

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)

Company Matter No. 193 of 2019

(Judgment has been pronounced in virtual Court)

IN THE MATTER OF :

An Application under Section 233 of the
Companies Act, 1994.

AND

Syed Nuruddin Ahmed

..... Petitioner

-Versus-

Maxwell Stamp Ltd. and others

..... Respondents

Dr. Md. Mahboob Murshed, Advocate

.....For the Petitioner

No one appears

.....For the respondents

The 17th May, 2020

Present:

Justice Muhammad Khurshid Alam Sarkar

This application under Section 233 of the Companies Act, 1994 (briefly, the Companies Act) has been filed by the petitioner, as a minority shareholder, for obtaining a declaration from this Court to the effect that the majority shareholders-cum-Directors of Maxwell Stamp Ltd (hereinafter referred to either as MSL or as the respondent No. 1-Company) are conducting the affairs of MSL in a manner prejudicial to the interest of MSL by embezzlement of MSL's funds, with a second prayer for restraining (i) Maxwell Stamp PLC, Abbot's Court, 34 Farringdon Lane, London, ECIR 3AX, UK (hereinafter referred to either as MSP or as the

respondent No. 2) from transferring the shares owned and held by it in MSL, (ii) restraining Mr. Martyn James William Kebell, who, by virtue of owning shares in MSP, is the Chairman of MSL, (hereinafter referred to either as Mr. Kebell or as the respondent No. 4) from transferring the shares held by MSP in MSL, (iii) restraining Mr. Jeremy Christopher West (hereinafter referred to either as Mr. West or as the respondent No. 5) from transferring the shares owned and held by him in MSL and (iv) restraining Mr. Rajnesh Mittal & Mr. Anthony John Wright (hereinafter referred to either as the respondent Nos. 7 & 8 respectively or as the Administrators) from transferring the shares owned by MSP in MSL, now held by the Administrators on behalf of MSP, in any manner to any juristic/natural person, till the misappropriated funds are deposited either by the Directors, Managing Directors and Chairman of MSP or by the Administrators of MSP into MSL's account; and with the third prayer for obtaining a declaration from this Court to the effect that the majority shareholder-MSP or its Administrators are not competent to appoint any Chairman and Director in MSL until the defalcated money is refunded and, till then, Chairman/Director for MSL should be appointed by this Court.

In the petition it is averred that MSL was incorporated under the Companies Act as a private company limited by shares, in Dhaka on 26.12.2002, with the main objective of, amongst others, the consultancy business; that the petitioner is a director of MSL wherein he owns and holds its 40% shares, MSP owns and holds 59.9% shares and Mr. West owns and holds 0.1% shares in MSL; that MSP implemented foreign aided projects in Bangladesh through MSL who provided the services of national consultancy in the projects and MSP reimbursed the consultancy fees of national consultants at the local rate and other overhead expenses of implementing the projects; that MSL paid the national consultants at their respective individual rate while it was to receive the fee for each individual national consultant as per the rate fixed in the project document; that MSL made profits from the difference between the two rates; that MSP used to remit funds to MSL to meet its operational expenses on a monthly basis to the nominated bank account of MSL in Bangladesh; that on 23rd April 2013, MSL Board took the decision that surplus fund belonging to MSL should be kept in a ringfenced account titled “Maxwell Stamp Ltd Bangladesh” in a British Bank by MSP; that on 41st Board Meeting of MSL, the MSL’s Company Secretary informed the Board that as per the books of accounts of MSL as on 30th November 2018, the

intercompany receivables from MSP is BDT 150,420,057 (equivalent to GBP 1.42 million); that the independent auditor, ACNABIN, in its report dated 21 December 2018 confirmed the intercompany receivables from MSP by MSL was BDT 145,567,099; that the Financial Controller of MSP through two letters dated 09.01.2019 confirmed the amount owed by MSP to MSL was TK. 144,569,285 (equivalent to £1,310,822) and Maxwell Stamp LLC, Suit 1102, Kamala Towers, Dana Plaza Khalidiya, PO Box 111399, Abu Dhabi, UAE, which is a joint venture company of MSP, (hereinafter referred to either as MSLLC or as the respondent 3) owed to MSL an amount of TK. 997,814 (£9,047).

It is stated that MSL received a notice dated 30 January 2019 from the Administrators of MSP containing that the MSP has been placed in administration (winding up). Pursuant thereto, the Company Secretary of MSL informed the Administrators that MSP owed BDT 1,52,242,979 (£1,458,509) to the MSL and the said fund should not be the part of the administration and requested to return the same forthwith and MSL has never permitted MSP to use its fund by MSP for any activity or necessity of MSP. Then, on 30th January 2019, the Administrators of MSP vide their e-Mail to MSL informed that they had identified an account held in the name of

“Maxwell Stamp Ltd Bangladesh” at Lloyds Bank which has a balance of £127.33 as on that date and also informed that the bank had confirmed that this had been the balance since January 2017 when £115k was transferred from the account. Thereafter, in “the Administrators’ Proposals 20 March 2019”, it is disclosed that the MSP does not have sufficient property to enable a distribution to be made to unsecured creditors and made a suggestion that they would review bank statements and documentation to consider if there has been a breach of trust. On this basis, the Company Secretary of MSL requested the Administrators to keep MSL informed of the investigation to be made by the Administrators, but the Administrators did not carry out any investigation into the allegations of misuse of MSL’s fund. It is alleged that MSP, MSLLC, Chairman and present/former Director of MSP with mala fide intention and in order to defraud the petitioner misused the ringfenced funds of MSL causing severe financial loss/damage to MSL/petitioner and, also, the MSLLC in collusion with MSP did not pay the dues of MSL of Tk. 997,814 (equivalent to £9,047) as on 30th September 2018. Recently, the respondents Nos. 4 & 5 have resigned from the posts of Chairman and Director of MSL. Since the majority shareholders of MSL (respondent Nos. 2 to 6) have unauthorizedly used the ringfenced funds of MSL and thereby

conducted the affairs of the respondent No. 1-company (MSL) in a manner prejudicial to the interest of the minority shareholder, the petitioner has been compelled to file this petition before this Court under Section 233 of the Companies Act.

No Vokatnama/Power or any affidavit has been filed on behalf of any of the foreign respondents.

Dr. Md. Mahboob Murshed, the learned Advocate for the petitioner, takes this Court through (i) the minutes of the 30th to 41st meetings of the Board of Directors (BoD) of the MSL held from April 2013 upto December 2018, (ii) two letters both dated 09.01.2019 sent by the Financial Controller of MSP to the independent auditor ACNABIN and (iii) the report prepared by the ACNABIN, and submits that MSL is entitled to get an amount of BDT 152,242,979 (£1,458,509) from the respondent nos. 2,3,4,5 & 6 and, accordingly, respondent nos. 4, 5 and 6 are personally liable along with respondent no. 2 to pay the amount to MSL. He places the provisions of Section 233 of the Companies Act and forcefully submits that since the majority shareholder, namely, MSP (respondent No. 2) has embezzled the funds of the respondent No. 1-company (MSL) through employing, and in collaboration with, respondent Nos. 4, 5 & 6 as its representatives, MSP does not have any right to replace any one in the places of the respondent Nos. 4

& 5 in the management of the MSL for holding the posts of Chairman and Director and, further, their shares must not be transferred till they refund the money they owed to MSL. He then prays to this Court to pass an Order declaring that the Administrators are legally bound to hold the assets of MSP in order to ensure the payment of the dues of BDT 152,242,979 (£1,458,509) and BDT 997,814 (£9,047) owed by MSP and MSLLC respectively to MSL.

None of the respondents, either in person or through engaging any lawyer, appeared before this Court to make any oral submission.

It should be recorded here that after preliminary hearing, when this matter was admitted on 26.08.2019, it was felt by this Court that for an effective and fair disposal of this matter, presence of the respondents is required before this Court to find out the veracity of the petitioner's claim as to the misuse of the ringfenced funds of MSL by the Chairman and Directors of the MSP (who also holds the same post in MSL) causing severe financial loss/damage to MSL as well as the petitioner and further nonpayment of the dues of MSL of Tk. 997,814 (equivalent to £9,047) as on 30th September 2018 by the MSLLC. Accordingly, this Court passed an Order directing the Office of this Court to serve notices upon all the

foreign respondents through DHL courier services, e-Mails as well as through registered posts, in addition to publication of notices in the two daily national news papers. It is evident from the materials submitted by the petitioner and the concerned administrative unit of this Court that this Court's aforesaid Order has been complied with in toto. Even after service of notices through the above four methods, when this Court found that the respondents are not appearing before this Court, this Court, for ends of justice, adopted another device to notify the respondents about the filing of this case by communicating and contacting the respondent No. 3 through diplomatic channel i.e. through Embassy of the People's Republic of Bangladesh, Abu Dhabi, UAE, in an expectation that since MSP is no more in existence, its joint venture (respondent No. 3) might be in operation. After exhausting all the aforesaid procedures/methods/paths as to serving notices upon the foreign respondents, the matter was posted in the Daily Cause List of this Court under the heading "For Hearing". Thereafter, from the last few months the matter was appearing in the Daily Cause List with the name, of the foreign respondents and everyday when the matter was being called up, none appeared before this Court to represent the respondents. Lastly, on 23.03.2020, when the matter was taken up for hearing, no one is found present in the Court-room on behalf

of the respondents. In the premises, Dr. Md. Mahboob Murshed, the learned Advocate appearing for the petitioner, candidly submitted that since the respondents were not coming forward to take any step in this matter, in spite of the fact that the item was appearing in the list for consecutive 7 (seven) months, there is no point in waiting for them and, hence, he prayed for allowing this application under Section 233 of the Companies Act on merit; not only on the ground of non-appearance of the respondents.

In view of the fact that though the matter has been appearing in the Daily Cause List under the column “For Order” from 14.10.2019 for last consecutive 7 (seven) months with the names of the foreign respondents and no one on behalf of these respondents bothered to appear before this Court despite serving notices upon them through every possible means, both manually and digitally, this Court is led to take a view that the respondents do not have any interest to pursue or contest this matter. Therefore, I am satisfied that this case deserves to be proceeded and disposed of ex-parte.

After hearing the learned Advocate for the petitioner, perusing the instant application together with its annexures and reading the statutory laws and case-laws, it appears to me that the following issues are required to be adjudicated upon by this Court; (1) whether the allegations made by the petitioner against the

majority shareholders-Directors (respondent Nos. 2 to 6) are substantiated by the materials on record; (2) if the petitioner's allegations as to the misappropriation of the respondent No. 1-company's funds against the majority shareholders-Directors are found to be true, whether the facts of the case attract the provisions of Section 233 of the Companies Act, 2(a) whether the majority shareholder-MSP or, on its behalf, the Administrators is/are competent to make fresh appointments in the posts of Chairman and Director of MSL pursuant to resignations of the respondent Nos. 4 & 5 and 2(b) whether the Administrators should be restrained from selling out the shares owned by MSP and the respondent No. 5 in MSL till they refund MSL's fund.

Let me take up the first issue, namely, whether the allegations made by the petitioner against the majority shareholders (respondent Nos. 2 to 6) are substantiated by the materials on record. Annexure-C series are the minutes of different BoD meeting of MSL. For an effective and fair adjudication of the aforesaid issue No. 1, the decision No. 30.4 taken by the BoD of

MSL in its 30th meeting held on 23rd April, 2013 appears to this Court to be very pertinent, which is produced verbatim below:

30.4. Opening of a foreign currency bank account for MSL in London:

Further to the above, it was decided that the MD-MSP shall take this up with Standard Chartered Bank in London and MSP Financial Controller shall get back to the Company Secretary of MSL with a list of documents needed to open the FCY account for MSL in London. This will allow a corporate credit card for MD-MSL.

From the minutes of the above-mentioned decision of the BoD of MSL, it is apparent that there is a clear board resolution as to opening of a Foreign Currency (FCY) account in London for MSL and the company's (MSL's) majority shareholders (who are also the majority shareholders of MSP) were shouldered with the duties of doing the needful for opening up the said FCY account. It is evident from the aforesaid minutes of BoD that the resolutions were taken unanimously under the chairmanship of Mr. Adrian Neville Osborne (respondent No. 6).

From the minutes of all the subsequent BoD meetings, i.e. 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th and 41st meetings of the BoD held on 23rd September 2013, 14th July 2014, 12th March 2015, 7th July 2015, 25th November 2015, 10th May 2016, 16th August 2016, 26th July 2017, 17th April 2018, 26th September 2018 and 20th December 2018 respectively, it appears to this Court that

there was always an agenda in all these BoD meetings and every time the said item was left ‘to be followed up in the next meeting’. Although all the above-mentioned 11 (eleven) BoD meetings are required to be reproduced here for the purpose of clarity of the business transactions of MSL, however, for the sake of brevity, the minutes of only the 31st, 35th and 41st BoD meetings, out of the above-mentioned 11 (eleven) BoD meetings, are extracted below:

31st BoD meeting:

31.1.b. Follow-up on the proceedings of the 30th board meeting:

All the matters arising from the resolution of the 30th board meeting were followed up on except the following:

Following the decision under clause 30.4 of 30th board meeting the FCY bank account for MSL in London is yet to open.

35th BoD meeting:

35.1.b. Follow-up on the proceedings of the 34th board meeting:

All the matters arising from the resolution of the 34th board meeting were followed up on except the following:

As per the decision under clauses 32.6, 33.1.b (1st para) and of the 32nd, 33rd and 34th board meeting respectively, a GBP bank account for MSL has been set up in London, UK. However, the online view of Corporate Banking for MSL is yet to be separated from the Group bank accounts so that MSL may have access to this account from Bangladesh.

41st BoD meeting:

41.1.b. Follow-up on the proceedings of the 40th board meeting:

All the matters arising from the resolution of the 40th board meeting were followed up on except the following:

Following the discussions under clauses 32.6, 33.1.b (2nd para), 34.1.b (1st para), 35.1.b (1st para), 36.1.b (1st para), 36.3, 37.1.b (1st para), 38.1.b (1st para), 39.1.b (1st para), and 40.1.b (1st para) of the 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, and 40th board meetings respectively, it was notified by the Director, MSP to the Board of MSL that the Lloyds Bank has taken control of all bank accounts of MSP, UK including the bank account opened and maintained in the name and style “MAXWELL STSMP LTD BANGLADESH” and while the Board of Directors of MSP, UK is discussing other options with the bank and the financial advisors, it may go into administration in near future. The Director, MSP will update more to the Board of MSL once he is back to office from holidays on 2nd January 2019.

While the 31st to 39th meetings of the BoD of MSL were presided over by the respondent No. 6 (Mr. Adrian Neville Osborne), the next two BoD meetings were held under the chairmanship of the respondent No. 5 (Mr. Jeremy Christopher West) and all the resolutions were taken in the above-mentioned 11 (eleven) BoD meetings unanimously. From the minutes of all these BoD meetings, it appears that while in few meetings (31st onward BoD meetings) an impression was given by the foreign shareholder of MSL (i.e. the representative of MSP) that the FCY account is about to be opened, however, in the subsequent BoD meetings, it was informed that a bank account in the name of MSL had been set up in London. Even in the last meeting (41st BoD meeting held on 20th December, 2018, which was presided over by Mr. Jeremy Christopher West), it was being discussed that ‘..... *the bank*

account opened and maintained in the name and style of Maxwell Stamp Ltd Bangladesh.....'.

It further appears that in the 41st meeting of the BoD, which is the last BoD meeting presided over by a representative of MSP – Mr. Jerney Christopher West, the following two resolutions, among other resolutions, were taken, which being relevant for adjudication of this case, are extracted below:

41.2. To authenticate the annual accounts of the company for the period from 1st October 2017 to 30th September 2018:

The annual accounts of MSL for the year ended 30th September 2018 was authenticated by the Board.

The pre-draft audit reports issued by the auditors on 19th December 2018 along with audited financial statements were reviewed by the Board. It was brought to the attention of the Board that the auditors shall issue the final audit report after obtaining the inter-company balance confirmation letter from MSP, among others. However, MSL is yet to receive the inter-company accounts details from MSP for onward submission to the auditors.

41.3. To decide the collection process of inter-company receivables from MSP:

The Company Secretary informed to the Board that as per the books of accounts of MSL as on 30th November 2018, the inter-company receivables from MSP is BDT 150,420,057 (equivalent to GBP 1.42 million approximately).

The above funds belonging to MSL were held by MSP to MSL's order in a completely separate and ringfenced named account "MAXWELL STAMP LTD BANGLADESH" for use by MSL. In the circumstances that MSP may go into administration, these funds should not form part of the administration and should be returned to MSL forthwith. In this regard, it was decided that the Director, MSP shall follow up with the bank and the financial advisors and

get back to the MD MSL once he is back to office from holidays on 2nd January 2019.

It appears from the above-quoted two resolutions of the 41st BoD meeting of MSL presided over by the representative of MSP (Mr. Jeremy Christopher West) that a fund of BDT 150,420,057 (GBP 1.42 million) belonging to MSL is being held by MSP in a ringfenced account “Maxwell Stamp Ltd Bangladesh” for use by MSL.

It further appears that when through annexure–E, which is the General Notice dated 30th January, 2019 circulated by the Administrators (respondent Nos. 7 & 8), it was notified to all the stakeholders of MSP (i.e. all creditors, members and employees) that MSP had been placed on administration since 24 January 2019, the Company Secretary of MSL informed the Administrators upon furnishing the inter-company accounts about holding BDT 152,124,979 (GBP 1,458,509) by MSP to MSL’s order in a separate and ringfenced bank account titled “Maxwell Stamp Ltd Bangladesh”, advising the Administrators that the said fund should not form part of the administration with a request to return the same forthwith.

Then, it appears from annexure-G series that the Administrators found out a bank account in London at Lloyds Bank in the name of “Maxwell Stamp Ltd Bangladesh” with a balance of

only GBP 127.33 as of January 2017 and without any change in amount since then to date and, pursuant thereto, the petitioner, upon providing requisite papers in substantiating his claim, requested the Administrators to conduct necessary investigations to trace out the funds and, eventually, when the Administrators informed the petitioner that the management of MSP, (i.e. Directors, Managing Director and the Chairman of MSP, who is also the Chairman of MSL) have confirmed that they have never held the aforesaid amount of fund in London for MSL, then, the petitioner sought explanations from the Chairman of MSP (who is also the Chairman of MSL-the respondent No. 4) vide annexure-1, which is an e-Mail communication to Martyn Kebbell (mkebbell@maxwellstamp.com) and Jeremy West (jeremy_west69@hotmail.com) on 07 may 2019 at 13:14, under a captioned subject ‘You and Jeremy’s current status in MSL Board’. In order for having a better understanding about the contents of the aforesaid e-Mail, the relevant parts of the same are reproduced below:

Dear Martyn,

.....

As you had the overall responsibility as the Chairman of MSP UK, so you are the right person to respond to the following questions I set out below. These questions will need to be addressed at any Board meeting, so we might as well deal with them now.

.....
.....

What is more pressing and important to MSL Bangladesh, are your responses to the questions below:

Questions

1. Whereabouts of the £1.45 million owing to MSL by MSP?
2. Why funds belonging to MSL were used to run and fund the UK operations, without agreement of the Board of MSL?
3. Why the money belonging to MSL was not placed in the “ring-fenced” account as agreed?
4. Why was there a failure by you in connection with keeping MSL informed about its funds?

I look forward to hearing from you.

.....
.....

Since the afore-quoted e-Mail is a self-explanatory one, it is easily understandable that the majority shareholders of MSL (i.e. respondent Nos. 2, 4, 5 & 6) are being blamed by the petitioner to have been in breach of trust in dealing with the affairs of the respondent No. 1-company (MSL). In response thereto, Mr. Kebbell (the Chairman of MSP as well as of MSL) has endeavoured to provide some sort of explanations to the queries raised by the petitioner by annexure-L, which is the e-Mail sent by Mr. Kebbell to the petitioner on June 13, 2019 at 7:22pm. The relevant portion of the aforesaid e-Mail is extracted below:

Dear Nuruddin

The responsibilities of a Company-Chairman does not extend to becoming involved in the day-to-day management of companies. Accordingly, I did not get involved in the day-to-day matters of PLC. As

Chairman, I was primarily concerned with strategy. As CEO of Abu Dhabi, I was more concerned with the day to day management of that office. The equivalent person who managed PLC on a day-to-day basis was the managing director with whom I know you had a close and ongoing professional relationship. He might be better placed to answer your questions.

I am sorry that I cannot be of any further help on this.

.....
.....

It is evident that MSP, as a juristic person, was owing and holding 59.9% shares in MSL and Mr. Kebbell, as the Chairman of MSP, was holding the post of Chairman in MSL; and Mr. Adrian Neville Osborne was initially holding 0.1% shares in MSL, which, later on, was being held by Mr. Jeremy Christopher West and they were accordingly occupying the post of Director in MSL successively. So, apparently, among the current majority shareholders of MSL, MSP is the juristic person, Mr. Jeremy (respondent No. 6) is the natural person and Mr. Kebbell (respondent No. 4) being the owner/holder of shares in MSP was holding the post of Chairman in MSL. Given that Mr. Adrian Neville Osborne (respondent No. 6) has sold out his shares of MSL on 26.09.2018 after taking place of the occurrence as to missing of MSL's funds, thus, he is not indemnified from the liability of reimbursement of MSL's missing funds, on the ground of his present nonattachment with the affairs of MSL. Accordingly, it was the

legal obligation of Mr. Kebbell, Mr. Jeremy and Mr. Osborne to appear before this Court either to concede to the petitioner's claim or to controvert the same. But, after receiving the summons from this Court, while Mr. Jeremy by his e-Mail communication made to this Court (rg@supremecourt.gov.bd) on November 06, 2019 simply informed that he has resigned from MSL on 13th June 2019, Mr. Kebbell and Mr. Osborne abstained from making any communication with the Court. When any person receives summons from a Court together with the contents of the suit/case, it is incumbent upon the said person either to accept the claim or to oppose it by appearing before the Court in-person/through lawyer or by submitting affidavits. But in this case, neither did the Chairman, Managing Director or Director of MSP (respondent Nos. 2, 4 & 5 respectively) communicate this Court nor did the Chairman and Director of MSL (respondent Nos. 4 & 5 respectively) come forward to fulfill their respective legal obligations.

Given the above-mentioned scenario of this case, while it is apparently a difficult job for this Court to arrive at a concrete conclusion as to which person/s (Chairman or Managing Director or any other Director of MSP) is/are responsible for amalgamation of MSL's money with the money of MSP, however, the contents of

the two letters, both, dated 09 January 2019 sent by the Financial Controller of the juristic majority shareholder (MSP) to the ACNABIN, an internationally reputed Chartered Accountant Firm, (annexures-J & J1) appear to this Court to be of some use and assistance for resolutions of the petitioner’s complaint. The relevant portions of annexures-J & J1 are reproduced below:

“I confirm that as at 30 September 2018, the amount owed by Maxwell Stamp PLC to Maxwell Stamp Limited Bangladesh was Tk. 144,569,285 (equivalent to £1,310,822). The £ equivalent is calculate using the OANDA exchange rate of BDT 110.289 to £1 as at 30 September 2018.

.....
.....”

“I confirm that as at 30 September 2018, the amount owed by Maxwell Stamp LLC to Maxwell Stamp Limited Bangladesh was Tk. 997,814 (equivalent to £9,047). The £ equivalent is calculate using the OANDA exchange rate of BDT 110.289 to £1 as at 30 September 2018.

.....
.....”

It is evident from these two letters that the amount owed by MSP to MSL is BDT 144,569,285 (GBP 1,310,822) and MSLLC (respondent No. 3-whose majority shares are held by MSP) remains indebted to MSL of an amount of BDT 997814 and since the above two letters have been sent on behalf of the juristic person-MSP (i.e. the majority shareholder of MSL) by its Financial Controller and, after receiving the summons by MSP and its Administrators who

are now at the helm of the affairs of MSP, they are not contesting this case, this Court is led to take a presumption that the contents of the afore-quoted two letters are true.

Also, the audit report prepared by the independent auditor ACNABIN in its 'Statement of Financial Position' states that there is an inter-company receivables of an amount of BDT 145,567.099 under the heading 'Current Assets' as of 30 September 2018. The Note to the above financial statements are extracted below:

Note: 6.00 Inter-Company Receivables

Maxwell Stamp PLC, London (Parent company)	144,569,285 997,814	152,510,987 975,184
Maxwell Stamp KSA	145,567,099	153,486,171

This represents inter-company receivables after off-setting the inter-company liabilities arose for meeting the operational expenditure of the company.

So, in absence of any materials against the above-mentioned financial statements, there is hardly any choice left for this Court other than to hold that MSL is entitled to get the above-mentioned amount of money from MSP. To be more sure, this Court, in course of hearing of the instant case, appointed another C/A Firm to conduct audit of the respondent No. 1-company (MSL) and, after carrying out the audit for the Financial Years 2013 to 2019, the Court-appointed auditor reported that MSP had the custody of MSL's money of BDT 144,569,285 and, in addition thereto, MSLLC has to pay BDT 997,814 to MSL; and, since MSLLC is

also owned by MSP, the total amount of BDT 145,567,099 is owed to MSL by MSP, as of 30 September 2018. And, as on 31 October 2019, the said amount stood BDT 153,041,952, as per the Court-appointed auditor's report.

In my view, which is the settled principle of all the common-law jurisdictions, when a Court, having put its best efforts by using all the possible manual and digital means of serving notices upon the defendants/respondents/opposite parties, proceeds with the hearing of a suit/case ex-parte, it may take the statements/averments made by the petitioner to be true, subject to arriving at the findings by the Court, by tallying the pleadings with the annexed/exhibited papers upon carrying out a scrupulous and judicious scrutiny thereto, that the pleadings are compatible and plausible.

Against the backdrop of the foreign respondents' unwillingness to contest this case, coupled with this Court's painstaking findings on the papers/documents submitted by the petitioner before this Court by way of swearing an oath before the Commissioner of Oath of this Court, this Court is led to arrive at a conclusion that MSP was holding BDT 145,567,099 as of 30 September 2018 for and on behalf of MSL, which, by 31 October, 2019, has become BDT 153,041,952.

With the above conclusion on the issue No. 1, I may now embark upon examination of the issue No. 2, namely, whether the petitioner's case falls under the purview of Section 233 of the Companies Act together with the issue No. 2(a), namely whether the majority shareholder-MSP is competent to make fresh appointments to the posts of Chairman and Director of MSL pursuant to resignations of the respondent Nos. 4 & 5. In order to effectively adjudicate upon this issue, it would be profitable, if this Court is acquainted with the provisions of Section 233 of the Companies Act, which are as follows:

Protection of Minority Interest

233. Power of Court to give direction for protecting interest of the minority:- (1) Subject to the fulfillment of the conditions of the required minimum as specified in Section 195 (a) and (b), any member or debenture holder of a company may either individually or jointly bring to the notice of the Court by application that-

(a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner prejudicial to one or more of its members or debenture holders or in disregard of his or their interest; or

(b) the company is acting or is likely to act in a manner which discriminates or is likely to discriminate the interest of any member or debenture holder;

(c) a resolution of the members, debenture holders or any class of them has been passed or is likely to be passed which discriminates or is likely to discriminate the interest of one or more of the members or likely to debenture holder;

and pray for such order, as in his or their opinion, would be necessary for safeguarding his or their

interest and also the interest of any other member or debenture holder.

(2) The Court shall, on receipt of an application under sub-section (1) send a copy thereof to the Board and fix a date for hearing the application.

(3) If after hearing the parties present on the date so fixed, the Court is of opinion that the interest of the applicant or applicants has been or is being or is likely to be prejudicially affected for reasons specified in the application, may make such order as prayed for or such other order as it deems fit including a direction-

(a) to cancel or modify any resolution or transaction;
or

(b) to regulate the conduct of the company's affairs in future in such manner as is specified therein.

(c) to amend any provision of the memorandum and articles of the company.

From a plain reading of the above provisions, it appears that for filing a Section-233 application there is a condition that a petitioner individually or jointly have to be the owner of 10% of the issued-shares and, side-by-side, the petitioner has to satisfy the Court that his grievance/s come within the ambit of any of the paragraphs (a) or (b) or (c) of sub-Section (1) of Section 233 of the Companies Act. Thereafter, the Court would be in a position to pass any appropriate Order for the purpose of just and smooth functioning of the company, so that by maintaining and upholding the interests of the minority group, in essence, the greater interest of the company is protected. The above law is supported by a score of case-laws of our jurisdiction, the latest of which is AKM Lutful Kabir Vs Neeshorgo Hotel 2019(3) 17 ALR 101.

In this case, the petitioner owns and holds 40% of the issued shares, which being more than the minimum threshold, the petitioner is well-competent to be a petitioner of a Section-233 application. Also, the allegations labelled against the Chairman and the Directors of MSL (Mr. Kebell, Mr. West and Mr. Osborne – respondent Nos. 4, 5 & 6 respectively) appeared to this Court to have squarely fallen under the purview of Para (a) to sub-Section (1) of Section 233 of the Companies Act and, accordingly, it is held that the instant application is a fit one under Section 233 of the Companies Act.

In view of the findings of this Court that the majority shareholder-MSP (respondent No. 2), respondent No. 4, who as the shareholder and Chairman of MSP was holding the post of Chairman of MSL and respondent Nos. 5 & 6, have defalcated the funds of the respondent No. 1-company (MSL) in collaboration with each other; in other words, since the juristic shareholder (MSP) and its directors, Managing Director and Chairman have embezzled the funds of the respondent No. 1-company (MSL), this Court is of the view that the interests of the respondent No. 1-company as well as that of the minority shareholder shall be best protected if no representative from the majority shareholders are allowed to be on the Board until they refund the defalcated money

into the account of MSL. Until the money is refunded into the account of MSL, the Chairman and Director/s may be appointed by the Order of this Court as per the need of the respondent No. 1-company (MSL). It transpires from the Order-sheets of this case that after resignations of the Chairman (Mr. Kebbell) and the Director (Mr. West) on 13.06.2019, when the petitioner became the lone Director of MSL, this Court, on the petitioner's prayer during pendency of this case, vide an interim Order dated 29.10.2019, temporarily appointed (1) Syeda Nusrat Ahmed, daughter of Mr. Syed Nuruddin Mahmud and Mrs. Sufia Mahmud of House No. 78, Road No. 12, Block-E, Banani, PS: Gulshan, Dhaka-1213 and (2) Mr. Afsan Hasan Khan, son of Mr. Ashrafuzzaman and Mrs. Selina Begum of House No. 43, B-6, Road No. 1, Block-A, Niketon Gulshan, Dhaka-1212 as the Directors of the respondent No. 1-company (MSL), so that MSL can carry on its day-to-day activities, subject to fulfillment of the legal requirements (i) as to taking written consent from the proposed Directors and (ii) purchasing qualifying shares within sixty days from the date of appointment, under Sections 93 and 97 of the Companies Act respectively.

Now, comes examination of the issue No. 2(b), namely, whether the Administrators should be restrained from selling out the shares owned by MSP and the respondent No. 5 in MSL till the

MSL's funds are refunded by MSP or by its other stakeholders, (including the Directors, Managing Directors and Chairman of MSP and Mr. West) or by the Administrators. From the e-Mail communications between the Administrators and MSL, it appears to this Court that after sending the relevant papers and documents by MSL from Dhaka in compliance with the Administrators' request, the Administrators were of the view that MSP was supposed to maintain a separate account in London towards execution of the decision taken by the BoD of MSL in its 30th meeting. Also, the Administrators hinted at the existence of a balance of 1.2 million at some point in time in the year 2017, but due to not holding the said money independently for and on behalf of MSL by the management i.e. Board of Directors of MSP, the same has been spent by the MSP. The Administrators, then, opined that since the Directors of MSP have not implemented the said decision, under the circumstance, they would not be able to compensate the petitioner and MSL. Then, by another e-Mail, the Administrators informed the petitioner that they are going to sell out the 60% shares owned by MSP in MSL, which has been resisted by the petitioner by an Order of Injunction passed by this Court on 14 October, 2019.

From the administrative file of this case, it appears that the Administrators have received this Court's notices sent through (i) diplomatic channel, (ii) by registered post, (iii) by DHL courier and (iv) via e-Mail. It is worthwhile to record here that the Administrators were communicating with the petitioner before filing this case through the following two e-Mail accounts; (i) rajmittal<rajmittal@frpadvisory.com and (ii) anthony Simmons<anthony Simmonds@frpadvisory.com, but when this Court's Register General vide his e-Mail (rg@supremecourt.gov.bd) asked them to enter their appearance in this case, first-time, on Thursday, August 29, 2019 at 02:56pm and, thereafter, second-time, on Tuesday, November 05, 2019 at 04:23pm, they did not bother to respond to the same. Had the Administrators been in contact with this Court, there would have been an occasion for this Court to direct them to, at least, have an explanation from the MSP's Financial Controller about the whereabouts of MSL's money; the specific question would have been for the Financial Controller of MSP - as to how or, on what basis, he had confirmed the independent auditor ACNABIN on 09.01.2019, just before few days of placing MSP on administration, that an amount of BDT 152,124,9779 (GBP 1,458,509) is owed to MSL by MSP. Therefore, the stance of the Administrators in

transacting/dealing with the interests of MSL does not appear to be transparent to this Court.

In the backdrop of the findings arrived at by this Court hereinbefore that at the time of placing MSP on administration, MSP owed BDT 145,567,099 to MSL, coupled with the findings on the conducts of the Administrators, this Court is of the opinion that until the Administrators refund the aforesaid money into the account of MSL or they amicably sort out the dispute with the respondent No. 1-company (MSL), the 60% shares owned by MSP and Mr. West shall not be bequeathed, gifted, sold or transferred in any other manner.

Based on the observations made and the findings arrived at by this Court hereinbefore, the following Declarations, Directions and Orders are now going to be passed by this Court:

- (1) It is declared that MSP (respondent No. 2), as the majority shareholders of MSL and the representatives of MSP, namely, Mr. Martyn James William Kebbell (the Chairman of both MSP and MSL-respondent No. 4), Mr. Jeremy Christopher West (Director of MSL-respondent No. 5) and Mr. Adrian Neville Osborne (former Director of MSL-respondent No. 6) have conducted the affairs of the

respondent No. 1-company (MSL) in a manner prejudicial to the interest of the petitioner as well as MSL.

(2) It is further declared that MSP, its shareholders/stakeholders and the Administrators shall not be eligible to make appointment to the post of Chairman and/or Director in the Board of Directors of MSL, until they refund BDT 145,567,099 as of 30 September, 2018. If MSP or its stakeholders (i.e. its Directors, Managing Director, Chairman) or the Administrators refund MSL's money, then, MSP shall be competent to be on the BoD of MSL.

(3) MSP, its shareholders and other stakeholders (including its Directors, Managing Director and Chairman), Mr. Jeremy Christopher West (respondent No. 5) and the Administrator of MSP are hereby restrained from transferring the 60% shares owned by them (jointly with MSP or severally) in MSL in any manner/form (i.e. by bequeathing, gifting, pledging, selling) without, at first, obtaining nod from the present BoD of MSL.

(4) (i) Syeda Nusrat Ahmed, daughter of Mr. Syed Nuruddin Mahmud and Mrs. Sufia Mahmud of House No. 78, Road No. 12, Block-E, Banani, PS: Gulshan, Dhaka-1213 and (ii) Mr. Afsan Hasan Khan, son of Mr. Ashrafuzzaman and Mrs.

Selina Begum of House No. 43, B-6, Road No. 1, Block-A, Niketon, Gulshan, Dhaka-1212, who were temporarily appointed as the Directors of MSL by this Court's Order dated 29.10.2019 shall be competent to continue to perform their respective duties as per the provisions of MoA & AoA of MSL, subject to the conditions that they have complied with the provisions of Sections 93 and 97 of the Companies Act from the date of their appointment as Directors of MSL.

- (5) The current Board of Directors of MSL is directed to resolve the issue as to refunding of MSL's fund with the Administrators with reference to this Judgment and Order amicably through adjustment of the sale-price of the 60% shares of MSL.
- (6) If the Administrators consent to adjust the value of MSP's 60% shares with the MSL's money (i.e. the money owed by MSP to MSL), in that scenario, if the amount of money of the sale of the 60% MSP's shares exceeds the amount due to MSP by the MSL, then, the surplus must be returned to the Administrators of MSP.
- (7) If the Administrators' job is ended up finally through dissolution of MSP, without sorting out the MSL's claim, in

that event, the Board of Directors of MSL shall be competent to deal with the shares as per the provisions of the Companies Act.

In the result, the instant application under Section 233 of the Companies Act is allowed with the above Declarations, Directions and Orders.

The petitioner is directed to inform the RJSC about this Judgment and Order by supplying the RJSC a copy of it, within 15 days from the date of drawing up of this Order.

The Register of the High Court Division is directed to take necessary steps to communicate a copy of this Judgment and Order to the respondent nos. 2-8 through the e-mail addresses given in the cause title of this application as well as through DHL courier service and diplomatic channel at the costs of the petitioner.

This Order will be effective subject to compliance with the direction given hereinbelow. As part of MSL's obligation towards fulfillment of its Corporate Social Responsibility (CSR), MSL shall donate Tk 10,00000/- (ten lacs) in two installments. (Tk. 5,00,000/- (five lac) in each installment). Accordingly, the petitioner shall pay Tk. 5,00,000/- (five lac) now from the funds of MSL and the next installment shall be paid by MSL on or before 17th November, 2020. The payment should be made through Pay Order to Kendrio

Eidgah Math Jame Masjid, Village-Paschim Chalua, P.O-Udakahli, Upazila-Fulchhari, District-Gaibandha. Bank Account No. 0100149433478 Janata Bank, Kalirbazar Branch (Code No. 0959), Fulchhari, Gaibandha (Contact number of Branch-01718-618879, 0542256109) e-Mail- jb0959@janatabank-bd.com.

On furnishing receipt of the above payment of Tk. 5,00,000/- (five lac), the Order shall be drawn up and operational.