

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

C.O. No. 01 of 2014.

Inam Ullah Khan.
VERSUS
AKSA Solutions Development Services Pvt. Ltd. Etc.

Petitioner by : **Mr Babar Sattar, advocate .**

Respondent No.3 by: **Mrs. Rahat Kaunain Hassan, advocate.**

Date of Hearing : **27-08-2015.**

ATHAR MINALLAH, J:- The petitioner has invoked the jurisdiction of this Court under sections 290, 291 and 292 of the Companies Ordinance 1984 (hereinafter referred to as the "**Ordinance**") alleging that the conduct of the respondents no. 2, 3 and 4 is oppressive.

2. The relevant facts for consideration and deciding the instant petition are as follows:-

- (i) The respondent No.1 i.e. M/S AKSA Solutions Development Services Pvt. Ltd (hereinafter referred to as the "**Company**") was incorporated under the Ordinance on 27-02-2000. The substantial objectives of the company as per the Memorandum of Association are, inter alia, to develop and provide on

a commercial basis information technology (IT) and control instruments for the unmet needs of clients, both in the local and international markets.

- (ii) As on 24-10-2013, the authorized capital of the company was Rs.13 million. The petitioner was 50% share holder with total shares of 62292 out of 124,664 shares.
- (iii) The respondents No.2, 3 & 4 are Ch. Fazal Ahmed, his son and his brother respectively (hereinafter referred to as the **"Respondent Group"**). Collectively the 'Respondent Group' owns the remaining 50% of share holding. On 24-10-2013, Ch. Fazal Ahmed i.e. the respondent No.2 owned 37,376 shares, respondent No.3 i.e Waseem Fazal owned 12,458 shares while respondent No.4, Ch. Noor Ahmad also owned 12,458 shares of the company.
- (iv) 27-09-2012; Notice through email informing that the Annual General Meeting shall be held on 22-10-2012 and the business to be transacted was mentioned therein (i) to confirm the minutes of the Annual General Meeting held on 19-09-2012 (ii) to receive, adopt and consider the Audited Accounts (iii) to appoint auditors (iv) to transact any other business.

- (v) 27-09-2013; The petitioner vide his email requested that the date be adjusted and informed that he would be available in the 2nd week of November, as he was out of the country.
- (vi) 30-09-2013; Through email dated 30-09-2013, the petitioner was informed that the meeting had been postponed and would be held on 31-10-2013.
- (vii) 02-10-2013; The Company Secretary communicated the notice for the "Extra Ordinary General Meeting" (hereinafter referred to as "**EOGM**") to be held on 24-10-2013 at 11:00 a.m. to transit the business as mentioned therein, which included considering and approving the increase and authorized capital by passing a special resolution of the company from Rs.13 million to Rs.30 million.
- (viii) 03-10-2013; The petitioner, vide his email, again requested that the meeting be postponed and held in the month of November.
- (ix) 04-10-2013; The petitioner through email clearly expressed ' I want to attend I will not allow at this time to increase the capital as we partners are not in line to do so Inshallah I will be there soon then we can decide'

- (x) 04-10-2013; The Company Secretary, in reply to the petitioner's email, informed that he had been advised not to postpone and the EOGM 'is going to be held under the law for the increase in authorised capital and no other business is being dealt except for the increase in authorised capital'.
- (xi) According to the petitioner, the notice of the EOGM was in violation of clause 55 of the Articles of Association as no Board meeting was convened on 02-10-2013, and the notice for the meeting was in violation of the Articles and law.
- (xii) It is also the case of the petitioner that no statement setting out the material facts concerning the business in the proposed meeting was annexed with the notice, nor were copies of the draft resolution, which was proposed for consideration in the meeting, annexed thereto.
- (xiii) 24-10-2013; The meeting was held and a resolution to amend the Memorandum and Articles of Association of the company to increase the authorized share / capital from Rs.13 million to Rs.30 million was passed.

- (xiv) 25-10-2013; A Circular under Section 86(3) of the Ordinance was received by the petitioner through email. The Circular, in its statutory format, was issued on 25-10-2013, and the last date for acceptance of the shares offered to the petitioner was mentioned as 04-11-2013. The mode of acceptance was not mentioned.
- (xv) 30-10-2013; The respondents filed a notice of the special resolution with the Securities and Exchange Commission of Pakistan (hereinafter referred to as the "**Commission**"), pursuant to Section 172 of the Ordinance, together with a notice of increase in nominal share.
- (xvi) 31-10-2013; The petitioner, vide email, expressed reservations regarding the EOGM held on 24-10-2013. However, he accepted the offer and confirmed to subscribe to any additional share issued by the company, so as to maintain his share holding. He also requested that another Extra Ordinary General Meeting be called after giving him 10 days notice, so that he could attend the meeting.
- (xvii) 31-10-2013; The petitioner served legal notice.

- (xviii) 05-12-2013; Board meeting was held, attended by the respondents No.2, 3 & 4. The petitioner's email dated 31-10-2013 was considered but rejected on the sole ground that he had failed to deposit any amount against additional shares.
- (xix) The reasons / justifications for increase of the share capital of the company were also recorded under agenda item No.3 of the minutes of the Board's meeting held on 05-11-2013.
- (xx) In the meeting dated 05-11-2013, the Board resolved to distribute the shares offered to the petitioner amongst the respondents No.1 & 2.
- (xxi) Pursuant to the above decision, the share holding of the petitioner was reduced and diluted, thus he became a minority, while the majority share holding was vested in the 'Respondent Group'. The share holding of the respondent No.2 increased from 37,376 shares to 67,352 shares, increase in shares of the respondent No.3 was 62,484 from 12,458 shares, while respondent No.4 who had 12,458 shares went to 32,456 shares, while one Muhammad Akram Sindhu continued to hold nominal shares of 100.

3. The petitioner has, therefore, invoked the jurisdiction of this Court, alleging 'oppression' and has sought various reliefs under sections 290, 291 and 292 of the Ordinance.

4. The learned counsel for the petitioner has contended that; the conduct of the respondents lacks probity and fair play; the share holding of the petitioner has been reduced and diluted as a result of acts and omissions, which amount to 'oppression'; the notice of the EOGM was in violation of Section 160(1)(b) read with Section 164 of the Ordinance, as no resolution was attached nor any explanation for increasing the authorised share capital was provided as required under the said provisions; the haste with which the respondents No.2 to 4 acted in increasing the share capital and then allotting the same to themselves was deliberate, so as to deprive the petitioner of his legal and proprietary rights; the respondents wrongfully went ahead and held the EOGM despite the requests made by the petitioner to postpone the meeting by three weeks; the Circular under section 86(3) for issuing of right shares was in violation of the Ordinance, as neither any Board meeting was held nor was the resolution approved through the circular; material information, particularly the mode of payment, was not mentioned; the respondents No.2, 3 & 4 breached their fiduciary duty by failing to disclose the interest of the respondent No.3, as is evident from the minutes of the Board meeting held on 05-11-2013, recorded under agenda item No.3; the respondents No.2, 3 & 4, exercising powers as Directors of the company, were acting for their own interest, rather than protecting the interests of the petitioner as a share holder; the acts and omissions are in violation of sections 21, 26, 28, 30, 31, 86, 160 and 164 of the Ordinance; a special resolution amending a memorandum is not effective without a notice to the affectees and without approval of the Commission. Reliance has been placed on "Taj Woolen Mills Ltd versus Muhammad Younas [PLD 1982 Lahore 664]; a special resolution is

necessary for alteration of Articles, reliance is placed on "Muhammad Rafiq Moti versus Pakistan" [PLD 1983 Karachi 589]; vested rights cannot be alienated lightly and respondents No.2 to 4 were in breach of their fiduciary relationship with the company. Reliance has been placed on "Naseer A. Sheikh versus The Commissioner of Income Tax (Investigation)" [PLD 1992 S.C. 276]. Reliance has also been placed on "Mathalone and others versus Bombay Life Assurance Co." [AIR 1953 S.C. 385] and "Nanalal Zaver versus The Bombay Life Assurance Co." [AIR 1949 Bombay 56]; the object behind section 290 is that the affairs of the company must be conducted in a lawful manner, strictly in accordance with the provisions of the Ordinance, Memorandum and Articles of Association. Reliance has been placed on "Neelofar Shah versus Ofspace Pvt. Ltd." [2013 CLD 114], "Ch. Muhammad Hussain versus Khaali Paper and Board Mills" [2005 CLC 636], "National Bank of Pakistan versus Baluchistan Wheels Ltd." [2004 CLD 1100], "Associated Biscuits International Ltd. versus English Manufacturers Ltd." [2003 CLD 815]; no board meeting was duly convened on 05-11-2013, so as to consider the issuance of shares; the offer made by the company to the petitioner was accepted as is evident from the minutes of the Board's meeting; the grounds for annulling the acceptance of the petitioner is not tenable in law. Reliance has been placed on the Contract Act, Shaukat Mahmood, 7th Edition, Chitty on Contracts, 24th Edition, Volume I: General Principles; during the pendency of the petition it came to the petitioner's knowledge that the respondents had perpetuated fraud through furnishing a personal guarantee on behalf of the petitioner without his knowledge and consent, for securing running finance facility for the respondent company; the signatures on the guarantee are forged and the same had been provided to the National Bank of Pakistan by the respondents; at the time when the personal guarantee in the name of the petitioner had been purportedly executed, the latter was out of the country.

5. The learned counsel for the respondents No.1 to 4 has argued that; the petition is not maintainable as there is no case of 'oppression' and mismanagement; the petitioner has come to this Court with undean hands; the actions of the respondents No.2 to 4 are in legitimate exercise of their rights and in no manner prejudicial to the interests of the company; the petitioner, having foredoed the statutory remedy available to him under section 160(A) of the Ordinance, could not have invoked the jurisdiction under section 290 read with section 291 of the Ordinance; no case of 'oppression' can be made out with alleged isolated breach of provisions of the Ordinance; the increase of authorized capital and subsequent right issue was in accordance with law and in the interest of the respondent No.1 / company; the intent of the petitioner is to obstruct the smooth running of the affairs of the company and to cause unnecessary interference; the petitioner is not a working Director of respondent No.1, which is against the spirit and object of section 290; the increase of the authorized capital of the company was to meet the financial needs and to execute the upcoming projects; the petitioner was fully on board, was given due notice at all times and, therefore, was well informed regarding the performance of respondent No.1; the petitioner declined the offer for additional shares by failing to deposit consideration in lieu of additional shares on or before the expiry date of the offer, and the said refusal led to the allotment and issuance of the declined and unsubscribed shares to respondents No.2 to 4 in accordance with law; the petitioner had made no contribution in promoting the business of the company, while the respondents No.2 to 4 have turned around the company from a 'dead investment' into a profitable venture; notice of the EOGM was given to the petitioner in accordance with the statutory requirements, for assuring the attendance of all Directors; the request of the petitioner to postpone the EOGM meeting to the 2nd week of November could not be acceded to because the meeting could not have been postponed beyond 31-10-2013, as that would have

resulted in the lapse of time frame of four months required for conducting the AGM under the law and for making necessary filings with the respondent No.5; the email dated 03-10-2013 had clearly disclosed that the increase in capital was considered necessary to meet the urgent and immediate cash requirements / needs of the company; the notice was accompanied with the draft resolution, which contained material information under section 160(b); the required information prescribed under the law and the necessary documents were filed with the respondent No.5 on 24-10-2013; the Circular under section 86(3) of the Ordinance was sent to the petitioner through email and post; the material information was sent to the petitioner vide notice accompanying the draft resolution dated 02-10-2013; it was for the petitioner to have inquired about material information he required for the purpose of acceptance of the offer; the petitioner, while accepting to subscribe to any additional share so as to maintain his share holding, did not meet the pre-requisites of a valid acceptance by failing to deposit consideration for his proportionate share on or before the expiry period of the offer, stipulated under section 86(3) Circular; the plea of the petitioner regarding his forged signatures on his personal guarantees submitted to the Bank, apart from being baseless and false, is totally irrelevant and is of no consequence; the petitioner had full knowledge of finance facilities being availed by the respondent No.1; the assets of respondent No.1 were primary security, while secondary security was given by the respondent No.2 against his personal property; the petitioner was not at risk at all; the allegation of forged guarantee does not prejudice the petitioner in any manner in exercise of his legal and proprietary rights of a share holder; all legal formalities in the context of the EOGM had been fulfilled; the reply filed by the Commission also supports the respondents' case; non service of notice and resolution of circular for issuance of right share is of no relevance; passing of such a resolution is envisaged and is valid in terms of clause 92 of the Articles of Association; such a resolution could

be passed by a majority of directors present, and clause 90 of the Articles expressly discharges the requirement of the notice to the directors living outside Pakistan. Reliance has been placed on "Shahbazud din versus Services Industries" [PLD 1988 Lahore 1]; no form is prescribed for the offer envisaged under section 86(1) of the Ordinance; the Circular under Section 86(3) contained all material information, including the amount of proposed issue; shares having been offered proportionately, the date by which offer was to be accepted i.e. 04-11-2013; the shares issued other than in cash have to comply with the Companies (Issue of Capital Rules 1996); in the absence of such procedure being applied the general rule is that mode of acceptance is cash; hence there was no ambiguity regarding the mode of acceptance; the cheque/draft had to be issued in the name of the Company and the petitioner cannot plead ignorance regarding such information; the petitioner sought no clarification in relation to the issue of right shares in his email dated 31-10-2013; the acceptance conveyed by the petitioner was conditional and not absolute; for holding of the EOGM on 24-10-2013, notice via email and via post were sent on 02-10-2013; the petitioner's main aim is to obstruct the smooth running of the affairs of the company and extort valuable pecuniary settlement from the respondents; the contribution of the respondents is far more than that of the petitioner; relief under section 290 of the Ordinance is equitable, while the conduct of the petitioner is dubious and, therefore, not entitled to any relief; there is no lack of probity on the part of the respondents, and the mere fact that the directors derive benefit by reason of the exercise of their fiduciary power to issue shares does not vitiate the exercise of that power; reliance has been placed on "Needle Industries India Ltd. Versus Needle Industries Newey (India) 1981 AIR 1298; the petitioner is a disinterested director, and the respondents had acted out of legal compulsion precipitated by the obstructive attitude of the petitioner; the case law cited on behalf of the petitioner is distinguishable in the facts and circumstances

of the present petition; "M/S Shaheen Foundation versus Capital F.M. Ltd." [2002 CLD 188], "Nanamuddin Zia versus Asma Qamar" [2013 CLD 1263], "Registrar of Companies versus Pakistan Industrial and Commercial Leasing Ltd." [2005 CLD 463.

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

7. Section 290 of the Ordinance is a special provision providing remedy to various categories of persons mentioned therein, inter alia, to a member who holds not less than twenty percent of the issued share capital of a company and complains that the affairs of the company are being conducted or are likely to be conducted in an unlawful or fraudulent manner, or in a manner not provided for in its memorandum or " in a manner oppressive to the member or any of the members or the creditor or any of the creditors" or are being conducted in a manner prejudicial to the public interest. The section, read with sections 291 and 292, vests wide powers in the Court for bringing to an end the matters complained of. Subsection 1 of section 290 provides that the Court may make such orders as it may think fit for achieving the objects as mentioned therein. The crucial expression is; affairs of the company being conducted in an oppressive manner to the member or any of the members or the creditors or any of the creditors. This phrase is distinct from other expressions used in the section, such as affairs conducted in an unlawful and fraudulent manner or in a manner not provided for in the memorandum. What amounts to affairs of a company being conducted in a manner oppressive to a member, or in other words what is the meaning and scope of the word 'oppression'?

8. The expression 'oppression', or conducting affairs of a company in an 'oppressive' manner in the context of the Ordinance is not defined *ibid*. The earliest interpretation is found in the words of Lord Cooper in the case of *Elder versus Elder & Watson Ltd.* (1952) SC 49, as "the conduct complained of should at lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every share holder who entrusts his money to the company is entitled to rely". In *Scottish Cooperative Whole Sale Society Ltd versus Meyer* (1958) 3 All ER 66, Lord Keith interpreted the expression as "lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members or to public interest". In same case Viscount Simonds, taking the dictionary meaning of 'oppression', said that it meant exercise of authority in a manner that is 'burdensome, harsh and wrongful'.

9. The Sindh High Court in *Mst. Neelofar Shah and another versus M/S Ofspace Pvt. Ltd. and others* [2013 CLD 114] has succinctly elucidated the scope of 'oppression' in the context of section 290 of the Ordinance. It has quoted a passage from the decision of the Court of Appeal in *Re: Jermyn Street Turkish Baths Ltd.* (1971) 3 All ER 184, 199 and the same is as follows:

".... oppression occurs when shareholders, having a dominant power in a company, either; (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs; or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in Scottish Co-

operative Wholesale Society Ltd. versus Meyer (1958) 3 All ER 66 at p 71: 'burdensome, harsh and wrongful' to the other members of the company or some of the, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs: see Scottish Co-operative Wholesale Society Ltd. Versus Meyer and Re HR Hammer Ltd. (1958) 3 All ER 689. We do not say that this is necessarily a comprehensive definition of the meaning of the words 'oppressive' in section 210 for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for our present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. If a director of a company were to draw a remuneration to which he was not legally entitled to or in excess of the remuneration to which he was legally entitled, this might no doubt found a misfeasance proceedings or proceedings for some other kind of relief, but it would not, in our judgment, of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers or retain the remuneration or to stifle proceedings by the company or other shareholders in relation to it."

10. Likewise in the same judgment of Sindh High Court a passage from the judgment in "Shahamatullah Qureshi versus Hi-tech Construction Pvt. Ltd." [2004 CLD 640] has also been reproduced and the same is as follows:

"The term 'oppression' has not been defined. It is left to the Court to decide on the facts of each case whether there exists oppression that may be called as ground of winding up. Whether the conduct and affairs of the company by shareholders is oppressive or not depend upon facts of particular case. To make out a case for winding up order, it must be established that there is some lack of probity or fair dealing towards the one or more members. Acts of misappropriation and mismanagement cannot be the grounds to support an application for winding up. The denial of right of inspection or other rights of shareholders or failure to comply with formalities required in the matter of giving notice of general meeting or refusal to declare more profit or the dividend even if profit earned justified a higher rate may not be taken by themselves as amounting to oppression. Mere illegal or irregular acts unless they are oppressive or prejudicial to the interest of the company or to the public interest will not support petition for winding up."

11. The Sindh High Court in Mrs. Neelofar Shah supra, therefore, concluded as follows:

"In my view, it cannot be said that a single act of misfeasance or other illegality can never amount to

oppression. As is dear from the case law (including the two cases cited above), much depends on the facts and circumstances of the particular case. Oppression is not a concept that has been or perhaps even should be exhaustively defined, and this is certainly the view of the Court of Appeal. Depending on its nature, gravity and consequences, (both actual and / or potential) even a single act may amount to oppression”.

12. This Court is in complete concurrence with the above view taken by the Sindh High Court in the case of Mrs Neelofar Shah supra. It would also be relevant to refer to some other judgments cited at the bar;

(i) In the case Ch. Muhammad Hussain versus Khaali Paper and Board Mills (2005 CLD 636), it was held; "For a relief under section 290 of the Companies Ordinance, 1984, it has to be shown that the conduct of the management lacked in probity and it was prejudicial to the interest of the petitioner in the exercise of the legal and proprietary rights as share holders."

(ii) In the case National Bank of Pakistan versus Balochistan Wheels Ltd. (2004 CLD 1100), it was held: "It is, worth mentioning that the object and scope of section 290 of the Companies Ordinance, 1984 is that the affairs of the company must be conducted in a lawful manner and strictly in accordance with the memorandum and articles of

association of the company and it cannot be invoked by any shareholder or creditor of the company."

(iii) In the case Associated Biscuits International Ltd. Versus English Manufacturer Ltd. (2003 CLD 815) it was held: "In order to invoke the jurisdiction of the company Judge under section 290 it must be made out that the company's affairs are being conducted in a manner prejudicial to public interest or oppressive to any member or members of the company and the facts justify the making of a winding up order, but at the same time, making such winding up order would unfairly prejudice such member or members. The provisions are essentially intended against the tyranny of the majority against the minority shareholders."

(iv) In Re: Companies Act, 1973 and another (PLD 1983 Karachi 45) it was held: "Reduction of directors from five to three was patently made by the majority for the purpose of getting rid of the petitioner as a director and this Court will not permit the exercise of their rights as a majority to deprive the petitioner of a directorship and also his right to be part of the management so long as he holds 20% shares in the Company".

(v) The object and scope of Section 290 can be understood from N.I.I. Ltd versus N.I.H. Ltd. (AIR 1981 S.C 1298) where it was held: "The person complaining of

'oppression' must show that he has been constrained to submit to a conduct which lacks in probity or to a conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder and not as a director or employee of the company."

(vi) *The scope of oppressive conduct was eluded to in Mohan Lal Chandumall versus Punjab Co. Ltd. (AIR 1961 Punjab Haryana 485) where it was held: "Section 397 provides relief inter alia where the Court is of the opinion that the company's affairs are being conducted in a manner oppressive to any member or members. In this case the non-voting members are being subjected to hardship or burden which may truly be called oppressive. They are subjected to an oppressive conduct in so far as they are being dominated and have to submit to excessive use of authority. Such a conduct amounts to unjust hardship. To oppress, ordinarily, means to crush, smother or trample. In this case, their valuable rights are being trampled upon by unjust exercise of authority or power. To take away the right or partaking in dividends earned by their contribution is not merely oppressive but even confiscatory."*

(vii) *The scope and powers of Court to issue interim orders under Section 291 and 292 was enumerated in Muhammad Afzal Munsif versus National Finance and Investment Services Ltd. (1998 CLC 695) where it was held:*

" The petitioners do not recognize the Directors as having been validly elected and are complaining of oppressive activities being perpetuated by them. However, the truth or otherwise of these allegations will be examined at the time of hearing of the main petition which will take place immediately after the Court reopens in the month of August. It will therefore, be in the interest of justice that the operational sphere of the Directors should remain confined to the terms of their interim arrangement. If the Directors are not restrained from acting in pursuance of the impugned notice, this will tantamount to allowing the balance to tilt in their favour thereby aggravating the grievance of the petitioners which fact, to begin with, has manifested itself in the form of the present interlocutory application".

13. From the above cited precedent law it may be concluded that 'oppression' is distinct from mere mismanagement. It is not necessary for the conduct to be in breach of law or a statutory provision in order to constitute oppression. Domestic disputes, being outvoted by the majority or loss of confidence in itself are not sufficient factors for an act or conduct to constitute oppression. The member bringing a complaint under section 290 of the Ordinance and alleging that the affairs of the company are being conducted in a manner oppressive to him or her has to show that the powers or authority has been exercised in a manner that is unjust, harsh, burdensome; that the member is constrained to 'submit to something which is unfair' and stems from some overbearing act or attitude on the part of the oppressor. The complainant, in order to establish a case so as to be entitled to the special remedies under section 290 of the Ordinance, has to show that the conduct complained of lacked

probity and fair dealing. It is for the Court to form an opinion in the light of the facts of each case whether acts, omissions and conduct complained of falls within the ambit of 'oppression'.

14. It would also be relevant to examine the status of the respondents No.2, 3 & 4 in the respondent company, and whether they owe any duty towards the members or shareholders. Admittedly, the respondents are Directors of the company, and are managing and conducting the affairs thereof by exercising powers vested in them under the provisions of the Ordinance and the Articles of Association. It is settled law that Directors of a company are saddled with the duty of loyalty, trust and utmost good faith. They are under a duty to act with diligence and care. Such a duty is termed as 'fiduciary'. The Directors, therefore, owe a fiduciary duty towards the share holders and the company. Besides a duty of loyalty and care, there is yet another core duty of full disclosure, particularly when shareholders are required to take decisions and/or when an act or transaction involves conflict of interest. The fiduciary duty envisages that each Director shall act for the benefit of the company and the share holders. A Director, therefore, cannot place himself in a position where his / her interest and duty would conflict. The interests of the share holders and the company shall prevail and dominate the personal interests of the Directors. The Directors have to discharge the onus to establish affirmatively that even if a personal interest has been gained, the same is not a result of conducting the affairs or exercising authority in a manner that lacked probity and fair dealing, or was burdensome, harsh and wrongful. In a situation when a Director has directly or indirectly gained personal advantage and interest, and there is a complaint of the affairs having been conducted in an oppressive manner, it inevitably raises the threshold of establishing that the acts and omissions complained of were in utmost good faith and free from probity or unfair dealing causing prejudice to

the complainant. Gaining personal interest per se will not constitute a breach of duty or oppression.

15. The august Supreme Court in "Naseer A. Sheikh versus Commissioner of Income Tax (Investigation) and others" [PLD 1992 S.C. 276] has held as follows:

"It is to be borne in mind that qua the company, the Directors hold fiduciary relationship and are required to exercise powers vested in them for the benefit of the company. But when the need of the company for increase of capital as established, the fact that in promoting the interest of the company, the Directors make use of this need to promote their own interest as well, their action cannot be dubbed as breach of trust".

16. The august Supreme Court further quoted with approval a passage from "Hirsche versus Sins" [(1894) A.C. 654]. It is, therefore, settled law that merely because a Director has promoted his / her own interest, this is not enough for the breach of fiduciary duty. However, it is embedded in the law relating to juridical persons incorporated under the Ordinance that Directors owe a fiduciary duty to the company and the shareholders, and the latter are entitled to seek the special remedies provided under section 290 read with section 291 if the complaint relates to allegations that affairs of the company are being conducted in an oppressive manner.

17. I now revert to and examine the facts and circumstances of the instant petition in the light of the above discussed principles and law, so as to

form an opinion as to whether respondents No.2, 3 & 4 have conducted the affairs of the respondent company in a manner oppressive to the petitioner, and if so, what remedial measures can be ordered so as to bring to an end the matters complained of through the instant petition. Admittedly, respondents 2, 3 and 4 are closely related to each other. Respondent no. 3, Waseem Afzal is the son of Ch. Fazal Ahmed i.e respondent no. 2 and the latter is the brother of respondent no. 4 namely, Ch. Noor Ahmed. It is not disputed that the petitioner prior to 24-10-2013 held 50% of the authorized capital of the company.

18. It appears from the correspondence between the petitioner and Ch Fazal Ahmed that the latter had expressed concerns and reservations regarding the efforts and contributions made by his son Waseem Ahmed and yet holding only 10% shares in the company as compared to 50% held by the petitioner. Ch Fazal Ahmed had also shown concern regarding salary drawn by the petitioner. The reservations and concerns of Ch Fazal Ahmed are obvious from his email dated 26-07-2012 (attached with the comments filed on behalf of respondents 1 to 4) and email dated 10-12-2012 (attached with the petition as Annexure E). The two emails are admitted and reflect resentment. Ch Fazal Ahmed, in his email dated 10-12-2012, had suggested to the petitioner to compensate his son, Waseem Ahmed, by offering to the latter 20% of his shares. These two emails are important for the reason that they reflect displeasure and resentment on the part of Ch Fazal Ahmed, and a desire that his son Waseem Afzal be compensated by transferring 20% shares held by the petitioner. The emails are, therefore, relevant to the subsequent events complained of by the petitioner.

19. Through email dated 27-09-2012, a notice for the 'Annual General Meeting' was sent to the petitioner intimating that it would be held on 22-10-2013. The business proposed to be transacted in the said meeting was also

mentioned. No indication was otherwise given of an intention to hold EOGM for the purposes of increase in the share capital. The petitioner in response informed that he would return from the United States in the second week of November and, therefore, requested that the date for the meeting be adjusted accordingly. Instead of adjusting the date for the Meeting in the second week of November, the Company Secretary, being aware that the petitioner could not attend a meeting before the second week of November, informed the petitioner vide email that the Meeting had been rescheduled for 31-10-2013. Contrary to the earlier notices, through email dated 02-10-2013, a notice for an 'Extra Ordinary General Meeting' scheduled for 24-10-2013 was sent to the petitioner. It was for the first time that the proposed business included passing of a special resolution to increase the authorized capital from Rs. 13 million to Rs. 30 million. It may also be noted that the earlier notices were for the Annual General Meeting and not an Extra Ordinary General Meeting. There is nothing on record to show that a meeting of the Board of Directors was held or that the notice was in pursuance thereof. In response to the notice for the EOGM, the petitioner wrote to the Company Secretary that 'I want to attend I will not allow at this time to increase the capital as we partners are not in line to do so Inshallah I will be there soon then we can decide. Also the further operation of the company will be decided'. The same day the Company Secretary, through an email, informed the petitioner that he *'had been advised that the Extra Ordinary General Meeting is going to be held under the law for the increase in authorized capital and no other business is being dealt except for the increase in authorized capital'*. It is, therefore, obvious that the respondents intended to hold the EOGM solely to transact business of passing a special resolution for the increase in authorized capital. The petitioner's request for holding the meeting in the month of November was reasonable, and there is nothing on record to show that the respondents were restrained or it was beyond their control to hold the EOGM in the month of November. The

respondents were adamant in holding the meeting on 24-10-2013. However, postponing the holding of the Annual General Meeting from 22-10-2013 to 31-10-2013 and then giving a notice for holding an EOGM on 24-10-2013 to transact the business for passing a special resolution for increase in the authorized capital, particularly when the petitioner had requested that the meeting be held in the second week of November, cannot be termed as conducting the affairs of the company according to acceptable standards of probity and fair play. This becomes even more crucial in the background of the two emails of Ch Fazal Ahmed discussed above.

20. The reasons for holding the meeting on 24-10-2013 and the inability to postpone it beyond 31-10-2013 is mentioned in the written comments duly filed with affidavits of the respondents no No.2 to 4. In reply to paragraph 5.2 of the petition, the respondents have taken a position that the AGM 'could not be postponed beyond 31-10-2013 as that would have resulted in lapse of time frame of four months required for conducting the AGM under law and making the necessary filings with respondent no. 5 pursuant thereto'. The petitioner had requested to hold a meeting in the second week of November, which was two weeks from 31-10-2013, and even if such a situation existed the respondents could have applied to the Registrar of the Commission to extend the time under the proviso to sub section 1 of section 158 of the Ordinance. Nothing is on record to show that such a request was made to the Registrar in this regard. Likewise the reply to paragraph 5.3 of the petition is vague. Neither has any reason been given for not acceding to the request of the petitioner to hold the EOGM in the second week of November nor for the haste or urgency for holding it on 24-10-2013. The reason that 'increase in capital is considered necessary to meet the urgent and immediate cash requirements/needs of the company' is not supported by anything on record. What was such urgency or

desperation that the meeting could not have been postponed for three weeks? The haste and urgency are unsubstantiated and unexplained. Indeed section 159 of the Ordinance does not place any limitation of time for holding an EOGM. It was asserted on behalf of the respondents that with their efforts respondent no. 1 i.e. the Company has been transformed from a 'dead investment to a profitable venture'. It has also been asserted that the equity has gone up from 55.5 million to 94.5 million. However, no plausible or sufficient cause has been given for such urgency that the EOGM could not have been postponed for three weeks so as to enable the petitioner to attend. There can be no other explanation except to obstruct the petitioner from attending the EOGM so that he is restrained from exercising his legal and proprietary rights as a 50% shareholder. Ch Fazal Ahmed, respondent no. 2, had already made his desire known to the petitioner to transfer 20% of his shares in the name of his son, respondent No.3. The emails dated 26-07-2012 and 10-12-2012 addressed by Ch Fazal Ahmed to the petitioner thus become relevant. The EOGM was not only held on 24-10-2013 but the special resolution for the increase in authorized capital was also passed in the absence of the petitioner, as he was prevented by the acts and omissions, or in other words the conduct of the respondents no. 2 to 4. There is, therefore, no doubt that the manner in which the affairs of the company were conducted by the respondents No. 2 to 4 was burdensome, harsh, unjust, wrongful and lacked probity and fair dealing. The affairs were conducted in a manner that was oppressive towards the petitioner.

21. The chain of events do not end with the holding of the EOGM or passing the special resolution for the increase in authorized capital of the company. Pursuant to the EOGM held on 24-10-2013, the Circular under section 86(3) of the Ordinance was sent to the petitioner on 25-10-2013, and 04-11-2013 was mentioned as the date of acceptance of the additional shares. There

was, however, no mention of the mode of payment despite there being a column in the printed form. Again, the respondents knew that the petitioner would return from the United States in the second week of November yet they went ahead in concluding the proceedings of allotment of the additional shares in his absence. The petitioner unequivocally expressed his intention vide email dated 31-10-2013 that he did not wish to dilute his shareholding in the company and that he would subscribe to the additional shares issued by the company. He further stated that an EOGM be held with a 10 days' notice to him so that he could attend. A legal notice dated 31-10-2013 was also sent by the petitioner. Instead of enabling the petitioner, who had admittedly held 50% shares before 24-10-2013, to return to Pakistan as it was a matter of two weeks, the respondents convened a Board meeting on 05-11-2013. The meeting was attended by respondents No. 2, 3 and 4. The acceptance of the additional right shares by the petitioner was rejected on the sole ground that he had failed to deposit the payment. Firstly, neither had the petitioner been informed regarding the mode of acceptance nor was an attempt made to afford him an opportunity to make the payment, and secondly, after rejecting the acceptance of the petitioner on the sole ground of non- payment, the respondents no. 2, 3 and 4 distributed the additional shares amongst themselves. As a consequence the petitioner's shareholding was reduced from 50% to 28%. He was relegated to the position of a minority. The minutes of Board meeting dated 05-11-2013 recorded under Item No 3 smacks of conflict of interest. The respondents No. 2, 3 and 4, despite owing a duty of loyalty, care and disclosure as fiduciaries, benefited themselves by conducting the affairs of the company in a manner that was obviously oppressive towards the petitioner. Starting from the first notice through email dated 27-09-2013 till the distribution and allotment of the additional right shares amongst themselves, the respondents 2, 3 and 4 had continuously conducted the affairs of the company in a manner that was

oppressive to the petitioner; it lacked fairness, probity and was indeed burdensome, unjust and harsh. The conduct and attitude of the respondents 2 to 4, as reflected from the acts and omissions described above, was undoubtedly overbearing and not according to the acceptable standards expected from fiduciaries. The affairs of the company have been conducted in a manner which inevitably leads to only one conclusion; to obstruct and restrain the petitioner from exercising his legal and proprietary rights and relegating him from holding 50% shares to 28% shares and thus bringing him to the position of minority. No opinion can be formed except that the acts, omissions and conduct of the respondents No.2 to 4, described above, were deliberate, calculated and indeed oppressive.

22. In the light of the above discussion, this Court is of the opinion that the petitioner has established 'oppression' in the context of section 290 of the Ordinance. Before passing an order to remedy the conduct complained of, it would be pertinent to advert to the legal objection raised by the learned counsel for the respondents No. 2 to 4 regarding maintainability of the petition.

23 The learned counsel has raised the question regarding the maintainability of the petition on the ground that the petitioner had failed to avail the remedy under section 160 A of the Ordinance. Section 160 A of the Ordinance provides for the circumstances in which proceedings of a general meeting can be declared invalid. Under the said provision members having not less than ten percent of the voting power can bring a petition before the Court for declaring the proceedings of a general meeting invalid. The grounds on which a meeting can be declared invalid are; (i) material defect in the proceedings (ii) omission in the notice (iii) irregularity in the proceedings which prevented members from using effectively their rights. On the other hand the

circumstances for invoking remedies under section 290 of the Ordinance and its object and purpose are distinct and separate. As discussed above, it is not necessary for a person complaining of 'oppression' to establish that the proceedings or acts were illegal i.e. in violation of statute, Memorandum, Articles or a rule or regulation. Likewise the circumstances giving rise to invoking section 160 A may not exist yet there may be oppression. Section 160 A and section 290 are independent and exclusive of each other. Section 290 provides for special remedies and vests wide powers in the Court. For a petition or complaint to be competent under section 290 of the Ordinance it is not dependent on the remedy available under section 160 A. 'Oppression' may consist of continuous or a series of acts and omissions, as in the instant case, while that is not the case under section 160 A. The argument that the petition is not maintainable as the petitioner has not availed a remedy under section 160 A is misconceived. After going through the judgments cited at the Bar by the learned counsel for the respondents, I have found them to be distinguishable in the facts and circumstances of the instant petition. There is also no force in the argument that the petitioner is not entitled to relief under section 290 of the Ordinance because of his own conduct. There is nothing on record to show that at any stage the petitioner was unreasonable or unfair.

24. The petitioner in paragraph 5.12 of the petition has made some serious allegations relating to bank/personal guarantees in the name of the petitioner. It is alleged that the respondents had submitted the said guarantees in the National Bank of Pakistan with the petitioners forged signatures. In compliance with this Court's order dated 22-10-2104, passed in C.M.A No. 152 of 2014, copies of the guarantees were placed on record by the respondents. The guarantees are not relevant for the purposes of the instant petition. However,

the petitioner shall be at liberty to institute fresh proceedings in this regard, if he so desires.

25. In view of the above, the instant petition is ***allowed***. The meetings of the Board and the EOGM convened by the respondents on 02-10-2013, 24-10-2013 and 05-11-2013 were a result of affairs having been conducted in a manner oppressive to the petitioner, and, therefore, it shall be deemed that the said meetings had not taken effect. The resolution passed on 24-10-2013, whereby the Memorandum and Articles of Association of the company had been amended, and the subsequent allotment of shares in the meeting held on 05-11-2013 was also the result of oppression and is, therefore, accordingly ***set aside***.

26. In order to bring to an end the matters complained of, and in addition to the above, it is ordered as follows;

(i) The Security Exchange Commission of Pakistan is directed to nominate an officer not lower in rank than a Director, who shall supervise the process of calling an Extra Ordinary General Meeting and all other subsequent steps. In the event that the EOGM passes a special resolution for increasing the authorized capital of the company, the nominated officer shall supervise the proceedings till the additional shares have been allotted.

(ii) The notice for the EOGM shall be issued in accordance with section 159 of the Ordinance within two weeks from the date of announcement of this judgment.

(iii) The EOGM shall be convened and subsequent proceedings completed preferably within eight weeks from the date of announcement of this judgment.

(iv) The officer nominated by the Commission pursuant to the above direction shall cause a report to be submitted in this Court after the proceedings are complete.

(v) The parties shall be at liberty to approach this Court if there is any difficulty in implementing this order.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 30-11-2015.

JUDGE

Approved for reporting.

*Asad K/**