

**Appellate Bench Orders**  
**Before the Appellate Bench No.3**

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*April 25, 2002*

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**Before Appellate Bench No. 3**

**In the Matter of**

**Appeal Nos. 17 & 23 of 2001**

1. M/s. General Tyre and Rubber Company of Pakistan Limited  
2. Pak-Kuwait Investment Company (Pvt) Limited  
3. National Investment Trust  
Limited.....Appellants

***Versus***

1. Bibojee Services (Pvt) Limited  
2. Executive Director  
(E&M).....Resp  
ondents

**Date of**  
**Hearing**.....  
.....April 18, 2002

**Present:**

For. M/s. Pak-Kuwait Investment Company (Pvt) Limited and  
National Investment Trust Limited

1. Mr. Munir A. Malik, Advocate  
2. Mr. Yawar Farooqi

For the Commission

3. Mr. Mubashir Saeed Saddozai, Deputy Director (E&M)

For M/s. Bibojee Services (Pvt) Limited

4. Mr. Abid Aziz Sheikh, Advocate on behalf of Mr. Zahid Hamid

Order

This order shall dispose of two appeals filed by M/s General Tyre and Rubber Company of Pakistan (Appellant No.1) and Pak-Kuwait Investment Company Limited and National Investment Trust Limited (Appellants No.2&3) against the order of the Executive Director (E&M) dated August 24, 2001.

2. The brief facts of the case are: M/s Bibojee Services (Pvt) Ltd (Bibojee) shareholder of M/s General Tyre and Rubber Company of Pakistan Limited (GTR) filed an application under Section 263 of the Companies Ordinance, 1984 ("the Ordinance") regarding irregularities in the affairs of GTR. It was alleged that Pak Kuwait Investment Company Limited (PKICL) and National Investment Trust (NIT) in collusion with other directors as majority shareholders maneuvered to acquire management of GTR in the Annual General Meeting held on August 22, 2000. The performance of technology supplier, M/s Continental Business Unit International (CBUI), was alleged as unsatisfactory and dismal, as GTR had suffered huge losses on account of warranties and discounts. The Executive Director (E&M) entertained the application of Bibojee and after giving an opportunity of hearing to GTR was of the opinion that circumstances existed warranting investigation into the affairs of the company under Section 263(a) of the Ordinance hence, Mr. Muhammad Tariq, FCA of M/s Tariq and Co., Chartered Accountants was appointed as an inspector to investigate into the affairs of the GTR vide his order dated August 24, 2001 (the "Impugned Order"). Being aggrieved with the Impugned Order, GTR filed an appeal before us. Subsequently, Pak Kuwait and NIT also filed appeal in the said matter.

3. At the outset of the proceedings, attention of the Bench was drawn to events after filing of the instant Appeal. The counsel for the Appellants No.2&3 submitted that the appointment of inspector was made at the request of Bibojee and an inspector report has also been filed with the Commission in this regard. However, a Memorandum Of Understanding dated -February 14, 2002 (MOU) has been signed by and between Bibojee, PKICL and representatives of CBUI, whereby the parties have inter alia agreed to withdraw different suits, applications and inquiries including the complaint of Bibojee made under Section 263 of the Ordinance. It is argued that MOU has changed the status after the filing of instant appeal and the complaint which rested with the announcement of Impugned Order, would stand withdrawn by Bibojee, if the MOU were complied with. The counsel for Bibojee, Mr. Abid Aziz Sheikh, Advocate confirmed signing of MOU and informed he has instructions not to oppose these Appeals. It has been submitted that the expected withdrawal of Bibojee's complaint even before the Appellate Bench, empowers the Bench to exercise the same powers as vested in the authority below. Reference in this regard was made to Anwar Ali Vs. Ghulam Qadir Shah 1986 CLC 1457.

4. It was considered by the Bench that even after withdrawal of the complaint the report which has now been finalized has a prima facie value of an evidence under law. Therefore, Commission has powers to take cognizance of the irregularity or contravention pointed therein independent of any complaint. Thus it was considered to be in the interest of the justice to hear the parties unless the Appellants proposed to withdraw their Appeals.

5. In view of the fact, that withdrawal of Appeal was not considered appropriate by the Appellants the parties were asked to proceed with the arguments. Leading his argument, Mr. Muneer Malik, counsel for Appellants No.2&3 argued that his clients have been affected by the Impugned Order, as certain adverse observations have been made in the Impugned Order without providing any opportunity of hearing. It was argued that the failure of the Executive Director to grant hearing to the Appellant No.2 & 3 vitiates the entire Impugned Order in view of the law laid down in the cases reported as PLD 1965 SC 90, PLD 1999 SC 666, 1994 SCMR 1299, 1998 SCMR 429, PLD 1959 SC 45, 1994 SCMR 2232, AIR 1981 SC 136, AIR 1981 SC 818, 1964 SC 150, 1976 SC 208. A reference was also made to Rehmat Bibi case reported as 1986

SCMR 962, which laid down that an order without providing an opportunity for hearing is a nullity in the eyes of law.

6. Attention was drawn by the counsel for the Appellants No.2&3, to the various paragraphs of the Impugned Order. In particular, paragraph No.10, wherein the Executive Director recognizing the principle of the natural justice stated that *public functionaries cannot pass an order without providing personal hearing to the concerned parties*. However, it is argued that in paragraph No.24, of the Impugned Order, the Executive Director has given finding as to an irregularity committed by PKICL and NIT to the effect that “they ignored established policy of the government” that financial institutions are not suppose to take over a management of company despite being in majority. Furthermore, in para 26 of the Impugned Order it was pointed out that another adverse finding has been made against the Appellant No.2&3. In the said paragraph, it is alleged that there is an *impuendo* that the conduct of the Appellants No.2&3 is “dubious”. It has been emphasized that no such findings could have been given without giving the opportunity of hearing to the parties, which as evident from paragraph 16 lines 5-10 was denied. The relevant part was read out: “on request of the Chief Executive of PIKCL Mr. Tasnim Farooqi also appeared on behalf of PKICL. Subsequent to the hearings several letters were received from PKICL and GTR counsel that an opportunity of hearing may provided to CBUI, PIKICL and NIT. As I am not passing an order against these institution and providing of such opportunity of hearing will unnecessarily prolong the issue before me, therefore, I do not consider necessary to call them”. The counsel concluded his arguments by stating that since the very principle of natural justice was not complied with, as no opportunity of hearing was given to Appellants No.2&3, therefore, the order passed is void ab initio and entire super structure of determinations based on the said Impugned Order would fall down.

7. The counsel for the Appellant No.1 submitted his arguments as follows: the first submission made on behalf of GTR was that, the order had gone beyond the scope of the complaint. It is the submission of the counsel that the terms of reference for investigation go far beyond the scope of the complaint. Secondly, it was asserted that the petition before the High Court under Section 290 which was subsequently settled by a consent order is virtually a replication of the complaint under Section 263 of the Ordinance. Infact filing of the complaint is tantamount to breach of the injunctive order passed by the Court in JM 44 of 2000. Thirdly, the fact that now Bibojee is not pursuing its complaint in view of the MOU reflects that the motive for filing of complaint was different and was directed to achieve other goals. Fourthly, it was contended that the Impugned Order suffers from a *mala fide* by addressing issues not falling within the ambit of the complaint. It is alleged that the Executive Director came to the conclusion without having the relevant parties and the documents before him and no “good reason” or “good cause” existed for the appointment of an Inspector under Section 263. It has been urged that the Executive Director has failed to appreciate the scope of Section 265(b) of the Ordinance since none of the conditions precedent as set out in this provision have been taken into account. In counsel’s view Section 263 cannot read in isolation and has to be read with Section 265, and while appointing an Inspector the Executive Director failed/neglected to take into account the material fact and has taken irrelevant consideration into account. The Impugned Order, therefore, cannot be said to have been based on reasonable opinion and is liable to be set aside. It has been stated in the Appeal that from mere perusal of the Impugned Order it is clear that the Executive Director has already drawn conclusion of fact which could only have been arrived at after an investigation and, therefore, has failed to appreciate that the fact of having formed the said conclusion of the fact are likely to influence the investigation and thereby deny the Appellant due process of law. Violation of principle of natural justice has also been taken in view of the fact the allegations and observations made against CBUI, PKICL and NIT were given without these persons being heard. It is also argued that appointment of an investigator is detrimental to the Appellants as aside from consuming precious time of the company and using its resources investigating a frivolous claim, the investigation damages the Appellants reputation and goodwill irreparably.

8. Furthermore, criticizing the Impugned Order, the counsel for GTR further stated that the Executive Director has omitted to mention that the decision to appoint the Deputy Managing Director as well as other decisions of the Board of GTR were made unanimously. Even if the presence of directors of Pak Kuwait in such a meeting is assumed to be an irregularity, which it was not, it was not a material irregularity as their absence would have affected the outcome of the meeting. Similarly, the provisions of Ordinance regarding

of appointment of Chief Executive have been misinterpreted as his appointment and exercise of functions for the ordinary duration was made impossible by Bibojee. However, all the decisions including the appointment of Executive Committee were made unanimously. It is argued that the learned Executive Director failed to recognize that the matter is essentially a dispute between the parties which is not justiciable under section 263 and 265 of the Ordinance. The powers under the said provisions must be exercised judiciously and with restraint. The Commission is not a proper forum for the resolution of disputes based on frivolous allegations and grievances that are rooted in disputed facts between members/or directors. The application under 263 of the Ordinance must have the element of transparency and a material fact in this regard was overlooked i.e., the applicant, Mr. Ahmed Kuli Khan Khattak was not the Chief Executive of Bibojee and was not authorized to bring the application on its behalf.

9. It is argued that the Executive Director misinterpreted the word “appreciated” in the consent order of the Court. The Order stated that *“it will be appreciated if the Board of Directors of respondent will follow their commitment for taking a unanimous decision on the issue of technical service agreement, as recorded in the minutes of the meeting dated 3rd April 2000”*. It is argued that the word “appreciated” was only a desire and wish and had no binding effect. Furthermore, there is nothing on the record to suggest that any such wish was not seriously taken into consideration by GTR. One of the material allegations of Bibojee was illegal transfer of management, it has been submitted in this regard that there is no evidence on record that suggests that Pak Kuwait and NIT have acted illegally or improperly. Seeking representation on the Board of Directors of a company proportionate to their shareholding is both legal and proper. It is alleged, that the Executive Director has failed to define as to what he meant by “normal function”. Furthermore, Pak Kuwait and NIT were not put on notice in respect of proceedings under Section 263 of the Ordinance. Reliance in this regard was placed on 2000 MLD 1880.

10. The Counsel for Bibojee, Mr. Abid Aziz Sheikh informed the Bench that in view of the MOU Bibojee would not oppose the instant Appeals. The Commission was represented by Mr. Mubasher Saeed Saddozai, who defended the impugned order being passed in accordance with law. In his submission, keeping in view the circumstances of the case, a proper opportunity of hearing was given to parties in this respect. He stated that it is worth mentioning here that in proceedings like such, no opportunity of hearing is required, but keeping in view the principles of natural justice.

11. The allegations set out in the Impugned Order, it is argued are within the ambit and scope of section 263. Regarding the question that both sections 263 and 265 should be read and spelled together it is stated that the same is based on mis-reading. Both sections are independent in application, however, all the allegations are within the scope of section 263. In this respect the recent judgment of Peshawar High Court in the matter of Diamond Industries v/s Commissioner SECP was relied upon which provides *“there are two provisions whereby the investigation is directed, the one is under section 263 where the investigation can only be ordered when the applicant provides evidence in support of his plea and after showing good reasons for the same, but in the case of section 265 (b) such an investigation can be directed suo moto by the Commission, if in the opinion of the Commission the circumstances exist suggesting the grounds mentioned therein for the purpose of investigation”*. Reliance can also be based on AIR 1959 SC 707.

12. The learned Executive Director passed the order after considering and examining all the evidence produced before him, and after exhaustive deliberations and through exchange of letters and record. Moreover, the purpose of investigation is to find out whether those in charge of the affairs are guilty of illegal conduct and in breach of conduct trenching upon breach of fiduciary obligations.

13. With reference to the appointment of Deputy Managing Director, it was argued even if it is considered to have been made unanimously, it cannot be termed as legal appointment and in accordance with provisions of the Ordinance and Articles of Association of the GTR. Referring to the argument of the counsel for GTR, the appointment and exercise of functions by the Chief Executive were made impossible by GTR itself and not by Bibojee. Moreover, the formation of Executive Committees is not allowed, as the Articles of Association of the company does not provide for constitution of such committees. The institutions like NIT and PKICL have neither played such pro-active role anywhere else nor taken over management of any other organization in such manner. There existed a prima facie situation of de-facto

transfer of management by assuming wider role of the Chairman and empowering Deputy Managing Director with functions of Chief Executive.

14. Having heard and considered the arguments of the parties, we are of the opinion that the main issue for us to determine is, as to whether there was a “good reason” or “good cause” for the Executive Director to appoint an inspector and investigate into the affairs of the Appellant company GTR. Further, whether such reasons were concluded after giving an opportunity of hearing to all concerned parties. Although, subsequent events arising after the appointment of inspector are generally not to be taken into account, in our view under the present circumstances it may be appropriate to mention these factors. We are informed by the parties that an MOU has been entered into pursuant to which a settlement has been arrived at and the parties have agreed to withdraw their claims against each other which also includes the withdrawal of complaint filed before the Commission. The counsel for Bibojee has stated that he has been instructed not to pursue the case in view of the MOU being entered into between the parties. We find some merit in the Appellant’s argument that the motive of filing the complaint seems otherwise than to really getting the investigation done by the Commission. However, coming now to the grounds, we concur with the Appellants view that the court’s “wish” for a unanimous decision with respect to technical services agreement was not binding on the Appellants. Furthermore, taking over of the management by the majority of the shareholders whether it be financial institution is not prohibited under the Ordinance, However, in our view, nothing bars the Executive Director to take into consideration government policies into account while passing an order for investigation in evaluating the conduct of the parties. The ground of appointing Deputy Managing Director by the Appellant would have been far more convincing had the complainant not been a party to such an act. Having considered and weighed the grounds for appointment of an inspector in the Impugned Order, we do not consider it necessary to go into the details of each and every ground. It appears that though there were reasons which could require inquiry into the affairs of GTR the decision should have been taken only after giving a full hearing to the major shareholders i.e. Appellants No.2&3 who definitely are the concerned parties in the said matter. We have taken note of the fact that on the issue of government policy vis a vis financial institutions, correspondence was exchanged with these parties, however, giving a fuller opportunity could have given a better picture of the affairs of GTR before passing an order under Section 263 of the Ordinance. Therefore, under the circumstances we consider that it is in the interest of justice that the Appeal be accepted. Relief prayed for under the Appeals is allowed and the matter is disposed off accordingly.

**Announced :** Islamabad  
25 April, 2002

**( SHAHID GHAFAR )**  
Commissioner  
(Securities Market)

**( N.K. SHAHANI )**  
Commissioner  
(Insurance & Information Technology)