2013 C 1, D 114
[Sind]
Before Munib Akhtar, J

Mst. NEELOFAR SHAH and another--Petitioners
versus
Messrs OFSPACE (Pvt) LTD. through Company Secretary and 8 others--Respondents
J.M. No.31 of 2007, decided on 5th Ju1y, 2012.
Abid S. Zuberi, Asghar N. Faruqui and Haseeb Jamali for Petitioners. Rasheed A. Razvi and Tahmasp Razvi for Respondent No.1. CDL 2013] Neelofar Shah U. Ofspace (Pvt) Ltd. 117 (Munib Akhtar, J)Agha Faisal for Respondents Nos. 2 to 4. Arshad M, Tayebaly and Amel Khan Kansi for Respondents Nos.5 and

6. Shehryar Qazi for Respondent No.8.
Dates of hearing: 5th,10th, 13th, 24th 30th May, 2nd June, 3rd, 4th August, 15th December, 2011 and
10th May, 2012.
ORDER
Order accordingly.

(a) Companies Ordinance (XLVII of 1984)---Sections 9 & 290--Court---Procedure---Court, under S.9 of Companies Ordinance, 1984, follows summary procedure in all matters before it---Provisions of S.9 of Companies Ordinance, 1984, cannot absolve the court from exercising its statutory jurisdiction on the ground that matter before it involved difficult, complicated or intricate (or simply disputed) questions of fact---Disputed questions of fact, even U intricate, complicated or difficult, arising in the context of petition under S.290 of Companies Ordinance, 1984, can be taken up and decided by court.

Lahore Race Club V. Raja Khush Bakht-ur-Rehman PLD 2008 SC 707; Yousuf v. Valika Textile Mills Ltd. PLD 1964 Kar. 31; Manzoor Ahmed Bhatti and others v. Haji Noval Khan 1986 CLC 2560; Zakir Latif Ansari and another v, Pakistan Promoters Ltd. and others 1988 CLC 1541; Engro Chemical Pakistan Ltd. v. Muhammad Hussain Dawood and others 2003 CLD 293; Shah Mushtaq Ahmad v. Shoukat Soap Factory and others 1987 CLC 2079: Khurshid Ahmad Khan and another V. Pak Cycle Manufacturing Company Ltd. and others PLD 1987 Lah. 1; Salaintddin Khan V. Al-Mansoor Ltd. and others_PLD 1987 Lah. 569; Muhammad Aslam Javed and another v. Malik Ijaz Ahmad and another 2003 YLR 2150; 2003 CLD 1442; Rohail Hashmi and others v. Nabeel Hashmi and others 2003 CLD 201; Scottish Co-operative Wholesale Society Ltd. v. Meyer [1958] 3 All ER 66; Shahamatullah Qureshi v. Hi-Tech Construction (Pvt.) Ltd. 2004 CLD 640; Saleh Muhammad v. Mst. Resham Bibi 1986 CLC 2561; Muhammad Suleman v, Abdul Rashid and others PLD 1987 Lah. 387 and Muhammad Mohsin Butt and others v. Muhammad Inayat Butt and others 2005 CLD 747 ref.

(b) companies ordinance (XLVII of 1994)--Section 290---Application to court---Limitation--Scope---Jurisdiction under Companies Ordinance, 1984, is indisputably equitable in nature and relief can be refused on the grounds of laches.

(c) Companies Ordinance (XLVII of 1984)---Sections 290, 291 BL 292--Case of oppression---Assets and income of company---Entitlement---Applicants claimed to be entitled to revenues and income received from the project of the company and -alleged that respondents had been usurping and grabbing the same---Validity-Property, assets and income of company belonged to it alone and shareholders did not have any interest, right or title in or to the same---Property in question

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belonged to company in question and was its assets and it was that company which was entitled to any income derived from it; such, assets regardless of whether the construction of property in question was financed entirely by applicants---Shareholders of the company, even by unanimous decision could not themselves deal directly with company's assets and income as though they were the owners thereof even though the shareholders could ultimately be entitled to the benefit of income by way of a payout of dividend---Two things [i.e. the company's income and a dividend declared in favour of shareholders) were in law separate and distinct---Rights and obligations purportedly created in terms of agreement between the parties with regard to property in question and income to be derived from it were unenforceable in law--Even those clauses of the agreement which could have such an effect were also unenforceable---Neither of the parties could have any legal grievance against the other with regard to any alleged "breach" of agreement in question---Alleged non-implementation of agreement in question by respondents could not form the basis of or support and action by applicants under S.290 of Companies Ordinance, 1984--Applicants had made out a case of oppression within the meaning of S.290 of Companies Ordinance, 1984 and were entitled to have brought the situation to an end---High Court declined to make an order for buyout of the shares of one group by the other, as the company was a going concern and it appeared to be a profitable one---High Court in exercise of powers under Ss.290 and 291 of Companies Ordinance, 1984, issued directions that would be to the ultimate advantage and benefit of both sides---Application was disposed of accordingly.

Syed Akbar Ali v. Mamun Ali Bumask (Pvt.) Ltd. And others 2006 CLD 960; Saeeda Mahmood and another v. Arias Munir (Pvt.) Ltd. and others 2007 CLD 637; Khurshid Ahmad Khan and.another v. Pak Cycle Manufacturing Company Ltd. and' others PLD 1987 Lah. 1; Fareeclabad Cold Storage v. Official Liquidator AIR 1978 Delhi 158; R C Abrol Company v. A R ,Chandia and Company AIR 1978 Delhi 167; Sha Mulchand & Co. Ltd. (In Liquidation) v. Jawahar Mills Ltd, AIR 1953 SC 98; Town Municipal Council, Athani v. The Presiding Officer, Labour Courts, Hubli and others AIR 1969 SC 1335; Kerala State Electricity Board, Trivandrum V. T.P. Kunhaliumma AIR 1977 SC 82; Saloman v. A. Saloman and Co. Ltd. [1897] AC 22; Anjum Rashid and others v. Shehzad and others 2007 CLD 1210 and in Re: Jermyn Street Turkish Baths Ltd. [1971] 3 All ER 184, 199 ref.

MUNIB AKHTAR, J .---By means of this petition under section 290 of the Companies Ordinance, 1984, the petitioners seek relief against alleged acts of oppression by the respondents Nos. 2 to 4 in relation to the affairs of the respondent No.1, of space (Pvt.) Ltd. ("the Company"]. The petition arises in the following circumstances. Learned counsel for the petitioners submitted that the Company was incorporated on 17-12-1997. It was set up for the purpose of constructing high end, top scale building projects. comprising of offices, which were to be let out and/or sold to select tenants or buyers. The income of the Company would arise from the rental payments and/or sale proceeds. At present, it appears that the Company has one project, which comprises of two office towers on plot No.St-8, Commercial Area, opposite Aisha Bawany School, Main Shahra-e-Faisal, Karachi ["the property"). The property was acquired by means of a registered sale deed executed on 21-01-1998 (pursuant to arsale agreement dated 07-01-1998), i.e., contemporaneously with the registration of the Company itself and indeed, it is the case of the petitioners that the Company was set up specifically with a project on the property in mind. (Although the designation and numbering of the two towers has changed over time, for convenience I will refer to them as Tower I and Tower II.) Tower I is by far the larger of the two blocks, and learned counsel submitted that on 26-12-1997 a lease deed was entered into between the Company and IBM whereby the latter agreed to take on lease Tower I or a substantial portion thereof (which was of course yet to be built on property yet to be acquired) in terms as therein stated.

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2. Learned counsel submitted that the Company and the project on the property were the brainchild of Mr. Nazeer Hussain Shah ("Mr. Nazeer"), who is respectively the husband and father of the two petitioners. Learned counsel submitted that Mr. Sher Asfandyar Khan ("Mr. Asfandayar"), the respondent No. 2, was an old friend of Mr. Nazeer and he was brought on board the project by the latter. Learned counsel emphasized that the financing for the project and the initial outlays and expenditures were incurred entirely by Mr. Nazeer and/or other companies owned or controlled by him and his family. More specifically, Mr. Asfandyar did not contribute any capital to the Company or the project. A shareholders agreement dated 14-01-1998 was drawn up ("the Main Agreement") to reflect the arrangement and understanding between the parties. This agreement was executed by Mr. Nazeer and Mr. Asfandyar, and witnessed, among others, by the respondent No.4 (who is the brother of Mr. Asfandyar) and the respondent No.5. Learned counsel submitted that the relationship between the parties was to be regulated by the Main Agreement, and it was in part, a violation of the terms thereof that led to the filing of the present petition under section 290. Learned counsel submitted that the shareholding of the Company was divided between the "Shah group" (represented by Mr. Nazeer)
and the "Khan group" (represented by Mr. Asfandyar). It was agreed that the Shah group would hold 44% of the shares. To be held by the wife and son of Mr. Nazeer (i.e., the present petitioners), who would hold 26% and 18% respectively. The Khan group would hold 26% of the shares to be held by the
respondent No.3, who is the sister of Mr. Asfandyar. Thus, the two groups taken together would hold 70% of the shares. The balance 30% would be held initially by the respondent No. 4, but only for a specific and limited purpose, i.e. for the possible distribution of these shares among certain persons listed in the Main Agreement in the proportions as therein stated. These persons included the respondents Nos. 5, 6 and 8. They would (if at all) be entitled to the shares on account of the assistance and other services (by way of consultancy, etc.) that were provided to the Company for the purposes of the project.

3. Referring to the Main Agreement, learned counsel submitted that the Shah group was throughout referred to as the majority shareholders and the Khan group as the minority shareholders. He submitted that it was agreed that Mr. Asfandyar, the respondent No. 2, would be the chief executive of the Company for two consecutive terms (i.e. from 1997-2001 and 2001-2004) and thereafter the chief executive would be appointed as desired by the Shah group. Learned counsel contended that in gross violation of this condition, Mr. Asfandyar continued to hold the office of chief executive and hence control over the day to day management of the Company, and thus its affairs had been usurped by the Khan group. He also submitted that it was agreed that two directors on the board would be nominated by the Shah group and two by. the Khan group, and the chairman of the board would be a Shah group nominee, specifically being Mr. Nazeer. lnsofar as the 30% shares to be held by the respondent No. 4 were concerned, learned counsel submitted that, the Main Agreement expressly provided that if the shares (or any portion thereof) were not to be issued to the persons specified therein, "the same shall revert back to the majority shareholders (Shah family) and the reasons for not issuing to the designated person are to be recorded in the relevant corporate registers". As will be seen. It is central to the grievance of the petitioners that, according to them, this condition has been grossly violated. Learned counsel also submitted that the Main Agreement expressly provided that the profits made by the Company were to be distributed among the shareholders only by way of dividends and that such a declaration could only be made by the chairman of the board with the concurrence of the board itself.

4. Learned counsel further submitted that along with the Main Agreement, and on the same date, another agreement ("the Second Agreement") was also executed between the parties (the executants being, as before Mr. Nazeer and Mr. Asfandyar). The Second Agreement related to

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Tower Il, the smaller of the two towers that comprised the project on the property. It also expressly recognized that the financial contribution and capital outlay in relation to the project had been undertaken by Mr. Nazeer and that the minority shareholders (the Khan group) were "professionals", who were "neither financial contributors towards the equity of the project till now, nor are they in a position to make any financial or material commitment towards the equity of the company". As such, the Second Agreement recorded that "the management shall maintain separate accounts regarding Expenses and Revenues of Tower-l and Tower-ll, and submit a bi-annual summary of accounts and progress report to Mr. S. Nazeer H Shah" and that "all incomes from Tower-ll shall be credited to bank account of S. Nazeer Shah".

5. The petitioners case is that Mr. Nazeer has a long history of suffering from various ailments and infirmities, which had in the past required major medical treatment, including surgical operations. These problems continued to persist such that sometime in January l999, Mr. Nazeer, accompanied by his family (including the petitioners) had to leave for the United States for long term treatment. This resulted in his (and his family's) absence from Pakistan for a number of years. It is stated that they (or at least Mr. Nazeer) returned to the country on a permanent basis only around July 2006. Although Mr. Nazeer did visit Pakistan in between on at least three occasions, each time it was (it appears) only for a short duration and necessitated by some major crisis or bereavement in the family. Thus, for all effective, purposes, the Shah group was out of the country for a number of years and the affairs of the Company were entirely in the hands of the Khan group, which of course (according to the petitioners) is led and masterminded by Mr. Asfandyar. Given the long standing relationship between Mr. Nazeer and Mr. Asfandyar, there was complete trust and confidence that the affairs of the Company would be dealt with and managed in accordance with law and the agreed terms as per the two Agreements executed on 14-01-1998 referred to above. The petitioners grievance is that it was only when Mr. Nazeer returned to Pakistan in 2006 and started probing into the affairs of the Company and how it was being managed that the true picture began to emerge and it became clear how badly the trust and confidence reposed in Mr. Asfandyar had been abused and betrayed. The petitioners case is that these revelations and grievances led directly to the filing of the present petition.

6. When the submissions of learned counsel for the petitioners, and the pleadings of the parties are considered, it becomes clear that the petitioners grievances fall under three heads. Firstly, the grievance is that in gross violation of the Main Agreement, the Khan group has grabbed the 30% shares that were meant for certain third parties as explained above, Specifically, the grievance is that these shares were to be held by the respondent No..4 in "safe custody" for the limited purposes permissible under the Main Agreement. Instead, these shares were purportedly transferred by the respondent No.4 to Mr. Asfandyar (except for one qualifying share allegedly retained by the former) by means of a transfer that took place on 15-01-1999 and which was approved by the board at two meetings held on that date in Islamabad. The petitioners contend that no such meetings ever took place and the signature of the petitioner No.1 on the minutes of one of those meetings (which show both her attendance at the meeting and approval for the transfer of the shares) is a forgery. The transfer was also questioned by SECP (the respondent No.9) inasmuch as it asked for certain details in respect thereof but no reply was ever given by the Company. Learned counsel contended that not merely was this purported transfer illegal. but it changed the very complexion of the shareholding as after this unlawful grab, the Khan group effectively became the majority shareholders (holding both their actual entitlement of 26% and the unlawfully acquired 30%). This obviously has a material and fundamental effect on the control and management of the Company's affairs.

7. Secondly, the petitioners grievance is that the Second Agreement has never been acted upon. The revenues and income received from Tower ll, which was to go to the Shah group (through Mr.

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Nazeer) has been unlawfully usurped and grabbed by the Khan group. No accounting has ever been given of these funds. The third grievance is that the petitioners have been completely ousted from the affairs of the Company. Although they continue to be shown, proforma, as directors of the Company, no accounts have been given to them, nor any access to the Company's records as is their entitlement both in,1aw and in terms of the Main Agreement. No notices of meetings, whether of the board or the shareholders, have been given even after the return of Mr. Nazeer to Pakistan and there is a complete blackout insofar as the petitioners are concerned. It is alleged that the revenues and income of the Company are being grossly misused and siphoned off by the Khan group for their own purposes, and have been illegally utilized by them to start several "spinoff businesses which they control and from which they alone benefit. Thus, it is alleged that blatantly illegal acts of misfeasance and fraud have been committed. No information is at all being given to the petitioners (acting at all material times through- Mr. Nazeer) despite their best efforts. Even the dividends to which the petitioners are entitled on the basis of their shareholding of record (44%) are being denied to them. Thus, the grievance of the petitioners is that although the Shah group was instrumental in the incorporation of the Company and the financing of the project, towards which the Khan group contributed nothing in money terms, the benefits accruing from the Company's operations have been illegal usurped and grabbed by the latter to the complete detriment and ouster of the former. Learned counsel for the petitioners contended that these acts (both in the past and as continuing up to the filing of the petition and its hearing] constituted acts of oppression within the meaning of section 290 of the Companies Ordinance and the petitioners were 'therefore entitled to suitable relief accordingly.

8. Learned counsel for the Company (respondent No.1) as also learned counsel for the respondents Nos.2 to 4 (the Khan group as identified' by the petitioners) strongly contested the petition and opposed the grant of any relief to the petitioners. Since the submissions by both learned counsel were' along the same lines and the pleadings were also substantially the same, I shall (without intending any disrespect) take them up together and without differentiating between them. Learned counsel rejected all allegations made by the petitioners. The Main Agreement and the Second Agreement were repudiated as forgeries and fabrications. Without prejudice to this stand, learned counsel contended that the Agreements executed on 14-01-1998 were between two persons (Mr. Nazeer and Mr. Asfandyar) who were not members or shareholders of the Company as on that date, i.e. were strangers. It was also pointed out in particular that admittedly Mr. Nazeer never became a member of the Company. Thus. the Agreements could not in any manner amount to any arrangement or relationship for laying out a roadmap as to how the affairs of the Company were to. Be regulated and dealt with. It was also contended that in effect, the present petition sought specific performance of the two Agreements and had a suit been brought for such purpose, it would have to be dismissed as being barred by limitation. Learned counsel contended that Article 181 of the first schedule to the Limitation Act applied also to matters under the Companies Ordinance' and the relief sought by the petitioners, was hopelessly time barred. In the alternative, it was contended that in any case, the petitioners were disentitled to any relief on the ground of laches. The petition had been filed in 2007, whereas the so called illegal grab (vehemently denied) of the 30% shareholding had occurred in January 1999. In any case, the petitioners had approved the transfer and / or were fully aware of the same throughout and could not now raise any such grievance or objection. Certain correspondence. which l will consider later, was relied upon in this regard.

9. Learned counsel also totally rejected all allegations that the Company's affairs were being (or had at any time been) run or managed in a fraudulent manner or that any illegality had been committed. It was submitted that the allegations made in this regard involved disputed and complicated questions of fact that were being hotly contested and these could not be determined in the present proceedings, since the Companies Ordinance mandated (in section 9) that a

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summary procedure, be adopted in the hearing of all petitions. The petition merited dismissal on this ground alone.` It was strongly denied that the petitioners had been dealt with in any manner save and except in accordance with law. They were fully aware of all material facts and developments in relation to the Company throughout. It was contended that admittedly Mr. Nazeer had visited Pakistan more than once during the period that he and the petitioners were stated to be in the United States, but no attempt had been made to visit the Company or "discover" the (allegedly) "true" state of affairs as was now being contended. It was also denied that the transfer of 30% shares from the respondent No.4 to Mr. Asfandyar was in any manner illegal, whether as being violative of the Main Agreement as alleged or otherwise. It was also denied that SECP had sought information from the Company in this regard. It was vehemently denied that there had been any oppression of the Shah group or any mismanagement of the affairs of the Company. It was submitted that dividend payments had been duly made to the petitioners and all corporate filings with SECP, as required by law. had been regularly made, These filings had not been challenged by the petitioners at any stage prior to the filing of the present petition and being public documents, they must be regarded as having full knowledge of the same at all material times. They could not now belatedly raise objections and grievances in relation thereto. It 'was the petitioners themselves who had refused to accept payment of the dividends, simply in order to create a fallacious ground for purposes of the present petition. Without prejudice to the other contentions, learned counsel also submitted that even if the transfer of shares from respondent No. 4 to Mr. Asfandyar could be impugned. in any manner, a single act (and certainly not that act) could not be regarded as constituting oppression within the meaning of section 290. It was therefore prayed that the petition be dismissed. 10. Learned counsel for the respondents Nos.5 and 6 supported the case put forward by learned counsel for the petitioners. Learned counsel for the respondent No.8 adopted the submissions by learned counsel for respondents Nos.5 and 6. it will be recalled that respondents Nos. 5, 6 and 8 are those persons who, according to the petitioners, could be entitled to a certain shareholding in the Company in terms of the Main Agreement, the said shares to come from the 30% shares held by the respondent No.4 in "safe custody" but subsequently transferred to Mr. Asfandyar. Learned counsel for the respondents Nos. 5 and 6 submitted that although the said respondents (and of course respondent No. 8 as well) were not shareholders of the Company, they did have a grievance and were entitled to be heard by reason of their position in terms of the Main Agreement, The impugned acts of the Khan group were not merely oppressive of and towards the Shah group but also these respondents as well, and the illegal grab of the 30% shares directly affected their interests. In fact, two of these respondents (Nos.5 and 8) had filed suits in the civil courts (of district Karachi South) seeking enforcement of the Main Agreement in their favour, i.e., for them to be granted the shares as per their entitlement in terms thereof. The Company then filed transfer applications under section 24, C.P.C. ,for these suits to be transferred to this Court, and by order dated 25-02-2009, the said suits have been so transferred.

11. Learned counsel for the Company and learned counsel for the respondents Nos. 2 to 4 strongly contested the claim put forward by the respondents Nos. 5, 6 and 8. It was denied that these respondents were in any manner claimants in respect of any shares in the Company or otherwise interested in its affairs and certainly not for purposes of a petition under section 290. Learned counsel contended that they had been impleaded as parties simply in order to give some credence to the otherwise frivolous and utterly vexatious case sought to be made out by the petitioners.

12. Learned counsel for the petitioner, exercising his right of reply, submitted that the law of limitation did not apply to matters under the Companies Ordinance. Furthermore, there had been no delay in the filing of the petition, which accordingly was not hit by laches. Really speaking, the petitioners discovered the true state of affairs and the full extent of the defalcations and other illegalities committed by the Khan group only in 2006 on the permanent return of Mr. Nazeer to

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Pakistan. Furthermore, the petition did not seek specific performance of the two Agreements executed on 14-l-1998. Rather, the petitioners had invoked the statutory remedy provided by section 290 for a redressal of their 2013! Neelofar Shah u. ofspace (Pvt.) Ltd. 125 (Munib Akhtar, J) grievances with regard to the affairs of the Company. There were no disputed questions of fact such as could not be ascertained by the Court in the present proceedings and for purposes of the present petition. The objections taken by the contesting respondents were entirely without any merit and the petition ought to be allowed.

13. Learned counsel for all the respective parties also referred to case-law in support of their submissions, which I will consider below to the extent as is necessary and relevant.

14. I have heard learned counsel as above, gone through the record with their assistance and considered the case-law relied upon. Before proceeding further, it would be convenient to set out the shareholding in the Company as per the corporate filings made by it (as at the time of the filing of the petition). The Company has an authorized capital of Rsil0 million divided into 100,000 shares of a par value of Rs.l00 each. The paid up share capital is Rs.2.5 million comprising 25,000 shares, and the holdings on the record as filed are as follows:--

Shareholder	Shares	Percentage
Mrs. Neelofar Shah (petitioner No.1)	6500	26
Mr. Raza Shah (petitioner No.2)	4500	18
Mrs. Sajida Naeem respondent No.3)	6500	26
Mr. Asfandyar (respondent No.2)	7499	30
Mr. Alamgir Shah (respondent No.4)	1	--
Total:	25000	100

The shareholdings of the petitioners, totaling 44% of the paid up capital, and the shares held by the respondent No.3 (26%) are of course not in dispute. What is disputed is the 30% held by Mr. Asfandyar, which was originally allotted to the respondent No. 4 to be held by him, as claimed by the petitioners and denied by the contesting respondents, for the specific purpose stated in the Main Agreement. These shares (other than one qualifying share) were transferred to Mr. Asfandyar on 15-01-1999, a transfer strongly contested by the petitioners as illegal and defended by the contesting respondents as being entirely in accordance with law. (By contesting respondents, 1 mean of course the Company and the respondents Nos.2 to 4.)

15. The two agreements, the Main Agreement and the Second Agreement, are of course central to the petitioners case and it is the alleged non-implementation and violation of these agreements that forms the core of their grievances. These agreements are denied as forgeries and fabrications by the contesting respondents. This defense is linked to the larger issue raised by them, namely that the present petition requires determination of disputed and complicated questions of fact, which is not possible in terms of the summary procedure to be applied to petitions under the Companies Ordinance. Learned counsel for the contesting respondents referred to a number of decisions in this regard. Among the cases cited were: (1) Lahore Race Club u. Raja Khush Bakht-ur-Rehman PLD 2008 SC 707, (2) Yousuf v. Valika Textile Mills Ltd. PLD 1964 Kar 31 (SB). (3) Manzoor Ahmed Bhatti and others v. Haji Noval Khan 1986 CLC 2560 (SHC; SB), (4) Zakir Latif Ansari and another v. Pakistan Promoters Ltd. and others 1988 CLC 1541 (SHC; SB), (5) Engro Chemical Pakistan Ltd. u. Muhammad Hussain Dawood and others 2003 CLD 293 (SHC; SB), (6) Shah Mushtaq Ahmad v. Shoukat Soap Factory and others 1987 CLC 2079 [LHC; SB), (7) Khurshid Ahmad

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Khan and another v. Pak Cycle Manufacturing Company Ltd. and others PLD 1987 Lah. 1 (SB), (8) Salaintddin Khan u. Al-Mansoor Ltd. and others PLD 1987 Lah. 569 (SB), (9) Muhammad Aslam Javed and another v. Malik Ijaz Ahmad and another 2003 YLR 2150; 2003 CLD 1442 (LHC: SB), and (10) Rohail Hashmi and others v. Nabeel Hashmi and others 2003 CLD 201 (LHC; SB). (It will be noticed that other than the Supreme Court decision, the others are all single bench decisions of this Court or the Lahore High Court.) Now, the factual element common to all of these decisions is that they involved issues relating to the rectification of the members' register of the company concerned, i.e., with regard to whether the petitioner (or plaintiff, since some of the cases in fact were or originated in suits) was entitled to relief under section 152 of the Companies Ordinance (or section 38 of the precedent legislation, the Companies Act, 1913). This was in fact, the crux of the dispute in all the cases. The cases, other than the Supreme Court decision, involved companies limited by shares, and hence the issue before the Court was as to the ownership or .title to shares, it being well established that shares in a company are a form of property, which is owned by the member concerned. The Supreme Court decision involved a company limited by guarantee, and the question was whether the claimant was its member). It was in this context that the courts decided that where the resolution of the issue of ownership or title involved intricate or difficult questions of fact, the more appropriate remedy was by way of a civil suit and declined to exercise jurisdiction under the statutory remedy provided by section 152 and/or section 38 (as the case may be) One question that arose was whether the civil courts had any jurisdiction at all to decide any issue relating to title or ownership of shares in View of the statutory remedy. Put differently. the question was whether the jurisdiction of the civil courts was impliedly barred. This question was definitively answered in the negative by the Supreme Court in the cited case. Thus, it was authoritatively established that there was a concurrent jurisdiction. The statutory remedy could be availed under all circumstances, but if the company court (i.e., the court exercising jurisdiction under the Companies Ordinance/Act) concluded that the issues regarding ownership or title were difficult or complicated and better resolved by a civil suit, the petitioner could be directed to pursue his remedy by the latter means and not the simpler and faster remedy provided by the statute, which was generally regarded as being reserved for cases that were relatively straightforward and simple. It is to be noted that a petitioner availing the statutory remedy is not to be turned away simply because there is a factual dispute, it is the nature of the dispute that is crucial. Any contested proceedings will involve issues that need to be decided by the forum concerned. What the cited cases have decided is simply that if the nature of the dispute is complicated or involved. then it could be more appropriate to refer the petitioner to civil litigation. If the factual dispute is relatively
simple and straightforward, then it can (arguably, must) be decided by the company court in the exercise of the statutory power to rectify the members register. (I have not, I may note by way of an aside, come across a case that could be regarded as. the logical obverse of this trend of authority, i.e.,
where the aggrieved party straightaway filed a civil suit, but was turned away and directed to take recourse to the statutory remedy because the issues involved were simple 'and straightforward.)

16. In my view, and with respect. the foregoing cases do not lay down any broad or general principle that if the petition involves intricate, difficult or complicated (or even simply disputed) questions of fact, it cannot be entertained and decided. This is so not merely because the factual matrix in which the cited cases were decided, namely a dispute with regard to the title or ownership of shares, was entirely different from the facts and issues at hand. It is more fundamental than that. A dispute with regard to the title or ownership of any property is preeminently of a nature that can be litigated before and decided by civil courts. It is quintessentially a dispute of a civil nature. In respect of such a dispute, the question is not whether the civil courts can take cognizance of it, but rather the opposite; is their cognizance expressly or impliedly barred? This was the underlying jurisdictional question in the cited cases

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(which was sometimes expressly raised but more often lay unstated) and was ultimately decided in the negative by the Supreme Court as explained above. However, this issue and its resolution are far removed from the issues that arise in the present matter.

17. It is important to keep in mind that the modern company is a creature of statute. It comes into existence by registration 'under the Companies Ordinance/Act. At the same time, judicial decisions in respect of matters relating to companies are also of paramount importance. Thus, the law relating to companies it governed both by statutory provisions and many judicially evolved rules, and these taken together constitute what might be described as "company law". Now, as presently relevant, three situations can be envisaged with regard to any disputes arising out of or in relation to or involving company law. One is where the right is governed by company law and there is a statutory remedy (i.e., under the Companies Ordinance), but the nature of the right is 'such that a dispute in relation thereto is also amenable to resolution by and before civil courts under the general law. The second, category is where the right is governed by company law but there is no statutory remedy available. The third is where the right is governed by company law and there is a statutory remedy, and the nature of the right is such that a dispute in relation thereto is not amenable to resolution by and before civil courts under the general law. With regard to matters that fall in the- first category, the question is' always whether, in light of the statutory remedy. the jurisdiction of the civil courts is expressly or impliedly barred. The jurisdiction may be barred or there may be a concurrent jurisdiction. Disputes regarding title or ownership of shares fall in the first category. Obviously, cases that fall in the second category can be brought before the civil courts, since there can be no right without a remedy. However, matters that fall in the third category are not amenable to the jurisdiction of the civil courts and must be heard and decided only by the company court. For example, the winding up of a company is beyond the jurisdiction of civil courts because the general law has no equivalent to the winding up provisions of the Companies Ordinance. The statute that has brought the company into legal existence has itself provided the statutory means for ending it Likewise with section 290. It confers a statutory power on the company court to regulate the affairs of a company if the conditions specified therein are applicable. It is to be noted that section 290 is based squarely on section 210 of the (UK) Companies Act, 1948, and with regard to the latter provision Lord Keith noted, in Scottish Co-operative Wholesale Society Ltd. v. Meyer [1958] 3 All ER 66, that it conferred "a wide power on the Court to deal with such a situation [i.e., oppression] which it did not have in the case of a company prior to the passing of the Act of 1948" (pg. 86). (It may be noted that earlier a provision analogous to section 290, being section 153-C, had been inserted in 1979 in the Companies Act, 1913, but Lord Keith's point' remains just as valid.) Thus, section 290 involves a situation and confers. a power and provides a remedy which has (and had) no equivalent or parallel under the general law. Cases that come within the ambit of this provision must necessarily proceed before the company court.

18. Now, it is no doubt correct that section 9 of the Companies Ordinance requires the company court to follow the summary procedure in all matters before it. However, that ordinarily cannot absolve the court from exercising its statutory jurisdiction on the ground that the matter before it involves difficult, complicated or intricate (or simply disputed] questions of fact. If the matter is such that it comes within the first category identified in the last preceding para, then the company court may stay its hand and direct the petitioner to approach the civil court. In cases that fall within the third category, it is in my view neither permissible nor possible for the company court to stay its hand and refuse to decide the issue. It must do so, in summary procedure and on the basis of the record and material as before it. The requisite standard in deciding the case would of course be that applicable to civil proceedings, namely the well known test of balance of probabilities.

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19. Learned counsel for the contesting respondents also relied on Shahamatullah Qureshi v. Hi-Tech Construction (Pvt.) Ltd. 2004 CLD 640 (SHC; SB). This was a case in which the winding up of the respondent company was sought. There was also a collateral issue regarding title to or ownership of certain shares, which was sub judice before the civil courts. The learned single Judge concluded that no case for a winding up had been made out, but observed that an order could have been made for the' buyout of the minority shareholders by the majority shareholders. However, in view of the dispute regarding the title of shares being sub judice no such order was made and the petition was dismissed (pg. 680). Learned counsel relied on the following passage at pg. 676:--

"The facts alleged and disputed by other side will necessarily entail holding of detailed inquiry and recording of evidence in respect of such disputed factual assertions which cannot be gone ,into by the
Company Judge whose jurisdiction in such matters is summary in nature in terms of subsection (3) of
section 9."

The learned single Judge relied on five cases to support, this observation (pg. 677), of which three were cases noted in para 15 above. The two remaining cases, (Saleh Muhammad, 11. Mst. Resham Bibi 1986 CLC 2561 and Muhammad Suleman v. Abdul Rashid and others PLD 1987 Lah. 387) did not arise at all under company law and with the utmost respect, would not therefore appear to have any direct relevance for the issue at hand.

20. Learned counsel for the petitioners on the other hand relied on Muhammad Mohsin Butt and others v. Muhammad Inayat Butt and others 2005 CLD 747, a judgment sought to be distinguished by learned counsel for the contesting respondents as being contrary to the view taken in the cases cited in paras 15 and 19. The case cited by learned counsel for the petitioners in fact involved matters under two different petitions, one of which arose under section 152 (J.M. 23 of 2001) and the other (J.M. 48 of 2001) under sections 152 and 290 (pg. 321). (Two other petitions were also referred to but not decided (see at pg. 367). An objection was taken that intricate and disputed questions of fact were involved, which could not be decided in summary procedure and could only be resolved by way of a civil suit. The learned single Judge proceeded to hear this objection first, and specifically framed certain questions in this regard (pg. 322). After a detailed and thorough examination of both the CLD 2013] Neelofar Shah v. Ofspace (Pvt) Ltd. 131 (Munib Akhtar, J) Companies Ordinance and corresponding laws in other jurisdictions, and the case-law, both of Pakistani and foreign courts, the learned single Judge concluded as follows (pg. 366):--

"27. The upshot of the above is as follows:--

(a) The summary procedure appearing in section 9 of the Ordinance does not exclude the consideration by the Court of controversial facts nor does it restrict it from deciding such controversies.

(b) There is no legal impediment in the Ordinance for the Courts entering into any inquiry, framing the points of determination, requiring oral evidence or evidence through affidavits."

The learned single Judge ordered that evidence be recorded in the petitions before him.

21. I have carefully considered the two contrasting views expressed in Shahamatullah Qureshi's case and Mohsin Butts case. With respect, I am inclined towards the view taken in Mohsin Butt. It

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accords with my own thinking and analysis as stated above. It may be that purely in the context of, and solely in relation to, section 152 the view taken in Mohsin Butt may not accord fully with the views expressed earlier in the cases cited by learned counsel for the contesting respondents (in para 1-5 above). However, it is not necessary for me to express any view on this particular aspect, since the present action is not under that provision. I am of the view that the broader and more general point made by the learned single Judge in Mohsin Butt accords more fully with company law and those statutory provisions as are applicable, and would certainly apply in relation to a petition under section 290. In contrast, the passage relied upon from Shahmatullah-Qureshi seeks to find support from cases that, with the utmost respect. involved an entirely different factual matrix or did not raise any issues of company law at all. With respect, I am unable to accept that the cited passage represents the correct view.

22. I therefore conclude that disputed questions of fact, even if intricate, complicated or difficult, arising in the context of a petition under section 290 can be taken up and decided by the company court and indeed. I am respectfully of the view that the 'Court cannot absolve itself of its obligation to decide the case before it on such a ground. The CID 132 CORPORATE LAW DECISIONS [V0l. XII objection taken in this regard by the contesting respondents cannot be accepted. I turn therefore to consider whether the Main Agreement and the Second Agreement are forgeries and fabrications as alleged.

23. The first point to note in this regard is that the two Agreements are signed on behalf of the Khan group by Mr. Asfandyar. I have compared his signatures on these agreements with those in the pleadings filed by him (on his own behalf as well as the Company). There is no material difference. It will be recalled that the respondent No.4 (Mr. Alamgir Khan) signed the Main Agreement as a witness. Now, this respondent and the petitioner No.2 (Mr. Raza Shah) were the subscribers to the memorandum and articles of .association of the Company on its incorporation. The petitioners placed on record a copy of said memorandum and articles of association taken from the official record as maintained by SECP, as signed by the two subscribers. There is no material difference between the signatures of respondent No.4 as witness to the Main Agreement and as subscriber to the memorandum and articles of association. This corroboration of signatures tends to attest to the authenticity of the two Agreements.

24. The second point is that the shareholdings in the Company fully accord with what is stated in the Main Agreement. This is true even of the disputed 30% inasmuch as the Main' Agreement envisaged that these shares would originally be allotted to the respondent No.4, which indeed was the case. (Of course, the Main Agreement required this respondent to continue holding the shares, but that is the
disputed point which will be taken up later.) As regards the undisputed shares, they are held exactly in line with the Main Agreement. The third point, which is perhaps of even greater importance, is that the Main Agreement is a fairly typical and common example of how two individuals (or groups) get together to establish a company for some commercial venture or business and enter into an agreement which regulates the manner in which the company is to be run. After all, private limited companies involving different individuals who appear to fall into two or more groups do not materialize out of thin air. Experience shows that there is invariably some context as to how such a company came to be established, and that, more often than not, is embodied in a formal shareholders agreement. It is also a fairly common scenario for one individual or group to provide the financing or capital and the other to provide managerial or other expertise or experience and for the company's shares to be allotted on such basis, with the providers of finance commonly being the majority shareholders. Indeed, the Main Agreement and Second Agreement expressly recognize the role played by the Shah group (and in particular, Mr.

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Nazeer) as the providers of finance and the Khan group land in particular, Mr. Asfandyar) as the providers (both in the past and for the future) of managerial and other expertise.

25. In short, the two Agreements relied upon by the petitioners constitute and provide a credible narrative of how the Company came to be incorporated and its shareholding took the form that it did and how its affairs are to be run and regulated. Although the two Agreements were executed a few days after the Company was incorporated, there is nothing peculiar with that. Rather, in my view, the Agreements and the incorporation of the Company should be regarded as contemporaneous. it is also to be noted that the subscribers to the memorandum and articles of association were the petitioner No.2 and the respondent No.4, i.e., the representatives of the two groups. which lends further weight
to the version of events presented by the petitioners. As opposed to this, the respondents Nos.2 to 4, other than denouncing the Agreements as fabrications, present no version at all regarding how the Company came into existence and its shareholding fell into two distinct groups. For them, the Company simply is and that is all that there is to it. This does not however, accord with experience in situations and scenarios where companies have been incorporated in facts and circumstances similar to the present case. The aforesaid respondents silence on the matter is not merely deafening; it actually speaks volumes.

26. For all of the foregoing reasons, I conclude that the contesting respondents objection that the two Agreements are forgeries and fabrications and their further objection that the present petition cannot- (or ought not to) be decided because it involves disputed questions of fact that are complicated or intricate cannot be accepted. I hold, on a balance of probabilities, that the two Agreements were duly executed and entered `into between the parties thereto, in terms as stated therein.

27. Before proceeding to consider in detail what those terms are, there is another objection taken by learned counsel for the contesting respondents that must- be dealt with. Learned counsel contended that the petition was nothing other than an attempt to seek specific performance of the two Agreements, which was not possible as the present proceedings were barred by limitation. It will be seen that this objection has two distinct parts. One is with regard to specific performance and the other in relation to limitation. I take up the second aspect first.

28. Learned counsel submitted that Article 181 of the First Schedule to the Limitation Act applied to petitions under the Companies Ordinance. In this regard, reliance was placed on Syed Akbar Ali u. Mamun Ali Bumask (Pvt.) Ltd. And others 2006 CLD 960 (SHC; SB), Saeeda Mahmood and anotlierw. Anas Munir (Pvt.) Lid. and others 2007 CLD 637 (LHC; SB) and Khurshid Ahmad Khan and another U. Pak Cycle Manufacturing Company Ltd. and others PLD 1987 Lah. 1 (SB). We have already met the last mentioned case in para 15 above. Like this case. the other two cases also arose in the context of section 152. In the first mentioned case, an objection was taken that the petition, seeking rectification of the members register, was barred by limitation. It was held by this Court as follows (pg. 966):--

"A party, who called in question title of the shares and of omitting his name fraudulently from the register of Company, has two remedies i.e. by filing a suit. for declaration before the civil Court and/ or by filing an application. under section 152 of the Companies Ordinance, 1984 but such remedies ought to have been invoked within the period of limitation provided and if no period is specifically provided then within reasonable period of time. Without going into the `question whether Article 120 of the Limitation Act and/or Article 181 of the Limitation Act is applicable to the petition under section 152 Companies Ordinance. 1984 or not as such petition is neither a suit nor an application under section 3 of the - Limitation Act, the petitioner cannot be allowed to call

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in question transfer of shares at his own sweet-will. Once a remedy of Civil Suit has become barred by time then only in exceptional circumstances a party can be allowed to avail other remedy if available in law. Since the petitioner has 'failed to give any reason what to say cogent reason for not questioning the transfer of shares from his name for 11 long years the petitioner is not entitled to discretionary relief under section 152 of the Companies Ordinance, 1984, the petition is, therefore, dismissed." It is to be noted that the Court carefully avoided deciding the question whether the Limitation Act was applicable or not to a petition under section 152. Since in relation to a question of title or ownership of shares a civil suit can lie, and a suit can certainly become barred by limitation, the Court held that if such a suit would be barred on the facts of the case before it, it would only be in "exceptional circumstances" that the remedy under section 152 could be availed. It is clear that this Court did not hold that such a remedy was as such barred by limitation.

29. The decision of the Lahore High Court in Saeeda Mahmood's case is to the same effect. Again, the issue was title or ownership of shares and the relief sought was rectification of the members register. interestingly, the learned single Judge cited passages from both Syed Akbar Ali's case (supra) and Khurshid Ahmed Khan's case (supra). After considering these and other cases, it was held as follows (pp. 645-6, para 11):-- "An overview of the judgment cited at the bar referred to above reveals time available for filing a petition under section 152 of the Companies Ordinance, 1984 is not open ended where a suit based in a same cause of action seeking substantially the same relief as prayed for under section 152 of the Companies Ordinance No. XLVII of 1984 has become barred by limitation, the application of this under section .152 of the Ordinance would ordinarily be liable to be dismissed. Time of the knowledge of the facts and circumstances giving rise to the cause of action would be relevant. In our jurisdiction there appears to be no definitive precedent to the effect that the provision of Limitation Act applies to a petition under section 152 of the Companies Ordinance or whether the same is covered under Article 120 or Article 181 thereof however in the Indian Jurisdiction such an application is treated to be covered by the residual Article pertaining to filing of application (i.e. in para materia to Article 181 of the Limitation Act, 1908). However, this aspect of the matter need not to be adjudicated upon for the purpose of deciding the lis in hand...." The objection as to limitation was rejected and on the facts, the petition was allowed. Again, no definitive finding was given as to whether the Limitation Act applied in relation to petitions under the Companies Ordinance, and if so, whether it was Article 181 or Article 120 that would be applicable. This Court, in the case noted above, has used the words "exceptional circumstances" whereas the Lahore High Court has preferred the word "ordinarily". The effect, in my view, can be regarded as the same (although, arguably, perhaps the threshold established by this Court sets the bar higher than the Lahore High Court). In relation to a matter where a civil suit can lie, i.e., a dispute regarding title or ownership of shares, a petition under the Companies Ordinance (i.e., under section 152) brought beyond the period when the suit would have become time barred would not, ordinarily or barring exceptional circumstances, be entertained. But, and this is of course the crucial point for present purposes. such a petition would not be barred by the law of limitation as such. 'In view of this position, it is not necessary to consider in detail the third case (Khurshid Ahmed Kharfs case) relied upon by learned counsel.

30. The foregoing discussion of course, still leaves open the question as regards those petitions, such as one under section 290 or a petition to wind up the company where a civil suit cannot or does not lie. Would, or ought, such petitions be governed by Article 181 of the Limitation Act? Learned counsel for the contesting respondents relied on certain Indian decisions, in particular, Fareedabad Cold Storage v. Official Liquidator AIR 1978 Delhi 158 and R C Abrol. Company U. A R Chanclia and Company AIR 1978 Delhi 167, both cases arising in relation to section 446 of the (Indian) Companies Act, 1956 (which is equivalent to section 316 of the Companies Ordinance). In fact, both judgments were handed down by the same (full) bench on the same date. Although

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there are certain differences between the' two, for present purposes, they can be regarded as but one decision. In order to properly appreciate the principle enunciated therein. certain (earlier) decisions of the Indian Supreme Court will need to be considered.

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31. In Sha Mulchand & Co. Ltd. (In Liquidation) v. Jawahar Mills Ltd. AIR 1953 SC 98, a case seeking rectification of the (Put) Ltd. 137 - V (Munib Akhtar, J) members register under section 38 of the Companies Act, 1913, a question arose whether the petition was barred by limitation under Article 181. It was held that that Article did not apply and was confined only to applications under the C.P.C¢ In 1963, a new Limitation Act came into effect in India, and what used to be Article 181 became Article 137 of the schedule to the new enactment. There was however, some change in the language. In Town Municipal Council, Athani v. The Presiding Officer, Labour Courts, Hubli and others AIR 1969 SC 1335 (a case that did, not arise under the Companies Act), it was sought to be argued that the new Article 137 did apply to statutes other than the C.P.C. Relying in part on the 1953 decision, the Indian Supreme Court concluded that there was no material difference between the new Article 137 and the old Article 181 and hence the former continued to apply, as before, only to applications under the C.P.C. (see especially at paras 11-13 of the decision). The 1969 decision was in fact relied upon by learned counsel for the Company but, or so it would seem, somewhat mistakenly, since in my view this decision goes against the objection taken by him. Finally, reference must be made, to Kerala State Electricity Board, Trivandrum U. .T.P. Kunhaliurnma AIR 1977 SC 82. In this case (which again, was not under the Companies Act) the Indian Supreme Court revisited its 1969 decision. overruled it, and concluded that the new Article 137 did in fact apply to statutes other than the C.P.C. (see especially paras 19 and 23 of the decision). It was this decision that was relied upon by the Delhi High Court in the two cases cited, and it was held that Article 137 of the (Indian) Limitation Act 1963 applied to an application under section 446 of the (Indian) Companies Act.

32. As the foregoing discussion makes clear, the Indian decisions, rather than supporting the objection taken by learned counsel, appear rather to go against it. insofar as Article 181 is concerned, the Indian view has clearly been that it does not apply to the Companies Act. Even in relation to the new Article 137 the View of the Indian Supreme Court has changed over time. In view of the foregoing position, the objection that the petition is barred by limitation cannot be sustained. In the alternative, learned counsel for the contesting respondents contended that the petition was hit by laches and liable to be dismissed as such. Here perhaps the respondents are on firmer ground, since jurisdiction under the Companies Ordinance is indisputably equitable in nature, and such relief can be refused on grounds of laches However, further consideration of this objection is deferred till later in the judgment.

33. The second aspect of the objection, namely that to grant relief to the petitioners would be to order specific performance of the two Agreements, may now be considered. In my view, this objection is misconceived. In an action under section 290, what the Court is concerned with (if at all a case is made out] is to bring to an end "the matters complained of i.e., which constitute oppression, and for this purpose, the statute has conferred a wide jurisdiction on the Court. It may make any order it thinks fit, whether for regulating the affairs of the company (in future), or for a buyout, "or otherwise" (see subsection (2)). As the case-law and section 291 make clear, the last words are not in any manner limited (e.g. by a reading ejusdem genera) and clause (C) of the last mentioned section is relevant in this context. Now, it may be that if the Court is satisfied that relief ought to be granted, it makes an order that is indistinguishable from an enforcement of some or all the provisions of a shareholders' agreement. However, the jurisdiction of a court to specifically enforce an agreement on the one hand and its statutory jurisdiction under section 290 on the other are entirely separate and distinct. As Lord Keith observed, the latter power did not

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exist prior to its conferment by statute, whereas the power of ordering specific performance is inherent in a civil court (though of course, in this country it is regulated by the Specific Relief Act, 1877). The fact that the effect of the exercise of the statutory power, in the facts of a particular case, would be the same as the exercise of the (general law) power of specific performance does not mean that the nature or source of the two powers (or jurisdictions) is the same. The distinction can also be appreciated by keeping in mind that while exercising the statutory power, the Court is not at all bound by the terms of the shareholders agreement. In other words, if it concludes that there has been oppression, the Court is not limited to only enforcing the shareholders agreement. It may entirely disregard (or even utterly reject] the terms of such an agreement and yet make an order and give directions that are a lawful and valid exercise of the statutory power. This objection also therefore, is without any force.

34. The way is now clear for a consideration of the terms of the two Agreements. Unfortunately, these Agreements, and especially the Main Agreement, are not (to put it mildly) happily drafted. No doubt these Agreements are intended to be a commercial bargain between the parties (the two groups) with regard to the affairs of the Company and its properties, assets and income. However, the Agreements display a singular lack of awareness of (or at least attention to) one of the fundamental principles of company law, namely, that a company is a legal entity in its own right entirely separate and distinct from its shareholders. Thus. the Agreements intermingle, and indiscriminately purport to regulate, matters that can and do fall within the domain of shareholders and about which they can lawfully enter into an agreement (such as the composition of the board, the allocation of offices in the company, the distribution of dividends, the matters which can be given effect to only with the approval of one of the parties, etc.) and those which cannot be directly controlled, regulated or dealt with by shareholders in their capacity as such. The position of company as a separate legal entity and the distinction between it and its shareholders has been fundamental to the ,law since the decision of the House of Lords in Saloman v. A. Salornan and Co. Ltd. [1897] AC 22. In the more than 100 years since then. the courts of common law jurisdiction, 'including the courts of the subcontinent, have fully worked out the implications of, and legal conclusions that follow from, this foundational principle of company law. One of these conclusions, which itself is a bedrock principle of company law, is that the property, assets and income of a company belong to it alone. and the shareholders do not, as such, have any interest, right or title in or to the same. There are innumerable decisions in which this principle has been stated and applied. and for illustrative purposes, reference may be made to two Division Bench decisions of this Court. In The Eastern Federal Union Insurance Company Ltd. v. State Life Insurance Corporation of Pakistan 1987 CLC 1408, it was observed as follows: "It is a well-settled principle of law that a Company is a separate legal entity from its shareholders and that they cannot lay any claim against any assets of the Company while it is operating except against the declared dividend" (pg. 1414). And in Aryum Rashid and others v. Shehzad and others 2007 CLD 1210, it was observed that a company is a separate entity distinct from its Director and no shareholders/or Director of a company can be said to be the owner of any particular piece of a property in which the company has an interest. Such distinction has to be clearly observed between the company as a legal entity and its rights on the one hand and individually share holders and their right on the other, as such, it cannot be said that the property in question is owned by its share holders or Directors" (pg. 1225).

35. The reason why I have explained in some detail principles which are (quite rightly) regarded as the ABC of company law is because the singular failure keep them in mind has rather serious land indeed fatal) consequences for that part of the petitioners case that is based on the Second Agreement. It will be recalled that this was in relation to Tower II and provided, inter alia, that separate accounts would be kept for the income from this tower block and that that income would be credited directly to Mr. Nazeer's account (see para 4 above). Now there can be no doubt that

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Tower II is property that, in law, belongs to the Company and is its asset and thus it is the Company which is entitled to any income derived from it. This is so regardless of whether (as claimed) the construction of this tower block was financed entirely by the Shah group. The shareholders of a company, even by unanimous decision, cannot themselves deal directly with the company's assets and income as though they were the owners thereof, even though the shareholders may, ultimately, be entitled to the benefit of the income by way of a payout of dividend. The two things (i.e. the company's income and a dividend declared in favour of the shareholders) are in law separate and distinct. Thus, the rights and obligations purportedly created in terms of the Second Agreement with regard to Tower II, and the income to be derived from it, are unenforceable in law. Equally, those clauses of the Main Agreement that purport to have such an effect are also unenforceable. Neither group can have any legal grievance against the other with regard to any alleged "breach" of the Second Agreement. It therefore necessarily follows that the alleged non-implementation of the Second Agreement by the Khan group cannot form the basis of, or support, an action by the petitioners under section 290 of the Companies Ordinance. To this extent therefore the petitioners case fails and cannot be accepted.

36. The Main Agreement also suffers from the legal infirmity that put paid to the Second Agreement, though to a lesser (and non-fatal) degree. The Main Agreement contains many clauses that deal with matters that are unexceptionable for a share holders agreement. At the same time however, it also, in certain parts; fails to distinguish between the Company and its property and assets on the one hand, and the shareholders on the other. Thus, parts (D) to (J) of the Main Agreement contain a number of commonplace provisions that regulate the affairs and business of the Company, and these or similar clauses can be found in virtually any shareholders agreement. However, part (B), which deals with matters relating to capital and shareholding, suffers from the same confusion between company and shareholders as has been highlighted above. Thus, this part purports to deal separately with Tower-ll (which, as already noted, is unenforceable) and Tower-1, and purports to establish the paid up capital of, and shareholding in, the Company only with reference to the latter. However, this lack of clarity, which could otherwise have proved fatal. can in my view be resolved by reading and applying the Main Agreement as a whole. As l have already noted, the Main Agreement, when considered in its entirety, is intended to be a commercial bargain between the two groups represented by Mr. Nazeer and Mr. Asfandyar respectively and in my view, business efficacy can, and ought, to be given to this bargain. This is particularly so because (unlike the Second Agreement) the Main Agreement does not uniformly offend against the basic principles of company law. As already noted most of its parts are consistent with company law and contain what one could expect to find in a shareholders agreement. I would therefore hold that the Main Agreement can, and ought, to be so read that references in it to the capital and shareholding are in relation to the Company itself. and not any particular asset or property thereof, whether Tower-l or Tower-ll. The entire Agreement should, in other words. be read and applied as a contract relating to the affairs .and regulation of the Company and not otherwise.

37. It will be recalled that the petitioners grievances fall under three heads (see paras 6-7 above). One of these grievances. i.e. in relation to the Second Agreement, has already been found to be without force. The grievances under the other two heads i.e. ouster from the affairs and management of the Company, and the allegedly illegal grab of the 30% shares allotted and reserved for a specific purpose,
remain to be considered. These grievances, in the main emanate from the Main Agreement. I first take up the matter of the alleged ouster, and in this context, the objection of aches as raised by the contesting respondents is particularly relevant,

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38. There can be little doubt that if the shareholding of a company is divided (as is the case at hand) between two groups, then the ouster of one group from the affairs of the company by the other would ordinarily constitute oppression. The question therefore is whether the petitioners have been so oppressed. The admitted position is that for a number of years, starting from around January 1999 to the middle of 2006, the Shah group was in the United States. It is averred that at least Mr. Nazeer has been permanently in Pakistan since then. Now, the material placed on the record appears to indicate that other than one set of correspondence in September, 2005 (which is considered below in the context of the issue relating to the 30% shares), the Shah group did not seek to involve itself in the affairs of the Company up to2006. The explanation for this is that there was trust and confidence between Mr. Nazeer and Mr. Asfandyar (which, according to the petitioners. was grossly abused by the latter). However, this is not enough. At all material times, the petitioners were directors of the Company and they had duties and responsibilities towards the latter. Mr. Nazeer was certainly well enough to travel to Pakistan on three different occasions. The petitioner No. 2 (the son) was certainly capable of coming to the country. In any case, in these years, the channels of communication (physical, electronic, etc.) expanded exponentially. However, it appears that no attempt was made by the petitioners to keep themselves abreast of, or actively and directly involved in, developments in the Company. If the Shah group chose to give a carte blanche to the Khan group, then it did so at its own peril and in disregard of its own duties and responsibilities towards the Company. Relief under the Companies Ordinance is equitable in nature. The conduct of the petitioners is of particular relevance. In my view, for the period from 1999 to 2006, the petitioners' case is clearly hit by laches and their own clear duties in law as directors.

39. What however, of the period from mid-2006 till the filing of the petition (in October, 2007), when Mr. Nazeer at least was back in Pakistan and making inquiries regarding the Company's affairs and (allegedly) being rebuffed by the Khan group? In my view, on a balance of probabilities. The petitioners have not been able to establish a case of ouster even for this period. Their allegations, hotly denied by the contesting respondents, 'remain unsubstantiated. For example, the contesting respondents have relied on a letter sent to the petitioners in August, 2006, where, although the authority of Mr. Nazeer to obtain any record from the Company is challenged (on the ground that he is a stranger thereto). it is nonetheless stated that the records for 2001 to 2005 were provided to him. In the affidavit in rejoinder, the petitioners have taken issue with the receipt of this letter (and other correspondence) but the substantive claim, namely that the relevant record was provided is not denied as such. Another incident referred to in the pleadings is also instructive, In the counter affidavits, the contesting respondents have alleged that sometime in September 2007, one Mr. Zain Shah, a son of Mr. Nazeer showed up at the Company's offices and starting assaulting the employees. A complaint was made to the police in this regard, In the affidavit in rejoinder, the allegations regarding assault are denied, but it is stated that Mr. Zain Shah "was deputed by the petitioners Attorney [i.e., Mr. Nazeer) only after his request to provide tax related information, delivered through his employee (Mr. Sohail) was not responded to, by the respondent No.1's management". It is further stated that Mr. Zain Shah was “humiliated". Whether or not the third Mr. Shah was humiliated (or misbehaved with the Company's staff) is, for present purposes, beside the point. I find Mr. Nazeer's behavior and attitude to be seriously open to question, if he is, as is claimed, in law the attorney of the petitioners, he had no authority to delegate another of his sons (or to send an employee) to approach the Company and start making demands to be granted access to documents and material which, in law. is only accessible by directors (unless otherwise permitted by the board). This is absolutely clear from section 230 of the Companies Ordinance. Even the two (registered) powers of attorney appended to the petition, whereby Mr. Nazeer has been constituted as attorney by the petitioners, do not confer any such authority on him (even if they could, in law. at all have done so, which I very much doubt). Mr. Nazeer appears to treat the Company with (if I may say so) a rather cavalier disregard

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for the proprieties and requirements of company law. Even if for certain purposes, such as a petition under section 290, the Company can (as I am inclined to) be regarded as a quasi-partnership, that does not and cannot mean that company law has ceased altogether to apply in relation to it. That is not so at all. The petitioners., who are after all the shareholders and directors of record, cannot simply recede into the background and vanish for all practical purposes, leaving matters entirely in the hands of Mr. Nazeer. He may well have been the signatory to the Main Agreement and the main force behind and mainstay of the Shah group, but in the end the forms must
also be obeyed. Thus, while the Main Agreement does state that Mr. Nazeer is to be the chairman of the board of directors, at no stage was any attempt made by Mr. Nazeer to have himself placed on the board and be elected as the chairman. Indeed, the fact that the company continues to recognize the petitioners as directors although on their own showing they have not attended to its affairs for years
on end is itself something that raises serious doubts regarding their allegations. Whether this absence, e.g., engages section 188(1)(b) of the Companies Ordinance is not a point on which I am minded to give a definitive finding. But the whole attitude of the petitioners and their attorney towards the Company does leave a lot to be desired. I also find no force in the petitioners grievance that Mr. Asfandyar has usurped the office of chief executive by continuing to hold the same notwithstanding that the two terms to which he was entitled under the Main Agreement have expired. The petitioners disengaged themselves from the Company for years on end. Every company must have a chief executive. The petitioners do not dispute Mr. Asfandyar's right to be the chief executive for the first two terms. It is not at all surprising that in such circumstances Mr. Asfandyar continued to hold the said office.

40. In view of the foregoing discussion, I conclude that the petitioners have also failed to substantiate and make out a case of their alleged ouster from the affairs and management of the Company. The second head of grievances therefore also fails. I turn now to consider the third head, which is regarding the allegedly illegal grab of the 30% shares by the Khan group.

41. The details of the grievance in this regard have been set out above: see paras 2, 3 and 6. It will be recalled that these shares were intended for certain persons named in the Main Agreement in the proportions as therein stated on account of the services, etc. rendered by them in relation to the construction of the tower blocks on the property. If however, the shares were not to be given to these persons, then the Main Agreement provided that they would be transferred to the Shah group. These persons have been joined as respondents Nos.5 to 8, and as noted above three of them (respondents Nos.5, 6 and 8] have appeared, and they support the petitioners case. These respondents were, if at
all, respectively entitled to 10%, 4% and 6% shares in the Company (out of the total 30%). It will be convenient to first take up the submissions made on behalf of these respondents. Learned counsel appearing on the behalf of respondent Nos. 5 and 6 relied on certain case-law to submit that even though admittedly they were not shareholders, they nonetheless had a right to be heard since their interest had been adversely affected by the allegedly illegal grab of the shares by the Khan group. However, it will be convenient to start by considering what it is that these respondents actually have to say.

42. I first take up the case of respondent No.6 (a firm of architects/consultants). In its counter affidavit, this respondent. while asserting its right as above, has stated that it subsequently entered into an agreement with the Company to accept Rs.5 million in lieu of the shares. It is further stated that of this amount, around half has been paid, but the balance remains outstanding and the respondent reserved its right to file appropriate proceedings for its recovery. The Company, in its affidavit in rejoinder, has denied any right of the said respondent to any

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shares and also any agreement as claimed by it, Be that as it may, since this respondent has on its own showing given up its right to any shares, it need not be heard in this petition.

43. It will be recalled that the respondents Nos.5 and 8 both filed (separate) suits (in 2008) in the civil courts at District South Karachi, seeking to have the Main Agreement enforced insofar as it affected them. These suits were, on the Company's applications, transferred to this Court, I have examined the plaints in both suits. Insofar as respondent No.8 (who is Mr. Nazeer's brother) is concerned, it appears
that he was a director and/or chief' executive in two companies controlled by the Shah family, and these companies provided services, etc. to the Company for purposes of the project. It is in terms of these services, etc. that the respondent No.8 has made his claim to the shares. Now a reading of the plaint indicates prima facie, that any services, etc. that may have been rendered were by the companies and the respondent No. 8 was involved only as a director and/or chief executive thereof and not in his personal or individual capacity. Prima facie therefore, if at all any person is to be recompensed for services rendered, it would be the companies, and not any officer or director thereof. Again, there is that marked failure to appreciate the distinction between a company on the one hand and its shareholders/officers on the other. While I refrain from saying anything more on the point since there is a civil suit pending (and the observations in this para are made solely for purposes of the present petition and shall not in any manner affect the civil suit). I am not at all satisfied that this respondent should be recognized for present purposes, and therefore he need not be heard.

44, I turn to the last remaining claimant, respondent No. 5 This respondent was also a witness to the two Agreements. In his plaint, he has been singularly reticent about providing any particulars with regard to the services. etc. rendered by him, and the plaint is confined to the same sort of generalities as are to be found in the Main Agreement ("Consultant on Financial and Banking requirements and arrangements"). Now, the civil suit was filed in 2008 and with regard to the accrual of the cause of action, the plaint states as follows:--

21. That the cause of action accrued to the plaintiff against the defendant on 14-1-1998 at the time of the [Main] Agreement, in July 2006 when the plaintiff came from USA and demanded his due share and again in November 2007 when the plaintiff was served with a notice of proceedings in J. Misc. and continuous [sic] till the filling [sic] of the instant suit."

It is averred in para 13 of the plaint that "the civil construction of the project commenced in the year 1998 and was completed in the year 2001". It is further averred that the respondent No.5 left for the United States in September, 2001. On the foregoing basis, it would seem prima facie that the suit may be barred limitation (and indeed. this point has been taken in the written statement filed by the contesting defendants). Again, I refrain from saying anything more on the point and emphasize that the foregoing observations are made solely for purposes of the present petition and shall not in any manner affect the civil suit. However, I am not at all satisfied that this respondent should be recognized for purposes of the present action, and therefore he also need not be heard.

45. In view of the foregoing position, it is not necessary for me to consider in detail the case-law relied upon by learned counsel for the respondents Nos.5 and 6. 46. I now proceed to consider the rival submissions of the main disputants with regard to the 30% shares. Since I have held that the 'Main Agreement was valid and subsisting and is to be interpreted and applied in the manner as explained above, it necessarily follows that in my view, the shares were allotted to the respondent No.4 for the specific purpose as therein stated. In other words, these shares were (in the words of the Main Agreement) ,"to be kept in 'safe Custody' and retained in the name of Alamgir Khan

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brother/of Sher Asfandyar Khan for further distribution and transfer to the following persons at a later stage as a bonus/Compensation for their continued goodwill, assistance and professional Collaboration to make the project a successful venture". And of course, the Main Agreement provided that should the shares or any of them not be transferred then they would "revert back" to the majority shareholders, i.e., the Shah group.

47. It is common ground that the shares were. as agreed, originally allotted to the respondent No. 4. It is the transfer on 15-01-1999 to Mr. Asfandyar that is hotly contested. Now, in this regard, the contesting respondents' case is that on that date two meetings of the board of directors were held in quick succession, one being held at 11.00 a.m., and the other at 12-30 p.m. Notice for the first meeting was issued on 10-01-1999 and for the second on 15-01-1999, both notices being issued from Karachi. Both notices stated that the meetings were to be held at the same designated address in Islamabad. The agenda for the first meeting was "to discuss and transfer 'of shares". Although the shares were not identified, it appears that it was in relation only to those held by the respondent No.4. The second meeting was called in order to allow the respondent No.4 to continue holding one share (in order to enable him to remain a member of the Company) and for the splitting of one of the share certificates for this reason. The minutes of the first meeting were placed on record, and these show that four directors attended. One was the petitioner No.1 (the wife of Mr. Nazeer), who signed the minutes, as did two of the other attendees, Mr. Asfandyar and the respondent No. 3. The record of the second meeting merely stated that the board allowed for the share certificate to be split. The document placed on record in this regard is not however signed by any of the attendees except Mr. Asfandyar.

48. The petitioners reject this entire record as concocted and aver that the petitioner No.1 did not attend any such meeting(s) and that her signature on the purported minutes is forged. I have examined the documents placed on record as above. There are certainly material irregularities and discrepancies. For example. there was no need to call for two separate board meetings: the transfer of the shares and the splitting of one of the certificates to allow the respondent No.4 to retain the qualifying share could easily have been done in one meeting. No explanation however has been given as to why two meetings were called. The meetings were held at Islamabad, where obviously Mr. Asfandyar was present (the documents so indicate). Yet, the notice for the second meeting was issued on the same day (15-01-1999) under Mr. Asfandyar's signature from Karachi. The minutes of the first meeting are again dated as of l5»l-1999 but drawn up at Karachi. These minutes, and the notice issued for the first meeting, describe Mr. Asfandyar as the chief executive, but the notice for the second meeting describes him as the chairman. It is also significant that although the respondent No.4 is expressly shown as having attended both meetings his signature does not appear on any of the documents. On the other hand, the other three directors shown to have been present at the first meeting signed the minutes thereof.

49. Although the contesting respondents have denied that any enquiry was ever made by SECP, the material placed on record by the petitioners shows that starting from 16-04-2002, the SECP repeatedly asked the Company to produce the transfer deeds with regard to the transfer of the 30% shares from respondent No.4 to Mr. Asfandyar, but this was never done. The petitioners, under cover of a statement dated 18-02-2011, placed on record what they stated were transfer deeds executed in favour of Mr. Asfandyar by the respondent No. 4. These deeds are dated as of 22-01-1998 and the signatures of the respondent No. 4 on them are materially at variance with what I regard to be his true and correct signature, i.e., as subscriber to the memorandum and articles of association (see para 23 above). In petitioners have also placed on record certain documents of the Company which purport to respondent No. 4's signatures, and again, these are different from the true and correct signature.

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50. The contesting respondents have also relied correspondence (annexed along with the counter affidavits) that was exchanged between the parties in 2005 to show that the petitioners were all along aware of the transfer of shares. Significantly, this was addresed to Mr. Nazeer and not directly to the petitioners. The correspondence, it appears, requested the petitioners (and Mr. Nazeer) to sign and/or endorse certain resolutions adopted by circulation and dated as of 24-09-2005. One of these resolutions showed the shareholding of the Company, and this indicated that Mr. Asfandyar held 30% shares in the Company. The resolutions were signed by the petitioner No.1 and Mr. Nazeer, and attested by a notary public in Los Angeles (since the Shah family was then in the United States), lt appears- that the resolutions were necessitated on account of the sale of a portion of a tower block and were required by the bank involved in the transaction. According to the contesting respondents, this correspondence corroborates that the petitioners were all along aware of the transfer of the shares. In their affidavit in rejoinder. the petitioners have not denied this correspondence, but have annexed a copy of a handwritten note prepared by Mr. Nazeer. This is stated to be the covering note under which the correspondence was returned to Pakistan, and in it Mr. Nazeer appeared to state that he did not agree with the transfer from respondent No.4 to Mr. Asfandyar. but that was "going along" in order to facilitate the ' property transaction. Indeed, in this note, Mr. Nazeer also appeared to be pressing for the transfer of the 30% shares to the persons for whose benefit the respondent No,4 held them in “safe custody" as per the Main Agreement. The petitioners of course contend that this shows that they were earlier unaware of any transfer of shares to Mr. Asfandyar.

51. After having carefully considered all of the foregoing material and record, I conclude as follows. Firstly, and quite apart from anything else, the shares ought never to have been transferred from/by the respondent No.4 to Mr. Asfandyar as this was contrary to the express terms of the Main Agreement. That Agreement clearly required for the shares to be held by the respondent No, 4. Prima facie therefore, the transfer was a breach of the Main Agreement and in the facts and circumstances of the case must be regarded as a serious and material breach by the Khan group. It is pertinent to note that no explanation as such has been given by the Khan group for the transfer. The onus lay on the contesting respondents to show that the Shah group had agreed to and/or accepted the transfer, The irregularities and discrepancies noted in relation to the which could constitute such acceptance, cast serious doubt on the authenticity of the record in relation thereto. When this record is considered in the larger context of the Company's failure or refusal to produce the transfer deeds (which in law must. nave been placed before the board and be with it: see section 76) and the serious discrepancies in the signatures of the respondent No.4 as appearing on various corporate documents, in my view, and on a balance of probabilities, the record of the two meetings purportedly held on 15-01-1999 cannot be accepted. Equally. the correspondence of 2005, when read in light of Mr. Nazeer's covering note makes clear that that was the first time that the petitioners had any knowledge of the purported transfer and they did not, as such, accept it, but only tolerated it for purposes of facilitating the property transaction then underway. Mr. Nazeer also indicated that the shares should be transferred to the persons nominated in the Main Agreement. Instead, the Khan group has appropriated the shares for itself.

52. In my view therefore, the transfer of the 30% shares to Mr. Asfandyar and their continued retention by the Khan group is clearly unlawful. The question is whether this is tantamount to oppression within the meaning of section 290. Learned counsel for the contesting respondents contended that a single act of misfeasance or illegality, even if established, cannot amount to oppression within the meaning of section 290. Reliance was placed on the following passage from the decision of the Court of Appeal in Re: Jermyn Street Turkish Baths Ltd. [1971] 3 All ER 184, 199 to show the legal meaning of "oppression":--

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" .... oppression occurs when shareholders, having a dominant power in a company, either: (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs; or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in Scottish Co-operative Wholesale Society Ltd. v. Meyer [1958] 3 All ER 66 at p 71: burdensome, harsh and wrongful to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs: see Scottish Co-operative wholesale Society Ltd. v. Meyer and Re HR Hammer Ltd. [1958] 3 All ER 689. We do not say that this is necessarily a comprehensive definition of the meaning of the words 'oppressive' in section 210 for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however. That it may serve as a sufficient definition for our present purpose. Oppression must, We think, import that the oppressed are being constrained to submit- to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. If a director of a company were to draw a remuneration to which he was not legally entitled to or in excess of the remuneration to which he was legally entitled, this might no doubt found a misfeasance proceedings or proceedings for some other kind of relief, but it would not, in our judgment, of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers or retain the remuneration or to title proceedings by the company or other shareholders in relation to it." (emphasis supplied)

Reliance was also placed on Shahamatullah Qureshi's case (supra), at pp. 674-75:-

"The term 'oppression' has not been defined. It is lei to the Court to decide on the facts of each case
whether there exists oppression that may be called as ground of winding up. Whether the conduct and affairs of the company by shareholders is oppressive or not depend upon facts of particular case. To make out a case for winding up order, it must be established that there is some lack of probity or fair dealing towards the one or more members. Acts of misappropriation and mismanagement cannot be the grounds to support an application for winding up. The denial of right of inspection or other rights of shareholders or failure to comply with formalities required in the matter of giving notice of general meeting or refusal to declare more profit or the dividend even if profit earned justified a higher rate may not be taken by themselves as amounting to oppression. Mere illegal or irregular acts unless they are oppressive or prejudicial to the interest of the company or to the public interest will not support petition for winding up."

53. In my view, it cannot be said that a single act of misfeasance or other illegality can never amount to oppression. As is clear from the case-law (including the two cases cited above), much depends on the facts and circumstances of the particular case, Oppression is not a concept that has been or perhaps even should be exhaustively defined, and this is certainly the view of the Court of Appeal. Depending on its nature, gravity and consequences, (both actual and/or potential) even a single act may amount to oppression. In the present case, it is clear that the shareholding of the Company is held by two groups, the Shah and the Khan groups. Insofar as the undisputed shareholding is concerned, the Shah group is the majority shareholder (holding 44%) and the Khan group is the minority shareholder (holding 26%). The balance 30% shares were held for a specific purpose and to the extent that that purpose was not achieved were to be transferred to the Shah group. The transfer of these shares to Mr. Asfandyar is clearly an appropriation of those shares by the Khan group. It is an important principle of company law that in general, it is the majority decision that prevails, and unless the law, the articles of association or some valid agreement otherwise require, this means a simple majority. Now, "majority" can, in this context,

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mean either a relative majority or an absolute majority. For example, in the facts of the present case, on the undisputed shareholding the Shah group has a relative majority over the Khan group though neither has an absolute majority. However, since the Shah group has more shares than the Khan group, it would prevail over the latter in respect' of any action that is required to be taken by, or the exercise of any powers that vest in, the shareholders. This is of course, why the Main Agreement refers to the Shah group as the "majority shareholders" and the Khan group as the "minority shareholders". The appropriation of the 30% shares by the Khan group has changed this position. The balance of power between the two groups has been decisively and permanently altered. The Khan group has acquired an absolute majority (56%) The majority (i.e. the Shah group) has been reduced to a minority and can never reclaim its former position. This materially and fundamentally alters the position in the Company on a continuing and permanent basis, to the manifest benefit of the Khan group and the obvious detriment of the Shah group.

54. In my view, the foregoing position clearly constitutes oppression within the meaning of section 290. Indeed, it is oppression even within the description of the term as given in Re: Jermyn Street Turkish Baths. Thus, reference can be made to the following portion of the passage cited from this decision, with words suitably inserted in square brackets for present purposes:----the oppressed [i.e. the Shah group] are being constrained to submit to something which is unfair to them [i.e. their being reduced to a permanent minority position from their erstwhile dominant position] as the result of some overbearing act or attitude [the transfer of the 30% shares and the resultant change in the balance of power] on the part of the oppressor [i.e. the Khan group]."

I therefore conclude that the petitioners have been able to make out a case of oppression within the meaning of section 290 in terms of the third head of grievances. Clearly, the petitioners are entitled to have this situation brought to an end, After having carefully considered the situation, it appears to be me that it would not be appropriate to make an order for the buyout of the shares of one group by the other. This is because the Company is a going concern and, it appears, a profitable one. I am of the view that suitable directions/orders can be given in the exercise of powers under sections 290 and 291 that would be to the ultimate' advantage and benefit of both sides.

55. Accordingly, this petition is allowed and disposed off in terms of the following orders and directions:-

(a) In this para, the "Shah group" means Mr. Nazeer and the petitioners or any of them (and no other person), and the "Khan group" means the respondents Nos.2 to 4 or any of them (and no other person).

(b) Within 10 days from the date of announcement of this judgment ("announcement date"). the Official Assignee shall appoint a date and time (being a date not earlier than three weeks from the announcement date, nor later than six weeks from that date) for the holding of an EOGM for the election of a fresh board of directors of the Company ("election date"). The Official Assignee shall communicate the election date to the Company, but it shall be the responsibility of the Shah and Khan groups themselves to ascertain the election date from Official Assignee.

(c) The EOGM shall be held at the registered office of the Company and shall be presided and supervised by the Official Assignee.

(d) The elections shall be held only on the basis of the undisputed shareholding, i.e. 44% for the Shah group and 26% for the Khan group. The shareholders shall elect four directors of

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Whom two must be from the Shah group and two from the Khan group. Each of the Shah and Khan groups may, by declaration submitted to the Official Assignee not later than seven days before the election date (which may be submitted only once and shall be irrevocable), alter the shareholding inter se the group, and the Official Assignee shall hold the election on the basis of such declaration and the persons listed in the declaration shall be deemed to be shareholders of the Company in terms of the shareholding therein stated. lf no such declaration is filed, then the petitioner No. l shall be deemed to hold 26% shares, the petitioner No. 2 18% and the respondent No. 3 26%. However, each, of the respondents Nos.2 and 4 shall be deemed to hold one qualifying share in the Company. Only shareholders of the Company shall be eligible to stand for election. Only such members of the Shah and Khan groups as are shareholders shall be entitled to attend and participate in the EOGM and may appear and vote at the EOGM by proxy (which, however, may be given only to a member of the group) and which may be delivered to the Official Assignee at any time up to the holding of the. EOGM. Any proxy so delivered shall form part of the report to be prepared by the Official Assignee.

(e) Once the EOGM has been held and the directors elected, the Official Assignee shall declare the result, close the meeting and immediately supervise the first meeting of the newly elected board. The only agenda for the first meeting shall be to elect a chairman who must be from the Shah group and appoint a chief executive who must be from the Khan group and one of the persons elected to the board. In case there are any differences or disputes that cannot be resolved, the Official Assignee shall, in his discretion, appoint the chairman or chief executive (as the case may be) and such appointment shall be final and binding. At the meeting, the Khan group shall hand over to the Official Assignee the original share certificates in relation to the 30% shares registered in the name of respondent No. 2 (including the certificate regarding the qualifying share of respondent No. 4) Who shall keep the same in safe custody pending further disposal' in terms of these directions or as otherwise ordered by the Court. The first meeting of the board shall then stand concluded.

(f) The Company, the Shah group and the Khan group and any and all servants, employees or agents of each of them shall provide all such assistance to the Official Assignee as he may require or deem fit, including providing any information or record that he may call for, Whether on, before or after the election date for purposes of or related to anything contained in this para. Without prejudice to the generality of the foregoing, the Company shall promptly satisfy the Official Assignee that it has made all corporate entries and filings to reflect (i) any change in the shareholding as permitted under clauses (d), and (ii) the election of directors and appointment of chief executive in terms of clause (e) above.

(g) The Official Assignee shall prepare a report in respect of the foregoing matters and place the same on the record. The fee of the Official Assignee is Rs.100,000 payable by the Company, but the fee may be paid at any time by either of the Shah or Khan groups who shall be suitably reimbursed by the Company. The Official Assignee shall not be bound to take any action in terms as provided in this para, save and except as in clause (b) above. unless his fee has been paid in full.

(h) The term of office of the board of directors elected, and chief executive appointed, in terms as above shall be one year from the election date, and thereafter a new board of directors shall be elected and chief executive appointed in terms as provided in the Companies Ordinance. At any meeting of the board elected in terms of clause (e) above, the chairman shall at all - times have a second or casting vote.

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(i) Any director of the Company, whether elected in terms of clause (e) above or any time thereafter, shall have immediate, full and unimpeded access to all books of accounts and papers of the Company (howsoever stored) and its advisers and to all its properties and assets (subject to third party rights) and neither the Company. the Shah group or the Khan group nor. Any of their servants, employees or agents shall at any time by act or omission prevent, hinder or impede any director's access as aforesaid, but the right hereby confirmed shall only be exercisable by the director in person and not through any attorney or agent.

(j) At no time shall any person exercise any voting or other rights in respect of the 30% shares save and except as herein permitted or provided and any dividends declared by the Company shall, in relation thereto, be promptly deposited with the Nazir of this Court, who shall invest them in some profit bearing scheme.

(k) If by or before the end of the one year period specified in clause (h) above. the Shah and Khan groups have come to some understanding or arrangement with regard to the transfer of the 30% shares (or any portion thereof) to the person(s] identified for this purpose in the Main Agreement, the same shall be affirmed and recorded by the` board of directors and a certified copy of the relevant resolution shall. Be provided to the Official Assignee. He shall thereupon hand over a suitable number of share certificates to the Company for transfer to the person(s] concerned and also issue a certificate in relation thereto to the Nazir who shall release the relevant portion of any dividends deposited to the person(s) concerned upon confirmation by the Company that the shares have been transferred in his name.

(l) If by or before the end of the one year period specified in clause(h) above, the Shah and Khan groups have not been able to come to any understanding or arrangement in terms as stated in clause (j) above, then the Official Assignee shall, after making such inquiries with the Company as he deems appropriate, release the relevant share certificates to the Company for transfer of the shares to the Shah group and the last part of clause (j) shall apply mutatis mutandis. However, the shares (and share certificates) in relation to the portion transferable to the respondent No.5 (10%) and the respondent No.8 (6%) shall continue to be retained by the Official Assignee and their disposal shall depend on the outcome and fate of the. civil suits filed by each of these respondents or as may otherwise be ordered by the Court.

(m) The Second Agreement and those provisions of the Main Agreement as relate to Tower Il are unenforceable and shall not be given any effect by the Company or the Shah group or the Khan group.

(n) The affairs of the Company and the rights of its shareholders shall for a period of one year from the election date, be regulated and governed by company law and the provisions of parts (D) to (J) of the Main Agreement (but subject always to this para). After the expiry of the aforesaid period of one year, but subject to the terms of this para. the affairs of the Company and the rights of its shareholders shall be regulated and. governed strictly by and in accordance with company law. However, as long as the Khan group continues to hold at least the same number of shares as held in the name of respondent No, 3 as on the announcement date, the Khan group shall be entitled to elect two directors and the total number of directors of the Company shall not exceed five. If the Company is converted into a public company then, subject to the foregoing condition. the Khan group shall be

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entitled to elect three directors and the total number of directors of the Company shall not exceed seven.

(o) The civil suits filed by the respondents Nos.5 and 8 respectively that stand transferred to this Court shall be registered as suits on the original side and be fixed for further proceedings and, unless the Court otherwise directs, shall be listed together.

(p) The Official Assignee, Company, Shah group, Khan group or the Nazir (as the case may be) may at any time apply to the Court for such directions and/or clarifications as the Court may deem fit and appropriate to give or make in order to give effect to anything stated or contained in this para.

(q) The Shah group or the Khan group may place a certified copy of this judgment before the Official Assignee and/ or Nazir in order to ensure compliance, but the office shall in any case forward a copy hereof to the Official Assignee.

(r) Nothing in this para shall prevent the Shah group and the Khan group from, at any time coming to a settlement or compromise with regard to any or all of the matters herein contained (save and except in relation to the shares claimed by the respondents Nos.5 and 8 in the civil suits filed by them), and any or all such matters may be altered, modified or, superseded by any such settlement or compromise, but no such settlement or compromise shall have any effect unless. (i) placed before the Court by appropriate application, and (ii) the Court accepts and endorses the same whether with or without amendment.

56. The petition stands disposed off in the above terms. All pending applications have become infructuous and stand disposed off accordingly.

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