimately in the RJSC’s records accessible online.

27. Given these facts and circumstances and the findings above, the Court has now to consider the rectification of the Company’s share register accordingly:

- (i) deletion of the entry recording the transfer of 400 ordinary shares of the Petitioner to the Respondent No. 1;
- (ii) deletion of the entry recording the transfer of 400 ordinary shares from the Respondent No. 1 to Respondent No. 2;
- (iii) deletion of the entry recording the transfer of 1200 ordinary shares from Respondent No.1 to Respondent No. 3; and
- (iv) deletion of names of Respondents Nos. 2 and 3 as shareholders of the Respondent No. 4 Company.

28. Furthermore, with regard to deletion of the name of the Respondent No. 3 in relation to the 1,200 shares, Mr. Alam has satisfactorily argued that given the illegality that has tarnished such transaction the Respondent No. 3 had always run the risk of his title being defeated at the Petitioner’s behest seeking this Court’s intervention under Section 43. This Court in applying the *Hurst vs. Crompton Bros Case* ratio and on a true construction of the preemption clause in Article 8 of the Company’s Articles, accordingly, finds the Respondent No. 1 to have been in breach of the Articles the moment he executed an instrument of share transfer transferring 1,200 shares to the Respondent No. 3. This was sought to be done by ignoring the Petitioner’s overriding right of preemption as an existing member of the Company. Resultantly, and the Petitioner having never waived his right of preemption, the Respondent No. 3 is found to have acquired in law no entitlement to these shares. In other words, that purported transfer, a nullity in law shall henceforth be treated as not having taken place at all. The Respondent No. 3 was and has always been, therefore, a claimant only to the price that would have been paid once the right of preemption was allowed to be freely exercised by the Petitioner. That price, as indicated in Article 8 itself, would be a fair negotiated price settled by the Transferee and the directors. Since, however, the ostensible transfer of 1,200 shares (as evident in Annexure- ‘2’ of the Affidavit-in-Opposition) was for a consideration of Tk. 1,20,000/- calculated at the face value of Tk. 100 each, it is a reimbursement of that consideration value that the Respondent No. 3 can expect to be entitled to from the Respondent No. 1 qualifying as a fair price under Article 8.

29. It is found, accordingly, that the Petitioner remains a shareholder in the Respondent No. 4 Company to the extent of his 800 shares. Furthermore, until his beneficial and legal interest in the 1,200 shares are fully restored in his favour he shall be deemed a ‘*cestui que trust*’ in whose favour the Respondent No. 1 shall hold the 1,200 shares in trust. As enunciated by the Indian Supreme Court in *R. Mathalone vs. Bombay Life Assurance Co. Ltd.*

reported in *AIR 1953 (SC)*, 385 the relation of a trustee and a ‘*cestui que trust*’ is established on the transfer of shares, whereby, ‘*cestui que trust*’ i.e., (the Petitioner in these facts) becomes the sole beneficial owner of those shares sold by the transferor in whom the legal title remains vested. It is the crux of such relationship that the transferor holds the shares for the benefit of the transferee. In the facts and circumstances it will be the Respondent No. 1 who will hold such shares to the benefit of the Petitioner. It was also found in that case by the Indian Supreme Court that within this relationship-

*“equity clothes the transferor with the status of a constructive trustee and this obliges him to transfer all the benefits of property rights annexed to the sold shares of the ‘cestui que trust’.”*

30. The Agreement of 7.10.2012 which was a prelude to the transfer of shares to the Petitioner by the Respondent Nos. 1 and 2 in January and February 2012, upon perusal, provides no indication or guideline as to the actual transactions in shares that followed such execution. The Agreement speaks of an anticipated departure of the Respondent No. 1 from Bangladesh upon divesting himself of all interest in the Company in favour of the Petitioner. The Respondents though initially acknowledging the validity of this Agreement have by a subsequent Supplementary Affidavit-in-Opposition of 7.4.2014 denied outright the legal effect of the same. This is on account of the Agreement, purportedly a “*rental agreement*”, never being registered with the relevant Government authority pursuant to Clause-9 of the Agreement. Be that as it may, this Court finds that the Agreement in effect has no bearing on determining the extent of the shareholding interest of the parties thereto under this Section 43 Application, and consequentially deems it superfluous to arrive at any substantive finding on the validity or not of Agreement or the consequences thereof.

31. In light of the above, this Court now finds that the facts merit an intervention by this Court by virtue of its authority under Section 43 of the Act only to the extent of recognizing the the Petitioner’s continued beneficial interest and legal title accruing under 800 shares transferred to him by the Respondent Nos. 1 and 2 and the existing beneficial interest of the Petitioner to the 1,200 share illegally transferred by the Respondent No. 1 to the Respondent No. 3, such shares to be deemed now to be held by the Respondent No. 1 in constructive trust for the Petitioner until such time that the Petitioner acquires the same for a consideration determined at par value of Tk. 100 each.

32. Accordingly, this Court, hereby, directs the rectification of the Company’s share register by cancelling and deleting all previous entries showing the Respondent No. 1 as a transferee of 400 ordinary shares from the Petitioner and of the Respondent No. 2 as the transferee of 400 shares from the Respondent No. 1. It shall be incumbent further upon the Company to delete any entry recording the transfer of 1,200 ordinary shares from the Respondent No. 1 to the Respondent No. 3 consequent upon the Petitioner making a one-time payment of Tk.1,20,000/- in favour of the Respondent No. 1 within a period of 1(one) month from the date of the drawing up of this Order. This shall necessarily lead to the Petitioner emerging as the Company’s sole shareholder director allowing for Section 222 of the Act to be called into operation permitting the Company to carry on business for a period of up to 6(six) months with sole membership beyond which period the induction of a new member shall become necessary. In that regard, Mr. Alam, by reference to Article 14 read with Regulation 90, Schedule 1 to the Act, submits on the induction of a member from amongst

the Petitioner's family members without being in breach in any way of the rule of preemption and until such time enabling the Petitioner to act solely for the purpose of increasing the number of directors to the required minimum of two shareholders-directors. This will satisfy, therefore, the requirement of Section 90(2) of the Act that obligates a private company to have at least two directors. Consequentially, it shall be incumbent upon the Petitioner to ensure the due subscription of qualification shares by such new shareholders-directors within a period of 60 (sixty) days of such induction/appointment to the extent of at least 400 ordinary shares as per Article 14 of the Articles of Associations.

33. This Court further directs the Respondent No. 4 Company to file, pursuant to Section 44 of the Act, a notice of the rectification of the share register as hereinbefore ordered upon to the Respondent No. 5, Registrar, Joint Stock Companies and Firms within 15 (fifteen) days from the date that the transfer is effected of 1,200 shares by the Respondent No. 1 in favour of the Petitioner.

34. In the result, the Application is allowed subject to the directions and observations above.

35. There is no Order as to costs.

36. The Respondent No. 3 is, hereby, consequentially allowed to take back documents filed in their original and in certified copy upon replacing all such documents with photocopies thereof duly attested and dated by the learned Advocate Mr. Sarder Alamgir Ahmed himself.