

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Suits No. 318 of 2023
Muhammad Ayub Tareen & others
Versus
JS Bank Limited & others

AND

Suit No. 674 of 2023
Osama Yunus & others
Versus
JS Bank Limited & others

Date	Order with signature of Judge
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For hearing of injunction applications
(CMA No.3782/2023 in Suit No.318 of 2023 and CMA No.7244/2023 in Suit No.674 of 2023)

Dates of hearing: 19.06.2023, 20.06.2023 and 21.06.2023

Mr. Salman Akram Raja assisted by Mr. Basil Nabi Mallik along with M/s. Bilal Ahmed Khan and Kehar Khan Hyder for plaintiffs.

Mr. Khalid Jawed Khan along with Mr. Umer Akhund for defendants No.1 and 2.

Mr. Shahan Karimi for defendant No.3.

Mr. S. Mustafa Ali along with Dr. Atifuddin for defendant No.5/
State Bank of Pakistan along with Shahbaz Shahid, Joint Director
State Bank of Pakistan.

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Muhammad Shafi Siddiqui, J.- Plaintiffs in these suits have challenged the acquisition of decisive percentage of shareholding in defendant No.3 i.e. Bank Islami Pakistan Ltd/BIPL by J.S. Bank. The plaintiffs sought an injunctive order to restrain J.S. Bank and/or purported JS Group, from acquiring majority shareholding in defendant No.3 through listed injunction applications, which are being decided through this common order as being based on similar facts and law.

2. Precise issue as such is whether provisions of Banking companies Ordinance, 1962 (BCO) read with relevant IBD`s Circular/s would restrict

J.S. Bank from acquiring such decisive shareholding in Bank Islami Pakistan Ltd.

3. For the purpose of convenience index abbreviations as used are as under:-

IBD Circular	= Islamic Banking Department Circulars
JSCL	= Jahangir Siddiqui & Co. Ltd
BIPL	= BankIslami Pakistan Limited
NBD	= National Bank of Dubai
SBP	= State Bank of Pakistan
BCO	= Banking Companies Ordinance, 1962
SA	= Securities Act, 2015
SECP	= Securities & Exchange Commission of Pakistan
PES	= Pakistan Stock Exchange

4. Brief facts as could be deduced from case file and arguments raised are that an entity namely Jahangir Siddiqui & Co., Ltd (JSCL) being one of the founding member of Bank Islami owned 21.26% shareholding by 31.12.2021 in BIPL whereas it (JSCL) owns 75.02% shares of J.S. Bank Ltd.

5. Facts disclosed that on 6.10.2022 BIPL made a public disclosure that its regulator SBP, has granted approval to J.S. Bank to acquire 7.79% shareholding from Emirates NBD being another founding shareholder of BIPL and was to be given effect on 10.11.2022. This is followed by a public announcement made on 15.11.2022 to acquire 51% share in BIPL by JS Bank. Plaintiffs acquired shares of BIPL on 01.02.2023 and filed suits on 06.03.2023 and 11.05.2023 respectively.

6. This event of acquiring shares is opposed by plaintiffs being holders of negligible number of shares in BILP i.e. < 0.36%, acquired subsequent to above announcement by JS Bank, even after taking into

accounts shares of some individuals of plaintiff No.4, which individuals are not party to the proceedings.

7. Case of Mr. Salman Akram Raja, learned counsel for plaintiff is that Section 23 of the BCO 1962 and IBD Circular No.2/04 and Circular No.4/20 does not figure out and/or conceive an idea of acquisition of shares in/off an already existing banking company (be it within frame of exception to Section 23(1)), as being, and/or to form, a subsidiary company.

8. He attempted to interpret the provision of Section 23 ibid in a way that no banking company can be formed unless such banking company is being formed afresh to fulfill one of the purpose mentioned in the exceptions provided. He emphasized on the use of the word `form` which, per counsel disclosed the intention of legislature to only allow creation/establishment of newly incorporated subsidiary as against acquisition of shares of an already existing company, within exceptions of Section 23(1) of BCO, 1962.

9. He placed his reliance on the interpretation made by SBP on the basis of IBD Circular 2/2004 which encompasses detailed criteria for `setting up` of Islamic Banking subsidiaries by existing commercial banks.

10. He argued that use of the word `form` in Section 23 of BCO is indicative of the fact that both the circulars of 2004 and 2020 uses the phrase `setting up` or `establish` which is at par with form(ed). He relied upon Pakistan Tobacco¹ which interpreted the word `set up` as start and begin.

11. Similarly reliance is placed on the case of Multan Educational Trust² to support above contention.

¹ 1991 PTD 359 at 373 (Pakistan Tobacco Co. Ltd. v. Pakistan & 4 others)

² 2014 Lahore 57 at 60 (Multan Educational Trust v. Commissioner Inland Revenue)

12. He argued that since the intent of legislature in describing the above phrases is known to regulator, SBP used the term acquisition in other circulars³ (made available) as distinct from the term establish or form. Hence, purposeful omission of the word acquisition, as argued, has to be noted by courts in IBD Circular 4/2020. Same is the case when licensing and regulatory framework for digital banks was prescribed, as emphasized.

13. He argued that the omission of the word acquisition in Section 23 has to be given meaning in consideration of regulators' interpretation vide different circulars referred.

14. He relied upon basic rule of interpretation that unless it is essentially required to streamline absurdity, plain meaning should be given effect and relied upon Chevron⁴.

15. Without conceding to the above, he next argued that group restriction and fit and proper test requirement bars JS group from taking over a second bank. He considers JS Bank and JSCL as a group to apply restriction highlighted in the law.

16. Last he emphasized on the *locus standi* of plaintiffs who were accused of acquiring shares after the public announcement of JS Bank for acquiring BIPL 51% shares. He argued that just because the shares were purchased after the announcement, it alone will not oust the plaintiffs from exhausting the jurisdiction.

17. Being minority shareholder he claimed a lawful treatment in terms of President National Bank⁵. He submits that quantum, magnitude and timing of acquiring shares have nothing to do with approaching the court for redressal of their grievances as discussed in the case of

³ Clause 13 (II)(A) of F.E. Circular No.1 dated 10.2.2021

⁴ 468 US 837 (1984)(SC) at 842-844 (Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.)

⁵ 2023 SCMR 766[Para 5] (President National Bank of Pakistan v. Waqas Ahmed Khan)

Kohinoor Raiwind Mills Ltd. by learned Single Judge of Lahore High Court⁶ followed by learned Division Bench of Lahore High Court⁷ (in appeal against the order of learned Single Judge) and in the case of Muhammad Yasin Fecto⁸. He did not dispute the date of acquiring shares by plaintiffs.

18. In reply, Mr. Khalid Jawed Khan initially argued that plaintiffs do not have courage to explain the reasoning of buying and acquiring shares from the market despite public announcement of JS Bank for acquiring shares but only relied upon the argument that this act alone would not deprive plaintiffs from availing jurisdiction. He however submitted that principles governing injunction application as to shares being acquired by the plaintiffs in BIPL subsequent to public announcement have different application altogether. He gave some figures of shareholding in BIPL at the relevant time which is as under:

JS Bank	7.79%
JSL	21.26%
Randeree Family	19.48%
Sumya Builders & Developers	<u>1.71%</u>
Total	<u>50.23%</u>
Remaining others including public at large	49.77%

19. He submits that in terms of Section 111 of Securities Act, 2015, read with the Listed Companies (Substantial Acquisition of Voting Shares and Take-over) Regulation, 2017, JS Bank must acquire 50% of the remaining 49.77% i.e. 24.88 shares to complete the transaction.

20. He demonstrates the acquisition of shares was followed by swap ratio which swap ratio was not argued by Mr. Raja. He objected to the

⁶ 2002 CLD 1314 (Kohinoor Raiwind Mills Limited v. Kohinoor Gujar Khan Mills) Paras 11, 14, 43

⁷ 2002 CLD 1747 (Kohinoor Raiwind Mills Limited v. Kohinoor Gujar Khan Mills)

⁸ 1998 CLC 237[245] (Muhammad Yasin Fecto v. Muhammad Raza Fecto)

application of IBD Circular 2/2004 as has been superseded by IBD Circular 4/2020.

21. Mr. Mustafa Ali Advocate, appearing for State Bank of Pakistan submitted that no relief is sought against SBP including interim relief. He supported the case of JS Bank for acquisition of shares, as approved by SBP and submitted that the interpretation provided by plaintiffs is not at all acceptable if Section 23 is read altogether. Plaintiff's interpretation, if applied would collapse the entire edifice of lawful understanding and intention of legislature in relation to Section 23 of BCO 1962. He provided a meaning understanding of law i.e. Section 23 ibid does not provide any absurdity.

22. I have heard the learned counsel for parties and perused the record.

23. Plaintiffs No.1 to 3 in Suit No.318 of 2023 (plaintiff No.4 is not a shareholder itself) and plaintiffs No.1 to 3 in Suit No.674 of 2023 purchased very small quantity of shares on 01.02.2023 i.e. after public announcement so as to file title suits. Causes disclosed in the plaint were of prior to public announcements made by JS Bank. Plaint itself shows that:

- i) on 15.11.2022 JS Bank made announcement;
- ii) on 15.11.2022 president/CEO of JS Bank announced Bank's intention;
- iii) on 16.11.2022 JS Bank disclosed to PSE;
- iv) on 16.11.2022 defendant No.3 made disclosure in terms of Taken over Regulations;
- v) on 13.01.2023 JSCL issued letter dated 13.01.2023 to PSE.

24. Cause for plaintiffs could have conceived had they already acquired shares before such public announcements. The reasons of acquiring such shares after announcement is not difficult to understand

and will have its effect for considering injunction applications, if not against the suits, which situation may not be ideal for plaintiffs. To my understanding of law, plaintiffs were not carrying any cause which may have triggered after the purchase of shares by plaintiffs and that demonstrates intention. Nonetheless, I consider other grounds as well in connection with injunction applications. The details of their minimal shareholding and dates of purchase i.e. 01.02.2023 are not disputed. This being an equitable relief, the plaintiffs prima facie have not shown to have approached this Court with clean hands and camouflaged motive of such shareholders is obvious. What compelled them to buy shares of BIPL is not satisfactorily explained.

25. The plaintiffs on merits have raised two-fold objections during submissions before the Court:

- (a) IBD Circular 2/2004, as revised in 2020 envisages setting up/establishing a new subsidiary, therefore, JS Bank cannot acquire majority shareholding in BIPL which was/is an existing company;
- (b) JS Bank does not meet the fit and proper test envisaged in the above circular.

26. IBD Circular 02/2004 was superseded by IBD Circular 04/2020 dated 02.10.2020 hence has a preferential application in the case. These are the guidelines and criteria for setting up subsidiary by existing commercial banks.

27. Term subsidiary is not defined in BCO 1962 however its Section 2 enables simultaneous application of the companies Law/Act to Banking Company, unless specifically barred by the BCO 1962. 2017`s Act defines subsidiary in Section 2(1)(68) and that summed up as a company in which the holding company (a) controls the composition of the board; (b)

exercises or controls more than one-half of its voting securities either by itself or together with one or more of its subsidiary companies.

28. The method/procedure to create and/or bring into existence a subsidiary company falls in the domain of SECP which is a regulators of companies in general whereas SBP is a regulator of banking companies in terms of licensing them, supervising their function, actions, and obligations, issuance of circulars/regulations guide them and direct them to achieve regulatory object to make them thrive in main statute.

29. Since the words incorporate and/or acquire have not been used or defined in Section 23, Mr. Salman Raja attempted to make its ignorance felt. The edifice of plaintiffs' entire case is structured around the word `form` and `formed` which Mr. Raja interpreted to only mean `newly incorporated`.

30. The word `form` as interpreted by Mr. Raja is not only a narrow and pedantic gear to proceed but also hypertechnical. One can be distracted by initial part of Section 23, if only plain English language meaning is applied but by extracting the gist of "entire Section 23" it turn differently altogether even if plain meaning is applied. The holistic and result oriented purposeful interpretation of entire Section 23 of BCO 1962 leads to an inescapable conclusion that the word `form` includes both concept i.e. incorporation of company afresh and by way of acquisition of shares, thereby enabling J.S. Bank to make BIPL, an already formed or existing Islamic Banking Company, its subsidiary by acquiring its majority shareholding and management rights in it. It sounds illogical that in having a subsidiary with exceptions, incorporation would be adjudged lawful and acquiring shares in already existing company with exceptions of Section 23 would be unlawful. This apparently was not the legislative intent. After all when share are acquired by a company for its subsidiary, already existing within

exception, it would mean formation of a subsidiary banking company with the injunctions of Islam for JS Bank i.e. a conventional commercial bank having an Islamic Banking Subsidiary.

31. Plaintiffs' stance that the JS Group can own two banks if they "incorporate" an Islamic banking subsidiary afresh through JS Bank is contradictory. Although reliance in this regard is placed by them on the aforementioned Circulars of the SBP, however the same is a perverse interpretation. If acquiring the majority shareholding in another existing bank (Bank Islami) by JS Bank thereby making the former its subsidiary attracts the alleged prohibition per the SBP Circulars and causing the sponsors to fail the Fit and Proper Test, then how is the same situation remedied if JS Bank were to incorporate an Islamic Banking subsidiary as in that case as well the JS Group would (then) be owning two Banks simultaneously. Therefore, the arguments are contradictory. As far as JS Group (group company) is concerned. It may be noted JSCL is not a banking company to apply restriction provided by Section 23(2) BCO 1962.

32. The referred guidelines and criteria (IBD Circular 04/2020) issued pursuant to Section 41(2) of Banking Companies Ordinance, 1962, read with section 17H of State Bank of Pakistan Act, 1956, which confer general powers on State Bank of Pakistan to issue directives, instructions and regulations in whatsoever form as may be necessary for carrying out the functions of SBP under this Act or any other law. The Regulations and Circulars are binding and have the force of law⁹ but not in derogation of main statute.

33. As discussed above, the governing law on the subject which specifically deals with the issue is Section 23(1) and (2) of BCO 1962.

⁹ 2002 CLD 542 (United Bank Limited v. Azmat Textile Mills Limited), 2005 CLD 114 (Anya Knitwear (Pvt.) Ltd. v. United Bank Limited and others), 2016 CLD 1202 (Bank Alfalah Limited v. Callmate Telips Telecom Ltd.).

This provides for restrictions on the nature of subsidiary companies held or to be held by conventional/commercial banking companies. It states in terms of Section 23(1)(aa) that a Banking Company shall not form any subsidiary company except a subsidiary company formed for carrying on banking business strictly in conformity with the injunctions of Islam. So the substance of the section is restriction of nature of subsidiary company not the method of having it.

34. BIPL was/is indisputably a company formed for carrying on banking business strictly in conformity with the injunctions of Islam.

35. I am not in conformity with the arguments raised by Mr. Raja that in Section 23 and IBD Circular explain the use of word “form” only as a new incorporation. Mr. Raja may have seen the apparent conflict or inconsistency between the words used in Section 23(1) BCO, i.e. form and words used in IBD Circular 04/2020 i.e. setting up/establish but in my opinion acquiring of shares means that a commercial bank intend to establish and form a subsidiary within exceptions provided. Even otherwise later circulars would yield in the way of Section 23, which is already explained above. Mr. Raja however put up the exact opposite, i.e., that the Circulars to dictate the true meaning and interpretation of the word ‘form’ as used in Section 23(1) and this must be interpreted and construed in light of circulars. This unfortunately, tantamount to putting the cart before the horse and it goes against settled jurisprudence. The substance of the said circular lies in substantive guidelines and not the heading used for guidelines and criteria viz. setting up/establishing. What matters is the actual criteria laid down in IBP Circular 04/2020 which must be met and fulfilled by JS Bank as evaluated by State Bank of Pakistan. To challenge such tests no case was placed.

36. Even if there is any inconsistency between words used in a statute and the words used in IBD Circular and that too only to the extent of heading which is otherwise illustrative, the latter must be interpreted in the light of and in harmony and consistency with the statute and not the other way round¹⁰.

37. It is the JS a conventional/commercial bank which is setting up and establishing an Islamic Banking operations in whatever way permitted including acquisition and/or fresh incorporation and while acquiring shares of such subsidiary it actually form or establish the subsidiary/Islamic bank. Thus, the word “form/formed” is inclusive of acquisition of shares in view of above understanding of law.

38. A subsidiary as defined in Section 2(68) of the Companies Act, 2017, which can only exist in relation to a holding company in which the holding company either (i) controls the composition of the Board of the subsidiary or (ii) exercises or controls more than one half of its voting securities. Viewed in this context and in particular read with Section 23 of BCO, it is clear that the word “form” used in this section clearly envisages the forming of a subsidiary by acquisition either by control of composition of its Board or control of more than half of its shareholding by way of acquisition under the Regulations, 2017. This is further strengthened by the fact that Section 23(1) uses the term “formed” in past tense in respect of the subsidiary being taken over by Banking Company. So it envisages a subsidiary which is being formed or was already formed.

39. Section 23(2) strengthens above interpretation as the interpretation advanced by the plaintiffs would render Section 23(2) redundant because this provision allows holding of less than 30% shareholding by Banking Companies in any other companies including

¹⁰ 2022 SCMR 1787[1790] (Farrukh Raza Sheikh v. Appellate Tribunal Inland Revenue) and PLD 2022 SC 345[351] (Muhammad Uneeb Ahmed v. Federation of Pakistan)

new or existing. However, it specifically carves out an exception for more than 50% shareholding falling under Section 23(1) as it uses the words “save as provided in subsection (1)”. Therefore, “same as otherwise provided” is actually a bridge between (1) and (2) of Section 23 to have a meaningful nexus.

40. Generally, the word “form” is a flexible word and takes its meaning from the context in which it is used. In the particular contest it is to be given a broader rather than a restrictive meaning as has been done by State Bank of Pakistan. The objective behind and mischief sought to be avoided by Section 23(1) is to bar more than one commercial banking license within a group save where a subsidiary is engaged in Islamic banking. Whether the subsidiary is a newly formed company or formed by way of acquisition of its majority shareholding, is immaterial to that objective.

41. The heading of Section 23, which is otherwise illustrative, demonstrates that the restriction (or conversely the permission) on owning / having a subsidiary by a banking company is based on the ‘nature’ of business of the said subsidiary and not on the ‘manner or procedure’ adopted for having one of such kind.

42. That Section 23(1) places a general restriction on a banking company, such as JS Bank, from forming any subsidiary company except if the essence / subject matter / character of the business of the subsidiary company falls within the exceptions provided for in Section 23(1)(a) to (e), which exceptions include the business of Islamic banking. Therefore, regardless and irrespective of whether the word “form” means “to incorporate” and / or “to acquire,” if the nature of business of the subsidiary company in question is neither of the kind provided for in Section 23(1)(a) to (e), then a banking company is simply prohibited

from its incorporation and / or acquisition and that actually the spirit of the law and not the method of forming one.

43. Upshot of above discussion is that the plaintiffs have not been able to make out prima facie case; balance of inconvenience is not in their favour nor would they suffer irreparable loss in case injunction is refused.

44. In view of above reasoning the applications i.e. injunction application bearing CMA No.3782/2023 in Suit No.318 of 2023 and CMA No.7244/2023 in Suit No.674 of 2023 merit no consideration and hence were dismissed by short order dated 27.06.2023 and these are reasons for the same.

Dated:

J U D G E