



BEFORE APPELLATE BENCH

In the matter of

Appeal No. 64 of 2009

Zafar Moti Capital Securities (Pvt.) Limited Appellant

Versus

Director (SMD)
Securities and Exchange Commission of Pakistan Respondent

ORDER

Date of hearing 19-05-11

Present:

For the Appellant:

Mr. Nauman Qaiser, Advocate

For the Respondent Department:

Syed Asad Haider, Joint Director

Muhammad Ali, Deputy Director



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

1. This order shall dispose of appeal No. 64 of 2009 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 (the "SECP Act") against the order dated 16-10-09 (the "Impugned Order") passed by the Respondent.

2. On perusal of trading data of Karachi Automated Trading System ("KATS") of Karachi Stock Exchange ("KSE") for the month of May 2009 it was noted that two clients of the Appellant, namely:
 - a) Muhammad Hussain sold 77,000 shares of National Bank of Pakistan ("NBP") between 1231 hrs and 1504 hrs and purchased 55,000 shares of NBP between 1507 hrs and 1529 hrs on 04-05-09 and further purchased 22,000 shares of NBP between 0931 hrs and 0932 hrs on 05-05-09, thus, squaring up position in the scrips of NBP;

 - b) Mr. Abdullah sold 60,000 shares of Oil & Gas Development Company ("OGDC") between 1239 hrs and 1242 hrs and purchased 60,000 shares of OGDC between 1256 hrs and 1522 hrs on 26-05-09, thus, squaring up position in the scrips of OGDC.

The record did not show that Muhammad Hussain and Mr. Abdullah (the "Clients") had pre-existing interest in the shares before the sales took place.

3. Show cause notice ("SCN") was issued to the Appellant under section 22 of the Securities and Exchange Ordinance, 1969 (the "Ordinance") and the Brokers and Agents Registration Rules, 2001 (the "Rules") stating that the



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Appellant had prima facie contravened clause A (2) and A (5) of the Code of Conduct 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, observed that the Appellant had placed short sales in its Clients' behalf without fulfilling prerequisites of the Regulations for Short-Selling under Ready Market, 2002 (the "Regulations") which in turn is violation of clause A (2) and A (5) of the Code of Conduct set under the Third Schedule of the Rules. The Respondent passed the Impugned Order and imposed a penalty of Rs. 400,000 on the Appellant under section 22 of the Ordinance.

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

- a) the Clients had pre-existing interest in the shares. The shares were owned by a person namely Sajjad Mehdi ("SM"), who gifted the shares to the Clients through a gift deed. The Appellant, prior to show cause proceedings, had provided the Central Depository Company ("CDC") Account Balance Report and two authority letters given by SM in favor of the Clients, as proof of pre-existing interest. It was contended that even though the authority letters from SM to the Appellant do not specifically mention the word 'gift', nevertheless, it is the intention that has to be construed, which is that of a 'gift'. SM was the donor while the Clients were the donees. The possession of the shares was not with SM, but with the Appellant, who kept accounts of all clients and transacted on their behalf. Moreover, the contention of the Respondent in the Impugned Order that the actual delivery of the gifted shares did not take place, hence, the gift lacked the basic ingredient of a valid



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

'gift' is unfounded. It was argued that, as held in the case of *Haji Muhammad Ibrahim & others vs Muhammad Usman Ghani Qureshi & others* [2007 M L D 837], whenever the donor himself is not in physical possession of the subject matter of the gift, then actual delivery of the subject matter of the gift to the donee is not necessary. In such cases only a constructive delivery would suffice, provided that the donor spells out his intention by divesting himself, not only from the ownership, but of all rights attached thereto. Reference was placed on *Reham Ali and Another vs. Abdul & three others* [1980 C L C 1110 SC (AJ&K)] and it was contended that under the Mohamedan Law there should be: a declaration of intent of gift by the donor; an acceptance of gift expressed or implied by the donee or somebody on donee's behalf and delivery of the gift either actual or constructive.

SM showed his bonafide intention to 'gift' the shares to the Clients through authority letters addressed to the Appellant. The Appellant's impliedly accepted the 'gift' on behalf of the Clients when the Appellant sold/bought the gifted shares, as such, delivery of possession was not required. Further, in terms of the clause in the said authority letter i.e. "*I confirm that after this activity I have no claim against you for the above mentioned shares*" shows that intention was to make a gift;

- b) without prejudice to the above, it is a principle of law that when an accused is charged for the same offence under two different statutes; the accused can only be tried for offences under the law which provides lesser sentence. Section 22 of the Ordinance provides maximum penalty of Rs 50 million, whereas, rule 8 of the



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Rules provides maximum penalty of Rs 100,000, thus the maximum penalty that could have been imposed could not exceed Rs. 100,000. Reliance was placed on: *Rana Khalid Mehmood vs The State* [2007 Y L R 1088 (Khi)], *Mir Jan vs The State* [2003 P Cr. L J 1903 (Khi)], *Muhammad Ashraf vs The State* [2003 M L D 165 (Khi)]. It was prayed that the penalty of Rs 400,000, imposed under section 22 of the Ordinance, may be reduced in light of this argument.

5. The department representatives contended that:

- a) the term 'gift' is defined in section 122 of the Transfer of Property Act, 1882 (the "Transfer of Property Act") wherein it is clearly stated that delivery of entitlement and possession is necessary to constitute a valid gift. Further, the CDC Balance Report of SM and the authority letters clearly show that shares were not transferred in favor of the Clients. The shares were traded by the Clients on behalf of SM, hence, the main ingredient of gift in shape of transfer of entitlement or possession was not there. The authority letters cannot be treated as a valid gift;
- b) the penalty provided under section 22 of the Ordinance was rightly imposed. The penalty was imposed under the Ordinance which is primary legislation whereas the rules are secondary legislation. The Clients, by executing the sale transactions, earned approximately Rs 200,000. The penalties are based on the severity of the case and calculated on the basis of various factors including profit earned, number of transactions and volume of shares involved. The Appellant was fined an amount of Rs 400,000 under section 22 of the Ordinance.



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

The sum of Rs 200,000 was gain made by the Clients from the sale transactions and Rs 200,000 was imposed as penalty. Moreover, the cases referred to by the Appellant's counsel cannot be relied upon for the purposes of this case as the principles laid down relate to 'accused being charged under two different statues' in the criminal proceedings.

6. We have heard the parties. The perusal of the CDC Account Balance Report of SM show that shares were not transferred in favor of the Clients. Examination of the authority letters show that the shares were only traded by the Clients on '*behalf*' of SM. The relevant parts of the authority letters are reproduced for ease of reference:

"I authorize to Mr. Muhammad Hussain his trading ID # 8317 NIC No. 42301-2562651-3 the mention below share can sell and move from my account on my behalf."

"I authorize to Mr. Abdullah his trading ID # 8305 NIC No. 42301-3854378-3 the mention below share can sell and move from my account on my behalf."

[Emphasis added]

The word '*authority letter*' has been used in the forwarding letter attached to the authority letters. Further, the phrase in the authority letters on which reliance has been placed by the Appellant's counsel for the purposes of declaring the authority letters as gift deeds i.e. "*I confirm that after this activity I have no claim against you for the above mentioned shares*" can at best be described as an indemnity clause and does not make the authority letters gift deeds. The authority letters were authorizing the



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Clients to trade on behalf of SM and the Clients had no pre-existing interest in the shares when the sale order was placed by the Appellant.

The Appellant counsel's 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 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 and administer 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 do not see any reason to interfere with the Impugned Order. The appeal is dismissed. Parties to bear their own cost.

(MUHAMMAD ALI)
Chairman

(MR. TAHIR MEHMOOD)
Commissioner (CLD)

Announced on: 17th June 2011