

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

Company Matter No. 266 of 2021

IN THE MATTER OF :

An application under Section 81(2) read
with Sections 85(3) and 396 of the
Companies Act, 1994

AND

In the Matter of

Nahid Sarwar

.....Petitioner

-Versus-

The Registrar, Joint Stock Companies
and Firms, Dhaka (RJSC) and another

.....Respondents

Mr. Muhammad Shafiqur Rahman,

Advocate

.....For the Petitioner

None

.....For the RJSC

The 10th February, 2022.

Present

Justice Muhammad Khurshid Alam Sarkar

By filing this application under Section 81(2) read with
Sections 85(3) and 396 of the Companies Act, 1994 (briefly, the
Companies Act), the applicant prays for permission to call and
hold the Annual General Meetings (AGMs) of the company,
namely, Cityscape International Ltd (hereinafter referred to as the
company) for the calendar years 2018 to 2021 upon condoning the
delay thereof and, also, for exoneration from the fine incurred for
default, with a further prayer for directing the company to call and
hold the Board Meeting by the sole Director for the purpose of
carrying on the usual activities of the company, including

transmission of the shares of the deceased shareholders to her heirs and registration thereof.

It is stated in the petition that the petitioner is the Managing Director of the company, which was incorporated on 26.08.2009 as a private limited company under the provisions of the Companies Act. The principal activities of the company are to carry on businesses relating to real estate and land development. The company was formed with only 2 (two) shareholders, named, Nahid Sarwar and Mrs. Khaleda Sarwar who were also directors, upon holding 9500 and 500 shares respectively. However, one of the shareholders, Mrs. Khaleda Sarwar, who was the mother of the other shareholder Nahid Sarwar, passed away on 16.11.2017, leaving behind the following three heirs, namely, (1) Sehly Sarwar (daughter), (2) Pavel Sahid Sarwar (son) and (3) Nahid Sarwar (son). Since its incorporation, the company regularly held its AGMs and its last AGM was held on 22.01.2017 for the calendar year 2017 with the accounts for the Financial Year 2015-2016. After the sad demise of Mrs. Khaleda Sarwar, the number of shareholders of the company was reduced to one, and no AGM was held since then. In the meantime, the aforementioned three heirs of the deceased applied for transmission of their mother's shares. In view of the fact that the number of shareholders has been reduced to one, it became impracticable to call and conduct a meeting of the company in the manner prescribed by the Articles or the Companies Act. It is stated that no proceeding has been

initiated yet against the company and/or any of its officials for not holding AGMs for imposing fines against them.

Mr. Muhammad Shafiqur Rahman, the learned Advocate for the petitioner, submits that despite sincere and bona-fide intention on the part of the management to hold the company's AGMs for the calendar years 2018 to 2021 in compliance with Sections 81 and 85(3) of the Companies Act, it was not possible to do so due to reasons beyond the petitioner's control, and since the time period for holding the aforesaid AGMs has already elapsed long ago, this Court's necessary Directions are required. He next submits that since no proceeding has been drawn yet against the company or any of its officials under Section 396 of the Companies Act for not holding AGMs of the company, whatever penalty has been incurred under Section 82 of the Companies Act for not holding AGMs within the statutory time, may kindly be exonerated, as there was no intentional laches on the part of the petitioner or any other officers of the company. He then refers to Regulation 90 of the Schedule-1 to the Companies Act and submits that since the sole Director is competent to call and hold necessary Board Meeting of the company only for the purpose of calling a general meeting or for increasing the number of directors, and since no allowance has been made in law for holding a Board Meeting for the purpose of registering new members, this Court's intervention is required. On this issue, he further contends that in the backdrop of the prevailing tendency

and practice of the office of the RJSC as to non-acceptance of the Resolutions and Returns following holding a Board Meeting by a sole Director, the petitioner found it proper to seek ancillary and consequential Orders and Directions from this Court upon the company and the RJSC. He submits that in view of the settled principle of law that under Section 85(3) of the Companies Act, the Company Court has ample power to give ancillary directives in the matter of not only holding AGM but also holding other types of meetings, this Court may order to call and hold the AGMs for the calendar years 2018 to 2021 as well as Board Meeting/s by the sole Director.

No one appeared to oppose the petition.

After hearing the learned Advocate for the petitioner, perusing the application and reading the relevant statutory laws and case-laws, it appears to me that the following issues are to be adjudicated upon by this Court: (1) whether any sole Director can call, conduct and hold a Board Meeting of an incorporated company taking recourse to the provisions of Regulation 90 of the Schedule-I to the Companies Act without approaching this Court under Section 85(3) of the Companies Act, (2) whether the sole Director can induct/elect a person in the Board of Directors who is not a member of the company, (3) whether there has been any fine for not holding the AGMs for the calendar years 2018 to 2021 and, if there has been any, whether the delinquents can be

exonerated, and (4) whether any consequential and/or ancillary Directions should be given in this case.

Let me take up the first and the second issues together for the sake of clarity and brevity of this Judgment. Given that this venture essentially involves determination of the relationship between the company's power to act under Regulation 90 of Schedule-I to the Companies Act and the Court's power to issue Orders/Directions under Section 85(3) of the Companies Act, it would be useful if I look at both of the aforesaid provisions of the Companies Act in turn.

Regulation 90 of the Schedule-I to Companies Act provides as follows:

90. The continuing Directors may act notwithstanding any vacancy in their body; but, if and so long as their number is reduced below the number fixed by or pursuant to the Regulations of the company as the necessary quorum of directors, the continuing Directors may act for the purpose of increasing the number of Directors to that number, or of summoning a general meeting of the company, but for no other purpose.

From a plain reading of the afore-quoted provision of law, it appears that despite occurring any vacancy in the Directors' body, if the remaining Directors can fulfill the quorum, the continuing Directors may carry on all types of works and businesses necessary for the company. But where there are not sufficient Directors to fulfill a quorum, the remaining Director or Directors may act only for two purposes, namely, (i) to increase the number of Directors and (ii) to call a general meeting.

A pertinent question in this regard arises as to whether the words 'continuing Directors' in Regulation 90 will include the case of a sole 'continuing Director'. Usually a Board of Directors is meant to be a forum of two or more Directors, but as per Regulation 1(c) of the Schedule-I to the Companies Act (which provides that "*words importing the singular shall include plural, and vice versa*") and also as per Section 13(2) of the General Clauses Act, 1897 (which provides that, "*In all Acts of Parliament and Regulations, unless there is anything repugnant in the subject or context,- ... (2) words in the singular shall include the plural, and vice versa.*"), a Board of Directors may be a Board of a single Director, upon interpreting the word "Directors" as a single Director. Therefore, it can be safely held that a continuing Director is allowed to reconstitute the Board of a company in which he is a Director, in the event the number of Directors of the Board is reduced below the number fixed by the company in its Articles of Association.

Section 85(3) of the Companies Act provides as follows:

"If for any reason it is impracticable to call a meeting of a company in any manner in which meeting of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given the Court may give such ancillary or consequential Directions as it thinks expedient and any meeting called, held and conducted in

accordance with any such Order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.”

From a minute reading of the full text (not merely the first few lines), it appears to this Court that Section 85(3) of the Company Act is applicable when it is impracticable for the company to call, hold and conduct i.e. to carry out all these three acts for any types of meeting, or to carry out two out of these three acts for any types of meeting, or to carry out any single act out of these three acts for any types of meeting. And, once a petitioner gets an entry in this Court by invoking the route of Section 85(3) of the Companies Act, the Court, upon being satisfied about the above-mentioned features, becomes empowered to pass necessary Orders and Directions, not only upon the company, but also upon the RJSC, BSEC, Bangladesh Bank, Financial Regulation Council and all other State-Functionaries and statutory bodies of the country.

From the legal analysis of the aforesaid two provisions of law, it appears that except for the purpose of increasing the number of Directors or of calling a general meeting, the Director or Directors (whose number has fallen below the quorum) cannot act under Regulation 90 and must seek relief under Section 85(3) of the Companies Act. However, two other related aspects need also to be addressed before reaching a final conclusion on this issue, and these are: (a) the legal status of the Regulations contained in Schedule-I to the Companies Act vis-à-vis the

provisions of the Act itself, and whether Regulation 90 is applicable to the present case, and (b) the law of formation of a private company and appointment of its Directors.

The common perception is that the status of an Act of Parliament is superior to that of a Regulation in the hierarchy of laws of our country, for, usually at the last part of an Act of Parliament, the Legislature sets out a provision empowering the concerned Ministry or statutory body to make necessary Regulations. However, when any Regulation is directly drafted and enacted by the Parliament itself by appending it as a Schedule to the Act, it becomes an integral component of the said Act and, consequently, the status and force of the said Regulations are as good as those of an Act of Parliament.

Since Regulation 90 of the Schedule-I to the Companies Act has been made applicable here in this case by virtue of Article 1 of the Articles of Association ("AoA") of the company with reference to Section 18 of the Companies Act, it will be useful if Section 18 is quoted here:

"18. Application of Schedule I.- In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify regulations in Schedule I, those regulations shall, so far as applicable be the regulations of the company in the same manner and to the same extent as if they were contained in the duly registered articles.

From the wordings employed in Section 18 of the Companies Act, the understanding that I get is that unless any

Regulation of Schedule-I to the Companies Act is modified or negatived or contained in the Articles of Association of a company, the Regulations contained in Schedule-I to the Companies Act will mandatorily apply to the company in view of the employment of the word 'shall' therein.

Now, let me see whether the AoA of the company excludes or modifies the provisions of Regulation 90 of Schedule-I to the Companies Act. Article 1 of the Articles of Association of the respondent No. 2-company provides as follows:

"1. The Regulations contained in Table 'A' in the First Schedule to the Companies Act, 1994 shall apply to this Company with respect to such provisions as are applicable to Private Limited Companies so far only as they are not negatived or modified by or are not contained in the following Articles or any Articles that may from time to time be framed by the Company or by any other statute."

From a plain perusal of the AoA of the Company, it is vividly clear that the company's AoA does not contain any provision for dealing with the situation of causal vacancy in the Board of Directors, nor does it provide any provision for resolution of a dilemma where the number of Directors fall below the quorum, and since the AoA does not modify or expressly exclude Regulation 90 of Schedule-I to the Companies Act, inevitably Regulation 90 has become a part and parcel of the AoA of the company by operation of Section 18 of the Companies Act. Accordingly, it can be safely held that Regulation 90 may be

resorted to by the company, if no other legal obstacle surfaces from the rest of the on-going examination of the issues herein.

Let me now take up the issue regarding formation of a private company and appointment of Directors in a private company. In order to have a clear understanding let me quote Section 5 of the Companies Act:

5. Mode of forming incorporated company:- Any seven or more persons or, where the company to be formed will be a private company, any two or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise with the requirements of this Act in respect of registration of an incorporated company, with or without limited liability.

So, for the purpose of formation of a private company, there shall at least be two persons who shall be known as the members of the company.

Now, let me look at the provisions regarding Directors.

90. Directors obligatory:- (1) Every public company and a private company which is a subsidiary of a public company shall have at least three directors.

(2) Every private company other than a private company mentioned in sub-section (1) shall have at least two directors;

(3) Only a natural person may be appointed a director.

(underlined by me)

The simple meaning of the words employed in sub-Sections (1) to (3) is that there must always be two Directors, who will be natural persons, for a private company which is not a subsidiary of a public company.

Then comes the provisions of the appointment of Directors of any company. Section 91 provides the following provisions;

91. Appointment of Directors:- (1) Notwithstanding anything contained in the articles of a company-

- (a) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors are appointed.
- (b) the directors of the company shall be elected by the members from among their number in general meeting; and
- (c) any casual vacancy occurring among the directors may be filled in by the other directors but the person so appointed shall be a person qualified to be elected a director under clause (b) and shall be subject to retirement at the same time, as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.

(underlined by me)

Section 91(1) overrides the provisions of Articles of Association of a company and, therefore, Regulation 90 of Schedule-I to the Companies Act being an Article of the company shall not be applicable, if it is found to be inconsistent with the provisions of Section 91(1) of the Companies Act. Since Clause (b) of Section 91(1) of the Companies Act requires that the Directors of the company shall be elected by the members *from among their number* in a general meeting, and since Clause (c) of the aforesaid Section says that if there is any casual vacancy it may be filled in by the Directors in a Board Meeting and no general meeting is required, but in that case "*the person appointed shall be a person qualified to be a Director under Clause (b)*", the sole Director may appoint one or more Director/s from among the persons who are members of the company.

So, from the forgoing examinations, it appears that a person who is not a member of the company cannot be appointed a Director by the sole remaining Director. The condition contained in Section 97(1) of the Companies Act that a newly appointed Director may obtain qualification shares within sixty days, does not mean that he may hold *nil* shares at the time of his appointment, rather it means that he may hold a certain number of shares which was *below* the number required for being qualified to be appointed as Director, i.e. the qualification shares.

There is scanty precedent on the subject of the number of Directors falling below the quorum, but it is clear that the Directors cannot act unless the number is first made up by the Board itself or through general meeting.

In *Channel Collieries Trust Ltd. v. Dover St. Margaret's and Martin Mill Light Rly* (1914) 2 Ch. 506, the Articles of the company provided that the minimum number of Directors should be three and the quorum for the Board's meeting should be two. The Articles also gave power to the "remaining Directors" to fill in vacancies. The company began with three Directors, then two of them resigned leaving only one Director in office. When he co-opted a Director from the other shareholders, it was contended that the co-option was invalid because the Board had neither the minimum strength nor even the quorum provided by the Articles. Rejecting this contention Lord Cozens Hardy M.R. observed as follows:

“Sir John Jackson thus became sole director. What was his power? Under the Companies Clauses Act, 1845, as continuing director, he had power to fill up the vacancies on the board. The fact that a person exercising that power does not constitute a quorum is not really a relevant matter. The generality of the language used in Section 99 is so clear that it is impossible for us to overlook it. Any other view on that point would paralyse many a company.”

In the above-cited case, the sole Director was held to have rightly acted when he held a single Director’s Board meeting and co-opted another Director. However, the question as to whether a non-member of a company can be made a Director was not an issue in this cited case, for, in England Directors are not required to hold any share in the company.

The observations of Swinfen Eady L.J. are also illuminating inasmuch as our regulation 90 speaks of ‘continuing *Directors*’, not ‘*Director*’:

“I think that the context requires that the words ‘remaining directors’ should include the case of a remaining director. It is obvious that the number of the board may, by death or resignation or otherwise, be so reduced that it may be below the quorum, as well as that there may be vacancies occurring in the board whilst still leaving a quorum, but in either case it is necessary or proper that the vacancy should be filled up. In my opinion the necessity of the case requires that ‘the remaining directors’ should be read as including the case of a remaining director, so that if and so long as there is any remaining director he may proceed to fill up the board by appointing persons when casual vacancies occur.”

Since I have already held that the words “continuing Directors” in Regulation 90 will include the case of a sole “continuing Director”, accordingly, upto that extent, the above

dictum supports my conclusion. However, since in England there is no requirement for a Director to hold qualification share in the company in which a non-member of the company appointed as Director, the *ratio* of these two English cases does not help this Court in adjudication upon the case in hand.

In the Indian case of *A. Ananthalakshmi Ammal vs The Indian Trades And Investments Limited* [AIR 1953 Mad 467], the Madras High Court applied the above English principle and held that it was lawful for a single remaining Director to co-opt another Director when the strength of the Board had fallen below the prescribed quorum.

The law is different in India from that of our country. Section 152(2) of the Indian Companies Act 2013 says: “*Save as otherwise expressly provided in this Act, every Director shall be appointed by the company in general meeting.*” It does not say that the shareholders must elect the Directors “from among their number”. Since there is no requirement in the Indian Companies Act for qualification shares, in India non-member Directors may be appointed.

With the above legal analysis and on the basis of the *ratio* laid down in the above-discussed cases, this Court holds that a single remaining Director is competent to call and hold the Board Meeting upon invocation of the provisions of Regulation 90 of the Schedule-I to the Companies Act for the purpose of appointment of the Director/s towards fulfilling the quorum of the Board

Meeting, subject to the condition that the proposed Director/s must be a member of the company. But where there is no other member of the company except the remaining sole Director, the sole Director having no means of increasing the number of Directors and having faced an 'impracticability' to call and hold a Board Meeting, must approach this Court invoking Section 85(3) of the Companies Act.

In the present case there were two shareholders: mother and son, and because of the mother's death, the sole shareholder-Director is now the son. Since the company is not registered as an OPC (One Person Company) under the amendments to the Companies Act in 2021, rather the company is formed under Section 5 of the Companies Act as a private company, it must have at least two members and two Directors as per Section 90(2) of the Companies Act. The sole member-Director is now under an obligation to increase the number of members and Directors.

The 3 heirs of the deceased have applied to the company for registration of their mother's transmitted shares, but the sole Director is not competent to call the Board Meeting without first increasing the number in the Board of Directors, and there is currently no other member (i.e. shareholder) of the company who may be inducted in the Board. Vexed by the quandary, the petitioner has come before this Court under Section 85(3) of the Companies Act seeking necessary sanctions/directions. If, with the permission of the Court, a Board Meeting is at first held, then

the sole Director will be able to register the shares of the deceased which have been transmitted in the names of the children of the deceased by operation of law. There shall not be any need for further formalities, inasmuch as recognition of the heirs' entitlement to the transmitted shares and registration of the shares are the province of the Directors, as per the provisions of Section 38 of the Companies Act and Regulations 20-22 of the First Schedule to the Companies Act, on top of the provisions contained in an Article of any company's Articles. Upon calling and holding the meeting with the permission of this Court, once the number of shareholders is increased to 3 (the sole Director being one of the heirs), the company can avert the crisis of the number of its shareholders being reduced below the statutory minimum. And, that is how, there shall be a proper resolution of the predicament without giving any scope to any person or authority, like RJSC or any Bank/Financial Institution to raise any question as to the legality or propriety of holding the post of Director by the deceased's heirs.

The above factual and legal analyses lead me to hold that:

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- (1) When, due to the death or resignation of any Director/s, there remains only one Director, but there are other members of the company willing to act as Director/s, the sole Director will have the option either to use the power conferred by Regulation 90 of Schedule-I to the Companies Act and hold a board

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meeting for the purpose of increasing the number of Directors, or to invoke Section 85(3) of the Companies Act and approach the Court for appropriate relief;

- (2) But when, due to the death or resignation of any Director/s, there remains only one Director, coupled with a scenario that there is no other member who may be appointed as a Director of the company, the continuing Director cannot act under Regulation 90 but must approach the Court invoking Section 85(3) of the Companies Act.

When the sole Director invokes Section 85(3) of the Companies Act in scenario (1) above, the Court may direct calling, holding and conducting a single Director's meeting, and

- (a) direct appointing new Director/s in the Board meeting from amongst the other members in accordance with Section 91(1)(c) of the Companies Act or Regulation 85 of Schedule-I to the Companies Act or Article 28 of the Articles of Association of the company, or
- (b) direct taking resolution regarding calling, holding and conducting a general meeting for the purpose of electing new Director/s in accordance with Section 91(1)(b) of the Companies Act.

When the sole Director invokes Section 85(3) of the Companies Act in the scenario contemplated in paragraph (2)

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above, the Court may direct calling, holding and conducting a single Director's meeting, and

(a) if the vacancy has occurred due to death and there are successors:

(i) direct registering the shares that were transmitted to the legal heirs of the deceased shareholder by operation of law; and

(ii) direct appointing new Director/s from amongst the newly registered shareholders, or direct taking resolution regarding calling, holding and conducting a general meeting for the purpose of electing new Director/s in accordance with Section 91(1)(b) of the Companies Act;

(iii) if none of the newly registered shareholders is willing to be so appointed, and it has been brought to the notice of the Court that there is/are willing purchaser/s of shares either from the sole Director or from the new shareholders, direct taking necessary actions for effecting the sale and appointing such purchaser/s as Director;

(b) if the vacancy has occurred due to death and there are no successors, and it has been brought to the notice of the Court that there is/are willing

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purchaser/s of shares from the sole Director, direct taking necessary actions for effecting the sale and appointing such purchaser(s) as Director;

- (c) if the vacancy has occurred due to resignation, and it has been brought to the notice of the Court that there is/are willing purchaser(s) of shares from the sole Director, direct taking necessary actions for effecting the sale and appointing such purchaser/s as Director;

Additionally, when the sole Director comes to Court in either of the situations mentioned in paragraph (1) or (2) above, the Court may appoint an Independent Chairman and direct calling, holding and conducting a Board Meeting, for the purpose of taking necessary actions in order to bring the number of shareholders and directors up to the statutory minimum, based on the circumstances and in accordance with the Companies Act and the Articles of Association of the company. An example of such a course of action was the case of *Monowara Begum Vs RJSC* 24 ALR (HCD) page 1. In the said case, the petitioner's husband died leaving behind the sole surviving Director and their children as their heirs. The company under the circumstances could not call and hold the Board Meeting and the AGMs, and the petitioner approached this Court invoking Section 85(3) of the Companies Act, where no prayer was made for application of the Regulation 90 of the Schedule-I to the Companies Act, rather the petitioner

herself, who was a simple housewife, appearing before this Court in person prayed for appointment of an Independent Chairman, so that for the time being she can carry out the necessary businesses of the company with the aid of the Court-appointed Chairman. Accordingly, this Court appointed an Independent Chairman for the company and directed the sole surviving Director and the Court-appointed Chairman to do the needful for calling and holding the Board Meeting and the AGMs.

I make no claim of ingenuity in laying down the above principles of law: they were derived logically and inexorably from statutory provisions and precedents discussed above. I hope the Directions and Guidelines set down above will steer the companies in similar situations towards proper resolution of their crises.

With the issues concerning Regulation 90 of Schedule-I to the Companies Act and Section 85(3) of the Act resolved, I shall now turn my attention to the question of according permission to the company to call and hold the AGM for the calendar years 2018 to 2021 belatedly, upon exoneration of the fine for the delay. Section 82 of the Companies Act makes the defaulting company and its responsible officer/s liable for a fine which may extend to ten thousand Taka and in case of continuing default, with a further fine which may extend to two hundred fifty Taka for every day after the first day during which such default continues and, accordingly, there has been a fine of Tk. 2,50,750/- (Taka two lacs

fifty thousand seven hundreds and fifty) for the delay of 1003 (one thousand three) days.

I have considered the statements made in the petition and the documents annexed therewith as well as the submissions of the learned Advocate for the petitioner, and I am of the opinion that since the delay in holding the pending AGMs of the company for the calendar years 2018 to 2021 occurred because of the demise of one shareholder out of two shareholders of the company, which resulted in the quorum crisis and, thus, I find that the approach of the petitioner before this Court for filing this petition is bonafide. Therefore, this Court should pass necessary Directions for calling and holding the AGMs for the calendar years 2018 to 2021 of the company.

In the result, the petition is allowed and the prayer for sole Director's Meeting is allowed in order to enable the company to bring in more shareholders and fill in the vacancy in the Board. And, further, the delay in holding the AGMs is condoned, and the company and its Director and responsible officer/s are also exonerated from payment of fine for the said delay in holding the AGMs for the calendar year 2018 to 2021 with the following Direction and Orders;

(1) The sole Director on behalf of the company is hereby entrusted with the power to call, conduct and hold the Board Meeting at first.

(2) The Board then shall recognize, and register heirs of the deceased Director as shareholders.

(3) Once the number of shareholders is increased above the statutory minimum, the Board shall then either appoint one or more Directors from amongst the newly registered shareholders, or call an Extraordinary General Meeting for the purpose of electing new Director/s.

(4) The AGMs shall be held for the calendar years 2018 to 2021 upon scheduling the date, time and place of the Annual General Meetings of the company for the calendar years 2018 to 2021 within 8 (eight) weeks from the date of drawing up of this Judgment and Order.

(5) The Registrar of Joint Stock companies and Firms is directed to accept all Filings and Returns accordingly, in connection with the said Board Meeting and the AGMs.

The petitioner has expressed his willingness to spend an amount of Taka 1,00,000/- (one lac) only as part of his company's CSR expenditure, through Pay Order (which is to be deposited to the concerned company section) to Fulchari Hazi Sattar Trust, Upzailla Road, Kalirbazar, Fulchari, Gaibandha. Bank Account No. 2050 4550 2000 00305, Islami Bank Bangladesh Limited, Kalirbazar Branch (Code No. 455), Fulchari, Gaibandha. (Contact number of Branch-01716-762276, 01886-762277) e-mail- kalirbazar455@islamibankbd.com. On furnishing receipt of payment, the order may be drawn up, if so prayed for.

Before parting with the Judgment I would like to sincerely thank Mr Muhammad Shafiqur Rahman, the learned Advocate for the petitioner, for rendering useful assistance to the Court and for his cogent legal arguments which have greatly assisted me in arriving at a correct decision based on a correct analysis of law and precedent.

Company Matter No. 266 of 2021

1. Whether a 'sole Director' can call and hold Board Meeting?

Despite occurring any vacancy in the Directors' body, if the remaining Directors can fulfill the quorum, the continuing Directors may carry on all types of works and businesses necessary for the company. But where there are not sufficient Directors to fulfill a quorum, the remaining Director or Directors may act only for two purposes, namely, (i) to increase the number of Directors and (ii) to call a general meeting. (Page-5)

2. Under what circumstances, invocation of the provisions of Section 85(3) of the Companies Act is appropriate?

Section 85(3) of the Company Act is applicable when it is impracticable for the company to call, hold and conduct i.e. to carry out all these three acts for any types of meeting, or to carry out two out of these three acts for any types of meeting, or to carry out any single act out of these three acts for any types of meeting. And, once a petitioner gets an entry in this Court by invoking the route of Section 85(3) of the Companies Act, the Court, upon being satisfied about the above-mentioned features, becomes empowered to pass necessary Orders and Directions, not only upon the company, but also upon the RJSC, BSEC, Bangladesh Bank, Financial Regulation Council and all other State-Functionaries and statutory bodies of the country. (Page-7)

3. Status and force of an Act of Parliament and any Regulations:

The status of an Act of Parliament is superior to that of a Regulation in the hierarchy of laws of our country, for, usually at the last part of an Act of Parliament, the Legislature sets out a provision empowering the concerned Ministry or statutory body to make necessary Regulations. However, when any Regulation is directly drafted and enacted by the Parliament itself by appending it as a Schedule to the Act, it becomes an integral component of the said Act and, consequently, the status and force of the said Regulations are as good as those of an Act of Parliament. (Pages-8)

4. Whether Regulations contained in the First Schedule to the Companies Act are mandatorily applicable?

Unless any Regulation of Schedule-I to the Companies Act is modified or negated or contained in the Articles of Association of a company, the Regulations contained in Schedule-I to the Companies Act will mandatorily apply to the company in view of the employment of the word 'shall' therein. (Pages-8 & 9)

5. Whether a non-member can be appointed as the Director of a company?

Section 91(1) overrides the provisions of Articles of Association of a company and, therefore, Regulation 90 of Schedule-I to the Companies Act being an Article of the company shall not be applicable, if it is found to be inconsistent with the provisions of Section 91(1) of the Companies Act. Since Clause (b) of Section 91(1) of the Companies Act requires that the Directors of the company shall be elected by the members *from among their number* in a general meeting, and since Clause (c) of the aforesaid Section says that if there is any casual vacancy it may be filled in by the Directors in a Board Meeting and no general meeting is required, but in that case *"the person appointed shall be a person qualified to be a Director under Clause (b)"*, the sole Director may appoint one or more Director/s from among the persons who are members of the company. (Page- 11)

6. What are the steps may be taken by the Board of Directors when the number of Directors of the BoD is reduced to a single-number BoD due to resignation/death of other Director/s.

- (1) When, due to the death or resignation of any Director/s, there remains only one Director, but there are other members of the company willing to act as Director/s, the sole Director will have the option either to use the power conferred by Regulation 90 of Schedule-I to the Companies Act and hold a board meeting for the purpose of increasing the number of Directors, or to invoke Section 85(3) of the Companies Act and approach the Court for appropriate relief;
- (2) But when, due to the death or resignation of any Director/s, there remains only one Director, coupled with a scenario that there is no other member who may be appointed as a Director of the company, the continuing Director cannot act under Regulation 90 but must approach the Court invoking Section 85(3) of the Companies Act.

When the sole Director invokes Section 85(3) of the Companies Act in scenario (1) above, the Court may direct calling, holding and conducting a single Director's meeting, and

- (a) direct appointing new Director/s in the Board meeting from amongst the other members in accordance with Section 91(1)(c) of the Companies Act or Regulation 85 of Schedule-I to the Companies Act or Article 28 of the Articles of Association of the company, or
- (b) direct taking resolution regarding calling, holding and conducting a general meeting for the purpose of electing

new Director/s in accordance with Section 91(1)(b) of the Companies Act.

When the sole Director invokes Section 85(3) of the Companies Act in the scenario contemplated in paragraph (2) above, the Court may direct calling, holding and conducting a single Director's meeting, and

- (a) if the vacancy has occurred due to death and there are successors:
 - (i) direct registering the shares that were transmitted to the legal heirs of the deceased shareholder by operation of law; and
 - (ii) direct appointing new Director/s from amongst the newly registered shareholders, or direct taking resolution regarding calling, holding and conducting a general meeting for the purpose of electing new Director/s in accordance with Section 91(1)(b) of the Companies Act;
 - (iii) if none of the newly registered shareholders is willing to be so appointed, and it has been brought to the notice of the Court that there is/are willing purchaser/s of shares either from the sole Director or from the new shareholders, direct taking necessary actions for effecting the sale and appointing such purchaser/s as Director;
- (b) if the vacancy has occurred due to death and there are no successors, and it has been brought to the notice of the Court that there is/are willing purchaser/s of shares from the sole Director, direct taking necessary actions for effecting the sale and appointing such purchaser(s) as Director;
- (c) if the vacancy has occurred due to resignation, and it has been brought to the notice of the Court that there is/are willing purchaser(s) of shares from the sole Director, direct taking necessary actions for effecting the sale and appointing such purchaser/s as Director; (Pages-16, 17, 18 & 19)

