

LEX/BDHC/0151/2013

Equivalent Citation: 18BLC(2013)704, 2014 34 BLD 91, 1CLR(2013)526

IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)

Company Matter No. 69 of 2013

Decided On: 16.06.2013

Appellants: **Sirajul Haque**
Vs.

Respondent: **Apollo Ispat Complex Limited**

Hon'ble Judges:

A.K.M. Abdul Hakim, J.

Counsels:

For Appellant/Petitioner/Plaintiff: M. Zahir, Senior Advocate and Shah Muhammad Ezaz Rahman, Advocate

For Respondents/Defendant: Rafique-ul-Huq, Senior Advocate and Margub Kabir, Advocate

JUDGMENT

A.K.M. Abdul Hakim, J.

1. This is an application under Section 43, of the Companies Act, 1994 (shortly, the Act) for rectification of the share register of the respondent No. 1 company, Apollo Ispat Complex Limited by entering the name of the petitioner in the share register as holder of 2,38,22, 400 shares in total on receipt of payment for 1,69,91,600 shares. Facts leading to this application, in short, are that the respondent No. 1 Apollo Ispat Complex Limited is a public company by shares and engaged in business of manufacture and production of Cold Rolled Coil (C.R. Coil) Galvanized Plain Sheet (G.P. Sheet) and allied products. The respondent No. 1 Company was initially incorporated under the Companies Act, 1994 as a private company limited by shares with the subscription of twelve persons including the petitioner having incorporation No. C27547 dated 31.12.1994; that the petitioner is one of the sponsor shareholder of the Company; that company was subsequently converted into a public company limited by shares; that the respondent No. 1 company was initially formed with 1,00,000 paid-up shares and the petitioner had 10,000 shares in the company. Subsequently the paid-up capital of the company was increased from time to time by way of increase of the number of paid-up shares, firstly to 5,00,000 shares and thereafter 43,00,000 shares, thus upto 20.03.2009 the total number of paid-up shares of the company was 43,00,000.

2. Subsequently the petitioner came to learn that on 15.12.2010 the respondent No. 1 company had increased the number of paid-up shares from 43,00,000 to 150,00,00,000 shares (after the denomination of the face value of the shares from Taka 100/- to Taka 10/-) by allotting 10,70,00,000 ordinary shares to respondents No. 2-7 and 11-48 which appears from the return of allotment filed by the company on 21.12.2010 showing allotment of 10,70,00,000 ordinary shares on 15.12.2010 in favour of 43(forty three) allottees including 11(eleven) companies.

3. It is further stated that the petitioner is a sponsor director of the respondent company and as such, in case of increase of share capital of the company, new

shares must be offered to the petitioner and other members in proportion to the existing shares held by them and such prior offer is required to be made under Article 63 of the Articles of Association of the company, which is also a statutory requirement under Regulation 42 of the First Schedule to the Companies Act, 1994. Although the petitioner was holding 6,83,080 shares as on 20.03.2009 when the company increased its paid-up capital and therefore, entitled to an offer under Article 63 of the Articles of Association of the company but no such prior offer was made to the petitioner while allotting 10,70,00,000 ordinary shares to respondent Nos. 2-7 and 11-48.

4. That out of total 43,00,000 shares the petitioner was holding 6,83,080 shares in the company as on 20.03.2009 which is 15.88% of the total share capital as it then was. Accordingly, in case of allotment of new shares, the petitioner is entitled to 1,69,91,600 shares being 15.88% of the total number of shares proposed to be allotted. The petitioner received no notice under Article 63 of the Articles of Association making any such offer to him by the company specifying the number of shares, to which he is entitled. It is evident from the summary Share Capital filed by the Company on 26.06.2011 which shows that the petitioner is holding 68,30,800 shares after denomination of face value of the shares from Tk. 100/- to Tk. 10/-. If the company had offered new shares to the petitioner in proportion to the existing shares held by him at the time of allotment of share on 15.12.2010 the petitioner would have held $68,30,800 + 1,69,91,600 = 2,38,22,400$ shares instead of 68,30,800 shares. The company having made no offer to the petitioner under Article 63, the petitioner did not have any opportunity to accept the offer or intimate his decision within time limit and accordingly, the new shares were allotted to the other share holders and some outsiders as per the choice of the existing member of the Board.

5. It is also stated that the petitioner earlier filed two cases, namely Company Matter No. 250 of 2011 and Company Matter No. 251 of 2011 against Md. Ansar Ali and Md. Rafique for rectification of share register in this Hon'ble Court so far it relates to the transfer of 1,44,000 shares by respondent No. 3 and 95,400 shares by respondent No. 7 are concerned and this Hon'ble court after hearing the parties allowed both applications. Thereafter, the petitioner also filed Company Matter No. 366 of 2011 in this Hon'ble Court for rectification of shares register stating that the petitioner's brother late Md. Mozammel Haque being one of the sponsor shareholders of respondent No. 1 company entered into a Vendor's agreement with the petitioner on 23.10.2005 for selling a total number of 7,16,380 shares to the petitioner and accordingly Form-117 executed for only 4,08,800 shares during his lifetime on an understanding that the remaining shares will be transferred later on and after demise of his brother Md. Mozammel Haque, although his legal heirs have agreed to transfer their late father's shares to the petitioner as per the Vendor's Agreement dated 23.10.2005, the respondent No. 3 is refusing to register the said transfer and the matter is pending disposal before this Hon'ble Court.

6. It is pertinent to mention that above mentioned three Company Matters the petitioner made no claim in respect of the shares of the petitioner is entitled to but was not offered by the company under article 63 while making further allotment on 15.12.2010. The petitioner once became the Managing Director of the respondent No. 1 company but later on removed from the post on 13.01.2007 by the respondent No. 3, who also filed Title Suit No. 27 of 2007 against the petitioner and his late brother Md. Mozammel Haque claiming the post of Managing Director of the respondent No. 1 company and ultimately the; suit was withdrawn for non prosecution on 26.10.2011.

7. It is further alleged that not only the petitioner but also the legal heirs of the

petitioner's brother late Md. Mozammel Haque were not offered any shares before making allotment of 10,70,00,000 shares on 15.10.2010. It may be mentioned that one of the legal heirs of late Md. Mozammel Haque, namely Murshida Haque Usha received an envelope from the company sent by the registered post in June, 2010 but found only a blank piece of paper in the envelope. Stating the aforesaid fact, Ms. Haque immediately lodged a General Diary being GD. Entry No. 1131 dated 23.06.2010 with Dhanmondi Police Station.

8. The Board of Directors of the respondent No. 1 company have decided to make an issue of capital through Initial Public Offering (IPO) and appointed ICB Capital Management Limited to act as Issue Manager. The petitioner brought the issue in question to the notice of the Securities and Exchange Commission (SEC) by letters dated 24.08.2011 and 15.01.2013 for redress and meanwhile the SEC has temporary postponed the IPO proceedings of the company and decided to investigate into the company alleged irregularities including the interest of the company's shareholder and directors.

9. In this circumstances, the share register of respondent No. 1 company should be rectified showing the petitioner as owner of 2,38,22,400 shares in total including the 1,69,91,600 shares to which the petitioner is entitled.

10. The respondent having made no offer to the petitioner while allotting 10,70,00,000 new shares on 15.12.2010 thereby refusing the petitioner's legal right conferred by Regulation 42 of the First Schedule to the Companies Act, 1994 and also by Article 63 of the Articles of Association of the Company. Thus the petitioner has compelled to file the present application under Section 43 of the Companies Act, 1994, praying for rectification of the share register of the respondent No. 1 company.

11. The application is opposed by the respondent No. 1 company by filing affidavit-in-opposition dated 16.05.2013 denying the material allegations made in the application. Their positive case is that the petitioner was made aware of the increase of paid-up capital by letter of the respondent No. 1 company being No. AICL/ADM/GA/10 dated 08.06.2010 (Annexure 'X'). The petitioner being an existing shareholder was duly offered shares by the company vide letter dated 08.06.2010 and in the said offer the petitioner was given 15(fifteen) days time from the date of receipt of the letter to accept the offer of shares, which is also in accordance with Article 63 of the Articles of Association of the company. In the said notice the company correctly stated that the petitioner holds 15.88% shares in the company, but inadvertently stated about 23,82,000 shares. However, the money sought from the petitioner against the shares offered to him was Taka 23,82,00,000.00 which shows that the company, in fact, has offered 2,38,20,000 shares to the petitioner, which is much more than what the petitioner is entitled to. It is further stated that the petitioner did not reply to the said notice till date. He did not accept the said offer of shares or intimate his decision to the company or ever informed the company about the inadvertent mistake in the said notice. The said letter was sent by registered post in compliance with Article 176 of the Company and was properly served upon the petitioner as per section 27 of the General Clauses Act, 1897 as it was received by one Dulal Guard on behalf of the petitioner. The petitioner having failed to accept the offer is deemed to have declined the same and that is why no shares were allotted to the petitioner by the company. As the petitioner did not accept the offer of shares, the said offered shares were allotted to others in compliance with Article 63. At this stage, it is not possible for the company to issue fresh shares in order to allot shares to the petitioner, specially when no communication whatsoever was received from the petitioner's end for the last three years and therefore, there is no scope to allot any shares to the petitioner at this stage. The petitioner with mala fide intention without

accepting the offer within the given time, has now filed the instant application under section 43 of the Companies Act, 1994. Section 155(1)(b) of the Companies Act, 1994 provides that if the offer is not accepted within the specified time, it shall be deemed to have been denied. Therefore, the company cannot at this stage be made liable to have offered the said shares to others. It is pertinent to mention here that from the letters of the petitioner dated 24.08.2011 and 15.01.2013 it is apparent that he was very much aware of the said allotment. In the meantime he had filed Company Matter Nos. 250 and 251 of 2011 and also company Matter No. 366 of 2012, however no claim has been made in relation to the said allotment of shares in 2010.

12. It is also stated that the petitioner is a habitual bank defaulter and at present several civil and criminal cases were filed against him and he is in the central jail. In such situation it is apparent that the petitioner was not even in a position to subscribe for the said shares which was offered to him in 2010 and therefore, he did not accept the offer of the company. The petitioner has filed the present company matter only to hamper the progress of the company and delay its IPO process. As such, the present application under Section 43 of the Company Act, 1994 having no merit is liable to be dismissed.

13. Against the affidavit-in-opposition filed by the respondent No. 1 company, the petitioner filled affidavit in reply dated 02.06.2013 stating the fact that both Section 155 of the Act and Article 63 speak of offering shares to the members in proportion to the existing share held by them by notice specifying the number of shares; as such, the number of shares offered to a member must be specified in the notice and there is no scope within the meaning of section 155 or Article 63 to presume this number from the value sought from the said number, in other words, it is the number of 'shares' and not the 'value' which will determine as to whether an offer is valid or not. Since the Petitioner did not receive the notice he had no scope to give any reply thereto; in any event, an offer which is admittedly defective is no offer in the eye of law and failure to accept such offer or non-payment of money against such defective offer does not take away the right of the Petitioner conferred by law and the Article of Association. As regards Petitioner's knowledge about allotment it is stated that the Petitioner being at loggerheads with the other members of the Board was ousted from the management in 2007 and since then he has no participation in the day-to-day affairs of the company. In fact, the Petitioner learnt about the decision of the company to allot further shares from his own source and brought it to the notice of the SEC but the Petitioner came to know about distribution of new shares to different persons much after the allotment had been actually made inasmuch as no offer was made to the Petitioner.

14. It is further stated that the so-called notice sent by registered post on 08.06.2010 was received by Dulal Guard on the next very day (09.06.2010) is not only unusual but also unprecedented in the case of registered post and the identity of the said Dulal Guard is not also clear. In any event, the statutory right of a member to shares in proportion to the existing holder by him cannot be denied merely because the said member did not accepted the involved offer or make no payment against such offer.

15. It is also stated that the subject matter of company Matter No. 366 of 2012 is totally different from that of the present application and a subsequent application under Section 43 is not barred merely because the petitioner did not make the claim in an earlier application under Section 43 of the Companies Act filed on different ground and for different relief. It is also stated that the petitioner though came to learn about the decision of the company to allot further shares from his own source

had no reason to complain unless and until his right as an existing member is denied and as such, the petitioner has filed the instant application only when it came to the knowledge of the petitioner that new shares had been allotted and distributed to different persons without making any offer to the petitioner.

16. There is no time limit prescribed by law for filing an application under Section 43 and as such, the petitioners right cannot be denied for preferring the application under Section 43 after three years of allotment, especially when the company admittedly made an invalid offer to the petitioner in violation the provisions of law and the Articles of Association. It is further stated that as per claim of the petitioner regarding allotment of shares is concerned the Bangladesh Securities and Exchange Commission (BSEC) cannot assume the power of this Hon'ble Court to decide a question relating to title under Section 43 of the Companies Act, 1994 and in fact, BSEC has not taken any decision in this respect. Further it is the respondent No. 1 who has claimed that BSEC has withdrawn suspension of IPO proceedings of respondent No. 1 company but BSEC has not published any such decision till now. That the judgment and order of conviction or filing of several civil and criminal cases against the petitioner does not take away his right as a shareholder under the Articles of the company. The petitioner being a shareholder of respondent No. 1 company has no intention to hamper the progress of the company, provided the management of the company looks after the interest of the petitioner as member. In fact the BSEC postponed the IPO proceedings of the respondent No. 1 company by a resolution adopted in its meeting held on 12.02.2013 and decided to investigate into certain issues, the result of which is yet to published officially.

17. In this company matter notice were served upon all the respondents, only respondent No. 1 company contested the matter by filing Affidavit-in-opposition. Although the respondent No. 26 filed power in this court on 05.06.2013 through its learned Advocate Syed Monjurul Hoque but it did not contest the matter.

18. At the time of admission of the company matter, on the prayer of the learned Advocate for the petitioner, this court by order dated 13.03.2013 restrained the respondent No. 1 company from taking any further steps with regard to the IPO without disposing the petitioner's claim as regards the said 1,69,91,600 shares and further restrained the Respondent Nos. 2-7, 11-48 from transferring their shares allotted on 15.12.2010 to any other person. The respondent No. 1 company appeared in the matter and filed an application on 31.03.2013 for vacating the part of the order of temporary injunction dated 13.03.2013 passed in this matter restraining the respondent No. 1 company from taking any further steps with regard to the IPO without disposing of the matter. Against that application, petitioner filed Affidavit-in-opposition dated 22.04.2013. Thereafter, respondent No. 1 company filed Affidavit-in-reply on 25.04.2013 against the affidavit in opposition dated 22.04.2013. Subsequently, injunction matter was taken up for hearing on 29.04.2013 and 07.05.2013, during hearing of the injunction matter the learned Advocate for both the parties agreed that for proper adjudication of the matter, the substantive application should be heard and disposed of and on their prayer company matter was fixed for hearing on 14.05.2013.

19. Dr. M. Zahir, learned Senior Advocate with Mr. Shah Muhammad Ezaz Rahman, the learned Advocate appearing on behalf of the petitioner. Dr. M. Zahir, learned Senior counsel by referring the letter dated 08.06.2010 (Annexure-X) to the application dated 31.03.2013 filed by the respondent No. 1 company for vacating the part of the order of temporary injunction submits that in this case admittedly the company in its letter dated 08.06.2010 did not specify the correct number of shares, such offer of shares to the petitioner cannot be treated as valid offer in the eye of law

as clearly provided under Section 155 of the Companies Act of 1994 and Articles 63 of the of the Articles of Association of the company which speaks of offering shares to the members in proportion to the existing share held by them.

20. Learned Advocate further submits that in respect of offering numbers of shares it is not clear in its meaning and definite in its intention and there is no scope within the meaning of Section 155 or under Article 63, to presume this number from the value sought from the petitioner precisely it is the number of share and not the value which will determine as to whether an offer is valid or not. Thus an allotment in contravention of section 155 of the Act is illegal and inoperative.

21. Dr. Zahir next submits that since the petitioner did not receive the notice, he had no scope to give reply thereto, and in any event, an offer which is admittedly defective is no offer in the eye of law and failure to accept such invalid offer or non-payment of money against which offer does not take away the statutory right conferred by law and the Articles of Association of the company.

22. He also submits that by virtue of section 43(3) of the Act, the company judge have power to decide any question relating to the title of these shares of the petitioner, who is a party to the application and the High Court Division had wide jurisdiction to decide the issue of title to these shares as per provision of sub-section (3) of section 43 of the Act.

23. He finally submits that the present application is not barred by limitation as this question was strenuously argued by Mr. Rafique-ul-Huq, the learned Senior Advocate for the respondent No. 1 that act and conduct of the petitioner, coupled with the Inordinate delay in filing the application shows that he had declined to accept the shares offered. In reply, the learned Advocate for the petitioner contents that an application under Section 43 of the Act no period of limitation has been prescribed in law and delay of two years eight months from the date of definite knowledge of the petitioner about the transfer of shares is quite reasonable and is not at all inordinate delay. In support of his submission the learned Advocate cited certain decisions reported in 43 DLR (AD) 34 and 29 BLD (HC) (2009) 206.

24. Learned Senior Advocate Mr. Rafique-ul-Huq, appeared for the respondent No. 1 company with Mr. Margub Kabir, learned Advocate on the other hand argued that the petitioner was offered shares by letter dated 08.06.2010 which was sent by registered post and duly received in his address on his behalf. The learned Advocate contents that the petitioner was provided 15 days time to accept this offer shares in writing, otherwise, it was specifically stated that the Board of Directors shall allot the said offered shares to other.

25. He further submits that since the petitioner has not accepted the said offer within stipulated time, as per Article 63 of Article of Association of the company it has been deemed that he has declined to accept the shares offered and the company in compliance with Article 63 has allotted the said shares to other.

26. He next submits that the petitioner was well aware of the facts that the paid up the capital of the company was increased from 43,00,00,006 to 150,00,00,000 and he is also aware about the allotment made on 15.12.2010 to other person as it transpires from the Company Matter Nos. 250-251 of 2011 and 366 of 2012, in such circumstances present application is hit by principle of waiver, acquiescence and estoppels.

27. He also submits that act and conduct of the petitioner coupled with the inordinate delay in filing the present application clearly shows that he had knowledge

of transfer of shares and declined his right to his shares allotted to other persons and thus application is barred by limitation and Limitation Act, 1908 will govern the application under Section 43 of the Companies Act, 1994.

28. The learned Advocate by referring Articles 176 of the Articles of Association of the Company and Section 27 General Clauses Act, submits that the petitioner being an existing shareholder was duly offered shares by the company through letter dated 08.06.2010 in compliance with Article 63 and said letter was sent by the registered post in compliance of Article 176 of the company and it was received by one Dulal Guard on behalf of the petitioner thereby the notice was properly served upon the petitioner. Since the petitioner has not accepted the said offer within the time stipulated, it has been deemed that he denied to accept the shares offered.

29. The learned Advocate lastly submits that as the petitioner has not accepted the said offer within the stipulated period and the time period for accepting the said shares has expired long before, the petitioner is not entitled to any shares and as such his application under Section 43 of the Companies Act, 1994 is liable to be dismissed.

30. I have heard the submissions of the learned Advocates of both the parties, perused the application and annexure thereto, affidavit-in-opposition filed by the respondent No. 1, affidavit-in-reply and other materials on record.

31. The main issue in this matter is that whether the respondent No. 1 Apollo Ispat Complex Limited by letter dated 08.06.2010 (Annexure-X) offered shares to the petitioner in proportion to his existing shares held by him in the respondent No. 1 company at the relevant time.

32. In this back ground I have considered the contents of the Letter dated 08.06.2010 (Annexure-X) in the light of the relevant provision of section 155 and Article 63 of the Articles of Association of the respondent No. 1 Company.

33. For the sake of convenience and for disposal of the matter the Letter dated 08.06.2010, provisions of Section 155 of the Companies Act 1994 and Article 63 of the Articles Association of the company are quoted below in their entirety:

Letter dated 08.06.2010 reads thus:

"APPOLLO ISPAT COMPLEX LIMITED

সূত্র:-এআইসিএল/এডিএম/জিএ/১০/

তারিখ: ৮ই জুন ২০১০ইং

জনার খোয় সিয়ামুল হক রেজিষ্টার উইথ এ, ডি

বাড়ী নং: ৩৫/এ: সড়ক নং- ২

ধানমন্ডি আবাসিক এলাকা

ঢাকা

সম্মানিত চেয়ারম্যানের,

বিগত ৬ই জুন ২০১০ইং তারিখে অনুষ্ঠিত কোম্পানীর পরিচালকমন্ডলীর সভার সিদ্ধান্ত অনুযায়ী কোম্পানীর পরিশোধিত মূলধন বর্তমানের টা ৪৩,০০,০০,০০০/- কোটি (তেতাল্লিশ কোটি টাকা) হইতে টা ১৫০,০০,০০,০০০/- কোটি (একশত পঞ্চাশ কোটি) টাকায় উন্নীত করার সিদ্ধান্ত গৃহীত হয়। কোম্পানীতে আপনার বর্তমান শেয়ারের অনুপাতে (যাহা পরিশোধিত মূলধনের ১৫.৮৮%), আপনাকে ২৩,৮২,০০০ টি অতিরিক্ত শেয়ার গ্রহণ করিতে হইবে অর্থাৎ টা ২৩,৮২,০০,০০০/- (টাকা তেইশ কোটি বিয়াল্লিশ লক্ষ) অতিরিক্ত বিনিয়োগ করিতে হইবে।

অতএব, উক্ত শেয়ার গ্রহণে সম্মত হইলে আর পর প্রাপ্তির ১৫(পনের) দিনের মধ্যে লিখিতভাবে সম্মতি প্রদানের অনুরোধ করা হইল, অন্যথায় পরিচালক মন্ডলী আপনার শেয়ারের অংশ অন্য কাহাকেও বরাদ্দ প্রদান করিবে।

পরিচালক মন্ডলীর আদেশক্রমে

অস্ফট

(শেখ আবুল হাসান)

কোম্পানী সচিব

34. The Companies Act 1994, provides in section 155 as under:

"Section 155: Further issue of capital. - (1) Where the directors decided to increase the subscribed capital of the company by issue of further shares within the limit of the authorized capital-

(a) such further shares shall be offered to the members in proportion, as nearly as circumstances admit, to the capital paid up on the existing share held by such member, irrespective of class, at the date of the offer;

(b) such offer shall be made by notice specifying the number of shares offered and specifying the time limit, not being less than fifteen days from the date of the offer, within which the offer if not accepted will be deemed to have been declined;

(c) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the members to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they may think most beneficial to the company.

(2) Notwithstanding anything contained in sub-section (1), the further shares aforesaid may be offered to any person whether or not those person include its person referred to in clause (a) of that sub-section in manner whatsoever."

35. The Articles of Association of the company which are relevant for the purpose of present application may be set out as follows:

"Article 63 - Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them and such offer shall be made by notice specifying the number of shares, to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined and after the expiration of such time

or on receipt of an intimation from the member to whom such notice is given, that he declines to accept the shares offered, the Directors may dispose of the same in a manner as they think fit most beneficial to the Company. The Directors, in like manner may, dispose of any such new or original shares as aforesaid which, by reason of the proportion borne by them to the number of persons entitled to such offer as aforesaid or by reason of any other difficulty in apportioning the same, cannot in the option of the Directors be conveniently offered in manner herein before provided."

36. In the present case, the respondent No. 1 company in the said offer letter dated 08.06.2010 admitted that the company in its Board Meeting decided to increase paid up capital of the company from 43 crore to 150 crore. Since the petitioner hold 15.88% shares in the company was offered additional 23,82,000 (Twenty three lac, Eighty two thousand) shares and against the offered shares the petitioner had to invest additional Taka 23,82,00,000 (Twenty three crore Eighty two lac). The petitioner was further requested to inform if he agreed to accept the offer of said shares he should informed in writing within 15 days, otherwise the Board of Directors will allot those shares to others.

37. Respondent No. 1 company send the said letter by registered post with Acknowledgment Due and same was received by one Dulal Guard on his behalf on 09.06.2010 (Annexure-X) at page 22 of the application filed by the respondent No. 1 company for vacating the order of Temporary injunction. The respondent No. 1 in its affidavit-in-opposition clearly admits that the petitioner holds 15.88% shares in the company, but inadvertently stated about 23,82,000 shares but the money sought from the petitioner against the shares offered was Taka 23,82,00,000.00 which shows that the company, in fact, has offered 2,38,20,000 shares to the petitioner.

38. The letter dated 08.06.2010 (Annexure-'X') itself shows that the offer was made for 23,82,000 number of shares to the petitioner and same was not in strict compliance with the provision of Section 155 of the Companies Act and Article 63 of the Articles of Association and same has been admitted by the respondent No. 1. Section 155 of the Companies Act, 1994 and Article 63 speak of offering shares to the members in proportion to the existing shares held by them by notice specifying the number of shares offered to a member must be specified in the notice and there is no scope within the meaning of Section 155 and Article 63 to presume this number from the value sought from the said member; in other words, it is the number of shares and not the value which will determine to whether an offer is valid or not.

39. Thus it is evident that the discrepancy in the letter dated 08.06.2010 in respect of offering quantum of shares to the petitioner in proportion to the existing share held by the petitioner in the company is not minor discrepancy which could be so lightly brushed aside. The Letter dated 08.06.2010 upon which petitioner based his claim shows that there is an apparent mistake in offering the number of shares to him. In the said letter company offered only 23,82,000 shares which is less than the number of shares in proportion to the existing share held by him in the company. Hence it cannot be said that in fact 2,38,20,000 shares were offered to the petitioner, the letter upon which the respondent company declined the claim of the petitioner. Since the defect or error is apparent which is admitted by the respondent company.

40. Thus I find that the offer made by the company cannot be treated as valid offer under the provision of section 155 of the Act which clearly provides that further shares should be offered to the members in proportion on the existing shares held by the member by notice specifying the number of shares offered. Where a statute specifically provides that a company has to act in a particular manner, then it has to

be done in that manner and in no other manner, it is a mandatory provision which has to be strictly complied with. Further, the petitioner cannot be debarred from his accrued right under section 155 of the Act and Articles of Association of the company.

41. In the case of Nazir Ahmed vs. King Emperor AIR 1936 PC 253, the Privy Council held that when a statute requires a thing to be done in a particular way, it must be done in that manner or not at all and all other methods are forbidden.

42. The learned Advocate for the respondent No. 1 submits that the notice dated 08.06.2010 issued by the company was served upon the petitioner under registered post with acknowledgment due and one Dulal Guard received the said notice on behalf of the petitioner on 09.06.2010. To prove this fact, the respondent No. 1 annexed one photocopy of Registry postal receipt No. 819 (Annexure-'X', at page 21) issued by the Bangladesh Postal Department where it shows that letter bearing Memo No. AICL/ADM/GA/10 dated 08.06.2010 (Annexure-'X', at page 20) was sent by registered post on 08.06.2010 with Acknowledgement due and also annexed a report dated 06.07.2010 (Annexure-'X', at page 22) issued by Sub-Postmaster, L.S.G., New Market, Dhaka which reads as under:

“রেজি- ৮১৯ তাং ০৯/০৬/২০১০- নাম- সিরাজুল হক
রেজি- ৮২০ তাং ০৯/০৬/২০১০- নাম- মোস্তাফিজুল
হক
ডেলিভারী- তাং ০৯/০৬/২০১০
গ্রহন পক্ষে দুলাল গার্ড
অফিস
০৬/০৭/২০১০
সাব পোস্টমাস্টার
এস.এস. জি
নিউ মার্কেট ডাকঘর
ঢাকা- ১২০৫।

43. I have meticulously examined the relevant registered Postal receipt No. 819 dated 08.06.2010 and the report of the Sub-Postmaster dated 06.07.2010 (Annexure-'X', at Page 21 and 22) annexed to the application dated 31.03.2013 filed by the Respondent No. 1 for vacating the order of temporary injunction. A combined reading of the above Annexures shows that the said letter was sent to the petitioner by Registered Postal receipt No. 819 dated 08.06.2010 but in the report of the Postmaster date was shown 09.06.2010 and further, it is very unusual and unprecedented that registered notice/letter sent by registered post with Acknowledgement due (A/D) was received by one Dulal Guard or delivered on the very next day i.e. 09.06.2010 and identity of the Dulal Guard is not also clear. Generally, letter posted by registered post with A/D ordinarily served upon the addressee within 7(Seven) days time. But in the present case, report of the Postmaster shows that letter in question dated 08.06.2010 was received/delivered on the very next date i.e. 09.06.2010. The notice was therefore ineffective and it would be regarded as null and void notice and bad in law, specially in the case when the respondent company disposes further shares of the petitioner to any person. This factual aspect being vital in the present case but the respondent No. 1 failed to prove this aspect by adducing proper evidence where the petitioner-addressee strongly denied that neither this letter was received by the petitioner nor duly served upon him. Further the question of proving the falsity of the postal acknowledgment receipt and report of Sub-Postmaster, (Annexure-X) since involved factual aspect requirement the evidence to be taken in dock, the same cannot be adjudicated under provision of section 43 of the Act.

44. Notice and the date of offer means the date of service of the notice of the offer and not the date of posting of the notice or any other date. 'Offer' implies the

communication of an intention or desire in respect of any matter and without such communication, there can be no offer. The minimum 15 days time must be counted from the date of service of the notice of the offer as provided in section 155(1)(b) of the Act.

45. Now, I will deal with the question whether the present application is Filed after inordinate delay and barred by the limitation.

46. Mr. Rafique-ul-Huq, the learned Advocate on behalf of the respondent No. 1 emphatically submits that the petitioner had definite knowledge about transfer of the shares to other person on 15.12.2010 and the petitioner has filed this application after inordinate delay of two years eight months and same is barred under the provision of Limitation Act, 1908.

47. The learned Advocate for the petitioner, Dr. M. Zahir, on the other hand submits that an application under section 43 of the Act no period of limitation has been prescribed in law and the delay of two years and eight month from the date of definite knowledge of the petitioner about the transfer of shares is quite reasonable and is not at all inordinate delay and further the limitation Act is not at all applicable in the present case.

48. It has been well settled in the case of Tamizul Hague and another vs. Shamsul Hague and others reported in 43 DLR (AD) 34, wherein it has been held by our apex court that the Limitation Act is not application in the case under Section 43 of the Companies Act. That the application for rectification of the shares under Section 38 of the Companies Act is left to be governed by the general principle that it shall be filed within a reasonable time and not after inordinate delay, depending on the facts and circumstances of a particular case.

49. Admittedly present case was filed after two years and eight months from the date of definite knowledge about the transfer of share is quite reasonable and is not all an inordinate delay and considered as reasonable time within which the present application is filed. It has been well settled by our apex court that the application under section 38 of companies Act is left to be governed by the general principles and not governed by any provision of Limitation Act, 1908. Thus contention as laid by the learned Advocate for the respondent No. 1 as to the limitation is therefore rejected.

50. The materials on record prima-facie shows that there was absolute violation and non observation of Section 155 of the Companies Act and Articles 63 of the Articles of Association in issuing the notice dated 08.06.2010 and it cannot be treated as notice under the aforesaid provision of law and articles of Association of the company.

51. There is no dispute that the petitioner is a Sponsor Director of the company and he is entitled to 15.88% of the total share capital that is 6,83,080 shares as on 20.03.2009, when the company increased its paid-up capital. In this situation the question as to the title of these share can be well decided within this jurisdiction. Since the basis of claim of the petitioner are undisputed, so, this court has ample power to decide the issue of title to these share of the petitioner as per provisions of section 43(3) of the Companies Act, 1994. The proceedings for rectification of share register under section 38 of the Act of 1913 corresponding to section 43 of the Companies Act 1994 is a special proceeding under a statutory original jurisdiction. The High Court Division in its original jurisdiction exercises a statutory jurisdiction and matters decided under the Companies Act in the High Court Division are not disposed of in exercise of its ordinary original civil jurisdiction. (Dhaka Jute Mills Ltd.

And others vs. Satish Chandra Banik and others, reported in LEX/HEPK/0293/1967 : 19 DLR 735).

52. In this respect the argument of the learned Advocate for the petitioner has considerable substance for the law relating to the discretionary power of the Judge under section 43 of the Companies Act, 1994 is now well settled that in the facts of the present case, this court has ample jurisdiction to decide the issue of title to these shares as per provisions of section 43(3) of the Companies Act, 1994, the provision of which are similar to those section of 38 of the Companies Act, 1913.

53. A bare reading of section 43 on its own language does not indicate that the jurisdiction conferred by the section is one hedged in with a condition that it can only be exercised when relief can be granted in a summary manner. There is nothing in the language of section 43 which excludes decision of questions of title to shares that may arise in an application for rectification of the share register. On the other hand, the language of sub-section (3) of section 43 makes it abundantly clear that in such an application, the court has power to decide the question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register and the court would have further jurisdiction to decide the question of title even when it arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand. It further widens the jurisdiction of the court when it permits or enables the court generally to decide any question which is necessary or expedient to decide in connection with the application for rectification.

54. In any event, in my opinion, the Companies Act is a special statute which provides for special, and specific remedies. The powers of the company judge to try and dispose of matters which relates to rectification of the register of members or which involve determination of title to shares in companies, when specifically, under the provision of section 43(3), question of title can be determined by the company court.

55. In this connection reliance may be placed in the case of Ahmed Impex (Private) Ltd. vs. Moqbul Ahmed reported in 56 DLR (AD) 92, wherein our apex court observed that the provision of Section of 38 the Companies Act gives the court a wide discretion to scrutinise any fraud, error or undue influence or misrepresentation in the matter of transfer of any share and grant relief commensurating with the appropriate relief contemplated under the said section.

56. In the case of Mohiuddin Ahmed and others vs. Lutfur Rahman and another LEX/BDHC/0008/1990 : 44 DLR 48 the learned Company Judge of this court held that:

"Maintainability of application before the Company Court for rectification of share register. It is a discretion of the Court to see whether the point at issue relating to rectification of share register can be resolved on the basis of materials on record. If the case is complicated and very doubtful and if it appears that without resorting to some procedure other than the summary proceeding under section 38 of the Act a case cannot be disposed of, the Company Court should not interfere with such a matter. But if it is apparent on the face of the records that legal rights of the parties are clear and can be settled on the basis of the materials on record, the Company Court can exercise its jurisdiction in the matter."

57. In the present case it appears to me that the documents and papers filed by the parties are so clear that the rights of the parties can be easily settled on the basis of

those papers and the matter can be disposed of accordingly.

58. In the case of *A.R. Shaw vs. The Diamond Rock Boring Company Ltd.* 1877 QB Division (Vol. II), 463 their Lordships observed as follows:

Regarding jurisdiction of this Court:

"The Lord Chief Baron read the later part of section 35. I cannot imagine any language better adopted for conferring a jurisdiction to decide disputes between two alleged members of a company in respect of the title to shares therein. I think, therefore, that the jurisdiction exists."

It is further held that:

"But the Joint Stock Companies Act 1857 section 9, greatly increased the effect of the earlier enactment, for it expressly gave power to decide questions of title arising between two or more alleged holders of shares."

It is further observed as follows:

"Looking at all the words of section 35 and giving them a reasonable construction, I think that the legislature intended to give the Court jurisdiction to make an order so as to decide questions of title, trusting to the discretion of the Court not to decide in this summary manner any intricate or difficult question of title; but that, if the Court thinks fit, they have jurisdiction to make the order in all cases."

59. In the case of *United Planters and Traders Ltd. vs. Md. Mosharraf Hossain Khan*, 34 DLR 343, the learned Company Judge of this Court held that the provisions of section 38 are very wide and the Court has ample scope and power to grant relief and save the parties from being harassed and unnecessarily relegated to protracted litigation in a simple case.

60. In the case of *Messrs. Anath Bandhu Guha & Sons Ltd.* 7 PLR (Dac) 159, their Lordships held as follows:

"We have set out the relevant provisions of law and the cases at length as not only this case was argued at some length, but also because we have not got many decisions of Pakistani Courts on this point though there is a large number of decisions of other countries, and we have no doubt that the provisions of section 38 of the Companies Act are very wide, and in appropriate case give a Judge dealing with Company matters a very wide discretion in granting speedy relief to the holder of shares, as it has been held in *Ex Parte A.R. Shaw's* case, and also in a number of cases. It is not necessary for the Court to find that there has been actual default on the part of the Company, and even in cases other than that of default of the Company, under section 38 the Court has ample scope and power to grant relief, and save the parties from being harassed, and unnecessarily relegated to protracted litigation in a simple case. It has even held that the jurisdiction given to the Court under section 38 of the Companies Act, is not limited to the cases mentioned in this section (section 35 of English Companies Act) vide *Burns vs. Siemens Bros. Buckley on the Companies Acts*, 12th Edition, at page 261 says: "When there is no dispute as to a person being, or having ceased to be, a member, the summary jurisdiction under this section to compel the Company to perform the ministerial duty of entering the fact on

the register is clear As between alleged share-holders and the Company, there are numerous cases in which this section has been used for determining the equities although, if the case be one of difficulty and complication, the Court may refuse the motion without prejudice to an action being brought. As between the applicant and the Company, the Court will enforce the ministerial duty if the application shows a clear right; and will not readily refuse to proceed and leave an action to be brought."

61. In my opinion the principle laid down in the aforesaid decisions is very much applicable in the facts and circumstances of the present case and as such I find that there are no intricate and complicated questions of fact which will preclude this Court from deciding this case on merit and as such I find substance in the argument advanced by Dr. M. Zahir.

62. The papers and documents as discussed above and also the annexures with the application as well as affidavits of the parties are quite clear to settle the rights of the parties involving rectification could well be decided summarily and having found that the notice was defective and invalid as such I find merit in this application.

63. Considering the facts and circumstances of the case and the materials on record, the decisions cited above, I am of the view that the petitioner is entitled to have the relief as prayed for in the present application.

64. In the result, the application under Section 43 is allowed.

65. It is declared that the petitioner has lawful title in respect of 1,69,91,600 (One Crore Sixty nine lac Ninety one thousand and Six hundred) numbers of ordinary shares allotted to Respondent Nos. 2-7 and 11-48 on 15.10.2010.

66. Accordingly, the respondent No. 1 is directed to allot 1,69,91,600 (One Crore Sixty nine lac Ninety one thousand and Six hundred) ordinary shares of Taka 10/- each out of 10,70,00,000 ordinary shares and rectify the share register of respondent No. 1 company by entering the name of the petitioner in the share register as holder and owner of 2,38,22,400 (Two crore Thirty eight lac, Twenty two thousand and Four hundred) number shares in total on receipt of payment of Taka 16,99,16,000 (Sixteen crore Ninety nine lac and Sixteen thousand) for the 1,69,91,600 number shares not offered to the petitioner before making allotment of 10,70,00,000 on 15.12.2010 to respondent Nos. 2-7 and 11-48 within a period of 60(sixty) days from the receipt of the certified copy of the Judgment and order of this court.

67. There shall be no order as to costs.

68. The order of injunction passed by this court on 13.03.2013 is hereby vacated. The Bangladesh Security Exchange Commission (BSEC) will proceed with the IPO proceedings of the respondent No. 1 Company, Appollo Ispat Complex Limited. Let a copy of the judgment and order be sent to the respondent No. 49, Registrar of Joint Stock Companies and Firms.

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