



BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 39,40 and 45 of 2006

Pakistan Electron Limited APPELLANT No 1
Masood Textile Mills Limited APPELLANT No 2
Lahore Stock Exchange (Guarantee) Ltd APPELLANT No 3

Versus

Mr. Arif Mian, ED (SMD), SECP RESPONDENT

ORDER

Date of Hearing

6 February 2009

Present:

For the Appellant:

Dr. Parvez Hassan
Advocate

Mr. Asif ur Rehman
Advocate

For the Respondent Department:

Mr. Imran Inayat Butt
Director (SMD)



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1. This order shall dispose of the appeal No. 39, 40 and 45 of 2006 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the Order (the "Impugned Order") of the Executive Director, Securities Market Division ("E.D, SMD"), Securities and Exchange Commission of Pakistan (the "Commission"), dated 26-04-2006.
2. The facts leading to the case are that Pakistan Electron Limited ("PEL") sought the approval of Commission under section 86(1) of the Companies Ordinance 1984 (the "Ordinance") and Rule 5 (i) of Companies Share Capital (Variation in Rights and Privileges) Rules 2000 (the "Rules") for the issuance of its 62,500,000 preference shares to certain financial institutional investors without a rights issue. Masood Textile Mills Limited ("MTML") also sought the approval of the Commission for the issuance of its 60,000,000 preference shares to certain financial institutional investors without a rights issue. The Commission granted the approval for issuance of the preference shares to the institutional investors by PEL and MTML. Both the companies sought permission for listing of the preference shares from Lahore Stock Exchange (Guarantee) Ltd ("LSE"), which was approved by LSE and the shares were listed on the Stock Exchange.
3. That E.D, SMD issued show cause notices to the PEL and MTML on grounds that they acted in violation of Regulation 3(2) and 8(3) of the listing regulations of the Lahore Stock Exchange (the "Regulations"). E.D, SMD also issued a show cause notice to LSE for having listed PEL and MTML in violation of the Regulations. The Appellants response to the show cause notices were not found satisfactory and E.D, SMD after hearing the parties passed the Impugned Order whereby PEL and MTML preference shares were delisted from the LSE and a fine of Rs. 100,000/- was imposed on Managing Director LSE.



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4. The Appellants preferred appeals against the Impugned Order before the Appellate Bench (the "Bench"), which have been clubbed together as the Appellants are aggrieved from the same order. The appeals of PEL and LSE were taken up for hearing on 8-5-06 and the Impugned Order was suspended to the extent of the PEL and LSE until next date of hearing. It is pertinent to mention here that the appeal of MTML was not fixed for hearing prior to 6-2-09 and therefore no order of suspension of the Impugned Order was passed in their favor.

5. The appeals finally came up for hearing before the Bench on 6-2-09. The counsel, Dr. Parvez Hassan on behalf of PEL contended:
 - a) that the application for issuance of preference shares made to the Commission was accompanied by a) special resolution and b) Term Sheet in respect of PEL shares. It was argued that in PEL, Term Sheet the shares were mentioned as "Listed Cumulative Non-Voting Preference Shares" as such the Commission, while granting approval for the issuance of the securities was fully aware that the shares will be listed on the LSE. The attention of the Bench was drawn to the doctrine of promissory estoppel and stated that Commission after granting approval for the issuance of "Listed Cumulative Non-Voting Preference Shares" could not have delisted the shares of the companies from LSE. Further that there was sufficient public interest in the securities as the preference shares were convertible into ordinary shares and on their conversion the public interest would have accrued. Moreover the company was listed much earlier to the listing of the preference shares therefore there was sufficient public interest in the company, which is pre-requisite of regulation 3(2) of the Regulations.



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- b) that since the approval for the issuance of "Listed Cumulative Non-Voting Preference Shares" was given by the Commission, therefore it cannot impose penalty on LSE for having listed the company in violation of the regulations. He also objected to the levying of penalty on the Managing Director of LSE and contended that the decision of the LSE to list PEL preference shares was taken in the Company Affairs Committee ("CAC") after deliberation. The CAC had delegated the authority to the Managing Director to approve the listing of a security on its recommendation. That the Managing Director acted on behalf of CAC and is no way personally responsible for decision. Moreover, the Managing Director could not have been penalized under section 22 (1) of the Securities and Exchange Ordinance 1969 ("SEO 1969") as the acts of the CAC were not *wilful*, which is a prerequisite for imposing penalty.
6. The counsel for MTML, Mr. Asif Rehman, appearing on behalf of Mr. Imtiaz Siddiqui, Advocate, adopted the arguments of Dr. Parvez Hassan.
7. The representative of department, Mr. Imran Butt contended:
- a) that the approval granted by the Commission was in respect of the issuance of preference shares under 86(1) of the Companies Ordinance 1984, and it cannot be construed as approval of listing of the preference shares. Further that the issue of listing rests with relevant Stock Exchanges (i.e LSE in this case). The application for listing of preference shares was made by PEL and MTML to LSE, which had to decide the issue of listing based on the Regulations.



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- b) On the issue of whether there was public interest in the issuance of securities, Mr. Imran Butt stated that there was no public interest, as the securities were issued to institutional investors and therefore the listing was in violation of regulation 3 (2) of the Regulations. That E.D, SMD, rightly proceeded by delisting the shares of PEL and MTML and imposing penalty on LSE for violation of the Regulations.
8. We have heard the parties at length. The Appellants contention that the Commission by giving its approval of issuance of securities had in fact allowed listing of securities with the LSE has no substance. The approval given by the Commission on the issue has been carefully examined and is reproduced below for ease of reference:

.....
.....
.....
Dated: November 19, 2004

Subject: ISSUE OF PREFERENCE SHARES TO INSTITUTIONAL INVESTORS

Dear Sir,

Please refer to your letter dated November 08, 2004 on the subject noted above, requesting approval of the Commission to allow M/s Pak Electron Limited (the "Company") to issue 60,500,000 cumulative non-voting preference shares @ Rs. 10/- each amounting to Rs. 605,000,000/- other than right issue, to institutional investors under subsection (1) of section 86 of the Companies Ordinance, 1984 (the "Ordinance") and Rule 5(i) of the Companies Share Capital (Variation in Rights and Privileges) Rules, 2000



2. In this connection, I am directed to inform you that the Commission, on the basis of special resolution passed by shareholders of the Company, has been pleased to grant approval to issue 60,500,000 cumulative non-voting preference shares carrying preferential right of dividend @ 9.5% p.a, other than right offer, to following institutional investors:

List of Financial Institutional (Sr No 1 to Sr No 15)

The preference shares shall be issued to the institutional investors, mentioned above within 120 days of the date of this letter.

Signature

Abid Hussain

Joint Director

It is clear, from the contents of the letter that the approval was given only for the issuance of preference shares and does not allow listing of the securities with LSE. In any case the power to list companies and securities is not with the Commission and is vested with LSE in terms of its regulation 3 of the Regulations which states:

3. (1) No dealings in securities of a company shall be allowed on the Exchange, either on the Ready Quotation Board or Futures Counter, unless the company or the securities have been listed and permission for such dealing has been granted in accordance with the Regulations.



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(2) *The permission under sub-regulation (1) may be granted upon an application being made by the company or in respect of the securities in the manner prescribed. The Exchange in granting such permission will consider among other things, sufficiency of public interest in the company or the securities.*

Emphasis added

(3)

(4) *The Board will be the sole authority to grant, defer or refuse such permission and may for that purpose, relax any of these regulations subject only to two third majority of the directors present at such meeting of the Board and so resolving.*

Emphasis added

9. Regulation 3 (1) and 3(2) of the Regulations set out the requirements for dealing in securities of a company on the Stock Exchange. No security can be traded without being listed and in granting the permission for the listing of the security, the Stock Exchange is bound to see whether or not there is public interest involved in its listing. In the instant case, there can be no public interest involved, since the Commission had granted permission for private placement of the Cumulative Non-Voting Preference Shares to 15 financial institutions only, the securities should not therefore have been listed on the Stock Exchange.

10. Regulation 3 (4) of the Regulations lays down the only exception to public interest test of the security. The board of the Stock Exchange with two third majority of the directors present at such meeting of the Board may grant, defer or refuse such permission and may for that purpose, relax any of the Regulations. However, no letter seeking permission for relaxation was produced by the Appellants in this case from the LSE Board and therefore it is



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obvious that the LSE Board did not relax the Regulations, accordingly the LSE should not have allowed the listing of preference shares.

11. The contention of the counsel for Appellant No 3, that the penalty could not have been imposed on the Managing Director under section 22 (1) (c) of SEO 1969, as the decision to list preference shares of Appellant No 1 and 2 was of CAC and the act of Managing Director was not wilful. Time was sought to present case law which would support Appellants contention that the violation was not wilful. Case law on the word *wilful* was provided to us on 13th February 2009, some of which are reproduced. The counsel has relied on judgments from Pakistani, Indian and English jurisprudence. In one of the cases titled *Shaukat Baig vs. Shahid Jamil*, PLD 2005 SC 530, it has been held that the term *wilful* means in common sense, voluntary or intentional. In another case titled *Pakistan Paper Corporation Limited vs. Secretary, Federal Ministry of Finance*, 1984 CLC 2456 the word *wilfully* is defined as an act done deliberately and intentionally, not by accident or inadvertence, but so that the mind of person who does the act goes with it. In another case also cited titled *Jalaluddin F.C.A vs. Commissioner SEC*, 2005 CLD 333, where the meaning of *wilful* in context of duty of auditor has been discussed, it was held that:

"whereas intent is a necessary ingredient of willfulness, impropriety is not (1960) 30 Com cases 523. It is therefore not necessary to prove that the default committed by the Appellant was mala fide."

Reliance was also placed on case titled *City Equitable Fire Insurance Co Ltd Re*, 1925 Ch 407 referred to in 2005 CLD 333:



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"a default, in case of breach of duty, will be considered 'wilful' even if it arises out of being recklessly careless, even though there may not be knowledge or intent."

12. With due deference to the other judgments cited, we are of the view that case law by itself and/or as laid by the superior court would not come to the aid of a person claiming that an act performed was not willful and absolve him from liability, unless, it is demonstrated by the conduct of the party that the act was not willful. The Appellant No 3 has not been able to show to us that its action to allow the listing of PEL's and MTML's Cumulative Non-Voting Preference Shares on LSE was not willful. In the instant case the Appellant No 3 is aware of its Regulations and claim to have followed them, when in fact they have not done so. The insistence of LSE that the securities were approved by the Commission and were therefore listed, despite knowing full well that listing of securities is the prerogative of LSE, shows that it acted intentionally by listing the securities without properly evaluating the applications of LSE and MTML and therefore their actions can be termed as nothing else but *willful*.
13. Regarding the contention of the counsel for Appellant No 3 that the Managing Director approved the listing of preference shares on recommendation of CAC. We are of the view that the mechanism adopted by LSE for approval of listing of shares is an internal working function of LSE and is of no consequence, especially in the light of regulation 3(2) and 3(4) of the Regulations.
14. In view of the foregoing, LSE is directed to de-list the preference shares of PEL and MTML. However, on the issue of penalty on Managing Director of LSE, for having failed to scrutinize the application in accordance with the Rules, we are of the view that it is LSE which needed to be penalized and not



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its Managing Director. Accordingly, the Order is modified to the extent that the penalty of Rs. 100,000/- shall be paid by LSE.

(SALMAN ALI SHAIKH)

Chairman

(S. TARIQ. A HUSAIN)

Commissioner (LD/ CLD)

Announced on: 4th March 2009