

RETHINKING OF RIGHTS AND PROCEDURAL COMPLEXITY IN TRANSFER OF SHARE: A REVIEW UNDER COMPANY LAW IN BANGLADESH

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Abstract

This paper unveils the pen-picture of rights in transfer of share and the pitfalls in that regard. In order to find out the pitfalls, the Companies Act 1994 in Bangladesh has been taken as the bedrock for analysis. Also, the Listing Regulation of Dhaka Stock Exchange Limited 1996 in Bangladesh has been applied to streamline the analytical issues. Various forms in transfer of share create a problem for transferor in Bangladesh. Indeed, the provisions of the Act are manufactured in such way that it throttles the rights of transferor. The confusion over rights in joint shareholding seems to put shareholders at stake owing to the inadequate legal support. Refusal in transfer of share is lamentably more emphasized in the Act than rights and the process of transfer in provision appears favoring the refusal rather than protecting the rights. All these have been critically extrapolated with the study over the relevant English, Indian and Pakistani laws to redress the balance in transfer of share in Bangladesh.

Keywords: transfer of share, Companies Act 1994, pre-emption, refusal, director

JEL Classification: D23, K11, K22

1. Initial Phase

Share is generally one kind of interests and of rights owned by a shareholder holding a share in company. When a person invests his money into company through purchasing share of that company, a bundle of rights and interests in relation to that company is attached with him. In *N.W. Transportation v. Beatty*³⁷ it is decided that a share is a kind of property which is to be enjoyed and exercised for the owner's personal advantage and use. On the other hand, it is found that shares in a company are taken as personal estate.³⁸ Also share can be said as intangibles like chose in action and those are generally available in the company in which the register of members is kept.³⁹

From the above scholarly passage, it is felt that share is a personal property which is used for the shareholder's personal utility.

Davies says that though a shareholder holds share in a company through a contract with the company and thus, he may possess rights in *personam*, a share is something more than that (Davies 2008). On the other hand, John Birds and others say that the idea of share bears a dual nature as both contract and property (Birds *et al.* 2007, 259).

In legislative assertions, section 2(1)(v) of the Companies Act, 1994 in Bangladesh provides that share means a share in the capital of the company and includes stock when a distinction between stock and shares is expressed or implied.

In England, section 540 of the newly passed Companies Act, 2006 provides that share means in the company's share capital and that it may no longer be converted into stock; that section also includes that references to shares include stock except where a distinction between share and stock is express or implied. On the other hand, section 541 of that Act, the shares or other interests of a member in a company are personal property, not in the nature of real estate.

From the above, the views on share of the two Acts – Bangladeshi Companies Act 1994 and English Companies Act 2006, are firstly the same but the English Company Law goes further that the share is personal property, not in the nature of real estate at all.

³⁷ (1887) 12 App. Cas. 589 (P.C.) cited in Geoffrey Morse, *Charlesworth & Morse Company Law*, (London: Sweet & Maxwell, 1995) . 391

³⁸ Mores, *Company Law*, 234

³⁹ *International Credit and Investment Co.(overseas) Ltd. v. Adham* [1994] 1 BCLC 66 cited in Morse. *Company Law*, 234

Upon the pattern of negative expressions reflecting mandatory force in section 38(7) of the Companies Act, 1994, if the negative aspects is manufactured into the other pattern of expressions changing negative words or expression, mandatory provisions may be turned into directory provisions or the flexible expressions and the right of parties to transfer of share may prevail over the harsh refusal facts of transfer in all in the negative view.

The view about anything contrary to equity, justice and good conscience bonafide works, giving birth to fraud and bad faith in manufacturing articles should be removed. Insertion of the reasonable provisions in articles should be firmed up through the operating of specific directives by insertion of guideline in the provisions of transfer of share of the Act in Bangladesh. So in section 38 of the Act specific guideline to remove the scope of the harmful idea into articles for dealing with transfer of share should exist.

In the Act, there should be a specific guideline about the dividend when transfer of share is pending for finalization transfer of share legally.

On the view transfer of share reflecting a contract, unless the term of returning consideration in breach of contract is provided expressly beforehand, it may be hard to follow up and this may invade the force of rights of shareholders. Without giving a carte blanche (full freedom) to the transferor, it may be provided that the provision for transfer of share should exist perfectly even also at the point of breach of transfer contract for taking back consideration at refusal of transfer at large in the Companies Act, 1994 in Bangladesh.

3. Concluding Remarks

Where a shareholder holds a property like share, transfer of share is one of the great advantageous rights of the shareholder and it is expected to run freely without any reasonable pitfalls. Procedure of transfer, refusal to register the new shareholder's name in the register, sending information of refusal within the mandated time, excess of application of power by the company to refuse the transfer-all these matters come under the ambit of legal provisions centrally under section 32, 38, 39 and 43 of Companies Act, 1994. Though sections 32, 38, 39 and 43 of the Act become relevant, section 38 of the Act plays a pivotal role to regulate the transfer process at large. In Bangladeshi Companies Act 1994, instead of different types of form for transfer of share, one form under Companies Act, 1994 should be provided so that confusion could not arise any longer. Fairly enough, the wrong procedure and omission of one element of procedure of transfer can make the scope for the refusal but those provision become clogged up when it is found that only the ground for refusal is provided but after refusal, the restorative measures by the parties to transfer are not clearly found. These matters are succinctly mentioned in Indian and Pakistan law on the issue. In those laws after refusal, the reactivating provisions have been provided with the insertion of the terms re-lodgment of the corrected transfer instrument to the company in full view. This confusion becomes a concern. So in Bangladeshi Companies Act 1994 in transfer provisions e.g. section 38, the restorative provisions in clear expression after refusal of transfer for making the scope of the parties to transfer or the transferee should be incorporated.

Pre-emption is a discerning issue in transfer of share. This matter is expressed in articles of company. But as per the pre-emption rules, once the transferor offers the existing member of the company and the latter agrees with the terms and conditions but the latter one, he denies, then the condition of the transferor seem to become fatal. This invokes the provisions for the rule of estoppel and this rule of estoppel has been discussed above with case references. However, in fact of denial, the rule of estoppel can prevent it and thus the transferor can get the proper protection of law. And this type of legal provisions of estoppel in view of the hypothetical facts may be followed up in transfer provisions, e.g. section 38 of the Companies Act, 1994 in Bangladesh. However, in transfer of share, the valuation of share is a vital issue. Regarding it, the proper guideline should exist in transfer of share e.g. section 38 of the Companies Act 1994. Even stronger, the valuer and the auditor responsible for valuing the share concerned may be held liable and provisions to that effect needs to be made in the Companies Act, 1994 to get the proper value for the transferor.

As far as transfer of share is fairly dependent on articles, the unfettered power for companies to insert provision in articles is not a healthy support of the protection for transfer of share of the parties. So there should obtain a guideline to remove the area of harm in articles in companies The Companies Act 1994 should contain a prudent guideline in that regard.

Quite fairly, the regulating provisions for refusal in section 38(7) of the Act are provided in mandatory provisions since those are expressed in negative words. These mandatory provisions have put emphasis on refusal rather on the protection of rights of the parties to transfer. Many case-based discussions have been presented above. Procedural provisions are for proper regulation securing the protection of all the parties concerned. Here, again in section 38(7) of the Act, the language for refusal couched in negative words reflecting as mandatory language has made the protection of rights in transfer of the parties subservient to the

commanding refusal by the company. Therefore, it should be that the language in section 38(7) of the Act, should give priority to the right of parties to transfer of share necessarily over the refusal altogether because rights to transfer of share should be more of attention than other factors.

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