

# IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No. 970 of 2009**

Plaintiff: Syed Shoaib Khursheed, through Mr. Abid.  
S. Zuberi, Advocate.

Defendants

Nos.1 & 2: M/s. Al-Mal Securities & Services Ltd &  
Another, Nemo.

Defendant No.3: Zeal Pak Cement Factory Ltd, through Mr.  
Khilji Bilal, Advocate.

Defendant No.4: Central Depository Company Limited,  
through Mr. Jahanzaib Awan, Advocate.

Defendant No.5: Karachi Stock Exchange (Guarantee)  
Limited, through Mr. Tariq Qureshi,  
Advocate.

Date of hearing: 07.05.2018

## **ORDER**

**YOUSUF ALI SAYEED, J** - In terms of this Civil Miscellaneous Application, bearing CMA Number 6734/09, the Plaintiff seeks interlocutory relief in the shape of an injunction restraining the Defendants and persons acting through or under them “from dealing or creating any third party interest including sale, alienation, conversion, pledge, transfer in any manner whatsoever of the shareholding of Zeal Pak Cement Factory Ltd and further direct the Central Depository Company / Defendant No.4 to block the sale, purchase, transfer, pledge, alienation, conversion of the shares of Zeal Pak Cement Factory Ltd”. On 09.07.2009 an ad-interim Order was made in the matter, whereby the Defendant No.4 was directed to block 226,340,000 of the Defendant No.3, namely Zeal Pak Cement Factory Ltd (“**ZPCFL**”), as were being claimed by the Plaintiff.

2. Succinctly, the salient aspects of the Plaintiff's case, as pleaded and further advanced by learned counsel appearing on behalf of the Plaintiff during the course of arguments in support of the subject Application, are as follows:

- (a) That, through a process of privatization, the Plaintiff is said to have acquired the state owned Associated Cement Rohri Limited, and proceeded to convert the same into a private limited company by the name Rohri Cement (Pvt.) Limited.
- (b) In terms of a Scheme of Arrangement sanctioned by this Court in J.M No.39 of 2007 in exercise of its Company Jurisdiction under the erstwhile Companies Ordinance, 1984, Rohri Cement (Pvt) Limited, Zeal Pak Industries (Pvt) Limited and Pakistan Slag Cement Limited were all merged into a fourth entity (i.e. ZPCFL), and of the total number of 257,838,526 shares to be issued pursuant to the said Scheme, the Plaintiff was allegedly entitled to 226,340,000 shares thereof, which was said to equate to and represent 52.9% of its issued and paid-up capital.
- (c) ZPCFL is said to have entrusted the function of transferring the shares envisaged as per the aforesaid Scheme to the Defendant No.1, namely M/s. Al-Mal Securities & Services Ltd ("**Al-Mal**"), but rather than issuing the requisite shares to the Plaintiff and other eligible persons as per their entitlements, Al-Mal transferred the same to the sub-accounts of three ineligible parties, Sardar Muhammad Ashraf D. Baloch (Pvt.) Ltd, Mr. Sikander Ali Jatoi and Mr. Abdul Ghani, maintained under the Central Depository System (the "**CDS**") established by the Defendant No.4 under the Central Depositories Act, 1997 (the "**CDA**"), and that subsequently further illegal transfers were made from the aforementioned sub-accounts to various other parties.

3. It was submitted that such transfers were unauthorized, illegal and fraudulent, that the Plaintiff was entitled to return of the 226,340,000 Shares, and to interim relief as prayed pending final determination of the Suit. It was contended that the Plaintiff had thus made out a prima facie case, and that the balance of convenience was in favour of injunctive relief being confirmed as irreparable loss would be caused to the Plaintiff in the event that the shares were not restored to him, since his 52% majority holding in ZPCFL would be set at naught and damages could not serve to adequately compensate him in that respect.
  
4. In the absence of representation on the part of Al-Mal, the Application came to be opposed principally by the Defendant No.4, and whilst it was acknowledged by said Defendant vide its pleadings that it had no proprietary interest in the shares being claimed by the Plaintiff, it was clarified that its opposition was mounted on the basis that the relief claimed in terms of the Suit, especially Prayers (b) and (c), was prejudicial to the integrity of the CDS and at odds with the scheme of the CDA, in as much as the grant of such prayers would essentially entail rectification of the central depository register, whereas rectification was explicitly barred in terms of Section 11 of the CDA, hence the question of interim relief being granted also did not arise.

5. In this context, it merits consideration that the final relief sought in the plaint is couched in the following terms [sic]:

- “A. Declaration that the transfer/sale/alienation/pledge/conversion of 427,838,526 shares/book entry security of Zeal Pak Cement Factory Ltd including the shares owned by the Plaintiff in the said company by the Defendant No.’s 1 & 2 is illegal, malafide, fraudulent, unlawful and of no legal effect.
- B. Mandatory injunction directing the Defendants to return the shares of M’s Zeal Pak Cement Factory Ltd to the Plaintiff and other merging companies i.e. PSCL & ZPIL.
- C. Permanent injunction against the Defendants restraining them from dealing or creating any third party interest including the sale, alienation, conversion, pledge, transfer in any manner whatsoever of the same in the shareholding of Zeal Pak Cement Factory Ltd and further direct the Central Depsoitory Company / Defendant No.4 to block the sale, purchase, transfer, conversion, pledge, alienation of the shares of Zeal Pak Cement Factory Ltd
- D. Mandatory injunction directing the Defendant including CD to submit all the details of the trail / transfer of the Plaintiff shares before thjis Hon’ble Court.
- E. Directing the SECP to initiate investigation against the Defendant Nos. 1 & 2 and take punitive action them in accordance with law.
- F. Without prejudice to the above, damages in the tune of Rs.500,000,000/- against the Defendant Nos. 1&2 for the illegal conversion of their shares.
- G. Appoint the Nazir of this Hon’ble Court as Receiver of the shares of Zeal Pak Cement Factory Ltd being illegally traded in the CDC and commit the same to the possession / custody of the Nazir as the same shall be wasted and further misappropriated.
- H. Such better and appropriate relief/s as this Hon’ble may deem in the circumstances of the case
- I. Cost of the suit.”

6. It is also pertinent to consider that Section 11 of the CDA stipulates as follows:

**“11. Bar on rectification of central depository register.** Notwithstanding anything contained in Section 152 of the Companies Ordinance, 1984 (XLVII of 1984), if

- (a) an account holder or a sub-account holder did not consent to a transfer of any book entry securities from, or to, his account or sub account, as the case may be; or
- (b) the name of any account holder or sub-account holder is fraudulently or without sufficient cause entered in, or omitted from, the central depository register.

the aggrieved party may apply to the Court for relief and the Court may award damages to the aggrieved party but shall not order rectification of the central depository register.

Explanation. The expression “Court” for the purposes of this Section shall mean the High Court having jurisdiction over the defendant.”

7. Addressing this aspect, learned counsel for the Plaintiff submitted that Section 11 of the CDA would not be applicable in the instant case, as the Plaintiff was neither an account holder or sub-account holder. It was also pointed out that it had been observed in the judgment of the Honourable Supreme Court in the case reported as Al-Meezan Investment Management Company Ltd v. Wapda First Sukkuk Company Limited, Lahore PLD 2017 SC 1 that “Section 11 of the Central Depositories Act 1997 cannot override fraud if it is once established as it is settled law that fraud vitiates the most solemn of proceedings and a superstructure built on a foundation of fraud must fall like a house of cards”. Hence, per learned counsel, rectification was not barred in the instant case.

8. Learned counsel for the Plaintiff further submitted that there had been a dereliction of duty on the part of the Defendant No.4 to adequately safeguard the interests of the Plaintiff, and contended that the said Defendant had acted negligently by failing to take timely measures to curtail the ability of Al-Mal to transact after being made aware that Al-Mal was involved in suspicious activities in relation to share transactions of an entity by the name of Noorie Textile Mills Ltd, instead, allowing transfers of shares to take place thereafter. It was alleged that the Defendant No.4 was seeking shelter under the umbrella of Section 11 in an endeavour to gloss over such negligence.
  
9. Conversely, learned counsel for the Respondent No.4 pointed out that the concept of the CDS entails the transfers of shares on the basis of electronic book keeping without any paper transaction, vide a computerized electronic register maintained in respect of book-entry securities, and is essentially predicated on two pivotal concepts, namely “dematerialization” and “fungibility”. It was explained that whereas dematerialization entailed the replacement of physical shares with electronic entries, so that once a company was enrolled in the CDS, its shares ceased to exist in physical form, the concept of fungibility meant that all shares entered in the CDS were identical and could not be identified so as to separate one share from another in terms of a distinctive number, as was the case with scrips in physical form, so that it is impossible to draw a distinction between one share and another, thus rendering the shares equal and interchangeable. It was submitted that unlike the case of physical scrips where a process of tracing and rectification could conceivably be carried out with reference to the unique serial number of each certificate, such a process was not possible in respect of book entry securities under the CDS, which is the very

reason that Section 11 had been introduced so as to obviate a claim for rectification.

10. It was further contended by learned counsel for the Defendant No.4 that the arguments raised on behalf of the Plaintiff in relation to Section 11 of the CDA were fallacious and misconceived. In this respect it was submitted that the instant case fell squarely within the scope of Section 11, and as far as the observations of the Honourable Supreme Court in Al-Meezan's case (Supra) in relation to the application of the said provision in cases of fraud were concerned, it was pointed out that the said case turned on its own facts and was distinguishable. It was also pointed out that notwithstanding the Defendant No.4 having been a *pro forma* respondent in that proceeding and being unrepresented on the date that the matter had been heard and decided, it had proceeded to file a Civil Review Petition on the ground that the view expressed in that Judgment was against the meaning and effect of Section 11 of the CDA. A copy of the Order made in that matter under review by the Apex Court was placed on record, which *inter alia* reads as follows:

“The applicant was a *pro forma* respondent in the case and was not represented on the date when the matter was heard and decided by this Court. Through this application, permission is sought for the applicant to file a review petition only for the reason that in Paragraph No.14 of the impugned judgment, the view expressed by this Court that: “*Section 11 of the Central Depositories Act 1997 cannot override fraud if it is once established as it is settled law that fraud vitiates the most solemn of proceedings and superstructure built on a foundation of fraud must like a house of cards*”. This view is claimed by the applicant to be against the meaning and effect of Section 11 of the Act (supra).

2. After hearing the learned counsel for the applicant, we allow the application, grant permission to the applicant to file the review and direct office to number the review petition. With regard to the observation highlighted above, it is clarified that the quoted part of the Judgment is confined to the peculiar facts of the case(s), and the parties contesting before us and that such observation shall not affect the authority of the applicant or the finality of its record in any other case. Accordingly, the review petition is disposed of.”

11. Addressing, the allegation the Defendant No.4 had been negligent in failing to act against Al-Mal upon being made aware of suspicious activity on its part, learned counsel submitted that the Defendant No.4 was not a market regulator and could only act as per the CDA, within the defined parameters thereof, and pointed out that as per the case of the of the Plaintiff, Al-Mal had admittedly been authorised to undertake the requisite transactions in pursuance of the Scheme of Arrangement. He further pointed out that Al-Mal had initiated the transfer of such shares on 03.06.2008, and proceeded to issue/transfer the vast majority of shares (all but 4,000,000) to the sub-accounts of Sardar Muhammad Ashraf D. Baloch (Pvt.) Ltd., Mr. Sikander Ali Jatoi and Mr. Abdul Ghani between that date and 08.07.2008, by when the Defendant No.4 had not received any complaint in relation to the transactions being processed, either from the Plaintiff or any other quarter. Thereafter, on 02.09.2008, the Securities and Exchange Commission of Pakistan (the “**SECP**”), being the frontline regulator, ordered the Defendant No.4 to suspend Al-Mal’s status as a ‘participant’ in the CDS, albeit in an unrelated matter, and on the very day the Defendant No.4 issued a notification of suspension to that effect. However, Al-Mal then filed Civil Suit No. 1343 of 2008 before this Court, and the aforementioned notification of suspension was itself suspended vide Order dated 25.09.2008, in the face of



which the Defendant No.4 had no option but to allow resumption of Al-Mal's status as a participant, whereupon Al-Mal proceeded to make one last transaction in relation to the ZPCFL shares on 02.02.2009. It was submitted that the Defendant No.4 and the SECP vigorously contested the aforementioned Suit, and it was pointed out the interim order then came to be vacated on 25.05.2009. It was submitted that from this backdrop there had evidently been no dereliction of duty on the part of the Defendant No.4, and it was apparent that the said Defendant had acted throughout in good faith whilst discharging its obligations as per the dictates of the CDA, and no fault could be attributed to it in respect of the transactions conducted by Al-Mal.

12. In the context of the discharge of its functions under the CDA by the Defendant No.4, learned counsel for the invited attention to Section 8 of the CDA, which reads as follows:

**“8. Central depository discharged from liability if acting on instructions. –**

- (1) A central depository, if acting in good faith and without negligence, shall not be liable for any loss, damages, compensation, costs and expenses in tort or under any law or contract for any breach of trust or duty and in the cases where the central depository has, in the accounts or sub-accounts maintained by it, made or allowed to be made entries or handled or allowed handling of any book-entry securities, according to the instructions of an account-holder or a participant, notwithstanding that the account-holder or the participant, as the case may be, had no right to dispose of or take any other action in respect of such book-entry securities.

- (2) A central depository, if acting in good faith and without negligence, shall be fully discharged of its obligations to an account-holder and participant, upon the transfer or delivery of book-entry securities under the instructions of the account holder or participant, as the case may be.
- (3) A central depository shall not be required to enquire whether or not-
  - (a) An account-holder or a participant, has a right to handle any book-entry securities entered in his account or in any sub-account under his account, as the case may be, or to take any action in that regard; or
  - (b) The document of title in respect of a security deposited with an issuer for the purpose of registration of the transfer of the security in the name of the central depository is genuine.
- (4) Except as provided in this Act, a central depository shall not owe any fiduciary or any other obligations whatsoever, including, without limitation to the generality of the foregoing, any obligations in law, contract, tort, warranty or strict liability, to the sub-account holders in whose name sub-accounts are maintained in the central depository system.
- (5) Without prejudice to the provisions of any other law for the time being in force, if any loss is caused to an account-holder or a sub-account holder due to any negligent or wrongful act or omission of a central depository or any of its employees, the central depository shall compensate such account-holder or sub-account holder for such loss.

13. Learned counsel also invited attention to what were termed to be glaring anomalies in the parcel of facts underpinning the Plaintiff's case. In this respect it was pointed out that:

- (a) Despite pleading that the shares to which he was entitled had been were diverted by Al-Mal and fraudulently issued/transferred to the accounts of Sardar Muhammad Ashraf D. Baloch (Pvt.) Ltd., Sikander Ali Jatoi and Abdul Ghani, the Plaintiff had neither impleaded nor subsequently sought to add either these three beneficiaries of the alleged fraud as defendants, nor any of the persons to whom the shares were subsequently moved from these three accounts.
- (b) No criminal proceedings had been instituted by the Plaintiff against either the directors/management of ZPCFL or Al-Mal, or the three above named beneficiaries or any subsequent transferee.
- (c) Despite claiming almost 52.9% shares, the Plaintiff did not seek to assert his rights as against ZPCFL so as to get the majority of directors elected or to participate and vote in the general meetings of the company.
- (d) After the Scheme of Arrangement was sanctioned and while Al-Mal was transferring shares over a protracted period, the Plaintiff remained completely inactive and absent from the scene, until 09.07.2009, when the instant Suit was filed seeking for Declaration, Permanent Injunction and the rectification of the central depository register. It was submitted that a party genuinely expecting to receive such a large number of shares pursuant to the Scheme of Arrangement would have enquired into the matter when the same were not forthcoming soon after the sanction thereof.

(e) Albeit expecting to receive 226,340,000 shares, the Plaintiff did not and still does not have a CDC Account, which is a *sine qua non* for transfer, as the shares claimed are in a book-entry form.

Per learned counsel, such anomalies give rise to serious doubt as to the probity of the claim and reflect that the Plaintiff has not approached the Court with clean hands, and, apart from the bar under Section 11 of the CDA, is even otherwise not entitled to any equitable relief. Accordingly, it was prayed that the Application be dismissed.

14. Having examined the pleadings and material on record and the respective submissions advanced by learned counsel, it falls to be considered that certain obvious gaps and anomalies in the Plaintiff's case, as highlighted, remain unexplained and reflect a course of conduct that is inconsistent with the actions of a person exercising normal commercial prudence. Furthermore, in view of the case set up in the pleadings, it is apparent that the final relief being sought by the Plaintiff is an order for the return of the shares of ZPCFL, which would entail rectification of the central depository register, hence give rising to the question as to whether recourse to such a remedy is permissible in view of Section 11 of the CDA. Whilst considering this aspect, it has to be borne in mind that as per its own terms, Section 11 serves to create a marked exception to Section 152 of the Companies Ordinance 1984, which inter alia envisaged as follows:

**“152. Power of Court to rectify register.- (1) If-**

- (a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members or register of debenture-holders of a company; or
- (b) default is made or unnecessary delay takes place in entering on the register of members or register of debenture-holders the fact of the person having become or ceased to be a member or debenture- holder;

the person aggrieved, or any member or debenture-holder of the company, or the company, may apply to the Court for rectification of the register.

- (2) The Court may either refuse the application or may order rectification of the register on payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.
- (3) On any application under sub-section (1) the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or debenture-holders or alleged members or debenture-holders, or between members or alleged members, or debenture-holders or alleged debenture-holders, on the one hand and the company on the other hand; and generally may decide any question which it is necessary or expedient to decide for rectification of the register.
- (4) ...”

Following the repeal of the Ordinance vide the Companies Act, 2017, a comparable provision is to be found in terms of Section 126 of the repealing enactment. Be that as it may, what is apparent is that the fundamental premise of Section 11 is that once a transaction takes place in the CDS the same is not be reversed in the central depository register.

15. Turning to the arguments raised by learned counsel for the Plaintiff as to the inapplicability of Section 11 to the Plaintiff's case, from a reading of the said provision I am of the view that the scope thereof is not confined to precluding rectification of the central depository register in only those cases where the aggrieved party is an account-holder or sub-account holder, as such an interpretation would place a stranger to the CDS on a better footing than an account-holder or sub-account holder, which would run contrary to the spirit and intendment of Section 11, negating the very purpose thereof. Furthermore, when the wording of Section 11 is examined, it is discernible that two distinct scenarios emerge under clauses (a) and (b) thereof, which are to be viewed disjunctively. The grievance of an aggrieved party that the name of an account holder or sub-account has been fraudulently entered in the central depository register, as is the case in the matter at hand, is not predicated on the aggrieved party being either an account holder or sub-account holder.

16. As to the submission made on the basis of the observation made in Al-Meezan's case (Supra), suffice it to say that it stands clarified by the Honourable Supreme Court that the same turned on the basis of the peculiar facts of the case and did not affect the finality of the Defendant No.4's record in any other case. As such, in the matter at hand, the underlying facts of which are even otherwise clearly distinguishable from the cited case, the applicability of Section 11 remains unimpaired.

17. Under such circumstances, where the relief of mandatory injunction, being the principal relief sought, cannot be granted, then *a fortiori* a temporary injunction in aid of such final relief would also not lie. Be that as it may, the Plaintiff remains at liberty to pursue his remedy by way of damages, and it is clarified that the Plaintiff's case in that regard shall not be prejudiced in any manner by the observations made herein above.

18. In view of the foregoing, the application under consideration, bearing CMA Number 6734/09, is hereby dismissed.

JUDGE

Karachi  
Dated \_\_\_\_\_