IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 579 of 2014

Plaintiffs:	**Mr. Asif Mannaan & others** **Through M/s. Jaffer Raza & Rabia Khan, Advocates.**
Defendants No. 1 to 9:	**Mr. Suleman Lallani & others** **Through Mr. Khalid Jawed Khan alongwith Mr. Umer Akhund and Hanif Kamal Alam.**
SECP:	**Through Mr. Imran Shamsi, Advocate.**

1. ***For hearing of CMA No. 4651/2014.***
2. ***For hearing of CMA No. 12391/2014.***
3. ***For hearing of CMA No. 588/2015.***
4. ***For hearing of CMA No. 13510/2015.***

Dates of hearing:	**16.04.2019,18.09.2019, 13.01.2020 & 03.02.2020.**
Date of order:	**16.04.2020**

O R D E R

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration, Injunction and Recovery, and the Plaintiffs seek the following reliefs: -

A. Declare that the acts and omissions of the Defendants are illegal, arbitrary, without jurisdiction and *mala fide.*

B. Declare that the Defendant Nos. 1 to 8 are managing the affairs of Defendant No.9 illegally and fraudulently and in a manner highly oppressive to the minority shareholders.

C. Declare that the payment of advisory fee to Defendant No.8 is illegal and unlawful.

D. Declare that the Defendant Nos. 1 to 8 have failed to discharge their fiduciary obligations towards the Defendant No.9.

E. Direct the Defendants No.1 to 8 to submit a copy of the Advisory Agreement dated 02.05.2005.

F. Direct the Defendant No.10 to investigate the affairs of Defendant No.9.

G. Remove the Defendant Nos. 1 to 8 as directors of Defendant No.9.

H. Direct the Defendant No.8 to return the amount of Rs. 424,944,000/- along with markup to Defendant No.9 as well as all illegally acquired remunerations.

I. Appoint a receiver to manage the affairs of Defendant No.9.

J. Cost of the Suit.

K. Any other relief this Hon'ble Court may deem fit in the circumstances of this case.

1. Application at Serial No.1 **(CMA No. 4651/2014)** has been filed seeking a restraining order against the defendants from placing Special Business Item No.4 before the shareholders for their approval in the 22nd Annual General Meeting which was supposed to be held on 9.4.2014. Application at Serial No.2 **(CMA No.12391/2014)** has been filed under Order 39 Rule 4 CPC on behalf of defendants No.1 and 9 for recalling/reviewing Order dated 18.09.2014, whereby, it was ordered that any decision taken in the meeting to be held on 19.9.2014 shall not be effective till 26.9.2014 when the matter is already fixed and shall be subject to further orders of the Court; (however, perusal of order dated 22.9.2014 reflects that order dated 18.9.2014 stands recalled); hence, this application has served its purpose. Application at Serial No.3 **(CMA No. 588/2015)** has been filed by the Plaintiffs under Section 151 CPC seeking directions against defendant No.8 to deposit the amount of Rs.430.944 Million received as advisory fee with the Court. Lastly, application at Serial No.4 **(CMA No.13510/2015)** again has been filed on behalf of the Plaintiffs seeking a restraining order against defendant No.10 from approving the issuance of right shares by defendant No.9.

2. Precise facts as stated appear to be that Plaintiffs are minority shareholders (claiming to be holding 1%, which is disputed by Defendants) in Defendant No.9 (Company in question) and are primarily aggrieved with payment of Rs.430.944 Million to Defendant No.8 as advisory fee and its post facto approval. Since admittedly the quantum of Plaintiff's shareholding is less than what is required to maintain a Company petition under the then Companies Ordinance 1984, and even under the Companies Act, 2017, instant Suit has been filed under the Ordinary Civil jurisdiction of this Court. Learned Counsel for the Plaintiffs has contended that they are shareholders in defendant No.9 and for the present purposes have brought this Suit to challenge the conduct and manner, in which defendant No.8 has been paid a very exorbitant advisory fee of Rs.430.944 Million. According to him defendant No.8 is already being paid a substantial amount of Rs.9.0 Million per anum as advisory fee pursuant to Agreement dated 2.5.2005 with defendant No.9; however, in addition to this, the advisory fee as above has been paid without following the due process as contemplated under the Companies Ordinance, 1984. Per learned Counsel though the Plaintiffs are minority shareholders having around 1% shareholding; but at the same time, it is the fiduciary duty of defendants No.1 to 8 being Directors and majority shareholders, to act in the interest of the Company i.e. defendant No.9. Per learned Counsel if the directors of the Company itself are beneficiaries of such a transaction; then it is fraud with the ordinary shareholders and cannot be approved of. According to him, first the advisory fee in

question was paid without any approval of the members and shareholders; and thereafter, a *post facto* approval was being obtained through a general meeting, which is impermissible and is against the law. Learned Counsel has referred to Section 160 of the Companies Ordinance, 1984 and in response to the objection regarding maintainability of the Suit, has contended that a Civil Suit against the defendants is maintainable as the transaction alleged falls within the exception to the rule settled in the case of [**Foss v Harbottle (1843) 67 ER 189**]. Per learned Counsel, the alleged transaction has caused a tremendous loss to the Company in question and as a consequence thereof, the shareholders have lost substantial amount of their money, and therefore, the present Suit in the form of a derivative action is competent. According to him the purported advisory fee has been paid for certain transactions, whereby, shares of a Company namely Pakistan International Container Terminal Limited ("**PICT**") were firstly bought, and then sold; but for that no advisory fee is supposed to be paid, for the fact that defendant No.8 was already charging a heavy consultancy fee from the Company. He has also referred to inspection report of SECP dated 2.1.2014 and has submitted that despite an adverse report, no action has been taken. Per learned Counsel it is the case of the Plaintiffs that pursuant to the Agreement between defendants No.8 & 9, the transaction in question was fully covered by the said Agreement, and therefore, no further amount was required to be paid for the transaction in question. He has contended that it is a case of fraud, which is apparent from a mere examination of the transaction in question, whereas, the directors of the Company are apparently in breach of their fiduciary duty; hence a case for injunctive relief is made out. According to him, the Plaintiffs have also filed an application for restraining the defendants from giving effect to the transaction in question and in the alternative, so also for deposit of the amount received as advisory fee before the Nazir of this Court pending final trial of the Suit. He has argued that since the meeting in question has already been held pursuant to order dated 9.4.2014, whereby, the said approval is subject to further orders of this Court, for the present moment, the Plaintiffs are pressing upon their application for deposit of the amount received by Defendant No.8 from the Company with the Nazir of this Court till final adjudication of the Suit. This according to him, would be in the interest of all including the Company. In support he has relied upon the cases reported as ***Syed Amir Hussain Shah v. Progressive Papers Ltd. and others*** **(PLD 1969 Lahore 615)**, ***Naveed Textile Mills Ltd., Karachi and 3 others v. Central Cotton Mills Limited, S.I.T.E. Kotri district Dadu and 2 others*** **(PLD 1997 Karachi 432)**, ***Nizam Hashwani v. Hashwani Hotels Limited and 14 others*** **(1999 CLC 1989)**, ***Kohinoor Raiwind Mills Limited through Chief Executive v. Kohinoor Gujar Khan Mills and others*** **(2002 CLD 1314)**, ***Muhammad Suleman Kanjiani and 3 others v. Dadex Eternit Ltd. through Chief Executive and 4 others*** **(2009 CLD 1687)**, **Babri Cotton Mills Ltd.**

(2009 CLD 541), ***Mst. Sakina Khatoon and 6 others v. S.S. Nazir Ahsan and 17 others*** **(2010 CLD 963)**, ***Golden Arrow Selected Stock Funds Ltd. and another v. Clariant Pakistan Ltd. and 9 others*** **(PLD 2016 Sindh 50)**, ***Foss vs Harbottle*** **(1843) 67 ER 189**, **Re Lee, Behrens & Co, Ltd. [1932] All ER Rep 889**, ***Edwards and another vs Halliwell and others*** **[1950] 2 All ER 1064** and ***Re Halt Garage (1964) Ltd.*** **[1982] 3 All ER 1016.**

3. On the other hand, learned Counsel for the Company and private defendants has contended that the only grievance of the Plaintiffs is the payment of advisory fee, which according to them is exorbitant in nature; however, the Plaintiffs held less than 1% of the shareholding when this Suit was filed, which now stands reduced to 0.14%, and cannot successfully bring a Suit of this nature. According to him, the Companies Ordinance, 1984 or for that matter the Companies Act, 2017 as presently applicable, provides a complete mechanism for redressal of the grievance of the shareholders and for that it is mandatory that the shareholding must be equal to or more than 10% of the total shares of the Company; hence the Plaintiffs are apparently disqualified in law to bring about such an action, and have therefore filed a Civil Suit seeking the relief, which otherwise is not available to them under the Company Law. Per learned Counsel, when the legislature has put in a condition for maintaining an action against the Company, then the option of availing the ordinary remedy under the Civil Jurisdiction of this Court is barred. Learned Counsel has also referred to the inspection report of SECP as well as the conclusion drawn by it and has contended that there is no adverse finding; nor any proceedings are pending insofar as defendant No.9/Company is concerned. Per learned Counsel, the defendants have acted in accordance with law and payment of advisory fee was placed in the 22nd Annual General Meeting of the shareholders as directed by SECP and was duly approved by a thumping majority, which was then submitted before SECP to their satisfaction. He has further contended that once SECP has accepted the transaction, the matter ends, as the mandate of law has been duly fulfilled and complied with; therefore, no case for any injunctive relief is made out. Per learned Counsel the Plaintiffs have no locus-standi to institute the present Suit, which otherwise is aimed and brought to blackmail and pressurize the defendants by certain vested interests / adversaries, whereas, no statutory violation has been committed by the defendants. According to him in such matters, it is the majority of the shareholders, who run the Company and decide/ratify such decisions, which, in the instant case, has been approved by them; therefore, the Plaintiffs have failed to make out a prima-facie case. Lastly, he has contended that defendant No.9 has made huge profits from the efforts of defendant No.8 and has been paid advisory fee accordingly. In support of his contention he has relied upon the case of ***Muhammad Suleman***

Kanjiani and 3 others v. Dadex Eternit Ltd. through Chief Executive and 4 others **(2009 CLD 1687).**

4. Learned Counsel appearing on behalf of SECP has contended that pursuant to a complaint dated 08.04.2013, an inspection of the Company's affairs was ordered and vide report dated 02.01.2014, some irregularities were pointed out in holding meetings and thereafter the Company was asked to seek a fresh approval of the shareholders in the forthcoming Annual General Meeting; which though has been obtained, but due to pendency of this Suit and order passed on 09.04.2014; SECP has not yet taken any final decision. Per learned Counsel, now it is for the Court to issue any directions to SECP which will be followed accordingly.

5. While exercising his right of rebuttal, learned Counsel has contended that Plaintiffs have locus-standi to file instant Suit, as according to them the transaction in question is covered by the Advisory Agreement already existing between defendants No.8 & 9; hence, payment of this exorbitant advisory fee is in violation of the Agreement, and therefore, this Suit is competent as a derivate action by the shareholders. He has lastly contended that SECP has pointed out various violations and appropriate action has to be taken in accordance with the Companies Ordinance, 1984 or the Companies Act, 2017.

6. I have heard all the learned Counsel and perused the record. For the purposes of deciding the listed applications, the brief facts as narrated are that Plaintiffs being minority shareholders are aggrieved by payment of advisory fee of Rs.430.944 Million to Defendant No.8 by the Company, and its post facto approval in the Annual General Meeting supposed to be held on 9.4.2014, which as of now stands concluded. They have filed this Suit on 9.4.2014 and on that very date, as an ad-interim measure, the meeting was allowed to be conducted; however, approval of agenda item No.4 regarding this issue, was to be effective subject to further orders of this Court. Thereafter, perhaps for the reason that since payment had already been made to Defendant No.8, the Plaintiffs filed another application **(CMA No. 588/2015)** listed at Serial No.3 in 2015, seeking directions against Defendant No.8 to deposit the same with the Nazir of this Court. In essence, the Plaintiffs' Counsel has pressed upon this application only. It appears that the Plaintiffs in question are though shareholders of defendant No.9; but their shareholding is less than or around 1% as claimed in the plaint. As of today, as per the averments of Defendants, including SECP, it is 0.14%, and therefore, under the Company Law, they do not qualify to bring or challenge the transaction in question as for that a minimum 10% shareholding is required. In that case, apparently as one could say, they also appear to be disqualified so as to even bring about a Civil Suit competently, under the ordinary Civil Jurisdiction of this Court. However, there is an

exception to this rule being followed by the Courts in the Sub-continent famously known as the rule of exception of **Foss v. Harbottle.** This rule of exception is though consistently being followed by the Courts of Sub-continent including our Courts; however, it is also pertinent to note that since inception of this rule, all along, the laws with regard to the Companies, have also changed. So in all fairness, whether this rule is still to be followed strictly by this Court is unclear and remains debatable. However, in Pakistan (and, so it would appear, in India as well) the judicially evolved rule and its exception continues to apply[1]. For the present purposes, I would say that since this point has not been argued; nor this Court has been assisted on it, I leave it open, with the observation that it shall be dealt with as and when it is brought before the Court. Nonetheless, for the present purposes, I proceed further with the assumption that this exception rule still applies and examine whether the Plaintiff's Suit is one of it or not. From examination of various precedents, cited by the Plaintiff's Counsel, or otherwise available, it is noted that the Courts have, depending upon the facts and circumstances of a particular case, entertained Civil Suits, under its ordinary jurisdiction, if the Plaintiff can satisfy that his grievance falls within the exception to the rule as settled in the case of **Foss v. Harbottle.** This exception is also commonly known as a derivative action. The said rule is that where what has been done amounts to fraud and the wrongdoers are themselves in control of the Company it is relaxed in favour of the aggrieved minority, who are allowed to bring an action on behalf of themselves and others. And the reason for this is, that if they were denied their right, their grievance could never reach the Court because the wrongdoers themselves, being in control, would not allow the Company to come before the Court and sue the wrongdoers. However, even if it is assumed that the Plaintiffs have been successful and their case falls within the exception to the subject rule, the test for granting of an injunctive relief will still have to be fulfilled, notwithstanding this successful attempt. All three ingredients for grant of an injunctive relief must be present before any injunction orders could be passed in their favour. In this matter, three applications have been filed by the Plaintiffs and primarily the learned Counsel for the Plaintiff has pressed upon **CMA No. 588/2015** filed under Section 151 of Civil Procedure Code (**CPC**) through which it has been prayed to direct defendant No.8 to deposit the amount of advisory fee received by him from defendant No.9 before the Nazir of this Court. In fact, the other two applications of the Plaintiffs have now become infructuous or are of no relevance for the present purposes, in that, the Meeting in question has already been held, and the approval, has also been obtained, though post facto. As to the application being pressed upon, at the very outset, it may be noted that an application under Section 151 CPC seeking such a relief, is out of context and is not to be entertained under this provision

[1] Golden Arrow Selected Stock Funds Limited v Clariant Pakistan Limited (PLD 2016 Sindh 50)

of Civil Procedure Code. The relief being sought through this application is kind of a mandatory injunction; or a direction; or one may call it an application in the nature of attachment before judgment. However, by whatever context it is examined, at least it cannot be granted under Section 151 CPC, by exercising inherent jurisdiction of this Court. It is settled law, that if there is an appropriate or specific provision available for a relief being claimed under CPC; not every now and then, the said relief can as a matter of right, or for that matter in the interest of justice, has to be granted and entertained necessarily under s.151 CPC. The Code of Civil Procedure is undoubtedly not exhaustive; it does not lay down rules for guidance in respect of all situations nor does it seek to provide rules for decision of all conceivable cases which may arise. The Civil Courts are authorized to pass such orders as may be necessary for the ends of justice, or to prevent abuse of the process of court, but where an express provision is made to meet a particular situation the Code must be observed, and departure therefrom is not permissible. Inherent jurisdiction of the court to make order ex debito justitiae is undoubtedly affirmed by s. 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive[2]. The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intention of the Legislature. Inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code[3]. Inherent jurisdiction of the court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words, the court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further the power under Section 151 of the Code cannot be exercised as an appellate power[4].

7. Nonetheless, even if this is an application for a mandatory injunction or for that matter an application for attachment before judgment; the Plaintiffs have not been able to make out a prima-facie case nor balance of convenience lies in their favour. Such an application is rarely granted in like matters, and for that the averments / allegations, at a bare minimum are required to be so convincing that the Court can consider them to be

[2] Bahadur Rao Raja Seth Hiralal MANU/SC/0056/1961
[3] Subho Ram Kalita v Dharmeswar Das Koch (AIR 1987 GAU 73)
[4] Nain Singh vs. Koonwarjee and Ors (AIR 1970 SC 997)

prima facie in nature. It is settled law that a relief of attachment before judgment, otherwise is definitely a very harsh order to be made against a particular defendant. In granting such relief the Court has to be satisfied that plaintiff's case is of a prima facie nature, based on an unimpeachable averment / claim in the plaint, and Court must have reasons to believe on the basis of material before it, that unless jurisdiction is exercised and orders as solicited are not passed, there is a real danger that defendant may remove itself from the territorial jurisdiction of the Court and an intent to avoid passing of a decree must be clearly shown with reasonable clarity. In this Suit, the Plaintiffs' case is, that the Agreement in question between defendants No.8 and 9, for which an annual remuneration was being paid; covers the transaction in question. It is their case that in that situation, no additional advisory fee ought to have been paid. Now this question insofar as the case of the Plaintiffs pleaded before the Court on the basis of material available on record, cannot be decided without leading evidence by the respective parties. There is nothing on record, prima facie, so as to remotely suggest that the transaction in question is specifically covered by the Agreement referred to. It is a matter of fact that the advisory fee has already been paid, even before the institution of this Suit, whereas, no restraining orders to that effect are in field. Moreover, the Plaintiffs never approached this Court timely, and instead lodged a complaint before SECP. The only order, which is in field is to the extent that the approval of Special Agenda Item No.4 of the meeting held on 19.04.2014 would be subject to further orders of the Court. It is also a matter of fact that on the objection of SECP, whereby, certain irregularities were pointed out in this regard, subsequently Annual General Meeting was conducted with their permission and consent so as to regularize the defect, if any, and the payment of advisory fee has been approved and ratified by the majority of shareholders; hence, for the present purposes, and while deciding the listed applications of the Plaintiffs, there cannot be any exception to that transaction. As to the irregularity as alleged, if any, it was always open for SECP to act in accordance with law, whereas, they have allowed the Company to hold another meeting and seek approval. Such meeting has been held, whereas, approval has been obtained; hence, apparently, nothing more is to be done by SECP as of now.

8. As to the case law relied upon by the learned Counsel for the Plaintiffs, it may be observed that insofar as the cases of English jurisdiction are concerned, notwithstanding the importance we in the sub-continent attach to them, they are always persuasive in nature and are not a binding precedent ipso-facto. And more so when the law relied upon is not pari-materia in essential terms. Keeping this aspect aside, since the entire edifice of the arguments by the Plaintiff's Counsel was on the rule and its exception as settled in **Foss v. Harbottle;** let us now see what in essence is the dicta laid down and the rule of exception is. This was a Suit brought by two shareholders

before the Chancery Division of the High Court against the Directors and some others, alleging that the Directors, as Directors, had bought for an excessive price certain lands from themselves as private individuals, and, to find money for the purchase, had mortgaged the Company's property in a manner unauthorized by the Act of Incorporation. Directors took an objection that an individual shareholder could not sue, and the learned Vice-Chancellor, while conceding that in certain circumstances a Suit might properly be so framed, held that this was not such a case. It was held that the injury alleged was an injury to the Corporation as a whole, inflicted upon it, as a *cestui que trust*, by its trustees, and it was for the Corporation to deal with it. The purchase was not void but only voidable, and if the Corporation should choose to ratify it no individual shareholder could resist such action. (apparently the facts of this case are alike, and on that score, any reliance placed on it by the Plaintiffs' Counsel demolishes its own case). It was held that "*The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to show that the frame of this suit cannot be sustained whilst that body retains its functions*". The principles on which this case was decided were thus that there was no infringement of the individual rights of a shareholder, only a possible injury to the Company as a corporate body; and secondly, since it would lie with the Company to ratify it must also lie with it to challenge, whether by Suit or otherwise. The same principles were applied by Lord Cottenham, L.C., in ***Mosley v. Alston*** **(1847) 41 E.R. 833** where two shareholders complained of the omission of the twelve Directors to ballot out four of their number, in order that four others might be elected in their stead.

9. In fact, before the exception rule, it is the rule of majority which has been laid down by the Court. It says that If the alleged wrong can be confirmed or ratified by a simple majority of members in a general meeting, then the court will not interfere. If further lays down that the proper plaintiff is the Company itself inasmuch as any action in which a wrong is alleged to have been done to a Company, the proper claimant is the Company itself. And the rationale behind the rule refers to two different linked propositions of law; (a) *the Court will not intervene in case of internal irregularities;* and (b) *in case of alleged wrong the Company can be the only Plaintiff first*. And then it goes on to formulate the exceptions to this rule and i.e. (i) a derivative action by virtue of which the minority shareholders can bring a claim of the alleged wrong done to the Company; (ii) when the act complained of is against the memorandum of the Company; (iii) when the person against whom the relief is sought is himself in control, the rule of majority supremacy in not applicable; (iv) when the act is not for the benefit of the Company and discriminates between majority and minority shareholders, the action initiated at the behest of minority is valid; (v) when the minority shareholder had no

adequate notice of meeting in which a decision had been taken against it / him; and (vi) where a resolution requiring special majority is actually passed by simple majority.

10. I need not go on to state that I have not been assisted in any manner by the learned Counsel for the Plaintiffs as to which exception as above is applicable in this case. It was only referred to as an exception rule to the very maintainability of a Civil Suit against a Company, without the Company being joined as a Plaintiff. However, on my own, and with the pleadings so placed before the Court; I have labored myself on this. And perhaps the Plaintiffs case is either; that the person against whom the relief is sought is himself in control, and therefore, rule of majority supremacy in not applicable and the Suit is otherwise competent. And secondly, since the act is not for the benefit of the Company and discriminates between majority and minority shareholders, the action initiated at the behest of minority is valid. Even if this is so, does it entitles the Plaintiff to get an injunction straight away. To this my answer is in a big 'No'. First, it needs to be appreciated that when the Plaintiffs came before the Court, they had already exhausted remedy before SECP, and pursuant to their complaint some action was initiated against the Company in question. And finally, SECP asked the Company to get the transaction approved once again in the next Annual General Meeting from the shareholders. If one goes through the written statement of SECP it reflects that they had received a complaint from shareholders as well as through media about the transaction. It is further stated that review of annual audited accounts for the year ended 2012, revealed at note 26.4 that payment of 442.944 Million (Rs.12.0 Million in 2011) was made to Defendant No.8 as advisory fee in respect of signing share purchase agreement with ICTSI Mauritius Limited whereby, Defendant No.9 sold 13 Million shares of PICT at a rate of Rs.150/share and an explanation was called; in response to which a detailed reply was submitted by the Company on 8.4.2013; however, being dissatisfied an inspection order was passed on 8.4.2013 under s.231 of the Companies Ordinance, 1984. A report was furnished by the inspectors on 2.1.2014, with which the Company was confronted in terms of s.269(2) ibid; and response was submitted on 4.2.2014. Now one thing is clear and of which one must take note of is, that in this interregnum, the Plaintiffs never approached this Court and were perhaps satisfied with the action initiated by SECP. At least this is what one can infer from the record tentatively. Secondly, the Company, without prejudice, replied and agreed to take approval of this transaction from the Board of Directors for its placement before the shareholders in the next Annual General Meeting, and admittedly, through this meeting held on 9.4.2014, approval has been given by 66% members of the Company. Now one fails to understand, as to why the Plaintiffs were not advised to approach this Court earlier. Even the Court could have been approached with a derivative action, it at all, immediately upon issuance of notice of such meeting, though being held with the

concurrence of the regulator. But they chose to come only on the day of the meeting, and the Court rightly, instead of suspending the meeting and the agenda item for this transaction, gave a go ahead to seek approval, which naturally, would be subject to further orders. Now on this test, the Plaintiffs, even if their action is held to be maintainable under the exception rule, which I seriously doubt, are not entitled to the relief of injunction, which is equally dependent on the conduct of the parties. And as said earlier, the application for deposit of the amount in question with the Nazir of this Court by Defendant No.8, does not seems to be appropriate, if the test of such an application is having any regard to an attachment application under Order XXXVIII CPC. No ingredients of such an action have been either highlighted in this matter; nor any supporting argument or material has been shown or advanced while arguing this application in question. In fact, the provisions regulating attachment before judgment under CPC in a case like this are not to guarantee the plaintiff availability of an asset to satisfy the decree which ultimately would be passed; but to ensure, non abusing of process of Court by a defendant. Moreover, it is not the case of the plaintiff that the defendant in order to frustrate the decree which may ultimately be passed in this Suit, is running away or for that matter, is selling its assets. In fact, there appears to be no such real danger in hand in this case. And these ingredients I am afraid are completely lacking in the plaintiff's case as placed before this Court. It is also a settled law that order of this nature definitely burdens the defendant for a variety of reasons, and if there is any ambiguity or doubt in the case of the plaintiff, then such benefit of doubt must go in favor of the said defendant[5]. A mere mention of the words "recovery" in the title of Suit and a corresponding prayer to that effect, does not, in any manner entitles for grant of such a prayer sought through this application.

11. Moreover, and even otherwise, considering the fact that the Plaintiffs hold only 1% (or 0.14% or equivalent shareholding, as the case may be) could not muster any further support in failing the resolution and post facto approval of the transaction in question in the meeting held on 9.4.2014; in my view does not pass the test of grant of an injunctive relief in their favor as they do not have a prima facie case. As noted earlier, their shareholding is much below the minimum shareholding of the 10% required to take recourse to the special provisions of the Company Law in respect of any grievance against the Company. Therefore, it is but natural that they are not in a position to make any complaint to this effect; but despite this, SECP has already taken an action. The special law has provided a mechanism as to how a Company is to be run and how the management can make decisions with Board Meetings, shareholders meetings and the minimum requirement of voting. In that case it would not be appropriate to keep the Company hostage on the whims and desire of the Plaintiffs. The method and procedure

[5] KASB Corporation Limited v Bank Islami Pakistan Limited (2019 YLR 345)

of Corporate Governance are provided under the Company Law and the rules made thereunder, and if this is allowed in the manner as pleaded by the Plaintiffs, then no Company would ever be in a position to run and manage its affairs as it is only the members and the minimum requirement of shareholding which enables the Company to smoothly run its affairs. For the sake of arguments, even if it is assumed that initially no meeting was held as contended and no approval was sought or resolution was ever passed; which in fact has now been done with the permission of the regulator; would that allow the Plaintiffs to overrule this approval with a maximum of 1% of the shareholding. The answer would be a definite "No". Therefore, even otherwise, no case for an injunctive relief is made out. It appears that the subsequent meeting held with the consent of SECP fulfills the criteria and has followed the requirements of section 160 of the Companies Ordinance, 1984. In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitle to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes[6]. The rule in **Foss v Harbottle** also embraces a related principle, that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs provided that the irregularity is one which can be cured by a vote of the company in general meeting[7].

12. In the case reported as ***Prudential Assurance Co Ltd v. Newman Industries Ltd and others*** **[1980] 2 All ER 841** and **[1981] 1 Ch. 257**, it was held by the Chancery Division that *a shareholder was entitled to prosecute an action on behalf of the company if the interest of justice do require that a minority action should be permitted*. This matter went into appeal and the case is reported as ***Prudential Assurance Co Ltd v. Newman Industries Ltd and others (No.2)*** **[1982] 1 All ER 354.** The Court of Appeal did not appreciate such findings. Firstly, it was never a rule of exception in **Foss v Harbottle**. Secondly, if that be the case, then in each such category of cases, it would apply leaving aside the stringent exception rule of **Foss v Harbottle,** followed since long by Courts. The present Plaintiffs case at best, could be that payment of advisory fee by the Company could have led to diminution in their dividend income. That is the maximum they can suffer and agitate. The Court of Appeal also dealt with this issue and held that a shareholder cannot recover a sum equal to diminution in the market value of his share, or equal to the likely diminution in dividend, because such a loss is merely a reflection of the loss suffered by the Company, whereas, the shareholder does not suffer

[6] Macdougall v Gardiner [1875] 1 Ch.D.13 (L. J. Mellish)
[7] Prudential Assurance Co Ltd v. Newman Industries Ltd and others [1982] 1 All ER 354

any personal loss. In fact, his only loss is through the Company, in the diminution in the value of the net assets of the Company, in which the Plaintiffs as in this case, as of today have only 0.14% shareholding. It was further held that such shares are merely a right of participation in the Company on the terms of the Articles of Association read with the law and the regulations in force. The shares themselves, i.e. the right to participate is not directly affected by the alleged wrongdoing. The relevant finding(s) [highlighted] in respect of the above by the Court of Appeal reads as under;

(at pg:364)

> "It is commonly said that an exception to the rule in *Foss v Harbottle* arises if the corporation is 'controlled' by persons implicated in the fraud complained of, who will not permit the name of the company to be used as plaintiffs in the suit: see *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 at 482. But this proposition leaves two questions at large. First, what is meant by 'control', which embraces a broad spectrum extending from an overall absolute majority of votes at one end to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy. Second, what course is to be taken by the court if, as happened in *Foss v Harbottle,* in the *East Pant Du* case and in the instant case, but did not happen in *Atwool v Merryweather*, the court is confronted by a motion on the part of the delinquent or by the company seeking to strike out the action? *For at the time of the application the existence of the fraud is unproved. It is at this point that a dilemma emerges. If, on such an application, the plaintiff can require the court to assume as a fact every allegation in the statement of claim, as in a true demurrer, the plaintiff will be frequently be able to outmanoeuvre the primary purpose of the rule in Foss v Harbottle by alleging fraud and 'control' by the fraudster. If on the other hand the plaintiff has to prove fraud and 'control' before he can establish his title to prosecute his action, then the action may need to be fought to a conclusion before the court can decide whether or not the plaintiff should be permitted to prosecute it. In the latter case the purpose of the rule in Foss v Harbottle disappears. Either the fraud has not been proved, so cadit quaestio; or the fraud has been proved and the delinquent is accountable unless there is a valid decision of the board or a valid decision of the company in general meeting, reached without impropriety or unfairness, to condone the fraud*.

(pg:366)

> So much for the summons of 10 May. *The second observation which we wish to make is merely a comment on the judge's decision that there is an exception to the rule in Foss v Harbottle whenever the justice of the case so requires. We are not convinced that this is a practical test, particularly if it involves a full-dress trial before the test is applied. On the other hand, we do not think that the right to bring a derivative action should be decided as a preliminary issue on the hypothesis that all the allegations in the statement of claim of 'fraud' and 'control' are facts, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v Harbottle.* On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a

meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting.

(pp:366-367)

In our judgment the personal claim is misconceived. It is of course correct, as the judge found and Mr. Bartlett did not dispute, that he and Mr. Laughton, in advising the shareholders to support the resolution approving the agreement, owned the shareholders a duty to give such advice in good faith and not fraudulently. It is also correct that, if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; *this might include the expense of attending the meeting, but what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot be recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely right of participation in the company on the terms of the article of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property*. The deceit practiced on the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £ 100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £ 100,000 to nil. There are two wrongs, the deceit practiced on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely as step in the robbery. The plaintiff obviously cannot recover personally some £ 100,000 damages in addition to the £ 100,000 damages recoverable by the company.

(pg:367)

The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action as a means of circumventing the rule in *Foss v Harbottle*. The plaintiffs succeeded. A personal action would subvert the rule in Foss *v Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liabilities and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. *No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company*

observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration. In this case it is neither necessary nor desirable to draw any general conclusions."

13. In view of hereinabove facts and circumstances of this case, I am of the view that the Plaintiffs have not been able to convince this Court that their case as set-up for the purposes of interim relief, (at least), would fall within the exception to rule laid down in **Foss v Harbottle**; rather, on facts it is covered by the said judgment; hence, the applications filed on behalf of the Plaintiffs at Serial No. 1, 3 & 4 **(CMA Nos.4651/2014, 588/2015 and 13510/2015)** are hereby dismissed, whereas, the application filed by defendants No.1 & 9 **(CMA No. 12391/2014)** for recalling of Order dated 18.09.2014 has since been allowed after passing of Order dated 22.09.2014; and is therefore, disposed of accordingly.

Dated: 16.04.2020

J U D G E

Ayaz P.s.