EMPLOYEE SHARE OWNERSHIP AND FINANCIAL ASSISTANCE BY COMPANY -TURNING THE SEARCHLIGHT WITHIN

Junayed Ahmed Chowdhury *

Introduction

Lido Anthony "Lee" Iacocca[1], the famous American industrialist, once said:

> In the end, all business operations can be reduced to three words; people, product and profits. Unless you've got a good team, you can't do much with the other two.

Motivated employees are the pivotal foundation of every successful business enterprise. Jack Welch[2], arguably the finest manager of corporate America, stressing on the importance of human resource, once colourfully commented:

My main job was developing talent. I was a gardener providing water and other nourishment to our top 750 people.[3]

Yes; employees - they are the bloods that runs through any company's vein. That is why, apart from wages, there are various non-financial incentives that many companies, especially in the developed corporate world, offer to their employees. Employee Share Ownership[4] is one of the most popular non-financial incentives. A company may also set up an employee share scheme for various other reasons; notably, align employees' interests with those of shareholders, recruit or retain key employees,

---

* Junayed Ahmed Chowdhury, Barrister-at-Law and Advocate, currently practising as a Counsel Barrister at Temple Court Chambers-Dhaka Annexe; an International Wing of an UK based Barristers' Chambers called Temple Court Chambers.

1 Born October 15, 1924 in Allentown, Pennsylvania, Lee Iacocca is among the most widely recognized Businessmen in the world, and is the former chairman of Chrysler Corporation and was a passionate advocate of U.S. business exports during the 1980s.

2 Chief Executive Officer (CEO) of General Electric (GE) between 1981 and 2001.

3 Garten Jeffrey E. "Jack Welch: A Role Model for Today's CEO?" Business Week, September 10, 2001.

4 For an overview of employee share ownership, see the Article- "A Comprehensive Overview of Employee Ownership". This Article can be read online through http://www.nceo.org/library/overview.html, the website of The National Centre for Employee Ownership (NCEO). NCEO is a USA based private, non-profit membership and research organization that serves as the leading source of information on employee stock ownership plans (ESOPs), equity compensation plans such as stock options, and ownership culture.

compensate for lower salaries and relieve pressure on cash flow, increase loyalty and reduce staff turnover. From employees' perspective, the idea of profit varies depending upon the type of company in which they have shareholding. For instance, in case of private limited company, generally, when the company is making profit, it would distribute those profits to the shareholder(s) by way of a dividend. If, on the other hand, it is a public limited company, whose shares are freely traded in stock exchange, the employee shareholder may either hold his shares to get dividend or 'cash in' by selling them on the open market in the event the share price increases. Whatever the reason may be, the spirit behind such schemes is to give employees incentive, or rather, 'a piece of the pie' to help the company become more profitable.

In any employee share ownership scheme, in whatever form and format it may be, there are two basic considerations, each pertaining to the respective party to this transaction - for the company, it is the sourcing of shares to be issued to its employees and for the employees; it is the financing of such shares. There may be situation, however, where as a result of lack of funds, becoming shareholder(s) and the consequential profit as described above do not materialise. What if, in such a case, the company provides finance to enable the employees to acquire some of its shares? Let us take Employee X of a public limited company Y ("the Company") for an example. His salary may not be adequate enough to enable him to purchase some of his company's shares from the floor of the stock exchange, especially if it is a profitable company with high share prices. The Company, on the other hand, may want to motivate and retain key employees like Employee X to further its financial success. Does Employee X have any other option? Can the Company help him in some way; for example, lend him some money to acquire some of its shares? Can the Company do anything about it? This article tries to answer some of these questions from the legal perspective of Bangladesh.

Financial Assistance by Company

Like any other commonwealth jurisdiction, Bangladesh company law also deals with the principle of prohibition on 'financial assistance'[5] by a company to someone for the purchase of its own shares. Such prohibition on financial assistance was formulated since it resembled the purchase by a company of its own shares and was therefore similarly objectionable for violating the capital maintenance doctrine – that is, generally speaking, the capital yardstick

5 See generally, Gower's Principles of Modern Company Law, Sixth Edition, Sweet & Maxwell, London 1997.

represented by issued share capital (plus share premium account) of the company cannot be reduced except under an order of the court[6]. This article focuses on the applicability and extent of the prohibition on 'financial assistance' by a company to its employees for the acquisition of its shares.

In order to keep this article relatively short; I have limited myself to the discussion of the financing of shares. I, however, think that there are also tremendous confusion and ambiguities surrounding the sourcing of shares in Bangladesh company law[7]. The ambiguity in the statutory provision and the scarcity of judicial interpretation and academic discussion on such ambiguity has made it difficult to ascertain positively whether new shares may be offered and issued to any person other than the existing members of a company without even giving the existing shareholders the opportunity to exercise their right of 'pre-emption'[8]. That discussion, however, may be the subject of another article. In this article, for the sake of completeness, I have assumed that the existing shareholders of the Company were given an opportunity to exercise their right of pre-emption and they all have renounced that right.

Brief History of Bangladesh Company Law

Before elaborating this article, at the outset, I feel that it would be prudent to outline the history[9] of Bangladesh Company law for it would assist the reader to understand the various cross-references that I have made during my analysis and explanation. In the British sub-continent, company law initiated with Act 43 of 1850, which was based on the English Companies Act 1844. In 1857 another Act was passed, which was repealed by the Act of 1860 based on the English Companies Act 1857. Then, following the English Companies Act of 1862, Act of 1866 was passed in British-India. The law relating to companies was re-enacted in India by the Companies Act 1913. The Indian Companies (Amendment) Act 1936 introduced important provisions in the Companies Act 1913 in the light of English Companies Act 1929. After the partition of the sub-continent, India passed Companies Act 1956, based primarily on English Companies Act 1948. During the Pakistani regime and after the emergence of Bangladesh, no re-enactment of the Companies Act 1913 was made

6 Ibid., at p. 247.

7 See generally, *Company and Securities Laws*, at p. 138, Dr. Zahir, M., Revised and Updated edition, 2005, The University Press Limited.

8 I.e. the right either to accept or to renounce the share offer.

9 See Company and Securities Laws, Dr. Zahir, M., Revised and Updated edition 2005, The University Press Limited pp. 4-5.

until 1994, when the Companies Act 1994 was passed by the Parliament. Thus, the Bangladesh company law is derived from the English common law and predominantly influenced by English and Indian interpretation of the principles relating to company law. Therefore, English, Indian, and other Commonwealth Company case laws are authorities of high persuasive value and heavily relied on in Bangladesh courts. In this article, several Commonwealth case laws and relevant commentaries are discussed and to my knowledge, they stand as good law in Bangladesh.

Section 58(2) of the Companies Act 1994

Section 58(2) of the Companies Act 1994 ("the Act") deals with the prohibition on financial assistance by a company to someone to purchase its shares, which states as follows:

> No company limited by shares other than private company or a subsidiary company of a public company, shall give whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company.

Therefore, in Bangladesh, Employee X shall not be able to take a loan from the Company to purchase its shares from the floor of the stock exchange. Section 58 (2) of the Act, however, only deals with situations wherein financial assistance is given by a company for the purpose of or in connection with a 'purchase' of its shares. I did not come across any Bangladeshi case on Section 58 (2) of the Act, which deals with the interpretation of the word 'purchase'. It seems to me that Section 58 (2) of the Act does not deal with situation wherein a company gives financial assistance for the purpose of or in connection with 'subscription' of its shares.

'Subscription' defined

What is meant by 'subscription' of shares? In the context of Employee X, the Company selects Employee X who would make application to the Company for allotment of Z number of shares to him and the Company would make such allotment to Employee X and notify him of such allotment. The application by Employee X is an offer by him to take a certain number of shares and the allotment by the Company is an acceptance of the offer. When the company makes the allotment and notifies such allotment to Employee X (i.e. the applicant), a binding contract is constituted by and between Employee X and the Company to take and issue the shares[10]. In other words, the allotment by the Company

10 See *Halsbury's Laws of England*, Vol. 7(1), at p. 442, 4th Edition 1996 Reissue, Butterworths.

would create an enforceable contract for the issue of shares. Following the English case of *Arnison vs. Smith*[11], such a contract to take shares by means of a formal application under, which there is a liability to pay, is called 'subscription' of shares. Thus, the shares are 'issued' when an application to the company has been followed by allotment and notification to the purchaser and completed by entry on the register of members[12]. Employee X would then make payments against such issue of shares by the Company. Thus, the Company would provide financial assistance to Employee X for such 'subscription' of shares. The entire process described above is called "acquisition of shares by application and allotment".

'Subscription' analysed

In my opinion, if the Company provides financial assistance to Employee X for the purpose of financing the 'subscription' of its shares, such financial assistance will not violate Section 58 (2) of the Act. My position finds support from *Re V.G.M. Holdings Ltd.*[13], an English case dealing with the interpretation of the word 'purchase' in Section 45 of the English Companies Act 1929 (which is nearly identical to Section 58 (2) of the Act). Section 45(1) of the Companies Act 1929 opened as follows:

> It shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company.

The facts of Re V.G.M. Holdings Ltd involved a private company, V.G.M. Holdings Ltd. (V.G.M.), incorporated with a nominal capital of £20,000, divided into 20,000 shares of £1 each, all of which, at a board meeting on 4 May 1938, were allotted for cash to the directors of V.G.M as follows: to CV, 10,100, to MG, 4950, and to JM, 4950. It was resolved a meeting that a call of 16 shillings per share be made on all shares and it was further resolved that the secretary be authorised to make arrangements for V.G.M to acquire the share capital of Century Refrigeration Co. Ltd. (CRCL), the directors of which were the same as those of V.G.M. All the shares in CRCL were owned beneficially by CV. On 20 May 1938 V.G.M paid to CRCL a sum of £15,980 by cheque, and on the same day CRCL drew a cheque in favour of CV for £8080, and a cheque in favour of MG and JM for £3960 each. They all immediately endorsed and transferred the

---

11 (1889) 41 Ch. D. 348 at p. 357.

12 See *Halsbury's Laws of England,* Vol. 7(1), at p. 446, 4th Edition 1996 Reissue, Butter worth.

13 (1942) 1 Ch. 235.

respective cheques to V.G.M and the sums were credited to them in the books of V.G.M as payments of 16 shillings per share on their shareholdings. On October 1938, CRCL went into voluntary liquidation, and on November 1939, an order was made for the compulsory winding up of V.G.M. On December 1940, the liquidator of V.G.M took out a summons, to which CV was the sole respondent, alleging, amongst others, that the payment of £15,980 to CRCL by V.G.M was in breach of Section 45 of the Companies Act 1929. The trial judge held that the acquisition of a share from a limited company by application and allotment was a purchase of the share, and that, accordingly, CV was in breach of Section 45(1) of the Companies Act 1929. On appeal by CV, it was contended on behalf of the liquidator that under Section 45(1) of the Companies Act 1929, a company cannot give financial assistance in connection with 'a purchase' of its shares. There can be no legitimate distinction between a transaction in which a company provides money for the purchase of shares already issued and one in which it provides money for the acquisition of its shares by application and allotment and that each transaction is a 'purchase' within the meaning of Section 45(1) of the Companies Act 1929.

After extensive arguments by both sides, Lord Greene, M.R., observed and held as follows:

> The sole question is whether or not the word "purchase" in this section [Section 45 of English Companies Act 1929] covers a case where the money which the company provides is used to assist a subscription for the company's own shares … I am unable to agree with the view … that the subscription … was, within the meaning of the section, a purchase of those shares. In the first place, throughout the Companies Act, 1929, the language which is used with regard to the issue of shares to subscribers is invariably confined to words like "issue", "subscription", "application", "allotment", and so forth. There is not a single passage in the Act … in which the word "purchase" is used in relation to the transaction of subscription. That being so, it seems to me that a very clear context would be required to enable a meaning to be put on the word "purchase" in this section which would extend it so as to cover the acquisition of shares by subscription. Quite apart from those considerations of mere language of the Act, it seems to me that the word "purchase" cannot with propriety be applied to the legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company. He does not purchase anything when he does that. The counsel endeavoured heroically to establish the proposition that a share before issue was an existing article of property, that it was an existing bundle of rights which a shareholder could properly be said to be purchasing when he acquired it by subscription … I am unable to accept that view. A share is a chose in action. A chose in action implies the existence of

> some person entitled to the rights which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exist. Putting it in a nutshell, the difference the issue of a share to a subscriber and the purchase of a share from an existing shareholder is the difference between the creation and the transfer of a chose in action. The two legal transactions of the creation of a chose in action and the purchase of a chose in action are quite different in conception and in result. [14]

The analysis presented by Lord Greene M.R clearly states that, as a matter of construction, the word 'purchase' could not be extended to include 'subscription'. The decision of *Re V.G.M. Holdings Ltd*, led to subsequent reform in the English company laws. It was reflected in the Companies Act 1947 and then consolidated as Section 54 of the Companies Act 1948, which provided as follows:

> It shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase *or subscription* made, by any person of or for any shares in the company, or where the company is a subsidiary company, in its holding company. (Underline added)

Thus, as well as including the giving of financial assistance in relation to a subscription of shares within the ambit of the prohibition, the prohibition under Section 54 of the English Companies Act 1948 also extended to subsidiary companies providing financial assistance for the purchase of, or subscription for, shares in their holding companies.

In India, on the other hand, the Companies Act 1913 made provisions for prohibition on financial assistance under Section 54A, which did not extend to include 'subscription'. After the partition of the sub-continent, India repealed Companies Act 1913 by passing Companies Act 1956, which was based primarily on English Companies Act 1948. Section 77 of the Indian Companies Act 1956 brought important changes in the provision of financial assistance. Section 77(2) of the Companies Act 1956 opened with the following words:

> No public company, and no private company which is subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company. (Underline added).

The inclusion of the word 'subscription' in Section 54 of the English Companies Act 1948 and Section 77(2) of the Indian Companies Act 1956

14 Ibid., at pp. 240-241.

meant that the legislature of both the jurisdictions intended to prohibit financial assistance by companies to acquire shares through subscription. Thus, following the principle established in *Re V.G.M. Holdings Ltd*, in my opinion, unless reforms are made to include 'subscription' in Bangladesh company law, as it had been done by the English and Indian jurisdiction, there shall not be any violation under Section 58(2) of the Act if the Company provides money to Employee X for the acquisition of its shares by subscription.

'Share Option' defined-General

In the alternative, the Company may introduce 'employee share option scheme'[15] to help people like Employee X to acquire some of the shares of the company. In such a scheme, employees selected by a company would be given option to subscribe for certain number of shares at a specific price ("strike price") on or before a certain date (the expiration date) in the future (hereinafter referred to as "the Share Option"). The Share Option is a contract giving the buyer the right, but not the obligation, to buy shares (the underlying asset) at a specific price on or before a certain date. In other words, a right to acquire shares can be either a right to subscribe for new shares to be issued on exercise of the option or, alternatively, a right to purchase shares from an existing shareholder. Thus, when the employees exercise the Share Option, they would subscribe for the shares to be issued by the company in exchange for the agreed upon strike price. It should be remembered that all of this must occur before the expiration date.

'Share Option' analysed

With respect to financing the Share Option, Section 58 (2) of the Act is again relevant. There is no Bangladeshi case, which deals with the interpretation of the word 'shares' in the context of Section 58 (2) of the Act. Looking at the wording of Section 58(2), it appears to me that:

(1) Section 58 (2) does not deal with situation where a company gives financial assistance for the purpose of purchasing the Share Option;

(2) If a company provides financial assistance to its employees for the purpose of financing the purchase of the Share Option, such financial assistance will not violate Section 58 (2) of the Act; and

(3) To provide financial assistance to purchase option to subscribe for shares is not the same as providing financial assistance to purchase shares. In other words, as a matter of construction, it seems that the

15 Please note that ESOP (See note 4, supra) does not stand for "Employee Stock Option Plan". ESOPs and stock options are entirely different. They, however, fall within the broad category of employee share ownership schemes.

ordinary and natural meaning of *'financial assistance for the purpose of or in connection with a purchase … of any shares in the company'* in Section 58 (2) of the Act is clear enough. To stretch the language of Section 58 (2) to include the purchase of an option to subscribe shares would be a misinterpretation.

My above analysis finds support from *NZl Bank Ltd vs. Euro-National Corporation Ltd*[16], a New Zealand case dealing with Section 62 of the New Zealand Companies Act 1955 (which is similar to Section 58 (2) of the Act). The facts of *NZl Bank Ltd vs. Euro-National Corporation Ltd* are complex. In 1988, Euro-National Corporation Ltd (EN) and a linked company, Kupe Group Ltd (KGL) faced a host of difficulties following heavy trading losses, falling values of shares, urgent need of funds, the wish of major shareholders to be rid of their investments and the insolvency of EN's executive director RMP who owed money to NZl Bank Ltd (NZI) and DFC New Zealand Ltd (DFC) secured against his 10% shareholding in EN and certain management and listed options. To avoid the likely effect on share values if NZl and DFC sought to dispose of EN's shares on the market, a scheme of extraordinary complexity was devised by its legal and financial advisers. Its essential feature was that EN and KGL were to form a joint venture company, which was to buy the RMP shares and the management options and listed options; but NZl and DFC were to have call options (i.e. the right to acquire the RMP shares) over the RMP shares at 70 cent per share. EN was to set up an employee unit trust (EUT) which, subject to the options just mentioned, was to purchase the shares from the joint venture company in three years at 98 cents per share. In turn EN was to underwrite the obligation of the EUT and issued certain transferable payment bonds to the trustees of EUT to support that obligation. The EUT was to acquire at the once the RMP options, paying a total price to NZl and DFC of $3.2 million, EN advancing the money to EUT for this purpose. Since an essential feature of this scheme was that EN would provide financial assistance in connection with the contemplated acquisition of some of its own shares, namely the RMP shares and options, it was prima facie illegal under Section 62(1) of the Companies Act 1955 and therefore, the EUT was established as a conduit, on the theory that this would bring the transaction within the protection provided by the proviso of para (b) of the sub-section. The principal shareholders of EN secured control of the board and proceedings were brought in the name of EN to set aside what had been done. In the New

16 [1992] 3 NZLR 528.

Zealand High Court it was held that the scheme was illegal for breach of Section 62 and orders were made for the return of $3.2 million from NZl and DFC to return all parties to their previous position. NZl and DFC appealed.

Section 62(1) of the New Zealand Companies Act 1955 reads as follows:

(a) Subject as provided in this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security, or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company, or, where the company is a subsidiary company, in its holding company.

Provided that nothing in this section shall be taken to prohibit-

...

(b) The provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in company or its holding company, being a purchase or a subscription by trustees of or for shares to be held by or for the benefit of the employees of the company, including any director holding a salaries employment or office in the company.

On appeal, one of the important issues before the New Zealand Court of Appeal was to determine whether providing financial assistance to acquire options to acquire shares was prima facie illegal under Section 62(1) of the Companies Act 1955.

Cooke P, in his judgment observed as follows:

... To provide money to acquire options to acquire shares is not to provide money to acquire shares....

It is suggested ... that the distinction between acquiring a right to take up shares at a certain price and acquiring fully paid up shares is technical ... That I cannot accept. As has so often been said, certainty is particularly important in commercial law. The ordinary and natural meaning of 'for the purchase of, or subscription for, fully paid shares" is clear enough. It would be an unsound method of interpretation to stretch the language to include the purchase of an option to purchase or subscribe..." [17]

Richardson J, on the other hand, observed:

Were the options "fully paid shares" in the Euro-National?

A share confers an immediate interest in the capital of the company...

An option to purchase gives the holder a right to purchase a share in the company at some future time and on certain conditions, it does not follow

17 At pp. 531-532.

> that the option constitutes a share in the capital itself ... The critical question is whether these options constituted a fully paid shares in the company within the meaning of para (b) ...
>
> ...
>
> Whether the management options and the listed options are to be characterised as fully paid shares in EN is to be determined ...when the $3,222.000 in money was provided by EN. That money was not paid for the purchase of or subscription for fully paid shares in EN. It was paid for the right to acquire shares in the future ... It follows in my view that $3,222.000 was not paid for the purchase of or subscription for fully paid shares in EN.[18]

The decision by the New Zealand Court of Appeal in *NZl Bank Ltd vs. Euro-National Corporation Ltd.* has a direct bearing on the application and scope of the Section 58(2) of the Act, in the sense that, theoretically, the financing by the Company for the acquisition of the Share Option by Employee X will not violate Section 58(2) of the Act.

Section 58(2) Revisited

Also, in my opinion, the wording of Section 58(2) of the Act is unclear on the issue of the type of company capable of providing financial assistance. From a plain reading of Section 58(2) it appears that a private company, not being a subsidiary of a public company, can provide financial assistance to any person for the purpose of a purchase of the shares in that private company. It is not clear, however, whether Section 58(2) covers the situation where a private company, which is a subsidiary of a public company, provides financial assistance for the purpose of a purchase by any person of any shares *in its holding company.* The two terms*' No Company limited by shares other than private company'* (which means a public company) and '*a subsidiary company of a public company'* seem to have used disjunctively when dealing with the prohibition on financial assistance for the purpose of purchase of the shares *'in the company'*. In other words, Section 58(2) seems to deal with: (a) the prohibition on a public company to provide financial assistance for the purpose of purchase of the shares in that public company, and (b) the prohibition on a subsidiary company of a public company to provide financial assistance for the purpose of purchase of shares in that subsidiary company. There is no mention in Section 58(2) of any prohibition on a subsidiary company providing financial assistance for purchasing shares in its holding company. It should be noted that Section 54A(2) of the Indian Companies Act 1913 (repealed by the Indian Companies Act 1956) was the same as Section 58(2) of the Act. Section

18 At pp. 541-542.

77(2) of the Indian Companies Act 1956 (based on Section 54 of the English Companies Act 1948) amended the earlier Section 54A and clarified the position as follows:

> No public company, and no private company which is subsidiary of a public company, shall give ... any financial assistance for the purpose of or in connection with a purchase or subscription ... of or for any shares in the company or in its holding company. (Underline added).

Thus, like Section 54 of the English Companies Act 1948, Section 77(2) of the Indian Companies Act also extended the prohibition to subsidiary companies providing financial assistance for the purchase of, or subscription for, shares in their holding companies. In my view, similar amplification should also be introduced to Section 58(2) of the Act to clear up the confusion. However, in present situation, in my opinion, in this regard, there is a loophole in Section 58(2) and therefore, it may be possible for a subsidiary to provide financial assistance for acquisition of shares in its holding company.

The Indian Tale

India has come a long way in recognising employee participation in the profits of the company by incorporating necessary provision into the Indian Companies Act 1956. The proviso (b) and (c) to Section 77(2) of the Indian Companies Act 1956 deal with employee share ownership, which read as follows:

> Provided that nothing in this sub-section shall be taken to prohibit-
>
> ...
>
> (b) The provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in company or its holding company, being a purchase or a subscription by trustees of or for shares to be held by or for the benefit of the employees of the company, including any director holding a salaries employment or office in the company; or
>
> (c) the making by a company of loans ... to persons (other than directors or managers) bona fide in the employment of the company with a view to enable those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

It is interesting to note that proviso (b) to Section 77(2) of the Indian Companies Act 1956 is exactly the same as proviso (b) to Section 62(1) of the New Zealand Companies Act 1955. The spirit behind the promulgation of the proviso to Section 77(2) of the Indian Companies Act 1956 is

evident by the Company Law Committee's report[19], whose observation is most pertinent and significant:

> The only important recommendation that we make is that the prohibition imposed by section 54 of the Indian Companies Act [the 1913 Act] should not apply to the provision of funds by a company for the purchase of, or subscription for, fully paid-up shares by a trustee or by trustees for the benefit of employees of the company or to grant loan by the company to its employees for a similar purchase. ... The object of our recommendation is to enable the purchase of its shares by a company on behalf of and for the benefit of its employees or by the employees themselves up to a limited extent. ... We trust that this provision, if wisely and tactfully implemented, will enable the employees to a have reasonable stake in the affairs of a company and promote the improvement of industrial relations. At the same time, the operation if this provision will have to be carefully watched, in the initial stage, so that the opportunity that it offers to a company for the investment of its funds in its own shares is not abused to prejudice of the employees. [20]

Conclusion

In the UK, the Employee Share Schemes Bill was introduced in the House of Commons on 18 July 2001. It received Royal Assent and became law on 7 November 2002 as the Employee Shares Schemes Act 2002. In a House of Commons research paper dated 16 January 2002[21] on the Employee Share Schemes Bill, the UK government evaluated the cost-benefit analysis of the new employee shares schemes and had observed that the proposed schemes would be expected to provide, *inter alia,* the following benefits[22]:

(a) Benefit the economy as a whole, as well as individual employers and employees;

(b) Improve productivity particularly when combined with modern management practices and other forms of active employee participation;

(c) Help bridge the gap between employees, managers and shareholders; and

(d) Help reduce staff turnover by improving employee commitment and motivation.

---

19 The Companies Act 1956 was enacted on the recommendations of the Bhaba Committee set up in 1950 with the object to consolidate the existing corporate laws and to provide a new basis for corporate operation in independent India. With enactment of this legislation in 1956, the Companies Act 1913 was repealed.

20 Ibid., at p. 39.

21 Research Paper 02/05. For a copy of the research paper, see: http://www.parliament.uk/commons/lib/research/rp2002/rp02-005.pdf

22 Ibid., at p. 13.

The research paper, by giving reference to a consultation document published by the British Government on December 1998 on employee share ownership[23], observed as follows[24]:

In its consultation document the Government set out the economic case for extending employee share ownership as follows:

> Employee share ownership offers the prospect of bridging the gap between employees and shareholders, to the long-term benefit of employees, managers and outside investors. By aligning more closely the interests of the workforce and the owners of the company, employee ownership can help increase cooperation. Over time, employees with a stake in the business have an incentive to contribute more actively to the development of the business by raising productivity. If the majority of employees have such an ownership stake, then individual efforts may become mutually reinforcing, and employees have an interest in the work of their colleagues.
>
> Once they have become shareholders, employees are more likely to feel greater commitment to the company for which they work. This in turn can help companies in their recruitment and retention, and enable them to obtain a better return from their investment in employee training. Finally, employees who are also shareholders may better understand the risks faced by the company and its investors, which in turn can encourage recognition of the case for pay responsibility.

Particular mention was made of the experience of the United States:

> Employee share ownership is widespread in the United States, and most of the research evidence on the practical impact of employee ownership relates to the US. The key conclusion of this research is that employee share ownership, especially when combined with other means of active employee participation, does have a positive impact on employee motivation, productivity and corporate performance...

The above observation of the UK Government does indeed, in my view, make a good case for the introduction of employee share schemes in Bangladesh. In today's competitive global economy, employee participation in the company's profit sharing process is seen as a key to enhanced productivity and successful economic outcome. Bangladesh should not be an exception in this regard. Therefore, like the UK Government, Bangladesh should also introduce regulatory provisions governing the employee share schemes. There should, however, be adequate and extensive research before implementing such an Act.

---

23 Treasury, HM, "Consultation on employee shares ownership", December 1998.

24 "Research Paper 02/05", op. cit., pp. 8-9.

To this end, the relevant provisions of the Companies Act 1994, in particular the laws relating to financial assistance by the company to purchase its own shares should also be amended. The interpretation of Section 58(2) of the Companies Act 1994 has not been tested before the courts of Bangladesh. It is my view, however, that in such event, the court should interpret the words used in Section 58(2) by giving their ordinary and natural meaning. In the US Supreme Court, Justice Thomas, while delivering the opinion in *Connecticut National Bank vs. German*[25] stated:

> We have stated time and again that courts must presume that a ... legislature says in a statute what it means and means in a statute what it says there. ... When the words of a statute are unambiguous, then this first canon is also the last: "judicial inquiry is complete."... [26]

The wording of Section 58(2) of the Companies Act 1994, in its present state, is clear for the purpose for which it was formulated. That purpose, however, in my opinion, did not envisage 'subscription' and 'share option'. As Mark Twain once famously said:

> The difference between the almost right word & the right word is really a large matter--it's the difference between the lightning bug and the lightning. [27]

Therefore, Section 58(2) of the Companies Act 1994 should be amended by using the 'right word' when considering the provision of financial assistance by company regarding employee share ownership. As things stand, however, I am of the view that there are huge loopholes in Section 58(2) of the Act, and subject to sourcing of shares and the role of Securities and Exchange Commission[28], theoretically, I venture the following observations:

---

25 112 S. Ct. 1146 (1992).

26 Ibid., at p. 1149.

27 Letter to George Bainton, 10/15/1888, see The Art of Authorship; compiled by Bainton George, New York: D. Appleton and Company 1891.

28 Company and Securities Laws, Dr. Zahir M., Revised and Updated edition 2005, The University Press Limited, at p. 261: Section 2A-2F have been inserted in the SEO [The Securities and Exchange Ordinance 1969] by the Securities and Exchange (Amendment) Act 1993 ... Section 2A forbids any company incorporated in Bangladesh from investing anywhere other than Bangladesh except with the consent of the SEC [Securities and Exchange Commission]. Also, any company whether incorporated in Bangladesh or not shall, except with the consent of the SEC make an issue of capital ... in Bangladesh ... By a Notification dated 16 Sept. 1997 the SEC ... granted exemption from the provision under clause (a) of sub-section (2) of the SEO all private companies and any public company for an issue of capital upto Taka Ten Crores."

(1) there is no bar on a public company to finance its employees to acquires shares in the company by subscription;

(2) there is also no bar on a public company to finance its employees to purchase Share Options to acquire shares in that company at a future date on agreed terms; and

(3) it seems that if a company is a subsidiary of a public company, that subsidiary may provide financial assistance to its employees for the purpose of acquisition shares, either by purchase or subscription, in the holding company.

The sceptic may argue that loopholes are the results of 'legalese' or the 'letter of the law', not the spirit of laws, and therefore, my above observations offend the spirit behind the prohibition on financial assistance by the company for purchasing its own shares. I would argue that - *Tout ce que la loi ne defend pas est permis* - everything is permitted, which is not forbidden by law[29]. Section 58(2) of the Companies Act 1994 certainly does not expressly forbid financial assistance by the company for 'subscription of share' or 'purchase of share option'. Until and unless it is expressly stated therein, I am of the view that such actions by the company are well within the authorised purview of the Companies Act 1994.

Therefore, I urge that Bangladesh Law Commission should review the Companies Act 1994 and make appropriate suggestions to the Government to clear up the present confusion concerning financial assistance by a company to purchase its own shares in the context of employee share ownership. It is time, I believe, to turn the searchlight within.

Acknowledgement:

The author acknowledges the contribution of the following persons for this Article:

(1) Dr. Kamal Hossain, Senior Advocate, Supreme Court of Bangladesh.

(2) Dr. M. Zahir, Senior Advocate, Supreme Court of Bangladesh.

(3) Dr. Borhan Uddin Khan, Professor of Law and Dean, Faculty of Law, University of Dhaka.

(4) Mr. Zafar Sobhan, Attorney-at-Law and the Assistant Editor of the Daily Star.

(5) Ms. Sajeda Farisa Kabir, Barrister-at-Law and Advocate.

29 Bouvier J. Law Dictionary, Sixth Ed., Philadelphia, Child's & Peterson, 1856.