

# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

CP D 5016 of 2019 : AKD Investment Management  
Limited & Others vs.  
JS Investments Limited & Others

For the Petitioners : Mr. Altamash Arab, Advocate

For the Respondents : Mr. Khalid Jawed Khan, Advocate  
(Respondent no.1 / JSIL)

Mr. Tariq Qureshi, Advocate  
(Respondent no.3 / PSX)

Mr. Syed Hafiz Abad  
Law Officer  
(Respondent no.2 / SECP)

Dates of Hearings : 27.08.2019, 03.09.2019,  
17.09.2019, 03.10.2019  
& 15.10.2019.

Date of Announcement : 05.12.2019

## JUDGMENT

**Agha Faisal, J:** The petitioners, representing themselves to be minority shareholders of the respondent no.1, being a public listed company, have filed this Constitutional petition seeking to restrain the said private respondent from carrying out the purchase / buyback of its own shares for cancellation. To illustrate the claim before us it is consider prudent to reproduce the prayer clause herein below:

“i. Permanently and during pendency of the instant petition restrain the respondents from carrying out the Impugned Buyback of the respondent no.1’s shares.

ii. Direct the respondents no.2 and 3 to ensure they fulfill the legal duty to protect the interest of minority shareholders of the respondent no.1....”

2. Briefly stated, the respondent no.1, being a public listed company, had resolved, vide Extraordinary General Meeting dated 24<sup>th</sup> July, 2019 to purchase / buyback a specified quantum of its own shares for cancellation. Thereafter, the respondent no.1 had filed a statement of material facts disclosing the relevant resolution and also the pertinent particulars of the transaction sought to be undertaken. The Pakistan Stock Exchange Limited, being the respondent no.3, was duly notified of the foregoing vide the respondent no.1's letters dated 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> July, 2019. A public announcement for the buyback of the shares was also advertised in the daily newspapers on 25<sup>th</sup> July, 2019 and the relevant information was also placed before Security Exchange Commission of Pakistan ("SECP"), being respondent no.2 herein. The petitioner no.1 had sent a letter to the SECP, dated 17.07.2019, wherein it had objected to the purchase price of the shares, to be purchased by the respondent no.1, however, on account of the SECP not having responded in accordance with expectations of the petitioner the present petition was preferred.

3. Mr. Altamash Arab, Advocate represented the petitioners and submitted that the purchase / buyback of shares was being carried out in violation of the relevant provisions of the law as a company was only permitted to purchase its own shares as treasury stock and not otherwise for the purpose of cancellation. The crux of the arguments of the learned counsel was that the respondent no.1 ought to have gone for a reduction of share capital, as opposed to the buyback transaction placed before us, as the preferred exercise could translate into a better price at which the shares were to be acquired. Learned counsel candidly acknowledged that the entire motivation for the present petition was obtaining the maximum price per share and that the petitioners had every right to institute and maintain the present proceedings in order to maximize their returns.

4. Mr. Khalid Jawaid Khan, Advocate represented the respondent no.1 and submitted at the very outset that the petition was not maintainable against a private entity. It was sought to be demonstrated from the record that the purchase for cancellation transaction was in consonance with the law and the same stood duly

approved by the regulatory authorities. It was next submitted that pursuant to the Companies Act 2017 (“Act”) shares could either be purchased for cancellation or to be held as treasury shares and that the two circumstances were mutually exclusive. Learned counsel demonstrated from the Listed Companies (Buyback of Shares) Regulations 2019 (“Regulations”) that the action taken by the respondent no.1 was in conformity therewith and that proposition advanced by the learned counsel for the petitioner, denying the mutually exclusive nature of shares purchased for cancellation or to be held as treasury shares, was prima facie unsustainable in view of the Act and the Regulations.

Learned counsel highlighted the fact that during the pendency hereof the petitioners themselves had sought to participate in the buyback of shares offered, vide their communication dated 30.08.2019, however, the respondent no.1 was unable to accede to the said request in view of the ad-interim orders obtained by the petitioners in this very petition. It was thus demonstrated that despite having filed this petition the petitioners had themselves sought to avail said offer, at the denoted purchase price, during pendency hereof.

5. Comments were filed on behalf of SECP, respondent no.2 herein, and it was specifically prayed therein that this Court may be pleased to dismiss the subject petition. The comments delineated the relevant constituents of the Regulations and negated the grounds invoked by the petitioner. It was sought to be demonstrated that the SECP is conscious of the statutory requirements for a purchase / buyback of shares by a company and that no infringement in such regard has been demonstrated there-before in the present facts and circumstances. The respondent no.3, Pakistan Stock Exchange Limited, also filed comments and mirrored the constituents of the Regulations already cited by the respondent no.2. The said comments also did not merit the case of the petitioners.

6. We have heard the respective legal counsel and have also considered the law, regulations and record to which our surveillance was solicited. The primary question that requires to be addressed by

us is whether the petitioners were justified in invoking the writ jurisdiction of this Court in order to maximize their return from investment in the equity of a company.

7. It is manifest from the memorandum of petition, and exemplified by the prayer clause therein, that the primary relief is sought against a private juristic person.

The honorable Supreme Court has recently maintained, in the case of *Pakistan Olympic Association & Others vs. Nadeem Aftab Sindhu & Others* reported as 2019 SCMR 221, that invocation of Article 199 of the Constitution was merited with respect to a person performing public functions in connection with the affairs of the Federation, or a Province or a local authority as the case may be. Under no circumstances can the respondent no. 1 be considered as a person performing public functions in connection with the affairs of the Federation, or a Province or a local authority.

The petitioners have impleaded the respondent nos. 2 and 3 in an apparent effort to justify the invocation of the writ jurisdiction, however, their inclusion is illusory as the relief sought is *prima facie* against a private respondent. A Division Bench of this High Court, in *Muhammad Saddiq & another vs. Ruqaya Khanum & Others* reported as PLD 2001 Karachi 60, had deprecated the invocation of the writ jurisdiction in private disputes and had held that impleading of official respondents merely to overcome objections of the branch with respect to maintainability cannot but be disapproved.

8. The efforts of the petitioners seeking to benefit from the purchase / buy back offer made by the respondent no. 1, despite having filed the present petition assailing the same offer, is apparent from the record. This acquiesce in itself amplifies the intention of the petitioner, which in any event has been candidly acknowledged to be profit maximization. Learned counsel has been unable to convince us that the invocation of the Constitutional jurisdiction of this Court is justifiable in an admitted attempt by private parties to obtain preferential returns from another private party.

9. The spearhead of the arguments advanced on behalf of the petitioners was that a company had to acquire its own shares as treasury stock and thereafter undertake an independent exercise for the reduction of capital. It was the case of the petitioners that the Act and / or the Regulations did not permit of acquisition of shares by a company merely for cancellation. It argued that a complaint, in such regard, was filed before the SECP and that the same had not borne the desired result, hence, this petition.

Learned counsel for the respondent no. 1 had pointed to the constituents of the memorandum of petition in an effort to demonstrate that the aforesaid argument was alien to the pleadings. The complaint to the SECP was also read before us to show that the same merely called upon the regulatory body to intervene in order to maximize the purchase price of the shares.

Learned counsel for the petitioners made no effort to controvert the demonstrated submission that the pleadings, and the complaint under reference, were in fact incongruent with the argument pressed before us on behalf of the petitioners.

10. We are respectfully unable to sustain the argument that the law (Act / Regulations) does not cater for shares to be either purchased for cancellation or to be held as treasury shares. The foundation for this view is stated herein below:

a. Section 88 of the Act stipulates as follows:

“88. Power of a company to purchase its own shares. (1) Notwithstanding anything contained in this Act or any other law, for the time being in force, or the memorandum and articles, a listed company may, subject to the provisions of this section and the regulations specified in this behalf, purchase its own shares.

(2) The shares purchased by the company may, in accordance with the provisions of this section and the regulations, either be cancelled or held as treasury shares.

(Underline added for emphasis.)

(3) The shares held by the company as treasury shares shall, as long as they are so held, in addition to any other conditions as may be specified, be subject to the following conditions, namely- (a) the voting rights of these shares shall remain suspended; and (b) no cash dividend shall be paid and no other distribution, whether in cash or otherwise of the company's assets, including

any distribution of assets to members on a winding up shall be made to the company in respect of these shares: Provided that nothing in this sub-section shall prevent- (a) an allotment of shares as fully paid bonus shares in respect of the treasury shares; and (b) the payment of any amount payable on the redemption of the treasury shares, if they are redeemable.

(4) The board shall recommend to the members purchase of the shares. The decision of the board shall clearly specify the number of shares proposed to be purchased, purpose of the purchase i.e. cancellation or holding the shares as treasury shares, the purchase price, period within which the purchase shall be made, source of funds, justification for the purchase and effect on the financial position of the company.

(Underline added for emphasis.)

(5) The purchase of shares shall be made only under authority of a special resolution.

(6) The purchase of shares shall be made within a period as specified in the regulations.

(7) The proposal of the board to purchase shares shall, on conclusion of the board's meeting, be communicated to the Commission and to the securities exchange on which shares of the company are listed.

(8) The purchase of shares shall always be made in cash and shall be out of the distributable profits or reserves specifically maintained for the purpose.

(9) The purchase of shares shall be made either through a tender offer or through the securities exchange as may be specified.

(10) The company may dispose of the treasury shares in a manner as may be specified.

(11) Where a purchase of shares has been made under this section, the company shall maintain a register of shares so purchased and enter therein the following particulars, namely- (a) number of shares purchased; (b) consideration paid for the shares purchased; (c) mode of the purchase; (d) the date of cancellation or re-issuance of such shares; (e) number of bonus shares issued in respect of treasury shares; and (f) number and amount of treasury shares redeemed, if redeemable.

(12) Any violation of this section shall be an offence liable to a penalty of level 3 on the standard scale and shall also be individually and severally liable for any or all losses or damages arising out of such contravention.”

A bare perusal of the statutory provision supra demonstrates that the Act specifically recognizes the acquisition of its own shares by a company for cancellation or holding as treasury shares. There are two situations contemplated and the connection between the two is identified by the word “or”, signifying that the two situations are disjunctive.

b. In addition thereto Regulation 2(k) of the Regulations comprehensively defines “*treasury shares*” as follows:

“treasury shares means the shares purchased and held by the purchasing company in its own name in accordance with section 88 of the Act and these regulations.”

(Underline added for emphasis.)

It is *prima facie* apparent that the prescribed definition refers to shares purchased “*and*” held by the purchasing company. This appears to be at distinct from shares purchased by a company for cancellation.

c. Learned counsel had vehemently argued that the word “*or*” in Section 88 of the Act may be read as “*and*”, hence, conjunctively rather than disjunctively. It had been further contended that the word “*and*” in Regulation 2(k) of the Regulations may be read as “*or*”, hence, disjunctively rather than conjunctively. The learned counsel, however, was unable to articulate any cogent basis for this argument.

It is well settled law that where a statute has provided for a particular thing to be done in a specific manner then it is to be done in that manner and that the role of courts is not designed to legislate but interpret statutes according to their ordinary and plain meaning and not import and or supply words or provisions, no matter how laudable and desirable it may appear to be (*Zahid Iqbal vs. Hafiz Muhammad Adnan & Others* reported as 2016 SCMR 430). A court of law is not ordinarily entitled to read words into an act of Parliament (*Nadeem Ahmed Advocate vs. Federation of Pakistan* reported as 2013 SCMR 1062). It is also appreciated that a court cannot put into an Act words which are not expressed and which cannot be reasonably implied on any recognized principle of construction (*Amanullah Khan vs. Chief Secretary NWFP & Others* reported as 1995 SCMR 1856).

The Act, buffeted by the Regulations, appears to recognize the purchase of its own shares by a company either for cancellation or to be held as treasury stock and no case has been made out before us to read the relevant provisions of the law otherwise and / or ascribe any import thereto but the plain meaning thereof.

d. Our scrutiny was also solicited to the distinctive nature of shares purchased for cancellations as opposed to treasury

shares by adverting to Regulations 10(d), 11 and 13 of the Regulations to show *inter alia* that shares purchased by a company for cancellation have to be cancelled within ten days of closing of purchase period, whereas, treasury stock may not be sold, transferred or otherwise alienated by a purchasing company within six months from the closure of the purchase period.

11. Learned counsel for the respondents has placed before us the entire relevant record, pertaining to the transaction under scrutiny, in order to show that the transaction has been duly concluded, i.e. shares have been purchased in consonance with the offer and subsequently cancelled within the prescribed time, and that all the requisite filings have been made before the regulatory authorities.

The SECP has filed a detailed response before us and has dilated upon the law with regard to a purchase / buy back transaction. The stand taken by the SECP supports the arguments of the respondent no. 1 and in addition thereto seeks the dismissal of the petition.

We have found no cavil with the response submitted before us and the learned counsel for the petitioners has not made any effort to counter or deny any constituent of the comments referred to supra. It is thus apparent that no case for regulatory omission is made out before us as the relevant authority has demonstrably taken positive action and approved of the transaction concluded by the respondent no. 1.

12. Notwithstanding the discussion delineated supra it is pertinent to record that the learned counsel for the petitioners has not adverted to any fundamental right/s that may have been infringed by any respondent before us. While we have no cavil to any person expecting to maximize their return on investment, under no circumstances can such an expectation become actionable under the Constitutional jurisdiction of this Court.



13. In view of the reasoning and rationale herein contained, we are constrained to observe that the present petition is not maintainable and even otherwise devoid of merit, hence, this petition, along with pending applications/s, is hereby dismissed.

J U D G E

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Karachi.

Farooq PS/\*