IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(STATUTORY ORIGINAL JURISDICTION)

Present:

Mr. Justice Sikder Mahmudur Razi

Company Matter No. 240 of 2022

IN THE MATTER OF:

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

-AND-

IN THE MATTER OF:

Md. Mizanur Rahman

……. Petitioner.

- V E R S U S -

Astro Stitch Art Ltd. and others.
.....Respondents.

Mr. Md. Yousuf Ali, Advocate with
Mr. Md. Uzzal Hossain, Advocate with
Mr. Gobinda Biswas, Advocates
.....For the Petitioner.

Dr. Syeda Nasrin, Advocate with
Mr. Md. Monir Hossain, Advocate
.....For the Respondent No. 2.
Mr. Md. Shofiqul Islam, Advocate
……For the respondent No. 5

Heard on: 21.07.2025 & 10.08.2025
And
Judgment on: The 12th August, 2025

Sikder Mahmudur Razi, J:

1. Mr. Md. Mizanur Rahman as petitioner filed an application under Section 233 of the Companies Act, 1994 and the same was registered as Company Matter No. 240 of 2022 and the same was admitted on 08.08.2022. The reliefs originally prayed for by the petitioner were as follows:

A) To admit this application;

B) Allow the petitioner to issue and publish Paper Notification in at least two National Daily News Papers;

C) To reconstitute the Board of Directors of the Respondent No. 1 inducting the Petitioner as the Managing Director, and direct the Company to operate its Accounts jointly by the petitioner;

D) To direct the Respondent Nos. 1-4 to prepare and produce the Books of Accounts and management Accounts, and to produce Statements of all the Bank Accounts of Respondent No. 1 Company before the Honorable Court;

E) To appoint an Independent Chartered Accountant to audit the Books of Accounts, Management Accounts and Financial Statements of the Respondent No. 1 Company from 29th January 2008 to 30th June, 2022;

F) To direct the Respondent 2 to refrain from operating the Bank account of Respondent No. 1 without the Counter Signature of Petitioner.

G) To direct Respondent No. 2 to call, hold or conduct Annual General Meetings of the Respondent No. 1 Company upon preparation of financial statements of the Company within the statutory time frame;

H) And/or to pass such other or further order or orders as your Lordships may deem fit and proper.

2. Subsequently, at the time of hearing, the petitioner by way of filing a supplementary affidavit prayed for replacing/recasting his original prayers ‘C’ & ‘D’ by the following prayers:

"C. Direct the respondent no. 2 and added respondent no. 6 to ensure the transfer of 20,000 (twenty thousands) nos. of shares of the petitioner in the capital of the respondent no. 1 Company in favor of the added respondent no. 6 to give effect to the agreement dated 15.07.2020 (as contained in Annexure -C to the substantive application)

D. Direct the respondent Bank (respondent nos. 4 &5) to take immediate step for releasing the petitioner's properties and for attaching the property of the respondent no. 2 & 6 to give effect to the No Objection certificate approved vide their 368th Board meeting dated 31.01.2022 in favor of the respondent no. 1 Company"

3. It is the case of the petitioner that Respondent No. 1 is a Company limited by shares and incorporated on 29.01.2008 under the Companies Act, 1994 with the objectives amongst others to carry on the business of manufacturers, producers, sellers, exporters, buyers, importers and dealers of ready-made Garments, wearing apparels, clothing, fabrics and textiles of every kind. That the Authorized Share capital of the Company is Tk.1,00,00,000/- (one crore) divided into 1,00,000 (one lac) ordinary shares of Tk. 100/- each. The petitioner is a sponsor shareholder director of the Company and he subscribed to 20,000 Nos. of ordinary share in the capital of the Company. On the other hand, the other shareholder i.e. respondent no. 2 subscribed to 20,000 Nos. of ordinary shares. Thus, both the petitioner and respondent no. 2 has 50%-50% share in the company. Therefore, the petitioner qualifies the requirement as provided 195 (a) and (b) of the companies Act, 1994 and as such he is entitled to file this application. The petitioner entrusted the management of the company to another subscriber-shareholder, respondent no. 2 who by breaching the trust reposed upon him,

has been using the fund of the Company at his personal interest putting the business at stake. Respondent No. 1 Company, to run its business, availed credit facilities from the Al- Arafah Islami Bank Ltd, Uttara Model Town Branch, Dhaka. For the last time the Bank has renewed the credit facility vide sanction letter being no. AIBL/HO/CID-01/2018/327 dated 16.07.2018 for an amount of Tk. 5.80 crore taking securities amongst others some collateral securities which includes a residential flat measuring 1600 sft owned by the petitioner at House no. 665, Road no. 06, Shahinbagh, Tejgaon, Dhaka and another commercial space at level-2, shop no. 101, Basundhara City, Panthapath, Dhaka. The petitioner trusted the respondent no. 2 and was agreed to assign the management of the Company upon him and accordingly he was appointed as the first Managing Director of the respondent Company on 19.01.2008 for a period of 5 (five) years and the same expired on 28.01.2013 but still now he is holding the same without any authority of law whatsoever. The respondent no. 2 is also operating the bank account of the Company as a single signatory. The respondent no. 2 is running the business and/or affairs of the Company like a proprietorship concern without offering any accounts of the business of the Company to the petitioner. Indeed, the respondent no. 2 has extended his own business titled ISQ Printing and Mew House situated at Badal Di, Bawnia, Uttara, Dhaka, by siphoning the fund from the respondent no. 1- Company and is attempting to show negative value to the assets of the Company just to deprive the petitioner. As of today no Annual General Meeting of the respondent Company has been held since its inception and no annual return is filed with office of the respondent no. 3 in complying with relevant provision of the Companies Act. The petitioner has requested the respondent no. 2 on several occasions to hold General meeting in order to appoint

auditor for auditing the accounts of the Company but he does not care about the request of the petitioner. Finally, the petitioner decided to leave the company closing his dealing which the respondent no. 2 agreed and both the parties signed an agreement on 15.07.2020 detailing the terms and conditions of his exit plan. As per the agreement, the respondent no. 2 agreed to purchase the entire shares held by the petitioner in the respondent company in the name of his nominated person and further agreed to release the mortgaged flat and shop. But after signing the agreement, the respondent no. 2 did not maintain his commitment rather he is running the business and/ affairs of the Company without any involvement and/or role of the petitioner. The respondent no. 2 being the only director responsible for the affairs of the company is exercising his power in a manner prejudicial to the interest of petitioner and the respondent no. 2 is continuing the same in gross violation of the mandatory provision of law. The Managing Director has failed to call and conduct necessary meetings and to appoint the auditor as required by the Companies Act, 1994 and the Articles of Association of the respondent Company.

4. At the time of hearing, the petitioner by filing a supplementary affidavit which was dated 24.07.2025, asserted that clause no. 4 of the agreement dated 15.07.2020 categorically stipulates that the first party of the agreement i.e. the petitioner would be free from all sorts of liabilities both previous and prospective arising out of the business undertaking of the company effective from the date of execution of the agreement. Therefore, in accordance with the above stipulation, there cannot be any liability added with the petitioner on the account of the business venture of the company. Clause 03 of the said agreement further imposed restriction upon the parties in asking for any sort of account from each other in relation to Astro Stitch Ltd. The petitioner as

being the 1st party of the agreement fully complied with the said term and condition stipulated therein and did not ask for any account to the respondent no. 2 (2nd party of the agreement) about the Company after the above agreement was signed. The respondent no. 2 abusing the said restriction as a cunning device has misappropriated and/or siphoned the properties of the Company to his personal accounts and to the accounts of his wife-respondent no. 6 including the machineries and equipment without adjusting the loan liabilities of the respondent Company. From the sanction letter of the respondent Bank dated 27.12.2021 (Annexure G of the Audit report) it transpires that the respondent no. 2 (2nd party of the agreement) took the necessary step in accordance with the stipulation made in Clause 05 of the agreement to release the petitioner's properties mortgaged with respondent Bank against the credit facilities sanctioned in favor of the respondent company and proposed his own equivalent property as a mortgage to secure the loan liabilities of the company and the respondent Bank accepted the same and agreed to redeem the petitioner's property from charge of mortgage and further required respondent no. 2 to create mortgage the property specified in the sanction letter. Mysteriously enough the respondent no. 2 has not complied with the term and condition stipulated in the above sanction letter rather the Bank has sanctioned credit facilities in favor of the respondent Company on 30.06.2022, 29.12.2022 & 27.02.2023 to the tune of Tk.34,53,889/-(thirty four lac fifty three thousands, eight hundred and eighty nine). Respondent no. 2 placed a proposal to the Bank for restructuring the board of directors of the respondent no. 1 Company by removal of the petitioner's name from the board. The Bank agreed to the exit plan of the petitioner from the respondent no. 1 Company and accordingly performed their part by taking appropriate resolution vide its board meeting

no. 368th dated 20.01.2022 and accordingly No objection certificate was also communicated through its branch (respondent no. 5) to the Managing Director of the respondent no. 1 Company but the respondent no. 5 never communicated the same to the petitioner. It further reveals that the respondent no. 2 nominated the name of his wife Mrs Dalia Begum (added respondent no. 6) as a new director of the Board of the Company instead of the petitioner and placed the said proposal to the Bank. The Bank approved the same and communicated him duly by its letter dated 31.01.2022 but the respondent no. 2 has not taken step whatsoever to take the signature of the petitioner on the share transfer instruments as he agreed to do so by clause no. 1 of the agreement dated 15.07.2020. It is evident from the retrieved financial statements for the period of 2008-2022, that the retained earnings of the respondent no. 1 Company were accumulated to the tune of Tk. 30,09,39,212/-(thirty crore nine lac thirty nine thousands two hundreds and twelve) up to 30th June, 2022 whereas the credit liabilities of the company is only Tk.7,52,25,062.27/-(seven crore fifty two lac twenty five thousand six point twenty seven) as on 11.06.2024. The respondent no. 2 after signing up the agreement dated 15.07.2020 abused his position as the Managing Director and in connivance with the corrupt officials of the respondent Bank has sold out the Company's manufacturing plant which were hypothecated to the respondent Bank to secure the credit liabilities and converted the same as his own properties without depositing the sale proceeds to the bank to adjust the credit liabilities stated as above. The Company has no business as the respondent no. 2 has grabbed the entire properties and assets of the Company.

5. Respondent no. 2 i.e. holder of the rest 50% share as well as Respondent no. 5 i.e. the lender bank namely Al-Arafah Islami Bank Ltd., Uttara Branch, Dhaka contested the company matter by filing affidavit in opposition.

6. The defence taken and assertions made by the respondent no. 2 in his affidavit- in- oppositions and supplementary affidavits are that the petitioner instituted this Company Matter under section 233 of the Companies Act, 1994 seeking minority protection, initially praying for his inclusion as Managing Director of the Company and for active participation in its business and affairs. The Respondent acceded to this initial prayer. Subsequently, however, the petitioner amended his prayer to seek (i) rectification of the share register by transferring his shares to Respondent No. 6 pursuant to an agreement dated 15.07.2020; and (ii) a direction upon the Respondent bank to enforce the No Objection Certificate approved in the 368th Board Meeting of the Company dated 31.01.2022. The amended prayer is properly referable to section 43 of the Companies Act, 1994, not section 233; accordingly, the petition in its present form is not maintainable. The amended prayer fundamentally alters the nature and character of the original petition, rendering it untenable in law. The affidavits filed by the Respondent bank demonstrate that, by letter dated 21.05.2023, the Petitioner admitted liability for 50% of the Company's debts and expressed his willingness to repay the same to the bank in order to redeem the security. Such admission, made two years after institution of this petition, frustrates the relief sought, and the petition is liable to be dismissed. The agreement dated 15.07.2020, which the Petitioner now seeks to enforce under the guise of minority protection, is in substance a matter under section 43 of the Companies Act, 1994. Neither section 233 nor section 43 may be invoked as a substitute for a suit for specific performance of contract, for which

adequate remedy exists under the Specific Relief Act. The Petitioner, being an equal shareholder, is not entitled to minority protection under section 233. The Petitioner's interpretation of Clause 4 of the agreement dated 15.07.2020-purporting to absolve him from past and future liabilities is misconceived. The agreement was unregistered, unimplemented, never acted upon by either party, and its purpose has been frustrated. The Petitioner's statutory claim under section 233 is inconsistent with the agreement's nature as an exit mechanism. Having failed to execute the required share transfer instruments under Clause 1, the Petitioner cannot rely upon subsequent clauses. A party cannot approbate and reprobate; therefore, the Petitioner's reliance on the agreement to avoid liability is untenable. The Petitioner, holding 50% of the shares, had full access to and exercised control over the Company's financial affairs, including appointing his daughter as Executive Director (Finance) by letter dated 24.12.2019. The Company's bank account required joint signatures, rendering allegations of unilateral misappropriation baseless. Correspondence dated 02.01.2020 further confirms the Petitioner's active participation in operational and financial matters. The agreement dated 15.07.2020 was never implemented, and share transfer instruments were never executed. Acting alone, the deponent filed Writ Petition No. 8211 of 2024 and obtained a Rule and Stay Order dated 04.07.2024, thereby preventing auction of mortgaged property and protecting both parties' interests. The Petitioner made no contribution to litigation expenses or negotiations, and allegations regarding non-registration of the mortgage are without legal foundation. The allegations of unilateral sale and misappropriation of hypothecated assets are false. Owing to severe financial distress, factory equipment, wiring, machinery, and a generator were sold for Tk. 48,00,000/- under a documented deed to settle urgent debts. The

Petitioner remained absent and inactive throughout this crisis, contributing nothing towards the company's survival. The agreement in question was never performed: no share transfer forms were executed, no affidavits sworn, no registration effected with the RJSC. From 2009 to 2020, the Petitioner withdrew substantial sums from the Company, totalling approximately Tk.2,93,00,000/-, inconsistent with any claim of having exited. His current stance constitutes a bad faith attempt to avoid liabilities. The amended prayers, particularly Prayer "C", is beyond the scope of section 233, effectively amounting to rectification of the share register and compulsory acquisition of shares. Prayer "D" is impracticable given the company's ceased operations, ongoing litigation, and a pending Artha Rin Suit. Section 233 does not empower this Court to compel creation or substitution of a mortgage in respect of a corporate loan.

Respondent no. 2 also raised serious objection against the audit report terming the audit report as an accumulation of lies.

7. The summary of the affidavit-in-opposition and supplementary affidavit of the respondent no. 5- Bank are that respondent No. 5, Al Arafah Islami Bank Ltd, Uttara Model Town Branch, lawfully sanctioned and disbursed credit facilities in favour of respondent No.1-Company, namely Astro Stitch Art Limited, jointly represented by the Petitioner and respondent No.2, each being 50% shareholder and Director. The said credit facilities were secured by way of mortgage of the petitioner's own immovable property, duly executed through registered mortgage deeds, and other legal instruments following all applicable banking and regulatory requirements. The petitioner voluntarily executed such mortgage obligations in his capacity as a director of the borrower company. Subsequently, respondent No.1 Company, through respondent No.2, proposed to reconstitute the Board of Director of

respondent No.1 company by transferring entire shares of the Petitioner to respondent No.6 as per agreement dated 15.07.2020 which was approved conditionally in its 368th meeting dated 20.01.2022. The said conditional approval was clearly subject to fulfilment of multiple mandatory requirements, including (i) execution of Form 117 for share transfer, (ii) compliance with RJSC formalities and bank documentation protocols, (iii) execution of registered mortgage deed of the proposed new property, (iv) valuation and legal vetting of the substituted property and (v) registration of charge documents. Despite the passage of a considerable period of time, neither the petitioner nor respondent Nos. 2 and 6 took any step to fulfil the said preconditions and as such, the conditions of NOC issued by the Bank was never fulfilled and thus the same creates no obligation upon respondent No.5 Bank. The petitioner now seeks to enforce a non-acted upon private arrangement through the instant Company Matter, even though the necessary documents i.e., share transfer agreement, Form 117, RJSC registration, or mortgage deed of the substituted property have not been executed. The alleged internal understanding between the petitioner and respondent No.2 lacks all elements of enforceability, and respondent No.5- Bank was never a party to any binding commitment to release the petitioner's mortgaged asset unconditionally. The Respondent No.5 has already instituted Artha Rin Suit No. 207 of 2025 before the learned Artha Rin Adalat No. 4, Dhaka, against the Petitioner along with Respondent Nos. 1 and 2. The mortgaged property of the Petitioner has been included in the schedule of the said suit on the basis of the registered mortgage deed executed by the Petitioner himself. The Petitioner has already entered appearance in the said Artha Rin Suit by filing a Wokalatnama and has sought time to submit his written statement, for which the learned Court has fixed the date on 21.08.2025. The said suit

remains pending and is *sub- judice*. In view of such pending proceedings, the present Company Matter appears to be motivated by an oblique purpose to evade repayment obligations and is therefore liable to be rejected as an abuse of the process of the Court. The petitioner's current application contradicts his own prayers in the original Company Matter, where he has sought to be reinstated as the Managing Director and to jointly operate the Company's accounts. The petitioner's prayer to release him from liability and effectuate his exit from the Company by substituting collateral security is self-contradictory, and undermines the credibility and maintainability of this entire proceeding.

8. Mr. Yousuf Ali, learned advocate appearing with Mr. Gobinda Biswas and Mr. Uzzal Hossain learned advocates for the petitioner by placing the substantive application and the supplementary affidavit submitted that the respondent no. 2 is running the business and/or affairs of the Company like a proprietorship concern without offering any accounts of the business of the Company to the petitioner and he failed to held any Annual General Meeting of the Company since its inception and no annual return was filed with office of the respondent no. 3. As the petitioner decided to leave the company closing his dealing which the respondent no. 2 both the parties signed an agreement on 15.07.2020 detailing the terms and conditions of his exit plan. As per the agreement, the respondent no. 2 agreed to purchase the entire shares held by the petitioner in the company in the name of his nominated person and further agreed to release the mortgaged flat and shop. But after signing the agreement, the respondent no. 2 did not maintain his commitment rather he is running the business and/ affairs of the Company without any involvement and/or role of the petitioner. The respondent no. 2 being the only director responsible for the affairs of the company is

exercising his power in a manner prejudicial to the interest of petitioner and the respondent no. 2 is continuing the same in gross violation of the mandatory provision of law. The respondent no. 2 however has used the said agreement as cunning device to misappropriate all the assets and properties of the respondent company and convert the same as his personal properties. The petitioner exited from the management of the affairs of the Company on 15.07.2020 and since then the petitioner participated in no affairs of the Company, therefore, respondent no. 2 utilized this opportunity to the fullest in their favor including selling out the Company's properties keeping the petitioner in complete darkness as to the issuance of NOC by the Bank. He finally submitted that although the petitioner had 50% share in the company, nevertheless the instant petition at his instance under section 233 of the Companies Act, 1994 is maintainable and in support of his submission he relied upon a decision passed in the case of Mosharraf Hossain (Md) -vs- Saad Securities Limited and others, reported in 19 BLC (HCD) page 35. Mr. Yousuf further submitted that the power of the court under section 233 sub-section 3 of the Act, 1994 is wide enough to enforce any transaction between the parties and the agreement dated 15.07.2020 being a transaction between the petitioner and respondent no. 2, the same can be enforced by this court. He next submitted that though the word ‘enforce’ has not been used in clause (a) of sub-section 3 but the word ‘cancel’ includes ‘enforcement’ as well. Mr. Yousuf next submitted that the agreement being executed between the shareholders of the company, the same is enforceable by this court and had it been executed between a shareholder and a third party then the appropriate forum would be the civil court for specific performance of contract. He finally citing a decision of our Apex Court in the case of Nahar Shipping Lines Ltd -vs- Mrs. Homera Ahmed and others, reported in 9 MLR (AD)

2004, page- 59 submitted that in a fit case even the court can pass an order directing the majority to buy out the minority and vice versa and since there is already an agreement, therefore, the court can direct the respondent no. 2 to but you the shares of the petitioner and for this the petitioner will not claim any consideration.

9. On the other hand, Dr. Syeda Nasrin appearing with Mr. Monir Hossain learned advocate for the respondent no. 2 submitted that there are only 2 shareholders- directors of the respondent no. 1-company. The petitioner is the holder of 50% share of the company while the respondent no. 2 is the 50% holder of share and the Board of Directors of the company from the date of its incorporation is comprised by the petitioner and respondent no. 2 and every financial transaction of the company took place by their joint signature. Therefore, the petitioner is not a minority in the company and as such this petition under section 233 of the Companies Act, 1994 is not maintainable. In support of her submission the learned advocate relied upon a decision passed in the case of Moksudur Rahman & another vs Bashati Property Development Ltd & others, reported in 5 BLC (HCD) page 245. She further submitted that for violation of the terms of agreement dated 15.07.2020 the petitioner could have approached the competent civil court for enforcement of the contract but under no circumstances his remedy lies in an application under section 233 of the Companies Act. She next submitted that the so-called agreement was unregistered, unimplemented, never acted upon by either party and its purpose has been frustrated. Referring the decision of IPDC -vs- Meghna PET Industries, reported in 10 BLC (HCD) (2005) page 456 Dr. Nasrin submitted that title to shares cannot pass where obligations remain outstanding, unless ordered by a Civil Court in a specific performance action. She further submitted that admittedly the

company has no business operation for the last few years; the factory has already been laid off and the company is financially insolvent to pay off its debts and therefore, an application for winding up of the company has been filed being Company Matter No. 1146 of 2025 and the same has been admitted on 02.07.2025. With these submissions the learned advocate prayed for dismissal of the company matter.

10. Mr. Md. Shofiqul Islam learned advocate appearing on behalf of the respondent no. 5 Bank submitted that Bank has already filed Artha Rin Suit being No. 207 of 2025 before the Artha Rin Adalat No. 4, Dhaka and the petitioner has appeared in that suit and prayed adjournment for filing written statements. The learned advocate further submitted that since even after issuance of NOC the parties did not complete the necessary formalities for a long period of time and therefore, the said NOC has lost its efficacy and now since Artha Rin Suit has already been filed therefore, there is no scope to consider any change in the Board any more as the same will place the Bank in a precarious condition in recovering its huge debt. Mr. Islam also prayed for dismissal of the Company Matter.

11. I have considered the submissions of the learned advocates of the respective parties as well as perused the substantive petitioner, affidavit-in-oppositions, supplementary affidavits and the audit report. The jurisdiction and scope of giving reliefs by the company Court in an application under section 233 of the Companies Act, 1994 has been discussed elaborately in a catena of judgments. However, for proper adjudication of the case in hand, this court feel the urge to quote paragraph 26 and the guidelines set in paragraph 44 of the judgment passed in the case of Nurul Hoque Chowdhury –vs- Mahzabin Chowdhury, reported in 12 BLT, page 261. Paragraph no. 26 of the judgment runs as follows:

*"**26**. It appears from the analysis of section 233 that this provision would come to the aid of the applicant and the Court may give necessary orders or directions if it is satisfied, that the interest of the applicant is 'prejudicially affected'. It is also obvious that section 233 would not come to his aid unless it is found either by affidavit or on evidence that his interest has been or is being or is likely to be prejudicially affected. His interest may be prejudicially affected either because of the breach of any of the provisions of the memorandum and the articles of association of the company or violation of any law or his expectations which were legitimate but has been defeated or infringed by the acts or omissions of the majority members of the company. So, it appears that whatever might be the reason, the sine qua non for the applicability of this provision is 'prejudice' of the applicant as a minority member."*

*"**44**. The concept of reasonability and fairness is ingrained in every form of jurisprudence. However, wide the powers may be, whether conferred in the hands of a public authority or on the Court, it must pass the test of reasonability and fairness, from an objective standard. It is so also in the case of section 233 of the Companies Act, 1994. In arriving the opinion that the interest of the applicant has been or is being or is likely to be prejudicially affected, keeping in view the concept of minority protection under section 233, the following guidelines may be considered:*

1. As a matter of general principle, in conducting the affairs of a company, the board of directors are required to follow the provisions of the Companies Act, the memorandum and the articles of association, agreement, if any and also its fiduciary obligations.

2. If the actions or omissions of the directors are illegal or invalid, without more, appropriate actions may be taken in a Court of law, for

the redress of such illegality or invalidly but an application under section 233, is not the appropriate remedy.

3. The only issue under section 233 is whether the interest of the applicant has been or is being or is likely to be prejudicially affected because of:

i) the conduct of the affairs of the company.

ii) the exercise of the powers of the directors,

iii) disregarding the interest of the applicant,

iv) discriminatory actions of the company.

v) discriminatory resolution of the members,

In order to so hold, the Court is required to find, to its satisfaction, either on affidavit or on evidence, applying the test of objective standard of fairness, as to:

i) whether the board acted in accordance with the provisions of the articles of association,

ii) whether the board acted, keeping in view the business realities of the day and the commercial considerations, for the survival and economic prosperity of the company,

iii) whether the board acted bona fide in the overall interest of the company in exercise of its fiduciary obligations.

If the answers to the above questions are found to be in the affirmative, no application under section 233 shall succeed, however prejudicial or discriminatory the actions or conducts of the company or the board may appear to the applicants.

4. An application under this provision shall succeed if it is found that the interest of the applicant has been or is being or is likely to be prejudicially affected for the reasons specified in sub-section 1 because:

i) the acts or omissions on the part of the board was predominantly for a collateral purpose and not primarily in the interest of the company.

ii) the directors although, did not violate the provisions of the Companies Act or the articles of association but acted in such a manner which no ordinary man of business prudence would do.

iii) the directors failed to exercise its fiduciary obligations. In order to consider such facts, the test of objective standard of fairness has to be applied.

5. The powers under Section 233 is very wide but it should be applied cautiously with circumspection, otherwise, the interest of the majority members may be prejudicially affected."

12. Now, coming back to the present case, while examining the order sheet some disturbing feature caught to my eyes which prompted this court to examine the administrative file of the instant company as well and what is noticed is really shocking and unfortunate. It appears that the instant company matter was admitted on 08.08.2022. Though in the admission order the petitioner was directed to put in requisites forthwith but the same was deposited on 28.08.2022 but in the office note there is nothing to show that it was at all issued rather the relevant portion of the office seal in this regard is blank which suggests that notice was never issued at that time. Consequently, when the petitioner's application for audit report was allowed, it was

allowed *ex parte* on 15.02.2023. Subsequently, order for issuance of fresh notice on respondent no. 1 & 2 to another address was passed on 15.05.2023. But requisite for service of notice was deposited by the petitioner on 05.06.2024 and accordingly the same was issued on 06.06.2024 which is evident from the office note. The respondent no. 2 & 6 appeared in the matter on 04.07.2024.

13. Now, on examination of the audit report it has been noticed by this court from page 25 of the "application for acceptance of the report", that the auditor under the caption 'Observation' surprisingly assumed the function of an adjudicator releasing the petitioner from bank's liability, whereas, from page 93 of the said application, which is a letter issued by the Bank on 25.09.2023 to the petitioner clearly indicates that the petitioner admitted his liability with the Bank. The said letter runs as follows:

সূত্রঃ এআইবিএল/ উত্তরা/বিনিয়োগ/২০২৩/৮১৬

তারিখঃ ২৫/০৯/২০২৩ইং

মোঃ মিজানুর রহমান

পরিচালক

মেসার্স এ্যাস্ট্র স্টিচআর্ট লিমিটেড,

ঠিকানা: শরীফপুর, জাতীয় বিশ্ববিদ্যালয়, গাজীপুর-১৭০৪।

বিষয় ঃ	উত্তরা মডেল টাউন শাখার বিনিয়োগ গ্রাহক মেসার্স এ্যাস্ট্র স্টিচআর্ট লিমিটেড এর (০২ জন পরিচালক, মোঃ শাহ আলম, এমডি ৫০%+ মোঃ মিজানুর রহমান, পরিচালক ৫০% সমপরিমাণ শেয়ারের মালিক) বিদ্যমান দায় টাকা ৭.১৩৪২ কোটি থেকে- ক) জনাব মোঃ মিজানুর রহমান কর্তৃক ৫০% দায় (৭.১৩৪২/২)=৩.৫৬৭১ কোটি ০৬ (ছয়) মাসের মধ্যে পরিশোধ সাপেক্ষে তার মালিকানাধীন কাওরান বাজার, তেজগাঁও, ঢাকায় অবস্থিত বসুন্ধরা সিটি শপিংমলের লেভেল-২ এ ১৬০ বর্গফুটের দোকান এবং বাড়ি নং-৬৬৫, শাহীনবাগ, তেজগাঁও, ঢাকায় অবস্থিত ২০১১.৫৬ বর্গফুটের ফ্ল্যাট অবমুক্ত করণ; খ) ৫০% দায় সমন্বয় সাপেক্ষে জনাব মোঃ মিজানুর রহমান কে ব্যাংকের দায় হতে অব্যহতি প্রদানের অনুমোদন প্রসঙ্গে।

মুহতারাম,

আস্‌সালামুআলাইকুম।

উপরোক্ত বিষয়ে আপনার ২১.০৫.২০২৩ ইং তারিখের আবেদনের প্রেক্ষিতে গত ১৪ সেপ্টেম্বর, ২০২৩ ইং তারিখে অনুষ্ঠিত পরিচালক পর্ষদের ৩৯১ তম সভার সিদ্ধান্ত মোতাবেক প্রস্তাবটি নিম্নোক্তভাবে অনুমোদন করা হয়েছেঃ

(ক) জনাব মোঃ মিজানুর রহমান কর্তৃক ৫০% দায়(৭.১৩৪২/২)=৩.৫৬৭১ কোটি ০৬ (ছয়) মাসের মধ্যে পরিশোধ সাপেক্ষে তার মালিকানাধীন কাওরান বাজার, তেজগাঁও, ঢাকায় অবস্থিত বসুন্ধরা সিটি শপিং মলের লেভেল-২ এ ১৬০ বর্গফুটের দোকান এবং বাড়ি নং- ৬৬৫, শাহীনবাগ, তেজগাঁও, ঢাকায় অবস্থিত ২০১১.৫৬ বর্গফুটের ফ্ল্যাট অবমুক্ত করণ;

খ) ৫০% দায় সমন্বয় সাপেক্ষে জনাব মোঃ মিজানুর রহমানকে ব্যাংকের দায় হতে অব্যহতি প্রদানের অনুমোদন প্রসঙ্গে।

এক্ষেত্রে, জনাব মোঃ মিজানুর রহমান ৫০% দায় পরিশোধের পর এন.আই এ্যাক্ট মামলা থেকে অব্যহতি প্রদানের জন্য মাননীয় আদালতে আবেদন করলে আদালত মামলার কার্যক্রম বিঘ্ন না ঘটিয়ে তাকে অব্যহতি প্রদান করলে ব্যাংকের কোন আপত্তি থাকবেনা।

এমতাবস্থায়, উপরোক্ত শর্তাবলী পরিপালন করত মঞ্জুরীপত্র গ্রহণ পূর্বক বিনিয়োগের দায় সমন্বয় করার জন্য প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য অনুরোধ করা হলো।

মা-আস্‌সালাম।
আপনার বিশ্বস্ত,

স্বাক্ষর অস্পষ্ট/-
(এস.এম. আবু জাফর)
এসইভিপি ও ব্যবস্থাপক

Now, let us see what was the content of the application dated 21.05.2023 which was filed by the petitioner and which has been annexed by the respondent no. 5-Bank in his supplementary affidavit in opposition as Annexure-12. The said letter runs as follows:

তারিখ ঃ ২১/০৫/২০২৩ ইং

বরাবর,
এসইভিপি ও শাখা ব্যবস্থাপক
আল-আরাফাহ ইসলামী ব্যাংক লিঃ

উত্তরা মডেল টাউন শাখা, ঢাকা

বিষয় ঃ আমাদের প্রতিষ্ঠান এস্ট্রো স্টিচ আর্ট লিঃ এর ৫০% মালিকানা হিসেবে আমি মোঃ মিজানুর রহমান প্রতিষ্ঠানের বিদ্যমান দায় হতে ৫০% টাকা ০৬ (ছয়) মাসের মধ্যে এককালীন পরিশোধ সাপেক্ষে নামীয় বন্ধকী জামানত অবমুক্ত ও প্রতিষ্ঠানের সকল দায় দেনা হতে অব্যাহতি প্রসঙ্গে।

জনাব,

বিনীত নিবেদন এই যে, আমাদের পরিচালনাধীন প্রতিষ্ঠান এস্ট্রো স্টিচ আর্ট লিঃ বিগত ১১-০২-২০১০ ইং সাল হতে বিনিয়োগ সুবিধা ভোগ করছি। সর্বশেষ আমাদের আবেদনের প্রেক্ষিতে ১০.৬০ কোটি বিনিয়োগ সীমা অনুমোদন করা হয়। অনুমোদিত বিনিয়োগ সীমা আমরা ভোগ করেছি। দীর্ঘদিন যাবৎ আমি এবং মোঃ শাহ আলম (ব্যবস্থাপনা পরিচালক) ৫০ঃ৫০ শেয়ারের অনুপাতে ব্যবসা পরিচালনা করে আসছিলাম। বিনিয়োগ সুবিধার বিপরীতে আমার নামীয় বসুন্ধরা সিটি শপিং মল লেভেল-০২, কাওরান বাজার, তেজগাঁও, ঢাকায় অবস্থিত ১৬০ বর্গফুটের দোকান ও বাড়ি-৬৬৫, শাহীন বাগ, তেজগাঁও, ঢাকায় ২০১১.৫৬ বর্গফুট ফ্ল্যাট ছাড়াও প্রতিষ্ঠানের অপর পরিচালক মোঃ শাহ আলম সাহেবের নামীয় গাজীপুরস্থ ৪৪.৭৫ শতক জমি ও উত্তরার ৩ নং সেক্টরে ১৪১৩ বর্গফুটের একটি ফ্ল্যাট আপনার ব্যাংকে বন্ধক রয়েছে।

২০২১ ইং সালে আমি শারীরিকভাবে অসুস্থ হয়ে পরি এবং ব্যবসা পরিচালনা করতে অপারগ হয়ে যাই এবং আমার পার্টনার শাহ আলম (ব্যবস্থাপনা পরিচালক) এই মর্মে সম্মতি প্রদান করে আমি আমার সমুদয় শেয়ার তার কাছে হস্তান্তর করেছি এবং তিনি এককভাবে ব্যবসা পরিচারনা করবেন এবং উক্ত শেয়ার হস্তান্তরের পর কোম্পনির দায়ের বিপরীতে ব্যাংক এর নিটক আমার যে মর্গেজ সম্পত্তি আছে তাহা আমাকে বুঝিয়ে দিয়ে ব্যাংক এর অতিরিক্ত দায়ের বিনিময়ে মর্গেজ সম্পত্তি প্রদান করবেন। কিন্তু আমাদের অর্ন্তদ্বন্দের ফলে মালিকানা পরিবর্তনের বিষয়টি আরজেএসসিতে কার্যকর করা হয়নি। উল্লেখ্য, এই অন্তদ্বন্দের ফলে আমাদের কারখানার কার্যক্রম এককভাবে এমডি পরিচালনা করতেন এবং তাহার কারনে কারখানার উৎপাদন বন্ধ হয়ে যায় এবং এক পর্যায়ে প্রতিষ্ঠানটি বন্ধ হয়ে যায়। প্রতিষ্ঠানটির বন্ধ হয়ে যাওয়ার বিনিয়োগ দায়সময়মত পরিশোধ করা হয়নি। ব্যাংক দায় পরিশোধের জন্য বারবার তাগাদা প্রদান করছে এবং দ্রুত আইনগত ব্যবস্থা গ্রহণ করবে বলে আমাকে অবগত করে। আমি শারিরীক ও মানসিকভাবে অসুস্থ হয়ে পড়েছি। আমার পক্ষে আইনী লড়াই চালিয়ে যাওয়ার মত সক্ষমতা নাই। আমি প্রতিষ্ঠানের মালিকানায় থাকলেও এমডি'র স্বেচ্ছাচারিতার কারণে প্রতিষ্ঠানের সকল সুযোগ সুবিধা হতে বঞ্চিত হই এবং প্রতিষ্ঠানের দায়-দেনা আমার উপর ন্যস্ত হয়। তাই আমি উক্ত দায় হতে মুক্ত হতে চাই এবং আমার শেয়ারের ৫০% হিসেবে বিনিযোগ দায়ের ৫০% পরিশোধ করব, ইনশাল্লাহ। দায় পরিশোধের জন্য আমার নামীয়

বন্ধকী সম্পত্তি বিক্রয় এবং ধারদেনা করে হলেও দায় পরিশোধে সচেষ্ট থাকব। এখানে আরোও উল্লেখ যে,বন্ধকী সম্পত্তিটির সম্ভাব্য ক্রেতার সাথে আলোচনা হয়েছে। এর ভিত্তিতে আপনাদের অনুমোদন পাওয়া গেলে আমি আমার নামীয় আপনার শাখার বন্ধকীকৃত উক্ত সম্পত্তি বিক্রি ও ধারদেনা করে আগামী ০৬(ছয়) মাসের মধ্যে ৫০% দায় পরিশোধ করতে সক্ষম হব।

এমতাবস্থায়, সার্বিক দিক বিবেচনা করে, আমার আবেদনটি আপনার সদয় বিবেচনার জন্য অনুরোধ করা হলো।

নিবেদক,

স্বাক্ষর অস্পষ্ট/-
(মোঃ মিজানুর রহমান)
পরিচালক
এস্ট্রো স্টিচ আর্ট লিঃ

What is interesting to note here that, the petitioner signed the said letter as a director of the respondent-company. In the said letter he mentioned that as per their application the last investment limit sanctioned by the Bank in their favour was 10.60 crore. He further mentioned that because of their internal conflict the share transfer issue was not acted upon. Moreover, this Court has further noticed a number of gross anomalies in the audit report including describing the bank's liability. Therefore, the objection raised by the respondent no. 2 in respect of the audit report appears to be cogent and logical. Accordingly, the said audit report is discarded by giving caution to the auditor. The auditor is hereby declared to be disentitled from getting the rest of his fees.

14. It further appears from Annexure 11 of the Affidavit-in-opposition filed by the respondent no. 2 against the application for direction filed by the petitioner that, on 18.07.2021 there was a board meeting of respondent company in which both the petitioner and respondent no. 2 signed as Director and Managing Director respectively and took some decisions.

15. Following the said decision respondent no. 5 renewed the credit facilities vide their sanction letter no. 06.02.2022 (Annexure- 6 to the affidavit-in-opposition filed by the respondent no. 5 Bank). On the other hand, the NOC for reconstruction of the Board was approved by the Board of respondent no. 5 Bank on 20.01.2022 and the same was communicated to the respondent no. 2 on 10.02.2022. But to give full effect to the said reconstruction of the Board it requires some formalities with RJSC including signing Form -117, execution of affidavit and recording of the said change with RJSC but admittedly nothing that sort took place.

16. Furthermore, from the statements and reply as well as documents annexed by the parties it appears that the petitioner had active participation in the management of the company. The respondent no. 2 categorically stated that from 2009 to 2020 the petitioner withdrew a monthly salary of Tk.1,00,000/- for 134 months, totalling Tk.1,34,00,000/-. Additionally, he received Tk.80,00,000/- as profit, Tk.20,00,000/- for purchasing a car, Tk.44,00,000/- for Eid Celebrations, and Tk.15,00,000/- for medical expenses and the total amount stands Tk.2,93,00,000/-. The petitioner even positioned his daughter as the Executive Director (Finance). None of these facts has been denied. Therefore, the allegation that the petitioner had no participation in the affairs of the company does not stand as acceptable. In other way, there was no basis or evidence that the petitioner had been driven out of the company before 15.07.2020. Even after 15.07.2020 the petitioner and respondent no. 2 held a Board Meeting on 18.07.2021 and in 2022 he filed the company matter to appoint him as Managing Director and in 2023 communicated with the Bank as director of the company. Respondent no. 2 by filing affidavit-in-opposition robustly stated that if the petitioner ever expressed his intention to be the Managing Director, the respondent no. 2 would have resigned and

appointed the petitioner as Managing Director. From the entire record it appears to this court that the petitioner failed to make out any case of oppression. Rather as it appears, all the financial transactions took place at the joint signatures of the petitioner and respondent No.2. The responsibility of non-holding of AGM cannot be attributed solely to the respondent no. 2 as because being the director and 50% shareholder, the petitioner was equally under an obligation to take positive steps in this regard which he failed to perform, rather all these years the petitioner was actively involved in the affairs of the company, drew monthly salaries, withdrew profit, took bonus and other financial facilities from the company, obtained credit facilities from the Bank and mortgaged his properties and also stood as personal guarantor of the loan. Therefore, as per paragraph no. 26 of the above cited decision [12 BLT, page- 261] as well as the guidelines set therein in paragraph no. 44, the petitioner's application for minority protection is incompetent.

17. Further, admittedly the petitioner and respondent no. 2 each having 50% shareholding in the company and the Board of Directors being constituted only by these two persons, the petitioner's application under section 233 of the Companies Act, 1994 claiming himself as minority is also misconceived. In this regard the decision cited by the learned advocate for the respondent no. 2 fits to this matter. The issue whether an application under section 233 of the Companies Act, 1994 at the instance of 50% holder of share is maintainable or nor was elaborately discussed in the case of Md. Shamim Reza and another -vs- APS Design Works Limited and others passed by the High Court Division in Company Matter No. 383 of 2023. In that Judgment an elaborate discussion was made and a good number of cases on this issue was explicated. Finally, it was held that,

> "*Where there are two group of shareholder having equal shares and equal representation in the board but one group holds the post of chairman with a casting voting power in all the meetings of the company and in such a case the other group having equal shares and equal representation in the board but without holding the post of chairman of the company with a casting voting power can be said to be relegated to the minority entitling them to invoke the jurisdiction of the court under section 233 of the Companies Act, 1994 for seeking relief against the prejudicial acts by such majority shareholder affecting the interest of the such minority shareholders*."

But the situation is different in the present case. The number of shareholders and directors are only 2 (two) i.e. only the petitioner and the respondent no. 2. Admittedly, there is no chairman in the respondent-company and no question and scope of any casting vote. Therefore, the instant company matter under section 233 is not maintainable.

18. Moreover, admittedly the factory has been laid off and company has closed its business and the director-shareholders are at loggerhead and already a petition for winding has been filed and that has been admitted, Artha Rin Suit has also been filed before the competent court. The petitioner although filed the company matter with a view to be appointed as Managing Director, now, he is looking for an exit by enforcing the agreement dated 15.07.2020. Therefore, I find no scope to consider the prayers of the petitioner in either way at its present state. Moreover, jurisdiction of the company court cannot be extended to force anyone to mortgage his personal property or to direct the lender bank to redeem any property which is being held under mortgage for securing loan liability. It is true section 233 of the Companies Act, 1994

is of remedial nature and the Court has also wide power while dealing with an issue under section 233 but that does not mean that the court can order whatever the Judge thinks fair. Further, since the respondent- company obtained loan from respondent no. 5 bank and artha rin suit is pending for recovery of the loan, therefore, there is also no scope to consider the prayer to direct the respondent number no.2 to buy out the share of the petitioner.

19. Finally, I would also like to refer a judgment from Indian Jurisdiction. It is R. Balakrishnan and others –vs- Vijay Dairy & Farm Products Private Limited, reported in (2005) 59 SCL 667 (CLB). In this case there was also a Share Purchase Agreement (SPA) between the existing shareholders of the company to resolve an ongoing disagreement amongst the shareholders-directors. In that agreement there was also a clause to the effect that the petitioners shall exit from the company both as shareholders and as directors and the petitioner resigned from the Board as director. But as the agreement was not fully implemented, the petitioners filed the company matter under section 397 and 398 of the Companies Act, 1956 alleging acts of oppression and mismanagement in the affairs of the company. The Court finally held that, "*the grievances and reliefs undoubtedly flowing from the agreement dated 24.10.2003, in my considered view, must be agitated in a competent civil court having jurisdiction over the matter. Any remedy for the alleged breach of the agreement and consequential reliefs do not lie before the CLB. Since the alleged acts of oppression and mismanagement do not make out any cause of action under the provisions of sections 397 & 398, neither the inherent power of the CLB nor the decision in State of Orissa v. Klockner & Co.(supra) would go to the aid of the petitioners*."

20. In view of the facts and circumstances as well as discussions made above, this Court is of the view that the instant Company Matter under section 233

of the Companies Act, 1994 is not maintainable as well as the same is without any merit and accordingly, the same is dismissed.

Communicate the Judgment at once to all concerned.

(Sikder Mahmudur Razi, J:)