

LEX/BDHC/0089/2014

Equivalent Citation: 19BLC(2014)456, 2014 34 BLD 650

IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)

Company Matter No. 55 of 2014

Decided On: 11.03.2014

Appellants: **M.A. Quasem**
Vs.

Respondent: **The Registrar of Joint Stock Companies and Firms and Ors.**

Hon'ble Judges:

Rezaul Hasan, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Shah Monjurul Hoque, Advocate

JUDGMENT

Rezaul Hasan, J.

1. This is an application under section 81(2) read with section 83 and 85 of the Companies Act, 1994 (the Act). Let the supplementary affidavit do from part of the substantive application.

2. It has been stated in the petition, amongst other, that the petitioner is the Shareholder-Member of MAQ Paper Industries Ltd, a public company limited by shares and incorporated in the year 1992, having its head office at 141/1, Segunbagicha, Dhaka (henceforth referred to as the Company). It has been listed with the Dhaka Stock Exchange (DSE) in the year 2009 and now it falls under Z-category; that from its incorporation till 2000 the Company had been duly submitting all necessary documents and papers to the concerned authorities, including RJSC, in the result nothing remained pending/due till the FY 1999-2000; that the Company obtained last clearance certificate of submission of minutes of Annual General Meeting (AGM), returns of the share capital and other documents of the Company on 30.08.2001; that the Company could not hold its AGM in time due to unavoidable loss and damage suffered by the Company from fire accidents, change of directorships and members etcetera; that consequently, the Company has failed to submit AGM and Returns of Shares from 2000-2005: that thereafter, Company filed a petition, being Company Matter No. 05 of 2005, before the High Court Division under Section 81(2) read with Section 83 and 85 of the Companies Act, 1994, for condonation of delay in holding those AGMs and also for obtaining permission to submit the reports and returns of shares to RJSC for the years 2001-2005; that when that matter was pending before the Court, the Company was informed by the respondent No. 2 (SEC), vide letter dated 22.08.2005; that it was directed by the Secretary of the concerned Ministry, vide notification dated 6.08.2005 that a recommendation was proposed that for condonation of delay in holding those AGMs and for submitting the same before the RJSC no further permission might be required to be taken from High Court Division: that the respondent was also orally informed earlier that the concerned Ministry and the respondent Bangladesh Securities Exchange Commission (SEC) was under legal obligation to re-consider the matter that whether it was necessary to obtain permission from the High Court Division for condonation of delay in holding AGM and they were trying to find out a solution since June, 2004, which was evident from the letters dated 6.12.2004 and 5.01.2005; that

BSEC sent those letters also to the Company; that therefore, the Company caused default under the instruction of the SEC and the aforesaid company matter was dismissed for default; therefore the Company was requested not to proceed with the pending matter on this issue before the Court; that thereafter the Company kept waiting by the SEC for the final decision, but no such positive decision has yet been given by the SEC. Thereafter, petitioner repeatedly requested the SEC to receive Audited Account Reports, AGM, Returns of Shares and other relevant documents of the Company to the SEC and also sought for its advice; but the BSEC paid no heed thereon; that lastly, the petitioner approached before the RJSC for submitting the AGM, Returns of Shares and other documents of the Company, but BSEC refused to accept the same without having prior permission of the High Court Division.

3. Hence this application for condonation of delay to holding the Annual General Meeting for the years 2001 to 2012.

4. The learned Advocate Mr. Shah Monjurul Hoque, alongwith Ms. Fatema Khatun, appearing for the petitioner, having placed the petition alongwith the documents annexed therewith, submits that the company was incorporated on 27.02.1992, vide certificate of incorporation No. C-21829(236)/96, as a public company limited by shares and that the company is listed with the Stock Exchanges as a 'Z' category company. He further submits that since incorporation till 2000 the company duly held its Annual General Meetings and complied with all legal formalities, but the company could not hold its Annual General Meetings from 2001 to 2012. He also submits that the company filed an petition, being company matter No. 5 of 2005, before the High Court Division under Section 81(2) read with Section 83 and 85 of the Companies Act, 1994, for condonation of delay in holding AGMs and also for obtaining permission to submit AGM and Returns of Shares to RJSC for the years 2001-2005. When that matter was pending before the Court, the Company was informed by the respondent No. 2, BSEC, vide letter dated 22.08.2005 that it was directed by the secretary of the concerned Ministry, vide a notification dated 6.08.2005, that a recommendation was proposed that for condonation of delay in holding AGM and for submitting the same before the RJSC no further permission might be required to be taken from High Court Division. He next submits that, in these circumstance the Company Matter No. 5 of 2005 was dismissed for default. He also submits that thereafter the company was kept waiting by the SEC for its final decision, but no decision has yet been given by the SEC. Thereafter, petitioner repeatedly requested the SEC to receive Audited Account Reports, AGM, Returns of Shares and other relevant documents of the Company to the SEC and also sought for advice; but SEC paid no heed thereon. Lastly, the petitioner approached before the RJSC for submitting the AGM, Returns of Shares and other documents of the Company, but SEC refused to accept the same without having prior permission of the Hon'ble High Court Division. Accordingly, he concludes that there was no willful laches on part of the company in holding the aforesaid Annual General Meetings for the period from 2001 to 2012. He continues that this petition has been filed in good faith and unless the delay occurred in holding the aforesaid Annual General Meetings is not condoned the company as well as the shareholders/members will suffer irreparable loss. On a query from the Bench, as to whether the company is a going concern, the learned advocate has submitted a supplementary affidavit, sworn on 5.3.14, enclosing auditors report for the year ended on 31.12.2012 and submits that the company has been auditing its account on regular basis since 1st January 2001 to 31st December 2012 and, as such, evidently the company is a going concern. At last, based on foregoing facts and circumstances, he has prayed that the entire period of delay in holding the Annual General Meetings for the years from 2001 to 2012 may be condoned and the company may be permitted to hold its AGM for the aforesaid years.

5. No one appeared to oppose the application, even the SEC although it is respondent No. 2 and the petition contains certain statements about it.

6. I have heard the learned advocate, perused the petition and the documents annexed therewith.

7. Admittedly, the company was incorporated in the year 1992. It has been stated that till 2000 the company has held each Annual General Meeting without any default. Thereafter, as stated in the petition, the company could not hold its Annual General Meetings from for the years 2001 to 2012 for the reasons as stated in the substantive petition and as explained in the course of submission of the learned advocate for the petitioner. Hence, these are not needed to be repeated. Be that as it may, admittedly the company could not hold its Annual General Meetings for the years 2001 to 2012 and filed this petition for condonation of delay in holding those Annual General Meetings. The petitioner has submitted an audit report ended as at December 30th 2012 to show that it is a going concern and has been regularly auditing account its since 2001.

8. In this connection, I have taken for consideration section 210 of the Companies Act, 1994 that reads as follows:

"210. **Appointment and remuneration of auditors-** (1) Every company shall, at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the next annual general meeting and shall within seven days of the appointment, give intimation thereof to every auditor so appointed:

Provided that no person can be appointed auditor of any company unless his written consent has been obtained prior to such appointment or re-appointment.

(2) Every auditor appointed under sub-section (1) shall, within thirty days of the receipt from the company of the intimation of his appointment, inform the Registrar in writing that he has accepted, or refused to accept, the appointment.

(3) At any annual General meeting a retiring auditor, by whatsoever authority appointed, shall be reappointed, unless-

(a) he is not qualified for reappointment; or

(b) he has given the company notice in writings of his unwillingness to be re-appointed; or

(c) a resolution has been passed at the meeting appointing some body else instead of him or providing expressly that he shall not be re-appointed:

Provided that for the purpose of passing a resolution under clause (c), a notice thereof shall in accordance with section 211 be issued prior to the meeting, and such resolution cannot be passed except on the ground of death, incapacity or dishonesty or disqualification of the retiring auditor,

(4) if an appointment of an auditor is not made at an annual general meeting the Government may appoint a person to fill the vacancy.

(5) The company shall, within seven days of the Governments power under sub-section (4) becoming exercisable, give notice of that fact to the Government; and, if a company fails to give such notice, the company, and also every officer of the company who is in default, shall be punishable with fine which may extend to one thousand taka.

(6) The first auditor or auditors of a company shall be appointed by the Board of Directors within one month of the date of Registration of the company, and the auditor or auditors so appointed shall hold office until the conclusion of the first annual general meeting:

Provided that-

(a) the company may, at a general meeting remove any such auditor or all or any of such auditors and appoint in his or their place any other person or persons who have been nominated for appointment by any member of the company, and or whose nomination notice has been given to the members of the company not less than fourteen days before the date of the meeting; and

(b) if the Board of Directors fails to exercise its powers under this sub-section, the company in a general meeting, may appoint the first auditor or auditors.

(7) The Board may fill any casual vacancy in the office of any auditor, but while any such vacancy continues, the remaining auditor or auditors, if any, may act:

Provided that where such vacancy is caused by the resignation of an auditor, the vacancy shall only be filled by the company in general meeting.

(8) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

(9) Except as provided in the process pursuant to sub-section (7), any auditor appointed under this section may be removed from office before the expiry of his term only by a special resolution of the company in the general meeting.

(10) The remuneration of the auditors of a company-

(a) in the case of, an auditor appointed by the Board or the Government, shall be fixed by the Board or the Government respectively; and

(b) subject to clause (a), shall be fixed by the company in the general meeting or in such manner as the company in the general meeting may determine.

(11) For the purposes of sub-section (10), any sums paid by the company in respect of the auditors expenses shall be deemed to be included in the expression "remuneration".

(emphasis added)

9. Evidently, sub-section (4) of section 210 stipulates that, if appointment of an auditor is not made at an Annual General Meeting the government may appointment a person to fill the vacancy. Admittedly, the company did not hold its Annual General Meetings for the Financial Year 2000-2001 (FY 2000-2001), in respect of the AGM schedule to be held on in the year 2011. As such, no auditor was appointed in the Annual General Meeting scheduled to be hold in the year 2011, as required by the provision of sub-section (1) of section 210 of the Companies Act, 1994. Therefore, the auditors alleged to have been appointed by the Board of Directors for the FY 2000-2001 to FY 2001-2012 is contrary to the provisions subsection (1) of section 210 of the Companies Act, since no Annual General Meeting was held in the year 2001 or in the subsequent years. Hence, in my considered opinion, the auditor(s) appointed by the Board of Director for the FY 2000-2001 to FY 2011 and 2001 to 2012 is contrary to the provision of subsection (1) of section 210 of the Companies Act. Therefore, the auditors appointed by the Board for auditing the account of the company for FY 2000-2011 to 2001-2012 was beyond their authority of the Board of Directors because, except the first auditor/auditors, all other auditors shall be appointed in the Annual General Meetings, vide the provisions of sub-section (6) read with sub-section (1) of section 210 of the Companies Act. Hence, I hold that the auditor(s) appointed for auditing the account for the years 2001 to 2012 was ultra vires the authority of the Board of Directors and the audit reports submitted for the years 2001 to 2012 are of no legal effect and are not acceptable in law.

10. The directors may fill up any casual vacancy occurred in the office of the auditors. But, the question of casual vacancy would arise only when an auditor was duly appointed. In the instant case, no auditor was appointed in the Annual General Meetings (scheduled to be held in the year 2001), so the question of any casual vacancy or to fill the same up by the board of directors does not arise.

11. On the other hand, Rule (3A) of Rules 12 Securities & Exchange Rules, 1987, (hereinafter referred to as the Rules) provides as follows: "(3A) The financial statements referred to in sub-rule. (1) shall be audited within one hundred and twenty days from the date on which the issuer's financial year ends and a copy of such audited financial statements shall be submitted to the Commission and the Stock Exchange within fourteen days thereof:

Provided that on the application filed by the issuer within the aforesaid specified time the Commission may on good cause shown and only under extreme circumstances extend the time for auditing the financial statements or submission of the financial statements to the Commission, as the case may be, as it deems fit:

Provided further that if an issuer fails to get its financial statement, audited in the manner as specified in sub-rule (3) and fails to submit the same to the Commission and the Stock exchange within the said specified time, or extended time as the case may be, the Commission may appoint an auditor to audit the accounts of the issuer at the issuer's cost." But there is nothing on record to show that any auditor was appointed under sub-rule (3A) of Rule 12 of the SEC Rules, 1987, or in the manner as prescribed under the provisions of sections 210 of the Companies Act.

12. It is legal duty on the part of a listed company to get its account audited within the time or within the extended time, as the case may be, as laid down in sub-rule (3A) of Rule 12 of SEC Rules, 1987. Otherwise, the Commission (SEC) may appoint an auditor to audit the account of the issuer at the issuer's cost.

13. For the reasons herein before recorded, I am of further view that the auditors appointed by the Board of Directors for auditing the accounts of the company, not being appointed in the manner laid down in sub-section (1) of section 210 of the Companies Act, they had no authority to audit the financial statements of the company, and the audit reports for years 2001 to 2012 are not audit reports in the eye of law and shall not be treated as compliance on the part of the company or as proper audit of the accounts of the company, for those financial years.

14. Having considered the provisions of sub-section (4) of section 210 of the Companies Act vis-a-vis the provision laid down in sub-rule (3A) of Rule 12 of the SEC Rules, 1987, I am of the considered opinion that, in respect of a company listed with the Stock Exchanges, the Rules made under the Securities and Exchanges Commission Ordinance, 1969, being a Special Law, the provision of sub-rule (3A) of Rule 12 of the SEC Rules, 1987, shall override the provision of subsection (4) of section 210 of the Companies Act, 1994, authorizing the government to appoint auditor, if no auditor is appointed in the AGM, as required by sub-section (1) of section 210 of the Act. Commission shall appoint an auditor, as per provisions of sub-rule (3A) of Rule 12 of SEC Rules, 1987, to audit the accounts of the company for the FY 2000-2001, to be submitted in the AGM scheduled to be held in the year 2001. This auditor appointed by the Commission, for FY 2000-2001, may either be continued or a new auditor may be appointed in the subsequent Annual General Meetings to be held pursuant to the order of this court, as permitted by the provision of subsection (1) of section 210 of the Companies Act that stipulates that every company shall, at each Annual General Meeting, appoint auditor or auditors to hold office from the conclusion of that meetings until the next Annual General Meeting.

15. I have also considered the decision reported in 1986 BLD (AD), page 311: Ghyasuddin Ahmed vs. Q.A. Faruque. That judgment was delivered by the Appellate Division with a direction to hold the first Annual General Meeting of the company under the chairmanship of a neutral person and for placing balance sheets, profit and loss accounts before the meetings after auditing the same. That matter was considered as per provision of section 79(3) of the Companies Act 1913 and this is the consistent view of this court. This court's power to pass a direction to call, hold and conduct the Annual General Meeting is undisputed. However, in the instant case, this court is not appointing an auditor, nor the company has appointed any auditor in its Annual General Meeting, in this case. Hence, on this aspect, the instant case is liable to be distinguished from the case reported in 1906 BLD (AD) 311. Besides, another aspect, having jurisdictional relevance, to be noted here is that the judgment reported in 1986 BLD (AD) 311 was passed on 24.03.1986 i.e. before Companies Rules, 2009, has been framed. The Rules has invested inherent jurisdiction in this court under Rule 8, in addition to the inherent power vested in this court under Rule 263 of the said Rules.

16. The concept 'inherent jurisdiction' is far wider than the concept 'inherent power'. This court derives jurisdiction in company matters from two sources, one is section 3 of the Companies Act, 1994, and another is Rule 8 of the Companies Rules, 2009. Therefore, in an appropriate case, this court, in appointing auditor, may exercise its inherent jurisdiction, for ends of justice, particularly when the inaction, neglect of duty or mala fide on the part of concerned authority/regularity body is apparent from the materials on record. In other words, provision of Rule 8 of the Companies Rules, 2009 has overriding effect upon sub-rule (3A) of Rule 12 of the SEC Rules, 1987 as well as upon the provision of sub-section (4) of section 210 of the Companies Act, 1994.

17. Before parting of, this court notes dissatisfaction to the inaction, nonperformance

of statutory duties and indifferences on the part of the SEC, and their go slow or keeping the eyes closed like attitude in performing its duties entrusted upon it, to ensure compliance of the applicable laws, Rules and the notifications issued by it. How far the SEC is efficient and anxious in protecting interest of the small investors and in maintaining discipline in the capital market needs to be screened by studying its function since 1995 to 2012. SEC even did not appear in this case, although it is respondent No. 2. It has utterly failed to perform its duties as per provision of sub-rule (3A) of Rule 12 of the SEC Rules, 1987, in appointing auditor. If the small investor's trust in capital market is diminished then this the alternative source (the capital market) to procure equity, without recurring interest, will become a desert, unlike the industrialized economies. Besides, this alternative source (the capital market) available for procuring interest free equity must have positive impact on the economy in that it will most likely compel reducing bank interest rate and will have its competitive role as an alternative to money market. These deserves active attention of the authority which is entrusted to oversee the activities of the SEC, so that necessary enactments/amendment and/or guidelines can be made or formulated, as the case may be.

18. In view of the facts, circumstances and the deliberation recorded above, I find merit in this petition.

In the result the petition is allowed subject to certain directions.

Accordingly, the entire period of delay that has occurred in holding the Annual General Meetings of MAQ Paper Enterprise Ltd for the period of 2001 to 2012, is hereby condoned and the company is permitted to hold those Annual General Meetings, within 6(six) months from drawing up of this order and upon following the provisions of law and the Rules applicable to a public company listed with the Stock Exchanges and subject to appointment of auditor and doing fresh audit in respect of those years as per provisions laid down in sub-rule (3A) of Rules 12 of the Securities & Exchange Rules, 1987, read with subsection (1) of section 210 of the Companies Act, 2010.

The appointment of auditors by the Board of director, to audit the accounts of the company for the FY 2000-2001 to FY 2001-2012 is hereby declared ultravires and the audit reports for those period are neither to be treated as valid reports, nor to be placed for approval in any AGM for the said period.

The respondent No. 2 (SEC) is directed to appoint, within 14 days from receiving copy of this judgment and order, an auditor, from any one of the reputed audit firms having at least 3 years experience in auditing the account of a listed company, to audit the account of Paper Industries Ltd, for the FY 2000-2011 only and to submit a compliance report within 7(seven) days thereafter.

The auditors for the FY 2001-2002 to FY 2011-2012 is/are to be appointed in the respective AGM, according to the provision of sub-section (1) of section 210 of the Companies Act, 1994.

This order will be effective subject compliance of the direction regarding donation.

The company is directed to donate Tk. 1,00,000/- through payee order of which (1) Tk. 50,000/- to DAHARA, G.O. P.S. DHAKHIL MADRASA, P.O. Shahadal, Upazilla Hossainpur, Dist-Kishoregonj and (2) Tk. 50,000/- to Taltala Ideal Girls High School. P.O. Taltala Bazar, P.S. Chatkhil, District-Nowakhali, to submit an affidavit of compliance within 1(one) week thereafter.

Cost will be borne by the company.

Let a copy of this judgment and order be sent to the Registrar of the Joint Stock Companies and Firms for record and for acceptance of the documents to be filed pursuant to the meetings to be held pursuant to this court's order and as may be required to be filed as per law.

Let another copy of this judgment and order be sent to the Chairman. Bangladesh Securities & Exchange Commission, Jibon Bima Tower, Dilkusha C/A, Dhaka, through special messenger, at the cost of the petitioner.

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