JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

C.O No.3 of 2016

Kingsway Capital LLP etc.

Versus

Murree Brewery Co. Ltd. etc

J U D G M E N T

Date of Hearing.	19-10-2016
PETITIONERS BY:	M/s Jahanzeb Awan and Muhammad Raza Qureshi and Raashid Anwer, Advocates.
RESPONDENTS BY:	M/s Syed Zulfiqar Abbas Naqvi Advocate for respondents 1 & 3, Syed Ali Raza, Advocate for respondents 2 & 9 and Adnan ul Haq, Advocate for respondent No.11. Mr. Umair Mansoor, Advocate for SECP.

Shahid Karim, J:- This is a petition under section 160A read with section 290 of the Companies Ordinance, 1984 (**"the Ordinance, 1984"**). The petition has the following prayer:

> *"i. To Declare the EOGM held on 29.09.2016 as unlawful, illegal and invalid and Direct the Company and its Directors to hold a fresh General Meeting, allowing the Petitioners to participate in it as well;*
>
> *ii. Declare that the Notice of the EOGM dated 20.08.2016, was invalid and in violation of S. 160(1)(b) of the Companies Ordinance, 1984.*
>
> *iii. To restrain the Respondents from giving effect to any decision taken or resolution purportedly passed at the said EOGM;*
>
> *iv. To restrain the Respondents from announcing book closure for bonus shares from 21-Oct-2016 to 28-Oct-2016;*

v. To restrain the Respondent No.1 from increasing the authorized share capital and from issuing the proposed 1,500% rights issue;

vi. To restrain Respondents from interfering, in any way, with the Petitioners' right to attend and vote in the fresh Extra Ordinary General Meeting;

vii. Further or alternatively; such other orders are made, as may be just."

Facts:

2. The facts in this petition lend themselves fortunately to some simplification and the parties are not at variance on most of them. The petitioners seek a declaration that an Extraordinary General Meeting ("**EOGM**") of the respondent No.1, Murree Brewery Company Limited ("**Murree Brewery**") held on 29.9.2016 was invalid and incompetently held. Primarily, it is alleged that the petitioners' duly authorized representative was not permitted to participate in the EOGM as a result of which the respondents No.2 to 8 were able to procure the passage of resolutions enhancing Murree Brewery's authorized capital to the detriment of the petitioners. The enhancement of the authorized capital was a *sine qua non* for the issuance of bonus shares and the facts relating thereto shall be unfolded in the proceeding paragraphs. It is stated in the petition that the respondent No.2 who controls Murree Brewery is

intending to issue 1500% additional shares in the Company which will have the unsavory effect of imposing an additional tax burden of approximately Rs.1.3 Billion on the shareholders. It is the apprehension of the petitioners that the entire act of the issuance of 1500% additional shares is a contraption on the part of the respondent No.2 who is well aware that many of the shareholders will not be willing to pay the 5% tax on bonus shares and as a result their shares will be sold in the market. These will then be plucked (at a throw away price) by the respondent No.2. The entire premise of this petition is that in order to issue bonus shares, the Company's shareholders were firstly to pass a special resolution. An EOGM held on 29.9.2016 was convened specifically for the purpose and since the petitioners have more than 25% shares, the respondent No.2 prevented the petitioners' representative from attending the meeting in order to pre-empt a vote against the passing of the resolution.

3. The petitioner No.1 is regulated by the Financial Conduct Authority (FCA) in the U.K and it manages the petitioner No.2 which is a fund incorporated under the laws of Luxembourg. Kingsway Capital is one of the

largest investors globally. The petition states the goal of the fund to be to identify securities which offer long-term capital appreciation and dividends creating long-term value for all shareholders of the portfolio companies. The Fund holds 27.06% stake in the Company as represented by its holding of 6,237,651 ordinary shares of the Company, currently valuing at over $75 million. The petitioners take strong exception to the acts of the management of the Company represented by the respondents No.2 to 9, which according to the petitioners, is not in the best interest of the shareholders who may have better alternate venues to invest this money. It will cause the Company's shares to fall which will, in turn, decrease the value of investment of the current shareholders.

4. The Board of Directors of Murree Brewery at its meeting on August 20, 2016, proposed increasing the authorized share capital from Rs.300 millions to 4 Billion by issuing bonus shares of 1500%. According to the petitioners, this makes no economic sense as income tax equal to 5% of the value of bonus shares will be levied on the shareholders. The issuance of the bonus shares means that the Company's free cash reserves will

be converted into capital with no benefit for the Company. In a nub, the petitioners allege a conspiracy to have been hatched by the respondent No.2, who has publicly declared that he intends to acquire additional shares in order to control 5% shares in the Company. The entire scheme which is apprehended by the petitioners to have been hatched by the respondent No.2, has been brought forth in the contents of the petition. However, it is not necessary to allude to the contents relating to the apprehensions as expressed. The petition lays a challenge to the EOGM and the illegality which has crept in the entire process preceding the EOGM.

Issues:

5. The learned counsel for the petitioners has raised the following issues of law which impact the outcome of this petition and render the EOGM as a nullity:

I. *In terms of section 160(1)(b) of the Ordinance, where any special business is to be transacted at general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business. The notice of the EOGM which was sent is not accompanied by a statement as envisaged by*

section 160(1)(b) and, therefore, renders the said notice a nullity.

II. *By relying upon section 28 of the Ordinance, it is contended that a company may by special resolution alter or add to its articles provided that where such alteration affects the substantive rights or liabilities of members or of a class of members, it shall be carried out only if a majority of at least three-fourths of the members or of the class of members affected by such alteration, as the case may be, personally or through proxy vote for such alteration.*

III. *The meeting was incompetent, in that, the representative of the petitioners was prevented from attending the EOGM on the pretext that the proxy in favour of the representative was improper and in contravention of the specifications provided in law for a proxy to be valid.*

6. Reply has been filed on behalf of the respondents No.1, 2, 3 and 9. The parties agree that the petition can be dealt with and decided on the basis of the replies filed by these respondents which are the proper and necessary parties in the matter.

7. The respondents in their replies have controverted the contents of the petition and the averments and allegations contained therein. It is not necessary to refer in greater details to the contents of the replies at this

juncture. They shall be dealt with in the course of the judgment that I propose to render and with regard to each issue of law which arises in this petition.

Statement U/s 160(1)(b):

8. As adumbrated, the learned counsel for the petitioners invites this Court to hold that the EOGM is incompetently held on the ground that the notice sent to the petitioners (as also to the other shareholders) offended the provisions encapsulated in section 160 of the Ordinance, 1984. Section 160 reads as under:

> ***160. Provisions as to meetings and votes. -*** *(1) The following provisions shall apply to the general meetings of a company or meetings of a class of members of the company, namely:-*
>
> *(a) notice of the meeting specifying the place and the day and hour of the meeting alongwith a statement of the business to be transacted at the meeting shall be given-*
> *(i) to every member of the company;*
> *(ii) to any person entitled to a share in consequence of death of a member if the interest of such person is known to the company; and*
>
> *(iii) to the auditor or auditors of the company; in the manner in which notices are required to be served by section 50, but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting;*
>
> *(b) where any special business, that is to say business other than consideration of the accounts, balance-sheets and the reports of the directors and auditors, the declaration of a dividend, the appointment and fixation of remuneration of auditors, and the election or appointment of directors, is to be transacted at a*

> *general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business, including, in particular, the nature and extent of the interest, if any, therein of every director, whether directly or indirectly, and, where any item of business consists of the according of an approval to any document by the meeting, the time when and the place where the document may be inspected shall be specified in the statement;*
>
> *(c) ….*
>
> *(d)….*

9. From a reading of section 160 above, it is clear that the provision applies to general meetings of a company and it is not in dispute that EOGM was such a meeting. By clause (b) of sub-section (1), it has been specified that where any special business is to be transacted at a general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business, including, in particular, the nature and extent of the interest, if any, therein of every director, whether directly or indirectly, and, where any item of business consists of the according of an approval to any document by the meeting, the time and the place where the document may be inspected shall also be specified in the statement. The same clause (b) gives an inkling of what special business means. Special business, according to this clause, is business other than consideration of accounts, balance-sheets and the reports

of the directors and auditors, the declaration of a dividend, the appointment and fixation of remuneration of auditors, and the election or appointment of directors. Therefore, any business apart from those incorporated in the clause shall be a special business. It is common ground between the parties that the increase in the authorized capital of the Company is a special business within the meaning of clause (b) of section 160 and thus, under ordinary circumstances a statement ought to have been annexed to the notice o the meeting. The precedent *M. Shahid Saigol and 16 others v. M/s Kohinoor Mills Ltd and 7 others* (**PLD 1995 Lahore 264**), according to the learned counsel for the petitioners, is an authority for the proposition that the provisions of section 160(1)(b) being mandatory, any notice as well as resolution passed in a general meeting, stood vitiated on account of its non-compliance. The relevant portions of *M. Shahid Saigol and 16 others*, are reproduced as under:

> *"12. Adverting to the main question as to whether the notice dated 8-9-1994 for holding Extraordinary General Meeting of respondent No. 1-company to be held on 1-10-1994 and the resolution passed on 1-10-1994 in the meeting so held suffer from legal infirmities and the same stood vitiated.*
>
> *"Under section 160(1)(B) it has been made mandatory to annex to the notice of the meeting a*

statement setting out all material facts concerning the business ... ... Under section 161(8) the Court on a petition by members having not less than 10 % of the voting powers in the company declare the proceedings of a general meeting as invalid by reasons of a material defect or omission in the notice or irregularity in the proceedings of the meeting in case the same had prevented members from using effectively their rights and can direct that a fresh general meeting be held."

"…a statement regarding all material facts in relation thereto under section 160(1)(B) was also to be appended with the notice so that all the members of the company must come to know as to what was the exact scope and nature of the business to be discussed in the meeting so that they could make up their minds considering the' importance of the matter from their point of view to attend the meeting and to use their rights effectively."

"In my considered view the notice dated 8-9-1994 for Extraordinary General Meeting suffered from acute illegality for non-compliance of provisions of section 160(1)(B) and the resolution itself passed on 1-10-1994 was also violative of section 208 as it failed to indicate the terms and conditions attached to the investment to be made in the Maple Leaf for which it was sought to be passed to confer authority thereunder to the Chief Executive to make such investment. The said provisions of law being mandatory, therefore, the notice as well as the resolution dated 1-10-1994 stood vitiated for non-compliance thereof."

"On the other hand the view taken by me finds support from a number of judgments from foreign jurisdiction referred to by learned counsel for the petitioners interpreting section 173 of the Indian Companies Act, 1956 which is similar to section 160(1)(B) of Companies Ordinance, 1984. These are:--

(1) (1917) AC 607;

(2) (1915) 1 Ch. D 503;

(3) (1898)1 Ch. D. 358;

(4) (1973) 43 Company Cases 17, and

(5) (1899)I Ch. 861

18. In Lalaji Bhi C. Capadia v. Lalaji Bhai Desai (1973) 43 Company Cases 17 it was held that section 173 of the Indian Companies Act, 1956 had been enacted in the interest of general body of shareholders that in the notice of a meeting statement containing all material facts concerning each special item of business should be given so that all the shareholders must be in a position to make up their mind in advance whether they would attend the meeting or leave it. to the good sense of the majority present in the meeting. It was held that noncompliance with this requirement will have the effect of nullifying the action taken in the meeting. It was also laid down as a rule that while considering the legal efficacy of afy such notice a benevolent construction cannot be adopted so as to defeat the provisions of the statute. The argument here that all the members must be presumed to know about the affairs of the company its financial position as also the company in which investment was to be made. These assumptions on which the argument was raised is wholly untenable. Even if it be so assumed it cannot be argued that the members were not entitled to disclosure of all material facts and the terms and conditions attached to the investment before taking a decision as regards the business in question. On top of this it has been laid down as principle of law in case reported as E.A. Evans v. Muhammad Ashraf PLD 1964 SC 536 that if doing of a particular thing is made lawful doing of something in conflict of that will be unlawful. It has also been laid down that i where the statute provided as a mandatory requirement for issuance of a notice as prescribed under the law, implied notice or information received aliunde would not be sufficient to absolve the person from its legal obligation from issuing express notice in writing. In view of the law declared by the Supreme Court there is no merits in the arguments of the learned counsel for the respondent."

"20. For the foregoing reasons this petition is accepted. The notice dated 8-9-1994 for Extraordinary General Meeting and the resolution passed in pursuance thereof on 1-10-1994 in the Extraordinary General Meeting are hereby declared to be invalid. The respondent No.l-company may hold fresh Extraordinary General Meeting for the purpose after making compliance with the provisions of

section 160(1)(B) and section 208 of the Companies Ordinance."

10. Mr. Ali Raza, Advocate, the learned counsel for respondents No.2 and 9 does not deny that the notice of EOGM did not have a statement annexed to it. The learned counsel also tried to distinguish the case of *M. Shahid Saigol and 16 others* on the ground that the case was an authority on its own facts and the Court in the said case was swayed by the peculiar facts and circumstances of that case which related to the notice being issued by one company for making investment in associated company by way of rights shares. It was in this context that the Court held the annexing of a statement to the notice as mandatory in order to lend transparency to the entire process. However, I am not convinced that the judgment is distinguishable and the ratio of that judgment does not apply to the facts and circumstances of the instant case. The holding in *M. Shahid Saigol and 16 others* revolves around the true construction of section 160(1)(b) of the Ordinance, 1984 and the effect of its non-compliance. Upon a consideration of the entire scheme of section 160 and the policy underlying that provision, the Court came to the conclusion that the provisions of section 160(1)(b)

were to be mandatorily applied to all general meetings where special resolutions were passed. The learned counsel for the respondents No.2 and 9 retorts that there was no requirement for a statement to be annexed to the notice sent to the members as the business being transacted at the EOGM was to increase the authorized share capital of Murree Brewery which was the only business to be transacted and in the submission of learned counsel that business is not a special business for which a statement was required to be annexed with the notice. This submission of the learned counsel is inextricably linked to the submissions made in response to the other issues of law raised by the learned counsel for the petitioners and shall be dealt with during the course of the proceeding paragraphs. The learned counsel for the respondents No.2 and 9 submitted that if the contention that the increase in the authorized share capital was not a special business were to be accepted by this Court, the rigors of section 160(1)(b) will not apply.

11. A peripheral issue which will exercise a gravitational pull on the controversy in hand will have to be dilated upon at this juncture. The issuance of the

bonus shares was resolved in the meeting of the Board of Directors dated 20.8.2016. The directors resolved as under:

> *"A. to approve Bonus Issue to the Shareholders of the Company*
>
> *The Board approved the issuance of Bonus Shares as an interim payout towards the Members of the Company and the following resolution was passed:*
>
> *"a sum of Rs.3,457,953,750 be capitalized out of the free reserves of the Company and applied toward the issue of 345,795,375 of Ordinary Shares as Bonus Shares in the ratio of fifteen (15) bonus shares for every One (01) Ordinary Share held by the shareholders, whose names appear on the Register of Members on 15th September, 2016. These shares shall rank pari passu in all respect with the existing shares except payment of interim dividend announced today.*
>
> *FURTHER RESOLVED that for the purpose of giving effect to this Resolution, the Company Secretary be and is hereby authorized and empowered, on behalf of the Company, to give effect to this resolution and to do or cause to be done all acts, deeds and things that may be necessary or required for the issue, allotment and distribution of bonus shares."*

12. It will be seen that by the resolution, referred to above, the Board approved the issue of bonus shares as an interim payout towards the members of the Company and it was resolved that a certain sum of money lying in the reserve be capitalized and applied towards the issuance of ordinary shares as bonus shares. The decision made by the Board of Directors is not directly under challenge in this petition. However, it may be necessary to allude to that aspect for a complete grasp of

the controversy involved and perhaps to enable the resolution of that controversy. It may be reiterated that the learned counsel for the petitioners states that three items were to be transacted as a special business and to be resolved through special resolution in the EOGM. The first related to the increase in the authorized share capital, the second regarding the amendment in the Articles and the Memorandum of Association of the Company and the third matter concerned the capitalization of reserves in terms of clause 121 of the Articles of Association. These three decisions were necessarily to be dealt with and decided in a general meeting by a special resolution. Any deviation from it would impinge upon the vires and competence of the EOGM, which has been called in question. In a nub, the learned counsel for the petitioners said that it did not lay within the powers of the Board of Directors to issue bonus shares and was a power within the ambit of the general meeting through a special resolution. The learned counsel for the respondents does not take cavil with the fact that the matter regarding the issuance of bonus shares was not brought before the shareholders in the EOGM under challenge.

13. One event which requires to be mentioned in the context of the controversy is a letter dated 9.9.2016 written by the Security and Exchange Commission of Pakistan (**SECP**) to the Board of Directors of Murree Brewery. The contents of the letter which are relevant for our purposes read as under:

> *"4. It is evident from above announcements that MBCL has yet to obtain its shareholders' approval through special resolution to increase its authorized share capital and fulfill other ensuing requirements to allow issuance of 1,500% bonus shares.*
>
> *5. In terms of PSX Regulations made under the Securities Act, 2015 (Act), share price of a listed company is adjusted in proportion to the announced bonus dividend to work out ex-bonus trading price. In case of MBCL, outcome of change in authorized capital would be known only after announced EOGM is held whereas in the meantime its shares would be traded on ex-bonus basis in terms of PSX regulations. Any trading by members of MBCL and general investing public on ex-bonus basis up till EOGM to be held on 29th September, 2016 would not be in interest of general public and capital markets.*
>
> *6. Therefore, the Commission considering the protection of members of MBCL and general public interest, in terms of section 100 of the Act, hereby directs MBCL, through its board of directors, to immediately change its book closure date pertaining to issuance of 1,500% bonus shares to a date that is after the announced EOGM to be held on September 29, 2016. Resultantly, the book closure from September 16 to 29, 2016 of the MBCL shall be valid only to the extent of entitlement of 100% interim cash dividend and extra ordinary general meeting to be held on 29th September 2016 and not valid for any bonus announcement made whatsoever."*

14. It is admitted on all hands that the EOGM was convened and held in pursuance of the letter issued by

SECP and to comply with the directives contain therein. The learned counsel for the petitioners submits that this was merely a partial compliance of the requirement and, in fact, the decision regarding issuance of bonus shares still went abegging. That decision too ought to have been taken in the general meeting by a special resolution. The entire reliance of the learned counsel is on clause 121 of the Articles of Association, which for facility, is reproduced as under:

> *"121. Subject to any necessary sanction or authority being obtained, the Company in General meeting may at any time and from time to time pass a resolution that any sum (a) for the time being standing to the credit of any reserve fund or reserve account of the Company, including premiums received on the issue of any shares or debentures of the Company, or (b) being undivided net profits of the Company, be capitalized, and that such sum be appropriated as capital to and amongst the ordinary shareholders in the proportions in which they would have been entitled thereto if the same had been distributed by way of dividend on the ordinary shares, and in such manner as the resolution may direct, and such resolution shall be effective; and the directors shall in accordance with such resolution apply such sum in paying up in full any unissued shares or debentures of the Company on behalf of the ordinary shareholders aforesaid and appropriate such shares or debentures and distribute the same credited as fully paid up to and amongst such shareholders in the proportion aforesaid in satisfaction of the shares and interest of such shareholder in the said capitalized sum or otherwise deal with such sum as directed by such resolution. Where any difficulty arises in respect of any such distribution, the Directors may subject to the provisions of Section 86(2) of the Ordinance settle the same as they think expedient, and in particular they may fix the value for distribution of any fully paid-up shares or debentures, make cash payments to*

> *any shareholder on footing of the value so fixed in order the adjust rights, and vest any such shares or debentures in trustees upon such trusts for or for the benefit of the persons entitled to share in the appropriation and distribution as may seem just and expedient to the Directors. When deemed requisite a proper contract for the allotment and acceptance of any shares to be distributed as aforesaid shall be delivered to the Registrar of Companies for registration in accordance with Section 73 of the Ordinance and the Directors may appoint any person to sign such contract on behalf of the persons entitled to share in the appropriation and distribution and such appointment shall be effective."*

15. Upon a reading of clause 121 above, there could not be clearer expression in the Articles of Association that the capitalization of the reserves and any decision with regard thereto will have to be taken in a general meeting. Thus, ostensibly the decision taken by the Board of Directors runs counter to the mandate of clause 121 of the Articles of Association and the requirement laid out in that clause. The learned counsel for the respondents 2 and 9, puts forth an argument which is ingenious to say the least in order to stump the effect of clause 121. The ingenuity of the argument is accentuated by the context in which it is made.

16. Before proceeding further, let me refer to the constitutional enterprise of a company called the Articles of Association (**Articles**) which lays down the constitutional division of powers between the members

in general meeting and the Board of Directors. A company, to quote the well-known passage from *Viscount Haldane LC in Lennard Carrying Co. Ltd. V. Asiatic Petroleum Co. Ltd. [1915] AC 705*, was "only a juristic figment of the imagination, lacking both a body to be kicked and a soul to be damned". From this it follows that there must be some one or more human persons who did, as a matter of fact, act on behalf of the company and whose acts therefore must, for all practical purposes, be the acts of the company itself. In first of such bodies is clearly the Board of Directors to whom the management of the business of the company is expressly delegated. The second is the shareholders in the general meeting.

17. The Articles constitute a binding contract between a company and its members and between members inter se. It is a statutory contract. Hence, orthodox rules of contractual interpretation generally apply. It was held in *Bratton Seymour Service Co Ltd v Oxborough [1992] BCLC 693 (CA)* by Steyn LJ that:

> *"Section 14(1) of the Companies Act 1985 [now see Chartered Accountant 2006 s 33] provides that 'the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member'. By virtue of s 14 the articles of association*

> *become, upon registration, a contract between a company and members. It is, however, a statutory contract of a special nature with its own distinctive features. It derives its binding force not from a bargain struck between parties but from the terms of the statute. It is binding only insofar as it affects the rights and obligations between the company and the members acting in their capacity as members. If it contains provisions conferring rights and obligations on outsiders, then those provisions do not bite as part of the contract between the company and the members, even if the outsider is coincidentally a member. Similarly, if the provisions are not truly referable to the rights and obligations of members as such it does not operate as a contract. Moreover, the contract can be altered by a special resolution without the consent of all the contracting parties. It is also, unlike an ordinary contract, not defeasible on the grounds of misrepresentation, common law mistake, mistake in equity, undue influence or duress. Moreover … it cannot be rectified on the grounds of mistake."*

18. Thus, a company must have articles of association prescribing regulations for the company. for the proposition that Articles create a contract between a company and its members, see *Wood v Odessa Waterworks (1889) 42 Ch D 636; Pender v Lushington (1877) 6 Ch D 70 and MacDougall v Gardiner (1875) 1 Ch D 13.*

19. The law as to Articles and its setting in the scheme of Company Law has undergone a sea-change in England by the enactment of Companies Act, 2006 (CA 2006). S. 17 of CA 2006 defines the Company's Constitution as including the articles of association and 'any resolutions and agreements to which chapter 3 applies'.

Thus there is a considerably reduced role of the memorandum of association under CA 2006 and it does not form part of the company's constitution. The Articles are sometimes referred to as the 'instruction' book of a company. It was held in *Hickman v Kent or Romney Marsh Sheep-Breeders Association [1915] 1 Ch 881* that:

> *"First, no article can constitute a contract between the company and a third person; secondly no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as for instance a solicitor, promoter or director can be enforced against the Company; thirdly, articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively."*

20. Thus the Articles occupy a unique position in the scheme of things and clause 121, viewed in that context, is not a pauper's will or a mere painting to be looked at, without more. The twin arguments of Mr. Ali Raza, Advocate, one premised on Section 196(2) (l) and the other on Section 92(1)(a) seeking to discountenance the real importance of the Articles, and to diminish their status, is hung on a tenuous peg of tabulated legalism.

21. It is not the scope of this judgment to dissect the proper place of the Articles and Memorandum of association and to juxtapose them against each other.

Suffice to say that section 31 of the Ordinance, 1984 gives the effect of memorandum and articles by laying down that:

> ***31. Effect of memorandum and articles***.- *(1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe and be bound by all the provisions of the memorandum and of the articles, subject to the provisions of this Ordinance.*
> *(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.*

22. Thus the memorandum and articles, when registered, bind the company and the members, to observe and be bound by all the provisions of the memorandum and the articles, subject only to the provisions of the Ordinance. This chimes with the general rule of contractual obligations. The argument of Mr. Ali Raza, Advocate will have to be analysed against the backdrop of the rule expounded by section 31 that the memorandum and articles bind the company and the members alike and this obligation is only subject to anything to the contrary in the Ordinance, 1984.

23. Recent observations of the Supreme Court of Pakistan on the scope of the memorandum and articles

may also be referred. Saqib Nisar, J., elucidate the scope in ***Lucky Cement Ltd. v. Commissioner Income Tax, Zone Companies, Circle-5, Peshawar*** (2015 CLD 1482), as follows:

> *"Before resolving the proposition in hand, we find it expedient to briefly state that the nature and legal status/position of Memorandum of Association (MOA) and Articles of Association (AOA) of a company, the purpose and object of the same, the rules of its application and the construction/interpretation of such a document. In this regard, several judgments of superior courts have shed light and from the gist thereof, it can be held that the MOA and Articles of Association when read as a whole are the constitution of the company. MOA provides and prescribes the object(s) and the purpose(s) for which the company has been established and constituted, with specific reference to the business and the avocations which it can conduct, carry on and undertake. While the AOA are the organizational and governance rules of the company which primarily deal with the management affairs. There are judgments of the superior Courts to the effect that anything done by a company (as the company is a juristic person and has to act through natural person i.e. its management) which is beyond the scope of its MOA is ultra vires and thus cannot be given any legal sanctity. In other words, a company cannot engage in a business which is not fairly covered by any of its independent objects, or such objects which are ancillary and incidental to those for which a company has been created and such MOA is duly recognized and accepted, by the regulatory body(ies) meant for the incorporation of a company and oversight thereof.*
>
> *It has been noticed and experienced by us for various MOAs of different companies that in order to avoid any of its venture being declared as ultra vires of the object, besides the main object of the company and its ancillary purposes, the latest trend is that the company shall incorporate in the MOA certain other objects as well which are aloof and independent of its main object/business; this is also so because the company might at some point of time like to undertake some*

> *another or more business, but would be precluded from doing so, because of the lack of object and it is difficult to have the MOAs changed and altered frequently."*

Section 86 & 96(2)(1) argument:

24. The learned counsel for the respondents 2 and 9 relies upon the provisions of section 86 and 196(2)(1) of the Ordinance, 1984 to contend that the power squarely lies with the Board of Directors and by law there is no requirement for the said matter to be decided by a general meeting and through a special resolution. In a word, the learned counsel invites this Court to hold that clause 121 contravenes the express provisions of the Ordinance, 1984 and must be considered as *non est* to that extent. Section 86 says that:

> ***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 a 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].

(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."

25. The reliance of the learned counsel for the respondents No.2 and 9 on section 86 of the Ordinance, 1984 should receive a short shrift. The section clearly relates to the increase in the capital of the company and thus applies to rights issue. This is at once evident from a holistic reading of the entire section 86. Clearly, the section relates to the increase of the capital of the

company and does not concern itself with the capitalization of the reserves which is the converse of the increase in the capital of the company. By rights issue, shares are offered to the members in proportion to the existing shares held by each member and in case the whole or any part of the shares offered under sub-section (1) is declined or is not subscribed, the directors may issue such shares in such manner as may deem fit. Therefore, the intention clearly is to increase the capital of the company by subscription of shares and offering them to existing shareholders. On the contrary, the bonus shares are issued by a capitalization of the reserves of the company for which the shareholders do not pay any cash and they are merely offered the shares out of the reserves with the company.

26. Section 86 encapsulates two things: firstly; it enumerates one of the methods by which the company may increase its share capital; secondly, it confers pre-emptive rights on the existing shareholders. Section 86 deals in Rights issue and is a species of pre-emption rights. One distinguishing feature is that the Rights issue will raise new money for the company but bonus or capitalization issue will not raise any new money. The

general statement of law regarding Rights issue is to be founded in *Gower, Principles of Modern Company Law, by Paul L. Davies and Sarah Worthington (Gower), (Tenth edition)* in these words:

> *"Once a company has made an initial public offering of shares it will have additional methods whereby it can raise further capital and, even if it proceeds by an offer for sale, this will be less expensive if the securities issued are of the same class as those already admitted to listing or to the AIM. More often, however, it will make what is called a "rights issue" and, if it is an offering of equity shares for cash, it will generally have to do this, or make an open offer, unless the company in general meeting otherwise agrees. This is because of the pre-emptive provisions discussed in the previous chapter. In one sense a rights issue is considerably less expensive than an offer for sale: circulating the shareholding is cheap in comparison with publishing a lengthy prospectus in national newspapers and mounting a sale pitch to attract the public. But in another sense it may be dearer: if the issue price is deeply discounted the company will have to issue far more shares (on which it will be expected to pay dividends) in order to raise the same amount of money as on an offer. In any event, as we shall see, a rights issue will normally be a public offer for the purposes of the prospectus rules.*
>
> *Other methods of issue, which can be used in appropriate circumstances include exchanges or conversion of one class of securities into another, issues resulting from the exercise of options or warrants, and issues under employee share-ownership schemes—though these will not necessarily raise new money for the company. Nor, of course, the capitalization issues, dealt with in Ch. 13 above. We do not discuss them further in this chapter."*

27. Hence, for all intents, section 86 rights will be triggered only if the proposed issue is exclusively for cash. The reliance on Section 86 is therefore inapt and

no support can be sought from its provisions for the proposition canvassed by Mr. Ali Raza, Advocate.

28. Mr. Ali Raza, Advocate, the learned counsel for the respondents No.2 and 9 next sought refuge in section 196(2)(l) by saying that by the tenor of section 196(2)(l), it lies within the power of the directors of a company "to declare interim dividend". The learned counsel however did not have his attention adverted to the entire reading of section 196 and the intent of the legislature underlying this provision. Section 196 relates to the interplay of powers of the directors and members in a general meeting and states that:

> ***196. Powers of directors.-*** *(1) The business of a company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the*
> *company, and may exercise all such powers of the company as are not by this Ordinance, or by the articles, or by a special resolution, required to be exercised by the company in general meeting.*
>
> *(2) The directors of a company shall exercise the following powers on behalf of the company, and shall do so by means of a resolution passed at their meeting,*
> *namely:—*
>
> *(a) to make calls on shareholders in respect of moneys unpaid on their shares;*
>
> *(b) to issue shares;*
>
> *(c) to issue debentures or any instrument in the nature of redeemable capital;*

(d) to borrow moneys otherwise than on debentures;
(e) to invest the funds of the company;

(f) to make loans;

(g) to authorise a director or the firm of which he is a partner or any partner of such firm or a private company of which he is a member or director to enter into any contract with the company for making sale, purchase or supply of goods or rendering services with the company;

(h) to approve annual or half-yearly or other periodical accounts as are required to be circulated to the members;

(i) to approve bonus to employees;

(j) to incur capital expenditure on any single item or dispose of a fixed asset in accordance with the limits as prescribed by the Commission from time to time:

Provided that the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of moneys on deposit by a banking company with another banking company on such conditions as the directors may prescribe, shall not be deemed to be a borrowing of moneys or, as the case may be, a making of loans by a banking company within the meaning of this section;

(k) to undertake obligations under leasing contracts exceeding one million rupees;

(l) to declare interim dividend; and

(m) having regard to such amount as may be determined to be material (as construed in the Generally Accepted Accounting Principles) by the Board,—

(i) to write off bad debts, advances and receivables;

(ii) to write off inventories and other assets of the company; and

(iii) to determine the terms of and the circumstances in which a law suit may be compromised and a claim

or right in favour of a company may be released, extinguished or relinquished.
(3) The directors of a public company or of a subsidiary of a public company shall not except with the consent of the general meeting either specifically or by way of an authorisation, do any of the following things, namely:—
(a) sell, lease or otherwise dispose of the undertakings or a sizeable part thereof, unless the main business of the company comprises of such selling or leasing; and
(b) remit, give any relief or give extension of time for the repayment of any debt outstanding against any person specified in sub-section (1) of section 195.

(4) Whosoever contravenes any provision of this section shall be punishable with a fine which may extend to one hundred thousand rupees and shall be individually and severally liable for losses or damages arising out of such action.

29. Sub-section (1) of section 196 is the pivotal provision which is the provenance of the powers to run the business of a company for the directors and the shareholders in a general meeting. It says that the business of the company shall be managed by the directors who may exercise all such powers of the company as are not by the Ordinance, or by the Articles, or by a special resolution required to be exercised by the company in general meeting. Thus, ordinarily the business of the company is to be managed by the directors and this is only subject to anything to the contrary given in the Ordinance or the Articles and which is required to be exercised by the company in

general meeting. Sub-section (1), therefore, is the foundational basis of powers to be exercised and gives primacy to the Articles if a matter is delineated therein. Both the learned counsel are agreed that clause 121 in the Articles relates specifically to the capitalization of reserves and thus the intention has clearly been expressed and is without equivocation. Sub-section 2(1) of section 196, however, renders the scheme of things a little complicated. The learned counsel for the respondents No.2 and 9 submits that by this provision, the directors of the company have been conferred the power to declare interim dividend and this is, in essence, what the directors have done through their resolution of 20.8.2016. However, in my opinion, a purposive construction will have to be put on the reading of sub-section (2)(1) of section 196. In the first place, the entire section 196 will have to be read cumulatively and conjunctively and the provisions cannot be construed in isolation. As adumbrated, sub-section (1) is the general provision regarding the business of a company to be managed by the directors and that power is subject to inter alia anything to the contrary given in the Articles. Sub-section (2) merely specifies the powers which the directors of a company may exercise on behalf of the

company. The power to declare interim dividend may vest in the directors of a company but, in case, the Articles of the company lay down a procedure by which that power is to be exercised by the company in general meeting, then the power of the directors to declare interim dividend is always subject to the power laid down in the Articles. This is in the only construction which will give purpose to the policy of section 196. Any other construction will render sub-section (1) and the intention underlying it as redundant. It may be that the directors of a company pass a resolution by their meeting for the declaration of interim dividend. However, that is all that the directors can do and the decision regarding the capitalization of reserve of a company will necessarily have to be dealt with by the company in a general meeting and by a special resolution in terms of clause 121 of the Articles. Therefore, the directors may, at best, express an intention to declare interim dividend yet that intention will always be subject to the capitalization of reserve by the company through a resolution in the general meeting. Upon a perusal of the resolution of the Board of Directors of 20.08.2016 the Board of Directors not only approved the issuance of bonus shares but also proceeded to capitalize a certain

sum from the free reserves of the company. This was clearly beyond the powers of the Board of Directors. The resolution, therefore, offends the provisions of sub-section (1) of section 196 read with clause 121 of the Articles.

30. Herein lies the subtle distinction which sets the concept of capitalization of reserves apart from that of interim dividend mentioned as a power of the directors in section 196 (2) of the Ordinance, 1984. Let me revert to *Gower* for the amplification of the meaning of interim dividend:

> *"The term "interim accounts", although now well established in the Act, as potentially confusing because it might lead one to suppose that such accounts are needed whenever it is proposed to declare interim (which are very common) or special dividends, in addition to the normal dividend for the year. That is not so. So long as the company has duly complied with its obligations under the Act in respect of its annual accounts for the previous year, it can, in the current year, pay interim or other special dividends in addition to the final dividend for the year so long as these dividends are supported by those accounts. It is only when the last annual accounts would not justify a proposed payment that it is necessary to prepare interim accounts. Normally, however, it will not be necessary to prepare interim accounts merely because the company pays quarterly or half-yearly interim dividends, in anticipation of the final dividend for the year, to be declared by the company when that year's accounts are presented. The previous year's accounts are used to support the interim dividends. The articles normally provide for interim dividends to be paid on the authority of the directors alone, there not being any regularly scheduled meeting of the shareholders to which the matter could be put."*

31. Interim dividend or dividend for that matter does not include capitalization of reserves which is a distinct concept more properly dealt with as a topic of issuance of shares and accounting of legal capital rather than under dividends and distribution. Since issuance of bonus shares involves the capitalization of the company's reserves, no payment by the shareholders is involved and the shares must be allotted pro-rata to those entitled to the reserve, were if distributed or in the case of an undistributable reserve, whose contribution constituted the reserve (as in the case of a share premium account). The allotment of bonus shares is a form of financial assistance by a company to acquire shares and is an exception to the rule against such a prohibition. It is highly doubtful, therefore, that the term interim dividend as used in section 196(2) has the same connotation as issuance of bonus shares by capitalization of reserves. These are intrinsically different concepts and one must not be confused with the other. The implications may also be remarkably different in that in case of bonus shares, the share worth will be reduced (besides other significant changes) which will not be the case in interim dividends. The issuance of bonus shares will also result in increase in authorized capital while this does not occur

in the pay-out of interim dividends. It was thus precisely for this purpose that the matter of capitalization of reserves was dealt with separately and inserted in the articles to be decided by the shareholders in a general meeting. It was well within the contemplation of the members while enacting the articles and entering into binding obligations that the two did not mean the same thing or at least capitalization of reserves was a distinct species of issuance of interim dividends and this cannot be left to the directors.

32. Dividend is a permitted distribution applicable to all companies. The primary rule is that a company may not make a distribution to any of its members except out of profits which are available for that purpose. Section 249 of the Ordinance, 1984 mandates that "No dividend shall be paid by a company otherwise than out of profits of the company". By section 829 of the Companies Act, 2000 (English), 'Distribution' is defined exceptionally widely to mean "every description of distribution of a company's assets to its members, whether in cash or otherwise, subject to specified exceptions". One of those exceptions being issues of bonus shares. Thus issuance of bonus shares is not a

dividend distribution. Although the provisions of Ordinance 1984 do not specify the exceptions as such, a holistic reading of those provisions and the intention as culled out from the articles leads one to the same result. At this point the following observations from *Cases and Materials in Company Law by Len Sealy and Sarah Worthington* (9th Edition) (**Sealy**) regarding bonus shares will shed further light on the uniqueness of the concept:

> *"Capitalisations and bonus shares*
>
> *A profitable company that does not distribute all its profits as dividends will accumulate reserves (retained earnings). The shares will in consequence have a market value which is greater than their nominal value. There will be a similar situation when a company's fixed assets appreciate in value as a result of inflation or of a movement in their market value. Suppose, for example, that a company with a nominal capital of 10,000 £1 shares, all issued and fully paid, has accumulated profits of £90,000. Instead of paying out this surplus to its shareholders as dividends it may resolve to 'capitalise' these reserves by issuing a further 90,000 shares, so that nine new shares are allotted to the holder of each existing share, and treating the new shares as fully paid because the £90,000 is appropriated to meet the issue price. No cash changes hands at all. The formal result will be that the reserve has become capital and ceases to be available for distribution as dividend, the company's issued share capital has risen from £10,000 to £10,000 each shareholder now has ten times as many shares as before, and the market value of each share will have fallen back from something like £10 to £1. (Of course, other factors influence the market price of shares, apart from their 'asset backing', but this in simplified terms will be what happens."*

And in Gower*:*

"The net worth of a business will fluctuate from time to time according to whether the company makes profits and ploughs them back or suffers losses. But a company's legal capital, i.e. the issue share capital plus share premium account (if any) does not automatically fluctuate to reflect this. It remains unaltered until increased by a further issue of shares, which must be made in conformity with the rules dealt with above, or reduced in accordance with the rules dealt with in Ch.13. If, however, the company has made profits and not distributed them as dividends, a necessary consequence of the static nature of its capital accounts is that its net asset value will exceed its legal capital. This is not necessarily something either company or shareholders need worry about== in fact, they should welcome the profits—but an accounting device is needed to bring the company's books back into balance. This is to be found by including a (notional) liability on the balance sheet in order to balance the "assets" and "liabilities". This is normally described as a "reserve", an expression which may confuse those unaccustomed to accounting practice since it may suggest (falsely) that the company has set aside an actual earmarked fund to meet some potential or actual liability. The crucial point is that this reserve is a distributable reserve, unlike the capital accounts, i.e. the company can distribute assets to its shareholders up to the value in the reserve, and keep its books in balance by reducing the reserve accordingly.

Should a profit-rich company wish to bring its legal capital more into line with its net worth, it can do so by making a "bonus" or "capitalisation" issue to its shareholders. The former expression is likely to be used by the company when communicating with its shareholders (in the hope that they will think that they are being treated generously by being given something for nothing) and the latter when communicating with the workforce (which might otherwise demand a bonus in the form of increased wages). In fact, such an issue is merely a means of capitalizing reserves by using them to pay-up shares newly issued to the shareholders. We have already noted one form of bonus issue, where the shares are paid up out of the share premium account, which is accordingly reduced to the extent of the nominal value of the bonus shares, whilst the share capital account is

correspondingly increased. Here, however, the bonus shares are paid up out of the distributable profits reserve. For example, suppose that before the issue the net asset value (taking values) of the company was ***£2*** *million and the issued capital one million shares of* ***£****1 each. The shares, on book values, will be worth* ***£2*** *each. The company then makes a one-for-one bonus issue paid up out of the distributable profits reserve. The immediate effect on a shareholder is that for each former* ***£1*** *share worth* ***£2*** *he or she will now have two* ***£1*** *shares each worth* ***£2.*** *However, a more significant change has occurred, which may have implications for the future. The formerly distributable profit can no longer be distributed because it has been converted into share capital. The company is thus signaling a need to have greater permanent risk capital than might previously have been understood to be the case. Further, it is likely to stop short of capitalizing undistributed reserves to an extent which would impair its freedom to pursue an appropriate dividend policy in the future. Thus, a bonus share paid up out of distributable reserves is a potentially more significant event than an issue of bonus shares paid up from the share premium account, where the decrease in one undistributable account is balanced by the increase in another."*

Section 28 Challenge:

33. This issue is inextricably linked to the issue raised by the learned counsel for the petitioners relating to the failure on the part of the Company to comply with the provisions of section 160(1)(b) of the Ordinance, 1984 which, according to the learned counsel, obliged a statement to be annexed with the notice. The learned counsel for the respondents No.2 and 9 had retorted that the business being transacted was not a special business and, therefore, there was no requirement for a statement to be annexed with the notice. The learned

counsel for the petitioners placed his entire reliance on the provisions of section 28, which reads as under:

> ***28. Alteration of articles.-*** *Subject to the provisions of this Ordinance and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution:*
> *Provided that, where such alteration affects the substantive rights or liabilities of members or of a class of members, it shall be carried out only if a majority of at least three-fourths of the members or of the class of members affected by such alteration, as the case may be, personally or through proxy vote for such alteration.*

34. The learned counsel for the petitioners simply invites this Court to hold that the business to be transacted in the EOGM was the alteration of its Articles which require a special resolution for the alteration to be made. By its proviso, any alteration which affects the substantive rights or liabilities of members or of a class of members shall be carried out only if a majority of at least three-fourths of the members or of the class of members affected by such alteration either personally or through proxy votes for such alteration. There is no quarrel that only 37% of the shareholders were present in the EOGM and which was far below the requirement of the proviso of section 28. The parties are also not at variance that if the matter

of increase in share capital by issuance of bonus shares, and the alteration of Articles is to take place, the proviso lays a precaution which cannot be dispensed with.

35. The learned counsel for the respondents No.2 and 9 argued that section 21 of the Ordinance, 1984 deals with the alteration of the Memorandum of a company. Any such alteration of the Memorandum has to be brought about by special resolution but this provision is subject to the provisions of the Ordinance, 1984. Section 92, in the opinion of the learned counsel, obliges a company to alter the conditions of its Memorandum where it is sought to increase its share capital. Section 92 is to the following effect:

> ***92. Power of company limited by shares to alter its share capital.-*** *(1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum so as to-*
>
> *(a) increase its share capital by such amount as it thinks expedient;*
>
> *(b) consolidate and divide the whole or any part of its share capital into shares of larger amount than its existing shares;*
>
> *(c) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum; or*
>
> *(d) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled:*

Provided that, in the event of consolidation or sub-division of shares, the rights attaching to the new shares shall be strictly proportional to the rights attaching to the previous shares so consolidated or sub-divided:

Provided further that, where any shares issued are of a class which is the same as that of shares previously issued, the rights attaching to the new shares shall be the same as those attaching to the shares previously held.

(2) The new shares issued by a company shall rank pari passu with the existing shares of the class to which the new shares belong in all matters, including the right to such bonus or right issue and dividend as may be declared by the company subsequent to the date of issue of such new shares.
(3) The powers conferred by sub-section (1) shall be exercisable by the company only in a general meeting.

(3A) Notwithstanding anything contained in this Ordinance or any other law for the time being in force or the memorandum and articles, where the authorised capital of a company is fully subscribed, or the unsubscribed capital is insufficient, the same shall be deemed to have been increased to the extent necessary for issue of shares to a scheduled bank or financial institution in pursuance of any obligation of the company to issue shares to such scheduled bank or financial institution.

(4) A cancellation of shares in pursuance of sub-section (1) shall not be deemed to be a reduction of share capital within the meaning of this Ordinance.

(5) The company shall file with the registrar notice of the exercise of any power referred to in sub-section (1) within fifteen days from the exercise thereof.

36. The learned counsel for the respondents No.2 and 9 seeks to put a construction on section 92 (1)(a) so as to invite this Court to read the provision to mean that in order to increase the share capital of a company, a mere alteration in the conditions of the Memorandum of a

company is required and there is, in fact, no requirement for bringing about any alteration in the Articles of the company. It follows, therefore, according to the learned counsel that section 28 is rendered ineffective and redundant in view of the specific provisions contained in section 92 which squarely deals with the increase in share capital of a company and makes it relatable to the alteration of the conditions of the Memorandum of a company and not its Articles.

37. This submission of the learned counsel for the respondents No.2 and 9 besides being tendentious is also nuanced and ignores the setting of the Memorandum and the Articles in the entire scheme and also of the law. The argument is stated in a narrow compass. As a necessary corollary, according to the learned counsel for the respondents No.2 and 9, since section 21 mandates any alteration of Memorandum to be made by special resolution and no such condition has been given in section 92, the alteration in the Memorandum for the purpose of increase in the share capital of a company may be brought about by a simple resolution and not by a special resolution.

38. As a prefatory, it may be stated that the power of a company to increase its share capital must be authorized by its Articles. This is at the heart of section 92 of the Ordinance, 1984. Clause 33 of the Articles of the Company gives such a power to Murree Brewery to increase its authorized capital. Clause 33 simply says:

> *"33. The Company may from time to time in General Meeting, increase the Authorized Capital by the issue of new shares of such amount and of such designations, powers, preference and rights as it thinks expedient, subject to provisions of the Ordinance."*

39. Therefore, in terms of clause 33, reproduced above, the Company from time to time in general meeting, increased its authorized capital by the issue of new shares. The requirement of doing so in a general meeting is echoed in sub-section (3) of section 92 of the Ordinance, 1984. However, neither sub-section (3) of section 92 nor clause 33 of the Articles specify as to whether the increase in the authorized capital has to be treated as a special business or not. The learned counsel for the respondents No.2 to 9, on the touchstone of section 92 (1)(a) wants this Court to hold that the effect of the increase in the authorized capital will be to alter the conditions of the Memorandum of a company. This view is untenable and is a slender thread on which to hang. By section 92, the authorization in the Articles

must be both as to increase in its share capital as well as the alteration in the conditions of the Memorandum. That would be a fair reading of section 92 and will lend actuality to any construction to be put on it. The clause 33 of the Articles of Murree Brewery merely prescribes a power to vest in the Company to increase its authorized capital. It does not refer to any alteration in the conditions of its Memorandum. Therefore, the Articles do not deal with the issue of the alteration of the conditions of its Memorandum but merely prescribe a power to increase the authorized capital. Any increase in the share capital of a company will have the inevitable consequence of the alteration of the conditions of Memorandum as well as the Articles of the company. It is of no avail to argue that merely the conditions of the Memorandum will be altered upon increase in the authorized capital of a company. Clause 3 to clause 19 in the Articles deal with the topic of "capital". Clause 3 of the Articles mentions the authorized capital of Murree Brewery. It would be a fallacy on the part of any one to say that the increase in the share capital of a company will not thereby bring about an alteration in the Articles of the company. This argument will lead to anomalous results. The law by section 92 leaves it to the discretion

of a company to increase its share capital and this may be done by conferring the authorization in the Articles of the company. Therefore, the power resides in the company by virtue of the Articles. It must be borne in mind that the primary power that section 92 deals with is the increase in the share capital of a company and that is what the caption of section 92 describes. It is the alteration of its share capital. The alteration in the Memorandum and the Articles naturally flows from the act of the alteration of the share capital of a company. The mere fact that section 92 does not make a mention of the alteration in the Articles, does not detract from the fact that the alteration will be brought about and, therefore, section 28 will be triggered in these circumstances.

40. The argument of the learned counsel for the respondents No.2 and 9 loses sight of the notice of EOGM sent to the members. There is a clear distinction regarding ordinary business and special business to be transacted in the EOGM. The special business consists of passing special resolutions regarding increase in the authorized capital, the alteration of the Memorandum of Association and alteration of the Articles of Association

of the company. With regard to the Articles of Association of the company, the word "amended" has been used in place of "altered". This, in my opinion, makes little or no difference as it amounts to the same thing. However, the fact remains that the increase in the authorized capital and the alteration in the Memorandum and Articles was deemed as a special business to be passed and transacted through special resolutions. Therefore, as per Company's own showing, the business was a special business and the respondents No.2 and 9 cannot be heard to allege otherwise. Necessarily the Articles of Association were to be amended/ altered by the increase in the authorized capital of the Company and thus a compliance of section 28 of the Ordinance, 1984 assumes greater significance. As explicated, only 37% of the shareholders attended the EOGM. It is not a proposition which is seriously disputed that the alteration of the authorized capital affects the substantive rights and liabilities of the members and could only have been carried out if a majority of at least three-fourths of the members were personally or through proxy able to vote for such alteration. The alteration of the increase in share capital will, in turn, lead to the issuance of bonus shares to

which serious exception is being taken by the petitioners and, therefore, it is not difficult to hold that the compliance of section 28 was a *sine qua non* for a valid EOGM to be held. That pre-condition has gone abegging in the instant case and the EOGM has been held incompetently.

41. "These words cannot be meaningless, else they would not have been used." *United States v Butler 297 US 1, 65 (1936)(per Roberts, J.).*

42. It has been adumbrated that Articles constitute a statutory contract between the company and its members. Its regulations must be carried into effect. The argument of Mr. Ali Raza, Advocate renders meaningless the provisions of section 28. The reading of the length and breadth of the Ordinance, 1984 does not mandate that for an increase of share capital, an alteration of the conditions of Memorandum shall suffice and thereby specifically prohibits the alteration of Articles for this purpose. This cannot be culled out as a prohibition which ousts the applicability of section 28. The section 28 deals with the alteration in the Articles and makes no distinction between one or the other kind of alteration as in the case of a memorandum (see e.g

s.21 and s.92). Thus every alteration of Articles entails a special resolution. In so holding, I am swayed by the surplusage canon of interpretation which has been explained in *Reading Law: The Interpretation of Legal Texts by Antonin Scalia and Bryan A. Garner*, in the following words:

> *"If possible, every word and every provision is to be given effect (verba cum effectu sunt accipienda'). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."*
>
> *"The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition. A provision that seems to the court unjust or unfortunate (creating the so-called casus male inclusus) must nonetheless be given effect. As Chief Justice John Marshall explained: "It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation." Or in the words of Thomas M. Cooley: "The courts must … lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." This is true not just of legal texts but of all sensible writing: "Whenever a reading arbitrarily ignores linguistic components or inadequately accounts for them, the reading may be presumed improbable."*
>
> *"Lawyers rarely argue that an entire provision should be ignored—but it does happen. For example, in Fortec Constructors v. United States, the quality-control paragraph of a construction contract with the Army read as follows:*
>
> > *All work…shall be subject to inspection and test by the Government at all reasonable times and at all places prior to acceptance. Any such inspection and test is for the sole benefit of the Government and shall not relieve the Contractor of the responsibility of providing*

> *quality control measures to assure that the work strictly complies with the contract requirements. No inspection or test by the Government shall be construed as constituting or implying acceptance.*

When the Army demanded that the contractor demolish and reconstruct noncompliant work, the contractor protested that the on-site Army inspector had failed to notify Fortec of the defects and that this silence constituted an acceptance of the original work. The court correctly rejected this argument:

> *To agree with Fortec's contention would render clause 10 meaningless. This court must be guided by the well accepted and basic principle that an interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless. Therefore, Fortec's contention is rejected for being inconsistent with contract clause 10. The Corps quality assurance inspections did not constitute an acceptance of the work."*

43. Section 92 must be taken to mean what it says. Nothing can be read into it, least of all a prohibition which has the unkind effect of taking away statutory right vesting in minority shareholders. That would be stating the effect of section 92 in a narrow compass. The argument also ignores the anomalous result that it produces. If Mr. Ali Raza had his way, the result would be that although the memorandum is altered, the Articles remain unaltered and continue to describe the previous authorized capital. Can this be countenanced? Clearly not.

44. A common thread that runs through the provisions which the petitioners rely upon is the fiduciary doctrine in corporate law. Fiduciary accountability had formally crystallized in the English jurisprudence by the end of the eighteenth century. This is at the heart of our Ordinance, 1984 as well. It was held in *York Buildings Co v Mackenzie (1795) 8 Bro. 42* that:

> *"He that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself, because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted."*

45. The petitioners simply ask the directors to act in the best interest of the corporation. The holding of the meeting in the manner prescribed by law, the alteration of Articles in terms of section 28 and the capitalisation of reserves by the procedure laid down in clause 121 of Articles are measures put in place in order to rule out set-serving conduct of the directors and to make certain that their acts are *bone fide* for the benefit of the company as a whole. In *Punt v Symons & Co. Ltd. [1903] 2 Ch. 506*, the power to issue shares was characterised as a fiduciary power and it was stated by Byrne J. that: *"A power of the kind exercised by the directors in this case, is one which must be exercised for*

the benefit of the company… but whom I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and bone fide exercise of the power."

46. I am not here called upon to determine whether there was a breach on the part of the directors of their fiduciary power or that the directors failed to act fairly or in the best interest of the corporation. But the implication clearly is that there is a lurking danger of an unfairly prejudicial conduct on the part of the directors and their probity which seems to emerge from the flaws in convening the meeting.

47. Section 28 is an important safeguard against majority oppression or abuse of power. *Peter's American Delicacy Co Ltd. v Health (1939) 61 CLR457 (High Court of Australia)* is arguably the most important case on the issue of alteration of articles. Dixon, J. held that:

> *"Dixon J: Primarily a share in a company is a piece of property conferring rights in relation to distribution of income and of capital. In many respects the proprietary rights are defined by the articles of association, and it is easy to see that a power of alteration might be used for the aggrandisement of a majority at the expense of a minority. For example, if there were no check upon the use of the power, it is conceivable that a three-fourths majority might adopt*

an article by which the shares which they alone held would participate, to the exclusion of other shares, in the surplus assets in winding up or even in distributions of profit by way of dividend. Again, authority might be obtained under an alteration so as to convert the assets or operations of a company into a source of profit not of the company but of persons forming part of or favoured by the majority. It has seemed incredible that alterations of such a nature could be made by the exercise of the power. But reliance upon the general doctrine that powers shall be exercised bona fide and for no bye or sinister purpose brings its own difficulties. The power of alteration is not fiduciary. The shareholders are not trustees for one another, and, unlike directors, they occupy no fiduciary position and are under no fiduciary duties. They vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantage. No doubt the exercise of the right affects the interests of others too, and it may be that an analogy may be found in other powers which though given to protect the donee's own interests affect the property rights of others, as, for instance, does a mortgagee's power of sale. Some such analogy probably gave rise to the suggestion made in Buckley on The Companies Acts that the limitation on the power is that the alteration must not be such as to sacrifice the interest of the minority to those of a majority without any reasonable prospect of advantage to the company as a whole.

Apart altogether from altering articles of association, the voting strength of a majority of shareholders may be used in matters of management and administration to obtain for themselves advantages which otherwise would enure for the benefit of all the members of the company, and in some circumstances such an attempt on the part of the majority to secure advantages to the prejudice of the minority conflicts with ordinary notions of fair dealing and honesty. Often when this is done the thing attempted will be found by its nature to fall outside the power of the members in general meeting and even outside the corporate powers of the company. But this is not necessarily the case, and a thing not of its own nature ultra vires may be invalidated by the effect which it produces or is intended to produce in benefiting some shareholders

at the expense of others or individuals at the expense of the company.

An example of a misuse of power on the part of shareholders constituting a majority in the administration of a company's affairs is the unjustifiable refusal to allow an action to be maintained in the name of the company to redress a wrong to it by one of themselves.

In these formulations of general principle there is an assumption that vested in the company or in the minority of shareholders, as the case may be, is an independent title to property, to rights or to remedies, and the ground of the court's intervention is that by the course adopted by the majority, the company or the minority will be deprived of the enjoyment of that to which they are so entitled. The conduct of the majority is then given some dyslogistic description such as 'fraudulent', 'abuse of powers' or 'oppression'. A chief purpose of articles of association is to regulate the rights of shareholders inter se, and their relations to the profits and surplus assets of the company are governed by the provisions of the articles. A power to alter articles of association is necessarily a power to alter the rights of shareholders inter se, including their mutual rights in respect of profits and surplus assets. It is therefore evident that some difficulty must arise in applying to resolutions for the alteration of articles a statement of principle which assumes the independent existence of rights which should not be impaired or destroyed. Prima facie rights altogether dependent upon articles of association are not enduring and indefeasible but are liable to modification or destruction; that is, if an when it is resolved by a three-fourths majority that the articles should be altered. To attempt to distinguish between alterations which deserve the epithet fraudulent or oppressive or unjust and those deserving no moral censure without explaining the considerations upon which the distinction depends, is to leave the whole question to general notions of fairness and propriety…To base the application of these descriptions to a particular resolution upon the fact that it involves a modification or defeasance of rights of a valuable or important nature, is in effect to go back to the discarded distinction between articles affecting the constitution and those affecting the administration of the company or to a distinction very like it. To base the application of the epithets upon

> *the circumstance that the majority obtain a benefit by the changes seems to involve some departure from the principle that the vote attached to a share is an incident of property which may be used as the shareholder's interests may dictate…"*

48. Therefore, I have no doubt that the alteration of articles had to be made and this was to be done by complying with section 28 of the Ordinance, 1984.

Proxy:

49. The parties' dispute centers around the issue of proxy. The petitioners allege that the proxy appointed by the petitioners company was not permitted to attend the EOGM on the pretext that the proxy was deficient and incompetent. The Chairman, therefore, did not allow Ijaz Malik who was appointed as the proxy to attend the EOGM. This was based on a reading of section 161(1)(d) of the Ordinance, 1984. The said provision entitles a member of a company to vote at a meeting of the company through appointment of a proxy to attend and vote instead of him. It further provides that the proxy so appointed shall have such rights as respects speaking and voting at the meeting as are available to a principal. Clause (d) of sub-section (1) however, imposes a prohibition on the appointment of a proxy other than a member unless articles of the company permit appointment of a non-member as proxy.

Ijaz Malik who was appointed as a proxy and who sought to attend the meeting is not a member of Murree Brewery and thus his appointment was caught by the rigors of section 161 (1)(d). By a power of attorney dated 29.10.2014, Kingsway Fund appointed Citibank N.A Karachi as the true and lawful attorney to inter alia:

> *"9. To appoint with written consent proxies on our behalf for attending the shareholders meeting and for that purpose to sign proxy forms and complete other formalities in accordance with the instructions of BANQUE PICTET & CIE S.A. (such consent and instructions may be given by tested telex or SWIFT communications).*
>
> *For purposes of this power, the Attorney shall be restricted to acting in connection with shares, bonds or securities which are traded or dealt with in Pakistan and which are or are to be held in our custody account with the Attorney."*

50. Taking this power of attorney as the source of power, a series of power of attorneys were subsequently executed. The first in line is dated 08.04.2014 in favour of Nadeem Lodhi by Citibank N.A conferring the same power on said Nadeem Lodhi. Nadeem Lodhi, in turn, conferred the same power on Naseer ud Din Ahmad vide a power of attorney duly executed on 14.04.2015. The learned counsel for the respondents seriously objects to the authority of Ijaz Malik to attend the EOGM on the simple ground that no power of attorney has been executed in the name of Ijaz Malik and does not take

cavil with the fact that there was no prohibition for Nadeem Lodhi or Naseer ud Din Ahmad to attend the meeting as they held a valid power of attorney in their favour.

51. I have no doubt in my mind that the case is not covered by section 161 (1)(d) of the Ordinance, 1984 and is more properly covered by the provision of section 162, which is as follows:

> ***162. Representation of corporations at meetings of companies and of creditors. -*** *(1) A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.*
>
> *(2) A company which is a creditor of another company may authorise any of its officials or any other person to act as its representative at any meeting of the creditors of that other company held in pursuance of this Ordinance or any other meeting to which it is entitled to attend in pursuance of the provisions contained in any debenture or trust deed or any other document and the person so authorised shall be entitled to exercise the same powers as are available to the company which he represents.*

52. Clearly, the proxy issued in favour of Ijaz Malik was not a valid proxy and does not comport with the express provisions of the Ordinance, 1984 dealing with proxies. Clause 58 of the Articles also reinforces and

echoes the terms of section 161 relating to the condition of only a member to act as a proxy. Therefore, it is in my opinion a fallacy on the part of the petitioners to claim to appoint a proxy. The Form of proxy by which Ijaz Malik was appointed is annexed at page 30 with the reply filed by the respondents No.2 and 9. This document makes an interesting reading. I will advert to this document at a later stage.

53. The reliance of the learned counsel for the respondents No.2 and 9 on section 162 is proper and for all intents the provisions of section 162 will regulate the issue in the facts and circumstances of the case. The provisions with regard to the proxy have no applicability and thus cannot be pressed home. The proxy issued in favour of Ijaz Malik can at best be taken as an authorization in terms of section 162. Since a special procedure has been carved out by section 162, the controversy will have to be resolved in the context of the tenor of the said provision which provides that a company which is a member of another company (which is not in doubt that the petitioner is such a member) may by resolution of the Directors, authorize any of its official or any other person to act as its representative at any meeting of that other company. This has been

brought forth in clause 56 of the Articles which is the regulation dealing with the vote of a company as a member and it says that:

> *"A company which is a member of the Company may by resolution of its Directors authorise such person as it thinks fit to act as its representative at any meeting of the Company and the person so authorized shall be entitled to exercise the same powers on behalf of such company as the Company could exercise if it were an individual member of the Company."*

54. I will first advert to the admitted facts. The authorization by Kingsway Fund in favour of Citibank N.A is not in dispute. It is not in dispute that this is based on past practice by which Kingsway Fund participated in the meetings of the Company. It is also not in dispute that Ijaz Malik has attended previous meetings as the representative of Kingsway Fund. Ijaz Malik has not been directly appointed as a representative by Kingsway Fund. He has been appointed by a circuitous method by way of assigning the power of attorney in favour of Citibank N.A. I have referred to clause (9) in the power of attorney in favour of Citibank N.A. It follows, therefore, that it is for the Company which is a member to authorize such person as it thinks fit to act as its representative at a meeting. The Kingsway Fund does not deny the status of Ijaz Malik as its representative and has reasserted the said status in the

present petition. It is also not in doubt that Ijaz Malik has been acting as the representative for the petitioner-Company in the past meetings and the Chairman was well aware of it. If the principal (Kingsway Fund) does not deny Ijaz Malik to be its agent, it does not lie within the power of the Chairman to do so. The Chairman, in terms of clause 65 of the Articles, could at best, decide on the validity of a vote, if an objection was taken. But Ijaz Malik was not permitted to vote and thus the Chairman preempted the casting of the vote. Be that as it may, the Chairman misdirected himself by treating Ijaz Malik as a proxy and not an authorization in terms of section 162 of the Ordinance, 1984. Mr. Ali Raza, Advocate, counsel for the respondents No.2 and 9 admitted that had Nadeem Lodhi attended the meeting, he would have been permitted to attend as he had the power of attorney in his favour executed by the main attorney Citibank N.A. However, in my opinion, it does not matter whether Ijaz Malik had no power of attorney and on the doctrine of substantial compliance, what matters is that Citibank N.A had appointed Ijaz Malik to attend on its behalf and accepts all acts performed by Ijaz Malik for seeking to attend the meeting. Further, a recital in the power of attorney dated 20.06.2013 in

favour of Citibank N.A should clear the cobweb to have surrounded the controversy. The document of power of attorney provided, inter alia:

> *"The Attorney being a corporate body, all powers invested in the Attorney by this Power of Attorney may be exercised by any Attorney of the Attorney or upon prior notification to us, via PICTET & CIE, by any substitutes appointed by that Attorney. It is hereby clarified for the avoidance of doubt that in case a third party (not being an employee of the Bank) is substituted or delegated by the Attorney, the prior written consent of THS KINGSWAY – FRONTIER CONSUMER shall be obtained."*

55. There could not be a clearer expression of the intent that the attorney being a corporate body, all powers invested in the Attorney by the power of attorney were permitted to be exercised by any attorney of the attorney or by any substitute appointed by that attorney (that is Citibank N.A).

56. Therefore, the attorney which is the Citibank N.A may further appoint any attorney or a substitute, either appointed by the attorney of the attorney or by the attorney himself. Indubitably, therefore, Citibank N.A could appoint its attorney which it did by appointing Nadeem Lodhi and Naseer ud Din Ahmad as also could have appointed Ijaz Malik as a substitute. There was thus wide power in the attorney to further appoint an attorney or a substitute. The underlying intention is for

leeway to be given to the attorney to make it possible for a representative to attend the meeting and to perform all other acts on behalf of the principal that is Kingsway Fund. Neither Kingsway Fund nor the Citibank N.A denied the authority of Ijaz Malik and so the Chairman was palpably wrong in denying Ijaz Malik to attend the meeting.

57. The proxy Form which was executed to entitle Ijaz Malik to attend the meeting was executed by the Kingsway Fund appointing Ijaz Malik as the proxy. This Form of proxy could have been taken as an authorization directly by Kingsway Fund in favour of Ijaz Malik. Be that as it may, the Form does have the official stamp of Citibank N.A affixed on it and it has been signed by Naseer ud Din Ahmad. This leaves it in no manner of doubt that Ijaz Malik acted as the substitute for Naseer ud Din Ahmad and this was within the authority conferred on the attorney Citibank N.A by Kingsway Fund. At the foot of the Form of proxy are given certain notes and in terms of note 3, in case of a corporate entity, the power of attorney with specimen signatures shall be submitted to the company. However, by the same statement, it is not required to be submitted if it has been provided earlier. Undoubtedly, the power

of attorney and necessary authorization has already been submitted to the Company and Ijaz Malik has been attending the previous meetings of the Company on behalf of Kingsway Fund. On this basis, therefore, it is held that the act of the Chairman to deny Ijaz Malik from attending the EOGM renders the EOGM as invalid as also the proceedings taken in that meeting.

58. There is also a case of *estoppel* made out to challenge the proxy. If Ijaz Malik has been attending previous meetings and Murree Brewery has accepted the decisions arrived at by his vote, the company or the Chairman is estopped from laying a challenge to his authority. This begs the question; what if Ijaz Malik attended and voted in favour of the special resolution? Would the company or the Chairman allege his vote as invalid and to be taken out of consideration? This, in my opinion, is highly improbable.

Petitioners' Standing:

59. Mr. Ali Raza Advocate, counsel for the respondents No.2 and 9 made a flanking rather frontal attack on the standing of the petitioners to maintain the instant petition. It was contended that the petitioner No.1 was not a shareholder and, therefore, could not maintain the petition. This is not denied and, therefore,

the standing of the petitioner No.1 to maintain this petition is not established.

60. This is not the case with the petitioner No.2 Kingsway Fund which is a member having not less than 10% of the voting power in the Company.

61. By clause 19 of the Articles of Association of Kingsway Fund, the Company will be bound towards third parties by the joint signatures of any two directors or the single signature of any other person to whom such power has been delegated by the Board of Directors. Therefore, the Company has, by article 19, bound itself by the joint signatures of any two directors. This petition has been filed by Mr. Muhammad Hassan in whose favour there is a power of attorney executed on 29.9.2016 by two of the directors of Kingsway Fund. Therefore, the power as duly been conferred in terms of clause 19 of the Articles of Association governing the conduct of the internal management of Kingsway Fund. Moreover, section 160A of the Ordinance, 1984 does not impose a condition for such a strict construction of the question relating to standing. What is required as a *sine qua non* is that the Court may be approached by the members having not less than 10% of the voting power. It is not denied that Kingsway Fund is such a member

and Kingsway Fund does not dispute the authority of Muhammad Hassan to file and maintain this petition. There is no doubt that as a corporate entity, Kingsway Fund must act through its Board of Directors. No material has been brought forth to lay a challenge to the assertion of the petitioners that the power of attorney was conferred on the two directors by the Board of Directors who have, in turn, executed that power of attorney in favour of Muhammad Hassan. That Mr. Conor McNaughton, Director of Kingsway Fund has been acting on behalf of the petitioner No.2 in all its correspondence and affairs, is evident from the letter dated 30.08.2016 annexed as attachment 'A' with the reply filed by the respondents No.2 and 9. It is the same Director of Kingsway Fund who has executed the power of attorney in favour of Muhammad Hassan to file the instant petition. Therefore, I have no doubt that the petition is maintainable and has been competently filed.

62. There are observations in *Shahid Saigol and 16 others*, which bolster the conclusion drawn above as to standing. It takes a novel approach to the issue. It was said that:

> *"Under section 161(8) shareholders having not less than 10% voting powers could maintain the petition but it could be urged by them that the proceedings in*

> *the said meetings had been vitiated on account of defect in the notice if the members in general were prevented from using their rights effectively. They were entitled to maintain and show that had all material facts been disclosed and terms and conditions attached to the investment clearly mentioned those who abstained from attending the meeting would have taken a decision to attend the same in view of the importance of the matter, therefore, it is the prejudice caused qua the whole body of members which can be made the basis for declaring the proceedings invalid and not in relation to particular members bringing the petition before the Court as in section 161(8) the expression used is "that the members were prevented from using effectively their rights" and not such members who had brought the petition before the Court…"*

Case Law:

63. *Parashuram Detaram Shamdasani and another v. Tata Industrial Bank, Ltd. and others* (A.I.R 1928 Privy Council 180):

> *"A shareholder, who by his conduct shows that he knew the real effect or work to be transacted at a meeting, cannot complain of the notice on the ground of insufficiency."*

64. This judgment of the Privy Council turned on its own peculiar facts and it was held that the action was personal to the appellant in that case and no complaint of the sufficiency or otherwise of the notice by any person or from any quarter was brought to the attention. However, the provisions which were in issue in the judgment were materially different and the judgment proceeds on the doctrine of substantial compliance holding that in case a member knew the real fact or the

work to be transacted at a meeting, he could not complain of the notice on the ground of insufficiency. In this case, the learned counsel for the respondents simply denies that a statement in terms of section 160(1)(b) of the Ordinance, 1984 was not relied at all. Therefore, the reliance on this judgment is inapt. The cases reported as *Abdul Sattar and another v. Mian Muhammad Attique and another* (2010 YLR 616), *Muhammad Yaseen Siddiqui v. Tahseen Jawaid Siddiqui* (2003 MLD 319) and Muhammad Maroof Ahsan v. Messrs Beach Developers through Partner (2011 MLD 36) were cited to establish the insufficiency in law of the power of attorney in favour of Muhammad Hassan. It was held in the precedents so cited that a power of attorney which is executed in a foreign country has to be attested and registered in accordance with law to lend it validity. These cases are distinguishable and relate to the execution and registration of power of attorneys of Pakistanis living abroad and the execution of these power of attorneys for accomplishment of certain transactions in Pakistan. The ratio in these judgments does not apply to foreign companies registered abroad and seeking to authorise a person to act on their behalf in Pakistan.

65. In view of the above, this petition is allowed. It is held that:

i. *The EOGM of 29.9.2016 is declared as invalid and unlawful.*

ii. *The notice for the EOGM of 29.9.2016 is declared incompetent and in violation of section 160(1)(b) of the Ordinance, 1984. The Directors of Murree Brewery shall hold a fresh General Meeting after complying with the provisions of section 160(1)(b) as to Notice and Statement.*

iii. *The respondents are restrained from giving effect to any decision taken or resolution passed at the EOGM of 29.9.2016.*

iv. *Mr. Ijaz Malik holds a valid authorisation on behalf of the petitioners and is entitled to attend the General Meeting until revoked in accordance with law.*

v. *The alteration of the Articles shall be made in terms of section 28 in the fresh General Meeting. Any capitalisation of reserves shall be done by complying with clause 121 of the Articles.*

Petition allowed.

(SHAHID KARIM)
JUDGE

Announced in open Court on 28-10-2016:

Approved for reporting

JUDGE

*

Rafaqat Ali