



BEFORE APPELLATE BENCH NO.III

In the matter of

Appeal No. 18 of 2004

1. Lt. General (Retd) Ali Kuli Khan Khattak
109/2 Ghandara House
Main Clifton, Karachi

2. Ahmed Kuli Khan Khattak
109/2 Ghandara House
Main Clifton, Karachi

3. Jamil Ahmed Shah
109/2 Ghandara House
Main Clifton, Karachi

4. K. U Rahman
109/2 Ghandara House
Main Clifton, Karachi

..... Appellants

Versus

1. Commissioner (CLD) SEC

2. Gammon Pakistan Limited
through its Secretary
400/2 Peshawar Road
Rawalpindi

..... Respondents

Date of Impugned Order

03-06-2004

Dates of Hearing

15-10-2004, 25-01-2005 & 01-02-2005

Present:

1. Abid S. Zuberi, Muhammad Umer Lakhani & Khurram M. Hashimi
Advocates for the Appellants
2. Mubasher Saeed, Joint Director & Wajiha Farooqi, Assistant Director SEC
for Respondent No.1
3. Dr. Khalid Ranjha & Fakhar Mehmood Chanda, Advocates for
Respondent No.2



ORDER

1. This order will dispose of appeal No. 18 of 2004 filed by Lt. General (Retd) Ali Kuli Khan & 3 others against Commissioner (Company Law Division) SEC and Gammon Pakistan Limited ('Company') under section 33 of the Securities & Exchange Commission of Pakistan Act, 1997.

2. The facts leading to this appeal are that the Securities & Exchange Commission of Pakistan ('Commission') received a complaint in May 2003 on behalf of the legal heirs of (Late) Lt. General (Retd.) Habibullah Khan Khattak, being shareholders of the Company, pointing towards irregularities committed in the election of Board of Directors held in the AGM dated 31-12-2001. It was alleged by the complainants that they were denied the opportunity to exercise their legitimate voting rights in the said election, and despite holding 14 percent shares in the Company none of their representatives were elected on the board.

3. Previously on 11-12-2001, before the said elections were held, the complainants had filed a complaint alleging that the management, with a view to denying the right of the complainants to participate in the election of directors, was, holding the election six months prior to the expiry of the term of existing directors. They alleged that the Company's management was also denying the transfer of 288,241 shares to them. They contended that the issue of transfer of these shares would be sorted out before the expiry of term of the existing directors in June 2002, thus allowing them to contest the election of the directors with these shares. Taking action on this complaint, Commissioner (Enforcement & Monitoring Division) had issued a direction under section 472 of the Companies Ordinance, 1984 ('Ordinance') dated 14-12-2001 to the Company not to proceed in violation of statutory provisions and not to hold the election at an earlier date. However, the Company did not heed the direction of the



Commissioner and held the election on 31-12-2001 as planned. Prior to the election on 15-12-2001, the complainants (Appellants herein) delivered to the Company, notices of their intention to contest the election. However, these notices were rejected by the company secretary as invalid and the Appellants were not allowed to contest the election.

4. In view of these facts and the complaints filed by the complainants, Commissioner (Company Law Division) issued a notice under section 186 read with section 476 of the Ordinance to the chief executive, the directors and the secretary of the Company (the 'Management') to show cause why action should not be taken against them for rejecting the notices of intention to contest election in violation of statutory provisions. The Management filed detailed responses and also availed an opportunity of hearing before the Commissioner. They contended that the appellants had filed notices of their intention pursuant to the wrong provision of the Ordinance, therefore these were rejected. In the impugned order dated 03-06-2004, the Commissioner held that mention of wrong provision did not vitiate the notices and these should not have been rejected on technical grounds by the company. However, as considerable period had passed since the election of directors, and also because under section 179 of the Ordinance, the power to declare the election of directors invalid rested with the High Court, the Commissioner did not deem it appropriate to interfere in the matter.

5. The Appellants being aggrieved by the impugned order filed the instant appeal before this Bench. The appeal was initially fixed on 26-08-2004 however it was adjourned on the request of counsel for the Appellants. Thereafter, this appeal was fixed for hearing and adjourned more than 10 times on the request of the counsels of Appellants and Respondent No.2. It was finally heard on 01-02-2005. Mr. Abid S. Zuberi and Mr. Umer Lakhani appearing on behalf of the



Appellants on different dates contended that Commissioner (CLD) erred in law as whilst observing that mentioning wrong provision of law does not vitiate the proceedings or purpose behind such actions, he failed to declare the election process as illegal and void. Further he failed to give any finding on the allegedly illegal act of holding the election of directors 6 months prior to the expiry of tenure of the directors. Mr. Lakhani argued that this act was an attempt to defeat the interest of the minority shareholders and resultantly the shareholders were not able to elect a truly representative board of directors. He further stated that the Commissioner had failed to take action against the company and its management for violating the direction of the Commission issued under section 472 of the Ordinance prior to the election. He argued that the company had wrongly and with malafide intent, rejected the notices for contesting the election without giving the Appellants a proper hearing to explain their position. He stated that notices of those persons who had not mentioned any provision had been cleared by the company and the Appellants' notices had been rejected on the ground of mentioning the wrong provision. This, he argued clearly established malafide intent on part of the management vis-à-vis the Appellants. He argued that the Commissioner relied on affidavits of certain persons to come to the conclusion that the elections were not held on the basis of show of hands, however the deponents were not present before him to verify the contents of the affidavits. He further contended that the Commissioner had erred in holding that the matter should have been referred to the High Court under section 179 of the Ordinance, as the said provision requires at least 20% voting power in the company, whereas the Appellants only held 14.616% shares at that time. He prayed that the impugned order may be set aside and the election of directors held on 31-12-2001 be declared null and void. Also, the directors of the company be restrained from performing their functions or holding new elections, and the



directors be punished for non-compliance with direction given by the Commission under section 472 of the Ordinance.

6. The Company which is Respondent No.2 in this appeal has taken some preliminary objections in its defence. It contended that:

- (i) the appeal is barred by limitation and no condonation can be provided by the Appellate Bench as Limitation Act 1908 does not apply to proceedings before it.
- (ii) Appeal under section 33 of the Securities & Exchange Commission of Pakistan Act, 1997 ('SECP Act') can only be filed in those issues where the impugned order has been passed under the parameters of Part VIII of the SECP Act.
- (iii) The functions of the Commission are laid down in Schedule to the SECP Act, which does not provide for hearing appeals.
- (iv) None of the Appellants were a party to the proceedings before the Commissioner and therefore cannot file an appeal to the Appellate Bench.

7. In addition to above, it was contended by Dr. Khalid Ranjha and Fakhar Mehmood Chanda, counsels for the Company that the bar on transfer of 288,241 shares to the heirs of (Late) Lt. General (Retd.) Habibullah Khan Khattak was imposed by the State Bank of Pakistan and not the Company or its management. Further, the bar on the transfer of these shares had no effect on the voting rights of the Appellants as they held the proxies for these shares and had been exercising the right to vote under these proxies since 1989. Even otherwise these shares were not transferred in the names of the Appellants even after June 2002 and therefore could not have effected the election if they were held in June 2002. Mr. Fakhar Mehmood Chanda contended that there was no bar under the



Ordinance on a company holding the election 6 months prior to the date of expiry of term of the directors. He stated that only the election were held 6 months prior but the term of office of the directors as fixed by the Ordinance remained the same and the new directors elected on 31-12-2001 took office in July 2002 on expiry of the term of directors at that time. He further stated that this was a practice which had been followed by the Company since 1982 when (Late) Lt. General (Retd.) Habibullah Khan Khattak was the chairman of the Company. The Appellants had never objected to this practice in the past. He contended that although his clients were not challenging the impugned order, however the observation of the Commissioner that notices for contesting the election by the Appellants should not have been rejected for mentioning the wrong provisions, was incorrect. He argued that this was not a case of mentioning the wrong provision but in fact it was not at all a notice of intention to contest the election. He argued that section 184 under which the notices were sent by the Appellants relate to nomination or co-option of directors. Therefore the company was right in assuming that the Appellants wanted to be nominated or co-opted on the board rather than contesting the election. He stated that the Commissioner had rightly held that issue of rejection of notices fell within the purview of section 179 of the Ordinance and therefore the Appellants should have sought relief from the High Court. On the allegation of the Appellants that the election were held on the basis of show of hands, he stated that the minutes of meeting and the affidavits of persons who attended the AGM proved that it was not held by show of hands. He prayed that the appeal may be dismissed.

8. We have heard the arguments presented by counsels of both parties in detail and also considered the documents on record. We start with the preliminary objections raised by the counsels for the company. The official record shows that the appeal was filed within the 30 day period specified in section 33 of the SECP Act read with Rule 3 of the Securities & Exchange



Commission of Pakistan (Appellate Bench Procedure) Rules 2003. The appeal is therefore not barred by limitation. Even otherwise, we are inclined to dispose off the matter on merits. The second objection that appeal under section 33 of the SECP Act can only be filed in those cases where the impugned order has been passed under the parameters of Part VIII of the SECP Act is misconceived. Section 33 of the SECP Act is clear and self explanatory and does not place this bar. The third objection that Commission is not authorized to hear appeals is just as misconceived in presence of section 33. As for the issue that none of the Appellants were party in the proceedings before Commissioner, it is clear from the record that the numerous complaints which had been filed before the Commission on various dates had been filed on behalf of the Appellants. The Appellants being aggrieved by the impugned order have the right to appeal against it to the Appellate Bench.

9. The Appellants have argued that the refusal of the management of the Company to transfer 288,241 shares in their favor amounted to denying them the right to elect directors. However, as pointed out by the Company, the bar had been placed by the State Bank and not the management of the Company. In addition, the Appellants held the proxies for these shares and had been exercising the right to vote under these proxies since 1989. Notwithstanding that, even if the election were held in June 2002 as prayed by the Appellants, the issue of these shares had not been settled by June 2002. The counsel for the Appellants have not denied or rejected any of these arguments. It is therefore clear that the issue of non-transfer of these shares or holding the election 6 months prior to the expiry of tenure of directors had no effect on the rights of the Appellants.

10. As for the issue of legality of holding the election 6 months prior to the expiry of tenure of directors, the Appellants could not point towards any provision of law which bars it. When questioned by the Bench, Mr. Mubasher



Saeed Joint Director, appearing on behalf of the Commissioner stated that the Ordinance is silent as to how much earlier the election of directors may be held from the expiry of tenure of outgoing directors. He however, referred to Circular No.28 of 2004 dated 31-08-2004 issued by the Commission which requires the companies to hold Extra-Ordinary General Meeting to elect the directors in case if the Annual General Meeting is required to be held prior to expiry of the tenure of directors. We have perused the Circular and find that it has been issued in a different context, besides, this Circular being issued subsequent in date to the case at hand had no effect thereupon. Also, the company had been following the practice since 1982 when (Late) Lt. General (Retd.) Habibullah Khan Khattak was the chairman of the company and therefore there is no proof of any malafides on part of the management in holding the election earlier. We understand that these are the reasons why the Commission subsequently decided not to take any action against the company or its management under section 495 of the Ordinance for not complying with the direction given under section 472. And we find that there is no reason why any action should be taken now under this particular provision. The Department is however directed to be cautious in future and only issue directions which are in accordance with the provisions of law.

11. On the issue raised by the Appellants that the election of directors was held on the basis of show of hands, there is no evidence on record to prove that. Besides it was pointed out by Mr. Mubasher Saeed that a representative of the Commission attended the AGM in which the election of directors was held and he has reported that the election were not held on the basis of show of hands.

12. On the issue of rejection of notices of intention to contest the election, we agree with the Commissioner that the management should not have rejected the same for mentioning the wrong section. This is a principle which has been established by numerous judgments of the Superior courts. In fact if there was



any discrepancy in the notices, the company secretary should have clarified it and guided the shareholders in fulfilling the procedural requirements. The company secretary is the secretary to the company and its shareholders, and not just the management, and therefore, in our opinion has a fiduciary duty towards all shareholders. He or she should not, under any circumstances, be a partisan in a dispute between shareholders and/or the management. The argument of the company that the notice of intention by the Appellants was given under section 184 of the Ordinance which deals with co-option or nomination on the board is misconceived. Notice under section 184 is required to be filed by those directors who after having been nominated or appointed on the board, consent to act as directors of the company. It is clear that the Appellants by that time had neither been nominated nor appointed as directors and therefore could not have been filing their consent to act as directors. Considering the fact that the Commission had received numerous complaints by the minority shareholders, including a few specifically against the company secretary before the said election, the rejection of these notices by the Management therefore, prima facie point towards malafides.

13. As for the issue whether the election of directors in question should be declared invalid for this reason, the Commissioner has rightly observed that the power to do that lies with the Hon'ble High Court under section 179 of the Ordinance. Therefore even if the Commission comes to the conclusion that there was a material irregularity in holding of the election, it does not have the authority to declare the election invalid. The Appellants should have sought their relief from the High Court. The argument of the counsel for Appellants that they did not possess 20% voting rights in the company required under section 179 cannot be made a ground for the Commission to exercise this power when it has not been granted that power under law.



14. Having said that however, we do believe that the officers of the Company who were responsible for rejection of the notices filed by the Appellants should have been penalized for violating the procedure for election of directors laid down in section 178 of the Ordinance. Sub-section (4) of section 178 clearly provides that all notices of intention for contesting the election received by the company should be transmitted to the members of the company. After having held that the notices of intention filed by the Appellants were not invalid and should not have been rejected by the Company, the learned Commissioner has not given any finding on the culpability of the Management pursuant to section 186 of the Ordinance under which the show cause notice dated 24-12-2001 was issued. Therefore, considering that appeal is a continuation of the original proceedings, we impose a penalty of Rs.10,000/- each on Mian Muhammad Arif, who was the chief executive at that time, and Mr. Muhammad Salahuddin who was the company secretary, under section 186 of the Ordinance for contravening the provisions of section 178. Both these persons are directed to deposit the aforesaid fine in the designated bank account maintained in the name of Securities and Exchange Commission of Pakistan with Habib Bank Limited within thirty days from the receipt of this Order and furnish receipted challans to the Commission.

This appeal is disposed of.

(ETRAT H. RIZVI)
Commissioner

(SHAHID GHAFAR)
Commissioner

Announced in Islamabad on ____ March 2005