



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 57 of 2016

- 1) Mr. Ali Aslam Malik (Chief Executive) ...Appellants
 - 2) Mr. Shahzad Akbar (Director)
 - 3) Mr. Muhammad Iqbal Khan (Director)
 - 4) Mr. Saeed Ahmed Bajwa (Director)
 - 5) Mr. Rais Ahmad Dar (Director)
 - 6) Mr. Amir Shehzad (Director)
- Chief Executive and Directors of First National Equities Limited
(FNEL)

Versus

- 1) The Securities & Exchange Commission of Pakistan through its
Chairman
- 2) The Executive Director
(Corporate Supervision Department) Securities and Exchange
Commission of Pakistan ...Respondents

Date of Hearing: 08/11/16

Present:

For the Appellants:

- 1) Mr. Raza Imtiaz Siddiqui, Counsel (Imtiaz Siddiqui & Associates)
- 2) Mr. Mohammad Humza Sheikh, Counsel (Imtiaz Siddiqui & Associates)
- 3) Mr. M. Masood, Management Consultant (SHC Consulting Pvt. Ltd)

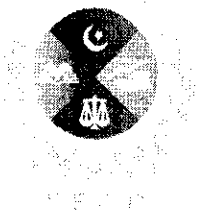
For the Respondents:

- 1) Ms. Amina Aziz, Director (CSD)
- 2) Mr. Tariq Ahmad, Joint Director (CSD)

Tariq Ahmad

Appeal No. 57 of 2016

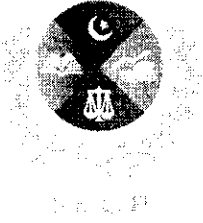
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Securities and Exchange Commission of Pakistan

ORDER

1. This Order is passed in the matter of Appeal No. 57 of 2016 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (SECP Act) against the Order dated 09/06/16 (the Impugned Order) passed by the Respondent No.2.
2. Brief facts of the case are that on an application by M/s. First National Equities Limited (Company), under the provisions of section 84 of the Companies Ordinance, 1984 (Ordinance) and Rule 10 of the Companies (Issue of Capital) Rules, 1996 (Rules), the Commission, vide letter dated 12/06/13, accorded approval to the Company to issue 333.96 million ordinary shares at 70% discounted price of Rs.3 per share, as 242% right issue. Through the aforesaid approval, the Commission also relaxed the mandatory requirements of Rule 5(v) of the Rules, which prescribe that right issue of a loss making company or a company whose market share price during the preceding six months has remained below par value shall be fully and firmly underwritten. The aforesaid relaxation from the requirements of Rule 5(v) was approved based on an undertaking from the Directors of the Company, whereof, they submitted that in case the whole or any part of the right shares offered by the Board of Directors (BOD) of the Company is declined or is not subscribed, including any portion of Directors' right shares, the Directors shall subscribe or procure subscription for allotment and issue of all such right shares not taken up by the existing shareholders in terms of section 86(7) of the Ordinance. Pursuant to the aforesaid approval by the Commission, the Company was required to issue right shares within sixty days i.e. 11/08/13 in terms of section 84(1)(d) of the Ordinance. The Company failed to issue the right shares within the prescribed time and instead submitted a revised schedule of issuance of letter of rights based on approval by the Karachi Stock Exchange (KSE) under the Listing Regulations. The Company did not seek approval of the Commission under



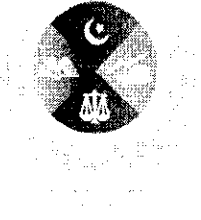
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section 84 of the Ordinance for extension in time for issuance of the right shares. The Commission received several complaints from public stating that despite having deposited the subscription amounts within the stipulated period ending on 22/11/13, right shares have not been issued to them. It was further informed that despite lapse of three months after the acceptance date, the requisite shares had not been issued. In view of the inordinate delay on part of the Company to issue right shares, the Commission, after giving due notice on 25/02/14, and after considering the Company's response dated 04/04/14, issued an order on 08/04/14 under section 472 of the Ordinance in terms whereof the Appellants were directed to immediately issue shares against the subscription money already received and complete the entire process of issue of right shares, as approved by the shareholders in an Extra-Ordinary General Meeting (EOGM) dated 15/05/13 within ninety days of the order.

3. Show Cause Notice dated 06/06/15 (SCN) was served upon the Appellants under section 495 of the Ordinance as they, prima facie, failed to comply with the direction issued by the Commission. Hearing in the matter was held on 22/02/16. Mr. Ali Aslam Malik, the Chief Executive (Appellant No.1) of the Company, appeared on behalf of the Appellants and made his submissions.
4. The Respondent No.2 dissatisfied with the response of the Appellants imposed a penalty of Rs.50,000 on each of the Appellants with the total amount aggregating to Rs.350,000 in exercise of powers under section 495(1) of the Ordinance.
5. The Appellants preferred the appeal on the following grounds:
 - a) The Commission had approached the Honourable High Court of Sindh at Karachi by filing J.M. No.03/2016 under section 290 of the Ordinance for the same issue, therefore, the Impugned Order could not have been passed.

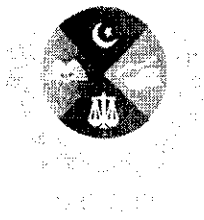
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- b) The Impugned Order has been passed in excess of jurisdiction as no delegation of power in terms of section 10 read with section 20 and 40 of the SECP Act, for exercise of powers under section 495 of the Ordinance has been made to the Executive Director, Corporate Supervision Department. The SECP Act also manifests that the statutory powers vested in the Commission under various provisions of the SECP Act are in the nature of (a) administrative powers (b) quasi judicial powers and/or (c) legislative powers; the same are to be exercised collectively by the Commissioners. However, some of these may be delegated to any Commissioner and/or officer, thereof, by the Commission. Similarly, the Federal Government, in relation to the Commissions' powers and functions, is entitled to frame Rules and Regulations under the SECP Act and the Ordinance. The Commission being a statutory body is distinct from the Federal Government. The SECP Act manifest that the Commission and Federal Government are separate and distinct entities with separate set of administrative, quasi-judicial and legislative functions under the referred statutes. The delegation of power through SRO, if any, to the Executive Director, CSD, therefore, is also without jurisdiction as the same has been issued and enforced by the Commission and its functionaries and not the Federal Government. The exercise of powers resulting in the framing and enforcement of SROs are utterly without jurisdiction. The SROs must meet the parameters contained in section 506 of the Ordinance which provides that before making any rule, the draft shall be published by the Federal Government in the official gazette for eliciting public opinion which is not the case in the instant matter. Similarly, other alleged instruments, referred above, suffer the same defect. It is a trite law that provisions of a statute have to be read as a whole and in harmony with each other to ensure compliance of statutory provisions. The SROs are in violation of the provisions of the SECP Act; the same have been issued by a coram non iudice Commission. The delegation of powers, as permissible under section 10 of the SECP Act has to comply with parameters of section 39 and 40 of the SECP Act as well as 501(2) of the



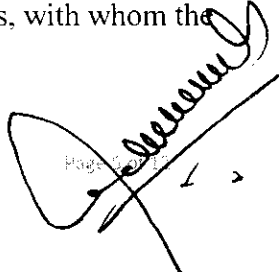
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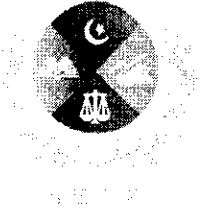
Ordinance. The SRO's have been issued in violation thereof and the same are without lawful authority.

- c) Hearing in the matter was conducted on 22/02/16, however, Impugned Order was rendered on 09/06/16 after a lapse of 110 days from the date of the final hearing. The Impugned Order in terms of judgment of the Supreme Court of Pakistan in the matter of *Mfmy Industries Ltd. And others vs. Federation of Pakistan through Ministry of Commerce and others* cited at 2015 SCMR 1550 is time barred. The Commission's approval dated 12/06/13 specifically contained a term that right issue at discount shall be governed in view of the terms and conditions, as approved by the shareholder in the EOGM held on 15/05/13. The Company, amongst other things, resolved in its EOGM that the Chief Executive shall be authorized to enter into any agreement with any person regarding the issuance of right shares and in furtherance thereto, the Directors of the Company would be authorized to allot the unsubscribed right shares in any manner as they deem fit by virtue of section 87(6) of the Ordinance. The Company further through its letters dated 08/05/14 and 09/05/14 communicated to the Commission that the Directors intended to exercise their powers under section 87(6) of the Ordinance, as per the resolutions of the referred EOGM by way of allotting/issuing shares against the land and building of the Directors/Sponsors, the amount already received from the Directors/Sponsors and the amount paid by the investors. The Company was left with the above option and, therefore, had sought permissions from the Commission. The Commission had advised the Company to resolve its matter under the consideration of the Karachi Stock Exchange and the Securities Market Division of the Commission and, thereafter, the Company may proceed with the rights issue within the already allowed or extended period subject to an approval by the Commission.
- d) The Directors of the Company were fulfilling their fiduciary obligations vis-à-vis the Company and in furtherance thereto, were in the process of negotiating with various parties/individuals to complete right issue process, with whom the



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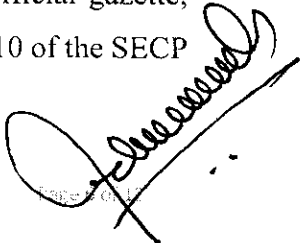
Company had made original agreements. The Appellants had relied on Bank Alfalah's (Bank) commitment for taking up the unsubscribed portion of the right issue to the tune of Rs.250 million, however, the Bank backed out of its commitment. As a result of the Bank's commitment, the Company had not involved and pursued foreign investors with respect to taking up the shares.

- e) The Appellants had no reason to act in a malafide manner and no mens rea could be established on part of the Appellants. The imposition of penalty on the Appellants is unlawful as the Appellants strived to achieve the completion of the issue of right shares.

6. The Respondents rebutted the arguments of the Appellants as follows:

- a) The petition under section 290 of the Ordinance has been filed by the Commission in order to seek direction of the Court to buy back shares of the Company and on account of various facts revealed which are prejudicial to the interest of the shareholders of the Company. The petition does not preclude the Commission from exercising its legal powers for violation of mandatory legal provisions by the Appellants and the Company. The Appellants' plea, therefore, is not justified.
- b) The Impugned Order has been passed by the Executive Director (CSD) who was duly authorized to issue the SCN under section 495 of the Ordinance for non-compliance with the directions of Executive Director (CSD) issued in pursuance of section 472 of the Ordinance. Powers to issue direction under 472 and powers to adjudicate in cases of non-compliance with directions under section 495 are also delegated to Executive Director (CSD). Powers to issue direction under section 472 and powers to adjudicate cases of non-compliance with directions under section 495 of the Ordinance are also delegated to Executive Director (CSD) by the Commission. The notification has been duly approved by the Commission and has been published in the official gazette, under section 10 and section 20(4)(o) of the SECP Act. Section 10 of the SECP


Executive Director (CSD)

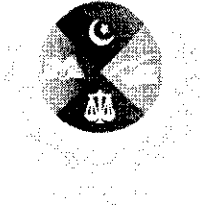

Executive Director (CSD)



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Act clearly provides for delegation of powers of the Commission to its officers and the powers so delegated are to be exercised by the respective office subject to such limitations and conditions as the Commission may impose. The powers under section 492 and 472 of the Ordinance have been duly delegated by the Commission. Section 40 of the SECP Act does not bar the Commission from delegating its powers to the officers of the Commission. It is rather an enabling provision which empowers the Commission to make regulations as may be required to carry out the purposes of the SECP Act or the functions of the Commission specified in section 20(4) of the SECP Act. The words “the Commission may make such regulations” means that in case regulations are required to be made to carry out the purpose of the SECP Act or functions of the Commission, the Commission may make regulations subject to certain conditions and limitations. Delegation of the Commission’s powers through notification is not strictly a process of making regulations, therefore, previous publication and public comments on the draft is not a pre-requisite. The Appellants’ emphasis and reference to the mandatory requirements of section 40 is irrelevant. Provisions of section 506 of the Ordinance referred to by the Appellants is irrelevant in respect of delegation of powers of the Commission. The aforesaid section relates to framing of rules by the Federal Government and does not relate to issuance of notification for delegation of powers of the Commission. The Commission has duly delegated its powers to its officers including Executive Director (CSD) and all the required legal formalities have been complied with, in line with the established practice over the years. The Appellants’ attempt to challenge the delegation of powers of the Commission and proceedings in the instant matter appears to be a mere attempt to distract the Appellate Bench from merits of the case. Furthermore, the explicit provisions of section 5(5) of the SECP Act, as substituted by the Finance Act, 2013 that was passed by the Parliament and received assent of the President on 22/03/13 state that no act, proceeding or decision of the Commission shall be invalid only by reason of the existence of a vacancy or defect in the constitution

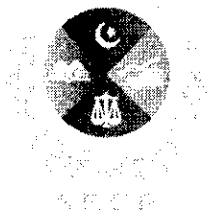
Secretary General



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of the Commission. All the statutory notifications issued and powers exercised by the Commission are valid and with proper legal authority.

- c) The hearing was held on 22/02/16 and the CEO appeared before the Respondent No.2 on behalf of the Appellants. The Respondent No.2 allowed two weeks' time to the CEO for furnishing complete plan and timeline for completion of the process of right issue of shares. As the requisite information was not submitted, the CEO through letter dated 01/04/16 was required to furnish complete roadmap and timeline regarding the completion of process of issue of right shares. In response, the Company Secretary through letter dated 07/04/16 submitted minutes of the meeting of the BOD of the Company dated 07/04/16 (received by the Commission on 08/04/16) which contained detailed minutes of the BOD including, inter alia, the decision of the BOD regarding the plan for unsubscribed portion of the right issue for completion of the process of issue of right shares. Perusal of the minutes of the meeting revealed that in respect of the unsubscribed portion of the right issue the BOD resolved to approve the plan. Therefore, the Impugned Order was withheld for want of information based on the request of the Appellants. The time of passing of the Impugned Order is reasonable even in terms of judgment of the Honourable Supreme Court of Pakistan, referred to by the Appellants, which states that the lower or session court may pass a judgment within sixty days after final hearing. Moreover, there is a difference in judicial proceedings and the proceedings before the Commission. In case of judicial proceedings, the courts follow a specific procedure of recording evidence, witnesses and proceedings during hearings. Therefore, timing is more of essence after hearing when passing an Order. In proceedings before the Commission, all the materials including written replies and documents whether presented during, before or after hearings are relevant and are duly considered before passing the Order.
- d) The Directors have not fulfilled their duty to comply with mandatory requirements of the Ordinance in respect of issue of right shares and completion of the process within the time prescribed by the law. The Appellants are shifting



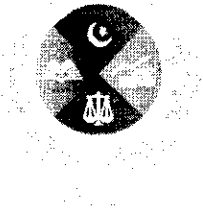
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the blame on the Bank, however, subscribing to the unsubscribed portion of the right issue or arranging for subscription for the same was ultimately their own responsibility which they failed to discharge. As a result of the Company's continued failure to complete the process of right issue in line with the requirements of the applicable laws and the terms and conditions of the Commission's approval, the Commission served SCN under section 472 of the Ordinance and after considering the response of the Appellants issued Order dated 08/04/14. The Appellants were directed to immediately issue shares against the subscription money already received and complete the entire process of issue of right shares within ninety days i.e. latest by 07/07/14. However, the Appellants expressed their inability to complete the right issue process as per the direction. They did not comply with the directions of the Commission, resulting in initiating of the proceedings.

- e) The Appellants have failed to complete the right issue process within the time prescribed by the Ordinance and their failure to do so continued even after issuance of direction by the Commission under section 472 of the Ordinance. The Appellants, therefore, were penalized under section 495 of the Ordinance. The penalties have been imposed strictly in accordance with the law. Mens rea is not a necessary ingredient to establish default under section 495 of the Ordinance committed by the Appellants by not complying with the Commission's directions under section 472 of the Ordinance. Proof of default with knowledge of the act of default and applicable legal provisions is sufficient to penalize. Right issue once announced cannot be withdrawn, therefore, the Appellants' request was not in accordance with the law. The provisions of the Ordinance have been applied fairly and justly and due process of law has been followed before passing the Impugned Order.

7. We have heard the parties i.e. the Appellants and Respondents. The Appellants have argued that since petition under section 290 of the Ordinance is filed in the Sindh High Court by the Commission, the Impugned Order could not have

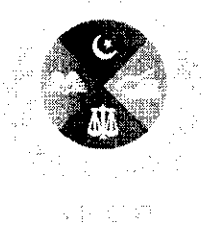
Report No. 07 of 2016



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been passed. Furthermore, powers cannot be delegated to the Executive Director through SROs which are not in accordance with the law and there was no mens rea on part of the Appellants. The Respondents have rebutted the argument by stating that the petition under section 290 is not related to the issue at hand and the Respondents have powers to penalize the Appellants in accordance with the law.

8. We are of the view that the filing of J.M. No. 3/2016 under section 290 of the Ordinance in the Sindh High Court does not entail that the Commission cannot exercise its own powers for violation of mandatory provisions by the Appellants and the Company. The matter under litigation is distinguishable from the matter in appeal. Furthermore, the Appellants have not been able to justify why they were not able to issue right shares within the time frame prescribed by the Ordinance. It was the ultimate responsibility of the Appellants as Directors and the Bank's failure to subscribe 250 million shares cannot exonerate the Directors of their responsibilities. The Commission is fully empowered to delegate power to its officers through SROs and all SROs are issued in accordance with the provisions of the SECP Act. Furthermore, we place our reliance on section 4 of the Securities and Exchange Commission of Pakistan (Amendment) Act, 2013 (SECP Amendment Act) which provides that, *"Anything done, actions taken, orders passed, instruments made, notifications issued, agreement made, proceedings initiated, processes or communications issued, powers conferred, assumed or exercised by the Commission as defined in clause (g) of Section 2 of the said Act or its employees as defined in clause (k) of Section 2 thereof in terms of amendments made through this Act, on or after 19th December, 1997 and before the commencement of this Act, shall be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed and exercised and the provisions of this Act shall have and shall be deemed to have had effect accordingly."* The Respondent's argument, therefore, that power could not have been delegated through the SRO has no merit



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whatsoever. Mens rea has been defined in Black Laws Dictionary as “*the state of mind that the prosecution, to secure conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness*.” The word “*willful default*” has been defined in Oxford Dictionary of Law Fifth Edition as “*The failure of the person to do what he should do, either intentionally or through recklessness*.” The argument of the Appellants that the default was not willful or there was no mens rea holds little merit as even though there may not be knowledge or intent, the Appellants did not exercise the due skill and care required of them as Directors of the Company. Moreover, by not completing the right issue on time, the subscription money withheld by the Company of the shareholders and investors without issuing the right shares despite lapse of mandatory time is a matter of public interest and cannot be condoned under any circumstances.

9. We have perused the judgment of Supreme Court of Pakistan in the matter of *Mfmy Industries Ltd. And others vs. Federation of Pakistan through Ministry of Commerce and others* cited at 2015 SCMR 1550, wherein, it is stated, “...*If the Judges cannot compose and deliver the judgments within the above (reasonable time), then they for sufficient reasons, to be recorded (by them) should set out the case for re-hearing...*” We are of the view there is no absolute time within which a judgment should be announced, however, it must be a reasonable time. In the instant case, we are of the view that the Respondent No.2 passed the Impugned Order after following the due process and in reasonable time under the circumstances of the case.

