

Appellate Bench Orders

**Order in the matter of Appeal No. 25 of 2001 before Appellate Bench No. 1
in respect of appeal filed by Mr. Aqeel Mehmood Khawaja.**

February 14, 2002

Before Appellate Bench No. 1

In the Matter of

Appeal No. 25 of 2001

Mr. Aqeel Mehmood Khawaja, Member,
Islamabad Stock Exchange (Guarantee) Limited (ISE)
.....Appellant

VERSUS

Islamabad Stock Exchange (Guarantee) Limited
.....Respondent No. 1

Lahore Stock Exchange (Guarantee) Limited
Respondent No. 2

3. Mr. Asif Baig Mirza, Member,

Lahore Stock Exchange (Guarantee) Limited
(LSE).....Respondent No. 3

Impugned Order passed by: Mr. Shamim Ahmad Khan, former Chairman, SEC

Date of impugned order: *5th April 1999*

Date of hearing: *22nd January 2002*

Present

For the Appellant:

1. Mr. Talat Farooq Sheikh, Advocate

2. Khawaja Muhammad Inam

For the Respondent No. 1:

3. Mr. Ahmad Noman, D.S. Islamabad Stock Exchange

For the Respondent No. 3:

4. Mr. Asif Baig Mirza

For the Commission:

5. Syed Aamir Masood, Director (SM)

6. Mr. Aly Osman, Joint Director (SM)

7. Ms. Sumbul Naved Qureshi, Junior Executive (SM)

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For the Commission:

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Order

This is an appeal filed by Mr. Aqeel Mehmood Khawaja, a member of the Islamabad Stock Exchange Guarantee Limited (ISE) challenging the order dated 5th April, 1999 (impugned order) passed by Mr. Shamim Ahmad Khan, former Chairman of the Securities & Exchange Commission of Pakistan (SEC).

2. This appeal relates to a complaint addressed to the ISE on 4th January, 1995 by one Mr. Amir Ishaque on behalf of Respondent No. 3 for recovery of an amount of Rs. 689,000/= from the Appellant alleging loss in transactions in 108,000/- shares of M/s. Hub Power Company Limited (Hubco) for which contracts were exchanged between the two brokerage houses. The complaint was referred to the Joint Committee, the Inter Stock Exchanges Committee established to resolve disputes arising between members of different stock exchanges. The decisions of the Joint Committee were to be implemented by the concerned stock exchanges, the Joint Committee not being vested with executive or punitive powers. After hearing both

the parties on 18th December, 1996, the Joint Committee vide letter dated 29th December, 1996 concluded that the Appellant is liable to pay Rs.5,62,815/- to the Respondent No. 3. However, when asked to agree on a round figure, Mr. Asif Baig Mirza indicated to accept a lump sum amount of Rs.500,000/- instead of Rs.5,62,815/- as settled by the Joint Committee. The Appellant challenged the decision of the Joint Committee alleging the transactions to be fraudulent based on discovery of material evidence. Thereupon, Chairman of the erstwhile Corporate Law Authority (CLA), SEC directed the Joint Committee to review the case in the light of the certain fresh documents produced by the Appellant. The Joint Committee, after hearing the Appellant and the Respondent No. 3 at length and considering the documentary evidence produced by them in its meeting held on 25th July, 1998, formed a sub committee comprising Mirza Sher Dil, Vice Chairman, LSE and Mr. Omer Iqbal Pasha, Vice Chairman, ISE who were required to verify counter claims of both the parties after taking into account all the fresh evidence produced. The sub committee formulated its recommendations, which were submitted to the Joint Committee who, not finding any fresh point, decided to uphold its earlier decision. Thereafter, the Appellant again approached the Chairman, CLA on the plea that the material and documentary evidence produced by him has been ignored by the Joint Committee. Mr. Shamim Ahmad Khan, former Chairman of the Commission, then called both the parties and, after hearing them and their written submissions, passed the impugned order on 5 April, 1999. The Appellant challenged the impugned order through writ petition No. 7258 of 1999 on 21st April, 1999 in the Lahore High Court which, on 11th June, 1999, was dismissed as withdrawn. Thereafter, the Appellant preferred an appeal before the concerned Appellate Bench of the Commission which, after hearing the parties on 21st June, 2000, dismissed the Appeal on 12th July, 2000 as being barred by limitation of time. The Appellant preferred commercial appeal No. 2 of 2000 before the Lahore High Court challenging the order dated 12th July, 2000 passed by the Appellate Bench as well as the impugned order. The case was remitted to the Appellate Bench of the Commission, vide an order dated 19th July, 2001 of the Lahore High Court, requiring that they hear the parties on 7th August, 2001 by first considering the Appellant's application for condonation of delay in filing of the Appeal before the Appellant Bench of the Commission. Paragraph 2 of our order dated 11 January, 2002 in this Appeal dilates upon the proceedings called on this and subsequent dates before the concerned Appellate Bench of the Commission.

3. At the hearing called on 10th January, 2002, the application for condonation of delay in filing of the Appeal was taken up and, after hearing the parties concerned, the same was allowed by our order dated 11th January, 2002, the next date to hear the main case being called on 22nd January, 2002 at Islamabad.

4. On 22nd January, 2002, Mr. Talat Farooq, Advocate, appearing on behalf of the Appellant, submitted that the Appellant had appointed Mr. Zeeshan as his agent who was authorised to work on behalf of the member at the floor of the ISE and he had no authority to deal with the members of the other stock exchanges; that since the complaint pertains to a transaction in Hubco shares, which was not listed with ISE, such transactions among the members has no validity; that the ISE refused to interfere in the matter as it was a kerb transaction; that the complaint was referred to the Joint Committee, which was not a legal forum; that even though the Appellant challenged decision of the Joint Committee contending discovery of documents and alleging fraud, the Chairman of the erstwhile CLA referred it back to the Joint Committee for review; that since the shares of Hubco were neither listed at the LSE

nor at the ISE, the trading thereof between Respondent No. 3 and the agent of the Appellant was not a valid transaction and, therefore such an agreement being unenforceable at law is void ab initio under section 2(g) of the Contract Act of 1872; that authority cited in support of his contention was the case of Hub Power Company Vs. WAPDA reported at 1999 CLC 1320 wherein it was held that any contract executed under fraud and misrepresentation is not enforceable by law; that since the transactions carried out between Respondent NO. 3 and the Appellant's agent are kerb transactions, the same may be treated as null and void.

5. Respondent No. 3 rebutted the arguments of the Appellant's counsel and stated that the plea of Appellant is incorrect and baseless because it was a deal between officers of the Appellant and the Respondent No. 3; that the Appellant has approached the Commission for the third time and that too with unclean hands; that the Appellant has concealed the fact, as admitted before the Chairman, Floor Committee of the ISE, that as a result of an arbitrage deal of the same scrip, a profit of Rs. 9,37,815 was received by him and, therefore, cannot be allowed to own or disown the transaction at other stock exchanges; that since trading in scrips not listed at a particular stock exchange is done through a member of the stock exchange where the particular shares are listed, a similar method was adopted in respect of the disputed Hubco share transactions; that the Appellant has no cogent reason to question the legal status of the Joint Committee since he himself has been appearing before the said Committee and at the time of hearing of the review at Karachi on 27th July 1998, he had furnished an undertaking to discharge his determined liability and the decision of the Joint Committee was accepted by both the parties; that authority cited was the case of West Pakistan through the Executive Engineer Vs. M/s. Azhar & others PLD 1977 Lahore page 1013, "wherein it was held that party participating in proceedings before Arbitrator without any objection to his authority and competence to act as such and thus displaying an intention to be benefited by award, if made in his favour – Estopped from raising any objection to jurisdiction of arbitrator, at later stage;" that the Appellant's contention is also incorrect that the ISE did not decide the issue, the factual position being that the Appellant had failed to produce any evidence in support of his contention; that the issue was considered twice by the Joint Committee and both times its decisions were unanimous; that a sub-committee was also constituted to examine the fresh evidence and allegations of fraud whose report was made the basis of the decision of the Joint Committee; that the Appellant's contention not to own the acts of an authorized agent is also unfounded and self-contradictory as the same agent was working with the office of Malik Rafi & Co., a member of the Karachi Stock Exchange (Guarantee) Limited (KSE); that the rules and regulations of all the stock exchanges specifically held the members fully responsible for the acts and dealings of their authorized agents; that his fairness may be appreciated in that, on persuasion of the members of Joint Committee and in a spirit to resolve the issue, he agreed to accept the lower amount of Rs. 5,00,000/- as a round figure against the determined amount of Rs. 5,62,815/-.

6. By an examination of the documents on record, the Appellant, by his letter dated 7 February, 1995 addressed to the Chairman, Floor Committee, ISE, recognizes the profit earned by his client, i.e. Rs. 937,815/=, subject to adjustment of the loss of Rs. 375,000/= occurred due to certain transactions in Genertech shares. In the same letter, he also accepts liability of Rs. 273,000/=, not Rs. 689,000/= being claimed by Respondent No. 3, in respect of transactions in Hubco shares, which he calculates on his understanding of the methodology adopted by the

LSE applicable prior to its listing on the provisional counters. Thereafter, by his letter dated 18th November, 1996 addressed to the President, Islamabad Stock Exchange, he states that 'for the sake of resolving this dispute, we are willing to pay in full for the purchase of 108, 000 shares of Hub-co @ 22.28, as per contract, after deducting the sum of Rs. 375, 000/- due to us by Mr. Atif Ishaq o/a (on account) loss of Genertech Pak' (brackets for acronym). By this statement, the Appellant acknowledges Respondent No. 3's loss in Hubco share transactions to be Rs. 689,000/= instead of the earlier amount determined by him at Rs. 273,000/=. The Appellant's subsequent stance before the Joint Committee and at each successive forum has been inconsistent with his own determination of loss, makes it appear that he is avoiding implementation of decisions made twice by the Joint Committee, by the sub-committee formed by the Joint Committee and former Chairman, SEC.

7. We are of the considered view that, since both the parties furnished a written undertaking that '(i) they will abide by the decision of the Joint Committee; (ii) fulfill their part of the obligation within thirty days of the receipt of the decision of the Committee, and (iii) the decision of the Committee in the matter shall be binding and final for all purposes in the matter' and since the decision in the impugned order has been based on the findings of the Joint Committee in its meeting held on 4 September, 1998, the Appellant is legally and morally bound by their decision. It is also clear that the Appellant is playing dilatory tactics to avoid his determined liability.

8. After hearing both the parties at great length and examining the documents available, we find no justification to interfere in the impugned order. Accordingly, the Appeal is dismissed

Announced :14th February, 2002

(N. K. SHAHANI)

Commissioner

(Insurance and Information Technology)

(ABDUL REHMAN QURESHI)

Commissioner

(Enforcement & Monitoring)