

Appellate Bench Orders

Order in the matter of Appeal No. 7 of 2001 before Appellate Bench No. 1 in respect of appeal filed by M/s. National Assets Leasing Corporation against the order (impugned order) passed by Executive Director (SC).

July 31, 2001

BEFORE APPELLATE BENCH NO.1

In the Matter of

Appeal No.7 of 2001

National Assets Leasing
Corporation.....Appellant

Versus

Executive Director (Specialized
Companies).....Respondent

Date of impugned order: 7 May 2001

Dates of hearing: 29 May, 2001, 11 July, 2001 and 18 July, 2001

Present on 29 May, 2001:

1. Mr. Yahya Khan Afridi, Advocate
2. Mr. Athar Minhala, Advocate.....on behalf of the Appellant
3. Ms. Irum W. Butt, Director (Leasing), SEC... on behalf of the Respondent

Present on 29 May, 2001 and 18 July, 2001:

4. Mr. Yahya Khan Afridi, Advocate.....on behalf of the Appellant
5. Ms. Irum W. Butt, Director (Leasing), SEC... on behalf of the Respondent

ORDER

This is an appeal preferred against the order (impugned order) dated 7 May, 2001 passed by the Executive Director (SC) of the Commission.

2. The appeal first come up for hearing on 29 May, 2001 whereat Mr. Ather Minhala and Mr. Yahya Khan Afridi, Advocates, appeared for the Appellant. Ms. Irum W. Butt, Director (Leasing) represented the respondent. The case was adjourned at the request of the Appellant in order to produce necessary documents in respect of negotiations with potential foreign investors. The case was then called for hearing on 11 July, 2001, arguments heard and adjourned to enable Director (Leasing) to carry out an in-depth analyses of the special audit report by 18 July, 2001; on which date, arguments of the parties were heard at great length after submission of an in-depth analyses.

3. The counsel for the Appellant dilated on the arguments presented in the memo of appeal: The impugned Order envisages the appointment of an inspector u/s 265 (b) of the Companies Ordinance, 1984 with such terms of reference as have been covered in the parameters to the special audit conducted by M/s. F. R. Merchant, Chartered Accountants under Rule 19(2) of the Leasing Companies (Establishment and Regulation) Rules, 2000; an order passed invoking section 265(b) envisages that there is a prima facie case that requires investigation without pre-judging the relevant issues; no where in the impugned order does it say "appears to be" but in fact makes absolute and definite assertions; the impugned order is substantially the same as the show cause notice and tantamounts to being an extended statement of the show cause notice and ignores the response and documents provided by the Appellant in pursuance of show cause notice No.SC/LES-ED/205/2001 dated 9 March, 2001; the impugned order has passed a judgement on the financial health of the Appellant Company and, has therefore, entered the domain of an investigator before even such an investigator has commenced his assignment; while there is no malafide, the Respondent has exercised authority in excess of her discretionary powers; certain crucial negotiations that are in process between the Appellant and potential foreign investors have been marred by the appointment of an investigator and the ensuing publicity; the counsel of the Appellant company particularly referred to crucial negotiations with Capital Assets Leasing Corporation Limited and, in support of his assertions produced before the Appellate Bench, a spiral bound papers titled "record relating to ongoing negotiations;" due diligence required to be undertaken by Ford, Rhodes, Robson and Morrow, Chartered Accountants under the Memorandum of Understanding with Capital Assets Leasing Corporation Limited comprehensively deals with all matters relating to financial health and management of the company and encompasses the matters sought to be investigated by the Respondent; all the matters referred to in the impugned order have been adequately dealt with in the special audit report rendering any 'investigation' futile and counter productive especially in view of the prospective acquisition by Capital Assets Leasing Corporation Limited; separate proceedings for alleged violations of section 208 of the Companies Ordinance, 1984 through show cause notice have already been initiated by Executive Director, which effort has been duplicated through the impugned order.

4. The counsel for the Appellant raised certain legal issues. SRO 862(I)/2000 dated 6 December, 2000 delegates the Executive Director (specialized companies) to exercise 'allpowers and functions under.....as may be applicable to specialized companies' which has not been defined. The delegation is vague and of a general nature besides not defining the term, 'specialized companies.' The Commission has delegated ad judicatory powers to Commissioners vide para 2 of SRO 863(I)/2000 dated 6 December, 2000 who are, therefore, required to conduct proceedings under section 265 of the Companies Ordinance, 1984. The latter, being specific would prevail over the former, being general. Since the show cause notice is dated 2 February, 2001, the subsequent amendment of SRO 863 would be of no avail. Super structure built on illegal foundation must fall. Further, the delegation of powers under SRO 862 are ultra vires: powers of the Commission may be delegated under section 10 of the Securities and Exchange Commission of Pakistan Act, 1997 ("the Act"); section 20 ibid enumerates powers; sections 5(3) and 6(2) ibid provides that powers, functions and proceedings shall be exercised, discharged or conducted in accordance with regulations made by the Commission; the Board frames regulations under section 21(b) ibid that requires to follow the procedure laid down in section 40 ibid i.e. previous publication of draft in two newspapers thirty days before making regulations.'

5. The representative of the respondent Executive Director (SC) argued that appointment of an inspector to investigate the affairs of the company is necessary. The Leasing Companies (Establishment and Regulations) Rules, 2000 are sub-servient to provisions of Companies Ordinance, 1984 and, therefore, Section 265 overrides the said rules made under section 506 *ibid*. The impugned order requires a more detailed investigative report of various aspects of the financial health of the Appellant Company that are not covered by parameters of the special audit being conducted under Rule 19(2) of the Leasing Companies (Establishment and Regulations) Rules, 2000. M/s. F. R. Merchant, Chartered Accountants have been appointed on 16 February, 2001 to conduct the special audit under the leasing rules and the said report in fact supports this contention. Mr. Hussain Chaudhry, Chartered Accountant, has been appointed as the investigator on 9 May, 2001 and has accepted the assignment.

6. The representative of the Executive Director (SC) read out the contents of 'in-depth analyses' of the special audit report elaborating and justifying the appointment of an investigator. During the course of hearing, copy of the said analyses was provided to counsel of the Appellant to afford him a right of reply. The counsel for the Appellant proceeded to urge the futility of a duplicate effort envisaged in the impugned order, the unnecessary and extra ordinary damage that it would cause to the company, the benefits of the proposed merger with Capital Assets Leasing Corporation Limited pending the outcome of due diligence, the efforts to protect the interests of the shareholders especially the minority shareholders, the aggressive recovery effort of the management. In addition, he challenged the validity of the order on legal grounds as summarized paragraph 4 herein. Since the in-depth analyses required detailed scrutiny, he was allowed to make all his submissions in writing by the following day, which he duly complied with by forwarding a spiral folder containing comprehensive material.

7. We have considered the arguments of the learned counsel for the Appellant. His pleadings fails to adequately address the pivotal query raised by the representative of the respondent as to whether the special audit addresses all the matters sought to be investigated in the impugned order. We have also carefully considered the three legal grounds raised by the counsel for the Appellant. The impugned order was passed after super cession of both the SRO's relied upon by the counsel for the Appellant. Further, it is quite clear that section 10 of the Act does not preclude the Commission from delegating its powers by following the methodology of section 40 *ibid*. Accordingly, the impugned order does not suffer from any legal infirmity.

8. For the aforementioned reasons recorded herein, the appeal is rejected as dismissed.

Announced : 31 July 2001

(N.K. SHAHANI)
Commissioner
(Securities Markets & Insurance)

(M. ZAFAR-UL-HAQ HIJAZI)
Commissioner
(Company Law)