IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 281 of 2013

Date	Order with signature of Judge

For hearing of CMA No.9973/2013 (U/O 39 R 1&2 CPC):

24/09/2013:

M/s. Ziaul Haq Makhdoom and Muhammad Ahmer, Advocates for the plaintiff.

M/s. Sajid Zahid and Safdar Mehmood, Advocates for Defendant No.1.

Mr. Munawar Hussain Advocate holding brief for Dr. Muhammad Farogh Naseem, Advocate for Defendants No.2 to 5.

None present for Defendants No.6 to 10.

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1. Learned counsel for the plaintiff has filed affidavit-in-rejoinder to the counter affidavit and supplied its copies to the other side. Both the parties have agreed to advance their respective arguments to finally dispose of this application.

2. The plaintiff through this application has sought injunctive order to the effect that the defendants may be restrained from making investment or capital expenditure in the shares of Javedan Corporation Limited (hereinafter called JCL) and maintain status quo. The urgency for hearing of this application has been shown by the plaintiff and defendants on account of the fact that the Defendant No.1 in its board meeting held on 17th September 2013 have decided to hold 39th Board of Directors' meeting for today i.e. 24.9.2013 at 6.30 pm and the agenda, amongst others items, is to seek approval of investment of funds of the company. Both the learned counsel has referred to Item No.3 of the agenda which reads as follows:-

> *"To consider, discuss and approve the amount of investment in the listed shares of the companies other than related parties".*

3. The plaintiff has shown his apprehension of suffering losses in the event of any investment in JCL by Defendant No.1. The plaintiff claims to represent minority shareholders of more than 20% shares as stated in Para 2 of the plaint. No written-statement has been filed. However, despite raising objection in their counter-affidavit that the plaintiff does not possess 20% share, the defendants have not pressed this objection in rebuttal of the claim of plaintiff that their shareholding is 20%. In this regard plaintiff in his affidavit-in-rejoinder has filed copy of the proxies showing more than 20% shareholding by the plaintiff. He has further contended that plaintiff is admittedly non-elected member of the Board of Directors. The plaintiff's main thrust of argument is that the Defendants No.2 to 5 who are directors of Defendant No.1 are going to make investment in JCL, a company in which they have more than 20% share and the purpose of holding meeting of the board of directors on 24.9.2013 is to seek approval for such investment in JCL. The plaintiff contends that the JCL is already suffering losses. Therefore, the defendants are indirectly trying to secure their losses in JCL by purchasing the shares of JCL through the Defendant No.1. The learned counsel for the plaintiff has referred to Annexure 'B' to the application to demonstrate that the defendants are also shareholders of JCL as reflected in the annual report ending on June 30, 2012. He has vehemently argued that son of Defendant No.3 and 4 Mr. Asim Ghani and the Defendant No.2 on 19.4.2013 have purposely resigned from the directorship of JCL so that the possible legal objection on investment in the "associated company" can be circumvented. He has specifically drawn my attention to Para 5 of the application wherein he has demonstrated through table showing shareholding of Defendants No.2 and 3 in JCL who have resigned from the directorship of JCL on 19.4.2013 alongwith another director Mr.Asim Ghani son of Defendants No.3 and 4 so that in the event of purchasing/investing anything in the JCL through Defendant No.1 the legal impediment of Section 2(2) of the Companies Ordinance, 1984 and the requirement of "special resolution" in terms of Section 208 of the Companies Ordinance, 1984 may be

conveniently avoided. The plaintiff's counsel has referred to the following prayers from the plaint;

A. Declare that the affairs of the Defendant No.1 company are being governed and managed by the Defendant No.2 and the management etc. arbitrarily, fraudulently, illegally and in a manner highly oppressive to the minority shareholders represented by the Plaintiff.

B. Declare that the Defendants No.2 to 5 have fraudulently siphoned off the funds of the Defendant No.1 company by diverting the same to their personal accounts etc. through multiple sham/bogus transactions including through banking channels, under invoicing etc.

C. Declare that the management of the Defendant company headed by the Defendant No.2 has fraudulently siphoned off Rs.600 million belonging to the Company in the garb of capital expenditure for expansion.

D. Declare that the Defendant No.2 having acted unlawfully, fraudulently and in breach of his obligations as Chief Executive of the Defendant company is liable to be removed from the position of CEO / Director and is liable to account to Company as well as liable to prosecution by the Defendant No.10.

E. Declare that the Defendant No.3 being a broker cannot directly or indirectly interfere in the management or the affairs of the company including attendance of the board meetings and / or operation of the bank accounts of the Company etc.

to stress on his point that the plaintiff has averred several illegalities and fraudulent activities in the functioning and working of the Defendant No.1. The plaintiff apprehends that the defendants will invest in their sister concern or associated company by the name of JCL for their personal benefits after getting the approval of Board of Directors which in turn might result in the losses for the minority shareholders. Learned counsel for the plaintiff has conceded that he is not going to interfere in the internal management of the defendant No. 1 regarding day to day affairs or otherwise running of the company and, therefore, he restricts his grievance against the defendants only to the extent that the defendant No. 1 may take any decision through the

defendant Nos. 2 to 5 regarding investment of funds in whatever listed companies they want to but they may be restrained only from taking the decision to make investment in JCL.

4. The case of the plaintiff is that there is indirect investment by the directors of Defendant No.1 in the shareholding of the associated company since the ultimate beneficiary of the decision if any taken by the board of directors in their meeting on 24.9.2013 regarding investment in JCL, will be the same defendants who are/were holding more than 20% share in JCL. Therefore, board meeting to be held today i.e. 24.9.2013 should have been held keeping in view the requirement of Section 208 read with Section 2(36) of the Companies Ordinance, 1984.

5. In rebuttal to the contention of learned counsel for the plaintiff Mr. Sajid Zahid, learned counsel for Defendant No.1, has extensively argued that the freedom of management cannot be curtailed purely on the apprehension of the plaintiff that by making investment even in JCL the management will suffer losses. The ill-founded apprehensions need support of some backing of law which is apparently lacking. He has contended that there is no legal impediment in the way of the defendants and he stressed that even in Para 14 of the application the plaintiff himself has admitted that there is no common directorship of Defendant No.1 and the directors of JCL. It is mere apprehension of the plaintiff that by sale of JCL shares to Defendant No.1, if at all it is decided, the defendants will suffer loss of huge amount to the detriment of plaintiff/minority shareholders and mere apprehension is not sufficient to pass any injunctive order. Both the learned counsel has extensively referred to Section 2(2), Section 2(36) Section 208 and Section 196(2)(e) of the Companies Ordinance, 1984 defining “associated Companies”, “special resolution” “investment in associated companies” and “powers of directors to invest funds of the company”.

6. Learned counsel for Defendant No.1 contends that the agenda for the meeting on 24.9.2013 and resolutions in pursuant to Section 196(2)(e) of the Companies Ordinance read with

Memorandum and Article of Association of the defendant No. 1 are perfectly within the power conferred on the defendants under the law. He has laid particular emphasis on the language of item No 3 on the agenda wherein it has specifically been mentioned that "and approve the amount of investments in the listed shares of the companies other than the related parties". Underling is only to appreciate that the counsel for the defendant No. 1 has repeatedly referred to the phrase "other than related parties" to emphasis the use of this phrase in the agenda sufficiently addressing the apprehension of plaintiff since the defendants have chosen to rule out to invest in any company of the relatives of the defendants. He stressed that this phrase is interchangeable with the word "associated companies". Therefore, there is no need to comply with the requirements of Section 208 of the Companies Ordinance, 1984. He further contended that plain reading of agenda of the board meeting does not give any impression that the defendants are going to purchase shares of JCL. This is a mere apprehension of the plaintiff. He has drawn my attentions to their counter affidavit wherein he has repeatedly mentioned that "there is no common directorship between the defendant No.1 and JCL". In reply to Para 12 of the application in their counter affidavit he has reflected shareholding of defendants NO.2&3 in JCL which is 12.38% and 14.28% respectively and by referring to Section 2(2) of the Companies Ordinance he say that shareholding of both the directors' in JCL when taken individually is less than 20%. He has drawn my attention to proviso of Section 2(2) of Companies Ordinance, 1984 to demonstrate that the shareholding of defendants No.2&3 cannot be combined to attract the threshold of 20% shares in JCL because the defendants No.2&3 are not related to each other. They are independent and each shareholder to attract provisions of Section 2(2) is supposed to have independent 20% shares. Therefore, there is no legal impediment in the way of defendant No.1 to hold the meeting and even to purchase shares of JCL if so decided by the company. To a direct question from the court that whether defendant No.1 intends to make investment in JCL, replies were vague. He politely stressed that the company is to be run in accordance with law and the apprehension of the

plaintiff cannot be addressed through undertaking by the defendants. He states that the plaintiff contentions are not backed by any law thus plaintiff has failed to make out prima facie case since they have failed to show that the agenda of the meeting on 24.09.2013 at 6:30 p.m. is such in which Defendant No.1 is going to conduct this meeting in violation of companies ordinance 1984 to make investment of funds in the associated companies or associated undertakings because there is no such agenda. The board meeting is scheduled in terms of the powers conferred on the directors under section 196(2) (e) of the Companies Ordinance, 1984 to invest fund of the company in line with the authority of Memorandum and Article of Association of the company.

7. He has vehemently argued that in the event of any order from this Court the principle of indoor management would be violated and injunctive orders on mere apprehension affecting the power of the management of the Defendant No.1 to manage the business of the company should not be passed. He has also drawn my attention to sub-section 3 of Section 208 of the Companies Ordinance, 1984 and forcefully argued that in the event of any violation of Section 208 of the Companies Ordinance, 1984, the defendants shall be subjected to comprehensive penalty available in law which is sufficient to deter the defendants from committing any mistake apprehended by the plaintiff. Therefore, on two accounts, namely, principle of internal management and the penalty under Subsection 3 of Section 208 of the Companies Ordinance, 1984 the plaintiff has no prima facie case. The counsel for defendants in support of his contention that the court should not interfere in the general management of the company unless there was reason that action of the company was fraudulent or against the natural justice has relied on the case laws reported in PLD 1956 (WP) Karachi 315 (FARID SONS LTD. VS. THE KARACHI COTTON ASSOCIATION LTD.), PLD 1980 Karachi 401 (PARVEZ ASLAM MIAN MUHAMMAD ASLAM VS. SYNTHETIC CHEMICAL CO. LTD. KARACHI AND ANOTHER) and PLD 1995 Karachi 374 (MESSRS PORT SERVICES (PRIVATE) LIMITED VS. PAKISTAN THROUGH SECRETARY, MINISTRY OF COMMUNICATIONS, GOVERNMENT OF PAKISTAN, ISLAMABAD AND OTHERS).

8. Mr. Sajid Zahid, learned counsel while still arguing has been informed by his colleague that his office has received a letter through fax from the defendant No.10 in response to some complaint lodged by the plaintiff. According to this letter the defendant No. 10 has taken cognizance and the Defendant No.1 has been "advised to refrain from making any investment in the associated company(s) till such time subject matter raised in the complaint stands settled/redressed". He has handed over a copy of such letter from the defendant No. 10 to the court and wants to place on record. I have also examined this letter from defendant No.10 and have taken it on record and reproduced below:-

"SECURITIES & EXCHANGE COMMISSION OF PAKISTAN
Enforcement Department
Company Law Division

September 24, 2013

"No EMD/233/14/02

The Company Secretary,
Al-Abbass Sugar Mills,
2nd Floor, Pardesi House, Survey No.2/1,
R.Y.16, Old Queens Road,
Karachi
Fax: (92-21) 32470090

SUBJECT: APPLICATION UNDER SECTION 474 AND OTHER ENABLING PROVISIONS OF THE COMPANIES ORDINANCE, 1984 IN THE MATTER OF AL-ABBAS SUGAR MILLS LIMITED.

Dear Sir,

We are receipt of any application under section 171 of the Companies Ordinance, 1984, filed by Mr. Suleman Lalani, having shareholding over twenty percent in the paid-up capital of the company (copy attached), the contents of which are self-explanatory.

In view of the above, i am directed to advise you to address the concerns of the shareholder/complainant, under intimation to this Commission. Furthermore you are adivsed to refrain from making any investment in the associate company(s) till the time the subject matter raised in the complaint stand settled/redressed.

Sd/-
Ayesha Riaz
Joint Director (Enforcement)"

9. Learned counsel for defendant now says that in view of this fax received in his office, the plaintiff grievance is also before the regulator and it can be taken care of by the regulators.

10. The arguments of Mr. Sajid Zahid, learned counsel for Defendant No.1, have been adopted by learned counsel for Defendants No.2 to 5, namely, Dr. Muhammad Farogh Naseem through Mr. Munawar Hussain, advocate who is holding brief for him.

11. The counsel for the plaintiff while exercising his right of reply to meet the contention of defendants that apprehension is not sufficient ground for granting injunctive orders has contended that the plaintiff case is not merely a case of apprehension but it is spelt out from the conduct of the defendants. He has referred to a number of prayers made in the plaint in which direct allegations of fraud, mismanagement and siphoning money has been sought to be declared against the defendants. He has also referred to Para 15 to 26 of the plaint showing direct allegations of illegally received payment by the defendants with banks records.

12. I have examined the record and heard arguments of the parties as narrated hereinabove; I am surprised that a Joint Director (Enforcement) of defendant No.10 from Islamabad, who is a party in this case, despite full information of its pendency, has not sent any one to represent them in Court on their behalf.

13. The urgency shown by the respondent No.10 in putting the defendant No.1 on notice on the plaintiff's complaint under Section 474 of the Companies Ordinance, 1984, without giving a date to examine the complaint in presence of the parties, but with a casual advice to the defendants to refrain from making any investment in the associated company(s) till the time the subject matter raised in the plaint stands settled or redressed is of an utmost importance. Such casual behaviour on the part of regulator of corporate affair would adversely affect the concept of corporate governance. The Defendant No.10 seems to have disposed of the complaint of

plaintiff by directing the Defendant No.1 to address the concern of the plaintiff under intimation to the Defendant No.10. That is all. The regulators are not supposed to be oblivion of the purpose of their establishment. The purpose of establishment of the Defendant No.10 as envisaged in the preamble of the Security and Exchange Commission of Pakistan Act include "superintendence and control of corporate entities" has been defeated by the Joint Director (Enforcement) when the complainant has been left at the mercy of accused Defendant No.1 to address the concern and just inform the Defendant No.10. This is not the spirit of law.

14. The outcome of the discussion and the timely intervention of defendant No.10 to take cognizance of complaint of the plaintiff is that the prima facie, the plaintiff has a case of possible mismanagement or one can say that the defendants No.2 to 5 prima facie playing smart to circumvent the law and they may be indirectly benefitted by investing in the shareholding of JCL pending final disposal of the issue that whether JCL is associated company or not and whether the defendants by their conduct have attempted to circumvent provisions of law to indirectly invest in the company they are prohibited by application of provision of Section 2(2) read with Section 208 of the Companies Ordinance, 1984. As far as contention of defendant counsel that the court should not interference in the internal management of the companies since the companies are empowered and acting within the parameters of law, one cannot have a cavil to such proposition. However, in the case in hand the plaintiff has not sought indulgence of court to sabotage the meeting to be held on 24.09.2013 at 6:30 p.m. Even Item No.3 on the agenda placed on record has not been challenged by the plaintiff as illegal. At this point of time the plaintiff is only seeking interference to the extent of possible decision by board of directors with reference to investment only in one company namely Javedan Corporation Limited (JCL). They have leveled several allegations of fraud in the plaint as well as in the application. The plaint so far has gone unrebutted since no written statement has been filed. However, allegations in the application has been controverted in the counter affidavit. Fact remains that the allegations of fraud and other

objectionable functioning and running of affairs of the defendant No.1 have yet to be determined. The record shows that till date the defendants have not filed any written statement and even counter affidavit to the earlier application bearing CMA No.2647/13 has not been filed, though injunctive order had been passed by this Court on 12.3.2013 whereby the defendants were restrained from taking up Item No.4 on the agenda of the meeting held on 14.03.2013. The defendant appears to be comfortable with the interference in the internal management of the defendant-company through the order dated 12.3.2013. This conduct of defendants has diluted otherwise a forceful contention that Court should refrain from interfering in the internal management of a corporate entity.

15. In the above facts and circumstances, the defendant No.1 is free to hold its 39th meeting of Board of Directors on 24.9.2013 at 6.30 p.m. and take any decision for the benefit of the company according to their wisdom. The defendants are restrained only to the extent that if they take any decision with reference to the investment of funds in JCL, they may take even that decision, however such decision shall be subject to final outcome of this suit. Since there are serious allegations on malpractices by the defendants who may be the beneficiary at the end of the day pending decisions on the allegations of fraud, if the defendants are restrained only to the extent of excluding JCL from investment of fund for the time being, it will not amount to interference in the internal management of the defendants as the management is free to invest funds in thousands of other listed shares of the companies.

16. Before concluding I must observe that the Defendant No.10 has halfheartedly taken cognizance of certain grievances of the plaintiff, against the Defendant No.1. The law makers have given suo muto powers to the Commission (the Defendant No.10) to conduct investigation of affairs of a company under Section 29 of the Securities and Exchange Commission of Pakistan Act, 1997. Similar powers can be exercised by the Commission under Section 263 of the Companies Ordinance, 1984 on the application

by members. Both these sections have roots in the preamble of the two enactments which inter alia provide for “Superintendence and control of corporate entities” and “protection of investors and creditors”. In the given facts and circumstances of the case, the failure of Defendant No.10 to exercise its authority by invoking the relevant enabling provisions to protect interest of plaintiff (minority shareholders) investment in defendant company has, in fact, frustrated the very basis of establishing the Commission under Section 3 of the SECP Act, 1997. I, therefore, specifically direct defendant No.10 to treat plaint of this suit as a complaint under Section 263 of the Companies Ordinance, 1984 read with Section 29 of the Security and Exchange Commission of Pakistan Act, 1997, and conduct a thorough investigation of the affairs of the Defendant No.1 in accordance with provisions of law and submit a preliminary report within four (04) weeks from the date of receipt of this order. The plaintiff must in terms of Section 264 of the Companies Ordinance, 1984, place evidence in support of the allegation before the Commission. The Defendant No.10 may take any step(s) necessary to redress grievances of the minority shareholders. In my humble view the Defendant No.10 being regulator should have also been represented in court to extend their independent expert assistance in appreciating the intricate provisions of Companies Ordinance in the light of the allegations of fraud and mismanagement which appears to be major grievance of the minor shareholders through the plaintiff. The Defendant No.10 must also file its comments/written-statement at the earliest. Copy of this order must also be immediately sent to the defendant No.10 for compliance.

JUDGE

S. Akhtar