



**BEFORE  
RE-CONSTITUTED APPELLATE BENCH NO. III**

**In the matter of**

**Appeal No. 43 of 2006**

Northern Tourism Development (Pvt) Ltd  
Executive Business Centre  
Saudi Pak Tower  
Islamabad.....Appellant

Versus

1. Executive Director (Company Law), SEC
2. Muhammad Gulzeb Abbasi  
PD, 435-B Near Nawaz Sharif Park  
Pindora, Rawalpindi
3. Saghir Ahmed Khan  
4583/ A, Gawalmandi  
Rawalpindi

.....Respondents

Date of Impugned Order 13 April 2006

Date of hearing of appeal 22 June 2006

Present:

1. Malik Qamar Afzal Advocate the Appellant
2. Munawar Ali Bhatti, Joint Registrar for Respondent No.1
3. Fakhar Mahmud Chanda Advocate for Respondents No.2 & 3



## **ORDER**

1. This appeal has been filed under sub-section (1) of section 33 of the Securities & Exchange Commission of Pakistan Act, 1997 by Northern Tourism Development (Pvt) Limited ('Company') against the order dated 13-04-2006 ('Impugned Order') passed by Executive Director (Company Law).

2. Brief facts of this case are that the Executive Director (Company Law Division) vide the Impugned Order has appointed an inspector under section 263 of the Companies Ordinance, 1984 to investigate the affairs of the Company on an application made by Respondents No. 2 and 3. Respondents No. 2 and 3 are shareholders of the Company and together hold 35% shares in it. They have been involved in a long standing dispute with the majority shareholders of the Company led by Mr. Riaz Karim who is also the Chief Executive Officer (CEO) of the Company. The Company has filed this appeal through its CEO, challenging the appointment of the inspector by the Executive Director.

3. A brief history of the dispute between the parties is that Respondents No. 2 & 3 filed a petition under section 290 of the Companies Ordinance, 1984 ("Ordinance") before the Hon'ble Lahore High Court Rawalpindi Bench in year 2004. Through this petition C.O No.1/2004, they alleged administrative, corporate as well as financial mismanagement on part of the management of the Company led by its CEO Mr. Riaz Karim. The Hon'ble Court realizing the complicated nature of the dispute and the allegations leveled by the parties, appointed a Local Commission to inspect the affairs of the Company vide its order dated 30-04-2004. The Court directed that the Registrar companies may, on the basis of the Local Commission's report, make an application to the Court under section 290 of the Ordinance for suitable directions for regulating the affairs of the Company so that this matter may be brought to an end. It further directed that no property of the Company would be alienated till that



time. The Local Commissioner in his report stated that from the evidence produced before him he was unable to find any financial misappropriation. However, during the investigation it was unearthed that dual statements of account of the Company had been prepared. Since the identity of the person who had prepared these accounts could not be ascertained, the Local Commissioner recommended that a detailed enquiry may be conducted through an investigation agency to ascertain that fact.

4. As per the directions of the High Court in CO. No.1 of 2004, the Deputy Registrar companies moved a petition CO. No.2 of 2005 under section 290 of the Ordinance against the Company and its management on two grounds. The first ground was regarding the preparation of dual accounts of the Company, and the second was regarding further allotment of 400,000/- shares to Mr. Riaz Karim the CEO, which allotment had been disputed by Respondents No. 2 & 3. The Hon'ble Court vide its order dated 01-06-2005, dismissed the petition on the ground that the matter of dual accounts had not been investigated by the Registrar companies as recommended by the Local Commissioner, and the complaint filed by Respondents No.2 and 3 regarding issuance of further shares was also pending investigation with the Registrar.

5. In compliance with the order of the Hon'ble Court in CO. No. 2 of 2005, the Commission issued a notice dated 16-06-2005 to the Company under section 263 of the Ordinance to show cause, why an inspector may not be appointed to investigate its affairs. The Company and its CEO challenged the show cause notice by filing a petition WP No.1918 of 2005 under Article 199 of the Constitution before the Lahore High Court, Rawalpindi Bench. The Court dismissed this petition vide its order dated 03-02-2006 inter alia on the ground that the Commission was competent to appoint an inspector and the show cause has been issued in compliance with the High Court order dated 01-06-2005 passed in CO. No. 2 of 2005. Subsequently, the



Executive Director after hearing the parties appointed an inspector under section 263 vide the Impugned Order which has been challenged in this appeal before us.

6. Along with the appeal, the Appellants had also filed an application for suspending the operation of the Impugned Order. The Impugned Order was suspended by the Bench on 14-06-2006 till the date of hearing of appeal. The appeal was heard on 22-06-2006 when Mr. Qamar Afzal Advocate appeared on behalf of the Appellant Company along with its CEO Mr. Riaz Karim and Mr. Fakhar M. Chanda Advocate appeared on behalf of Respondents No. 2 and 3.

7. Narrating the history of the dispute, Mr. Qamar Afzal, stated that the Company only has one asset which is an amenity plot on the Murree Mall. The Company is developing a multi-storey plaza known as the 'Millennium Mall' on the said plot. In his view, the bone of contention between the parties was that the Respondents were against the development of the project and wanted the Company to sell the plot of land. He stated that with the appreciation in the value of the land, the original investment made by the Respondents had increased manifold which they wanted to encash. He stated that the Respondents originally held 35% shares in the Company, however their shareholding was diluted to 6% when the Company issued further 400,000 shares which were taken up by the CEO Mr. Riaz Karim. He stated that even with the diluted shareholding, the value of Respondents share was much higher than their original investment.

8. As a preliminary objection in his appeal, Mr. Qamar Afzal argued that the power to appoint inspector under section 263 of the Ordinance has not been delegated to the Executive Director (CLD) by the Commission, and therefore the Impugned Order is without jurisdiction. He further contended that under section 263, the shareholders who make an application for appointment of inspector are required to hold not less than 10% of the total voting power in the Company.



However, the complainants in this case (Respondents No. 2 and 3) only have 6% shareholding and therefore are barred from making an application. He relied on a case cited at PLD 1990 Kar 198. He argued that the Executive Director had passed an arbitrary non-speaking order without examining the record or discussing the evidence, and has based his findings on a self-created direction of the High Court. He contended that the case should be remanded back to the Executive Director for fresh adjudication on this ground alone. He referred to three previous decisions of the Appellate Bench on this principle cited at 2006 CLD 283, 2006 CLD 308 and 2006 CLD 311. He further argued that the power of the Commission to appoint an inspector on the directions of the court, as purportedly done in this case, was contained in section 265 and not section 263 of the Ordinance. Therefore the appointment of inspector was not validly done. He referred to the case cited at 2000 MLD 1880.

8. Mr. Qamar Afzal stated that the allegations of mismanagement have been resolved by the Hon'ble High Court in the three judgments passed in CO. 1/04, CO.2/05 and WP. 1918/05. He stated that these allegations had been thoroughly investigated by the Local Commission appointed by the High Court in CO. No.1/04 which found no evidence of financial embezzlement. Therefore there was no justification to appoint another inspector in this regard. He stated that as far as the recommendation of the Local Commission on the issue of dual books of accounts was concerned, the Local Commissioner had suggested that an investigation should be carried out by an agency, which means Police and not by the Commission. He further stated that on the basis of the recommendation, the Company had gotten an FIR registered with the Police against Respondent No. 2 and 3 for preparation of false books of accounts and this matter was being investigated.

9. The counsel for the Appellant further stated that the enhancement of the authorized capital of the Company and issuance of further 400,000 shares to Mr. Riaz



Karim was done legally and after following the proper laid down procedure. He produced before us what he claimed to be attested copies of the new share holdings of the parties issued by the Company Registration Office. He stated that notices were served upon the Respondents who refused to accept the said notices. He produced copies of the peon book of the Company to back his claim.

10. Mr. Fakhar M. Chanda Advocate appearing on behalf of Respondents No. 2 and 3 challenged the contentions raised by the other side. As a preliminary objection, he stated that the appeal filed by the Company was not competent as the CEO was not authorized by the Company or its board of directors. He referred to a case cited at 2006 CLD 85. He in fact stated that the CEO had been appointed without the due process and this was one of the allegation raised by the Respondents which was required to be investigated by the inspector. He contended that there were clear directions from the Hon'ble Court in all three decisions passed in CO.1/04, CO. 2/05 and WP.1918/05 that an inspector should be appointed to investigate the affairs of the Company. He also referred to the Local Commission's report in this regard which has also recommended the same. He rejected the argument of the Appellant's counsel that the term 'investigation agency' used by the Local Commissioner meant Police. He stated that the Commission was the competent authority/agency under the statute to order investigation in this regard. He produced before us a copy of the inquiry report dated 16-11-2005 prepared by the Investigation Wing of the SP Office Islamabad on the FIR registered against Respondents No.2 and 3. The report concludes that an inspector should be appointed by SECP as directed by High Court, and a case should be registered against the persons if any, found to be involved in preparation of dual books of accounts on the basis of the report of the said inspector. He stated that the management of the Company led by Mr. Riaz Karim had submitted the same forged accounts of the Company to Saudi Pak Industrial & Agricultural Investment Co. (Pvt) Ltd in order to secure a finance facility.



11. On the issue of further issuance of 400,000 shares, he stated that these had been illegally issued only with the intent of diluting the shareholding of the Respondents in the Company. He referred to section 86 as well as the articles of association of the Company which require that in case further shares are issued by the Company, they are required to be offered to the members in proportion to their existing shareholding. He alleged that the disputed shares had been issued without offering to the Respondents which was a clear violation of the statute and the articles. He challenged the assertion of the Appellant's counsel that the Respondents had refused to accept the notices issued by the Company in this regard. He further stated that the Registrar's office had refused to accept the circular required to be deposited with the Commission under sub-section 3 of section 86 and therefore the 400,000 shares were issued illegal. He also challenged the sale of shares by one of the shareholders, namely Mr. Abdul Rehman Abbasi who was also previously the CEO of the Company, to the present CEO Mr. Riaz Karim. He referred to the Articles of Association of the Company which require that if any of the members sells his shares, they will be bought by the others members on pro-rata basis. Furthermore, any member who wants to sell the shares is required to sell all his shares, which has not been done in this case and Mr. Abdul Rehman Abbasi has retained 1% shares for himself. He contended that there were numerous other violations of the Memorandum and Articles of the Company, which would be raised by the Respondents before the inspector. He stated that the petition CO. No. 1 of 2004 under section 290 filed by the Respondents before the High Court has not been concluded. He prayed that the appointment of inspector may be upheld.

12. Mr. Munawar Bhatti, Joint Registrar appearing on behalf of the Department confirmed that the required circular under section 86(3) has not been accepted by the Registrar's office. He further contended that the appointment of inspector has been done on the clear instructions of the High Court in numerous decisions. He stated



that the appointment of inspector was not a punitive action against the Company but a fact finding exercise and therefore should not be opposed by the Company.

13. We have heard the parties in detail and also examined the record produced before us. The facts, the history of the case and the allegations exchanged between the parties confirm the Hon'ble High Court's decision that this matter requires detailed examination. This examination of record, witnesses and evidence in our view cannot be done by a court or an officer sitting in adjudication. It requires time, effort, knowledge of corporate laws and the internal workings of a company, investigative expertise and skills and most of all, a fair and independent assessment of disputes. The allegations leveled by the parties include financial and administrative irregularities as well as contraventions of rules and regulations which come within the jurisdiction of the Commission. In our opinion therefore the necessary agency through which this examination and investigation should be done is the Commission. This view is supported by the findings of the High Court as well as the Investigation Wing of the Police.

14. Coming to the objections raised by the Appellant in this appeal, we find no merit in the argument that the Executive Director (CLD) has not been delegated the power to appoint inspector under section 263 by the Commission. This power has been clearly delegated by the Commission through SRO 1061 (I)/2005 dated 18-10-2005. The argument of the Appellant's counsel that the Respondents do not hold 10% voting power in the Company and therefore cannot apply for appointment of inspector under section 263 is also untenable. The issuance of further shares by the Company is clearly disputed and the circular required under section 86(3) has not been accepted by the Registrar's office. The High Court in Para 14 of its order dated 01-06-2006 in CO. 2/05 has also directed that this matter should be investigated on the complaint filed by the Respondents. The Respondents right under section 263 therefore cannot be ousted in this way. Similarly, the Respondents' contention that





the instant appeal filed through the current CEO is unauthorized cannot be accepted. These matters form the subject matter of the investigation to be conducted by the inspector, and cannot be decided by this forum on the basis of the parties' assertions.

15. The Appellant's contention that the matter has been finally settled through the High Court's decisions is self-serving and clearly untenable. The High Court has repeatedly held that the Commission must investigate the matter. In Para 13 of the High Court's order in CO. 2/05, the Hon'ble Court has taken exception to the fact that the Deputy Registrar has not investigated the preparation of dual accounts as recommended by the Local Commissioner. On the issue of complaint under section 263 by the Respondents, the High Court in Para 14 of the same order, has observed:

*"It was incumbent upon the Commission to have appointed an Inspector and to proceed with the matter with regard to this complaint."*

In fact the main reason for the rejection of the petition filed by Deputy Registrar under section 290 was that the investigation in the matter was not complete. The High Court in its subsequent order dated 03-02-06 in WP 1918/05 relied inter alia on the above observation of the Court to dismiss the petition of the Appellant. It observed that:

*"Respondent No.1 Securit(ies) and Exchange Commission of Pakistan under section 263 of the Companies Ordinance, 1984 has the jurisdiction to investigate the affairs of the Company on the application by the Members..."*

It further held that the show cause notice under section 263 regarding the appointment of inspector has been issued by the Commission in pursuance of the order of the High Court in CO. 2/05, which matter has not been concluded as yet.



16. Prima facie, there seems some merit in the argument that if the appointment of inspector has been made on the directions of the High Court as stated in the Impugned Order, then, it should have been made under section 265 and not section 263 as provided therein. The counsel for the Appellant has also contended that the Executive Director has passed a non-speaking order without asking for any evidence as is required under section 264 of the Ordinance. However, based on the unique facts where the High Court has clearly and repeatedly advised appointment of inspector upon the complaint of the Respondents and also the recommendation of the Local Commissioner, and, the plethora of record which has come up before the courts as well as the Commission, the requirement of section 264 in our opinion have been fulfilled. It is clear that the Commission based on these facts and record is satisfied that this is a fit case for appointment of inspector. Remanding the case back on a mere procedural issue will waste further time and may effect the rights of innocent parties. Furthermore it will amount to impeding the implementation of the orders of the High Court.

17. For reasons stated above we uphold the Impugned Order. The Department is however, directed to involve the Fraud Investigation Unit (FIU) of the Commission in this investigation. The Department is further directed to initiate necessary proceedings under section 279 of the Ordinance with regards to the 400,000 disputed shares issued by the Company.

**(Razi-ur-Rahman Khan)**  
Chairman/Commissioner

**(Salman Ali Shaikh)**  
Commissioner

Announced in Islamabad on 28 June, 2006