



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN
APPELLATE BENCH REGISTRY

BEFORE APPELLATE BENCH

In the matter of

Appeal No. 19 of 2010

1. Syed Majeedullah Hussaini, CEO
 2. S. M. Rehmanullah, Director
 3. Mir Mujahid Ali Khan, Director
 4. Muhammad Hamidullah, Director
 5. Muhammad Aftab Changi, Director
- of KASB Modaraba Management (Pvt.) Limited

..... Appellants

Versus

Director (NBFC)

Securities and Exchange Commission of Pakistan

Respondent

Date of hearing

29-04-11

Appellant No 1

Syed Majeedullah Hussaini, CEO

For the Appellants:

Ms. Faiqa Naz

Mr. Abdul Baqi Lone, Advocate

Mr. Jam Asif Mehmood, Advocate

For the Respondent department:

Mr. Hasnat Ahmed, Registrar (Modaraba)



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1. This order shall dispose of appeal No. 19 of 2010 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 18-09-09 (the "Impugned Order") passed by the Respondent.
2. On the examination of annual audited accounts for the year ended 30-06-08 (the "Accounts") of KASB Modaraba managed by KASB Modaraba Management (Pvt.) Limited (the "Company"), it was observed that the Company had violated provisions of the Modaraba Companies and Modaraba Rules, 1981 (the "Modaraba Rules"), the Prudential Regulations for Modarabas (the "Prudential Regulations") and the Companies Ordinance, 1984 (the "Ordinance"). The Registrar (Modaraba) issued show cause notice dated 03-03-09 ("SCN") to the Appellants under section 32 of the Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980 (the "Modaraba Ordinance") for failure to comply with the provisions of rule 10 of the Modaraba Rules, regulation 7(3) of the Prudential Regulations and section 4 of part-I of Fourth Schedule of the Ordinance. The Appellants filed response to the SCN and hearing in the matter was held. The Registrar (Modaraba) dissatisfied with the response of the Appellants, passed order dated 08-05-09 (the "Order 1") and imposed penalty of Rs. 5000 on each Appellant for violation of rule 10 of the Modaraba Rules and imposed penalty of Rs. 50,000 on each Appellant for violation of regulation 7(3) of the Prudential Regulations.
3. The Appellants filed an appeal before the Respondent against the Order 1. The Respondent heard the parties and passed the Impugned Order whereby the penalty of Rs. 5000 on each Appellant for violation of rule 10



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of the Modaraba Rules was set aside and the penalty of Rs. 50,000 on each Appellant for violation of regulation 7(3) of the Prudential Regulations was upheld.

4. The Appellants' preferred to file the instant appeal against the Impugned Order. The Appellants' counsel argued that:

- a) the Prudential Regulations for Modarabas is not published in the Official Gazette. In terms of section 20A of the General Clauses Act, 1897, all rules, regulations and circulars having the effect of law made or issued under any enactment should be published in the Official Gazette. Reliance was placed on PLD 2005 Lahore 261, PLD 2004 SC 261, 2008 SCMR 1717 and PLD 2010 Karachi 236;
- b) the Company extended the leases to KASB Capital Limited and KASB Securities Limited on purely commercial basis observing all the prevailing marketing norms and KASB Capital made timely payments to the Company. The transaction was at arm's length and no loss was caused to the Company's shareholders/ certificate holders;
- c) the penalty imposed under section 32 of the Ordinance is discretionary and should not have been imposed arbitrarily as the contravention was not willful. Reliance was placed on 1984 CLC 2456, 2002 CLC 1925 and PLD 1984 Karachi 315.

5. The department representative stated that:

- a) The Prudential Regulations were issued as additional conditions for authorization to float a Modaraba in terms of powers conferred by



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section 11 of the Modaraba Ordinance, as such; it being a condition of license need not be published in the Official Gazette;

- b) KASB Capital Limited held 53% shares of Network Leasing Corporation Limited, which in turn owned 97.10% shares of the Company. The structure of holding shows that the KASB Capital Limited held large interest in the Company through its holding in Network Leasing Corporation Limited. In addition, KASB Capital Limited also owned KASB Securities Limited, as such, they were associated companies. The Company provided lease facilities to KASB Capital Limited of Rs 7.66 million and KASB Securities Limited of Rs 0.68 million (principle outstanding as on 30-06-08), in violation of Regulation 7(3) of the Prudential Regulations.

6. We have heard the parties and our findings on the issues raised before us are as under:

- a) The objection of Appellants' counsel that the Prudential Regulations for Modarabas is not published in the Official Gazette does not have any basis as the Prudential Regulations are additional conditions for authorization to float a Modaraba in terms of section 11 of the Modaraba Ordinance and were not required to be published in the Official Gazette. The conditions were introduced by the Commission through Circular No 5/2000 dated 20-04-00 and were widely disseminated to the Modaraba companies and were also placed on the web site of the Commission. Moreover, section 20A of the General Clauses Act, 1897 was introduced by General Clauses (Amendment) Ordinance (XXXIII of 2002), which was after Prudential Regulations



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came into force on 20-04-00, as such, the objection of the Appellants' counsel is devoid of merit.

- b) regulation 7(3) of the Prudential Regulations is reproduced for ease of reference:

7. Restrictions on certain types of transaction: (3) No Modaraba shall allow facilities of any kind to its modaraba company or to any of its directors or to any of its directors or to individuals, firms or companies in which it or any of its directors is interested as partner, director or guarantor, as the case may be, its chief executive and its major shareholders, including their spouses, parents and children or to firms and companies in which they are interested as partners, directors or major shareholders of that concern.

The department representative has elaborated the facilities granted to the Company and the two associated companies namely KASB Capital Limited and KASB Securities Limited in paragraph 5 (b) above. KASB Modaraba should not have allowed facilities such as leasing facilities to the Company or the Company's associated companies, as such; it was in contravention of regulation 7(3) of the Regulations.


- c) On the issue of whether the act was willful we have perused the case law. In one of the cases referred by the Appellants' counsel i.e. 1984 CLC 2456, the definition of willful has been reproduced from Black Law Dictionary as an act done with stubborn purpose, but not with malice, as done intentionally, knowingly and purposely as distinct from an act done carelessly, thoughtlessly, heedlessly or inadvertently.



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In the instant case the investments were made by the Appellants in the associated companies and the Appellants cannot be allowed to take a plea that a decision of such nature was done *carelessly, thoughtlessly, heedlessly or inadvertently*.

From the penultimate paragraph of the Impugned Order, it has been noted, that on Registrar (Modaraba) taking cognizance of the offence, the facilities were withdrawn by the Company. In view of the above and taking a lenient view, we set aside the penalty to the extent of the directors excluding the Chief Executive Officer, who is directed to pay the penalty as per the Impugned Order.


(MUHAMMAD ALI)
Chairman


(MR. TAHIR MEHMOOD)
Commissioner (CLD)

Announced on: 01 June 2011