

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

JCM No.42 of 2023

Muhammad Sohail & another

Versus

M/s. Union Cargo (Private) Limited & others

Date:	Order with signature of Judge
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Petitioner: Mr. Junaid Ahmed, Advocate

Respondent No.2: Mr. Maaz Waheed, Advocate

Dates of hearing: 29 July 2024, 30 July 2024 & 1 August 2024

ORDER

MOHAMMAD ABDUR RAHMAN, J. The Petitioners maintain this Petition under Section 126 read with Sections 286, 287, 288, 293 and 301 of the Companies Act, 2017 seeking to rectify the register of shareholding that is maintained by Union Cargo (Private) Limited (hereinafter referred to as “UCL”) on the ground that certain shares that were owned by them in UCL were fraudulently transferred into the names of the Respondent No. 2 and the Respondent No. 3. Premised on the ground of the alleged fraud, the Petitioners also seek relief alleging that the actions of the Respondents amount to operating UCL in an unlawful or fraudulent manner and in a manner oppressive to the members of UCL and for which they seek various remedies including, but not limited to, the winding up of UCL.

A. The Facts

2. UCL was incorporated under the provisions of the Companies Ordinance, 1984 and registered with the Securities and Exchange Commission of Pakistan (hereinafter referred to as the “SECP”) on 28 May 1998 as a private limited company with an authorised share capital of Rs. 10,000,000 (Rupees Ten Million) comprising of 100,000 (One Hundred Thousand) ordinary shares of a face value of Rs. 100 (Rupees One Hundred) per share and an issued share capital of 70,000 shares (Seventy Thousand) therefore constituting a total paid up share capital of Rs.70,000,000 (Rupees Seventy Million).

3. The shareholding of UCL at the time of the incorporation of UCL is not in dispute and various transfers of shareholding have taken place since the

incorporation of UCL which are not disputed. It seems that amongst the transfers, at some time, another company i.e. PCL Logistics (Private) Limited acquired the shareholding of UCL from the then shareholder Expolanka Freight FZCO through a Share Sale and Purchase Agreement dated 31 March 2021. PCL Logistics (Private) Limited thereafter sold 50% of their shareholding to the Respondent No. 2 and one Mst. Saltanat Rehmat while the balance 50% of the shareholding was transferred into the name of the Petitioners and at which stage the shareholding of UCL was on 28 July 2021 recorded in the Form A submitted by UCL to SECP as hereinunder:

Name	Shareholding	Percentage Share
Muhammad Sohail	21,000	30%
Abdul Wahab Sohail	14,000	20%
Rab Nawaz Khan	28,000	40%
Saltanat Rehmat	7,000	10%

It is not disputed that at some time thereafter the shares owned by Mst. Saltanat Rehmat were transferred in the name of the Respondent No. 3 and thereafter the shareholding of UCL was as follows:

Name	Shareholding	Percentage Share
Muhammad Sohail	21,000	30%
Abdul Wahab Sohail	14,000	20%
Rab Nawaz Khan	28,000	40%
Hamza Khan	7,000	10%

4. As can be seen the shareholding of UCL was divided as between two families so that 50% of the shares were jointly held by Muhammad Sohail and Abdul Wahab Sohail (hereinafter referred to as the "Sohail's") and the balance 50% 50% of the shares were jointly held by Rab Nawaz Khan and Hamza Khan (hereinafter referred to as the "Khan's"). The facts as narrated thereafter are disputed and protracted to say the least but which are not altogether relevant for these proceedings. Suffice to say that during the pendency of their relationship allegations and counter allegations of fraud and misappropriations have been made by the Sohail's as against the Khan's and by the Khan's as against the Sohail's in respect of monies that were held by UCL. This at some point culminated in a criminal complaint being lodged by the Respondent No. 2 as against the Petitioners bearing FIR No. 13 of 2023 and an enquiry being initiated, at the behest of the Respondent No. 2, as against the Petitioners before the Federal Investigation Agency, Commercial Banking Circle bearing Enquiry No. 18 of 2023. The Petitioners contends that these two proceedings were "closed" on the basis of a Memorandum of Understanding dated 22 March 2023 whereby it was purportedly agreed as between the Sohail's and the Khan's that:

- “ ... (i) The Company would pay PKR 5,450,000/- to the Respondent No.2 against the full and final settlement of FIR No.13/2023, dated 17.01.2023.
- (ii) In consideration of this payment, the Respondent No.2 agreed to withdraw FIR No.13/2023 dated. 17.01.2023 and Enquiry No.18/2023 lodged against the Petitioners;
- (iii) The Respondent No.2 will not take any sort of legal actions against other directors in the future and(or) none of the Directors of the Company would try to jeopardize the operations of the company in anyway, and
- (iv) A neutral External Audit of the Company would be arranged immediately, and any receivables declared by the external auditor reports against any Director or CEO of the Company must be accepted by all directors and would be deposited in Company bank accounts.”

5. The Petitioner contends that despite it being agreed that FIR No. 13 of 2023 would be withdrawn, this was not done and as alleged by the Petitioner, was thereafter used as leverage by the Khan's to get the Sohail's to transfer their shareholding in UCL to them. It is contended that initially the Petitioner No. 1 was forced to resign as the Chief Executive Officer of UCL and where after a Settlement Agreement dated 5 September 2023 was executed as between the Khan's and the Sohail's and whereby inter alia the Sohail's agreed to transfer their entire shareholding to the Khan's or their nominees. The terms of the Settlement Agreement as indicated by the Petitioners in the Petition are reproduced hereinunder:

- “ ... 22. That, subsequently the Petitioners and the Respondent No.2 entered into a Settlement Agreement on 05.09.2023 ("Settlement Agreement"), wherein it was agreed that the Petitioner No.1 would pay PKR 9,000,000/- (Rupees Nine Million only) by 31st December 2024, as part of the settlement to the Respondent No.1. Additionally, the Petitioners were also coerced to agree to transfer their entire 50% shareholding in the Company to the Respondent No.2 or any other person nominated by the Respondent No.2. Furthermore, the Petitioners were forced to resign from their positions as Directors of the Company. In such consideration, the Respondent No.2 withdrew FIR No.13/2023 and further indemnified the Petitioners. The Respondent No.2 personally guaranteed that following the Petitioners' departure from the Company, no legal actions/Suits would be pursued against the Petitioners, without any exception whatsoever...”

6. It is admitted by the Petitioners that the Settlement Agreement dated 5 September 2023 was acted upon and that the Sohail's executed transfer deeds in favour of the Khans and which were also executed by the Khan's as well and which had caused the entire shareholding to be transferred into the names of the Respondent No. 2 and the Respondent No. 3 and which transfer was thereafter approved by the Board of Directors of UCL and the transfer recorded in the register of shares maintained by UCL. The Petitioners now seek to vitiate the Settlement Agreement dated 5 September 2023 and thereafter to rectify the register to have their shareholding reinstated in the record of UCL. The basis for claiming such a right is premised on the vitiation of the Settlement Agreement dated 5 September 2023 and is pleaded in the Petition as hereinunder:

- “ ... 23. That, it is respectfully submitted that based on the Settlement Agreement and Share Transfer Deed dated 04.09.2023, the Respondent No.2 agreed to pay a consideration of Rs.3,500,000/- in exchange of the shareholding of the Petitioners being relinquished in favor of the Respondent No.2 or any other person nominated by the Respondent No.2. This consideration was reflected in the Share Transfer Deed dated 04.09.2023, whereby the Petitioners, in good faith, transferred their total shareholding of 50% in Union Cargo to Respondent No.2 and Respondent No.3. However, the Respondent No.2 to Respondent No.4 have blatantly and deliberately failed to remit the total consideration of PKR.3,500,000/- (PKR. 2,100,000 + PKR.1,400,000) (Rupees Three Million Five Hundred Thousand only), in relation to the Petitioner's total shareholding. Additionally, the Petitioners have also not been paid salaries by the Company, amounting to approximately PKR. 2,500,000/- (Two Million and Five Hundred Thousand Only)...
24. That, it is imperative to highlight that the Respondent No.2 to Respondent No.4 committed fraud against the Petitioners to acquire their lawful shares in the Company in favor of Respondent No.3 and Respondent No.4, even without remitting the agreed consideration to the Petitioners. In contrast, the Petitioners issued post-dated cheques amounting to PKR 9,000,000/- (Rupees Nine Million Only) to the Respondent No. 2. Subsequently, the Criminal Case No.1414/2023 was withdrawn by the Respondent No. 2...
25. That, it is apt to note that, within a mere two months of entering into the Settlement Agreement, the true malafide intentions of Respondent No.2 have come to light, as demonstrated by the Respondent No.2's email dated 06.12.2023, wherein it is alleged that the Petitioners had utilized the Company's resources without prior approval and malafiedly asserted that the Petitioners are required to pay PKR 25,570,185/- (Rupees Twenty-Five Million Five Hundred Seventy Thousand One Hundred Eighty-Five) to the Respondent No.2...
26. That, however, the Petitioner No.1 explicitly refuted the assertions made by the Respondent No.2 in its email dated 06.12.2023, characterizing them as manipulative and inaccurate. Additionally, the Petitioner No.1 reminded the Respondent No.2 of the Settlement Agreement and clarified that there exists no liability concerning the matters raised. Subsequently, in an evident attempt to coerce, exert pressure, and engage in coercive tactics, the Respondent No.2 issued a threatening email to initiate legal actions against the Petitioner No.1 through its legal representatives should the matter not be amicably resolved by 12.12.2023...
27. That, consequently, the email dated 06.12.2023 not only constitutes a blatant breach of the terms stipulated in the Settlement Agreement but can only be construed as fraud against the Petitioners. Moreover, the legal demands of the Respondent No.2, coupled with the threat of legal repercussions in the event of non-compliance, constitutes a coercive and unlawful approach. This directly violates the spirit of the Settlement Agreement and reflects a complete disregard for the terms agreed upon by the Petitioner.”

B. The Contentions of the Petitioners

7. Mr. Junaid Ahmed entered his appearance on behalf of the Petitioners and contended that he is entitled to seek the rectification of the Share Register of UCL on the grounds of a “fraud” having perpetuated as against the Petitioners as the consideration that was promised to the Petitioner was never paid and which on the basis of this “fraud” entitled the Petitioners to reverse the entries maintained in the register of shareholding of UCL. I had particularly requested Mr. Junaid Ahmed to address as to the jurisdiction that this Court has to entertain this Petition under Section 126 of the Companies Act, 2017, keeping in mind that to vitiate the Settlement Agreement dated 5 September 2023 on the ground of the “fraud” as alleged would require me to pass a declaration as to the breach of the terms of

that agreement and to set aside the agreement and hence to assist as to whether this Court, under the provisions of the Companies Act, 2017, possessed the power to pass such orders or as to whether such relief would rather be exercised under the provisions of the Specific Relief Act, 1877 by a civil court, constituted under Section 9 of the Code of Civil Procedure, 1908. Mr. Junaid Ahmed responded to that query by stating that this Court had the requisite jurisdiction, under the provisions of Section 126 the Companies Act, 2017, to rectify the share register on the basis that the entries that had been made in the register of shreholding was “fraudulent”, and which jurisdiction included the right to inquire into obligations on the basis of which the transfer deeds were executed and to opine and pass orders in respect of those obligations and which orders could extend to making such declarations and to set aside the Settlement Agreement dated 5 September 2023 for fraud and thereafter to rectify the share register of UCL. In addition, he contended that as the Respondents No. 2 and the Respondent No. 3 had sent the Petitioners a legal notice, that constituted a second breach of the Settlement Agreement dated 5 September 2023 and on which basis the Settlement Agreement dated 5 September 2023 could also be terminated by the Petitioner and which again would constitute a basis to maintain this petition for rectifying the share register of UCL. He placed reliance on the decision of the Supreme Court of Pakistan reported as **Mian Javed Amir & other vs. United Forum Industries & others**,¹ in which it was held that the expression “summary procedure” as contained in Sub-Section (3) of Section 9 of the Companies Ordinance, 1984 did not preclude evidence from being recorded to resolve the dispute as between the parties. He also relied on the decision of the Supreme Court of Pakistan reported as **Naila Naeem Younis vs. Indus Services Limited**,² in which it was held that the provisions of Section 3 of the Limitation Act, 1908 would not be attracted to an application under the provisions of the Companies Act, 2017. Reliance was also placed on the decision of the Supreme Court of Pakistan reported as **Zulai Khan Bibi vs. Roshan Jan**³ and the decision reported as **Abdul Rehman Khan v. Muhammad Altaf**,⁴ in each of which orders in a dispute involving land it was clarified that fraud would vitiate even the most solemn of proceedings. Reliance was also placed on the decision reported as **Mian Muhammad Saeed vs. The Province of West Pakistan**⁵ in which the latin maxim *Nullus Commodum capere potest de injuria sua propria*, No man should take advantage of his own wrong, was applied. He also relied on a decision of the Lahore High Court Lahore reported as **Main Waheed Ud Din vs. Royal Rice Millers Pvt. Ltd.**,⁶ wherein where a rights issue was made without complying with the provisions of Section

¹ 2016 SCMR 213

² 2022 SCMR 1171

³ 2011 SCMR 986

⁴ 1997 CLC 1260

⁵ PLD 1964 SC 572

⁶ 2015 CLD 1978

86 of the Companies Ordinance, 1984 the issue of shares was set aside and the share register rectified. He next relied on the decisions reported as **Akbar Ali Sharif & Others vs. Syed Jamaluddin & others**,⁷ **In re: Muhammad Salim Khan**,⁸ **Saleh Munawar vs. Shahnawaz Munawar**,⁹ and **Alliance Textile Mills vs. Mrs. Naheed Kayani**,¹⁰ where in each of these cases an entry was made in the register of shares showing a transfer of shares and when no transfer deeds were produced to confirm the transfer of shares, the Court rectified the register of shares. Reliance was also placed on the decision reported as **Amanullah Khan vs. Petrocon Limited & others**,¹¹ in which where a person who had subscribed to shares in a company was not indicated as the owner of shares in the register directions were given for him to be indicated in the register of shares as a holder of those shares. While considering the jurisdiction of this Court he relied on a decision of the High Court of Islamabad reported as **Dr. Omar Masood & another vs. Syed Amir Hussain & others**,¹² and wherein it was held that by adding Sub-Section (2) of Section 5 into the Companies Act, 2017, being an ouster clause, the jurisdiction of the civil court constituted under Section 9 of the Code of Civil Procedure, 1908 had been excluded in respect of all matters pertaining to transfer of a share including but not limited to the institution of suits in respect of Specific Performance on an agreement in respect of the transfer of shares. Reliance was also placed on a decision of the High Court of Balochistan reported as **Hafiz Zubair & others vs. Mst. Hazar Naz & others**,¹³ in which the decision of the High Court of Islamabad reported as **Dr. Omar Masood & another vs. Syed Amir Hussain & others**,¹⁴ was followed and a decision of the Lahore High Court reported as **The Lahore Polo Club vs. Additional District & Sessions Judge & others**,¹⁵ in which it was similarly held that the jurisdiction of the civil court had been ousted by the provisions of Sub-Section (2) of Section 5 of the Companies Act, 2017. He finally distinguished the decision reported as **Abdullah Khan Usmani vs. SECP & others**,¹⁶ as is being relied on by the Respondent No. 2 as being per incuriam as having not followed the decisions of the Supreme Court reported as **Mian Javed Amir & other vs. United Forum Industries & others**,¹⁷ and **Naila Naem Younis vs. Indus Services Limited**.¹⁸

C. The Contentions of the Respondent No. 2.

⁷ 1991 MLD 203

⁸ 1992 CLC 2273

⁹ 2011 CLD 1029

¹⁰ 2015 CLD 1532

¹¹ PLD 1982 Lahore 634

¹² 2019 CLD 931

¹³ 2022 CLD 1311

¹⁴ 2019 CLD 931

¹⁵ 2018 CLD 1214

¹⁶ 2022 CLD 821

¹⁷ 2016 SCMR 213

¹⁸ 2022 SCMR 1171

8. Mr. Maaz Waheed entered appearance on behalf of the Respondent No. 2. He has disputed the contentions of the Petitioners and has maintained that all the requisite formalities as envisaged in Section 74 to 76 of the Companies Act, 2017 had been completed and all of which had been appended with their reply to the Petition. While maintaining that no fraud had been committed by the Respondent No. 2, he contended that each of the grounds as pleaded by the Petitioners could not be considered in this Court's jurisdiction under the Companies Act, 2017 and which could only be maintained in a suit instituted under Section 9 of the Code of Civil Procedure, 1908 as allegations of fraud and intricate questions of fact requiring evidence could not be decided by this Court in its jurisdiction under the Companies Act, 2017. He relied on the decision of the Lahore High Court, Lahore reported as **Abdullah Khan Usmani vs. SECP & others**,¹⁹ wherein in a matter were that was dispute regarding the transfer of shares of a Petitioner who was located in the United Arab Emirates and who on his return to Pakistan came to discover that the shares held by him in the Company had been transferred, the Court in a through order clarified the scope of Section 126 of the Companies Act, 2017 and the criteria as against which an order for rectification of the register could be made. He also placed reliance on another decision of the Lahore High Court, Lahore reported as **Zahida Parveen vs. Lamrey Ceramics (Pvt.) Ltd & others**,²⁰ in which it was held that the relief granted under Section 126 of the Companies Act, 2017 was discretionary and where it was found that there were intricate questions of fact requiring evidence, the Court was empowered to direct the Petitioner to approach the civil court and only when relief was obtained thereat could a petition be maintained under Section 126 of the Companies Act, 2017. He next relied on the decision reported as **Lt. Gen. (Retd.) Mahmud Ahmad Akhtar vs. Messrs. Allied Developers (Pvt.) Ltd. through Chief Executive & 3 others**,²¹ in which the scope of Section 152 of the Companies Ordinance, 1984 was examined by the Court. He concluded by relying on the decision reported as **Lahore Race Club through Secretary & others vs. Raja Khushbakht-ur-Rehman**,²² in which the manner in which a company court is to adjudicate an application under Section 152 of the Companies Ordinance, 1984 was elaborated on by the Supreme Court of Pakistan.

9. I have heard Mr. Junaid Ahmed and Mr. Maaz Waheed and have perused the record.

D. Jurisdiction under Section 5 read with Section 126 of the Companies Act, 2017

¹⁹ 2022 CLD821

²⁰ 2021 CLD 1229

²¹ 2022 CLD 718

²² PLD 2008 SC 707

10. The High Court of Sindh exercises a jurisdiction to adjudicate on matters as clarified under the Companies Act, 2017 and which has been conferred on it by Section 5 of the Companies Act, 2017 the relevant provisions of which read as hereinafter:

“ ... 5. *Jurisdiction of the Court and creation of Benches.* –

(1) *The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate.*

(2) *Notwithstanding anything contained in any other law no civil court as provided in the Code of Civil Procedure, 1908 (Act V of 1908) or any other court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Court is empowered to determine by or under this Act.*

...”

11. The matter for which the Petitioner seeks relief in this Petition is for the rectification of the share register and which jurisdiction is exercised by this Court under Section 126 of the Companies Act, 2017 which reads as hereinafter:

“ ... 126. *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) *Where the Court has passed an order under sub-section (3) that prima facie entry in or omission from, the register of members or the register of debenture-holders the name or other particulars of any person, was made fraudulently or without sufficient cause, the Court may send a reference for adjudication of offence under section 127 to the court as provided under section 482.”*

It is apparent from Sub-Section (1) of Section 126 that the jurisdiction of this Court to adjudicate on a matter pertaining to the rectification of the share register will arise when either:

- (i) a person's name has been "fraudulently" or "without sufficient cause" been "entered in" or "omitted" from the register of members of debenture holders; or
- (ii) where "default is made" or "unnecessary delay" occurs in entering a person's name in the register of members of debenture holders.

The jurisdiction of this Court to adjudicate on such issues has been further clarified by Sub-Section (3) of Section 126 of the Companies Act, 2017²³ and by which this Court "may" decide "any question relating to the title of any person" within the criteria of persons specified therein and in addition "may" also generally decide any question which it is necessary or expedient to decide for rectifying the register.

12. Mr. Junaid Ahmed's arguments in respect of the jurisdiction of this Court are premised on reading Sub-Section (1) and (3) of Section 126 with Sub-Section (2) of Section 5 of the Companies Act, 2017 and on the basis of which he has pleaded that Sub-Section (2) of Section 5 of the Companies Act, 2017, being an ouster clause, would exclude the jurisdiction of a Civil Court to adjudicate on any matter involving the title of a person to shares and which would include any issue pertaining to the vitiation of the Settlement Agreement dated 5 September 2023.

13. In this regard Mr. Junaid Ahmed relied on a decision of the High Court of Islamabad entitled **Dr. Omar Masood & another vs. Syed Amir Hussain & others**.²⁴ The *lis* in that suit, which was maintained in the original civil jurisdiction, sought specific performance on a compromise agreement for the transfer of shares in a company. A question arose as to whether the jurisdiction of the civil court was ousted on account of the provisions of Sub-Section (2) of Section 5 of the Companies Act, 2017. The learned Chief Justice of the High Court of Islamabad, Athar Minallah C.J. (as his Lordship then was) contrasted the provisions of Sub-Section (2) of Section 5 of the Companies Act, 2017 with the previous provisions that existed in the Companies Ordinance, 1984 and after a detailed examination of Sub-Section (2) of Section 5 of the Companies Act, 2017 in the context of the jurisprudence that had developed regarding ouster clauses found that the jurisdiction to adjudicate on such matters vested solely with High Court exercising its jurisdiction under the Companies Act, 2017 and opined as hereinafter:

" ... 10. A combined reading of the provisions of the Act of 2017 unambiguously manifests the legislative intent. The legislature has intended that all matters relating to title or transfer of shares of a juridical person incorporated under the Act of 2017 shall be dealt with by the Court vested with jurisdiction under section 5 to entertain or proceed to determine under the Act of 2017. ...

²³ The Section is identical to Sub-Section (3) of Section 152 of the Companies Ordinance, 1984,

²⁴ 2019 CLD 931

27. In view of the above principles and law, it is held that the jurisdiction of a civil court has been expressly ousted under subsection (2) of section 5 of the Act of 2017 to entertain any suit or proceedings **in respect of any matter which the Court is empowered to determine by or under *ibid.*** Moreover, the legislature has prescribed the mechanism for the transfer of shares and the consequences of refusal by the company. A statutory right of appeal has also been provided. The Respondent had filed a suit and notwithstanding the wordings of the prayer sought therein, the latter was in fact seeking transfer of shares on the basis of the settlement deed. The mechanism in this regard has been provided under the Act of 2017 which was by passed by instituting the suit which was barred under subsection (2) of section 5 *ibid.* The suit filed by the Respondent was definitely barred and, therefore, proceedings therein should have come to an end by accepting the application under Order VII of the C.P.C."

A similar opinion, on Sub-Section (2) of Section 5 of the Companies Act, 2017, was made by the High Court of Balochistan in the decision reported as **Hafiz Zubair & others vs. Mst. Hazar Naz & others**,²⁵ in which the Court while following the decision in **Dr. Omar Masood & another vs. Syed Amir Hussain & others**,²⁶ held as hereinunder:

" ... The afore-referred provisions of the Ordinance 1984 and the Act 2017, clearly indicate that no court, other than the High Court, where the company exists, shall have jurisdiction to entertain the matter. In the case in hand admittedly, the respondents had sought declaration of title of their predecessor-in-interest as director of the Al-Matla Hajj and Umrah Services Private Limited, and profit as per shares owned by late Abdul Karim, thus, the matter squarely fell within the jurisdiction of the Company Judge. Reliance can be placed on the case of "Dr. Omar Masood and another v. Syed Amir Hussain Naqvi and another" (2019 CLD 931), wherein it was held:

"10. A combined reading of the provisions of the Act of 2017 unambiguously manifests the legislative intent. The legislature has intended that all matters relating to title or transfer of shares of a juridical person incorporated under the Act of 2017 shall be dealt with by the Court vested with jurisdiction under section 5 to entertain or proceed to determine under the Act of 2017."

Similarly, in a decision of the Lahore High Court reported as **The Lahore Polo Club vs. Additional District & Sessions Judge & others**²⁷ wherein after considering Section 4 of the Companies Act, 2017, which is a non-obstante clause, and Sub-Section (2) of Section 5 of the Companies Act, 2017 it was held that:

"... The above provision of law expressly bars jurisdiction of Civil Court in the matters pertaining of Company matters and word "shall" has been used in the same, which makes is mandatory, especially when there appears no mala fide or ill-will on the part of the Executive Committee of the Club, who, as stated above, has followed the rules after submission of requisition by 14 Regular Members for calling of an Extraordinary General Meeting, convened on 09.01.2018 and terminated the membership of the respondent No.3 by the requisite majority in the Extraordinary General Meeting as per Article 7(1) of the Articles of Association of the Company/Club and his name stands removed from the Register of Members and Form 29 in this regard has also been submitted to the Securities and Exchange Commission of Pakistan. Since the name of the respondent No.3 has been cancelled and his name has been removed from the Register of the Members of the Company, and Form 29 has already been submitted to the SECP, the matter strictly falls within the ambit of Companies jurisdiction, because it has converted to "rectification of the Register", which instance is dealt with under section 126 of the Act *ibid.* ..."

²⁵ 2022 CLD 1311

²⁶ 2019 CLD 931

²⁷ 2018 CLD 1214

An altogether different interpretation of the provisions of Sub-Section (2) of Section 5 of the Companies Act, 2017 has been cast by Saman Raffat Imtiaz, J. of the High Court of Islamabad in the decision reported as **Abdul Saeed vs. Mrs. Naseem Khattak Humayun**²⁸ and wherein while adjudication on obligations pertaining to the enforcement of a Share Purchase Agreement the learned Judge held that:

“ ... Section 5 of the Companies Act, 2017

12. Coming to the judgment relied upon by the Respondent No.4, with utmost respect I disagree with the judgment of Dr. Omar Masood (Supra) whereby jurisdiction of civil courts was found to be barred in respect of suit for specific performance of an agreement for transfer of shares in view of sub-section (2) of Section 5 of the Companies Act. Section 5 of the Companies Act is reproduced herein below:

5. Jurisdiction of the Court and creation of Benches. – (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate.

(2) Notwithstanding anything contained in any other law no civil court as provided in the Code of Civil Procedure, 1908 (Act V of 1908) or any other court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Court is empowered to determine by or under this Act.

(3) For the purposes of jurisdiction to wind up companies, the expression registered office means the place which has longest been the registered office of the company during the one hundred and eighty days immediately preceding the presentation of the petition for winding up.

(4) There shall be, in each High Court, one or more benches on permanent basis, each to be known as the Company Bench, to be constituted by the Chief Justice of the High Court to exercise the jurisdiction vested in the High Court under this Act:

Provided that Benches constituted under the Companies Ordinance, 1984 (XLVII of 1984), shall continue to function accordingly unless otherwise notified by the respective Chief Justice of the High Court: Provided further that provisions of section 6 shall be effective from the date of notification by the Chief Justice of the respective High Court within one hundred and eighty days from the date of the commencement of this Act.

(5) There shall be a Registrar to be known as “Registrar of the Company Bench” duly notified by the Chief Justice of the respective High Court who shall be assisted by such other officers as may be assigned by the Chief Justice of the respective High Court.

(6) The Registrar of the Company Bench shall perform all the functions assigned to it under this Act including all ministerial and administrative business of the Company Bench such as the receipt of petitions, applications, written replies, issuance of notices, service of summons and such other functions or duties as may be prescribed under section 423.

(7) The Chief Justice of the respective High Court, if deemed appropriate, may also establish a secretariat in each Company Bench of the respective High Court in such form and manner to provide secretarial support and to perform such functions as may be prescribed under section 423. [Emphasis added]

13. For purposes of the question before this Court it may be seen that Section 5 provides that no civil or any other court shall have jurisdiction in respect of any

²⁸ 2024 CLD 611

suit or proceeding in respect of any matter which the High Court (having jurisdiction in the place where the registered office of the company is situated) is empowered to determine by or under the Companies Act. In order to justify its holding that the Court under Section 5 of the Companies Act is empowered to determine a suit for specific performance of an agreement for transfer of shares by or under the Companies Act, this Court in Dr. Omar Masood (Supra) referred to the provisions of the Companies Act that provide the mechanism for transfer of shares and the consequences of refusal to transfer by the company. Consequently, it was held that all matters relating to title or transfer of shares of a juristic person incorporated under the Companies Act shall be dealt with by the court vested with jurisdiction under Section 5 of the Companies Act.

14. The provisions containing the mechanism for transfer of shares are encompassed in Sections 74 to 80 of the Companies Act. An examination the said provisions reveals that they pertain to the procedure to be adopted by the transferor/transferee for registration of transfer of shares with the company; the circumstances in which transfer of shares may be refused by the Board of Directors of the company; and restrictions upon transfer of shares by member of private companies, etc. In case of refusal to register a transfer by the company, the remedy has been provided for in terms of Section 80 *ibid*. Thus, it may be noted that such provisions deal with the relationship between the transferor/transferee *vis-a-vis* the company and not between the transferor and the transferee *inter se*. In other words the provisions deal with the steps to be taken by the transferor or the transferee *vis-a-vis* the company in order to give effect to their agreement for transfer of shares. They come into operation when the transferor and the transferee wish to register the transfer of shares from one to another in accordance with their agreement. However, a dispute between the transferor and the transferee with regard to their agreement to transfer shares or refusal by the transferor to give effect to the agreement to sell shares is not covered under such provisions.

5. Similarly, Section 126 of the Companies Act which has also been referred to in the judgment in Dr. Omar Masood (Supra) deals with rectification of register of members. The said provision only pertains to rectification for any fraudulent entry or omission of the name of any person in the register of, *inter alia*, members or if default or unnecessary delay is made in entering the fact of a person having become or ceased to be a member thereof. On the other hand, no allegation has been made in the Subject Suit that is covered under Section 126 *ibid*.

16. Thus, none of the provisions relied upon in the case of Dr. Omar Masood (Supra) pertain to the subject matter of the Subject Suit which was filed on account of the alleged refusal of the Respondent No.1 and 2 to perform under the Agreement to sell the shares held by them in the Company. Even otherwise, it is important to recall that in order for the jurisdiction of the civil courts to entertain any suit or proceeding to be barred under Section 5(2) of the Companies Act, it is not sufficient for the matter involved in such suit or proceeding to be covered under the Companies Act. The Court under the Companies Act must be empowered to determine the matter involved in a suit or proceeding for civil court jurisdiction to be ousted.

17. In this regard it may be noted that the mechanism of registration of transfer of shares on the application of the transferor or transferee with the company is covered under Sections 74 to 80 of the Companies Act. Yet the remedy in case of refusal by the company to register a transfer lies with the Respondent No. 4 in terms of Section 80 *ibid* and not with the Court under Section 5 of the Act. **Therefore, simply because certain aspects of transfer of shares are covered under the Companies Act it cannot be held that all matters relating to title or transfer of shares of a juristic person incorporated under the Companies Act shall be dealt with by the court vested with jurisdiction under Section 5 of the Companies Act.**

18. Therefore, in my humble view civil court jurisdiction is ousted only in respect of suits or proceedings which involve a matter which the Court under Section 5 of the Companies Act is empowered to determine. **It is reiterated that the controversy between the parties involved in the Subject Suit is a dispute regarding an agreement for the sale of the shares by Respondents No.1 and 2 to the Appellant due to which the Appellant is seeking specific performance of the Subject Agreement. There is no provision in the Companies Act which empowers the Court as defined therein to exercise jurisdiction in respect of disputes between parties to a share purchase agreements and therefore jurisdiction of civil courts under section 5 is not**

barred in respect of such disputes. Enforcement of a contract for sale/purchase of shares is covered under the Specific Relief Act, 1877. I am fortified in my view by the judgments rendered in National Investment Trust Ltd. Versus Lawrencepur Woolen and Textile Mills Ltd., 2002 CLD 527."

There are therefore clearly two divergent views that exist with regard to a Court exercising its jurisdiction under the provisions of the Companies Act, 2017. The first argument is premised on **the subject matter of the dispute** and which is that Sub-Section (2) of Section 5 of the Companies Act, 2017 acts as an ouster clause and when read with Sub-Section (3) of Section 126 of the Companies Act, 2017 would render all disputes pertaining to the transfer shares in the sole realm of the jurisdictions conferred on the High Court under Section 5 of the Companies Act, 2017 and which would therefore exclude the jurisdiction of the civil court under Section 9 of the Code of Civil Procedure, 1908. The second argument, is premised on **the relief that can granted by a court** and which if involving the grant of relief in excess of what is permitted to being granted by a Company Court under the Companies Act, 2017, would therefore exclude the jurisdiction conferred on the High Court under Section 5 the Companies Act, 2017 as being a matter which the Court would not be **empowered** to determine by or under the Companies Act, 2017 and would therefore have to be invoked in the jurisdiction as conferred under Section 9 of the Code of Civil Procedure, 1908.

14. The Petitioners have maintained this Petition on the ground that the failure on the part of the Respondent No. 2 to pay consideration for the transfer of shares as agreed in the Settlement Agreement dated 5 September 2023 amounts to a fraudulent act and hence brings the *lis* within the ambit of Section 126 of the Companies Ordinance, 1984. I cannot see how that can be correct. To my mind while a person being induced on the basis of a false statement to enter into an agreement can constitute either a fraud or a misrepresentation, failure of a person to perform on the terms of an agreement, willfully and knowingly entered into, is not a fraudulent act, it is breach of a contract and for which a person aggrieved may either, under Section 39 of the Contract Act, 1872 repudiate the Agreement,²⁹ or seek a remedy for specific performance of that term under Chapter II of the Specific Relief Act, 1877. Similarly, the second contention that the Respondent No. 2 had breached some other term of the Settlement Agreement dated 5 September 2023 would also at best entitle the Petitioner to only seek the same remedies or in addition for an injunction to restrain the performance of an act that

²⁹ See **Pakistan Airline Pilots Association vs. Federation of Paksitan through Secretary for Ministry of Interior, Islamabad** 2021 MLD 1059; **Karachi Water and Sewerage Board through Authorised Representative vs. Karachi Electric Supply Corporation** PLD 2012 Karachi 349; **Trustees of the Port of Karachi vs. Qutbuddin** PLD 2005 Karachi 645; **Mst Sultan Jehan vs. Islamic Esate and Builders Limited** 1987 MLD 2329, **Muhammad Shahabuddin and another vs. Khushi Muhammad And another** 1981 CLC 1556; **Messrs A.C. Yusuf & Co. Messrs K.B.H.M Habibullah & Co.** PLD 1965 Karachi 374; **Bengal Oil Mills Ltd. vs Dada Sons** PLD 1964 Karachi 18;

was prohibited by the agreement. For the Petitioner to obtain the relief for rectification of the register of shares of UCL, as prayed for in this Petition, keeping in mind that they admit both the execution of the Settlement Agreement dated 5 September 2023 and the execution of the Transfer Deeds would require a declaration to be issued as to whether or not the Settlement Agreement dated 5 September 2023 can be repudiated and if found to be permissible for a further order to be passed for the Settlement Agreement dated 5 September 2023 to be cancelled. While the Petitioners may be minded to consider that this Court has the requisite jurisdiction to adjudicate such an issue under Sub-Section (3) of Section 126 of the Companies Act, 2017, wherein it is stipulated that this Court may **decide** any question relating to the title of any person within the criteria of persons specified therein **to have their name entered in the register** and whereby a court in addition may also generally **decide** any question which it is necessary or expedient to decide **for rectification of the register**, I am clear that this Court does not have the requisite **powers** vested in in under the Companies Act, 2017 to pass such an order. As I see it the powers vested in the Court on Petition under Section 126 of the Companies Act, 2017 are as hereinunder:

- (i) under Sub-Section (2) of Section 126 of the Companies Act, 2017 the Court may refuse the application and may make such order as to costs as it in its discretion thinks fit;
- (ii) under Sub-Section (2) of Section 126 of the Companies Act, 2017 the Court may order for the 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;
- (iii) where there is found to be a violation of Sub-Section (1) of Section 126 of the Companies Act, 2017 in as much as an entry is made or omitted from the register of member or debenture holders either fraudulently or without sufficient cause, the Court may punish a person responsible for act or omission by sentencing them to imprisonment for a period up to three years, or impose a fine on them up to an amount of Rs. 3,000,000 (Rupees Three Million) or impose a sentence and a fine within the period and amount specified;
- (iv) under Section 128 of the Companies Act, 2017 to issue an order to the company to make the rectification in the register within fifteen days from the receipt of the order in the record of the Registrar of Companies;

- (v) under Section 493 of the Companies Act, 2017 act, on the basis of this omnibus provisions, to enforce any order passed by this Court in the same manner as a decree made by a Court may be enforced in a suit; and
- (vi) under Section 499 of the Companies Act, 2017 act, on the basis of this omnibus provision,s to punish a person who has not complied with an order of this Court.

I cannot see any power that has been conferred on a Court while exercising its jurisdiction under the Companies Act, 2017 to pass a declaration to repudiate an agreement or for that matter to allow the Court to set aside the Agreement. I am therefore minded to agree with the decision of the Islamabad High Court reported as **Abdul Saeed vs. Mrs. Naseem Khattak Humayun**³⁰ that this Court not having the jurisdiction to grant such relief, the jurisdiction to obtain such relief could only be exercised by the civil court constituted under Section 9 of the Code of Civil Procedure, 1908 in terms of the provisions of Specific Relief Act, 1877 and respectfully would disagree with the decisions reported as **Dr. Omar Masood & another vs. Syed Amir Hussain & others**,³¹ **Hafiz Zubair & others vs. Mst. Hazar Naz & others**,³² and **The Lahore Polo Club vs. Additional District & Sessions Judge & others**.³³ I am therefore clear that being deprived of this power by the Companies Act, 2017 this Court does not have the jurisdiction to entertain this *lis*. The remedy for the Petitioners in this regard was clearly to maintain a Suit under Section 9 of the Code of Civil Procedure, 1908 and to seek appropriate declaratory relief in that jurisdiction as to the repudiation and for the cancellation of the Settlement Agreement dated 5 September 2023 and which therefore cannot be an issue which this Court can be considered to be “**empowered to determine by or under**” the Companies Act, 2017.

F. Adjudication on the Lis on the Assumption that the Court had Jurisdiction under the Companies Act, 2017.

15. In addition, on the assumption that this Court did have the requisite jurisdiction under the provisions of Section 5 of the Companies Act, 2017, I am also clear the breach of the terms of the Settlement Agreement dated 5 September 2023, either on account of the failure on the part of the Respondent No. 2 to pay consideration or on account of the breach of a term of that agreement, cannot be construed as an act whereby the name of the Respondent No. 2 and the Respondent No. 3 has been entered **fraudulently** into the register of members

³⁰ 2024 CLD 611

³¹ 2019 CLD 931

³² 2022 CLD 1311

³³ 2018 CLD 1214

so as to permit the Petitioners to invoke Section 126 of the Companies Act, 2017. The expression “fraudulently” and “sufficient cause” in the context of its use in Section 126 of the Companies Act, 2017 has recently been discussed by the Lahore High Court, Lahore in the decision authored by Jawad Hassan, J. and reported as **Abdullah Khan Usmani vs. Securities and Exchange Commission of Pakistan and others**³⁴ and wherein his Lordship after discussing the various interpretations that have been cast on those expression in various jurisdictions has surmised that:

“ ... 26. Thus, the summary of the above definitions provides that Fraud, connotes an element of intent and the acts/omissions. The intent must be to benefit oneself or to cause loss or the risk of loss to another. The Act must be one which is false, coupled with the mental element of being aware that the act being done is false or misleading. Similarly, the Omission must also be deliberate and with the intent of causing a loss or misleading another...

36. The above discussion can be summarized in the terms: Sufficient cause means something that is a satisfactory explanation for the Court for an action or some omission, it may be a justifiable reason, a cogent reason, a reason which satisfies the Court that a certain action should have been taken or a certain omission was justifiable/excusable. Whether sufficient cause is shown for an act or an omission depends upon the facts of the case and it is at the discretion of the Court to decide whether it is satisfied that sufficient cause has been shown for an action or a justifiable excuse is provided for an inaction. Thus, whilst interpreting the phrase 'without sufficient cause' in the context of section 126 of the Act, the question before the Court is whether a justifiable cause has been provided for the act of removing a member from the register of members or whether a justifiable excuse is provided for failing to enter the name of a member in the register or whether a sufficient cause has been given by the Petitioner in filing the petition in hand after a long span of time, as the case may be.”

In the context of the purported fraud that is being alleged by the Petitioners in this Petition, Mr. Junaid Ahmed has contended that the fact that the Respondent No. 2 benefited from the Settlement Agreement dated 5 September 2023 by acquiring the shares in UCL against a consideration and which he purportedly defaulted on paying to the Petitioners constitutes a fraud. I cannot find myself to agree with such a contention. The Petitioners and the Respondent No. 2 willfully and knowingly entered in the Settlement Agreement dated 5 September 2023 and executed transfer deeds and were as such not duped by the Respondent No. 2 into either executing the agreement, agreeing to the quantum of the consideration payable or agreeing to the terms therein and which, even if the contentions of the Petitioner are to be accepted as true, to my mind clearly cannot constitute a fraud. This is because there clearly was no inducement that was made to the Petitioners **to enter into the obligations** contained in that agreement which can be found to premised on **a false statement** with intent to gain a benefit so as to entitle the Petitioners to vitiate the agreement under Section 19 of the Contract, Act 1872. While arguments of duress and undue influence may well be raised those are grounds that are distinct from fraud and therefore cannot be used to invoke the

³⁴ 2022 CLD 821

jurisdiction of this Court on that ground. Similarly the failure on the part of the Respondent No. 2 to comply with the terms of the Settlement Agreement dated 5 September 2023 also cannot constitute fraud so as to invoke the jurisdiction of this Court under Section 126 of the Companies Act, 2017.

16. While Mr. Junaid Ahmed did not argue the ground of sufficient cause before this Court however even if one is to consider that as a ground to maintain this Petition, the fact that the execution of both the Settlement Agreement dated 5 September 2023 and the execution of the Transfer Deeds are not disputed by the Petitioner would lend credence to the insertion of the names of the Respondent No. 2 and the Respondent No. 3 as the owners of the shares that was held by Petitioner as prima face compliance had been made with the requisite statutory requirements as detailed in Section 74 to 76 of the Companies Act, 2017 and which would therefore amount to a justifiable reason to record the transfer of the shares from the Petitioner to the Respondent No. 2 and the Respondent No. 3 thereby excluding the Petitioner from availing such a ground to maintain this Petition.

17. Although not argued by Mr. Junaid Ahmed, I have also considered the Petitioners contentions for relief under Sections 286, 287, 288, 293 and 301 of the Companies Act, 2017 and by which it is contended that the actions on the part of the Respondents by transferring the shares in the manner as narrated above and which have resulted in the Petitioners being removed as the shareholders of the UCL should be considered as operating the company in an unlawful or fraudulent manner or in a manner oppressive to the members of the Company and for which they seek various remedies including, but not limited to, the winding up of UCL. Suffice to say that a similar issue was considered by a Division Bench of this Court in the decision reported as **Muhammad Hussain vs. Dawood Flour Mill**³⁵ and in which it was held that:

“ ... 15. *From a reading of the above section it is apparent that if the name of any person is fraudulent or without sufficient cause entered in or omitted from the register of members, the aggrieved person may apply to the Court for rectification of the register and the Court after inquiring into the matter may order rectification of the register if it is satisfied that the aggrieved person is entitled to such relief. In the instant case, Hussain should have filed an application before a Court for rectification of the register as alleged his name has been fraudulently and without sufficient caused removed from the register of members. Instead of doing so, he filed an application for winding up of the Company which patently was not maintainable in law.*”

I am not only bound but am also inclined to follow the decision of the Division Bench and am also of the opinion that where there is a dispute as to shareholding the correct remedy to be adopted, where permissible, is to maintain only a *lis* for rectification and not to obtain relief as has been claimed contending that UCL was

³⁵ 2003 CLD 1429

been operated in an unlawful or fraudulent manner or in a manner oppressive to the members of the Company and on such a premise to seek the winding up of UCL. This Petition must therefore fail.

G. Order of the Court

18. For the foregoing reasons, the Petition as maintained by the Petitioner is misconceived as:

- (i) this Court in its jurisdiction under Section 126 of the Companies Act, 2017 cannot order for the repudiation of an agreement for breach of the terms of the Agreement and which jurisdiction vests with the civil court; and
- (ii) assuming that Court may have jurisdiction under the provisions of the Companies Act, 2017 in the facts and circumstances as narrated by the Petitioners, the failure to pay consideration or the breach of terms of the Settlement Agreement dated 5 September 2023 cannot be considered to constitute a fraudulent act or sufficient cause on the basis of which entries were maintained in the register of the UCL can be rectified by this Court under Section 126 of the Companies Act, 2017.

The Petition is therefore dismissed, along with all applications, with no order as to costs.

J U D G E

Karachi dated 17 August 2024.