



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH

In the matter of

Appeal No. 33 of 2014

M/s. Dewan Petroleum (Private) Limited

...Appellant

Versus

1. The Executive Director (C&CD), SECP
2. M/s. Dewan Salman Fiber Limited

...Respondents

Dates of hearing:

February 3, 2015, April 30, 2015,
May 6, 2015 & September 17, 2020

Present:

For Appellant:

1. Mr. Salman Akram Raja, ASC
2. Mr. Asad Ladha, Advocate High Court,
3. Malik Ghulam Sabir, Advocate High Court
4. Mr. Husnain Arshad, Advocate High Court
5. Mr. Mazhar Jawaaid Khan
6. Mr. Suhaib Ahmed
7. Mr. Anwar Jamakkaly
8. Syed Uzair Raja
9. Mr. Mansoor Ahmad Siddiqui, Company Secretary

For Respondent No.1:

1. Mr. Mubasher Saeed Saddozai, Director (CLD-C&CD)
2. Mr. Saeed Ullah, Additional Registrar (CLD-C&CD)
3. Ms. Saila Jamshaid, Joint Director (CLD-C&CD)
4. Mr. Muhammad Akram, Assistant Director (CLD-C&CD)

For Respondent No. 2:

1. Mr. Babar Sattar, ASC



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2. Mr. Salaar Khan, Advocate High Court
3. Ms. Zainab Janjua, Advocate High Court
4. Syed Muhammad Abbas Hyder, Advocate
5. Mr. Adeel Wahid, Advocate
6. Syed Maqbool Ali
7. Mr. Hanif German, Company Secretary

ORDER

1. This Order shall dispose of Appeal No. 33 of 2014 filed by M/s. Dewan Petroleum (Private) Limited (the Appellant) under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against order dated July 10, 2014 (the Impugned Order) passed by the Executive Director C&CD (the Respondent No.1).
2. The brief facts of the case are that M/s. Dewan Salman Fiber Limited (the Respondent No.2) filed an appeal under section 78-A of the Companies Ordinance, 1984 (the Ordinance) and stated that it had 30% shareholdings in the Appellant, however, the Appellant's management had prevented it from exercising its statutory right of "representation of corporations at meetings of companies and of creditors" under Section 162 of the Ordinance. The Respondent No. 2 stated that the Appellant's Annual General meeting (the AGM) and directors' election are scheduled to be held on May 29, 2014, therefore, the Respondent No.2 had sold/transferred qualification shares (the Qualification Shares) to three nominees to make them eligible to contest directors' election. The Respondent No.2 applied for registration of the Qualification Shares through applications dated May 7, 2014 and May 9, 2014, however, the Appellant's management had referred the matter to its members. The Respondent No.1 had considered the Appellant's letter dated May 27, 2014 as refusal to register the Qualification Shares, therefore, issued a show-cause notice dated May 28, 2014 (the SCN) and restrained the Appellant from holding the AGM. Hearing in the matter was held on July 1, 2014. The Respondent No.1 concluded the SCN proceedings and directed the Appellant to register the Qualification Shares.
3. The Appellant *inter alia* filed this Appeal on the grounds it neither refused registration of the Qualification Shares nor referred the matter to its members, therefore, the Respondent No.1 had mistakenly treated letter dated May 27, 2014 as refusal and issued the SCN under Section 78-A of



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the Ordinance. The Appellant further stated that as per proviso of the Section 77 of the Ordinance, share transfer in a private company is subject to limitations and restrictions imposed in its Articles of Association (the AOA), therefore, the Respondent No.1 has failed to note that registration of the Qualification Shares was subject to the restrictions contained in the Article 9 and 11 of the Appellant's AOA and the Ordinance. The Appellant stated that the Impugned Order has failed to appreciate the distinction between registration of Qualification Shares and nominations of proposed directors by the Respondent No.2. The Appellant stated nomination of proposed directors was referred to the members, however, the Respondent No.1 and Respondent No.2 had illegally construed the matter of Qualification Shares' registration has been referred to its members. The Appellant submitted that findings of the Impugned Order including fixation of the number of directors are beyond the scope of the SCN.

4. The Appellant stated that the Impugned Order has misconstrued the scope of Article 9 and 11 of the Appellant's AOA and has tried to create an exception not warranted by law. The Appellant stated that the Impugned Order has been passed without lawful authority and negates the requirements of the Section 2(28) of the Ordinance as well as Article 9 and 11 of the Appellant's AOA. The Appellant stated that the Respondent No.2 was not entitled to transfer the Qualification Shares to any person on pretext to represent it on the Appellant's Board of Directors (the BOD), because in 2006, the Respondent No.2 had acquired the Appellant's shares in its own name.
5. The Appellant stated that the SCN and the Impugned Order had been passed in derogation of thirty days' time period allowed to decide the matter of registration of shares under Sections 77 and Section 78 of the Ordinance. The Appellant stated that the Impugned Order as well as the SCN have made the provisions of Sections 158, 160 and 160A of the Ordinance nugatory because it is established law that conduct of AGM and directors' election may only be challenged, ex-post.
6. The Appellant's Counsels have argued that in paragraph 7 of the Impugned Order, the Respondent No.1 stated that the matter was examined in the light of the Appellant's letter dated May 27, 2014 (In Impugned Order mistakenly date has been mentioned as April 27, 2014) and thereafter, in paragraph 8 stated that accordingly the SCN was issued to Respondent No.2. The Appellant's Counsels stated May 27, 2014 letter was challenged in an appeal under Section 78-A of the Ordinance and on May 28, 2014 the SCN was issued with a direction to abstain from conducting the AGM on May 29, 2014. The Counsels stated that a chronological analysis of events has raised



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serious question on the integrity of the SCN proceedings. The Appellant's Counsels have presented additional argument/evidence and stated that as per clause 4 of the agreement dated June 20, 2007, the Respondent No.2 has no right to interfere in the management of the Appellant.

7. Respondent No.1 rebutted the grounds of Appeal and stated that the BOD referred the matter of Qualification Shares registration to the members, however, it was under their domain, therefore, it was deemed refused. Respondent No.1 stated that refusal to register Qualification Shares falls within the ambit of Section 78-A of the Ordinance. Respondent No.1 stated that transfer of Qualification Shares to nominees was not a normal sale transaction, therefore, restriction contained in Articles 9 and 11 of the Appellant's AOA were not applicable. Respondent No.1 stated that fixation of number of the Appellant's directors was a relevant fact, therefore, the Impugned Order was passed as per scope of the SCN.
8. Respondent No. 1 stated that Articles 9 and 11 of the Appellant's AOA are not applicable in this case because it was not a case of normal sale of shares to outsiders rather the Respondent No. 2 had transferred Qualification Shares to its nominees, to represent it on the BOD, therefore, it cannot be termed as a transfer of shares to outsiders or undesired persons. Respondent No. 1 stated that Respondent No.2 had previously tried to introduce its nominees to contest the Appellant's director's election in 2011, however, their nominations were rejected because they were not members of the Appellant. Respondent No. 1 stated that being a company, Respondent No 2 has a legal right to transfer Qualification Shares to its nominees, to represent it in the Appellant's meetings and to participate in the directors' election.
9. Respondent No.1 stated that Respondent's No.2 Board of Directors passed a resolution on April 25, 2014 and transferred Qualification Shares to its nominees and thereafter, all relevant documents were sent to the Appellant for registration of Qualification Shares through letters dated May 7, 2014 and May 9, 2014. Respondent No.1 submitted that the matter was required to be decided by the BOD, however, they referred it to the members, which was deemed as a refusal. Respondent No.1 stated that matter is not simply related to proceedings of the AGM but in fact, it is related to protection of rights of the minority shareholders for participation in the management of Appellant through directors' election.

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10. Respondent No.2 has denied the grounds of Appeal and stated that the Impugned Order has been passed in accordance with law and authority, therefore, needs no interference. The Respondent No.2 further stated that since 2011 they have been deprived by the management of the Appellant from exercising their right to nominate directors to represent it on the BOD. Respondent's No.2 representatives prayed to dismiss the Appeal.
11. The Bench has heard the parties at length and perused the relevant record. The Appellant's Counsels and the Respondents' representatives reiterated grounds of the Appeal and rebuttal thereof. Previously, hearing of the Appeal was held on April 30, 2015 before the Appellate Bench (the Bench) wherein, the Bench has restrained the Appellant to hold the AGM vide interim Order dated April 30, 2015 (the Interim Order). The Appellant had challenged the Interim Order before the Islamabad High Court, Islamabad (the Court) in Appeal No. 5 of 2015. The Court had *set aside* the Interim Order vide its Order dated January 25, 2017 and directed the parties to appear before the Bench for early disposal of this Appeal.
12. The Bench endorses the Appellant's argument that circumstances to take cognizance under Section 78-A of the Ordinance were missing, therefore, the Respondent No.1 had no power to invoke its jurisdiction. The Bench is of the view that in the present case, two different issues are involved, however, Respondent No.1 had failed to distinguish between both and in result thereof, misapplication of law and applicable requirements/procedure is evident. The Bench is of the view that the first issue was nomination of nominee directors by the Respondent No.2 whereas, other issue was registration of Qualification Shares. The Bench has perused the letter dated May 27, 2014 (Mark-XIV at page 82 of the Appeal) whereby the Appellant had responded to the Respondent's No.2 letter dated May 23, 2014 (Mark-XIII, at page 81 of the Appeal). The perusal of the letter dated May 27, 2014 revealed that in para three it has been conveyed to the Respondent No.2 that *"Form 28 signed by Mr. Haroon Iqbal and Mr. Salman Rasheed for consenting to participate in the board of directors' election in the forthcoming AGM. These name already been circulated amongst all the members of DPL for deciding such nomination"* The Bench is of the view that the Respondent No.1 has considered this letter as a refusal to register the Qualification Shares, however, as a matter of fact, the Appellant had communicated to the Respondent No.2 that issue of nominees nomination has been referred to the members. In view of the requirements of the Section



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174(4), the Bench believes that the Appellant has rightly referred nomination of nominee directors to the members, hence, said letter cannot be termed as refusal to register the Qualification Share.

13. The Bench is of the view that SCN is an intimation of the alleged violations, therefore, adjudication of a matter, which was not included in the SCN, shall be considered null and void. The Bench is of the view that the Impugned Order has been passed on violation of Section 77 of the Ordinance, therefore, its finding regarding reduction of numbers of directors was unwarranted.
14. The Bench has examined the definition of private company, which allow a company to place procedure in its Articles of Association for transfer of shares. The Bench has also minutely perused Articles 9 and 11 of the Appellant's AOA. In our view, Article 9 of the Appellant's AOA, restrict transfer of shares to non-members and if any member wants to divest its shares then a preemptive right to claim divesting shares is conferred upon existing members. The Bench is of the view that transfer of the Qualification Shares cannot be refused on the basis of Article 9 because in present case the Respondent's No.2 has not transferred its shares to outsiders, rather Qualification Shares were provided to its nominees. The Bench believe that Article 11 of the Appellant's AOA is also not applicable in the present case because Respondent No.2 has thirty percent shareholding in the Appellant, therefore, it cannot be presumed that Respondent No.2 shall nominate persons who may cause harm to the Appellants' interests. For reference Articles 9 and 11 of the Appellant's AOA are reproduced below;

"Article 9: Save as is hereby otherwise provided no shares will be transferred to any person who is not a member of the company so long as any member is willing to purchase the same at a fair value which shall be determined by the directors on the opinion of the Auditors.

"Article 11: The directors may, in their discretion, refuse to register the transfer of shares in favour of any person who, in their opinion, is not desirable in the interest of the company to admit to membership."

15. The Bench is of the view that the law does not preclude the Respondent No.2 to transfer shares to its nominees, which were initially acquired by it as a company. The Bench has observed that in the present case Respondent No. 2 had nominated three persons to get elected as directors in the AGM





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and in this regard Qualification Shares were transferred vide its board's resolution dated April 25, 2014.

16. The Bench is of the view that the Respondent No.1 had failed to follow the requirements of Sections 77 and 78 of the Ordinance, which provide thirty days' time to the BOD, to decide the matter of share registration. The Bench has noted that Respondent No.2 submitted requests to register transfer of Qualification Shares on May 7 and 9 of 2014, therefore, the BOD had thirty days' time to decide the matter (till June 6 and 8 June of 2014, respectively). In view of the aforesaid, the Bench believes that issuance of SCN before expiry of thirty days has caused serious damage to the sanctity of the Impugned Order. The Bench has observed that matter of shares registration was never referred to the members and this fact has also been established by paragraph eleven of the Impugned Order wherein it has been stated that the Appellant's directors had refused Respondent No.2 requests to register Qualification Shares on June 10, 2014, therefore, in our view prior to June 10, 2014 filing of appeal under Section 78-A and issuance of SCN were without any legal right and jurisdiction.
17. The Bench has examined the Impugned Order, which contained a sole direction to register transfer of Qualification Shares, therefore, the Appellant's stance that the Impugned Order has made Sections 158, 160 and 160A of the Ordinance insignificant is without any substance. The Bench has already explained that the Appellant had thirty days' time to decide the matter of shares registration, therefore, issuance of SCN prior to expiry of said limitation has rendered the SCN proceedings and the Impugned Order as null and void.
18. The Appellant has raised certain questions of law in this Appeal. The Bench has already addressed all such questions in the preceding paragraphs of this Order, however, we want to reiterate here that by nominating natural persons to represent it on the BOD, Respondent No.2 has not superseded Articles 9 and 11 of the Appellant's AOA. Furthermore, the Bench has no doubt that corporate entities such as Respondent No.2, by transferring Qualification Shares to natural person, can be represented by such nominees on the BOD.
19. The Bench rejects the Appellant's Counsels argument whereby they have raised a question on the integrity of the SCN Proceedings. The Bench is of the view that additional evidence was neither called by the Bench nor necessary for just conclusion of this case, therefore, we will not consider



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the agreement dated June 20, 2007. Furthermore, it appears that during the SCN proceedings, the referred document was in possession of the Appellant, however, neither this document was mentioned nor produced. Furthermore, the Commission or the Bench has no jurisdiction to decide the matters of statutory compliance and rights on the basis of private agreements executed between the parties.

20. Notwithstanding hereinabove, the Bench rejects Respondent's No.2 plea that the Appellant had prevented it to participate in its meetings under section 162 of the Ordinance because the Company Secretary of the Respondent No.2 was advised by the Appellant vide letter dated May 27, 2014 to participate in the AGM under Section 162 of the Ordinance. The Bench is of the view that for representation of a company under Section 162 of the Ordinance, transfer of Qualification shares is also not required. The Bench has responded to this issue because it has been mentioned in the Impugned Order, however, findings of the Impugned Order are not relevant to Section 162 of the Ordinance.

21. In light of the above facts and circumstances, the Bench is of the view that registration of Qualification Shares was neither referred to the Appellant's members nor it was refused by the BOD before issuance of the SCN, therefore, the SCN proceedings including the Impugned Order were unwarranted and without jurisdiction. In view of the forgoing, while admitting this Appeal we hereby *set aside* the SCN and Impugned Order. The Order has been passed, without any order as to cost.

(Sadiah Khan)

Commissioner (SCD-S&ED, INS-SD, AML)

(Farrukh Hamid Sabzwari)

Commissioner (SCD-PRDD)

Announced on: **17 DEC 2020**