



**BEFORE APPELLATE BENCH**

In the matter of

**Appeal No. 22 of 2010**

MRA Securities (Pvt.) Limited ..... Appellant

Versus

Director (SMD)  
Securities and Exchange Commission of Pakistan ..... Respondent

Date of hearing 04-07-11

**ORDER**

**Present:**

**For the Appellant:**

Barrister Atif Rafiq  
Mr. Farhan Rafiq, CEO

**Respondent:**

Mr. Imran Inayat Butt, Director (SMD)

**For the Respondent:**

Muhammad Ali, Deputy Director  
Mr. Kapeel Dev, Assistant Director



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1. This order shall dispose of appeal No. 22 of 2010 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 05-03-10 (the "Impugned Order") passed by the Respondent.
2. MRA Securities (Pvt.) Limited (the "Appellant") is a corporate member of Karachi Stock Exchange (Guarantee) Limited ("KSE") and Lahore Stock Exchange (Guarantee) Limited ("LSE") and is registered with the Commission under the Brokers and Agents Registration Rules, 2001 (the "Rules").
3. On perusal of trading data of Karachi Stock Exchange ("KSE") it was observed that on 28-09-09 the Appellant in its proprietary accounts first sold 1,695,000 shares of Jahangir Siddiqui & Company Limited ("JSCL") between 09:30:10 a.m. to 09:30:35 a.m. and subsequently squared its position to the extent of 1,415,000 shares by purchasing these shares between 09:30:38 a.m. to 14:06:38 p.m. The shares were sold from 12 (twelve) different proprietary codes of the Appellant and orders were placed through 11 (eleven) trading terminals of the Karachi Automated Trading System ("KATS"). After further correspondence with the Appellant, it transpired that the said trades were executed without any pre-existing interest in the shares.
4. Show cause notice ("SCN") was issued to the Appellant under section 22 of the Securities and Exchange Ordinance, 1969 (the "Ordinance") and the Rules stating that the Appellant had prima facie contravened clause A (2) and A (5) of the Code of Conduct set under the Third Schedule of the Rules. The Appellant responded to the SCN and hearing in the matter was held. The Respondent, dissatisfied with the response of the Appellant,



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passed the Impugned Order and imposed a penalty of Rs. 2,500,000 on the Appellant under section 22 of the Ordinance.

5. The Appellant preferred the instant appeal against the Impugned Order. The Appellant's counsel argued that:

- a) the Appellant had pre-existing interest in the shares sold. The Appellant had provided the details of Central Depository Company Account ("CDC Account") held by its clients and the details of its proprietary account to the Respondent exhibiting that the Appellant and its clients were holding more than 1,695,000 shares of JSCL on 28-09-09 in their own accounts. The proprietary account had approximately 5,90,000 shares and the client accounts had approximately 1,105,5000 shares of JSCL. It was mistake of KATS operator that the shares, which had to be sold through the client's account were sold through the proprietary accounts. The false impression created was a human error, which was rectified immediately;
- b) the Respondent failed to appreciate that the mandatory requirement for imposing penalty under section 22 of the Ordinance is *mens rea* i.e. willful default or fraudulent intention. The Respondent failed to prove beyond reasonable doubt that the Appellant had any fraudulent intention. The mistake of KATS operator was treated as a willful default by the Respondent. The events can at best be described as a negligence, which cannot be treated as willful;
- c) the Respondent had failed to appreciate that the covering letter addressed to KSE was received by KSE along with which the



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correction list of Trade Log Modification Report (“TLMR”) of at least 300 transactions were submitted. The Respondent has assumed, without recording any evidence that the TLMR provided by KSE is correct, whereas, the one furnished by the Appellant is false information;

- d) the penalty imposed on the Appellant is not proportionate to the violation stated therein. The Respondent had made an error in law to impose penalty under section 22 of the Ordinance, when the contravention as alleged was under the Rules for which maximum penalty of Rs 100,000/- is prescribed in rule 8(b) of the Rules.

6. The Respondent argued that:

- a) the record provided by the Appellant and the CDC house balance report of the Appellant’s proprietary account has confirmed that the Appellant had 630,000 shares of JSCL available on 28-09-09 in its CDC house account, which was 1,065,000 shares short of the actual shares sold on that date through the said account. The record also reveals that orders of sale of JSCL shares in Appellant’s proprietary account were placed through 11 (eleven) different trading terminals and it is impossible that the all 11 (eleven) KATS operators made the same mistake;
- b) the acts of the Appellant were willful. Knowledge or intent is a basic ingredient of willful act, however, the Respondent was under no obligation to show that the act was fraudulent as contended by the Appellant. Knowledge or the state of mind has to be gathered from the circumstances and the result surrounding the act. The



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circumstances surrounding the act clearly show that the act of the Appellant was willful;

- c) KSE, being a front line regulator was asked to provide TLMR for the month of September, October and November 2009. After scrutiny of TLMR it was revealed that the Appellant used to submit TLMR containing large number of entries on daily basis to KSE. The TLMR of 28-09-09 provided by KSE showed only 6 (six) rectifying trading entries of JSCL for three clients involving 62,300 shares. On the other hand, the Appellant provided TLMR of 28-09-09 which showed 300 transactions. The report submitted by KSE was shared with the Appellant, however, it failed to provide any explanation for the variance;
- d) the Appellant was found to be in violation of the Rules. The Rules are made under the Ordinance and in terms of section 22 of the Ordinance: penalty may be imposed on any person who contravenes or otherwise fails to comply with the provisions of the Ordinance or any Rules or regulation made there under.

7. We have heard the parties.

- a) the regulations 2(i) and 2(j) of the Regulations for Short Selling Under Ready Market 2002 are reproduced for ease of reference :

2. *Definitions:*

- i) *“Sale with pre-existing interest” means:*



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*The squaring up of an earlier purchase on the same exchange in the same settlement.*

*The squaring up of an earlier purchase on the same exchange in a different settlement which will settle prior to the settlement of the sale.*

*The squaring up of an earlier purchase on another exchange in a different settlement which will settle prior to the settlement of the sale.*

*The squaring up of an earlier purchase on another exchange in the same settlement.*

*The squaring-up of an open position in Margin Trading Market as a financee on account of same UIN of same security.*

- j) *"Short Sale" means a sale by a Member, on his Proprietary Account or on Client's Account, not owning securities at the time of sale or the sale without constituting a Pre-Existing Interest but is a sale on Proprietary Account or Client's Account entered into on the basis of SLB contract executed through SLB Market at Clearing Company in accordance with its Regulations /Procedure to meet delivery requirements on the settlement date.*

Emphasis added

Short sale by definition is a sale by a member or a client, who at the time of sale does not have a pre-existing interest in the securities. Short sale is permissible, as long as the member or a client has a contractual borrowing arrangement to ensure that the delivery requirements are met on the settlement date. In the instant case the CDC house balance report of the Appellant's proprietary

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account has confirmed that the Appellant had 630,000 shares of JSCL available on 28-09-09 in its CDC house account, which was 1,065,000 shares short of the actual shares sold on that date through the said account. The Appellant had not entered into a borrowing arrangement to ensure that the delivery requirements would be met.

The Appellant reliance on the assertion that the sale transactions were in fact in the client accounts which approximately had 1,105,5000 shares of JSCL cannot be accepted as orders of sale of JSCL shares in Appellant's proprietary account were placed through 11 (eleven) different trading terminals and it is impossible that the all 11 (eleven) KATS operators made the error of selling the shares through the proprietary account, when the sale was actually made in the client account;

- b) on the issue of whether or not the act was 'wilful', we place our reliance on 1984 CLC 2456, where the definition of 'wilful' has been reproduced from Black Law Dictionary as an act done with stubborn purpose, but not with malice, as done intentionally, knowingly and purposely as distinct from an act done carelessly, thoughtlessly, heedlessly or inadvertently. In the instant case, the Appellants cannot be allowed to take a plea that the mistake by 11 (eleven) KATS operator at 11 (eleven) different trading terminals was done carelessly, thoughtlessly, heedlessly or inadvertently;
- c) the submission of TLMR report by KSE containing large number of entries on daily basis to KSE shows that the Appellant was not executing its business with due care and skill. The variance in

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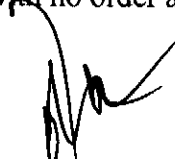
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TLMR report between; the one provided by KSE and the other by the Appellant was shared with the Appellant, who failed to provide any explanation in this regard, as such, the reliance was rightly placed on the TLMR report of KSE;

- d) the Appellant counsel's contention that the penalty is not proportionate to the violation stated therein has been examined in light of the circumstances of the instant case and the past conduct of the Appellant. The penalty of Rs 2.5 million has been imposed, as the Appellant despite issuance of order dated 09-06-09 under section 22 of the Ordinance and several warnings thereafter has failed to comply with the requirements of the law. Moreover, the contention that section 22 of the Ordinance cannot be invoked as provision of the Rules are self contained and penal provision have already been provided therein is misconceived. It may be noted that the Rules are secondary or subordinate legislation, made under section 43(b) of the SECP Act read with section 5A of the Ordinance. The Rules are made to implement the requirements of primary legislation i.e. the Ordinance and as such the Ordinance shall prevail. The Respondent, therefore, rightly imposed penalty against the Appellant under section 22 of the Ordinance.

In view of the above, we see no reason to interfere with the Impugned Order. The appeal is dismissed with no order as to cost.

  
(MUHAMMAD ALI)  
Chairman

  
(TAHIR MEHMOOD)  
Commissioner (CLD)

Announced on: 12<sup>th</sup> August, 2011