Appellate Bench Orders

Order in the matter of Appeal No. 12 of 2001 before Appellate Bench No. 2 in respect of appeal filed by Mian Muhammad Aslam Farid.

October 03, 2001

Before The Appellate Bench No. 2

In the Matter of

Appeal No. 12 of 2001

MIAN MUHAMMAD ASLAM FARID ……..Appellant

VERSUS

Mr. Shahid Ghaffar, Executive Director, Securities and
Exchange Commission of Pakistan, Islamabad…….……Respondent No. 1

Major (Retired) Muhammad Jahangir, resident of

House No. 411, Street 35, I-8/2, Islamabad…….…..…..…..Respondent No. 2

Islamabad Stock Exchange (Guarantee) Limited,

Islamabad Stock Exchange Building, Blue Area, Islamabad…..……Respondent No. 3

Date of Hearing: 24 April, 2001 and 4 July, 2001

Present on 24 April, 2001:

1. Mian Muhammad Aslam Farid……..……..Appellant

2. Mr. Tariq Aziz, Advocate

3. Mr. M. Tahir……on behalf of Appellant

4. Syed Aamir Masood, Director (SM)

5. Ms. Ayesha Shaikh, Deputy Director..….on behalf of Respondent No. 1

Present of 4 July, 2001:

1. Mian Muhammad Aslam Farid……...…….Appellant

2. Mr. Tariq Aziz, Advocate

3. Mr. M. Tahir…….on behalf of Appellant

4. Syed Aamir Masood, Director (SM)…..…on behalf of Respondent No. 1

5. Major (Retired) Muhammad Jahangir……..……Respondent No. 2

6. Mr. Ahmed Noman……..…on behalf of Respondent No. 3

ORDER

The matter before us arises from an appeal filed under Section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by the Appellant against the order of Respondent No. 1 dated 12 April, 2001 ("Impugned Order").

2. The brief facts of the present case are that Respondent No. 2 lodged a complaint dated 28 November, 2000 ("Complaint") with the then Chief Executive, Government of Pakistan copy of which was delivered to the Securities and Exchange Commission of Pakistan ("the Commission"). Respondent No. 2, in the Complaint, alleged that he had invested an amount of Rs.250,000 with the Appellant's brokerage house through the Appellant's accredited agent Mr. Qamar-ul-Bari. The terms of the arrangement, as alleged by Respondent No. 2, were that the aforesaid amount would be invested into the securities market and the Appellant would pay monthly interest @ 3% to Respondent No. 2. However, in breach of such agreement the Appellant neither paid the monthly amount of interest nor refunded the principal.

3. The matter revolved around the issue of deposit taking by a member of a stock exchange, an activity well outside the scope of a broker's business. The Securities Market Division of the Commission took serious notice of the complaint and eventually (after having received the comments of the Appellant on the Complaint) called the concerned parties in for a hearing before Respondent No. 1 on 13 March, 2001. The Respondent No. 1, upon hearing the parties passed an order dated 13 March, 2001 wherein he removed the Appellant from his membership with Respondent No. 3; directed that the Appellant's membership should be sold immediately by Respondent No. 3 with the proceeds thereof going to fully satisfy the claim of Respondent No. 2 and the balance to be dealt with in accordance with the rules and regulations of Respondent No. 3; and, directed Respondent No. 3 to supply the Commission on or before 16 March, 2001 a total list of claims lodged against the Appellant with Respondent No. 3 during the last 5 years, indicating which ones had been satisfied in whole or part.

4. The Appellant filed an appeal against Order 1 before this Appellate Bench ("Appeal No. 11 of 2001") on inter alia the grounds that the powers delegated by the Commission to Respondent No. 1 vide SRO No. 862(1) 2000 dated 6 December, 2000 did not empower him to pass an order under Section 7 of the Securities and Exchange Ordinance, 1969 ("1969 Ordinance"). The Respondent No. 1 in his written comments contended that as he has been delegated all powers under Section 20(4) (and, in particular, the powers under Section 20(4)(o)) of the Securities and Exchange Commission of Pakistan Act, 1997, he was competent to pass order dated 13 March, 2001. However, in his response to the appeal, Respondent No. 1 prayed that either order dated 13 March, 2001 be upheld or the matter be sent back to him for reconsideration. The Appellant did not object to remanding the case back to Respondent No. 1 for reconsideration. Therefore, by the consent of both parties, this Appellate Bench dismissed the Appeal No. 11 of 2001 on 12 April, 2001 with the direction that the matter be remanded back to Respondent No. 1 "for consideration on merit and having regard to all the facts and material on record." It is pointed out that, as the order dated 12 April, 2001 was passed with consent of both the Appellant and the Respondent, this Appellate Bench (contrary to the Appellant's submission found in paragraph 2.6 of the present appeal) did not decide on whether Respondent No. 1 was competent to pass an order under Section 7 of the 1969 Ordinance.

5. Furthermore, as Respondent No. 1 in order dated 13 March, 2001 had directed Respondent No. 3 to sell the Appellant's membership within 14 days thereof, the Appellant, along with the Appeal No. 11 of 2001, also filed a stay application before this Appellate Bench praying that that portion of order dated 13 March, 2001 be stayed during the pendency of the proceedings of Appeal No. 11 of 2001. This Appellate Bench granted the interim relief prayed for by the Appellant in our order dated 19 March, 2001.

6. Pursuant to the order of this Appellate Bench, Respondent No. 1 passed an order on 12 April, 2001 ("impugned order") wherein he removed the Appellant from his membership of Respondent No. 3; directed Respondent No. 3 to sell the membership of the Appellant within 14 days thereof and to utilize the proceeds of the sale in satisfying the claims against the Appellant and the balance to be disbursed in accordance with the rules and regulations of the Respondent No. 3; and, directed Respondent No. 3 to submit a report on any action taken against the Appellant and the status of all claims.

7. The Appellant has now made an appeal against order dated 12 April, 2001 (impugned order) of Respondent No. 1. Along with this appeal, the Appellant also moved a similar stay application as before praying that operation of impugned order be suspended till the final disposal of this appeal. However, having made the stay application before this Appellate Bench and with absolutely no indication that Respondent No. 3 had committed any act to sell the Appellant's seat, the Appellant filed a Writ Petition No. 1328 of 2001 before the Lahore High Court, Rawalpindi Bench against this Appellate Bench, the Commission and Respondents Nos. 1 to 3 wherein the Appellant prayed that order dated 13 March, 2001 and impugned order may be set aside and proceedings quashed. It was, indeed, the case that on the same day that a hearing was set before this Appellate Bench to hear the application of interim relief and the appeal (as stated earlier no action had been taken by Respondent No. 3 in selling the membership of the Appellant) the Appellant also agitated the same matter of interim relief before the learned Judge Mohammad Nawaz Abbassi of the Lahore High Court, Lahore. Notwithstanding the prayer made by the Appellant in Writ Petition No. 1328 of 2001, the learned Judge focused only on the matter of the interim relief and granted the same till the time that this Appellate Bench decided the present appeal.

8. In this present appeal, the Appellant's legal counsel, Mr. Tariq Aziz, has contended that the impugned order was passed without providing the Appellant an opportunity of hearing. His argument, in this respect, was that when Respondent No. 1 had passed order dated 13 March, 2001, he was not empowered by the delegation of powers provided in SRO 862 (I)/2000 dated 6 December, 2000 to pass an order under Section 7 of the 1969 Ordinance. In support of his arguments, he contended that the said SRO was later amended by SRO No. 183 (I)/2001 dated 20 March, 2001 wherein the power inter alia to remove a member of a stock exchange has been specifically and expressly incorporated. Mr. Aziz argued that, by virtue of the amendment referred to, a substantial right of hearing had been vested in the Appellant. Further to the foregoing, Mr. Aziz tendered a great deal of case law supporting his contention that a right of hearing is a fundamental right that cannot be overlooked.

9. In response to Mr. Aziz's contentions, Syed Aamir Masood, Director (Securities) representing Respondent No. 1, stated that Respondent No. 1 reiterated its argument (as provided in Appeal No. 11 of 2001 and in impugned order that Respondent No. 1 was empowered by SRO 862 (I)/2000 dated 6 December, 2000 to pass an order under Section 7 of the Securities and Exchange Ordinance,1969. Furthermore, Mr. Masood concurred with Mr. Aziz on the law (as expounded in the case law tendered) only in so far as the right of hearing being a necessity. However, Mr. Masood argued that a full hearing was given to the Appellant and the other Respondents on 13 March, 2001. As such, the right of hearing having been exercised by the Appellant (in accordance with natural justice principles and the requirements of Section 7 of the 1969 Ordinance) before Respondent No. 1, there was no requirement under law that a new hearing be provided.

10. Before entering into a deliberation on the contentions raised by both sides, it is important to first look at the order of this Appellate Bench dated 11 April, 2001 in Appeal No. 11 of 2001. The operative part of the said order reads:

5. In written comments filed by the Executive Director (Securities Market Division) it was prayed that either the impugned order be upheld or alternatively the matter be referred back to him for reconsideration. The Appellant's counsel did not object and he was also of the view that the case merits remand to the Respondent No. 1.

6. In light of the above, the case is hereby referred back to the Respondent No. 1 for consideration on merit and having regard to all the facts and material on record.

11. It can be seen from the above that it was our clear intention that, in accordance with the wishes of both the Appellant and Respondent No. 1, Respondent No. 1 should reconsider the matter having regard to all the facts and material on record. What is clearly evident by its omission is that Respondent No. 1 was not directed by us to call another hearing. The reason for this omission on our part was the knowledge that Respondent No. 1 had already provided an opportunity for a full hearing. As such, Respondent No. 1 was not in derogation of our order dated 11 April, 2001 when he passed impugned order without providing a second hearing.

12. The other point required to be considered pertains to delegation of powers by the Commission to Respondent No. 1. In this regard, it is pointed out that any ambiguity that may have been caused by the wordings of SRO 862 (I)/2000 dated 6 December, 2000 has now been clarified in the amending SRO 183 (I)/2000 dated 20 March, 2001, in that, at present and even at the time of passing impugned order, Respondent No. 1 does and did have the power to pass an order of removal of a member of a stock exchange. Let us, however, assume for a moment that Respondent No. 1 did not have the power to pass order dated 13 March, 2001 (as it was an invocation of the powers under Section 7 of the 1969 Ordinance). Nonetheless, if the foregoing assumption were to be correct then the only power that rested with Respondent No. 1 on 13 March, 2001 was:

To process and recommend action against a stock exchange or any of its members, directors or officers on any contravention of the Securities and Exchange Ordinance, 1969

13. It is clear from the above excerpt of SRO 862 (I)/2001 dated 6 December, 2000 that, regardless of whether Respondent No. 1 had the power to pass an order under Section 7 of the 1969 Ordinance, he was, nevertheless given the very serious responsibility of processing and recommending action against a stock exchange or any of its members, directors or officers. It is our considered view that such serious duties delegated to Respondent No. 1 encompassed, by necessity, the power to call hearings. As such, the hearing provided on 13 March, 2001 was one that Respondent No. 1 had the power to call, attend and hear arguments.

14. In light of the above and with particular emphasis on the facts that a hearing was provided to the Appellant and Respondents 2 and 3 on 13 March, 2001 and the subsequent clarification of the powers of Respondent No. 1 by SRO 183 (I)/2001 dated 20 March, 2001 we are of the view that Respondent No. 1 did adhere to the principles of natural justice and the provisions of Section 7 of the 1969 Ordinance in providing a hearing. Alternatively, to go along with the Appellant's submissions which, in essence, entail a second hearing being given on the same exact case which was fully argued on 13 March, 2001 is, in our view, unjustifiable.

15. Further to the above, the Appellant has argued that impugned order has been passed with undue haste, without applying judicial mind and with predetermined notions. In this respect, it is to be noted that a necessary component of natural justice is that a full and reasoned order be given. From a perusal of impugned order, it can be seen that the same encompasses a reconsideration of all the facts and material on record with a clear and concise application of mind. Therefore, we find the Appellant's contentions unsustainable.

16. The Appellant's next contention before us was that new evidence had been relied upon without soliciting any counter arguments from the Appellant. In this regard, the Appellant's counsel has referred to

paragraph 23 of impugned order in which Respondent No. 1 refers to nine more complaints against the Appellant on the records of Respondent No. 3 (the report which Respondent No. 1 received on 16 March, 2001 from Respondent No. 3). We find this argument to be unsustainable as, firstly, the record of the nine complaints was submitted in accordance with the direction given by Respondent No. 1 in order dated 13 March, 2001 and, secondly, Respondent No. 1 has highlighted such information only for the purpose of reprimanding Respondent No. 3 and not the Appellant. As such, there does not appear to be any grievance caused by Respondent No. 1's reference to the report of Respondent No. 3 tendered on 16 March, 2001.

17. The Appellant further argued that Respondent No. 1 has incorrectly interpreted the provisions of Section 188 of the Contract Act, 1872 which state as follows:

188. Extent of agent's authority. An agent having authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

18. We have looked closely at the above provision and found that the general principle being expounded by Section 188 of the Contract Act, 1872 is that a principal is not liable for the unlawful acts of his agent. However, as with so many other general principles, there are exceptions. One such exception is where the principal, if instrumental in inducing the third party to believe that the agent was acting within the scope of his authority when in fact he was not so acting, the principal will be liable to the third party for the act of the agent. Respondent No. 1 in impugned order has discussed in detail the reasons for which it has been found that the Appellant had been instrumental in inducing Respondent No. 2 to believe that his agent was acting within the scope of his authority when accepting deposits. What is, in our view, of greatest importance to note is that Mr. Tahir, on behalf of the Appellant is recorded in paragraph 17 of impugned order has having stated that Mr. Bari "was previously discovered transacting business on [his] own account." The report of the ISE further corroborates this submission and displays a startling fact, being that the first complaints of investors with respect to Mr. Bari's deposit taking were filed as early as late 1996. However, it is also noticed on the record that the Appellant did not terminate the agency of Mr. Bari until over a year later. Furthermore, there is no record of the Appellant, after having received notice of such complaints, warning investors that such deposits should not be given. In fact, instead of disputing these complaints, the Appellant actually paid the complainants there claims even where the transactions were unlawful. It is, therefore, abundantly clear that the Appellant had, with full knowledge and intent, acted in a manner which induced investors to believe that the agent was acting within the scope of his authority when accepting deposits and tendering profits thereon.

19. The Appellant's counsel also argued that the letter of Respondent No. 2 dated 7 April, 2001, wherein Respondent No. 2 informed this Appellate Bench that Mr. Bari had contacted him recently and told Respondent No. 2 that the deposit taken from Respondent No. 2 was a private transaction between him and Respondent No. 2, had not been considered by Respondent No. 1 in impugned order. As noted in paragraphs 1 to 3 of our order dated 11 April, 2001 contents of the letter of Respondent No. 2 dated 7 April, 2001 was discussed and found to be immaterial and irrelevant for consideration in Appeal No. 11 of 2001. Nevertheless, Respondent No. 1 did, in paragraph 26 of impugned order, did consider Respondent No. 2's letter dated 7 April, 2001. In this regard, we think it is important to make some observations. First of all, it appears very odd that Mr. Bari should after four years suddenly decide to contact Respondent No. 2 and satisfy (through a third party) Respondent No. 2's full claim. Mr. Bari's motives behind taking such action at a crucial stage while proceedings are pending against the Appellant are, therefore, suspect. Secondly, the foregoing suspicion as to the true motives of Mr. Bari are further exacerbated by the fact that, as observed on the record, Mr. Bari has not satisfied the claims or admitted to having taken deposits on his own account for the other complainants whose complaints were within his knowledge as they were filed with Respondent No. 3, approximately a full year before Mr. Bari's agency was terminated. Tertiary, Respondent No. 2 for the past 4 years has been alleging and has submitted before Respondent No. 1 and the Commission that his transactions were all with the Appellant and has tendered strong and valid proof to

that effect. In fact, the record as accumulated by Respondent No. 1 (and discussed above) also clearly shows that Respondent No. 2's submissions found in his letter dated 7 April, 2001 hold no weight.

20. We have gone through the record produced before us and observed that Mr. Muhammad Tahir, acting on behalf of the Appellant, stated in the hearing on 13 March, 2001 that Mr. Bari was an agent of the Appellant up till the end of 1996. This was clearly disproved by the record and, in Appeal No. 11 of 2001, the Appellant accepted the fact that Mr. Bari was his agent well into 1997. The statement of Mr. Tahir was clearly a false statement made to mislead Respondent No. 1 in his investigations. Our second observation is that complaints against Mr. Bari's deposit taking activities were submitted as far back as October to November, 1996. Our third observation concerns the blacking out of the name "Mr. Qamar-ul-Bari, Business Associates" from the letterhead of the Appellant in his letters dated 7 February, 2001 to Syed Aamir Masood and the letter dated 19 January, 2001 to the President of Respondent No. 3. It appears that the Appellant is attempting to hide any affiliation or association he may have with Mr. Bari to this day. Furthermore, we would also point out that the Appellant has stated before us that his letterhead and receipt slips were being used without his knowledge by Mr. Bari and possibly other employees as well. If true, the Appellant has failed utterly in managing his own brokerage house.

21. The foundation upon which the superstructure of the securities markets are built is the promise by all brokers that "my word is my bond". Not only does this encompass a strict adherence to all laws but required the individual broker to be beyond reproach in matters of honesty and ethics. It is, indeed, quite unfortunate that in Pakistan today brokers of the highest dignity are very few and, as such, confidence by investors have fallen to an all time low. In view of all the matters stated above, we find that the Appellant has acted in a reprehensible manner in the same terms of honesty and ethics and, therefore, has had and will continue to have a damaging effect on investors confidence and protection and would sorely undermine the fair dealings and, possibly, fair administration of the stock exchanges.

22. We would, further, like to add that unbridled deposit taking by members of stock exchanges without fear of penalty is a scourge in the securities markets which activities are well outside the scope of duties and privileges given to a broker and undermine not only the securities' markets themselves but also the financial sector of Pakistan.

23. In light of the above and after hearing the counsel to the Appellant and the representatives of all the respondents at length, the impugned order is maintained. Accordingly, the appeal is rejected as dismissed.

Announced : 3rd October, 2001

(N. K. SHAHANI)
Commissioner
(Securities Market and Insurance)

(ABDUL REHMAN QURESHI)
Commissioner
(Enforcement and Monitoring)