

**JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

ICA No.3/2005

JUDGMENT

Date of hearing..19.12.2017(Announced on 13.02.2018)

Appellant: (Haji Abdur Rehman) by M/S Fawad Khan and
Muhammad Khalid Usman, Advocates

Respondents: (Umar Farooq Miankhel and others) by M/S
Qazi Muhammad Anwar and Muhammad
Ali, Advocates.

YAHYA AFRIDI, C.J.-Through this single
judgment, we propose to dispose of four connected
matters, as they all have common questions of law
and facts involved therein. The particulars of the
same are:-

1. **ICA No.03/2005**
*(Haji Abdur Rehman and
others...Vs...Umar Farooq Miankhel and
others)*
2. **E.P.No.10/1998**
*(Umar Farooq Miankhel...Vs...Mughal
Flour and General Mills etc).*
3. **C.Mis.No.45/2002 in E.P.No.10/1998**
*(Umar Farooq Khan...Vs...Mughal Flour
and General Mills)*
4. **Cross Objection No.03/2007 in ICA
No.03/2005**
*(Haji Abdur Rehman...Vs...Umar Farooq
Miankhel)*

2. The brief facts leading to the above petitions are that *Haji Abdur Rehman, Haji Noor Muhammad, Umar Farooq Khan Miankhel and Fatehullah Khan Miankhel* were the subscribers to the *Memorandum of Association* of M/S Mughal Flour and General Mills (Pvt.) Limited (“**Company**”); that after the incorporation of the Company, *Haji Abdur Rehman* was elected as the *Managing Director of the Company*, whereas *Umar Farooq Miankhel* was designated as the *Executive Director*; and that the Company availed a finance facility from Regional Development Finance Corporation (“**RDFC**”), and as per terms thereof, *inter alia*, share certificates of Umar Farooq Khan Miankhel and Fatehullah Khan Miankhel were pledged, as part of the collateral and stipulation that the same could not be transferred without *RDFC’s* approval.

3. The events that follow have a chequered history. However, for disposal of the four matters, the relevant facts, in chronological order, are as follows:-

25.02.1992

Umar Farooq Miankhel and his brother, Fatehullah Khan Miankhel, dissatisfied with the way Haji Abdur Rehman was running the affairs of the Company, filed CC No.2/1992 before the worthy Company Judge under Sections 158, 170, 178, 233 and 29 of the Companies Ordinance, 1984 (“Ordinance”), praying that:-

- a) *holding of the Annul General Meeting of the Company for the year 1990-91 in terms of Section 158 of the Companies Ordinance;*
- b) *to present a balance sheet and the profit and loss account under the requirement of Section 233 of the said Ordinance before the Annual General Meeting of the Company;*
- c) *for declaration of the action taken, acts done or order passed by respondent No.2 after expiry of 18 months of the incorporation of the company, as illegal and without lawful authority; and*
- d) *for ordering the transfer of 55,000 shares by respondent No.2 in favour of respondent No.7 as illegal and ineffective.*

06.05.1992

Haji Abdur Rehman filed *Form ‘A’* and *Form ‘29’* of the Company, wherein Umar Farooq Miankhel and Fatehullah Khan Miankhel were

neither recorded members nor directors. The shareholding reflected therein was as under:-

- i. *Haji Abdur Rehman (170,000)*
- ii. *Haji Noor Muhammad (50,000)*
- iii. *Muhammad Ibrahim (30,000)*
- iv. *Saif-ur-Rehman (25,000)*
- v. *Fazal-ur-Rehman (125,000)*
- vi. *RDFC (130,000)*

10.05.1992

The Deputy Registrar of Company Peshawar refused to accept *Form 'A'* and *Form '29'* filed by Haji Abdur Rehman and required him to provide the followings:-

- i. *Copy of Minutes of the Meeting.*
- ii. *Copy of Notice of Meeting.*
- iii. *Copies of Transfer deed duly stamped.*

19.05.1992

Haji Abdur Rehman responded to the directions of Deputy Registrar, Peshawar *inter alia*, stating that there was no need of *Board* meeting for transfer of shares, as provided under Section 76 of the Ordinance and clause 9 of the *Articles of Association*.

06.06.1992

The company case *No.2/1992* was contested by the respondents, and was finally decided vide judgment dated 06.06.1992, in terms that:-

“Consequently, while allowing this petitions, all the directors of the company are directed to hold the first Annual General Meeting as prayed for in accordance with law without any further loss of time and to proceed in the matter in accordance with the relevant provision of law and respondents 4 and 5 should force compliance of the relevant provision of law and the said respondents are further directed to correct the wrongs and illegalities which have resulted on account of non-compliance of the mandatory provisions of the Ordinance. It is further ordered that the petitioners be shown as share-holders in the relevant register and their old status of Directors of the company be restored. Respondents 2 and 3 would bear the cost of this litigation”.

07.01.1997

Intra-Court Appeal No.01/1997, preferred against the abovementioned judgment, was decided in terms that:-

“Consequently, the instant appeal is hereby dismissed in limine as time barred alongwith CM # 10/97”.

08.10.1997

The aforesaid order was challenged before the Apex Court through *CPLA No.850 of 1997*, which too was decided vide judgment dated 08.10.1997, in terms that:-

“For the above reasons even if first appeal was to be filed within 90 days, as claimed by the petitioners, same by any calculation or construction clearly suffers from bar of limitation. We, therefore, do not find any merits in the petition; leave is accordingly refused.”

13.06.1998

Umar Farooq Miankhel and Fatehullah Khan

Miankhel filed Execution Petition No. 10/1998,

praying therein for the following:-

“It is, therefore, humbly prayed that this Hon’ble Court may like to execute and enforce its order dated 06.06.1992 passed in CC No.2 of 1992 and

- a) force respondents 2, 3, 6 to hold the first Annual General Meeting of the company which ought to have been conveyed in the year 1990 and also the Annual General Meetings for the subsequent years till today within a period of one week and to lay before the petitioners in the said Meetings the audited and signed reports of accounts for the years 1990 onwards for discussion, examination and action alongwith a report regarding action taken by respondents No.2 and 3 in the Administrative/Managerial affairs of the Company ever since,*
- b) direct respondents 4 and 5 to force compliance of the relevant provisions of law and correct the wrongs and illegalities which have been caused so far on account of the non-compliance of mandatory provisions of law AND*
- c) order the respondents to mention and record the names of the applicants as shareholders of the Company in the relevant register and restore their status as Directors of the company.*

The applicants further pray that since the order dated 06.06.1992, granting the aforesaid reliefs is to execute as a decree of the Civil Court, the same may please be executed through the

attachment and sale of the shares of respondents 2, 3, 6 in the respondent company and also through arrest and detention of the defaulting respondents with cost of these proceedings.”

Haji Abdur Rehman moved objection petition No.33/1999 before the worthy Company Judge hearing the Execution Petition No.10/98, wherein he prayed that:-

“It is, therefore, respectfully prayed that on acceptance of this petition, this Hon’ble Court may graciously be pleased to allow the objectors to produce evidence and, after recording evidence, the objection petition be accepted and the application for the enforcement of order dated 06.06.92, being without merits, be dismissed with costs”.

30.06.1998 till 01.01.1999

Haji Abdur Rehman, enhanced the share capital of the Company by 330,000 ordinary shares (valuing Rs.10/- each), thereby the total share equity of the Company was enhanced to 915,000 ordinary shares. These additional shares were finally issued in the names of *Fazlur Rehman, Muhammad Ibrahim, Shah Jehan, Khalid Mehmood, Iftikhar Mehmood, Mst. Gulzar Bibi and Saifur Rehman.*

12.07.1999

Execution Petition No.10/1998 was allowed and Objection Petition No.33/1999 was rejected by the worthy Company Judge vide decision dated 12.07.1999, in terms that:-

“In the result, I allow E.P.No.10/98 and direct the respondents/directors of the company to hold Annual General Meeting on 21.07.1999 at 9.00 AM in the office of Registrar of the Companies. In case the respondents did not convene the meeting as ordered, the petitioners and respondents are to hold the election under the supervision of the Registrar of the Companies for the appointment of Managing Director of the Company. Respondent No.2 shall make available all the necessary record. The contesting respondents, in case of non-compliance of order, shall pay a fine of Rs. 5000/- and for further defying the order of the Court shall also be liable to punishment with imprisonment for three months and a fine of Rs. 2000/- and shall also cease to hold the office for five years. Consequently, the objection petition is answered in negative.”

28.07.1999

In compliance with the orders of the worthy Company Judge dated 12.07.1999, *Annual General Meeting (“AGM”)* of the Company was held in the office and under supervision of *Registrar of the Companies*, with following in attendance at the commencement of the meeting:-

1. Mr. Fatehullah Khan
2. Mr. Umer Farooq Miankhel
3. Haji Noor Muhammad

4. *Representative of RDFC*
(*Mr. Yousaf Hasnain Naqvi*)
5. *Haji Abdur Rehman*
6. *Mr. Muhammad Ibrahim*
7. *Mr. Saif-ur-Rehman*
8. *Mr. Fazal-ur-Rehman*

Haji Abdur Rehman insisted that those who were issued additional shares be allowed to participate in the said meeting, which was refused by the *Registrar of Companies*, on the following grounds:-

- A) *The issue of allotment of shares subsequent to the Order of Hon'ble Court dated 06.06.1992 was raised in objection petition No.C.M.33 of 1998 and it was, inter alia, stated that "the objectors issued 3,30,000 shares (Rs. 10/ per share) to three persons namely, Khalid Mehmood, Gulzar Bibi and Iftikhar Mahmood and enhanced the paid up capital of the objectors from Rs. 58,50,000/- to Rs.91,50,000/-". It was also stated therein that "the judgment/order dated 6.6.92, because of the events subsequent to the judgment/order and circumstances of the respondent's company have now been totally changed. Hon'ble Court dismissed the objection petition and held in the order dated 12.7.1999 that "consequently the objection petition is answered in negative". A clear inference can, therefore, be drawn from the aforesaid judgment that event subsequent to the Order dated 6.6.1992 of the Hon'ble Court shall have no impact on the Annual General Meeting held on 21.7.1999.*
- B) *In sub-para III of para 6 of his report to the Hon'ble Court in C.M.No.10/98 in CC No.2/92, Registrar of Companies has already reported that "any further allotment of shares by the management of the company and their transfer to other persons are unlawful".*
- C) *The Order dated 20.07.1999 of the Hon'ble Court in CM 345/99 is "without prejudice to the impugned findings of the Court, and without prejudice to the rights of parties".*

Rights of parties have already been determined by Hon'ble Court vide Order dated 6.6.61992 by directing rectification of Register of Members of the company and by answering in negative the objection that on account of events subsequent to 6.6.61992 (i.e. allotment of shares, etc), the Order of Hon'ble Court dated 6.6.1992 cannot be enforced.

- D) Order dated 20.07.1999 has been passed by the Hon'ble Court on the appeal filed by Haji Fazal-ur-Rehman. Haji Fazal-ur-Rehman is shareholder of the company and he has not been debarred from attending the Annual General Meeting.***
- E) Annual General Meeting was being held, of course, "subject to final judgment of the Hon'ble Court in Appeal".***

Resultantly, only the shareholders, recognized by the worthy Company Judge in his decision dated 6.6.1992 were allowed to participate in the *AGM*. Haji Abdur Rehman, Saifur Rehman, Fazal-ur-Rehman and Muhammad Ibrahim staged walk-out from the *AGM* without signing the attendance sheet. The shareholders, recognized by the *Registrar of the Companies*, were as follows:-

- i. Haji Abdur Rehman (70,000 shares)*
- ii. Haji Noor Muhammad (50,000 shares)*
- iii. Mr. Umer Farooq Miankhel (100,000 shares)*
- iv. Mr. Fatehullah Khan (100,000 shares)*
- v. Representative of RDFC (130,000 shares).*

Finally, *Haji Noor Muhammad, Umar Farooq Miankhel and Fatehullah Khan Miankhel* were elected as *Directors* for a term of three years, while *Yousaf Hasnain Naqvi* was accepted as *nominee*

Director of RDFC. Further that, Umar Farooq Miankhel was appointed as *Managing Director/Chief Executive of the Company* for a period of three years.

01.02.2000

The order of the worthy Company Judge dated 12.07.1999 was assailed in *ICA No.1/1999* by Haji Abdur Rehman, *ICA No.2/1999* by Fazal-ur-Rehman and *ICA No.7/1999* by Muhammad Ibrahim etc. All the three *ICAs* were dismissed by the worthy Company Judge, in terms that:-

“For the aforesaid reasons, we dismiss all the three ICAs and direct that the report of the Registrar, Joint Stock Companies alongwith the Minutes of the Meeting be placed before the Hon’ble Company Judge of this Court on 14.02.2000 for further proceedings.

The respondents No.1 and 2 have also moved C.M.No.376/99 in ICA No.1/1999 for the appointment of a commission for spot verification and preparation of inventory with a direction to appellant No.2 not to remove the machinery etc. belonging to, installed in and lying within the premises of appellant No.1.

As observed above, the learned Executing Court will still proceed in the matter in the light of the report of the Registrar, Joint Stock Companies for the purpose of fully implementing the impugned judgment and, therefore, we think that it would be just and proper in the circumstances if the respondents No.1 and 2 move the executing Court for grant of such relief, which can be allowed if the implementation of the impugned judgment still wants some time.

All the CMs stand disposed off accordingly. The parties are left to bear their own costs.”

27.07.2000

Pursuant to the order of this Court in the *ibid* ICAs, the District Food Controller, D.I.Khan alongwith Mr. Riaz Khan Mehsud, Magistrate 1st Class, visited the unit of the Company and prepared inventory of all the equipment, machinery, construction, registers, furniture and fixtures, etc. installed and lying therein in the presence of the witnesses. Thereafter, possession of the unit of the Company was handed over to Umar Farooq Miankhel and Fatehullah Miankhel.

21.05.2001

The decision of this Court rendered in the above ICAs was challenged before the Apex Court through CPLA No.553, 554 and 559 of 2000. The stance taken by Haji Abdur Rehman, which prevailed before the Apex Court was that the disputed purchase/sale of shares from Miankhel brothers was duly reported to the *Deputy Registrar, Companies Peshawar*; that he arranged for the payments to *RDFC*, being liquidated liability of the Company amounting to Rs. 6.188 Million, and for

the three extra roller bodies installed in the unit of the Company costing Rs. 1.863 Million; that to meet these expenses, 330,000 further shares of the Company were issued; and that in the *Objection Petition No.33of 1999*, which he had filed, specifically prayed for adducing evidence in support of the above contentions, the opportunity whereof was not allowed to him.

While on the other hand, during the proceedings before the Apex Court, Miankhel brothers and Haji Noor Muhammad rendered an undertaking to the effect that:-

“The respondents, Umer Farooq Miankhel, Fatehullah Khan and Haji Noor Muhammad, Directors of Mughal Flour Mills shall have no objection if Petitions No.553, 554 and 599 of 2000 are allowed and case is remanded to the Company Judge to provide an opportunity to prove that they have purchased shares of Umar Farooq Khan and Fatehullah Khan Miankhels against valid sale deeds”.

Finally, the Apex Court vide judgment dated 21.05.2001, decided all the three Civil Petitions in terms that:-

“In view of the above statement of learned counsel for respondents the petitions are disposed in the following terms:-

- i. With consent of learned counsel for parties instant petitions are***

converted into appeals and allowed.

- ii. *Order dated 1.2.2000 passed by Peshawar High Court in ICA Nos: 1, 2 and 7 of 1999 as well as order dated 12.7.1999 passed by learned Company Judge are set-aside.*
- iii. *The case is remanded to the Company Judge of Peshawar High Court for fresh decision of the execution application No.10 of 1998 after impleading Fazlur Rehman, Muhammad Ibrahim, Shah Jehan, Khalid Mahmud, Iftikhar Mehmood, Mst. Gulzar Bibi, Saif-ur-Rehman as respondents and allowing them opportunity to substantiate their pleas relating to order dated 6th June 1992, if any.*
- iv. *Pending decision of execution application No.10 of 1998 the respondents Umar Farooq Miankhel and Fatehullah Khan Miankhel shall remain possession of the Mill and they shall keep it functioning accordingly.*
- v. *The final disposal of execution application No.10 of 1998 will regulate future status of the parties in the business/affairs of Mughal Flour and General Mills.*
- vi. *Learned Company Judge shall try to dispose of the case expeditiously.”*

01.07.2005

The worthy Company Judge, on remand of the cases, proceeded with the matter, and in compliance with the directions of the Apex Court, the names of Fazal-ur-Rehman and others, who were issued shares, were impleaded as respondents

No.8 to 14 in Execution Petition No.10/1998, and they were permitted to plead their view point. After hearing the parties, the worthy Company Judge passed the impugned decision dated 01.07.2005, in terms that:-

“25.In view of the above discussion:-

a) E.P.No.10/1998 is partially allowed, as:-

- i. The transfer of share of the petitioners No.1 and 2 in favour of respondents No.2 and 7 is directed to be void. In terms of Section 152 of the Companies Ordinance, their share hold status be restored and the register of members may be accordingly rectified. The Company (i.e. respondent No.1) is required under Section 154 of the Ordinance to file the notice of rectification with the Registrar (i.e. respondent No.5) within fifteen days. The respondent No.5 shall ensure the rectification of register of members and submit compliance report to this Court within a month. The respondents No.2 and 7 may seek their remedy for the recovery of payment alleged to have been made as consideration for the alleged transfer.**
- ii. The request of the petitioners in C.C No.2/1992 for holding the first Annual General Meeting and the subsequent Annual General Meeting is dismissed being impracticable and inexecutable after 15 years.**
- iii. Similarly, the request for restoration of the status of petitioners No.1 and 2 as Directors is dismissed because after three years, the Directors have to be elected afresh and those who were holding the status of Directors in 1990 or 1992 cannot be restored to the said status through the order of the Court. The election will be held in the Annual General Meeting as stated hereinafter.**
- iv. With regard to the prayer in C.C No.2/1992 and the decision dated 06.06.1992 for rectification of wrongs**

committed by non-compliance of mandatory provisions of law, the matter is being referred to respondent No.4 with a direction to appoint Inspectors, including a Chartered Accountant, in terms of Section 265(a)(ii) read with Section 265(b)(i) to (vi) of the Companies Ordinance for detailed investigation into the affairs of the Company including the inspection of accounts, audit, handling of the shares and the capital (for the entire period of 1989 till 2005). The cost incurred for such investigation shall be borne by the Company to the extent as may be prescribed by the respondent No.4. The Inspectors shall furnish their report within a period of three months in terms of Section 269 of the Ordinance.

- v. *The Inspectors shall also examine the record of the Company, the record of the bank account and the availability of machinery and equipment (this will dispose of C.M.No.10/2002, C.M.No.21/2003 and C.M.No.6/2005).*
- vi. *They shall examine the situation under which the shares of Malik Ashiq Saleem (respondent No.7) were transferred and similarly, the need for the enhancement of share capital and the issue of shares to the respondents No.8 to 14. Since the legal requirements were not followed, therefore, the report may also contain the suggestions about the measures to be taken for rectification of irregularities committed during the said process.*
- vii. *The matter of respondent No.2 Haji Noor Muhammad also needs consideration by them that how, if any, his shares were reduced or mortgaged/transferred without his consent C.C No.1/2005 is thereby disposed of).*

b) The Inspector shall, in addition to the above points, look into:-

- i. *The position of accounts of the Company from 1989 to 2005,*
- ii. *The inventory of equipments, machinery, construction, registers, furniture and fixture,*

iii. *The present share holding status of the respondents No.2,3 and 6 to 14 and petitioner No1 and 2 and the report about compliance of rectification of register of members as per Para-25 (a)(i) above.*

26. *During the proceedings of investigation by the Inspectors, respondents No.8 to 14 shall be entitled to participate as members as if they are validly entitled to the shares allotted to them. This shall be subject to the final determination of their status as per report of Inspectors and its ratification by the Annual General Meeting.*

27. *All the present and past officers, Directors, Managing Directors, Secretaries, employees and agents of the Company and all the persons who have been dealing with the company are required to provide all assistance to the Inspectors in terms of Section 268 of the Ordinance.*

28. *On the receipt of the final report from the Inspectors, the respondent No.5 shall arrange the holding of the Annual General Meeting preferably by the consent and participation of all the shareholders, and in case of non-cooperation, the respondent No.5 shall supervise and hold such meetings of all the share holders for:-*

- i. *the election of Directors,*
- ii. *the ratification of irregularities.*
- iii. *the rectification of the report of Inspectors.*

29. *In case of non-cooperation of either of the parties or the parallel groups, at any stage, or the failure to achieve the end result as per Para 28 above, the respondent No.4 shall initiate the case for winding up of the Company under Section 305(i)(iii) and (iv) read with Section 309 of the Ordinance with particular reference to clause (C) of Section 309.*

30. C.M.No.45/2002.

The request of Haji Abdur Rehman for return of management of the Mills to him is adjourned for four months to be fixed in November, 2005 (after the compliance of above). Similarly, C.M.N.7/2005 for registration of a criminal case is also adjourned to November, 2005”.

4. Having gone through the facts of the case, it would now be appropriate to review the specific prayers sought in the four matters, particulars of which are as follows:-

ICA No.3/2005

By way of this petition, the appellant, Haji Abdur Rehman etc., seek the following relief:-

“It is, therefore, respectfully prayed that on acceptance of this appeal, the judgment of the learned Company Judge dated 01.07.2005 be set aside and modified in the light of the submissions made in the aforementioned grounds of appeal and the execution petition No.10 of 1998 be dismissed and the Miscellaneous application made by the appellants and dismissed by learned Company Judge be accepted and orders pass accordingly by this Hon’ble Court”.

E.P.No.10/1998

Through this petition, petitioners, Umar Farooq Miankhel and Fatehullah Khan Miankhel, seek the following relief:-

“It is, therefore, humbly prayed that this Hon’ble Court may like to execute and enforce its order dated 06.06.1992 passed in CC No.2 of 1992 and

- a) force respondents 2, 3, 6 to hold the first Annual General Meeting of the company which ought to have been convened in the year 1990 and also the Annual General Meetings for the subsequent years till today within a period of one week and to lay before the petitioners in the said Meetings the audited*

and signed reports of accounts for the years 1990 onwards for discussion, examination and action alongwith a report regarding action taken by respondents No.2 and 3 in the Administrative/Managerial affairs of the Company ever since,

- b) direct respondents 4 and 5 to force compliance of the relevant provisions of law and correct the wrongs and illegalities which have been caused so far on account of the non-compliance of mandatory provisions of law AND*
- c) order the respondents to mention and record the names of the applicants as shareholders of the Company in the relevant register and restore their status as Directors of the company.*

The applicants further pray that since the order dated 06.06.1992, granting the aforesaid reliefs is to execute as a decree of the Civil Court, the same may please be executed through the attachment and sale of the shares of respondents 2, 3, 6 in the respondent company and also through arrest and detention of the defaulting respondents with cost of these proceedings.”

C.M.No.45/2002

On 27.11.2002, Haji Abdur Rehman filed this petition, stating therein for the following prayer:-

“It is, therefore, most humbly prayed that on acceptance of this application, this Hon’ble Court may be pleased to order delivery of possession of the Mughal Flour and General Mills (Pvt) Limited, Dera Ismail Khan alongwith its office and the record of the Company to the applicant, after preparing proper inventory through a

local commissioner, with regard to the machinery, building, equipment, stocks, material and record etc”.

Cross Objection No.3/2007 in ICA No.3/2005

By way of this petition, Objection-Petitioners,
Umar Farooq Miankhel and Fatehullah Khan Miankhel, seek the following relief:-

“It is, therefore, most respectfully prayed that this honourable Court may kindly be pleased to modify the judgment by granting relief as prayed for in CM No.10 of 1998 and other applications filed by the petitioners in accordance with law in view of the objections raised hereinabove. Any other relief, in the facts and circumstances of the case, found appropriate and proper, may also be awarded”.

5. After reviewing the facts and prayers sought by the parties in the aforementioned matters, it is noted that the resolution thereof would hinge upon the three essential issues;

firstly, whether the worthy Company Judge under the Ordinance was competent to record evidence and decide the disputed questions of facts or otherwise?

secondly, whether the transfer of shares alleged by Haji Abdur Rehman was proved in accordance with law or otherwise? and

thirdly, whether the increase in share capital asserted by Haji Abdur Rehman was in accordance with law or otherwise?

6. As the matter in disputes in the four matters relate to the period prior to the enactment of the Companies Act, 2017 (“Act”), the provisions of the Ordinance would govern the same.

7. Let us start with the legal issue relating to the jurisdiction of the Company Judge under the Ordinance. The jurisdictional contours of the Banking Judge under the Ordinance has been a matter of judicial attention in *Light Metal and Rubber Industries (Pvt) Ltd’s case* (2001 CLD 1485), *Mst. Maqsooda Begum’s case* (PLD 1968 Lahore 903), *Mian Miraj Din’s case* (1996 CLC 516), *Khaqan Industries’s case* (1979 SCMR 62), *Brothers Steel Ltd’s case* (PLD 1995 SC 320), *Attock Refinery Ltd’s case* (PLD 2010 SC 946), *Lahore Race Club’s case* (PLD 2008 SC 707), *Muhammad Aslam Javed’s case* (2003 YLR 2150), *Muhammad Ahmed ‘s case* (1998 CLC 426) and *M/S Platinum Insurance Company Ltd’s case* (PLD 1999 SC 1). Finally, the Apex Court in *Mian*

Javed Amir's case (2016 CLD 393) has settled the

matter, and held that;

16. The question which arises from these proceedings is whether a Court having jurisdiction under the Ordinance can undertake the exercise of recording oral/documentary evidence and decide disputed questions of fact in an Application under section 152 of the Ordinance, in view of the restriction contained under section 9(3) of the Ordinance. Section 9(3) of the Ordinance provides that "in the exercise of its jurisdiction as aforesaid, the Court shall, in all matters before it, follow the summary procedure". In our opinion, this Section does not abridge or curtail the power of the Court to record oral evidence or receive documentary evidence in the proceedings before it to determine the issues relating to a "Company" or its members covered under the Companies Ordinance, 1984.

17. Section 9 of the Code of Civil Procedure provides:-

"9. Courts to try all civil suits unless barred. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

Since the Ordinance was promulgated with an intent to amend the law relating to companies and certain other associations for the purpose of healthy growth of the corporate enterprises, protection of investors and creditors, promotion of investment and development of economy and matters arising out of or connected therewith, therefore, all matters relating to companies irrespective of the fact whether factual controversy involved or not are required to be tried by a Court having jurisdiction is under the Ordinance of 1984. Mere insertion of the term "summary procedure" does not debar the Company Judge from receiving evidence in cases where factual controversy is involved. The Court having jurisdiction under this Ordinance can receive evidence in cases it thinks appropriate in the circumstances of the case.

18.....

19. In order to carryout the purposes of the above Section and the Ordinance itself and to determine the factual controversy between the parties, a Court having jurisdiction under the Ordinance has ample power to record evidence in cases it deems fit. The object of section 152 of the Ordinance, which relates to factual controversy, cannot be achieved without entering into in-depth investigation and recording of evidence. Therefore, we hold that there is no legal bar for a Company Court to enter into factual inquiry, framing of issues for determination and recording of oral as well as documentary evidence in coming to the just conclusion of the case.

20. The learned Company Judge has also erred in law while directing the S.E.C.P. to appoint an Inspector who shall submit a report as to whether a case under section 305 is made out or not. Suffice it to observe that the power to appoint an Inspector under sections 263 and 265, vests with the Commission on an application by a member of the company or the Registrar of the Commission. The areas in which the Inspector was directed to investigate falls within the jurisdiction of the Company Court and can be investigated and looked into by a Company Judge itself.

8. The *ratio decidendi* of the above case finally resolved, **firstly**; that the Company Judge could adjudicate complicated disputed questions of facts by recording oral and documentary evidence, and **secondly**, that the Company Judge, if competent to decide a matter, was not to delegate the same to the Commission.

9. Now, let us take the second issue regarding transfer of shares of a Company. Haji Abdur Rehman's claims that Umar Farooq

Miankhel and Fatehullah Khan Miankhel have transferred their entire shareholding of 100,000/- (One Lac) shares each to him and Fazal-ur-Rehman vide separate deeds both dated 15.12.1991, respectively.

Transfer of shares of a company and the forum for redressal of any *aggrieved person* has been dealt with under Sections 76, 77 and 78-A of the Ordinance, which provides that:-

76. “Transfer of shares and debentures.-(1) *An application for registration of the transfer of shares and debentures in a company may be made either by the transferor or the transferee, and subject to the provisions of this section, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application was made by the transferee:*

Provided that the company shall not register a transfer of shares or debentures unless proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company alongwith the script.

(2) Where a transfer deed is lost, destroyed or mutilated before its lodgment, the company may on an application made by the transferee and bearing the stamp required by an instrument of transfer, register the transfer of shares or debentures if the transferee proves to the satisfaction of the directors of the company that the transfer deed duly executed has been lost,

destroyed or mutilated:

Provided that before registering the transfer of shares or debentures the company may demand such indemnity as it may think fit.

(3) All references to the shares or debentures in this section, shall in case of a company not having share capital, be deemed to be references to interest of the members in the company.

(4) Every company shall maintain at its registered office a register of transfers of shares and debentures made from time to time and such register shall be open to inspection by the members and supply of copy thereof in the manner stated in section 150.

(5) Nothing in sub-section (1) shall prevent a company from registering as shareholder or debenture-holder a person to whom the right to any share or debenture of the company has been transmitted by operation of law.

(6) In the case of a public company, a financial institution duly approved by the Commission may be appointed as the transfer agent on behalf of the company.

(7) If a company makes default in complying with any of the provisions of sub-sections (1) to (4), it shall be liable to a fine not exceeding five thousand rupees and every officer of the company who is knowingly or willfully a party to such default shall be liable to a like penalty.

77. Directors not to refuse transfer of shares.-*The directors of a company shall not refuse to transfer any fully paid shares or debentures unless the transfer deed is, for any reason, defective or invalid:*

Provided that the company shall within thirty days [or, where the transferee is a central depository, within five days] from the date on which the instrument of transfer was lodged with it notify the defect or invalidity to the transferee who shall, after the removal of such defect or invalidity, be entitled to relodge the transfer deed with the company:

Provided further that the provisions of this section shall, in relation to a private company, be subject to such limitations and restrictions as may have been imposed by the articles of such company.

10. A separate forum of redressal before the Commission, for those whose request for transfer of shares is refused, was created by inserting Section 78-A of the Ordinance vide *Companies (Amendment) Ordinance, 2002*.

11. Sections 76 and 77 of the Ordinance envisage various stages and conditions for acceptance of a request for transfer of shares of a company. The particulars of the said stages may be summarized in terms that:-

Stage-I(Section 76)

Lodgment of request for the transfer of shares of a company.

Stage-II (Section 77)

The *Board of Directors* of the company (“**Board**”) is to decide the request made for transfer of shares of the company.

Stage-III

In case, the *Board* approves the request for transfer of shares, the said transfer is recorded in *Register of Transfer of Shares*, and the *Register of Members* maintained by the company.

Stage-IV (Section 78-A)

In case, the *Board* decides not to accept the transfer of shares, then any *aggrieved party* may seek the redressal of his grievance by filing an appeal to the Commission against the refusal to accept the requested transfer.

12. In order to resolve the controversy agitated by the parties in the four matters, it would be appropriate to further elaborate the first two stages, noted hereinabove:-

Stage-I(Section 76)

Lodgment of Request for Transfer

- I. A written application by a *transferee* or *transferor* for transfer of the shares has to be made to the company for registration of the said transfer; and
- II. the said application is to be accompanied by,
 - i. a proper instrument of transfer deed duly stamped and executed by the *transferor* and *transferee*; and
 - ii. script/share certificates to be transferred.

What is also important to note is that the above two conditions have been rendered great importance, as failure to observe the same by the company would, under sub-section (7) of Section 76 *ibid*, lead to penal consequences of imposition of fine upon the company and every Officer of the company, who knowingly or willingly is a party to such default.

When the *legislature* in its wisdom has provided a penalty upon those who default in complying with the provisions contained in sub-section (1) of Section 76 of the Ordinance, then the said conditions are to be strictly construed and their

fulfillment is to be considered *mandatory* and not *directory*. In this regard, the law is well settled by the Apex Court in its celebrated judgment in *Maulana Naur-ul-Haq's case (2000 SCMR 1305)*, wherein it was held:-

“No doubt there exists no faultless acid test or a universal rule for determining whether a provision of law is mandatory or directory and such determination by and large depends upon the -intention of Legislature and the language in which the provision is couched but it is by now firmly settled that where the consequence of failure to comply with the provision is not mentioned the provision is directory and where the consequence is expressly mentioned the provision is mandatory”.

The principle settled by the Apex Court in the above case has been consistently followed by our superior Courts in *Malik Umar Aslam's case (2007 PLD 362 SC)*, *Ghulam Hassan's case (2001 SCMR 1001 SC)* and *Aftab Munawar's case (2016 SCMR 90 SC)*.

Recently, the Lahore High Court in *Alliance Textile Mills Limited's case (2015 CLD 1532)* refused to validate the transfer of shares of a company, as the mandatory requirements of Section 76 of the Ordinance had not been satisfied. The worthy Court opined that:-

“We have heard the learned counsel for the appellants at length and find that the alleged transfer of shares in favour of the appellants did not meet the requirements of section 76 of the Ordinance. Section 76 of the Ordinance clearly provides that the company shall not register a transfer of shares or debentures unless proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the script. Admittedly, in this case, the original instrument of transfer was in the custody of Habib Bank Limited where they had been pledged. Therefore the mandatory requirement of section 76 of the Ordinance was never complied with and any rectification in the register of members to show the transfer in favour of the appellants was not in accordance with the law”.

It would be pertinent to note that sub-section (2) of Section 76 of the Ordinance provides an exception to the condition precedent for submission of the transfer deed. To invoke the exception, the application for transfer of shares has to be made and submitted to the company by *transferee*, who has to prove to the satisfaction of the *Board* that the transfer deed duly executed between the parties has been lost, destroyed or mutilated.

Stage-II (Section 77)

13. The decision to accept the request for transfer of shares or otherwise rests with the *Board*. Section 77 of the Ordinance mandates the *Board*

not to refuse a transfer of share, unless the Transfer Deed is either improper or invalid. The negative command contained in Section 77 *ibid* reflects the true intent of the *legislature* for the same to be strictly followed. Further, failure to comply with the command embodied in the aforementioned provision may lead to penal consequences provided under sub-section (2) of Section 78 of the Ordinance, whereby penalty of fine may be imposed on the defaulters. Thus, as discussed earlier, the said provision is to be construed strictly and the command contained therein is *mandatory* and not *directory*. However, it would be pertinent to note that an exception to this strict rule has been provided in the *second proviso* to section 77, whereby cases relating to private limited companies have been qualified, and in such cases further limitations and restrictions for transfer of shares can be imposed as per the provisions of the *Articles of Association* of the said companies.

14. *Prima facie*, there appears a conflict in the command rendered for transfer of shares, as provided under Section 76, when compared to that stated in Section 77 of the Ordinance. Section 76

stipulates the application for transfer of shares to be accompanied by a transfer deed alongwith the share certificates, while Section 77 *ibid* impliedly provides for the submission of valid transfer deeds, without any express stipulation for the share certificates.

15. It is by now settled principle of *Interpretation of Statutes* that in case, there is any conflict appearing in the two provisions in a *Statute*, then all efforts are to be made to first harmoniously interpret the same, so as to ensure that conflicting provisions are *saved*, rather than rendered *redundant*, *read down* or even *struck down*.

16. In the present case, a more careful reading of Section 76 (1) and Section 77 of the Ordinance reveals that there is no conflict, and, in fact, the intent of the *legislature* was to cater for two different situations. The requirement for submission of the transfer deed alongwith the share certificates, as provided under Section 76(1) of the Ordinance, was a condition precedent for the lodgment of any request made for transfer of shares

of a company, being a matter related to *Stage-I*. Thus, *any person* seeking transfer of shares in a company has to fulfill the conditions precedent in the said provisions of law.

17. Now, moving on to the provision in Section 77 *ibid*, it is noted that this provision relates to *Stage-II i.e.* after the lodgment of a request for transfer of share is received by the company, and thereafter, the same is placed before the *Board* for its decision. The command provided in Section 77 *ibid* relates to the decision of the *Board* refusing transfer of shares, based on the transfer deeds. In this regard, the *Board* is directed **not** to refuse the request, if the transfer deeds are either invalid or improper. Thus, the provisions contained in Section 76(1) and Section 77 *ibid* cannot be declared to be in conflict. In fact, the two provisions provide criterion and guidance for structuring the discretion of the *decision makers* and supplement each other; Section 76(1) *ibid* relates to lodgment of the request for transfer of shares, while Section 77 *ibid* is restricted to refusing the transfer of shares on the legality of the transfer deeds. This is also supported by reading Section 76(2) wherein the legislature in

its wisdom catered for a situation of lost, destroyed or mutilated transfer deeds. Thus, when so interpreted, both the provisions are *saved* and there is no conflict between the said two provisions of the Ordinance.

18. Canvassing our company laws, it is noted that the requirement of filing the share certificates alongwith the transfer deeds for the transfer of shares was codified a century ago under Section 34 of the repealed Companies Act, 1913. With the development of the financial markets and the evolution of corporate sectors, the requirements for the incorporation (*birth*), day to day management/ affairs (*life*), and winding up (*death*) of different types of companies have evolved. The *legislature*, realizing the changing dynamics of the financial and corporate environment, has enacted specialized laws, like the Central Depositories Act, 1997 and the Securities Act, 2015 which deal with listed securities of public companies and the same have been rendered overriding effect. The *legislature* in its wisdom, recognizing the apparent contradiction in the said two provisions of the Ordinance, has deleted the express requirements of

submission of the share certificates with the application for transfer of shares under the recently enacted Companies Act, 2017. Furthermore, the difference in the conditions for approval of transfer of shares of private and public companies has been made more stark in the new enactment.

19. The issue of transfer of share, under the English Company Laws, also recognizes the different conditions precedent for accepting any request for transfer of share in a private limited company and that of a public company. The matter has been very accurately described in *Gower & Davies Principles of Modern Company Law* (*Ninth Edition*), which reads as under:-

“Although the above principle is true of all types of company, there is, as always, a major difference between companies with large and fluctuating bodies of shareholders whose shares are traded on a public exchange (“listed” companies) and companies with small bodies of shareholders whose composition is expected to be stable and where the allocation of shares is as much about the allocation of control in the company as it is about its financing (“non-listed” companies). In the former case, the law or the rules of the exchange will require the shares to be freely tradable as far as the issuer is concerned, so that except in a few cases the transfer of the shares will be simply a matter between the existing shareholder and the potential investor. Free transferability tends to be taken for granted in listed companies, but it does become controversial when what is

proposed is the wholesale transfer of the shares to a single person, in the shape of a takeover bidder, because in that situation, even in an open company, the transfer of the shares has clear implications for the control of the company.

Share transfers involve a two-step process. In the first step the buyer and the seller conclude a sales contract where they agree on the price which the shares are sold for and on other terms of the transaction. Bankers sometimes refer to this first step as “trading”. In the second step the transfer is carried out. At the end of the second step the buyer becomes the owner of the shares that formed part of the sales transaction. This second step is sometimes referred to as “settlement”. Settlement is a process which in itself consists of two or more stages depending on whether certificated or uncertificated shares are sold.

When shares in private companies and non-listed public companies are sold the buyer and the seller frequently know each other’s identity and are often personally involved in negotiating the terms of the transaction. Sales transactions are completed by way of delivery of certain transfer documents from the seller to the buyer and by way of registering the buyer’s name on the shareholder register.

When listed shares are sold, the transaction is frequently more standardized. In most cases, the seller does not go out to find a buyer him- or herself, but enlists the services of a broker who sells the shares for him or her. The broker does this either through the electronic trading system operated by the London Stock Exchange or by making a contract with another financial services provider over the telephone. In both cases buyer and seller rarely know each other’s identity. After the contract has been concluded, the buyer name is also entered on the shareholder register, but this settlement process is carried out electronically through a settlement system known as CREST.”

20. Now, keeping the principles discussed herein above, let us consider the first claim of Haji Abdur Rehman, who asserts that Umar Farooq Miankhel and Fatehullah Khan Miankhel have transferred their entire shareholding to him and Haji Fazal-ur-Rehman, vide two separate deeds dated 15.12.1991.

21. It is admitted position; firstly, that the disputed transfer of shares were of a private limited company, and secondly, that when the applications for said transfers were made to the Company, the condition precedent or filing share certificates was not fulfilled.

22. When the worthy counsel for Haji Abdur Rehman was confronted with the lapse of fulfilling the said condition, as provided in Section 76(1) of the Ordinance, his response was that, the said share certificates were, at that time, pledged with *RDFC*, creditor of the Company, and, thus, the same could not be deposited with the application for transfer of shares. He further added that by filing the transfer deeds, there was substantial

compliance of the requirement provided under subsection (1) of Section 76 of the Ordinance.

23. This Court is not in consonance with the submission of the worthy counsel for Haji Abdur Rehman. The condition of depositing the share certificates alongwith the application for transfer was a *mandatory* condition, the failure to do so was critical for the very lodgment of the application for the transfer of shares.

24. At this stage, it would be pertinent to also address the initial written response of Haji Abdur Rehman recorded in his letter dated 19.05.1992 that, the disputed transfer of shares was between the shareholders of a private limited company, and thus did not require any approval of the *Board* under Section 76 of the Ordinance, and clause 9 of the *Articles of Association* of the Company. This stance, so taken by Haji Abdur Rehman is completely contrary to the letter and spirit of the provisions governing the matter as provided under the enabling provisions of the Ordinance; *firstly*, the submission of *Form 'A'* and *Form '29'* of the Company in May 1992, does not

fulfill the mandate required for the transfer and increase of the shares, as provided under Sections 76 and 86 of the Ordinance; and **secondly**, the control of the Board of company over the affairs of the company, especially the approval of transfer of shares is one of the very distinguishing factor between a *sole proprietorship* and that of a *private limited company*. Thus, the contention of Haji Abdur Rehman that the impugned transfer of shares did not require a positive *Board Resolution* is contrary to the clear and express intent of the law, as provided in Sections 76 and 77 of the Ordinance. No doubt, clause 9 of the *Articles of Association* of the Company allows transfer of shares between shareholders, but when the provision of Ordinance mandates the transfer to be approved in a particular manner, then, under Section 2 (1) of the Ordinance, the same shall prevail, even if there is any contrary provision contained in the *Articles of Association* of the said company, which is not the case in the present controversy.

25. Before this Court proceed to the next issue, it would be pertinent to mention that with the expansion of the jurisdictional contours of the

Company Judge, as elaborately discussed by the Apex Court in *Mian Javed Amir's case* (*supra*), an *aggrieved party*, who can prove sale of shares by producing cogent, truthful and reliable evidence, cannot be denied his right for rectification of the *Register of Members* under Section 152 of the Ordinance, only because the share scripts were not submitted with the application to the company for transfer of shares. What is to be appreciated is that the scope of Section 76 of the Ordinance is in relation to the lodgment of the claim for transfer of shares by a *transferee* or *transferor*, which has to be accepted by the Company on fulfillment of conditions precedent, but this in no way can put a *clog* upon the jurisdiction of Company Judge to accept the grievance of an *aggrieved party*, who is able to prove the sale of shares by producing evidence in support thereof. In the present case, the requisite evidence was direly wanting.

26. Let us move on to the third crucial issue relating to further issuance of capital of the Company claimed by Haji Abdur Rehman. The legal requirement for a valid increase in share

capital of a company has been provided in Section

86 of the Ordinance, which reads:-

86. Further issue of capital.-

(1) Where the directors decide to increase the capital of the company by the issue of further shares, such shares shall be offered to the members in proportion to the existing shares held by each member, irrespective of class, and such offer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time, within which the offer, if not accepted, will be deemed to be declined:

Provided that the Federal Government may, on an application made by any public company on the basis of special resolution passed by it, allow such company to raise its further capital without issue of right shares:

Provided further that a public company may reserve a certain percentage of further issue of its employees under "Employees Stock Option Scheme" to be approved by the Commission in accordance with the rules made under this Ordinance.]

(2) The offer of new shares shall be strictly in proportion to the number of existing shares held:

Provided that fractional shares shall not be offered and all fractions less than a share shall be consolidated and disposed of by the company and the proceeds from such disposition shall be paid to such of the entitled shareholders as may have accepted such offer.

(3) The offer of new shares shall be accompanied by a circular duly signed by the directors or an officer of the company authorised by them in this behalf in the form prescribed by the Commission containing material information about the affairs of the company,

latest statement of the accounts and setting forth the necessity for issue of further capital.

(4) A copy of the circular referred to in sub-section (3) duly signed by the directors or an officer authorised as aforesaid shall be filed with the registrar before the circular is sent to the shareholders.

(5) The circular referred to in sub-section (3) shall specify a date by which the offer, if not accepted, will be deemed to be declined.

(6) [Omitted by the Finance Act, 1 of 1995].

(7) If the whole or any part of the shares offered under sub-section (1) is declined or is not subscribed, the directors may allot and issue such shares in such manner as they may deem fit].

27. The careful reading of the aforementioned provision provides specific steps to be taken for any valid increase in share capital of private limited company. The particulars of the same are as follows:-

Step-I

The authority to *increase* the share capital has been vested in the *Board*, which has to first pass a *Board Resolution*, resolving the increase in the share capital of the company.

Step-II

Once the *Board* resolves to increase the share capital, then it has to fulfill the other conditions:-

- I. the increase of shares has to be offered to the members in proportion to their existing shareholding;
- II. the offer is to be made by serving the members a notice specifying the number of shares, to which they are entitled and the time period within which the offer made is to be accepted;
- III. the said offer of new shares by the company to the existing members shall be accompanied by a *Circular*, containing material information about the affairs of the Company, the latest statement of accounts and setting forth the necessity for issuance of further capital; and
- IV. a copy of the *Circular*, duly signed by the Directors or an officer authorized by the *Board*, shall be filed with the Registrar before the *Circular* is sent to the shareholders.

28. Now, let us examine the claim of Haji Abdur Rehman regarding the increase in the share capital by 330,000 ordinary shares, and thereafter transferring it to *Fazlur Rehman, Muhammad Ibrahim, Shah Jehan, Khalid Mehmood, Iftikhar Mehmood, Mst. Gulzar Bibi and Saifur Rehman*. It is an admitted position that when the share capital was enhanced by Haji Abdur Rehman, the conditions precedent; **firstly** of offering the said increase to the existing shareholder, and **secondly** of issuing the *Circular*, justifying the increase

alongwith the time period within the said offer had to be accepted by the shareholders, was neither served upon the existing shareholders nor was it communicated to the Registrar, as required under Section 86 of the Ordinance.

29. Again, when the worthy counsel for Haji Abdur Rehman was confronted with the statutory requirements of service of *notice* to the existing members and *Circular* for increasing the share capital of the Company under the Ordinance, his response was that, the Deputy Registrar of Companies at Peshawar was duly informed in writing about the increase in the shares capital of the Company.

30. When the record was perused, it was noted that neither the requisite *notice* to the members nor the *Circular* to the Registrar, as provided under the enabling provisions of Section 86 of the Ordinance had been submitted in anyone of the Judicial fora, during the proceedings of the present matters spreading over the last two decades.

31. Interestingly, Haji Abdur Rehman has repeatedly urged the worthy Company Judge in his Cross Objection No. 33/1999, and later before the Apex Court that, he be provided an opportunity to produce the requisite evidence, but despite all opportunities, no cogent evidence regarding the statutory conditions precedent for valid transfer of shares or enhancement of share capital was produced before the Executing Court. However, during the present proceeding, when the worthy counsel for Haji Abdur Rehman was confronted to point out the said *notice* and *Circular*, he referred to letters of the Company both dated 19.05.1992. The perusal thereof reveals that the same do not qualify as *notice* or *Circular* envisaged under Section 87 of the Ordinance. This fact was correctly noted and highlighted by the worthy Deputy Registrar in his reply thereto vide letter dated 10.05.1992.

32. In view of the above deliberation, it is evident that the increase of share capital claimed by Haji Abdur Rehman was not in accordance with the mandatory conditions as provided under Section 86 of the Ordinance. However, this Court cannot shut its *eyes* to the claim of Haji Abdur Rehman of

having increased the share capital to meet the financial needs of the Company, and in particular the payment of the decree amount to *RDFC*, and installation of rollers bodies in the manufacturing unit of the Company. More importantly, he cannot be rendered remediless.

33. Before parting with the judgment, it would be important to recapitulate the discussed principles of law relating to the *jurisdiction of the Company Judge*, the *transfer* and the *increase* of share capital in a company. The summary whereof is as under;

- I. The Company Judge has the jurisdiction to record oral and documentary evidence to decide contested questions of facts;
- II. The power, discretion or authority exclusively vested in the Company Judge under the Ordinance cannot be delegated to SECP or the Commission;
- III. A written application by a *transferee* or *transferor* for registering the transfer of the shares made to the company is to be accompanied by a proper instrument of transfer deed duly stamped and executed by the *transferor* and *transferee*; and script/share certificates to be transferred. These conditions

precedent contained in sub-section (1) of Section 76 of the Ordinance are to be strictly construed and their fulfillment is to be considered *mandatory* and not *directory*;

- IV. An *aggrieved party*, who can prove sale of shares by producing cogent, truthful and reliable evidence before the Company Judge, cannot be denied his right for rectification of the *Register of Members* under Section 152 of the Ordinance, only because the share scripts were not submitted with the application to the company for transfer of shares.
- V. The scope of Section 76 of the Ordinance is in relation to the lodgment of the request for transfer of shares by a *transferee* or *transferor*, which has to be accepted by the Company on fulfillment of conditions precedent, but this in no way can put a *clog* upon the jurisdiction of Company Judge to accept the grievance of an *aggrieved party*, who is able to prove the sale of shares by producing evidence in support thereof.
- VI. And the exception to the condition precedent for submission of the transfer deed, as provided under sub-section (2)

of Section 76 *ibid*, is when the request is made and submitted to the company by *transferee*, who then has to prove to the satisfaction of the *Board* that the transfer deed duly executed between the parties is lost, destroyed or mutilated.

- VII. The authority to accept or refuse the request for transfer of shares rests with the *Board*, which is mandated under Section 77 of the Ordinance, **not** to refuse a transfer of shares, unless the Transfer Deed is either improper or invalid; And the exception to this strict rule has been provided in the *second proviso* to Section 77, whereby cases relating to private limited companies have been qualified, and in such cases further limitations and restrictions for transfer of shares can be imposed as per the provisions of the *Articles of Association* of the said companies;
- VIII. The provisions contained in Section 76(1) and Section 77 *ibid* supplement each other; Section 76(1) *ibid* relates to lodgment of the request for transfer of shares, while Section 77 *ibid* is restricted to refusing the transfer of shares on the legality of the transfer deeds; and
- IX. Section 86 of the Ordinance vests the authority to *increase* the share capital of a company in the *Board* by passing a *Board*

Resolution, resolving the increase in the share capital of the company. Once the *Board* resolves to increase the share capital, then it has to fulfill the other conditions:-

- i. the increase of shares of the company has to be offered to the members in proportion to their existing shareholding;
- ii. the offer is to be made by serving the members a notice specifying the number of shares, to which they are entitled and the time period within which the offer made is to be accepted;
- iii. the said offer of new shares by the company to the existing members shall be accompanied by a *Circular*, containing material information about the affairs of the Company, the latest statement of accounts and setting forth the necessity for issuance of further capital; and
- iv. a copy of the *Circular*, duly signed by the Directors or an officer authorized by the *Board*, shall be filed with the Registrar before the *Circular* is sent to the shareholders.

Accordingly, for the reasons stated hereinabove, this Court declares and holds that:-

- I. **ICA No.03/2005 (Haji Abdur Rehman and others .Vs. Umar Farooq Miankhel and others)**, is disposed of in terms that the impugned decision of worthy Company Judge dated 01.07.2005 is modified as under:-

Para 25(a)(i)

The finding of the worthy Company Judge, recorded regarding transfer of shares of Umar Farooq Miankhel and Fatehullah Khan Miankhel in favour of Haji Abdur Rehman and Malik Ashiq Saleem, is maintained, being in accord with the law. Similarly, further directions to Haji Abdur Rehman and Malik Ashiq Saleem to seek their remedy for the recovery of payment alleged to have been made as consideration for the alleged transfer is also legally correct, and thus maintained; and

Para 25(a)(ii)

The finding, so rendered, for holding the first *Annual General Meeting* is based on the correct appreciation of the facts of the present case, and thus maintained; and

Para 25(a)(iii)

The finding regarding restoration of the status of Umar Farooq Miankhel and Fatehullah Khan Miankhel as Directors, being based on correct appreciation of law, is also maintained; and

Para 25(a)(iv)

The finding, rendered for appointment of Inspectors, including a Chartered Accountant, in terms of Section 265(a)(ii) read with Section 265(b)(i) to (vi) of the repealed Ordinance [*now Section 257(a)(ii) read with Section 257(b)(i) to (vi) of the Companies Act 2017*], is modified to the extent that the matters to be investigated would be **audit** and **accounts** of the Company and the period would be from 1989 till December, 2017. Similarly, the finding regarding the payment of cost for the said investigation and the time period for the said report to be submitted, being reasonable and in accordance with the correct appreciation of facts and law, is maintained; and

Para 25(a)(v)

The finding with regard to the scope of investigation by the Inspectors, being reasonable and in accordance with the

circumstances of the present case, is also maintained; and

Para 25(a)(vi)

No cogent evidence was produced to prove that the mandatory conditions precedent for transfer of shares and increase in share capital had been carried out and that a valid sale of transfer of shares was executed between the parties, thus, the same are a nullity in the eyes of law and cannot be declared as an *irregularity*, which could be rectified, thus, the finding concerning the transfer of shares and the enhancement of share capital of the Company, being an *irregularity*, is not in accordance with the correct principle of law, is set aside; and

Para 25(a)(vii)

The findings regarding the transfer of shares of Haji Noor Muhammad, being in accordance with the facts and circumstances of the present case, are also maintained; and

Paras 25(b) and 26

The finding regarding the additional terms of reference for Inspectors is also modified to the extent that the scope of investigation would only be restricted to accounts and equipments

as provided in 25(b)(i) and (ii) only, and that the period of accounts of the Company would now be upto December, 2017. Similarly, the finding of the worthy Company Judge regarding the status of Haji Abdur Rehman, Haji Noor Muhammad, Fazlur Rehman, Muhammad Ibrahim, Shah Jehan, Khalid Mehmood, Iftikhar Mehmood, Mst. Gulzar Bibi and Saifur Rehman as shareholders being conditional upon the final determination of the report of the Inspectors is not in accordance with the correct appreciation of law. Once, this Court has held the transfer of shares and the increase in the share capital to be illegal and without lawful authority, then keeping their status conditional upon the final report would not be legally correct. However, in view of the record produced by Haji Abdur Rehman, it is admitted position that the decree amount of Rs. 6.188 Million and payment made for acquiring three roller bodies for the Company were financed from the said increase of share capital, hence, their claim, for the amount of Rs. 6.188 Million are declared to be a claim against the Company. This claim shall be listed in the *agenda* for deliberation and decision of the *Board*, in its first

meeting, after its constitution/election by the *Annual General Meeting*, ordered herein below; and

Para 27

The finding regarding all the present and past Officers, Directors, Managing Directors, Secretaries, employees and agents of the Company and all the persons who have been dealing with the Company to provide all assistance to the Inspectors in terms of Section 268 of the repealed Ordinance [*now section 261 of the Companies Act 2017*], being in accordance with law, is maintained; and

Para 28

The finding regarding the receipt of the final report from the Inspectors, and for the Registrar of the Companies to arrange the holding of the *Annual General Meeting* preferably by the consent and participation of all the shareholders, and in case of non-cooperation, the Registrar to supervise and hold such a meeting of all the share holders for:-

- i. the election of Directors,
- ii. the rectification of the report of Inspectors.

being in accordance with law, is maintained; and

Para 29

The finding regarding the non-cooperation of either of the parties or the parallel groups, at any stage, or the failure to achieve the end result, leading the SECP to initiate the case for winding up of the Company under Section 305(f)(i)(iii) and (iv) read with Section 309 of the Ordinance with particular reference to clause (C) of Section 309 [*now Section 301 (g)(i)(iii) and (iv) read with Section 304*], is premature, and the authority of the Commission to initiate proceedings ought not to be prejudiced by a definite findings at this stage, and thus the same is set aside.

II. **E.P No.10/1998 (Umar Farooq Miankhel**

.Vs. Mughal Flour and General Mills etc.)

is disposed of in terms of the findings recorded in ICA No.3/2005.

III. **C.Mis.No.45/2002 in E.P No. 10/1998**

(Umar Farooq Khan .Vs. Mughal Flour and General Mills etc.)

is disposed of in terms of the findings recorded in ICA No.3/2005.

IV. *Cross Objection No.03/2007 in ICA*
No.03/2005 is also disposed of in terms of
the findings recorded in ICA No.3/2005.

Announced.
Dated.13.02.2018

CHIEF JUSTICE

J U D G E

Noor Shah, PS
(DB) Hon`ble Mr. Justice Yahya Afridi, Chief Justice
Hon`ble Mr. Justice Qalandar Ali Khan, Judge