

Appellate Bench Orders

Before Appellate Bench No. 3

February 10, 2003

Before Appellate Bench No. 3 (Re-Constituted)
In the matter of
Revision No. 59 of 2002

1. Mr. Muhammad Ziauddin
Chief Executive Officer
Quality Steel Works Ltd.
D/22, S.I.T.E Manghopir Road
Karachi – 75700
2. Mr. Muhammad Farooq
Quality Steel Works Ltd.
D/22, S.I.T.E Manghopir Road
Karachi – 75700
3. Mr. Saeed Khan
Quality Steel Works Ltd.
D/22, S.I.T.E Manghopir Road
Karachi – 75700
4. Mr. Ahsan Ahmed
Quality Steel Works Ltd.
D/22, S.I.T.E Manghopir Road
Karachi – 75700
5. Mr. Mushtaq Ahmed
Quality Steel Works Ltd.
D/22, S.I.T.E Manghopir Road
Karachi – 75700
6. Mr. Irshad Ahmed
Quality Steel Works Ltd.
D/22, S.I.T.E Manghopir Road
Karachi – 75700
7. Mr. Muhammad Ismail Mukaddam
Quality Steel Works Ltd.
D/22, S.I.T.E Manghopir Road Petitioner
Karachi – 75700

Versus

Executive Director (EMD) SEC Respondent

Date of Impugned Order

June 28, 2002

Date of Hearing of Revision

November 15, 2002

Present:

For the Petitioners

1. Dr. Muhammad Azam Chaudhry, Advocate
2. Mr. Farooq Akhtar
3. Mr. Muhammad Ziauddin
4. Mr. Masood Ali

For the Respondent

1. Mr. Atta Muhammad Khan (Director)
2. Mr. Mubasher Saeed (Joint Director)
3. Ms. Amina Aziz (Deputy Director)
4. Ms. Sumaira Siddiqui (Deputy Director)

Order

This order will dispose off the present revision petition filed under clause (b) of sub-section (1) of section 477 of the Companies Ordinance, 1984 (the "Ordinance") by the Petitioners against the Order dated June 28, 2002 (the "Impugned Order") passed by the Executive Director (Enforcement & Monitoring).

1. Brief facts leading to this revision petition are that a show cause notice dated March 14, 2002 was issued by the Commission to the Chief Executive and the directors of the Company calling upon them to show cause as to why penalties as provided under sub-section (3) of section 245 of the Ordinance may not be imposed on them for:

(a) not preparing and transmitting to the members, half yearly accounts (the "Half Yearly Accounts") for the period ended December 31, 2001 on or before February 28, 2001 as required under clause (a) of sub-section (1) of section 245 of the Ordinance; and

(b) not filing with the Registrar and the Commission, copies of the Half Yearly Accounts as required under clause (b) of sub-section (1) of section 245 of the Ordinance.

2. An opportunity of personal hearing before the Respondent (the "Executive Director") was provided to the Petitioners on June 28, 2002. The Petitioners in their defence contended financial constraints, lay off of staff, law & order situation and non-finalization of annual accounts for the year ended June 30, 2001. However, the Executive Director rejected these arguments holding that none of these were valid reasons for not preparing and filing the Half Yearly Accounts within the time specified. The Executive Director finding the default deliberate and intentional imposed a fine of Rs.25,000/- on the Chief Executive and each one of the directors under sub-section (3) of section 245 read with section 476 of the Ordinance.

3. Aggrieved by the Impugned Order, the Petitioners have preferred this revision petition under clause (b) of sub-section (1) of section 477 of the Ordinance before this Bench, which was fixed for hearing on November 15, 2002 when the parties appeared and argued the case.

4. Mr. Farooq Akhtar, appearing on behalf of the Petitioners has taken the plea at the outset that the Appellate Bench lacks the jurisdiction to hear the present matter. Mr. Akhtar argued that under section 33 of the Securities & Exchange Commission of Pakistan Act, 1997 (the "Act") the Appellate Bench is empowered to hear appeals against orders passed by single Commissioner and not the orders passed by Executive Director, as in the present case. The counsels for the Petitioners contended that in order for the Appellate Bench to hear appeals against the orders of Executive Directors, section 33 of the Act would have to be suitably amended. They further argued that a SRO cannot amend a provision of the Act nor can it override it. In short, the counsels for the Petitioners argued that the revision petition filed by them is not maintainable before the Appellate Bench.

5. Although we failed to understand the logic and wisdom shown by the counsels in filing a petition before a forum, which in their own opinion lacks the jurisdiction to hear it, we take up this matter at the outset.

6. The counsels of the Petitioners may have noticed themselves that the petition they have preferred before the Appellate Bench is a revision petition under clause (b) of sub-section (1) of section 477 of the Ordinance and not an appeal under section 33 of the Act. Hence the argument with regards to lack of jurisdiction of the Appellate Bench as provided by section 33 of the Act, does not come into play. The relevant question therefore is whether the Appellate Bench is empowered to hear the revision petitions filed before it. Powers of revision granted by the Ordinance which are exercisable by the Commission have been duly delegated to the Appellate Bench by the Commission pursuant to SRO 72(I)/2001 dated February 02, 2001. The revision petition filed by the Petitioners is therefore maintainable before the Appellate Bench and the Bench is duly empowered to hear and decide the matter before it.

7. Having held that however, we would like to take up the argument preferred by the Petitioners with regards to lack of jurisdiction of the Appellate Bench to hear appeals against orders passed by Executive Directors. Sub-section (1) of section 33 of the Act provides,

"An Appeal shall lie to the Appellate Bench of the Commission in respect of an order of the Commission made by one Commissioner..."

Emphasis Added

The above provision clearly lays down that it is the orders of the Commission which are passed by a single Commissioner, which in turn are appeal-able before the Appellate Bench.

8. Sub-section (1) of section 10 of the Act provides:

(1) *"The Commission may, subject to such conditions and limitation as it may deem fit to impose, delegate any of its functions or powers to any one or more Commissioners or any officer of the Commission."*

(2) *"A delegation under this section shall not prevent the concurrent performance or exercise by the Commission of the functions or powers so delegated"*

Emphasis Added

Moreover, sub-section (1) of section 476 of the Ordinance states which officer and/or entity shall adjudge and impose the fine for any offence or default in complying with any provision of the Ordinance, where a fine other than fine in addition to or in lieu of imprisonment is provided for such offence or default. Sub-section (2) of section 476, however clearly lays down that,

(2) *"Notwithstanding anything contained in sub-section (1), the Authority may, by an order in writing empower any officer to exercise the powers conferred by the said subsection in respect of any case or class of cases, either to the exclusion of, or concurrently with, any other officer.*

Emphasis Added

It is unambiguous from above that the Commission is duly authorized to delegate any of its powers to any of its officers, which would include the Executive Directors, and yet exercise concurrent jurisdiction with regards to the same powers.

9. The Commission through SRO 323 (I)/2002 dated 14th June 2002, in exercise of its powers conferred by section 10 of the Act, has duly empowered the Executive Director (Enforcement & Monitoring) to enforce compliance with *inter alia* the provisions of section 245. It is therefore clear from above that the Impugned Order of the Executive Director (Enforcement & Monitoring) is in fact the order of the Commission as prescribed by sub-section (1) of section 33 of the Act and an appeal thereof shall lie to the Appellate Bench pursuant to the provisions of the said section.

10. The Petitioners further contended that the Impugned Order has been passed without lawful authority by the Executive Director (Enforcement & Monitoring) as SRO No. 230(1)/2001 does not delegate any power to the Executive Director (Enforcement & Monitoring). Mr. Farooq Akhtar argued that the said SRO lays down that, *"Executive Director (Enforcement Division) shall be empowered to adjudge..."*, which means that the Executive Director (Enforcement & Monitoring) shall be empowered to adjudge at some future date which date has not been specified in the SRO. We are unable to agree with this contention of the Petitioners. Firstly, the Executive Director was exercising powers under SRO 323 (I)/2002 dated 14th June, 2002 and not SRO No. 230(1)/2001. As already mentioned above, SRO 323 (I)/2002 dated 14th June, 2002 has duly empowered the Executive Director to enforce compliance with *inter alia* the provisions of section 245 of the Ordinance. Secondly, if the argument of the Petitioners that the SRO does not delegate any powers to the Executive Director is accepted then it would mean that the said SRO has been issued for no reason at all and does not fulfill any purpose. Laws are not made without purpose. One of the basic principles of interpretation of statutes is that the plain and logical meaning must be given to the laws while interpreting them. If

the said SRO does not specify a particular date from which the Executive Director (Enforcement & Monitoring) shall be empowered to adjudge, then the plain and ordinary interpretation of this is that Executive Director (Enforcement & Monitoring) shall be empowered to adjudge from the date of the SRO.

11. Besides objections relating to lack of jurisdiction of the Appellate Bench, the counsels of the Petitioners also raised some other arguments. Mr. Farooq Akhtar argued that the show cause notice in this matter was issued by the Commissioner (Enforcement & Monitoring), whereas the hearing was conducted by the Executive Director (Enforcement & Monitoring). This, the Petitioners argued was unlawful and void in the eyes of law. Mr. Farooq Akhtar further contended that the penalty has been imposed by Executive Director (Enforcement & Monitoring) on the Chief Executive and all the directors without fixing the responsibility as to who among them were responsible for delay in filing the Half Yearly Accounts. He argued that a director of the Company who only looks after the sales or another who looks after the administrative matters could not be liable for the default. He further asserted that penalty under section 245 of the Ordinance can only be imposed if the delay had taken place "knowingly and willfully" as provided by section 245 of the Ordinance. His contention was that it was not the "will" of the directors to cause any delay and as there was no 'mens rea', which is an essential determining factor, the Petitioners were therefore innocent.

12. The Petitioners have also contended that the Half Yearly Accounts of the Company could not be expected to be prepared before preparation of the annual accounts for the year ended June 30, 2001. The Petitioners also submitted that the Executive Director (Enforcement & Monitoring) in the Impugned Order has imposed penalty on a director of the Company who had resigned three (3) years earlier on March 01, 1999 and on another director who is indisposed due to paralysis since the previous one (1) year.

13. In the end the Petitioners prayed that the Company deserves special treatment as it has been recently privatized by the Government of Pakistan and is still trying to get out of a financial crunch. They stated that the Company is the only unit remaining in business in the country out of total 4 units previously producing transmission towers for WAPDA.

14. Mr. Atta Muhammad Khan, Director (Enforcement & Monitoring) along with Mr. Mubasher Saeed Joint Director appearing on behalf of the Executive Director (Enforcement & Monitoring) contended that all powers were lawfully delegated to Executive directors of the Commission under section 10 of the Act. They argued that due to the fact that both Commissioners and Executive Directors are working under one authority, there is no need that the same show cause once issued by Commissioner be re-issued by Executive Director in order to conclude the matter.

15. Mr. Atta Muhammad Khan argued that the Company remained operative during the years 1999 & 2000 as indicated by the Directors reports for the relevant years. It was therefore incorrect to argue that the situation was out of control of the directors and delay was not intentional. Mr. Mubasher Saeed argued that there is no exemption under sub-section (3) of section 245 for the working directors of a company and therefore any penalty to be imposed on the directors of the company is to be imposed on all directors. He also contended that non-finalization of annual accounts does not itself debar the directors of the company from the penalties

imposed for non-preparation of Half Yearly Accounts. He contended that as the Company and its officers had been committing default under other mandatory provisions of the Ordinance and various directives issued by the Commission for the past so many years, it was clear that the default was committed knowingly and willfully. He submitted that a director suffering from an infirmity is not exempt under law and should have nominated another person if he was unable to perform his duties.

16. We have heard both the parties and also examined the relevant provisions of the Ordinance and the material placed before us. To begin with we would like to point out that the counsels of the Petitioners have not taken due care in filing the revision petition before the Bench. Neither does the plaint mention who the petitioners or the respondents are in the case nor the plaint is signed by the Petitioners. Also, the power of attorney executed in favor of the counsels shows that the counsels are only authorized to file and not sign the revision petition and that too only on behalf of the Company and not the Petitioners who are the Chief Executive and directors of the Company. However, as the covering letter dated August 27, 2002 of the counsels attached with the revision petition suggests that the petition has been filed on behalf of the Chief Executive and the directors, taking a lenient view we have chosen to ignore these irregularities.

17. We agree with the contention of Mr. Atta Muhammad Khan that there was no need to re-issue the show cause notice to the Petitioners when the powers were delegated to the Executive Director (Enforcement & Monitoring). We have already concluded above that the powers being exercised by the Commissioners and the Executive Directors are the powers of the Commission, which have been duly delegated to the Executive Director (Enforcement & Monitoring). In any case, the provisions of section 10 of the Act and section 476 of the Ordinance as produced above, clearly lay down that a delegation under these sections does not prevent the concurrent performance or exercise of the functions or powers so delegated. We therefore do not see how the rights of the Petitioners if any, were prejudiced by the issuance of the show cause notice by the Commissioner and not the Executive Director.

18. The argument of the Petitioners that those directors 'looking after the sales or administration' of the Company cannot be held equally responsible for the default committed by the Company, is unfounded and is not based on the established principles of company law. The management of a company and all powers relating thereto are vested exclusively in the Board of Directors and the Board is therefore collectively responsible for that management unless the law expressly prescribes otherwise. This view is supported by decisions of the superior courts. In the case of Saraswati Printers Ltd. (1960) 30 Com Cases 523, it was held,

"The directors of the company cannot be allowed to escape the performance of their duties under the Companies Act by the mere plea that they had no real control over the affairs of the company and therefore they did not willfully permit the default. It is their duty not to be mere passive spectators of what is going on but to see and make the necessary attempt that the statutory requirements are carried out, and where this has not been done, the courts can and would legitimately infer that the defaults though not expressly authorized were willfully permitted."

Emphasis Added

This ruling is enough to reject the argument presented by the Petitioners that as there was no 'mens rea' or 'guilty mind' present in case of the board of directors to commit the default under the provisions of the Ordinance, therefore the default was not committed 'willfully'. Although, we may point out here that the provisions of sub-section (3) section 245 do not mention the word 'willfully' and therefore the arguments presented by the counsels on the issue are irrelevant. Sub-section (3) of section 245 provides;

(3) If a company fails to comply with any requirements of this section, every director including the chief executive and the chief accountant of the company who has knowingly by his act or omission been the cause of such default shall be liable.."

Emphasis Added

As far as the test of 'knowingly' is concerned, we accept the contention presented on behalf of the Executive Director that as the Company and its officers had committed default under other mandatory provisions of the Ordinance and specific directives issued by the Commission in the past, it was clear that the default was being committed with full knowledge of the law and its consequences.

19. We have also considered the argument preferred by the Petitioners that the Half Yearly Accounts of the Company could not be expected to be prepared before preparation of the annual accounts for the preceding year ended June 30, 2001. Although this may be true however, it is an established principle of law that a wrongdoer should not derive any benefit from his own wrong. The default committed by the Petitioners in failing to prepare the Half Yearly Accounts is a consequence of the default committed by them in preparing the annual accounts for the year ended June 30, 2001. The Petitioners therefore cannot rely on their own wrong.

20. Form 29 submitted by the Company to the Registrar of Companies in early 2001 shows, as contended by the Petitioners, that Mr. Muhammad Farooq who was a director of the Company and has been penalized in the Impugned Order had resigned in the year 1999. He therefore has been wrongly held liable in the Impugned Order for the default of not filing the Half Yearly Accounts. However, we are not inclined to accept the contention of the Petitioners that a director of a company who is indisposed cannot be held liable for the default.

21. In light of the submissions of the parties, examination of records and the above findings, we hold as follows:

(i) The penalty imposed on Mr. Muhammad Farooq under sub-section (3) of section 245 read with section 476 of the Companies Ordinance, 1984 for default in preparing and filing the Half Yearly Accounts is hereby set aside;

(ii) The remaining order of the Executive Director (Enforcement & Monitoring) dated June 28, 2002 is hereby upheld.

This revision petition is disposed off accordingly.

(ETRAT H. RIZVI)
Commissioner (Insurance)

(SHAHID GHAFAR)
Commissioner (Securities Market)

Islamabad

Announced: February 10, 2003