



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 26 of 2015

Next Capital Limited

...Appellant

Versus

Director/Head of Department

Market Surveillance & Special Initiative Department

Securities and Exchange Commission of Pakistan

...Respondent

Date of Hearing

06/07/15

ORDER

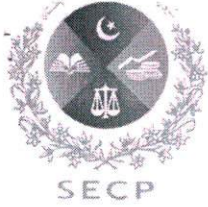
Present:

For the Appellant (through video conferencing):

- i. Muhammad Najam Ali, Chief Executive Officer, Next Capital Limited
- ii. Khurram Ali, Head of Compliance, Next Capital Limited

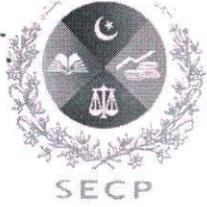
Department Representatives:

- i. Abid Hussain, Director (SMD)
- ii. Mirza Shoaib Baig, Deputy Director (SMD)



Securities and Exchange Commission of Pakistan

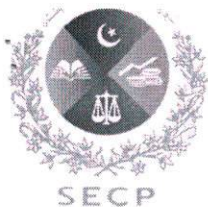
1. This order is in appeal No. 26 of 2015 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 ("SECP Act") against the order (the "Impugned Order") dated 24/02/2015 passed by the Respondent.
2. The brief facts of the case are that during the surveillance of Karachi Automated Trading System ("KATS") data, Next Capital Limited (the "Appellant") was requested vide Commission's letter dated 23/01/15 to provide the copy of Standard Account Opening Form ("SAOF") of the client bearing the client code "30218". The Appellant vide letter dated 30/01/15 provided the requisite document. The SAOF provided by the Appellant contained various discrepancies. During the examination of SAOF, following observations were made:
 - a) The SAOF does not bear date of account opening.
 - b) Particulars of nominee were not filled.
 - c) The SAOF was not witnessed by two individuals along with CNIC numbers and signatures
 - d) Authorisation letter was signed by the client and the Head of Operations (HOO) of the Appellant without name and details of person authorized to operate the account. However, the Appellant vide letter dated 30/01/15 stated that the client has not authorized anyone to operate his account.
 - e) The KYC/CDD details regarding employer's name and address and job title of the client was blank.
 - f) Copy of CNIC of the client was not attested as required under KSE Regulations.
 - g) Sections of SAOF for Corporate Account Holders were blank and not applicable for individual client but yet signed both by Client and HOO.
3. Show Cause Notice ("SCN") was issued to the Appellant as to why action may not be taken in pursuance of Rule 8 of the Brokers and Agents Registration Rules, 2001



Securities and Exchange Commission of Pakistan

("Broker Rules") and Section 22 of the Securities & Exchange Ordinance, 1969 ("Ordinance"). The Commission received reply of the SCN from the Appellant dated 12/02/15, wherein, the Appellant refuted the contents of the SCN. Hearing in the matter was held on 18/02/15 which was attended by Mr. Khurram Ali, Head of Compliance and Internal Audit ("Authorised Representative") on behalf of the Appellant. The Authorized Representative informed the Respondent that he has started reviewing all the SAOFs to ensure compliance of the law in letter and spirit. Further, he admitted that the observations made with regards to the SAOF in question are valid and have been noted. The missing data has been filled and CNIC was attested soon after the receipt of SCN.

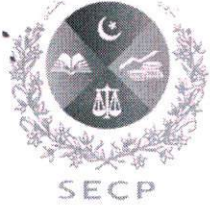
4. The Respondent dissatisfied with the response of the Appellant held the Appellant failed to exercise due care, skill and diligence in the conduct of its business. The Appellant allowed a client to open account and trade in the market whose complete particulars were not obtained. The Appellant has failed to abide by the applicable rules and regulations by violating Clause A(2) of Code of Conduct set forth under the Third Schedule of the Broker Rules which in turn is a violation of Rule 12 read with Rule 8 of the Broker Rules. The Respondent, therefore, in exercise of the powers under section 22 of the Ordinance imposed a penalty of Rs 100,000 and directed the Appellant to ensure compliance of all rules, regulations and directives of the Commission.
5. The Appellant aggrieved of the Impugned Order has preferred the instant Appeal. The Appellant's representatives argued that there was no willful misconduct or malafide intention on the part of Appellant as the Appellant admitted its oversight and immediately sought to correct the same. At the hearing held on 18/02/15, the Respondent was informed by the Authorised Representative that the Appellant had started reviewing all the SAOFs to ensure compliance with the laws in letter and spirit. The Authorised Representative also sought clarifications and guidance from the



Securities and Exchange Commission of Pakistan

Appellant to ensure that the Appellant continues to undertake its business in accordance with the applicable laws. Further, the Respondent passed the Impugned Order on the basis of the enquiry conducted with respect to the shares of Pak Elektron Limited (“PAEL”). The Commission would be required to initiate a separate enquiry for action against the Appellant. The Respondent also fails to appreciate the fact that the account opening forms are audited by the Central Depository Company of Pakistan Limited (“CDC”) on a yearly basis. The CDC has never raised any concerns in this respect which supports the fact that the Appellant carries out its business in accordance with applicable laws. It is emphasized that the error on part of the Appellant was merely technical which could not lead to severe repercussions and the Appellant quickly corrected its error to ensure that the same is not widespread in its operations. There was no suggestion, however, in the SCN or during the hearing that the actions on part of the Appellant were a result of willful misconduct or that such acts were prevalent in its business operations. Section 22 of the Ordinance expressly provides that a penalty may be imposed if the refusal, failure or contravention was willful. The Respondent does not demonstrate or attempt to establish that the actions of the Appellant were willful. The Respondent has, therefore, misapplied the provisions of section 22 of the Ordinance and has also contravened section 24-A of the General Clauses Act, 1897. In view of the same, the Impugned Order is completely unwarranted and excessive and is liable to be set aside.

6. The department’s representatives argued that admission by the Appellant of the violation and seeking guidance for compliance in future does not absolve the Appellant from the liability of the contravention of the laws and regulations. The applicable Karachi Stock Exchange (“KSE”) Regulations were in force since 18/06/14. The requested guidance was provided to the Authorised Representative during the hearing on 18/02/15 and the Appellant was instructed to complete SAOFs of all account holders within 3 months from the date of the Order and report the same to the Commission. The SCN does not pertain to the enquiry in the shares of PAEL and the same was issued for the Appellant’s violation of the Code of Conduct set



Securities and Exchange Commission of Pakistan

forth under the Broker Rules. The KYC/CDD details regarding employer's name and address and job title of the client was a blank form signed by the client indicating absence of any KYC/CDD process followed by the Appellant at the time of opening of the account. The requirement to maintain attested copies of National Identity Card of the Applicant and nominee (where applicable) is a requirement of the KSE Regulations as amended on 18/06/14 which must be complied with by the Appellant. The brokers, therefore, have to take all reasonable care to establish the true identity of customers. In this regard SAOF is the key document for establishing the identity of client and governs the relationship of client and the broker. It is, therefore, essential that SAOF must be duly filled with utmost accuracy and no applicable section must be left incomplete. Further, brokers should also obtain any document other than the prescribed documents from the account opener if it will help in establishing the true identity of the customer. The Impugned Order was, therefore, not in any way excessive or unwarranted.

7. We have heard the arguments. Section 22 of the Ordinance, Rules 8(i),(ii),(iii),(iv) and 12 of the Broker Rules are reproduced for ease of reference:

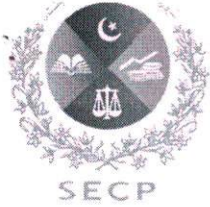
22. Penalty for certain refusal or failure. *-(1) If any person-*

(a) refuses or fails to furnish any document, paper or information which he is required to furnish by or under this Ordinance; or

(b) refuses or fails to comply with any order or direction of the Commission made or issued under this Ordinance; or

(c) contravenes or otherwise fails to comply with the provisions of this Ordinance or any rules or regulations made thereunder] Regulations made thereunder;

the Commission may, if it is satisfied after giving the person an opportunity of being heard that the refusal, failure or contravention was willful, by order direct that such person shall pay to the Commission by way of penalty such sum not exceeding [fifty million] rupees as may be specified in the order and, in the case



Securities and Exchange Commission of Pakistan

of a continuing default, a further sum calculated at the rate of [two hundred] thousand rupees for every day after the issue of such order during which the refusal, failure or contravention continues.

(2) Any sum directed to be paid under sub-section (1) shall be recoverable as an arrear of land revenue.

(3) No prosecution for an offence against this Ordinance shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

8. Suspension of registration.- Where the Commission is of the opinion that a broker- (i) has failed to remain in compliance with any conditions subject to which certificate of registration was granted under these rules;

(ii) has otherwise failed to comply with any requirement of the Act or the Ordinance or of any rules or direction made or given thereunder;

(iii) has contravened the rules and regulations of the stock exchange;

(iv) has failed to follow any requirement of the code of conduct laid down in the Third Schedule;....

....the Commission may if it considers necessary in the public interest so to I do, by order in writing:-

(a) suspend the registration of a broker for such period as may be specified in the order; or

(b) impose on a broker a fine not exceeding one hundred thousand rupees:

Provided that an appropriate opportunity of being heard, shall be provided to the broker to clarify his position with regard to suspension of registration.

12. Brokers to abide by code of conduct. - A broker holding a certificate of registration under these rules shall abide by the code of conduct specified in the Third Schedule.

Emphasis Added



Securities and Exchange Commission of Pakistan


In the instant case, it is established from the facts and circumstances that SOAF had errors and this was admitted by the Appellant. However, there was no malafide and the errors in SAOF were inadvertent on behalf of the Appellant. The Appellant provided the SOAF when required by the Respondent on as is basis. The Appellant could have rectified the error before providing the same to the Appellant; however, this was not done which again indicates that there was not willful error. Further, it is also important to note that errors in the SAOF were immediately rectified once it was brought to the notice of the Appellant by the Respondent.

The word “willful” can be used interchangeably with the word “intentional”. Reliance is placed on the Lahore High Court judgment of *Pakistan Industrial Promoters Limited versus Monopoly Control Authority* cited at 1990 CLC 1008, wherein, it was held that, that the word willful means, “...an act done intentionally, knowingly or purposely as distinct from the one done carelessly, thoughtlessly, heedlessly or inadvertently...”

Additionally, it is very important to place on record that the Appellant’s previous track record is unblemished.

In view of the foregoing, we set aside the Impugned Order to the extent of penalty with the direction to complete all SAOFs of all existing Account Holders within 3 months from date of issue of this Order and report the same to the Commission. Further, the Appellant must ensure compliance of all rules, regulations and directives of the Commission in future.

The Appeal is disposed of with no order as to costs.


(Fida Hussain Samoo)
Commissioner (Insurance)


(Tahir Mahmood)
Commissioner (CLD)

Announced on: **24 JUL 2015**