

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

WRIT PETITION NO.3912 of 2023

With

WRIT PETITION NO.3911 of 2023

And

WRIT PETITION NO.4644 of 2023

IN THE MATTER OF:

Applications under Article 102 of the
Constitution of the People's Republic of
Bangladesh

And

IN THE MATTER OF:

***Major General (Retd.) Md. Sarwar Hossain
and another.***

....Petitioners in writ petition No.3912 of 2023

Md. Shorab Hossain (Linkon) and others.

***... Petitioners in writ petition No.3911 of 2023
Simtex Industries Ltd.***

..... Petitioner in writ petition No.4644 of 2023

-VS-

***Bangladesh Securities and Exchange
Commission (BSEC), Dhaka and others.***

....Respondents in all writ petitions.

And

Mr. Ahsanul Karim, Senior Advocate with
Mr. Shah Manjurul Hoque, Senior Advocate with
Mr. M. Sayed Ahmed, Senior Advocate with
Mr. Muhammad Harunur Rashid, Advocate
Mr. Shahriar Mahmud, Advocate
Mr. Hafizur Rahman, Advocate
Ms. Shilpi Parvin, Advocate
Mr. Md. Nurul Huda, Advocate and
Ms. Aditi Rahman Dola, Advocate

..... For the petitioners in all writ petitions

Mr. A.M. Masum, Senior Advocate with
Mr. Nahiyan Ibn-Sobhan, Advocate
Mr. Sayed Mahsib Hossain, Advocate
Mr. Md. Forhad Bin Hossain, Advocate and
Mr. Taisir Hoque, Advocate

..... For the respondent Nos.1 and 2 in all writ petitions.

Mr. Sabbir Hamza Chowdhury, Advocate

.... For the added respondent No.4 and added respondent
No.7 in writ petition Nos.3912 and 4644 both of 2023.

Mr. Samarendra Nath Biswas, D.A.G. with
 Mr. Md. Abul Kalam Khan (Daud), A.A.G. with
 Mr. Md. Modersher Ali Khan (Dipu), A.A.G. and
 ..For the Respondents-government in all writ petitions.

**Heard on: 16.08.2023, 12.10.2023, 18.10.2023,
 01.11.2023, 02.11.2023 and Judgment on:23.11.2023**

Present:

Mrs. Justice Farah Mahbub

And

Mr. Justice Muhammad Mahbub Ul Islam

Farah Mahbub, J:

Since common question of law and facts are involved in all these 3(three) writ petitions as such, those have been heard together and are being disposed of by this single judgment.

In these 3(three) writ petitions the respective petitioners have challenged the impugned Directive No. BSEC/CED/48/2016/1428 dated 22.03.2023 (Annexure-A of Writ Petition No.3912 of 2023) issued by the respondent No.1 under the signature of the respondent No.2, directing the company in question namely Simtex Industries Ltd., the petitioner of writ petition No. 4644 of 2023, to restructure its existing Board of Directors by excluding the respective Independent Directors including one nominee Director in exercise of power as provided under Section 20A of the Securities and Exchange Ordinance, 1969, to be declared to have been issued without lawful authority and hence, of no legal effect; whereupon present Rules Nisi were issued by this Court along with order of stay of the operation of the said impugned Directive No. BSEC/CED/ 48/2016/1428 dated 22.03.2023 for a prescribed period.

Challenging the interim order of stay the respondents concerned moved the Hon'ble Appellate Division by filing Civil Petition for Leave

to Appeal Nos.1414, 1627 and 1419 all of 2023 in connection with writ petition Nos.3911, 3912 and 4644 all of 2023. However, upon hearing the respective contending parties the learned Judge-in-Chamber of the Appellate Division directed the parties concerned to maintain *status-quo* on the subject matter in question. Said order was subsequently affirmed by the Appellate Division vide order dated 05.06.2023 and 26.06.2023 respectively with direction upon this Bench to hear and dispose of the Rules on merit.

Common facts, in brief, are that the company in question namely Simtex Industries Ltd. was incorporated with the Joint Stock Companies on 29.05.2007 as a private limited company. Subsequently, it was converted into a public limited company in the year 2012. Said company was listed with Dhaka Stock Exchange on 03.11.2015 and Chattogram Stock Exchange on 29.10.2015 respectively. Since its inception, the company was strictly adhering to the relevant laws of the Bangladesh Securities and Exchange.

In July, 2022 the company, however, had 6(six) members in the Board, namely:

- (i) *Sharif Shahidul Islam, Nominee Director, nominated by Excel Farmganic Limited;*
- (ii) *Md. Akram Hossain, Independent Director;*
- (iii) *Md. Hafizur Rahman, Nominee Director, nominated by Excel Farmganic Limited;*
- (iv) *Lt. Col Md. Anisur Rahman, Shareholder Director,*
- (v) *Neaz Rahman Shaqib, Managing Director; and*
- (vi) *Shah Md. Asad Ullah, Independent Director, i.e., the petitioner No.2 of writ petition No.3912 of 2023.*

In this regard, it has been stated that on 07.10.2021 the petitioner No.2 of writ petition No. 3912 of 2023 was elected as the Independent Director of the company in question. However, in compliance of the Corporate Governance Code, 2018 (in short, the Code, 2018) respective

committees were formed by the company with 2(two) Independent Directors in order to oversee the audit, remuneration and nomination of the Directors etc. On 27.08.2022 one of the independent directors namely Md. Akram Hossain tendered his resignation. Since the company ought to have at least 2(two) Independent Directors, as stipulated vide clause 1(2) (a) of the said Code of 2018, in its meeting dated 17.08.2022 the company appointed the petitioner No.1 of Writ Petition No.3912 of 2023 as the Independent Director. In the said Board meeting, said petitioner was unanimously elected as the Chairman of the Board of Directors of the said company in place of the erstwhile Chairman Lt. Col. Md. Anisur Rahman in accordance with the tenets of the Companies Act, 1994 and under the recommendation of the nomination and Remuneration Committee (NRC) of the said company. Accordingly, pursuant to the Notification dated 13.01.2022 issued by the Bangladesh Securities and Exchange Commission (in short, the Commission), the officer concerned of the said company filed an application before the Commission for approval of his appointment as the Independent Director, but to date the respondent concern did not dispose of the same.

Meanwhile, the company filed writ petition No.11946 of 2022 before this Court, challenging the action of the Registrar of Joint Stock Companies in preventing said company to submit necessary documents and thereby to register, record and provide certified copies of the latest returns including Form XII. Having found *prima facie* substance thereto vide order dated 03.11.2022 a Rule Nisi was issued with direction upon the respondents concerned to allow the company to submit documentation/ requisition and to register, record and to provide certified

copies of the latest returns including Form XII. Accordingly, Form XII dated 20.11.2022 (Annexure-C(1)) was duly handed over to the company, endorsing the name of the petitioner No.1 of Writ Petition No.3912 of 2023 as its Chairman and Independent Director respectively.

Meanwhile, the Commission purportedly upon a complaint so made by the added respondent No.4 of Writ Petition No.3912 of 2023, the ex-Chairman and shareholder Director of the company, vide order dated 12.10.2022 constituted a 3(three) members enquiry committee, comprising the Additional Director, BSEC, Assistant Director, BSEC, and Deputy General Manager, Dhaka Stock Exchange to consider the overall affairs of the said company. Pursuant thereto all the directors, including the petitioners of writ petition No.3912 of 2023 were requested to appear personally before the said committee on the respective date with direction upon the Managing Director of the company to furnish necessary information. In response thereof the respective petitioners duly appeared before the said committee. However, during pendency of the enquiry the Commission i.e. respondent No.1 vide order dated 13.12.2022 (Annexure-F4 of Writ Petition No.3912 of 2023) directed the Board of Directors of the company to resolve their disagreements amicably by 31.12.2022 and to run the company smoothly. If failed, it might take appropriate action against the company for the greater interest of all the stakeholders particularly for the investors.

At this juncture, on 22.03.2023 (Annexure-A of Writ Petition No.3912 of 2023) all on a sudden, the respondent No.1 under the signature of the respondent No.2 directed the company purportedly under Section 20A of the Securities and Exchange Ordinance, 1969 (in short,

the Ordinance, 1969) to restructure its existing Board of Directors upon replacing its Independent Directors namely Md. Akram Hossain, Shah Md. Asad Ullah (the petitioner No.2 of Writ Petition No.3912 of 2023), Sharif Shahidul Islam and Major General (Retd.) Md. Sarwar Hossain (petitioner No.1 of Writ Petition No.3912 of 2023) with the following 5(five) individuals as Independent Directors namely:

- i) *Lt. General (Retd.) Sheikh Mamun Khaled, PhD, as the Chairman of the Board of Directors;*
- ii) *Mr. Shobod Deb Nath. PhD. Associate Professor, University of Dhaka*
- iii) *Mr. Kawser Ahmed, Partner, the Zurist, Dhaka;*
- iv) *Dr. Md. Abdul Kaium, Associate Professor, University of Barishal; and*
- v) *Abid Al Hasan, Business Entrepreneur.*

Being aggrieved by and dissatisfied with the respective petitioners have filed the instant writ petitions and obtained the present Rules Nisi.

The respondent No.1 entered appearance by filing affidavit-in-opposition stating, *inter-alia*, that pursuant to receiving complaints so made by the ex-Chairman and shareholder Director of the company the Commission vide order dated 12.10.2022 conducted an enquiry on the overall state of affairs of the company in exercise of power as conferred under Section 21 of the Ordinance, 1969 read with Section 17A of the Bangladesh Securities and Exchange Commission Act, 1993(Act No. XV of 1993) (in short, the Act, 1993).

However, during the course of enquiry the committee, while conducting physical inspection, scrutinizing relevant documents, interviewing relevant parties including the Board of Directors, Company Secretary, Chief Financial Officer, Auditor and Banker of the company, found downward trend both in profitability and operational efficiency of

the company. It also found inconsistency in the procedures of appointment of the new Chairman, (the petitioner No.1 of writ petition No.3912 of 2023), for, in the respective Board meeting there was no agenda on the said issue. The Expression of Interest was presented by the Managing Director of the company in the said meeting abruptly. Moreover, the committee also found that 2(two) directors of the Board namely Mr. Sharif Shahidul Islam and Mr. Hafizur Rahman were nominated by M/S Excel Farmganic Limited, whereas as on 30.09.2022 said company was holding only 2.36% share of the company; hence, had occasioned violation of BSEC notification dated 21.05.2019 by not maintaining the minimum number of shares for electing respective directors.

Anomalies were also detected by the enquiry committee leading to possible embezzlement of money. There were attempts to taint and misrepresent the financial statements. Severe negligence was also found in the audit process conducted by the appointed audit firm of the company. The enquiry committee also found that the shares held by Mr. Siddiquir Rahman, Mrs. Mahfuza Rahman, Mr. Niaz Rahman Sakib, Mr. Ishtiaque Rahman Imran and Mr. Md. Insan Ali Sheikh were, in fact, held by PK Halder, who is a fugitive and wanted in Bangladesh for embezzlement of more than 102 billion taka.

Said committee further detected that on 20.06.2019 in the meeting of the Board of Directors of the company Md. Siddiquir Rahman was appointed as the Chief Advisor of the company and on the same date resolutions were adopted by the company assigning him to operate the respective bank accounts of the company singly and without any limit. In

this regard, it was informed by the company that said. Md. Siddiquir Rahman, the Advisor of Simtex Industries Ltd. resided in Europe. Since Md. Siddiquir Rahman was staying outside the country and that he had been implicated in criminal cases lodged by the Anti-Corruption Commission relating to money laundering thus, created suspicion on the operation of the respective bank accounts singly by him and without any limit.

Moreover, in the audit report of the company for the year ended in June, 2021 it had been stated, *inter-alia*, that maximum payments against purchase and expenses (except import purchase) had been incurred in cash instead of A/C payee cheque or bank transfer. During the said period total withdrawal from bank was Tk.488,302,294.00 in which Tk. 279,903,940.00 had been incurred in cash, which goes to indicate non-compliance of the provisions of Income Tax Ordinance, 1984. Apart from other evidences of embezzlement of money the company had failed to provide any vouchers or supporting documents relating to payments amounting to Tk. 26,852,343.00.

Moreso, the Anti-Corruption Commission lodged Metro Special Case No. 03 of 2020 corresponding to Anti-Corruption G.R. No. 03 of 2020 under Section 27(1) of the Anti-Corruption Commission Act, 2004 read with Section 4(2) of the Anti Money Laundering Act, 2012 against PK Haldar along with Md. Siddiquir Rahman, his wife, and two sons; namely, Neaz Rahman Shaqib (current Managing Director of Simtex Industries Ltd.) Istiaq Rahman Imran and his brother Md. Ensan Ali Sheikh. Subsequently, the concerned court had ordered to freeze the respective shareholding of the company by those persons. Apart from that

vide a separate order, the court had also imposed foreign travel ban on Md. Siddiqur Rahman and his wife Mrs. Mahfuza Rahman.

Considering the above context, the enquiry committee made following recommendations on the steps the Commission might undertake to operate the company efficiently and improve its performance in compliance of the relevant laws and rules of the regulatory authority, which are quoted as under:

- “a. As anomalies found in the removal and appointment of the chairman, the committee recommends to regularize the changes of the Board of Simtex Industries Limited;*
- b. As two directors, Mr. Sharif Shahidul Islam and Mr. Md. Hafizur Rahman, are nominated by M/S Excel FARMGANIC Limited against 2.36% share, the Committee recommends their directorship to be vacated immediately as per BSEC Notification No. BSEC/CMRRCD/ 2009-193/217/Admin/90 dated 21 May 2019;*
- c. The Committee recommends for appointment of two new Independent Directors with the guidance of BSEC, in place of Mr. Md. Akram Hossain and Mr. Shah Md. Asadullah, who will also chair the Audit and NRC committees;*
- d. The sponsors and directors against whom ACC filed lawsuits may stay on the Board to fulfill the regulatory 30% shareholding but may be abstain from holding the position of Managing Director, Chairman of the Board or any committee till the issue is resolved;*

- e. *Signing authority of the Advisor, Mr. Md. Siddiquir Rahman, shall be vacated immediately till the issue of the ACC law suits is resolved;*
- f. *The Committee recommends dual signatory in all cases, one from the Independent Directors appointed as per guidance of BSEC and other from remaining directors and top officials of SIMTEX;*
- g. *As mismatch found (possible embezzlement) in the information submitted by SIMTEX and that of vendors on a sample basis during enquiry, the Committee recommends necessary legal actions including financial penalty against the Board of Directors, sponsors, and top management of SIMTEX as well as necessary steps to refund the embezzled fund to the company account through a Special Audit and necessary proceedings;*
- h. *Taking disciplinary measures against the Board of Directors, Company Secretary and Simtex Limited for not maintaining provisions of laws;*
- i. *The Committee found misrepresentation of financial statements thus recommend to conduct a Special Audit;*
- j. *The Committee recommends to strengthen the internal control and financial reporting of SIMTEX by implementing the recommendations of auditors;*
- k. *As negligence found in the auditing process, the Committee recommends to forward the matter to Financial Reporting Council (FRC) to take necessary action against the auditor Pinaki & Co.”*

In this regard, it has also been averred that the Board of Directors of the said company was reconstituted replacing 2 (two) Independent Directors and 1(one) nominee Director from the Board of the company with 5(five) new Independent Directors in their place. However, said reconstruction of the Board of Directors by the Commission was nothing but a routine work and it was done solely to protect the interest of general investors and shareholders and to ensure that the company operates efficiently, improve its performance and comply with the relevant laws and rules of the regulatory authority. For the said reason the application filed by the petitioner No.1 of writ petition No.3912 of 2023 to the Commission was put to halt considering the welfare of the company and the interest of the general investors and to avoid legal complexities within the management of the company. Hence, it cannot be construed that the impugned directive is tainted with illegality.

In view of the averments so made in the respective writ petitions and the affidavit in reply to the affidavit in opposition, filed in those writ petitions Mr. Ahsanul Karim, the learned Senior Advocate appearing with Mr. Shah Manjurul Hoque, the learned Senior Advocate and Mr. M. Sayed Ahmed, the learned Senior Advocate in all the 3(three) writ petitions conjointly submit that the respondent No.1 issued the impugned Directive No.BSEC/CFD/48/2016/1428 dated 22.03.2023 under the purported authority emanated from Section 20A of the Ordinance, 1969 which empowers the said respondent to issue such directions to the respective issuer, if it deems fit for the interest of investors. However, he submits, said authority, which has stemmed from Section 20A of the Ordinance, does not extend to restructuring the Board of Directors of an

issuer. Thus, it is apparent that the Commission while issuing the said impugned Directive has transgressed the authority as provided under Section 20A of the Ordinance, 1969.

He further submits that from the list of the newly appointed Independent Directors it is manifested that the respondent No.1 hand-picked the said individuals, whereas their individual qualifications are not impressed upon the company. In this regard, he goes to contend that in order to exercise power under Section 20A of the said Ordinance, 1969 it is imperative that any direction issued by the respondent No.1 must satisfy the test whether such direction would serve the interest of the investors. In the present case, he submits, the Commission appears to have chosen the individuals preferred by it, which exhibits a clear *malafide* intention on its part to harness an authority over the company. Said narcissist practice shall bring forth devastating result for the company as well as the investors associated therewith.

He also submits that vide the impugned Directive the Commission has removed the petitioners of writ petition No. 3912 of 2023 from the Board; such exclusion is repugnant to Corporate Governance Code, 2018 since clause 1(2)(e) of the said Code delineates that the tenure of the independent directors would be 3(three) years and that the term of the petitioner No.1 will expire on 17.08.2025 and petitioner No.02 on 07.10.2024 respectively. As such, he goes to contend in the absence of any specific reason to exclude the independent directors before expiry of their respective tenure, is not only an utter violation and disregard of the said provisions but also, a flagrant violation of the relevant laws and tenet of natural justice.

He again submits that Corporate Governance Code, 2018 has been framed by the respondent No.1 vide Notification No. BSEC/CMRRCD/2006-158/207/Admin/80 dated 03.06.2018 under Section 2CC of the Ordinance, 1969, which was enacted with the view to enhance corporate governance in the interest of investors and the provisions thereof are mandatory on all the listed companies. In this regard, he goes to argue that condition No.1(2)(a) of the Code clearly mandates that at least one-fifth (1/5) of the total number of directors in the Board shall be Independent Directors and any fraction thereof shall be considered to the next integer or whole number for calculating number of Independent Director. However, the manner of restructuring, as imposed and dictated by the respondent No.1, he submits, would form a Board of Company where there will be in total 7(seven) directors, out of which 5(five) will be Independent Directors; whereas vide condition No. 1(2)(a) a Board of 7(seven) members requires to have 2(two) Independent Directors. Hence, the respondent No.1 is acting in contravention to the Code by issuing the said impugned Directives.

He also submits that clause 1(2)(c) of the Code mandates that the Independent Directors shall be appointed by the Board and approved by the shareholders in the Annual General Meeting and hence, it is patently obvious that the privilege of appointing or excluding the Independent Directors lie with the general shareholders. However, by issuing the impugned Directive, the Commission most illegally got into the shoes of the shareholders and exercised an authority by excluding the petitioners, which by law is for the shareholders to exercise.

He further submits that clause 1(4)(c) of the Code mandates that the Chairperson of the Board shall be elected from among the non-executive directors of the company and therefore, it clearly transpires that the Chairman of the Board shall be 'Elected' as opposed to be 'Selected'. Accordingly, the petitioner No.1 of writ petition No. 3912 of 2023 was elected from the non-executive directors of the company. However, vide the impugned Directive the Commission did not only pick and choose the individuals, but also selected the Chairman in the place of an elected Chairman, i.e., the petitioner No.1; hence, is a blatant defiance of the Corporate Governance Code and the precepts of Company Law.

He again submits that Section 20A of the Ordinance, 1969 albeit clothed the Commission with the discretion to issue a direction, but such discretion is not unfettered and shall be exercisable only if the same is beneficial to the interest of the investors. In the present context, he submits, the Commission without predicating on any enquiry report and without being satisfied as to what interest of the investors would be protected if the petitioners of writ petition No. 3912 of 2023 are excluded from the Board, arbitrarily issued a direction for restructuring the Board on the basis of its own whim. Moreover, it has not been demonstrated anywhere in the impugned Directive as to how the exclusion of the petitioners of writ petition No.3912 of 2023 might benefit the investors.

Lastly, he submits that under the existing management, the company is progressing at a substantial rate and in 2022, the company has declared 8% cash dividend to its investors and is a 'B' Category company. Moreso, the company is duly compliant of all the relevant laws including the laws of Securities and Exchange. In spite of that the Commission has

been scheming to beleaguer the business of the company by practicing malicious and fraudulent action in restructuring the capable management of that company.

In view of the above legal position of facts as well as laws, he submits, the impugned Directive No. BSEC/CFD/48/2016/1428 dated 22.03.2023 issued by the respondent No.1 directing the company to restructure its existing Board of Directors by excluding the respective Independent Directors, is liable to be declared to have been issued without lawful authority and hence, of no legal effect.

Mr. A.M. Masum, the learned Senior Advocate appearing on behalf of the respondent No.1 by filing separate sets of affidavit-in opposition in all the 3(three) writ petitions submits that the preamble of both the Securities and Exchange Ordinance, 1969 as well as Bangladesh Securities and Exchange Commission Act, 1993 explicitly reflects the intention of the Legislature by stating, *inter-alia*, that the Ordinance as well the Act, 1993 have been enacted to provide protection to the interest of the investors and to regulate capital market and that keeping in view of the greater interest of the investors holding 56.19% share of the company in question the impugned order has been issued by the Commission.

He also submits that vide Section 8 of the Act, 1993 the functions of the Commission, amongst others, are to ensure proper issuance of securities, protect the interest of the general / vulnerable investors in securities, develop and regulate the capital market, regulate the business of stock exchange or any securities market, prohibit fraudulent and unfair business relating to securities, and regulate the activities of clearing corporation established for settlement of transaction of securities.

In this regard, he goes to argue that it is the settled principle that if the words are explicit, certain and unambiguous, then there is no safer guide than those words themselves which are to be construed in their ordinary and natural sense and they do, in the said circumstances, best declare the intention of the law-giver. Moreover, when the language of the statute is plain and unambiguous, the court must give effect to the words used in the statute irrespective of the consequences and it must be enforced though the result may be seen to be harsh, unfair or inconvenient. It would not be open to the court to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

Accordingly, he submits that Section 20A of the Ordinance, 1969 provides the Commission with unfettered discretion to issue directives to any stock exchange, stock broker, stock dealer, issuer or investor or any other person associated with the capital market if it deems necessary so to do in the interest of the investors or for the development of security market. Vide the said provision of law the Commission being the primary regulator has the absolute authority with a *non-obstante* clause to take any decision whatsoever and that includes restructuring the Board of Directors with a view to safeguarding the interest of the general investors and shareholders of the respective company.

He further submits that in view of Section 21 of the Ordinance, 1969 the Commission may, on its own motion, cause an enquiry to be made by any person appointed in this behalf into- (a) the affairs of any stock exchange, or of any issuer of a listed security; or (b) the business or any transaction in securities by any member, director or officer of a stock

exchange or of an issuer, or of a director or an officer thereof, or by any person. As such, he submits that no violation of law was committed by the respondent No.1 by passing necessary order to enquire into the overall affairs of the company by forming an enquiry committee. Even, he submits, under Section 85(3) of the Companies Act, 1994 the Company Court is empowered to reconstruct the Board of Directors of the company to protect the interest of the company. In this connection, he goes to contend that the individuals who have been appointed as Independent Directors in the company have no nexus with any of the previous directors of the company; they are independent and impartial. Moreover, the 5 (five) Independent Directors are dignified personalities with good educational qualifications and have unblemished track record in their respective arenas.

He again goes to argue that the basic object of the appointment of Independent Director is to ensure good corporate governance in the company and they are of special importance in setting and maintaining standards of corporate governance within the company. Moreover, the Independent Directors are those who, apart from receiving director's remuneration do not have any material interest or pecuniary relationship or transaction with the company, its promoters, its management or its subsidiaries. The Corporate Governance Code, 2018 does not encourage such nexus which might affect their independence of judgment.

Further he submits, the appointment or withdrawal of Independent Directors are done on a routine basis in order to facilitate companies like the instant company to ensure good governance within the management and to retrieve confidence amongst the investors. The respondent No. 1

has nominated qualified and experienced Independent Directors vide the impugned directives dated 22.03.2023 for which the petitioners cannot be said to have been aggrieved.

He also submits that the clause 1(2)(a) of the Code issued vide notification dated 03.06.2018 does not make embargo upon the Commission to nominate Independent Directors more than 1/5th ratio. The nomination of Independent Directors in 1/5th ratio is just an explicit numerical rule, not a mandate and therefore, the respondent No. 1 vide its Directive dated 22.03.2023 has rightly reconstituted the Board of Directors by appointing 5 (five) Independent Directors in exercise of power as conferred under Section 20A of the Ordinance, 1969.

He further submits that from record it is apparent that the company in question failed to act upon the suggestions and recommendations placed by the Commission in the minutes of the meeting held on 07.12.2022 in the presence of the respective officials of the company in order to ensure greater interest of all stakeholders by settling internal dispute which in due course led the respondent No. 1 to restructure the existing Board of Directors vide the impugned Directives dated 22.03.2023 under Section 20A of the Ordinance, 1969.

He also submits that the respondent No. 1 is empowered to exercise exclusive power to nominate or appoint or even withdraw the Independent Directors for the sole interest of the shareholders and for the larger interest of the capital market. In this regard, he submits that it is the settled principle that the terms "*Equality before law*" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which

they are placed or special qualities and characteristic which some of them may possess but which are lacking in others. The Legislature while proceeding to make law with certain object in view, which is either to remove some evil or to confer some benefit, has power to make classification on reasonable basis; hence, on the basis of the principle enunciated above, it cannot be said that the impugned Directive is discriminatory and violative of the rights of the petitioners guaranteed under Article 27 and 29 of the Constitution as the impugned Directive was issued solely to ensure good governance to protect the interest of the shareholders of the company in question who hold collectively 56.19 % shareholdings.

He also submits that vide Article 40 of the Constitution reasonable restriction can be imposed on person's entering upon any lawful profession or occupation and to conduct any lawful trade or business. The impugned Directive is solely directed as a routine work of the respondent No.1 being the primary regulatory body to safeguard the interest of the investors and to ensure good governance within the management of the company, not to hamper the day to day operation of the same. As such, it cannot be said that the impugned Directive has infringed the fundamental rights of the petitioners in any manner whatsoever.

He lastly submits relying upon the quotes of Justice P.N. Bhagwati so made in a landmark case of *National Textile Workers Vs. P.R. Ramkrishnan and others* reported in *AIR 1983(SC)-75*

"...the traditional view that the company is the property of the shareholders is now an exploded myth. There was a time when a group controlling the majority of shares in a company used to say: "This is our concern. We can do what we like with it." The ownership of the concern was identified with those who brought in capital. That was the outcome of the property-minded capitalistic

society in which the concept of company originated. But this view can no longer be regarded as valid in the light of the changing socio-economic concepts and values” he further stated that “Today social scientists and thinkers regard a company as a living, vital and dynamic, social organism with firm and deep-rooted affiliations with the rest of the community in which it functions. It would be wrong to look upon it as something belonging to the shareholders. It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors, which contributes to the production of national wealth. There is another equally, if not more, important factor of production and that is labour. Then there are the financial institutions and depositors, who provide the additional finance required for production and lastly, there are the consumers and the rest of the members of the community who are vitally interested in the product manufactured in the concern. Then how can it be said that capital, which is only one of the factors of production, should be regarded as owner having an exclusive dominion over the concern, as if the concern belongs to it? A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities towards the community in which it functions”.

Accordingly, he submits that all these Rules being devoid of any substance are liable to be discharged.

Mr. Sabbir Hamza Chowdhury, the learned Advocate appearing on behalf of the added-respondent No.4 in writ petition No.3912 of 2023 and added respondent No.7 in writ petition No.4644 of 2023 by filing separate sets of affidavit-in-opposition adopts the respective arguments so have been advanced on behalf of the respondent No.1 and hence, prays for discharging the respective Rules Nisi .

The moot question requires to be resolved in the instant Rules Nisi is whether the Commission is empowered under Section 20A of the Securities and Exchange Ordinance, 1969 to restructure the Board of Directors of the company in question, the issuer, upon excluding the Chairman who is also an Independent Director, 1(one) nominee Director and 2(two) Independent Directors and replacing them with 5(five) other

Independent Directors with direction, amongst others, that the restructured Board of Directors of the issuer shall elect the concerned Independent Director as being the Chairman of the Board.

Before we enter into the merit of the Rules let us first have a look at the relevant provisions of law.

In order to provide for the protection of investors, regulations of capital markets and issue and dealings in securities and for matters ancillary thereto the Securities and Exchange Ordinance, 1969 (Ordinance No. XVII of 1969) (in short, the Ordinance) has been promulgated giving effect from the date of publication in gazette.

Section 20A of the Ordinance, 1969, which has been inserted by the Securities and Exchange (Amendment) Act, 2000, empowers the Commission to issue, in writing, any direction, as it deems fit, to any Stock Exchange, stock broker, stock dealer, issuer or investor or any other person associated with the capital market if it is satisfied that in the interest of investors or securities market or for the development of securities market it is necessary so to do. However, vide Securities and Exchange Commission (Amendment) Act, 2012 (Act No. 46 of 2012) upon inserting the clause/words “*notwithstanding anything contained in any other law for the time being in force*” in Section 20A said provision has been given overriding effect to any other law for the time being in force.

Section 20A of the Ordinance, 1969 runs as under:

“[Notwithstanding anything contained in any other law for the time being in force, where] the Commission is satisfied that in the interest of investors or securities market or for the development of securities market it is necessary so to do, it may, by order in

writing, issue such directions as it deems fit to any Stock Exchange, stock broker, stock dealer, issuer or investor or any other person associated with the capital market.]

However, vide Section 21 of the Ordinance, 1969 read with Section 17A of the Bangladesh Securities and Exchange Commission Act, 1993 (in short, the Act, 1993) the Commission is empowered to cause an enquiry into the affairs of the Stock Exchange or of any issuer of a listed security or into the business or any transaction in securities by any member, director or officer of a Stock Exchange or of an issuer or of a director or officer thereof or by any person.

Section 21 of the Ordinance, 1969 and Section 17A of the Act, 1993 are accordingly reproduced herein below for ready reference.

“21. Enquiry.- (1) The Commission may, on its own motion or, in the case of the issuer of a listed security, on representation of holders of not less than ¹[five per cent] of equity securities at any time by order in writing, cause an enquiry to be made by any person appointed in this behalf into-

(a) the affairs of any Stock Exchange, or of any issuer of a listed security; or

*(b) the business or any transaction in securities by any member, director or officer of a Stock Exchange or of an issuer, or of a director or an officer thereof, or by any person ²[***].*

³[(2) Where an enquiry under sub-section (1) has been undertaken, every member, director, manager or other officers of the Stock Exchange or the issuer to which or to whose member, director, auditor or officer of the enquiry relates, an insurance company as defined in the Insurance Act, 2010, a bank, a financial institution as defined in the Financial Institutions Act, 1993, and every other person considered by the person conducting the enquiry to be capable of providing information which is, or may be relevant to

that enquiry, shall furnish such information as the person conducting the enquiry may require.

(2a) Notwithstanding anything contained in any other law for the time being in force in conducting enquiry under sub-section (1), the Commission, keeping the Bangladesh Bank informed, may seek information regarding bank account from any bank, or any financial institution or organization, as the case may be, so far as it relates to the transaction of security.]

(3) The person conducting an enquiry under sub-section (1) may, for the purpose of such enquiry, enter into any premises belonging to or in the occupation of the Stock Exchange or the issuer or of the person to whom the enquiry relates, and call for and inspect and seize books of accounts or documents in the possession of any such Stock Exchange, issuer or person.

(4) The person holding an enquiry under sub-section (1) shall, for the purpose of such enquiry have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely:-

(a) enforcing the attendance of a person and examining him on oath or affirmation;

(b) compelling the production of documents;

(c) issuing commissions for the examination of witnesses; and any proceedings before such person shall be deemed to be “judicial proceeding” within the meaning of sections 193 and 228 of the ⁴[* *] Penal Code (Act XLV of 1860).

⁵[(5) The Commission may recover any expense incurred for an enquiry under this section from the person or the institution against whose affairs, business or transaction, as the case may be, the enquiry was conducted or, where the Commission considers it to be appropriate, from the holders of securities making the representation.]”

“17A. Conducting Inspection or Enquiry: –

(1) The Commission may inspect or enquire the affairs of any person mentioned in sub-section (1) of section 10.

(2) A person or a committee consisting of more than one person empowered by the Commission, may conduct inspection or enquiry in order to fulfill the objectives of sub-section (1) and shall submit the enquiry report to the Commission.

(3) The person under inspection or enquiry shall be bound to submit all necessary information and documents to the enquiry officer or enquiry committee constituted under sub-section (2).”

In the instant case, it appears from record that pursuant to the complaint so made/lodged by the ex-Chairman and shareholder Director of the company the Commission vide order dated 12.10.2022 formed an enquiry committee of 3(three) members in exercise of power as provided under Section 21 of the Ordinance read with Section 17A of the Ain, 1993 with copy to the petitioner company to enquire on the overall affairs of the said company and to submit report thereof within a prescribed period. It further appears from record (Annexures- F-1 to F-3 of writ petition No. 3912 of 2023) that during the course of enquiry respective personnel including the present Chairman of the company along with another were called upon to remain present before the said committee on the respective date. It also appears from Annexure-F-4 of writ petition No.3912 of 2023 that pending disposal of the said enquiry the Commission itself convened a meeting on 07.12.2022 with the present Chairman of the petitioner Company (an Independent Director), ex-Chairman (shareholder Director) of the said company, the Managing Director, Chief Financial Officer and others and ultimately, took the following decision:

“The Board of the Directors of the company (SIL) are suggested to resolve the issue mutually by December 31, 2022 to run the Company (SIL) smoothly. In case of failure in doing so, the

Commission may take appropriate action against the Company (SIL) for the greater interest of the all stakeholders particularly for the investors.

The Board of the Directors of the Company are also requested to intimate the Commission regarding the progress of the issue by December 18, 2022; and

The Company (SIL) is asked to ensure governance in doing business.”

It is, thus, apparent that the Commission endeavoured to mitigate the dispute with the respective personnel of the company in question with the sole object to run the company smoothly with specific direction upon it that in case of its failure to resolve the dispute by 31.12.2022 the Commission might take appropriate steps against the company for the greater interest of all the stakeholders particularly in the interest of the investors.

The company, however, has failed to show from documents that it was able to resolve the dispute amicably within the said prescribed period. On the face of the said failure of the company meanwhile the enquiry committee submitted its report before the Commission on 10.01.2023 (Annexure-2 of the affidavit-in-opposition filed by respondent No.1 in writ petition No.3912 of 2023) for perusal and for doing the needful. Ultimately, the Commission vide the impugned order dated 22.03.2023 (Annexure-A of Writ Petition No.3912 of 2023) had replaced 3(three) Independent Directors including the Chairman and 1(one) nominee Director with 5 (five) Independent Directors, which is under challenge.

In view of the above backdrop, the question now crops up for consideration is, what is the legal standing of an Independent Director in a company listed in the stock market.

In order to enhance corporate governance in the interest of investors and the capital market the Commission deemed it fit that the companies who are listed with the stock exchange in Bangladesh shall be subject to certain conditions. i.e., Corporate Governance Code (in short, the Code). In that view of the matter, the Commission in exercise of power as provided under Section 2CC of the Securities and Exchange Ordinance, 1969 had imposed respective conditions in the name and style “*Corporate Governance Code*” by publishing in gazette on 10.06.2018 (Annexure-G of Writ Petition No. 3912 of 2023). However, the companies listed with the respective stock exchange in Bangladesh shall comply with those conditions or Code in accordance with condition No.9 i.e. to obtain certificate to that effect from the personnel concerned on yearly basis and said certificate shall be disclosed in the annual report. In other words, said Code has force of law meant to be complied with by the respective company listed with the stock exchange.

The concept of ‘*Independent Director*’ has been introduced by the Commission as an integral part of the Code:

- (1) *who, amongst other, does not hold any share in the company or holds less than 1% shares of total paid up shares of the company;*
- (2) *who is neither a sponsor of the company nor is connected with the sponsor or director or nominated director or shareholder of the company or any of its associates, sister concerns, subsidiaries and parents or holding entities who holds 1% or more shares of the total paid-up shares of the company on the basis of family relationship;*
- (3) *who does not have any other relationship, whether pecuniary or otherwise, with the company or its subsidiary or associated company; and*

(4) who is not a member or Trading Right Entitlement Certificate (TREC) holder, director or officer of any stock exchange;

In this regard, condition No. 2(a) and (b) are accordingly quoted below for ready reference.

“(2) Independent Directors

All companies shall have effective representation of independent directors on their Boards, so that the Board, as a group, includes core competencies considered relevant in the context of each company; for this purpose, the companies shall comply with the following:-

(a) At least one-fifth (1/5) of the total number of directors in the company’s Board shall be independent directors; any fraction shall be considered to the next integer or whole number for calculating number of independent director(s);

(b) For the purpose of this clause "independent director" means a director-

(i) who either does not hold any share in the company or holds less than one percent (1%) shares of the total paid-up shares of the company;

(ii) who is not a sponsor of the company or is not connected with the company's any sponsor or director or nominated director or shareholder of the company or any of its associates, sister concerns, subsidiaries and parents or holding entities who holds one percent (1%) or more shares of the total paid-up shares of the company on the basis of family relationship and his or her family members also shall not hold above mentioned shares in the company:

Provided that spouse, son, daughter, father, mother, brother, sister, son-in-law and daughter-in-law shall be considered as family members:

(iii) who has not been an executive of the company in immediately preceding 2 (two) financial years;

- (iv) who does not have any other relationship, whether pecuniary or otherwise, with the company or its subsidiary or associated companies;*
- (v) who is not a member or TREC (Trading Right Entitlement Certificate) holder, director or officer of any stock exchange;*
- (vi) who is not a shareholder, director excepting independent director or officer of any member or TREC holder of stock exchange or an intermediary of the capital market;*
- (vii) who is not a partner or an executive or was not a partner or an executive during the preceding 3 (three) years of the concerned company's statutory audit firm or audit firm engaged in internal audit services or audit firm conducting special audit or professional certifying compliance of this Code;*
- (viii) who is not independent director in more than 5 (five) listed companies;*
- (ix) who has not been convicted by a court of competent jurisdiction as a defaulter in payment of any loan or any advance to a bank or a Non-Bank Financial Institution (NBFI); and*
- (x) who has not been convicted for a criminal offence involving moral turpitude; ”*

Moreover, the Independent Director shall be a knowledgeable individual with integrity who is able to ensure compliance with financial laws, regulatory requirements and corporate laws and can give meaningful contribution to the business, as has been prescribed under condition No.1(3)(a).

Condition No. 1(3)(b) provides the respective qualifications of an Independent Director, which are quoted as under:

“(3) Qualification of Independent Director.-

(a)

(b) Independent director shall have following qualifications:

(i) Business Leader who is or was a promoter or director of an unlisted company having minimum paid-up capital of Tk.

100.00 million or any listed company or a member of any national or international chamber of commerce or business association, or

(ii) Corporate Leader who is or was a top level executive not lower than Chief Executive Officer or Managing Director or Deputy Managing Director or Chief Financial Officer or Head of Finance or Accounts or Company Secretary or Head of Internal Audit and Compliance or Head of Legal Service or a candidate with equivalent position of an unlisted company having minimum paid-up capital of Tk. 100.00 million or of a listed company; or

Explanation: Top level executive includes Managing Director (MD) or Additional or Deputy Managing Director (AMD or DMD), Chief Executive Officer (CEO), Chief Operating Officer (COO), Chief Financial Officer (CFO), Company Secretary (CS), Head of Internal Audit and Compliance (HIAC), Head of Administration and Human Resources or equivalent positions and same level or ranked or salaried officials of the company.

(iii) Former official of government or statutory or autonomous or regulatory body in the position not below 5th Grade of the national pay scale, who has at least educational background of bachelor degree in economics or commerce or business or Law, or

(iv) University Teacher who has educational background in Economics or Commerce or Business Studies or Law; or

(v) Professional who is or was an advocate practicing at least in the High Court Division of Bangladesh Supreme Court or a Chartered Accountant or Cost and Management Accountant or Chartered Financial Analyst or Chartered Certified Accountant or Certified Public Accountant or Chartered Management Accountant or Chartered Secretary or equivalent qualification;”

However, while fixing the size of the Board of Directors vide condition No. 1(1) to be not less than 5 and not more than 20, the Commission has stipulated that at least $\frac{1}{5}$ of the total number of directors in the Board of the Company shall be independent directors for their

effective representation who are to maintain independence and transparency so that the Board of the company gains competencies in smooth running of the said company.

Condition Nos. 1(1) and 1(2) (a) are quoted as under:

“1. Board of Directors-

(1) Size of the Board of Directors

The total number of members of a company's Board of Directors (hereinafter referred to as “Board”) shall not be less than 5(five) and more than (20).

(2) Independent Directors

(a) At least one-fifth (1/5) of the total number of directors in the company's Board shall be independent directors; any fraction shall be considered to the next integer or whole number for calculating number of independent director(s);”

From the above quoted provisions of the Code the intention of its framers becomes abundantly clear that the Independent Directors being appointed by the Board of Directors of the company listed with the respective stock exchange in Bangladesh are to maintain their independent entity and impartiality. Except receipt of remuneration for the services they have rendered they do not have any connection whatsoever with the sponsor, or director or nominated director or shareholder of the said company or its associates or sister concern nor can they be shareholders or directors of the said company, or have any interest whatsoever in the company whether pecuniary or otherwise.

In other words, the Commission while fixing up the criterion for appointment of Independent Director has drawn a clear line of demarcation between the management of the company and the Independent Director so that said director is able to take independent,

unbiased and impartial decision without being influenced, with a view to smooth running of the company, ensure good corporate governance within the respective company and also, to protect the greater interest of the investors of the said company.

However, vide condition No. 1(2)(c) the Independent Director shall be appointed by the Board of the company and approved by the shareholders in the Annual General Meeting. In addition thereto, the respective company shall apply to the Commission for approval regarding appointment or re-appointment of the Independent Director in the Board of Directors of the company, as is required vide Notification dated 13.01.2022 giving effect from 01.02.2022 issued by the Commission under Section 2CC of the Ordinance, 1969 [Annexure-8(c) of the affidavit-in-opposition filed by the respondent No.1 in Writ Petition No.3912 of 2023].

Relevant part of the said notification dated 13.01.2022 [(Annexure-8(c)] is quoted below:

“..... In compliance with the Corporate Governance Code, 2018 the respective company shall apply to the Commission for approval regarding appointment or re-appointment of the Independent Director in the Board of Directors of the company through the Commission’s Online Regulatory Submission Form for Independent Directors (weblink-www.sec.gov.bd).

This shall be effective from 1st February, 2022”

Moreover, according to condition No. 1(2)(e) the tenure of the office of the Independent Director shall be for a period of 3(three) years, which may be extended for 1(one) tenure only.

In the instant case, the Commission in exercise of power as provided under Section 20A of the Ordinance, 1969 had restructured the Board of the Directors of the company upon excluding 3(three) Independent Directors including the Chairman, who was also an Independent Director and 1(one) nominee Director and had replaced them with 5 (five) Independent Directors including selection of one as the Chairman of the Board.

The question now being posed by the petitioners is that whether said power of the Commission can be extended to restructuring the Board of Directors of an issuer so far replacing the Independent Directors are concerned. In other words, by replacement of the Independent Directors of the company in question whether it can be said to be an aggrieved person within the meaning of Article 102 of the Constitution of the People's Republic of Bangladesh.

As has been observed earlier, with the object, amongst others, to provide for the protection of the investors the Legislature has promulgated Securities and Exchange Ordinance, 1969 as well as Bangladesh Securities and Exchange Commission Act, 1993. However, in order to ensure that protection respective powers have been bestowed exclusively upon the Commission by inserting Section 20A vide the Securities and Exchange (Amendment) Act, 2000 with overriding effect over the other laws for the time being in force. In exercise of that power if the Commission is satisfied that in the interest of the investors, amongst others, necessary direction is required to be given upon the respective issuer it may do so by passing necessary order in writing and that includes replacement of the Independent Directors upon restructuring the Board of

Directors of the respective company which is enlisted with the respective stock exchange, where compulsive necessity so demands.

As referred above, pursuant to the complaint so made by the ex-Chairman and the shareholder Director of the company, the added respondent No.4 of Writ Petition No.3912 of 2023 the Commission in exercise of power as provided under Section 21 of the Ordinance read with Section 17A of the Act, 1993 vide order dated 12.10.2022 (Annexure-F) formed an enquiry committee to enquire on the overall affairs of the company. During the course of enquiry the Commission itself took initiatives to settle the dispute upon convening a meeting on 07.12.2022 with the petitioners of Writ Petition No.3912 of 2023, along with the ex-Chairman, Managing Director and other concerned officials of the said company. Ultimately, pursuant to the decision taken in the said meeting the Board of Directors were suggested to negotiate and resolve the issue mutually by 31.12.2022 in order to running the company smoothly. In case of failure to do so, the Commission might take appropriate action against the company for the *“greater interest of all stakeholders particularly for the investors”*. The company was further asked to ensure good governance in doing business.

The petitioners, however, have failed to show from documents that upon taking due initiatives they have resolved the issue mutually within 31.12.2022 for the greater interest of the investors of the company who are holding 56.19% shares of the company, as has been asserted by the respondent No.1 in its affidavit in opposition.

Meanwhile, the enquiry committee on conclusion of enquiry submitted its report before the Commission on 10.01.2023 (Annexure-2 of

the affidavit-in-opposition filed in Writ Petition No.3912 of 2023) for consideration with recommendations, as quoted above, which ultimately culminated in passing the impugned Directives dated 22.03.2022 (Annexure-A of writ petition No.3912 of 2023) with the restructure of the Board of the company in question.

In this regard, the categorical contention of the petitioners is that prior to restructure of the Board of the company the respondent No.1 ought to have complied with the rules of natural justice. For having not done so makes the impugned order tainted with illegality.

The rules of natural justice, however, have a definite meaning in law and their content are well established. Nonetheless, these rules yields to change with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible, as has been observed in the case of *Union of India vs. Tulsiram (1985) 3SCC 398*.

In the said case further it has been held that the *audi alteram partem* rule can be excluded when a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action; or where the nature of the action to be taken, its object and purpose and scheme of the relevant statutory provision warrant its exclusion; or importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so demands.

Considering the given circumstances of the case, non-compliance of the rules of natural justice prior to issuance of the impugned Directives

cannot be found unlawful. In that view of the matter, question of violation of the respective fundamental rights, as has been alleged by the petitioners, does not arise.

Moreover, the contention of the petitioners as to the numbers of Independent Directors being appointed/nominated by the Commission in violation of condition No.1(2)(a) of the Code, 2018 is not tenable in the eye of law, for, said provision does not put embargo against the Commission to nominate/appoint Independent Directors more than 1/5th ratio, if circumstances demand.

In view of the context as is prevalent in the company it is, thus, apparent that the Commission had exercised its independent supervisory power under Section 20A of the Ordinance by issuing the impugned Directives dated 22.03.2023 (Annexure-A of writ petition No. 3912 of 2023) with the restructure of the Board of Directors of the company so far Independent Directors and one nominee Director are concerned for the sole purpose i.e., for smooth running of the company and for the greater interest of its general investors.

Under the circumstances, the intervention of the Commission under Section 20A of the Ordinance, 1969 is found justified.

However, fact remains that the meeting of the Board of Directors of the company held on 17.08.2022 was chaired by the added respondent No.4 as the Chairman of the company, who is also a shareholder Director of the said company. In the said meeting the appointment of the petitioner No.1 of writ petition No. 3912 of 2023 as Independent Director was accepted by the Board. At the same time, in the said meeting he was also elected as Chairman of the Board since added respondent No.4 expressed

his willingness to resign from the position of both Director and Chairman of the Board (Annexure-D). Subsequently, vide office letter dated 23.08.2022 (Annexure-D2) the company Secretary sought approval of the appointment of the said petitioner in compliance of the notification dated 13.01.20212 (Annexure-D1). However, prior to issuance of the impugned order dated 22.03.2023 (Annexure-A) no decision was given on the said prayer.

As has been observed earlier, the conditions as prescribed under the *Corporate Governance Code, 2018* shall have to be complied with by the company listed with any stock exchange in Bangladesh and that Independent Director, who fulfils the requirements as provided in condition 1(2)(b)(i -x) shall be appointed by the Board and approved by the shareholders in the AGM. In this regard, the petitioner No.1 of writ petition No. 3912 of 2023, however, has failed to show that subsequent to his appointment as Independent Director due approval of the shareholders has been taken by the company in question in the AGM. Conversely, the enquiry report dated 10.01.2023 (Annexure-2) also does not disclose any remark or made any comment that said Independent Director is otherwise disqualified to be appointed for the said post for having not fulfilled the conditions so have been prescribed in condition Nos. 1(2)(b)(i-x) and 1(3).

In the said backdrop, non-compliance of the condition to take approval of the shareholder can be termed as a procedural irregularity, but not an illegality which can go to nullify his appointment by the Board as Independent Director. In that view of the matter, replacing the petitioner No.1 of Writ Petition No.3912 of 2023 with another by appointing him as

the Independent Director as well as with direction upon the company to elect him as the Chairman of the Board, cannot sustain in the eye of law.

With regard to replacing the nominee Director the findings of the enquiry committee is that in view of Bangladesh Security Exchange Commission Notification No. BSEC/ CMRRCD/2009-193/217/Admin/90 dated 21.05.2019 *“Each director other than independent director of any listed company shall hold minimum 2% shares of the paid up capital, otherwise there shall be a causal vacancy of director:*

Provided that any company or instruction shall hold minimum 2% (two percent) shares of the paid-up capital of any listed company for nominating any individual against each position of director, otherwise there shall also be a casual vacancy of the director.”

However, in the Board of the company there were 2(two) nominee Directors nominated by M/S Excel Farmganic Ltd. whereas as on 30.09.2022 said company was holding 2.36% shares in Simtex Industries Ltd., though subsequently, said company claimed to have secured 4% share (Annexure-J1 of the affidavit in reply to the affidavit-in-opposition filed in Writ Petition No.3912 of 2023).

In view of the notification dated 21.05.2019 issued by the Commission, for nominating 2 (two) directors M/S Excel Farmganic Ltd. was required to hold 4% share in the company at the relevant time i.e., on 17.02.2022, the date on which those two nominated directors were appointed. In that view of the matter, excluding or replacing the nominee Director concerned by the impugned order is found lawful.

So far replacing 2(two) other Independent Directors are concerned the enquiry committee itself found from record that one of the

Independent Directors named Md. Akram Hussain had resigned from the Board on 17.08.2022 (Annexure-C1) and his resignation was duly accepted by the Board. Moreover, not a single remark has been made by the said committee whether another Independent Director named Shah Md. Asadullah (petitioner No.2 of writ petition No.3912 of 2023) has failed to comply *Corporate Governance Code, 2018* while discharging his respective duties nor questioned his impartiality or found that he has violated any of the conditions as prescribed under the Code. At the same time, no document has been produced by the company in question to show that after obtaining approval of the shareholders of the company with regard to their appointment as Independent Directors respective prayer had been made by the company before the Commission for their approval.

In the given circumstances, in the absence of any findings of the enquiry committee on their being disqualified to perform their respective duties under condition No. 1(3) of the Code makes the procedure of their appointment as Independent Director irregular or incomplete, but not unlawful.

Consequently, vide the impugned order dated 22.03.2022 (Annexure-A) replacing the Independent Directors named Shah Md. Asadullah along with Md. Akram Hussain, who has already resigned from the Board on 17.08.2022 prior to initiation of the process of enquiry by the Commission, is not tenable in the eye of law.

In view of our above observations since appointment of the petitioner Nos. 1 and 2 of Writ Petition No. 3912 of 2023 is found flawed with procedural irregularity as such, subject to compliance of the

respective conditions as prescribed in the Code of 2018 they are at liberty to apply afresh before the Commission for approval in accordance with law. In that case, the Commission shall pass necessary order on the said prayer in due compliance of law.

In view of the facts and circumstances of the case, the observations and findings so given above and most importantly, for protection of the investors holding 56.19% shares of the company in question the respondent No.1, the Commission is hereby directed to restructure the panel of Independent Directors of the company in question upon considering the prayer of the petitioner Nos. 1 and 2 of writ petition No. 3912 of 2023, if so made in due compliance of law, upon recalling the impugned order dated 22.03.2023 (Annexure-A of writ petition No.3912 of 2023) preferably within a period of 60 days from the date of receipt of the copy of this judgment and order.

With the above, all the Rules in connection Writ Petition Nos.3911, 3912 and 4644 all of 2023 are hereby disposed of without any order as to costs.

Communicate the judgment and order to the respondents concerned at once.

Muhammad Mahbub Ul Islam, J:

I agree.