



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 40 of 2017

Lakhani Securities (Pvt.) Limited

Appellant

Versus

Executive Director, (SMD-PRPD), SECP, Islamabad.

Respondent

Date of hearing: December 11, 2018

Present:

For Appellant:

- i. Mr. Amjad Javaid Hashmi, Advocate High Court
- ii. Mr. Shahid Ali Qureshi, Advocate High Court
(M/s Tax Pulse, Advocates and Associates)
- iii. Muhammad Yasin Lakhani (Appellant's CEO)

For Respondent:

- i. Mr. Nasir Askar- Director (SMD)
- ii. Mehwish Naveed – Management Executive (SMD)

ORDER

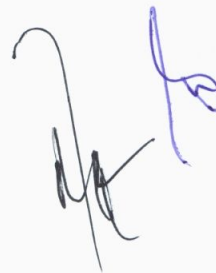
1. This Order is in the matter of Appeal No. 40 of 2017, filed by Lakhani Securities (Pvt.) Limited (the Appellant) against the Order dated 28/04/17 (the Impugned Order) passed by the Executive Director- PRPD (the Respondent) under Section 22 of the Securities and Exchange Ordinance, 1969 (the Ordinance) and Rule 8 of the Brokers and Agents Registration Rules, 2001(the Rules).

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2. Brief facts of the case are that the Securities and Exchange Commission of Pakistan (the Commission) in order to assess the compliance of the regulatory framework regarding segregation of client's assets, conducted a compliance review (the Review) of the Appellant under Section 79 (3) of the Securities Act, 2015 (the Act). The Review revealed that the Appellant was non-compliant of clause 4.18.1 clause 4.18.2 and clause 4.24 of the PSX Rule Book (the Rule Book). As per clause 4.18.1 and 4.18.2 of the Rule Book, Appellant was required to properly segregate the assets of the clients from its own assets and prohibition of using the funds and securities of its clients for any purpose other than as authorized by the client, respectively. Furthermore, in violation of clause 4.24 of the Rule Book, the Appellant received cash exceeding Rs 25,000 from its clients. Following are the main violations of regulatory framework:

- i. There was a difference between trade payables and clients bank balances as on April 4, 2016 and June 27, 2016.
- ii. Clients funds were received in Appellant's bank account from National Clearing Company of Pakistan Limited and were not transferred to clients' bank account.
- iii. Funds received from clients were not transferred to the clients' bank account. Furthermore, funds of clients were used for settlement of Appellant's obligation.
- iv. The Appellant used the funds of clients for making , payments of various expenses.
- v. The Appellant received cash exceeding Rs 25,000 from clients.

3. In view of the above stated non-compliances of regulatory framework, a Show Cause Notice dated 07/02/17 (the SCN) was served to the Appellant. The reply of the SCN was submitted by the Appellant vide a letter dated February 10, 2017. Hearing in the matter was held on March 03, 2017, which was attended by the Muhammad Yasin Lakhani (Appellant's CEO) and Mr. Kashif wherein, they reiterated the stance submitted through the reply of the SCN. After hearing, the Appellant submitted additional submissions vide a letter dated March 6,



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2017. However, the Respondent being dissatisfied with the reply of Appellant, imposed a penalty of Rs. 500,000/-.

4. The Appellant challenged the Impugned Order and filed the instant appeal. Hearing in the matter was held on December 11, 2018 before the Appellate Bench (the Bench). Appellant's and Respondent's representation was in the manner stated hereinabove. The Appellant's representatives contested the Appeal and prayed to set-aside the Impugned Order being illegal and contrary to law and facts of the case. On the other hand, the Respondent's representatives rebutted the arguments/grounds and prayed to dismiss the Appeal.
5. The Bench has heard the arguments of the parties. The Appellant's representative has raised certain preliminary objections with respect to initiation of Review under Section 79(3) of the Act and penalization of Appellant under Section 22 of the Ordinance.
6. The Bench has gone through the relevant provision (Section 79(3) of the Act) with the able assistance of the parties and found that Appellant's representative objection is correct. Section 79(3) of the Act authorize inspection of "accounting and other records" therefore, initiation of Review under this section was neither permissible nor justified. Initiation of Review was a clear violation of law and it was beyond the scope of Section 79(3) of the Act. If at all, we presume that the Review was an inspection, even then it does not correspond with the record and facts of the case. Section 79(3) of the Act assign the right of inspection to the Commission however, inspection procedure has not been provided therein, therefore, the Respondent was required to follow the inspection procedure laid down under Section 138(2) of the Act. Section 138(2) require a "written order" to initiate the inspection however, the Respondent had not observed the due procedure. The letter dated August 1, 2016 whereby, two officers of the Commission were deputed to conduct the Review, cannot be termed as "written order" on two counts; Firstly, it failed to demonstrate the reasons, which compelled the Respondent to initiate Review and Secondly, the officer who wrote the letter was not competent to write such letter. The bare reading of the letter is suffice to show that the



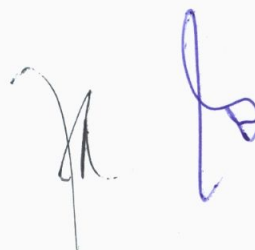
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additional director had no authority to write the letter and he only acted on the direction of competent authority. For reference Section 79(3) and Section 138(2) of the Act are reproduced below;

*79. Accounts and records to be kept.—(3) The accounting and other records required to be maintained under this section shall be preserved by the regulated person for a period of not less than ten years from the date on which they are made and shall at all reasonable times be open to inspection by the Commission or by any person appointed by the Commission. **Emphasis Added***

*138. Inspection.- (2) The Commission may through a written order authorize any person, hereinafter referred to as the "authorized person", to exercise the powers of the Commission under this section. **Emphasis Added***

7. The Appellant also objected the SCN and the Impugned Order on the ground that Section 22 is a consequential provision of Section 21 of the Ordinance therefore, it cannot be invoked to prove the wrongly presumed conduct under another statute i.e. Section 79 (3) of the Act. In this regard Appellant has relied on a judgment of the Supreme Court, in the case of *Chairman Board of intermediate Bahawalpur* reported as 2005 SCMR 728 whereby, it has been held "*Penal provision in a statute cannot be imported to another provision and attracted unless it is specifically made applicable*"
8. The Bench has evaluated Appellant's objection and observed neither the SCN nor the Impugned Order had alleged any violation under Section 79(3) of the Act. In this case, role of Section 79(3) of the Act is to the extent that the Review was carried out under this Section, which revealed alleged violations of clause 4.18.1, 4.18.2 and 4.24 of the Rule Book. Therefore, Appellant's objection is not valid. Notwithstanding, the objection of Appellant with regard to Section 22 of the Ordinance, the Bench has applied its independent legal mind to understand that how and why penal provision of Ordinance was invoked to establish the



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violation of the Rule Book. The Respondent had not provided any reason in this regard. In our view, regulatory non-compliances of the Rule Book should have been penalized under same regulations.

9. The Bench has further observed that the Respondent had also invoked the Rule 8 of the Rules however; none of the penalties provided therein, had been imposed on the Appellant. Therefore, a vague reference of Rules in the SCN and the Impugned Order is of no use to draw any adverse inference against the Appellant.
10. The Bench has reviewed the argument of the Appellant that being a front line regulator of securities and capital market, Pakistan Stock Exchange (the PSX) was an appropriate forum to deal with the alleged regulatory violations of the Rule Book. During the course of hearing, the Respondent's representative stated that ninety-six cases of similar violations of different TREC holders of PSX (brokers) were identified. All cases except, the case of Appellant were forwarded to the PSX for adjudication because Appellant's CEO was also part of the PSX board. Therefore, to avoid, any possible conflict of interest, Appellant's matter was adjudicated by the Respondent. The Bench has reviewed the contents of the Impugned Order however; no such observations or findings are on record. Although, the Appellant's representative has endorsed the assertion of Respondent's representative however, for just adjudication, these relevant facts should have been part of the Impugned Order. Furthermore, the Bench is of the view that in certain laws, the Commission and the PSX have concurrent jurisdiction to adjudicate upon the regulatory violations however, being a front line regulator, regulatory violations should have been dealt by the PSX itself. The Commission may use its powers under the exceptional circumstances. The issue in hand was exceptional therefore, the Commission was competent to take cognizance of the matter under applicable laws hence, Appellant's representative argument is not tenable.
11. The Bench believes that required procedure to probe the alleged regulatory violations had not been followed by the Respondent. Therefore, the SCN and the Impugned Order are against



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the verdicts of superior courts. The Apex courts have settled opinion that “When a thing was required to be done by law in a particular manner it should be done in that manner or not at all”¹. In view of the aforesaid facts, the SCN and the Impugned Order are a sheer violation of binding legal precedents.

12. In light of above discussion, we have no doubt to conclude that; Firstly, the Respondent had no authority to initiate Review under Section 79(3) thereby, rendered all proceedings including issuance of the SCN and pronouncement of the Impugned Order, *void ab initio*. Secondly, PSX Rule book violations should have been penalized under the provisions of same law therefore, penalty under Section 22 of the Ordinance is not sustainable. Thirdly, without mentioning the relevance to this case, vague reference of Section 22 of the Ordinance and Rule 8 of the Rules cannot be construed as desirable application of law.
13. In view thereof, we hereby allow this Appeal and set aside the SCN and the Impugned Order. Parties to bear their own cost.



(Tahir Mahmood)

Commissioner (Insurance)



(Shauzab Ali)

Commissioner (SCD)

Announced on: **29 JAN 2019**

¹ PLD 1964 SC 253, 2018 CLC 1613 Islamabad, 2018 PLC(CS) 1284 Islamabad, PLD 1979 Lahore 54, 2017 PLC(CS)N 46 Supreme-Court-Azad-Kashmir, 2017 YLR 1182 Peshawar-High-Court, 2017 CLD 1101 Lahore-High-Court-Lahore.