

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
JUDICIAL DEPARTMENT

SECP Appeal No. 05 of 2015

M/s Dewan Petroleum (Pvt.) Limited

**Vs**

Executive Director, SECP and another

DATES OF HEARING: 27-09-2016, 28-09-2016,  
07-10-2016, 20-10-2016  
and 28-10-2016.

Appellant BY: M/s Salman Akram Raja and Malik  
Ghulam Sabir Advocates.

RESPONDENTS BY: M/s Syed Ishfaq Hussain Naqvi  
and Shahzad Ali Rana Advocates, for  
the SECP.

Syed Ahmad Hassan Shah Advocate,  
for the respondent Company.

ATHAR MINALLAH, J.- Through this judgment I  
shall decide the instant appeal along with the following writ  
petitions:

- i) W.P. No. 484 of 2015, re: Shuja ur Rehman  
Farooqui and another vs. Executive Director,  
SECP, etc.

- ii) W.P. No. 1306 of 2016, re: Dewan Muhammad Zia ur Rehman Farooqui vs. Executive Director, SECP, etc.

2. The facts, in brief, are that M/S Dewan Petroleum (Pvt.) Limited (hereinafter referred to as the "appellant Company") was incorporated on 24-01-2003. Pursuant to a resolution of the Board of Directors of the appellant Company, dated 22-11-2006, twelve million (12,000,000/-) ordinary shares of the appellant Company, were issued to Dewan Salman Fiber Limited (hereinafter referred to as the "respondent Company"). Admittedly, the respondent Company holds 30% of shares in the appellant Company. Articles 9 and 11 of the Articles of Association of the appellant Company stipulate certain restrictions relating to the transfer of shares. The shares in the name of the respondent Company are, therefore, held by a juridical person and not a natural person. Through letters dated 07-05-2014 and 09-05-2014, the respondent Company informed the appellant Company that the latter had sold 500 shares each to three natural persons for a consideration mentioned in the said letters. The letters were placed before the Board of Directors of the appellant Company. It is the case of the appellant Company that instead of rejecting the request, the respondent Company was informed that the nominations made would be placed before the share holders of the latter

at the forthcoming Annual General Meeting (hereinafter referred to as the "AGM"). The respondent Company treated the letter dated 27-05-2014 as a refusal and consequently invoked the provisions of section 78 A of the Companies Ordinance, 1984 (hereinafter referred to as the "Ordinance of 1984") by filing a petition before the Security Exchange Commission of Pakistan (hereinafter referred to as the "Commission"). A show cause notice, dated 28-05-2014, was issued, which was contested by the appellant Company. Subsequently, the Commission passed order dated 10-07-2014 whereby the appellant Company and its Directors were directed to transfer the shares in the names of the nominees as per request of the respondent Company. The appellant Company preferred an appeal under section 33 of the Securities Exchange Commission of Pakistan Act 1997 (hereinafter referred to as the "Act of 1997"). The Appellate Bench of the Commission, vide order dated 30-04-2015, passed an injunctive order restraining the appellant Company from holding the AGM. The appellant Company has assailed the said order, dated 30-04-2015, by filing the instant appeal under section 34 of the Act of 1997. The petitioners in the two connected constitutional petitions (i.e. W.P. Nos. 484/2015 and 1306/2016) are share holders of the appellant Company who feel aggrieved by the directions given by the Commission vide order dated 10-07-2014 and they have, therefore, challenged the same by invoking the jurisdiction of

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this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "Constitution").

3. The learned counsel for the appellant/petitioners has contended that; the Appellate Bench of the Commission could not have passed the impugned order, dated 30-04-2015, restraining the company from holding the AGM till the disposal of the appeal; the Appellate Bench was only concerned with the appeal filed by the appellant Company against the order of the Commission passed under section 78 A of the Ordinance of 1984; there was no request nor any application for restraining the appellant Company from holding the AGM; the Appellate Bench was required to exercise quasi judicial powers only to the extent of an appeal filed before it and was not vested with the power to pass regulatory orders; even the Commission has no power to prevent a company from holding an AGM since the same is mandatory under section 158 of the Ordinance of 1984; the only statutory power that vests in the Commission or the Registrar, as the case may be, is to allow an extension in the holding of the AGM; the impugned order has been passed in a perfunctory manner; the legality of an AGM can only be challenged in the prescribed manner i.e. under section 160 A of the Ordinance of 1984; reference in this regard has been made to the case of "Jahangir Siddiqui and others vs. Azgard

Nine Limited and others" [2013 CLD 1953]; the AGM held in July, 2014 was challenged by the respondent Company through C.O. No. 07/2015 and the same was dismissed by this Court vide order dated 15-03-2016; the impugned order dated 30-04-2015 is a void order and the instant appeal is competent; an appeal under section 34 ibid is competent against 'an order' and is not restricted to a final order; when the law intends to bar the appeals against interim orders, clear stipulations are made to this effect and reference in this regard has been made to section 33(i)(d) and 485(1) of the Ordinance of 1984; the constitutional petitions filed by the share holders are maintainable for the reason that the latter are seeking determination of their civil rights and liabilities flowing out of the Articles of Association; the Commission, while invoking powers under section 78 A of the Ordinance of 1984, is not competent to exercise judicial powers so as to determine civil rights and liabilities; reliance in this regard has been placed on the cases of "United Liner Agencies of Pakistan (Pvt.) Ltd. Karachi and 4 others vs. Miss Mahenau Agha and 8 others" [2003 SCMR 132] and "Mian Javed Amir vs. United Foam Industries" [2016 SCMR 213]; the impugned order dated 10-07-2014, passed by the Commission, is without jurisdiction and a nullity in the eyes of the law.

4. The learned counsel appearing on behalf of the respondent Company has argued that; the appeal filed under

section 34 of the Act of 1997 is not competent; an appeal can only be filed against a "final order" or "decision"; the words "the decision" are expressly mentioned in sub section (2) of section 34; an appeal against an interim order is not competent; the article "the" before the word 'decision' is quite instructive. Reliance in this regard was placed on the case of "Fasih-ud-Din and others vs. Government of Punjab and others" [2010 SCMR 1778] in order to emphasize the argument relating to the use of the expression "decision"; decision entails judicial determination and an interim order is excluded from the ambit of a decision; the Commission has wide powers to perform quasi judicial functions for the purpose of determination of questions within its legislative competence; the respondent Company is a public listed company and being a share holder is vested with the right to participate in the meetings and that its nominees can contest the elections; these rights could not have been denied by the appellant Company; the refusal to transfer the shares as per request of the respondent Company was arbitrary and based on malafide and, therefore, the respondent Company had rightly invoked the jurisdiction of the Commission under section 78 A of the Ordinance of 1984; the main controversy relates to the right of the respondent Company to participate in and contest elections of Directors through its nominated natural persons; it is within the powers vested in the Commission to restrain a company, an incorporated entity,

from holding an AGM till the controversy is resolved; the powers vested in the Commission are wide enough to justify the impugned order; section 180 of the Ordinance of 1984 empowers the Commission in matters relating to general meetings; likewise, under section 170 of the Ordinance of 1984 the Commission, in order to protect the rights of the minority share holders, was justified in passing the impugned order; the constitutional petitions are not maintainable.

5. The learned counsels have been heard and the record perused with their able assistance.

6. The controversy between the two companies is premised on the interpretation of clauses 9 and 11 of the Articles of Association of the appellant Company. Moreover, legal questions regarding the interpretation of the provisions of the Ordinance of 1984 in the context of the nature of the transfer of shares requested by the respondent Company in favour of natural persons, are also involved. The Commission, while exercising powers under section 78 A of the Ordinance of 1984, had directed the appellant Company to transfer the shares pursuant to the request made by the respondent Company. The Commission had construed the request for transfer of the shares as distinct from the transfer envisaged under the Ordinance of 1984. This essentially involved interpretation of the relevant clauses of the Articles of

Association and the Ordinance of 1984 and, therefore, the appellant Company filed an appeal under section 34 of the Act of 1997. The learned Appellate Bench of the Commission, vide the impugned order dated 30-04-2015, restrained the appellant Company from holding its forthcoming AGM. It appears from the impugned order that neither had the learned Appellate Bench heard the parties nor had it taken into consideration the pre-requisites for issuing an injunctive order i.e. a prima-facie case was made out, balance of inconvenience and irreparable loss. On the face of the impugned order, it does not reflect that there was an application of mind. The questions which emerge for consideration are; firstly, whether an appeal against an interim order is competent under section 34 of the Act of 1997; secondly, if the appeal is competent, then whether the impugned order is sustainable in law and lastly, whether the two constitutional petitions filed by the share holders are maintainable.

7. The appeal has been filed under section 34 of the Act of 1997. Sub section (1) of section 34 provides that an appeal would lie to the Court i.e. a High Court in respect of 'an order' of the Commission, comprising of two or more Commissioners, or the Appellate Bench or an order made under sub section (2) of section 32(b). The Legislature, in its wisdom, has provided the right of appeal against 'an order'.



The expression 'order' has not been defined in the Act of 1997 and, therefore, guidance is sought from various dictionaries to ascertain its ordinary meaning. The relevant definitions are as follows:

**"Black's Law Dictionary (9<sup>th</sup> Edition):**

**ORDER:** A command, direction or instruction. See MANDATE (i). 2. A written direction or command delivered by a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands.-Also termed court order; judicial order.

**Oxford Advanced Learner's Dictionary (7<sup>th</sup> Edition):**

**ORDER:** --- **GIVE INSTRUCTIONS** 1 to use your position of authority to tell sb to do sth or say that sth must happen: [VN to inf] The company was ordered to pay compensation to its former employees. ◇ The officer ordered them to fire. ◇ [VN] They were ordered out of the class for fighting. ◇ The government has ordered an investigation into the accident. ◇ [v **that**] They ordered that for every tree cut down two more be planted. ◇ (BrE also) They ordered that for every tree cut down two more should be planted. ◇ [v **speech**] 'sit down and be quite,' she ordered.

It is obvious from the above, that the words 'an order' by no stretch of imaginations can be construed as meaning a final order or decision which disposes of or decides the appeal.

8. The learned counsel for the appellant/petitioners has rightly emphasized, in the context of the scheme of the Act of 1997, that where the legislature had intended that a remedy against an interim order was not available then the same was expressly barred by using express words to this effect. Reference to sections 33(I)(d) and 485(I) are apt in this regard. The emphasis placed by the learned counsel for the respondent Company on the expression "the decision" in sub section (2) of section 34 is misplaced; firstly because sub section (2) of section 34 merely specifies the limitation for filing an appeal and not the scope thereof and secondly, when sub section (1) and (2) are read together the legislative intent becomes obvious. Even if it is assumed that the provisions are in conflict, which they are not, then applying the principles of interpretation of statutes, the provisions have to be construed by reading them as a whole and in a harmonious manner. It is the duty of a court to construe the provisions of a legislative enactment so that it is in consonance with what the legislature had intended. Every word must be given meaning and effect, since redundancy

cannot be imputed to the legislature. Sub section (1) of section 34 of the Act of 1997 provides for the scope of the right of appeal while sub section (2) prescribes the period during which the said right can be exercised. The legislature, in its wisdom, has used words in relation to the right of appeal which cannot be construed as excluding an interim order or circumscribing it to a final order or decision. It is held, therefore, that the instant appeal is competent and that an order, inter-alia, including an interim order passed by the Appellate Bench under section 33 of the Act of 1997 is appealable.

9. Next is the question of maintainability of the constitutional petitions which have been filed by the share holders of the appellant Company under Article 199 of the Constitution. It is noted that the right of appeal to the Appellate Bench is provided under section 33 of the Act of 1997. The said provisions are unambiguous and clearly provide that any person aggrieved by an order of the Commission, passed by a Commissioner authorized in this regard by the Commission, may within the prescribed period prefer an appeal to an Appellate Bench of the Commission. In both the petitions, the petitioners claim to be aggrieved persons and that their grievance arises from the order passed by the Commission under section 78 A of the Ordinance of 1984. To the extent of their grievance they fall within the

ambit of the expression 'any person aggrieved', used in section 33 of the Act of 1997. It is obvious, therefore, that the right of appeal was available to the petitioners under section 33 of the Act of 1997 against the order dated 10-07-2014. The said statutory right of appeal is definitely an adequate and efficacious remedy. It is settled law that a High Court will not entertain a petition under Article 199 of the Constitution when another appropriate remedy is available, is not a rule of law barring the jurisdiction of the Court. However, when the law provides an adequate remedy then constitutional jurisdiction is exercised sparingly and in exceptional circumstances, such as when the order or action is palpably without jurisdiction, malafide, void or coram non-judice. Moreover, the tendency of bypassing the remedy provided under the relevant statute is discouraged so that the legislative intent is not defeated. The constitutional jurisdiction under Article 199 of the Constitution cannot be readily resorted to when the hierarchy provided under the relevant statute ends up by an appeal, revision or reference before a High Court or directly to the apex Court. Reliance in this regard is placed on the cases of "Collector of Customs, Customs House, Lahore and 3 others Vs. Messrs S.M. Ahmad & Company (Pvt) Limited, Islamabad" [1999 SCMR 138], "Khalid Mehmood vs Collector of Customs, Customs House, Lahore" [1999 SCMR 1881], "Ch. Muhammad Ismail vs Fazal Zada, Civil Judge, Lahore and 20 others" [PLD 1996 SC 246],

"Income-Tax Officer and another vs. M/s. Chappal Builders" [1993 SCMR 1108], "Commissioner of Income Tax, Companies-II and another vs. Hamdard Dawakhana (Waqf), Karachi" [PLD 1992 Supreme Court 847], "The Muree Brewery Co.Ltd vs Pakistan through the Secretary to Government of Pakistan, Works Division and 2 others" [PLD 1972 SC 279], "Lt. Col. Nawabzada Muhammad Amir Khan vs. The Controller of Estate Duty and others" [PLD 1961 Supreme Court 119], "Tariq Transport Company, Lahore vs. The Sargodha-Bhera Bus Service, Sargodha and others" [PLD 1958 SC 437].

10. In the light of the above discussion, both the constitutional petitions are held not to be competent, nor could the statutory provision i.e the right of appeal provided under section 33 of the Act of 1997 have been bypassed. Moreover, the interests of the petitioners have been taken care of by the appellant Company by filing an appeal under section 33 of the Act of 1997. Needless to mention that entertaining the constitutional petition would tantamount to defeating the legislative intent of enacting the Ordinance of 1984.

11. Finally, I shall advert to the legality of the impugned order dated 30-04-2015 passed by the learned Appellate Bench whereby the appellant Company has been restrained from holding its AGM till disposal of the appeal under section

33 of the Act of 1997. The holding of an Annual General Meeting is a statutory requirement mandated under section 158 of the Ordinance of 1984. Sub section (1) refers to the AGM which is required to be convened after the incorporation and provides that the subsequent AGMs are required to be held at least once every calendar year. In both the eventualities, the legislature in its wisdom has prescribed a limitation for holding an AGM. The proviso to sub section (1) of section 158 empowers the Commission or Registrar, as the case may be, to extend the time within which an AGM may be held and even in this regard time has been prescribed for granting such an extension. It is further noted that the legislature has provided for penalties in case of default made in convening an AGM in accordance with the provisions of section 158 of the Ordinance of 1984. The holding of Annual General Meetings is crucial for a company and its shareholders. It enables the shareholders to come together once in a year to examine the state of affairs of the company. The timelines provided in section 158 of the Ordinance of 1984 for convening an AGM or granting extensions in this regard cannot be interpreted as being directory in nature.

12. There is no cavil that statutory provisions can either be treated as 'directory' or 'mandatory'. It is by now settled law that a statute is understood to be 'directory' when it contains matters merely of directions but not when those

directions are followed by an express provision that in default of following them legal consequences would ensue. If consequences are provided for a default then the provisions are necessarily to be construed as 'mandatory'. Reference in this regard is placed on cases of '*Niaz Muhammad Khan v. Mian Fazal Raqib*' [PLD 1974 SC 134], '*Ghulam Hassan v. Jamshaid Ali and others*' [2001 SCMR 1001], '*Syed Zia Haider Rizvi and others v. Deputy Commissioner of Wealth Tax, Lahore and others*' [2011 SCMR 420], '*Maulana Nur-ul-Haq v. Ibrahim Khalil*' [2000 SCMR 1305], '*Malik Umar Aslam v. Sumera Malik and another*' [PLD 2007 SC 362] and *Human Rights Case Nos.4668 of 2006, 1111 of 2007 and 15283-G of 2010 decided on 4<sup>th</sup> June, 2010* [PLD 2010 SC 759].

13. The provisions of section 158 of the Ordinance of 1984 and the timelines provided therein are definitely 'mandatory' and not merely 'directory'. There is no power vested either in the Commission or the learned Appellate Bench to pass an order which has the effect of suspending a statutory provision. In the instant case it is an admitted position that the appellant Company follows a January to December financial year and thus the latter was under a statutory obligation under section 158 to hold the AGM not later than the end of April. This fact is acknowledged in the written arguments filed on behalf of the respondent Company. The short order was passed by the learned Appellate Bench on 30-04-2015 and obviously it had the effect of virtually suspending a mandatory statutory provision. Even otherwise, on the very face of the impugned order, it does not reflect

application of mind, particularly in the context of the mandatory requirements specified under section 158 of the Ordinance of 1984. The learned Appellate Bench was expected to have taken into consideration the prescribed limitations provided under section 158 of the Ordinance of 1984 and then to have passed an injunctive order. This indeed had not been done in the instant case. The scheme of the Ordinance of 1984 does not envisage passing an open ended blanket injunctive order whereby a company, an incorporated entity, could be restrained from holding an AGM mandated under section 158 of the Ordinance of 1984. The impugned order, dated 30-04-2015 was, therefore, without lawful authority, jurisdiction and in violation of the mandatory provisions of the Ordinance of 1984 read with the Act of 1997.

14. The argument advanced by the learned counsel for the respondent Company that the Commission was empowered to restrain the appellant Company from holding its AGM on the analogy of powers vested under sections 170 and 180 of the Ordinance of 1984 is misplaced. A plain reading of section 170 of the Ordinance of 1984 unambiguously affirms that the provisions of section 158 *ibid* are mandatory, particularly the timelines prescribed therein, and the same cannot be rendered ineffective, nor can an order be passed having the effect of suspending the statutory provisions. It is settled law that what cannot be done directly can also not be done indirectly.



15. For the above reasons, the instant appeal (i.e. SECP Appeal No. 05/2015) is allowed and the impugned order dated 30-04-2015 is hereby set aside. The constitutional petitions (i.e. W.P. Nos. 484/2015 and 1306/2016) are declared as not maintainable and are accordingly dismissed. The parties shall appear before the Appellate Bench and the latter is expected to decide the pending appeal expeditiously after affording an opportunity of hearing to the parties. This Court expects that adjournments shall not be requested by or on behalf of the parties, nor shall they be allowed unless for bonafide reasons and in circumstances which may be beyond the control of the parties or their counsels.

(ATHAR MINALLAH)  
JUDGE

Announced in open Court on 25<sup>th</sup> January, 2017.

JUDGE

Tanveer Ahmed.

*Approved for reporting.*