



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. II

In the matter of

Appeal No. 42 of 2013

Safeway Fund Limited

...Appellant

Versus

The Executive Director (SCD), SECP

...Respondent

Dates of hearing:

02/04/15 and 11/11/15

Present:

For Appellant:

Mr. Nihal Cassim, CEO

For Respondent:

- i. Mr. Shahid Naseem, Executive Director (SCD)
- ii. Mr. Asif Paryani, Joint Director (SCD)
- iii. Mr. Kaiser Iqbal, Deputy Director (SCD)

ORDER

1. This order shall dispose of appeal No. 42 of 2013 filed under section 33 of the Securities and Exchange Commission of Pakistan Act 1997 by the Safeway Fund Limited (the Appellant) against the order dated 31/05/2013 (the Impugned Order) passed by the Executive Director Specialized Companies Division (the Respondent) in the matter of Asian Stock Fund Limited (the ASFL).
2. The Brief facts of the case are that the Appellant is a Non-Banking Finance Company licensed to undertake the businesses of asset management services under the Non-



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Banking Finance Companies (Establishment and Regulation) Rules 2003 (the NBFC Rules 2003) and Non-Banking Finance Companies and Notified Entities Regulations 2008 (the NBFC and NE Regulations 2008). The Appellant was managing two closed-end funds i.e. the ASFL and Safeway Mutual Fund Limited (the SMFL).

3. The Appellant is 100% owned by its CEO Mr. Nihal Cassim and Appellant holds 25% of the total shareholding of the ASFL as of 31/12/12, which means that Mr. Nihal Cassim indirectly owns 25% stake in the ASFL. Other important facts of the case are as follows:
- i. The ASFL exposures in the shares of Bank AlFalah Limited (the BAFL) and DG Khan Cement Limited (the DGKC) were in excess of the per party exposure limit of 10% as prescribed in Regulation 55(5) of the NBFCs and NE Regulations 2008 since July 2011 due to increase in market price.
 - ii. In terms of Regulation 55(13) of the NBFCs and NE Regulations 2008, the excess exposure is required to be regularized within three months of the breach of limits unless the said three months is extended by the Commission on an application by the Asset Management Company.
 - iii. The Commission granted extension till 30/12/11 in case of BAFL and till 30/01/12 in case of DGKC to bring the excess exposures in line with the afore-referred Regulation. However, the Appellant continued to remain non-compliant with the aforesaid regulatory requirement and did not bring BAFL and DGKC exposures limits within the allowable limit of 10% of its total net assets.
 - iv. The Appellant was repeatedly advised vide communiqués dated 17/04/12, 08/08/12, 07/11/12 and 20/12/12 to regularize the ASFL's excess exposures in the scrips to ensure compliance of the mandatory provisions of the said Regulation. However, the Appellant remained adamant and continued to disregard the Commission's advices to ensure compliance in the matter.



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- v. In the above circumstances a Show Cause Notice dated 22/03/13 (the SCN) was served under Section 282J(1) read with Section 282D and Section 282M(1) of the Ordinance for violation of Regulation 55(5) of NBFCs & NE Regulations 2008. Thereafter proceedings were initiated and the Appellant was heard, however the Respondent being dissatisfied with the reply of Appellant imposed a penalty of Rs.500,000. Furthermore members of the Investment Committee were strictly warned and advised to be careful in future and follow regulatory framework in letter and spirit.
4. The Appellant has preferred the instant appeal against the Impugned Order on the following grounds:
- The statement made in para 3 of the Impugned Order regarding 100% shareholding of CEO Nihal Cassim in the Appellant and 25% shareholding of the Appellant in the ASFL is irrelevant and misleading.
 - The Respondent has failed to recognize that the Appellant acted in compliance with the obligation defined in Regulation 38 (a) of the NBFC and NE Regulations 2008.
 - The Premature sale of excess shares in compliance with Regulation 55(5) of the NBFC and NE Regulations 2008, including the sale of the BAFL and the DGKC in April 2013 has consistently demonstrated that compliance with the NBFC and NE Regulations 2008 results in a loss to the shareholders.
 - The Respondent has exercised the powers in a mechanical manner without any regard for the interest of the investors.
 - The Appellant's actions did not result in any injury to the shareholders of ASFL. These actions, by the grace of God allowed ASFL to be ranked amongst the top performing funds in the world for CY2012 and the top performing funds in Pakistan for FY2013.
 - The Respondent's imposition of a fine on the Appellant prior to diligence, due process, lack of intent to exercise the powers available to the AMC Wing and



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lack of intent to initiate action to consider an improvement to the Regulation is in defiance and contradiction of the very principles on which the Commission and its laws were formed.

- g. The Impugned Order has infringed the rights of shares holders as defined under the article 18 of the Constitution of Pakistan. Further, the Respondent did not exercise powers under the spirit of 282D of the Ordinance.
5. The Respondent has denied the grounds of appeal as follows:
- a. Only correct facts were provided at para 3 of the Impugned Order, therefore, the Appellant's contention that the said descriptions were irrelevant and misleading, is objected and denied.
 - b. The Regulation 38(a) of the NBFC and NE Regulations 2008 does not absolve Appellant from ensuring compliance of Regulation 55(5) of the NBFCs and NE Regulations 2008. The Appellant was required to manage the assets of the ASFL in good faith and to the best of its ability without compromising the compliance of any other provisions of law.
 - c. In view of the Regulations 37(3) (f), 37(3) (g) and 37(3) (h) of the NBFCs and NE Regulations 2008, the Appellant's claim that the compliance with the requirements of Regulation 55(5) of the NBFCs and NE Regulations 2008 resulted in a loss to the shareholders is not justifiable.
 - d. The NBFC regulatory framework is applicable to all the NBFCs operating within its jurisdiction; hence the Appellant cannot be treated as exception to others. Therefore, all the AMCs are bound to abide by the requirements prescribed in the NBFC and NE Regulations 2008 and NBFC Rules 2003 and all the directives and circulars issued time to time by the Commission.
 - e. The Appellant's contentions in the corresponding para are objected and denied. It may be appreciated that the laws, rules and regulations are framed in a manner to protect the interest of the investors at large. It may also be noted that per party exposure limit or other such restrictions are contained in law with the



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basic intent to protect the investors from unnecessary risks in a situation of unforeseen development. Although in the case of ASFL such exposures produced considerable gain for the investors but it could have been otherwise had the market faced any untoward situation.

- f. The Appellant's contentions in the corresponding para are objected and denied. It is reiterated that due process was followed as provided in law prior to issuance of the Impugned Order. It is matter of record that the Respondent has made several attempts through advices issued to the Appellant vide letters dated 17/04/12, 08/08/12, 07/11/12 and 20/12/12 to bring the excess exposures in line with the requirements prescribed in the Regulations. Extension was also granted by the Respondent to rectify the exposure limits. However, on continuous noncompliance proceedings were initiated against the Appellant.
- g. The Appellant's contention regarding violation of article 18 of the Constitution of Pakistan is misleading; therefore denied. Further, it is reiterated that the Respondent exercised powers vested under section 282(J) (1) of the Ordinance for the Appellant's willful contravention of Regulation 55(5) of the NBFCs and NEs Regulations 2008 made under section 282B of the Ordinance.
6. The Respondent has admitted the stance of the Appellant that the per party exposure limit of 10% as prescribed in Regulation 55 (5) of the NBFC and NE Regulations 2008 was breached due to appreciation of market value of the BAFL and the DGKC shares and the time of purchase of said shares Appellant was in compliance. The Respondent further apprised the Appellate Bench (the Bench) that ASFL has achieved compliance of Regulation 55(5) of NBFCs and NEs Regulations 2008 with reference to the exposures in the shares of the BAFL and the DGKC in April 2013 and it remained compliant till its revocation in July 2014. Further, the revocation process is complete and 88% of the proceeds have been distributed to the unitholders and the remaining proceeds of Rs. 5 million pertain to unitholders, who have not yet been traced by the trustee (CDC Limited).



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7. We have heard the parties i.e. Appellants and Respondent.
8. The contravention of Regulation 55(5) of the NBFCs and NE Regulations 2008 is evident from the record and same has been admitted by the Appellant. Furthermore, it is also on record that due to this default the Appellant has achieved favorable and better results for the investors. The Appellant has regularized the excess exposure after issuance of the SCN. It has been established that the Appellant has failed to perform its duties as required by law therefore, the Bench cannot absolve the Appellant from the proven violation, however due to the fact that appreciation of the market value of previously purchased shares caused breach of per party exposure, subsequent compliance of Regulation 55(5) of the NBFCs and NE Regulations 2008, benefit earned by the investors and present facts with respect to revocation of SMFL, we are inclined to take a lenient view in terms of penalty imposed through the Impugned Order.
9. In view of the aforesaid, we hereby convert the penalty of Rs.500,000 into stern warning, and in case of similar non-compliance in future, a strict action against the Appellant would be taken. The appeal is disposed of.
10. Parties to bear their own cost.

(Fida Hussain Samoo)

Commissioner (Insurance)

(Tahir Mahmood)

Commissioner (CLD)

Announced on: 09 DEC 2015