IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Abu Zafor Siddique

Mr. Justice Md. Shahinur Islam

CIVIL APPEAL NO.149 OF 2023

(From the judgment and order dated 02.03.2023 passed by the Company Bench of the High Court Division in Company Matter No.483 of 2022)

Tabassum Kaiser	:	....Appellant
	=Versus=	
Partex Cables Limited, represented by its Managing Director and others	:	...Respondents
For the Appellant	:	Mr. Probir Neogi, Senior Advocate with Ms. Nihad Kabir, Senior Advocate with Mr. Md. Asaduzzaman, Senior Advocate with Mr. Md. Anisul Haque and Mr. Subrata Chowdhury, Advocates, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record
For Respondent Nos.1-2	:	Mr. A. M. Aminuddin, Senior Advocate with Mr. Tanjib-ul Alam, Senior Advocate and Mr. Md. Mostafizur Rahman Khan, Advocate, instructed by Mr. Md. Helal Amin, Advocate-on-Record
For Respondent Nos.3,4,7,8&10	:	Mr. A. M. Aminuddin, Senior Advocate with Mr. Tangib-ul Alam, Senior Advocate and Mr. Md. Mostafizur Rahman Khan, Advocate, instructed by Mrs. Madhumalati Chowdhury Barua, Advocate-on-Record
Respondent NOs.5,6,9 &11-13	:	Not represented
Date of hearing	:	The 2nd & 3rd day of July, 2024
Date of judgment	:	**The 31st day of July, 2023**

JUDGMENT

M. Enayetur Rahim, J: The civil appeal, by leave, is directed against the judgment and order dated 02.03.2023 passed by the Company Bench of the High Court Division dismissing Company Matter No.483 of 2022.

The case of the appellant is that respondent No.01-company was incorporated on 18.09.2013 as a private limited company under the Companies Act, 1994 [hereinafter referred to as the Act 1994], having registration No.C-111384 and involved in the business as manufacturer of building wiring cables and power cables in Bangladesh with initial authorized share capital of taka 10,00,00,000/- (ten crore), divided into 10,00,000 (ten lac) ordinary shares of taka 100 each wherein initial promoters were Aziz Al Kaiser, respondent No.2 held 25,500 shares and Aziz Al Mahmood [ex-shareholder and ex-director of respondent No.01-Company] held 4,500 shares. Said Aziz Al Mahmood transferred his entire shares being 4,500 shares of the company to respondent No.02 and the present appellant, and resigned from his post as Director of respondent No.01-Company on 25.12.2017. After the said transfer of shares by said Aziz Al Mahmood, respondent No.02 held 27,000 shares and the present appellant held 3,000 shares of respondent No.01-Company. Pursuant to the said transfer of shares by said Aziz Al Mahmood, the appellant became a Director of respondent No.01-Company and the ratio of shareholding structure of respondent No.01-Company was 90:10, i.e. respondent No.02 held 90% of the shares and the present appellant held 10% shares. The present appellant recently came to know that respondent No.01, in connivance with respondent No.02, allegedly allotted a total number of 8,97,00,000 shares on 30.03.2022, 28.04.2022, 23.05.2022 and 23.06.2022 in favour of others, including various sister concern companies of respondent No.01-Company named Aziz Al Kaiser (respondent No.02) held 1,89,00,000 (Bonus shares). Tabassum Kaiser (appellant) held 21,00,000 (Bonus shares). Star Particle Board Mills Limited held 1,95,25,000 (ordinary shares). Partex Furniture Industries Limited held 32,45,000 (ordinary shares). Softavion Limited held 18,00,000 (ordinary shares), Lava Electrodes Industries Limited held 70,00,000 (ordinary shares).

Partex Laminates Limited held 2,15,20,000 (ordinary shares). Star Gypsum Board Mills Ltd held 39,00,000 (ordinary shares). CBC Capital & Equity Management Limited held 90,00,000 (ordinary shares). Triple Apparels Limited held 25,10,000 (ordinary shares). Oishee Agrotech Limited held 200,000 (ordinary shares) totalling 8,97,00,000. The appellant was absolutely in the dark about when and how the aforementioned allotments were made by respondent No.01-Company as the appellant never attended any Board of Directors Meeting or shareholders meeting of the company where the aforementioned allotment issues were discusse. The appellant recently came to know that respondent No.02 is planning to oust the appellant from the Board of Directors of respondent No.01-Company and is secretly taking steps in this regard. The appellant carried out a search within the records of the RJSC and came to know that respondent Nos.01 and 02 along with other respondents, in connivance with each other, have filed as many as 4 sets of Form-XV Return of Allotment dated 30.03.2022, 28.04.2022, 23.05.2022 and 23.06.2022 allotting a total 8,97,00,000 shares of the company to respondent Nos.02-11 and the appellant. As a result of the said illegal allotment, the shareholding percentage of the appellant within respondent No.01 has been diluted to 2.34% from 10%, which effectively means that her shares within the company has been illegally brought under the statutory threshold of 10% shares, which is required to take certain actions as a minority shareholder. The appellant further came to know that respondent No.02, in connivance with respondent Nos.03, 04, 07, 08 and 10, purportedly held an illegal Extra-ordinary General Meeting (EGM) of respondent No.01-Company on 01.06.2022 wherein they took decision to convert respondent No.01-Company into a public limited company and also amended the articles of association of the company. On perusal of the said minutes of the EGM dated 01.06.2022 from the office of respondent

No.13 and it transpires that the appellant has been shown as an attendee in the said meeting and in the Signature Box beside her name '-Sd-' has been shown but she never attended the said EGM dated 01.06.2022 and signed the minutes. The appellant is apprehending that her signature has been forged by respondent No.02 in connivance with the other respondents. In the said purported AGM, the authorized share capital of the company has been increased to taka 20,00,000,000/- (Taka two hundred crore) divided into 20,00,00,000 (twenty crore) ordinary shares of taka 10 each. Thereafter, the appellant attended a meeting dated 08.08.2022 with respondent No.02 at the office of respondent No.01 and in that meeting, the appellant vehemently raised objection to the alleged allotment of shares in favour of respondent Nos.02-11 and also requested respondent No.02 to immediately dissolve the illegally constituted board with the so-called newly appointed Directors and also requested the company secretary of respondent No.01 to note down the objections and dissents in the minutes of the meeting. Thereafter, the appellant sent an email dated 14.08.2022 to the company Secretary of respondent No.01 and respondent No.02 mentioning her complaints and dissents whereupon the appellant received an email dated 03.11.2022 from the company Secretary with draft minutes of the meeting dated 08.08.2022. The appellant was completely taken aback upon checking the contents of the draft minutes of the meeting dated 08.08.2022 as none of her objections and dissents were recorded therein. The purported increase of shares and allotment of the same beyond the participation and knowledge of the appellant which is in violation of 155 of the Act, 1994, and as such, the share register is required to be rectified.

Respondent No.01 by filing affidavit-in-opposition stated that at the time of incorporation of respondent No.01-company,

the authorized share capital was taka 10,00,00,000 (ten crore), divided into 10,00,000 (ten lac) ordinary shares of taka 100 each. The promoters of respondent No.01-company named Aziz Al Kaiser, respondent No.02 and Aziz Al Mahmood (brother of respondent No.02) held 25,000 and 4,500 shares respectively in the company. In December, 2017, Aziz Al Mahmood executed Form-117 and affidavit to transfer his entire shareholding to his brother, respondent No.02, Aziz Al Kaiser. Among those 4,500 shares, 3,000 ordinary shares were gifted to the appellant by respondent No.02 without any consideration, pursuant to which, the appellant became the owner of 10% of the total shareholding in respondent No.1-company. The appellant and respondent No.02 are husband and wife having married in 1993 and have three sons of whom two are adults and present Directors of the Board of respondent No.01-Company, representing respondent Nos.03 and 04 companies. Respondent Nos.03, 04, 07, 08 and 10 are sister concerns of respondent No.01-Company belonging to the renowned Partex Star Group of Companies, which represents the legacy of late M. A. Hashem. The companies of this group, including respondent Nos.03, 04, 07, 08 and 10, have common shareholders who are family members, including the appellant and respondent Nos.02. In fact, the shares were transferred to the appellant for holding the same on trust for the benefit of respondent No.02, and eventually for the children of the appellant and respondent No.02. In order to establish and run respondent No.01-Company profitably and to meet the insufficiency of capital, both the shareholders of respondent No.01-Company mutually decided to obtain intercompany loans from other companies of the Partex Star Group based on the understanding that eventually these loans would be converted into equity. As on 30.06.2021, the total outstanding intercompany loan of respondent No.01-Company was taka 45,96,50,000/-. With the loans obtained as aforesaid, respondent No.01-Company established

its factory in Madanpur, Bandar, Narayanganj upon purchase of around 5 acres of land which currently have approximately 700 employees. As such, considering the current state of affairs of respondent No.01, the company owes its existence to the intercompany loans of the group companies. In the course of business, in order to expand respondent No.01-company's business and pursue its objectives in a more efficient and productive manner, both the shareholders mutually decided to raise capital through an Initial Public Offering (IPO) of shares in the stock market upon converting respondent No.01-Company into a public company limited by shares. One of the preconditions for obtaining approval from the Bangladesh Securities and Exchange Commission (SEC) for listing is that the company seeking to make an IPO must be a public company limited by shares which requires minimum 7 shareholders in view of the provisions of section 5 read with section 2(1) (r) of the Companies Act, 1994. Hence, the existing shareholders decided to convert the intercompany loans into equity as per their initial understanding at the time of obtaining these loans. Accordingly, following all formalities, the abovementioned intercompany loans were converted into equity by issuing, 50,70,000 ordinary shares to the creditor companies which are linked to the Partex Star Group with full consent of the appellant.

In addition to the above, a further 18,000,000 ordinary shares were decided to be issued to four other companies that are not linked to the said group as placement. Due to such issuance and allocation of shares to the creditor companies, the shareholding percentage of both the appellant and respondent No.02 have diluted in a proportionate manner. Being a Director of respondent No.01-company, the appellant attended a board meeting held on 08.08.2022 where the company passed, among others, a

resolution for raising fund through initial public offering under fixed price method. In the said board meeting, the other Directors from the shareholder-companies as well as the Independent Director were present. In fact, Amman Al Aziz, nominee Director of a shareholder company was appointed the new Chairman for respondent No.01-Company in the said board meeting. The appellant did not raise any concerns or reservation on the shares issued to these creditor companies or their presence in the board meeting or the appointment of the Chairman from the other shareholder company in the said board meeting, which clearly shows that the appellant was well aware of the fact that the company has issued shares to these companies with her full consent and that the company has been converted into a public limited company and for which IPO process is going on for raising fund through capital injection but the appellant completely suppressed these material facts in the petition. After the decision in the board meeting dated 08.08.2022 for raising capital of the IPO, a set of standard documents, e.g. declarations and other forms were sent to the appellant for signing onward submission and to take other necessary steps for raising capital through IPO and also an email was sent by the company Secretary by reference to the board meeting decision dated 08.08.2022 requesting her to sign the documents within 26.10.2022 for onward submission of the draft prospectus to the SEC but the appellant did not sign the documents for which respondent No.01-company could not file the draft prospectus to the BSEC resulting in delay in the raising capital through IPO. This development had been notified to her by the company Secretary by an email dated 30.10.2022. Due to such negligence and *mala fide* action of the appellant, respondent No.1-Company suffered loss. Accordingly, respondent No.01 Company by a letter dated 08.11.2022 demanded compensation for the losses caused to

the company due to the appellant's actions but instead of taking responsibility of her actions, the appellant sent a letter dated 15.11.2022 denying her responsibilities and rather blamed the management and the officials of the company for no plausible reasons. Nowhere in the said letter, she denied attending the meeting on 08.08.2022 or dilution of her shareholding or presence of the other Directors nominated by other shareholders or appointment of the Chairman from a shareholder company or the company's decision to raise capital through IPO. As such, it is well established that the appellant was well aware of the fact that the company has issued shares to other shareholders and new Directors have been appointed and that the company has been converted into a public limited company. Respondent No.01-Company for the purpose of IPO made an application date 08.08.2022 to the SEC praying for an exemption from complying with rule 3(2)(p) of the Bangladesh Securities and Exchange Commission (Public Issue) Rules, 2015 and upon assessment of the application, audit report of respondent No.01-company as well as other relevant documents, the SEC granted respondent No.01-company exemption. The appellant and respondent No.02 married each other on 26.08.1993. Respondent No.02 transferred his shares to the appellant as a token of love to his wife without any consideration of whatever nature based on the understanding that those shares would be held on trust for their children. The appellant was merely enjoying the social status deriving from being a shareholder and Director in Partex Group Companies as wife of respondent No.02. However, after 27 years of happy marital life, for the last 2-3 years, the appellant involved herself into an extra-marital affair with a foreigner. Upon discovery with sufficient proof, respondent No.02 along with their sons confronted the appellant, which was the first breakdown point in their relationship. While respondent No.02 was putting efforts for reconciliation for the sake of

their children, the appellant suddenly started to claim for 50% of the total assets of respondent No.02. As part of the disgraceful and reprehensible plan, the appellant has filed as many as 4(four) criminal cases against respondent No.02 based on unfathomable allegations only to damage the social status of respondent No.02 and the Partex Star Group resulting in mounting pressure on respondent No.02 to make more gifts to her estranged wife, i.e. the appellant and as such, the instant application is liable to be dismissed.

Respondent Nos.03, 04, 07, 08 and 10 in their affidavit-in-opposition stated that following the disputed allotments, the new shareholders of respondent No.01-Company appointed new Directors on the Board. The appellant as Director participated in a Board Meeting on 08.08.2022, in which the Board took decision to raise capital through an Initial Public Offering (IPO) upon application for approval to Bangladesh Securities and Exchange Commission (BSEC). The appellant never objected to this decision. Though in an affidavit-in-reply, she has referred to an email of 14.08.2022 objecting to certain of the proceedings of the meeting of 08.08.2022, she did not object crucially to the decision to raise capital through the IPO which means that she had no objection to respondent No.01-Company being converted to a public Company through allotment of shares to additional shareholders, and accordingly, is now barred by the doctrine of waiver, acquiescence and estoppel from objecting to the allotment of the shares. Subsequently, the appellant refused to sign formal documents required for making the application to BSEC for approval. When the Chairman of the company took issue then the appellant by a letter dated 15.11.2022 complained about the delay in providing her with the documents, but she did not object to the decision to raise capital through the IPO and as such, she is

barred by the doctrine of waiver, acquiescence and estoppel from objecting to the allotment of the shares. The shares have been allotted to respondent Nos.03, 04, 07, 08 and 10 through conversion of loans provided by these companies to respondent No.01. These loans are documented and borne by the accounts of the said companies and banking transactions. Hence, there is no dispute about the fact that respondent No.01 has in fact received consideration for the shares. The appellant is a shareholder and Director in all of these companies and there is no record of her having objected with any of these companies about them having subscribed to these shares. In the event, the petition is allowed, and rectification as prayed for is effected respondent No.01-Company would revert to a shareholding structure where respondent No.02 would have 90% of the shares while the appellant 10% and the appellant will never be in a position to object to the raising of capital through issue of shares. All that she will achieve, is effecting a pre-emptive right to take up any or all of these shares. Yet, in the instant application, she is not offering to take up any or all of the shares allotted to the new shareholders. It is stated that where an applicant seeks rectification of the share register against an allotment of shares made for good consideration at the instance of the majority shareholders of a company upon a plea that the applicant's pre-emptive rights have not been accorded due respect, it is incumbent upon such applicant to offer to take up any or all of those shares upon paying off the shareholders whose shares are being affected by the rectification which has not been done.

The High Court Division having heard the parties and on perusal of the materials on record dismissed Company Matter No.483 of 2022 by the judgment and order dated 02.03.2023.

Being aggrieved by and dissatisfied with the aforesaid judgment and order dated 02.03.2023, the petitioner of the company matter filed the Civil Petition for Leave to Appeal No. 1404 of 2023 before this Division. Accordingly, leave was granted on 20.08.2023. Hence, the appeal.

Mr. Probir Neogi, learned Senior Advocate, Ms. Nihad Kabir, learned Senior Advocate and Mr. Md. Asaduzzaman, learned Senior Advocate have appeared for the appellant.

Their submissions are as follows:

i) The High Court Division has committed illegality by passing the impugned judgment and order without at all taking into consideration the strict requirements of section 155 of the Act, 1994, inasmuch as the alleged allotment of shares by the respondents without complying with the requirements of section 155 of the Act, 1994 is absolutely unlawful, thus rendering the purported issuance and allotment of the shares in question *ipso facto* illegal and void *ab initio;*

ii) the High Court Division most erroneously dismissed the company matter on the basis of some alleged activities of the appellant, such as, attendance at a meeting dated 08.08.2022 and subsequent letter dated 15.11.2022 to respondent No.1, without even taking into consideration that mere attendance in the so-called Directors' Meeting dated 08.08.2022 of respondent No.1 and the subsequent letter dated 15.11.2022 by the appellant, both after the fact of the illegality having been committed by the respondents, cannot tantamount to waiver/acquiescence of her statutory right to get notice of board meeting and participate in the decision of "existing directors" to be made for the issuance of further shares under

section 155 of the Act, 1994, and cannot mitigate in any way the failure to comply with the law in section 155 of the Companies Act, 1994;

iii) the High Court Division has committed illegality in passing the impugned judgment and order overlooking the ratios settled by this Division in the case of ***Jamuna Television Ltd. and another-Vs-Government of Bangladesh and others (reported in 65 DLR (AD) 253)*** to the effect, amongst others, that- (i) there is no estoppel against statute or there is no application of estoppel to prevent the performance of any constitutional or statutory duty (Para 28); (ii) the doctrine of promissory estoppel cannot be invoked against public interest or any stature. The public interest prevails over promissory estoppel (Para 29); and (iii) the doctrine of promissory estoppel cannot be invoked to carry out a representation which is contrary to law or in the abstract (Para 32), and therefore the impugned judgment and order seriously suffers from illegality and infirmity;

iv) the High Court Division has committed illegality in not appreciating that new allotments were done illegally and with ill-motive to harm and prejudice the interests of the Appellant, who is a minority shareholder in the Respondent No. 1 Company and this is a classic case of severe oppression of a minority shareholder of the Company and an unlawful act by the Respondent No. 1 Company and Respondent No. 2 to illegally bring the Company absolutely under their control and the Appellant fears that this is an attempt to ultimately remove the Appellant from the Respondent

No.1 Company and deprive her of her rights as a shareholder and director of the said Company. The appellant was never notified of the directors'/ shareholders' meetings where the resolutions for the purported issue/allotment of further shares were passed, never attended those so-called purported meetings, which could not be held with a quorum in her absence in any way as she was one of only two directors/shareholders of the Respondent No.1 Company at all material times, and as such, these meetings have not been held in compliance with the articles of association of the company but without taking into consideration any of the factors mentioned above, the High Court Division has passed the impugned judgment;

v) the High Court Division has failed to appreciate that the purported allotment of shares in Respondent No, 1 Company in the name of respondents No. 3 to 11 are *ex-facie* in violation of the provisions set forth in the Articles of Association of the respondent No. 1 Company, which is the constituent document of a company, and binding on the Company and its Directors;

vi) the purported allotment of shares, pursuant to which the shareholding status of the appellant was diluted from 10% to 2.34%, were done illegally and with ill-motive to discriminate against and prejudice the interests of the appellant, who is a minority shareholder in respondent No.1-Company and is an attempt by respondent No.1-Company and respondent No.2 to bring the Company absolutely under their control and to ultimately remove the appellant from the Company and by passing the impugned judgment and order of the High

Court Division has rubberstamped the illegal activities of the respondents and as such, the impugned judgment and order is bad in law and is liable to be set aside.

Per contra Mr. A.M. Amin Uddin, learned Senior Advocate,Mr. Tanjibul Alam, learned Senior Advocate, Mr. Md. Mostafizur Rahman Khan, learned Senior Advocate have appeared for Respondent Nos. 1-4, 7-8 and 10.

The main contention of the learned Advocates for the respondents are as follows:

i) It is an established principle of law that the Court can, in an appropriate case, decline to exercise its discretionary power under Section 43 of the Companies Act, 1994 if it finds that the applicant has disentitled herself of the relief due to suppression of material facts, acquiescence, waiver, delay or laches etc. As such, the relief under section 43 of the Companies Act, 1994 is not *ex debito justitiae* and equitable in nature. Hence, even if for the sake of argument, a technicality with respect to the compliance of section 155(1) of the Companies Act, 1994 is established, considerations such as waiver, acquiescence, estoppel etc. would be relevant while granting or refusing the same as has been rightly identified by the High Court in the present case.

In this connection the case of *Mukundlal Manchanda* v *Prakash Roadlines Limited (ILR 1994 Karnataka 1990; Bellesby* v *Rowland and Marwood's Steamship Co. Ltd.* 2 Ch. 265; *Muniyamma* v *Arathi Line Enterprise PV Limited* has been referred.

ii) upon participating in the board meeting dated 08.08.2022 along with other directors from the newly

subscribed shareholder companies and by consenting to go in the IPO event, the appellant had, in effect, acted upon the impugned subscriptions in question. All the facts of the case, as has been taken into consideration in detail in the impugned judgment, not only show acquiescence on the bringing about the situation which she sought to have altered by means of proceeding under section 43 of the Companies Act, 1994. As such, the High Court Division has rightly declined to exercise its powers under the said provision of law as the appellant before it had already disentitled herself of the said relief;

iii) there is no estoppel against statute or there is no application of estoppel to prevent the performance of a constitutional or statutory duty as settled by this Division in the case reported in 65 DLR (AD) 253 and as such there is no scope to rely on this ratio by taking it out of context to assert that such would be applicable in the present case. In any event, the doctrine of waiver, acquiescence and estoppel in the present case does not operate against the application of Section 155(1) of the Companies Act, 1994, rather prevents the appellant from insisting upon her rights granted by the said provision of law;

iv) the contentions of the appellant that her shares were diluted from 10% to 2.34% with an ill-motive to discriminate against and prejudice her interests are completely baseless and misconceived, in fact, the Appellant was well aware that the respondent No. 1 company had taken loans from other companies of the Partex Star Group for its survival and that such

loans would converted into equity eventually; thus the dilution complained of is the direct result of the conversion of the said loans into equity;

v) the appellant is asserting her preemptive rights under section 155(1) of the Companies Act, 1994, till date, she has never offered to take up of the shares allotted to the proportion of her shareholding; which makes it clear that this appeal has been filed with the sole motive to halt the progress of the respondent No. 1 company in raising capital through IPO, for collateral purpose of holding the respondent No. 1;

vi)the appellant concealed material facts relating to her participation in the meeting dated 08.08.2022 along with other shareholders whose subscription she is challenging, her acting upon the impugned subscription in question, her consent for the respondent No. 1 company to go to IPO knowing fully well that the disputed subscriptions actually took place to facilitate the company going into IPO, the respondent No. 1 company's claim for compensation for her failure to sign documents and her response to the company's claims by shifting the burden on the management of the company without denying her prior given consent for IPO or raising any objection to the allotted shares at any point in time prior to filing the application; hence, the appellant is not entitled to get any relief from this Court, as the relief under section 43 of the Companies Act, 1994 is equitable in nature;

vii) the appellant had the right to participate in the disputed issuance of shares only to the proportion

of her shareholding, i.e., 10% by paying consideration at face value, and that although the appellant is asserting her preemptive right to be offered the allotted shares she has till date, never offered to take up any of the shares, and the present Appeal is her attempt to belie the respondent No.l's attempt to raise its capital, for collateral purposes and existence of such collateral purposes has been established to the satisfaction of the High Court Division and no evidence has been adduced by the appellant in the instant proceeding to rebut such conclusion;

viii) it is not disputed that immediately prior to the first disputed allotments, the appellant held only 10% of the issued shares of the respondent No. 1 Company, with the respondent No. 2, as the only other shareholder, leaving 90% of the shares, the legal significance of which is two-fold, being first, the appellant, as a minority, was lever in a position to resist a decision for further allotment of shares, or resist conversion of the company to a public company, which acts, in themselves, are not unlawful, and secondly, all that would have been attained had the required formalities been adhered to, which she does not admit, is that she would have a pre-emptive right to take up 10% of the allotted shares upon payment of subscription.

We have considered the submissions of the learned Advocates appearing for the parties concerned, perused the impugned judgment and order of the High Court Division and other materials as placed before us on record.

In the instant appeal, the appellant has tried to assail the impugned judgment mainly on the ground that:

(i) the appellant was not aware of the allotment of shares to the respondent Nos. 3-11;

(ii) the respondent No. 2 is planning to oust the appellant from the management of the respondent No 1 company and is secretly taking steps in this regard;

(iii) the appellant was not provided with the minutes of the meetings of the respondent No. 1 company;

(iv) the shares allotted to the respondent Nos.3-11 were not first offered to the appellant in violation of the section 155 of the Companies Act, 1994;

(v) the appellant was never aware of any of the meetings for issuance of further shares or increase of shares or allotment of shares to the respondent Nos. 3-11. Based on the above arguments and allegations, the petitioner asserts that the names of the respondent Nos. 3-11 have been entered into the register of members of the respondent No.1 Company illegally and in violations of the provisions of the Companies Act, 1994, as such, according to the appellant, the register of members of the respondent No. 1 Company is required to be rectified upon deleting/omitting their names from the register of members.

Upon perusal of the impugned judgment and order, it transpires that the High Court Division addressed and decided all the above issues having considered materials on record as well the relevant law and principle law enunciated in different cases.

The High Court Division having considered the provision of section 155 of the Companies Act, 1994 coupled with the facts and circumstances of the present case has held that:-

> "But in the instant case it is already found that transfer of shares has been affected within knowledge

of the petitioner and with her concurrence and hence, 155 (2) of the Companies Act, 1994 will be applicable and above quoted decisions (34 BLD, 91, in the case of Md. Shirajul Haque vs Apollo Ispat complex Limited) has no relevance here."

It is fairly established that the relief under section 43 of the Companies Act, 1994 is not *ex debito justitiae*, rather the said relief is equitable in character and as the petitioner did not disclose all the materials facts, she is not entitled to get relief in the instant matter."

We have no hesitation to hold that the above findings of the High Court Division are based on sound principle of law. Section 155 of the Companies Act, 1994 runs as follows:

> *"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 authorised 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 shard 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."*

If we read meticulously, the above provision of law then it will be clear that in view of the provision of subsection (2),

the provision of subsection (1) of section 155 of the Companies Act cannot be said *Sine Qua Non*.

It is an established principle of law that the Court can, in an appropriate case, decline to exercise its discretionary power under Section 43 of the Companies Act, 1994 if it finds that the appellant before it has disentitled herself of the relief for any reason like suppression of material facts, acquiescence, waiver, delay or laches etc. The section in the Indian Companies Act corresponding to section 43 of the Companies Act, 1994 is section 155. In the case *Mukundlal Manchanda v Prakash Roadlines Limited* (ILR 1994 Karnataka 1990), the High Court of Karnataka, India on a very identical scenario held in paragraph 16, *"A plain reading of the provisions reproduced above shows that the same vests the Court with the power to direct rectification, the exercise of which power is discretionary with the Court as is apparent from the word 'may' used in this Section. The Court can in an appropriate case decline to exercise its powers under Section 155 if it finds that the petitioner before it has disentitled himself of the said relief for any reason like suppression of material facts, acquiescence, delay and laches etc. Relief envisaged by Section 155 is equitable in nature, and all such considerations as are relevant to the grant or refusal of any such relief would be attracted to proceedings under the said provision."*

In the case *Bellesby v Rowland and Marwood's Steamship Co. Ltd.* 2 Ch. 265 (quoted in paragraph No. 18 of the *Mukundlal Manchanda* judgment referred above), it was held, *"In considering an application for rectification the Court has always had regard to the lapse of time and to any facts and circumstances indicating acquiescence in the existing state of things by those on whose behalf the application is made to disturb it."*. In another case *Muniyamma v Arathi Line Enterprise PV Limited* (quoted in paragraph No. 19 of the *Mukundlal Manchanda* judgment referred above), it was held, *"...Whether in a particular case relief should be granted or not, because the jurisdiction is discretionary as the word used is 'may' in Section 155 of the Act would depend upon the facts and circumstances of the case but the exercise of jurisdiction cannot be refused on the ground that it involves complicated questions of law and facts Of course, the propriety of the petitioners and their conduct having a bearing on the*

subject matter of the petition would be relevant to the decision as to whether the discretion should or should not be exercised" (underlines added).

As such, from perusal of the above case laws, it is clear that the relief under section 43 of the Companies Act, 1994 is not *ex debito justitiae* and that relief under section 43 is equitable in character, and that considerations such as waiver, acquiescence, estoppel etc. would be relevant while granting or refusing the same. By participating in the board meeting dated 08.08.2022 along with other directors from the newly subscribed shareholder companies and by consenting to go in the IPO event, the appellant has, in effect, acted upon the impugned subscriptions in question. All the above background facts not only show acquiescence on the part of the appellant, but also her active participation in bringing about the situation which now she seeks to have altered by means of this proceeding under section 43 of the Companies Act, 1994. As such, the appellant is now barred by the principle of estoppel from seeking relief from this Court.

Moreover, the relief under section 43 is of equitable nature and it is an established principle of law that *"he who comes to equity, must come in clean hands"*. In the instant case, the appellant concealed material facts relating to her participation in the meeting dated 08.08.2022 along with other shareholders whose subscription she is challenging, her acting upon the impugned subscription in question, her consent for the respondent No. 1 company to go to IPO knowing fully well that the disputed subscriptions actually took place to facilitate the company going into IPO, the respondent No. 1 company's claim for compensation for her failure to sign documents and her response to the company's claims by shifting the burden on the management of the company without denying her prior given consent for IPO or raising any objection to the allotted shares at any point in time prior to filing the

application. All these facts manifestly show that she has concealed material facts and come before this Court without clean hands, as such, the appellant is not entitled to any relief from this Court.

The position relating to the equitable nature of remedy under section 43 of the Companies Act, 1994 is clear. It is also an established principle of law that a person may waive a right either expressly or by necessary implication and that such person may in a given case disentitled himself from obtaining an equitable relief particularly when he allows a thing to come to an irreversible situation and that is a person, through his conduct, has waived his right to an equitable remedy, such conduct precludes and operates as estoppel against him with respect to asserting the right *(Babulal Badriprasad Varma* v *Surat Municipal Corporation and ors. AIR 2008 SC 2919).* As such, the argument made by the learned Advocate of the appellant in the course of hearing that her right could not have been waived or that acquiescence could not have taken place is not correct.

The judgment and order of the this Division in the case *Jamuna Television Ltd. v Bangladesh (65 DLR (AD) 253)* was passed against the judgment and order dated 20.05.2010 passed by the High Court Division in Writ Petition No.8100 of 2009. The appellant relied on paragraph No.28 of the judgment, which states, *"The doctrine of promissory estoppel cannot be invoked against public interest or any statute."*

It is our considered view that the principles laid down in this judgment are applicable in public law matters, whereas the instant case is a company matter, hence, a private law dispute. The case law addresses the principle of promissory estoppel against statute; not waiver, acquiescence and estoppel. The concept of the principles 'waiver, acquiescence and estoppel' and 'promissory estoppel' is vastly distinct in law. As per the

Black's Law Dictionary, ‘acquiescence’ refers to ‘a person's tactic or passive acceptance; implied consent to an act’; ‘waiver’ refers to 'the voluntary relinquishment or abandonment-express or implied-of a legal right or advantage' and ‘Estoppel’ refers to ‘a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true’. On the other hand, as per the definition given in the Black’s Law Dictionary, ‘Promissory estoppel’ refers to ‘the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.’

In the instant case, it is not the case of promissory estoppel. All the background facts and conducts of the appellant not only show acquiescence and waiver on part of the appellant, but also her active participation in bringing about the situation which she now seeks to have altered by means of this proceeding. As such, it is argued by the respondent No. 1 that the appellant has, in effect, waived and acquiesced to the issuance and allotment of shares by her active participation in the board meeting and other subsequent conducts and hence, now estopped from challenging the same.

With regard to the issue that the appellant’s shares in the Company has been diluted from 10% to 2.34%, the High Court Division observed that-

> “.....but fact remains that when shares have been increased and allotted she also got bonus shares proportionately along with respondent No.2, but her percentage of shares diluted due to allotment of shares to respondent Nos. 3-10 and, hence, her allegation of

mala fide in dilution of her shares is also not sustainable."

We have no hesitation to concur with the above findings of the High Court Division.

Having considered and discussed as above, we are of the opinion that the judgment and order passed by the High Court Division does not suffer from any illegality or infirmity.

Accordingly, the appeal is dismissed.

There will be no order as to costs.

J.

J.

J.

B.S./B.R./*Words-6,843*