



BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 21 of 2004

First Capital Securities Corporation Ltd.
103 - C/II, Gulberg III,
Lahore..... Appellant

Versus

Commissioner (Securities Market)
SEC IslamabadRespondent

Date of Impugned Order July 16, 2004

Date of Hearing October 19, 2004

Present:

Imtiaz Rashid Siddiqui, Advocate for the Appellant

Imran Inayat Butt, Director &
Muhammad Farooq Deputy Director for Respondent



ORDER

1. This appeal has been filed by First Capital Securities Corporation Ltd. (the 'Appellant') under section 33 of the Securities & Exchange Commission of Pakistan Act, 1997 against an order dated 16-07-2004 (the 'Impugned Order') passed by Commissioner (Securities Market Division).

2. Brief facts of the case are that a notice dated 26-02-2004 was issued by the Commission to the Appellant to show cause as to why the gain made by it in sale and purchase transactions as beneficial owner of WorldCALL Communications Limited ('Issuer') should not be tendered by it in favor of the Commission, as provided in sub-section (2) of section 224 of Companies Ordinance 1984. The Appellant had sold 3,398,000 shares of the Issuer on 15-06-2001 at a price of Rs.20.20 and purchased 620,500, 228,000 and 547,500 shares on 25-06-2001, 15-08-2001 and 22-08-2001 respectively. The said sale and purchase transactions resulted in gain of Rs.7,665,500/- to the Appellant, which was not tendered to the Issuer within the period specified in section 224 (2) of the Ordinance. An opportunity of personal hearing was granted to the Appellant by the Commissioner (SM), however not being satisfied by the arguments presented, he directed the Appellant vide the Impugned Order to tender the said gain to the Commission.

3. The Appellant has preferred this appeal before the Appellant Bench against the Impugned Order, which was heard on 19-10-2004. Mr. Imtiaz Siddiqui appearing on behalf of the Appellant contended that the proceedings initiated by the Commission against the Appellant were contrary to the provisions of the Securities & Exchange Commission of Pakistan Act, 1997 and the Companies Ordinance, 1984 inasmuch as that they have not been initiated by the competent authority. He argued that the



proceedings were initiated by a Joint Director of the Commission by writing a letter dated 20-05-2003 who was not competent to do so. He further stated that the Commissioner had pre-judged the issue as he had already made up his mind which is evident from the communications between the Appellant and the Commission prior to the hearing before the Commissioner. He referred to section 224(2) of the Ordinance which provides:

“(2) Where a director, chief executive, managing agent, chief accountant, secretary, auditor or person who is beneficial owner as aforesaid fails or neglects to tender, or the company fails to recover, any such gain as is mentioned in sub-section (1) within a period of six months after its accrual, or within sixty days of a demand therefor, whichever is later, such gain shall vest in the Commission and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue.”

4. He contended that the Commissioner has taken an incorrect and unsustainable interpretation of section 224 (2) of the Ordinance and specially the words “*which ever is later*” to find that the gain vested in the Commission. He argued that the words “*within a period of six months after its accrual, or within sixty days of a demand therefor, whichever is later*” should be read disjunctively, meaning therefore that the company (Issuer) could raise the demand at anytime after the gain had accrued and then had sixty days to recover it. He disputed the interpretation given by the Commissioner that the demand by the Issuer had to be raised within the period of six months from the date of accrual and if it was not so raised, the gain vested in the Commission.

5. He further contended that the word ‘vest’ contained in sub-section (2) of section 224 did not mean that the Commission became the owner of the gain, but that the Commission was required to recover the gain as arrears of land revenue and then hand it over to the Issuer. He further stated that the gain made by the Appellant had already been tendered to the Issuer and the Commission was not justified in demanding the



same from the Appellant now. He prayed that the appeal may be accepted and the Impugned order may be set aside.

6. Mr. Imran Inayat Butt, Director appearing on behalf of the Securities Market Division stated that the interpretation of section 224(2) given by the counsel amounts to giving the Issuer unlimited time to make the demand and recover the gain, which was not the intention of the provision. He contended that the Commissioner was right in holding that the demand by the Issuer had to be raised within six months from the date of accrual of the gain. However the recovery could be made either within six months of the date of accrual or sixty days of the date of demand, which ever is later. These two periods run concurrently, and if the demand by the Issuer had been raised on the last day of the six month period, then the Issuer would have another sixty days to recover the gain. He prayed that the appeal may be dismissed and the Appellant may be ordered to tender the gain of Rs.7,665,500/-.

7. We have heard both the sides and perused the documents on record. The prime argument which has been raised by the Appellant's counsel is with regard to the interpretation of section 224(2). Although we agree that the two periods of six months and sixty days do not necessarily run concurrently, we are unable to agree with the interpretation that they are totally independent of each other. Following this interpretation would mean that Issuer has unlimited time to raise a demand for the gain. In such case, the provision providing for the gain to vest in the Commission would be defeated and become meaningless. Surely, this is not the intention of the legislature. We cannot agree that the Issuer has unlimited time to make a demand and then has sixty days to recover it. Had that been the intention of the Legislature, the provision would have said something like, "*where... beneficial owner as aforesaid fails or neglects to tender any such gain as is mentioned in sub-section (1) within a period of six months after its accrual, or, the company fails to recover the gain within sixty days of a demand*".



8. The plain reading of the provision provides that the demand by the Issuer must be raised within six months of the date of accrual of the gain. Once the demand is raised, the Issuer then has the remaining portion of the six month period or sixty days which ever is later, to recover the gain. So for example, if the demand was raised on the very first day of the accrual of the gain, then the Issuer has the remaining 5 months and 29 days to recover the gain – this period being later (longer) than sixty days. However, if the demand was raised on the last day of the six month period, then the Issuer has another sixty days to recover the gain.

9. The other issue which has been raised by the Appellant' counsel is that the word 'vest' does not connote ownership or title. He gave the example of a liquidator appointed for winding up of companies, saying that, although the property vests in the liquidator but he is not the beneficial owner of the said property. However, simple legal meaning of the word 'vest' as given in the Black's Law Dictionary is:

1. "To confer ownership of property upon a person. 2. To invest a person with full title to property. 3. To give a person an immediate, fixed right for present or future enjoyment.

10. It is therefore difficult for us to appreciate that the word 'vest' means anything other than what is given above. Even a liquidator, in our opinion, is vested with the ownership and title of the property. The only difference is that, the law which vests the property in the liquidator also specifically tells the liquidator what to do with the said property. Therefore if the law prescribes that the vested property is to be utilized in a specific manner, then the liquidator must do that. However, that does not mean that the liquidator does not have the ownership or title of the property for as long as it remains in his custody. On the other hand, where the law only provides that the property shall vest in a certain person, then that person cannot be denied full enjoyment of present and future rights in that property unless the law directly or indirectly provides



otherwise. Besides, in the present case, sub-section (2) of section 224 has to be read with section 23(2)(d) of the Securities & Exchange Commission of Pakistan Act, 1997. Section 23 provides as follows.

23. The Fund.- (1) *There is hereby established, for the purposes of this Act, a Fund to be administered and controlled by the Commission.*

(2) *The Fund shall consist of-*

(a) *...;*

(b) *...;*

(c) *...; and*

(d) *all other sums or property which may in any manner become payable to or vested in the Commission in respect of any matter incidental to the exercise of its functions and powers.*

11. It is therefore clear that the gain accrued in this case must become part of the Commission's Fund being property of the Commission. The contention of the learned counsel, that the Commission should recover the gain for the benefit of the Issuer, is flawed and self serving. The Commission cannot, conceivably be saddled with the duty to act as a recovery mechanism for the benefit of private parties.

12. As for the counsel's argument that the Commission should not be raising the demand with the Appellant for depositing the gain, as it had already tendered the gain to the Issuer, we find this untenable. Firstly, the gain had become the property of the Commission after the lapse of six month period from the date of accrual, and could not be given to any party, including the Issuer. More importantly, the gain was admittedly tendered to the Issuer after the Commission had raised the issue with the Appellant, which indicates malafides. In such circumstances, the Appellant's contention that the recovery should now be made from the Issuer, is quite devious and condemnable. Besides, it is an established principle of law that no man can take advantage of his own wrong.



13. With regards to the counsel's contention that the Commissioner had pre-judged the issue, we find no evidence to that effect. The counsel has referred to the correspondence prior to the hearing before the Commissioner. Unless the counsel is referring to the show cause notice issued by the Commissioner, we found no correspondence on record between the Commissioner and the Appellant. Even if there was so, it is clear that the Appellant was given a proper opportunity of presenting its case, and the Commissioner passed a detailed and reasoned order. On the issue that the proceedings against the Appellant were initiated by an unauthorized person, the counsel is mistaking the letter dated 20-05-2003 written by a Joint Director as initiation of proceedings against the Appellant. It is clear that, that letter did not initiate formal proceedings against the Appellant but the show cause notice dated 26-02-2004 issued by the Commissioner did. The Commissioner was duly authorized under law to initiate the proceedings and issue the show cause notice to the Appellant. In view of the reasons given above, we find no merit in this appeal, which is dismissed accordingly.

(ABDUL REHMAN QURESHI)
Commissioner

(ETRAT H. RIZVI)
Commissioner

Announced in Islamabad on November ____, 2004