

Appellate Bench Orders

Before Appellate Bench No. 3

February 10, 2003

Before Appellate Bench No. 3 (Re-Constituted)
In the matter of
Revision No. 65 of 2002

1. Quality Steel Works Ltd.
D/22, S.I.T.E
Manghopir Road
Karachi – 75700
2. Mr. Muhammad Ziauddin
Chief Executive Officer
Quality Steel Works Ltd.
D/22, S.I.T.E
Manghopir Road
Karachi – 75700

..... Petitioner

Versus

Executive Director (EMD) SEC Respondent

Date of Impugned Order July 15, 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 July 15, 2002 (the "Impugned Order") passed by the Executive Director (Enforcement & Monitoring).

1. Brief facts leading to this revision petition are that the Commission received a complaint from a shareholder of the Company (Petitioner No. 1 herein) alleging that the Company was ignoring his request for provision of a copy of the list of shareholders/register of members. The Company demanded an amount of Rs.29,250/- at the rate of Rs.250/- per page for providing a copy of the list of shareholders from the complainant. Following the failure of the Company to respond to the Commission's directions to provide the copy to the complainant, a notice dated July 03, 2002 was issued by the Commission to the Company, its Chief Executive (Petitioner No.2 herein) and directors calling upon them to show cause as to why penalties may not be imposed upon them for violation of sub-section (2) of section 150 of the Ordinance.

2. The Commission received no response to the notice from the Company, its Chief Executive and/or directors. A right of personal hearing was given to the Company, its Chief Executive and directors on July 10, 2002 by the Respondent (the "Executive Director"). The Petitioners in their defence contended that the Board of directors had fixed an amount of Rs.250/- per page for supply of copies of register of members in terms of Sub-section (2) of Section 150 of the Ordinance. They argued that the directors could fix any amount for the supply of copies of register of members. The Executive Director rejected the arguments of the Petitioners and imposed a fine of Rs.2,500/- (Rupees two thousand five hundred) on the Company and each one of the directors including Chief Executive of the Company for delay in sending of copies under Sub-section (2) of Section 150 of the Ordinance.

3. Aggrieved by the Impugned Order, the Company and its Chief Executive (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, counsel 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. He contended that in order for the Appellate Bench to hear appeals from the orders of Executive Directors, section 33 of the Act would have to be suitably amended. He further argued that a SRO cannot amend a provision of the Act nor can it override it. In short, the Petitioners argued that the revision petition filed by them is not maintainable before the Appellate Bench. Although we failed to understand the logic and wisdom shown by the counsels of the Petitioners of filing a petition before a forum, which in their own opinion lacks the jurisdiction to hear it and thus challenging the maintainability of their own petition, we take up this matter at the outset.

5. The counsels of the Petitioners may have noted 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 vide 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.

6. 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.

7. 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 stipulates which officer/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.*

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.

8. The Commission through SRO 386 (I)/2002 dated June 18, 2002, in exercise of its powers conferred by sub-section (2) of section 476, has duly empowered the Executive Director (Enforcement & Monitoring) to adjudge *inter alia*, all offences and defaults under sub-section (3) of section 150 and impose fine. It is therefore clear from above that the Impugned Order passed by 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.

9. The Petitioners further argued that the Executive Director is barred by virtue of clause (a) of sub-section (1) of section 476 of the Ordinance to adjudge the matter under sub-section (3) of section 150 of the Ordinance. This power they contended, is delegated to the Incharge of CRO where the Company was registered. The Petitioners further contended that the Impugned Order has been passed without lawful authority by the Executive Director as SRO No. 230(1)/2001 does not delegate any power to the Executive Director. 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 these contentions of the Petitioners. Firstly, the Executive Director was exercising powers under SRO 386 (I)/2002 dated June 18, 2002 and not SRO No. 230(1)/2001. As already mentioned above, SRO 386 (I)/2002 dated June 18, 2002 has duly empowered the Executive Director to adjudge inter alia, all offences and defaults under sub-section (3) of section 150. 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 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 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.

10. Besides objections relating to lack of jurisdiction of the Appellate Bench, the counsels of the Petitioners also raised some other arguments. Mr. Farooq Akhtar contended that the penalty has been imposed by Executive Director on the Company, its Chief Executive and all the directors without fixing the responsibility as to who among them was responsible for not providing the copies to the complainant. 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 held liable for the default. He contended that sub-section (3) of section 150 provides for a maximum penalty of Rs.500/- for violation of sub-section (2) of section 150, whereas the Executive Director has imposed a penalty of Rs.2,500/- on the Petitioners.

11. Another argument presented by the Petitioners was that under the provisions of sub-section (2) of section 150 of the Ordinance and Rule 24 of the Companies General (Provision and Forms) Rules, 1985 ("1985 Rules"), a Company can fix and charge whatever amount of fee it deems fit, from a creditor or member of the Company for the provision of copy of list of members. They asserted that since the complainant had failed to provide the fee, the Company had not violated any law by not providing the copies within 10 days of receipt of the application as provided by sub-section (2) of section 150.

12. Mr. Atta Muhammad Khan, Director SEC along with Mr. Mubasher Saeed Joint Director appearing on behalf of the Executive Director (Enforcement & Monitoring) contended that sub-section (3) of section 150 of the Ordinance does not segregate the working directors of a Company from non-working directors and any

penalty to be imposed on the directors of the Company can be imposed on all directors. They referred to the provisions of section 471 of the Ordinance which provides that the maximum limit of the fees to be charged by the Company from members, creditors or other persons for provision of copies of documents, inspection of record shall be such as may be prescribed. They contended that inordinate delay on part of the directors and demand of unreasonably high amount indicated that directors had deliberately, intentionally and willfully avoided sending copies of its register of members to its shareholders. While defending the imposition of penalty of Rs.2,500/- by the Executive Director, they stated that this penalty was calculated at the rate of Rs.50/- per day for the continuing default as provided in sub section (3) of section 150 of the Ordinance.

13. We have heard both the parties and also examined the relevant provisions of the Ordinance and the material placed before us. 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."

14. We also do not agree with the argument presented by the Petitioners that a Company can fix and charge whatever amount of fee it deems fit from a creditor or member of the Company for the provision of copy of list of members. Sub-section (2) of section 150 of the Ordinance provides;

(2) Any member or debenture holder or other person may require a certified copy of the registers and the index thereof mentioned in sub-section (1), or of any part thereof, on payment of such amount not exceeding the prescribed amount as the Company may fix, and the Company shall cause any copy so required by any person to be sent to that person within a period of ten days, exclusive of non-working days and days on which the transfer books of that Company are closed, commencing on the day next after the day on which the requirement is received by the Company."

Emphasis Added

It is clear from the wording of the above sub-section that although a Company can fix the amount to be charged by it for provision of copy of the list of members, it can only fix and charge such amount which does not exceed the amount prescribed by the Commission. Besides, section 471 of the Ordinance clearly states;

471 – “The maximum limits of fees to be paid to or charged by companies and liquidators from members, creditors or other persons for supply of copies of documents, inspection of records and other services as are required to be provided under this Ordinance shall be as such as may be prescribed.”

15. We also cannot accept the interpretation forwarded by the Petitioners that pursuant to Rule 24 of the 1985 Rules, the above position does not apply to creditors and members of the Company. Rule 24 provides;

24 - “The fee to be charged by a Company under Section 136, 150, 417 or any other provision of the Ordinance for inspection of any document or register or for the supply of any copy thereof to a person, other than a creditor or a member of the Company, shall not exceed the fee specified in Sixth Schedule for the inspection of a document or register or for the supply of a certified copy of an extract of any document or register kept by the Registrar”.

One of the basic principles of statutory construction is that rules cannot override statutes. The statutory provisions reproduced above clearly state that the Company would not charge fee exceeding the amount prescribed by the Commission from the members and the creditors. Provisions of Rule 24 therefore cannot change that legal position. In our view the plain and logical interpretation of Rule 24 therefore, which is harmonious with the statutory provisions mentioned above is that the Company shall not charge fee exceeding the amount prescribed by the Commission even from persons other than members and the creditors. Rule 24 therefore does not provide that the Company can charge a higher fee than prescribed, from the members and the creditors, rather it provides that the Company shall not charge fee exceeding the prescribed fee even from persons other than members and creditors.

16. There is no merit in the contention of the Petitioners that the Executive Director has imposed a fine greater than the fine prescribed under sub-section (3) of section 150. The fine of Rs.2,000/- in addition to Rs.500/- imposed by the Executive Director is the continuing penalty as prescribed by sub-section (3) of section 150 calculated at the rate of Rs.50/- per day from June 05, 2002 (the date, 10 days after the request was made by the complainant) to July 15, 2002 (the date on which the Impugned Order was passed).

17. We agree with the interpretation of sub-section (2) of section 150 of the Ordinance provided by the Petitioners, that the Company is required to provide the copies to a person within 10 days of receipt of the requirement as well as the fee. However, in our opinion the Petitioners cannot rely on this interpretation to claim that they have not committed any default under the provisions of section 150. The amount of fee, which the Petitioners required the complainant to pay, was exorbitant and illegal. This fee is in no way a justifiable charge and amounts to a deliberate and willful attempt on part of the Petitioners to deny the list of members to the complainant. We do however feel that the complainant would have been on a much better footing had he deposited at least the fee prescribed by the Commission with his application to the Company.

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

(a) the fine of Rs.500/- imposed on each of the Petitioners in the Impugned Order for violation of sub-section (2) of section 150 is hereby upheld;

(b) the continuing fine of Rs.2,000/- imposed on each of the Petitioners in the Impugned Order under sub-section (3) of section 150 of the Ordinance, is hereby set aside;

(c) in case the complainant is still interested in obtaining the copy of the list of members from the Company, he is directed to deposit with the company, the fee at the rate prescribed in the Sixth Schedule of the Ordinance;

(d) in case the complainant deposits the fee with the company as specified in Para (c) above, the Petitioners are directed to provide the copy of the list of members to the complainant within ten (10) days of receipt of the fee by the Company;

(e) in case the Petitioners fail to provide the copy of the list of members to the complainant within ten (10) days of receipt of the fee as directed in Para (d) above, the Petitioners shall be liable to a continuing fine of Rs.50/- per day as specified in sub-section (3) of section 150 of the Ordinance, commencing on the first day following the tenth day of receipt of fee by the Company, till the date the copy is provided to the complainant.

19. In the end we would like to mention that the counsels of the Petitioners have not taken due care in filing the revision petition before the Bench. The plaint fails to mention who the petitioners or the respondents are in the case. Although the counsels for the Petitioners have argued in detail on behalf of the directors of the Company, they have not made them a party to these proceedings. The power of attorney executed in favor of the counsels shows that the counsels are only authorized to file the revision petition on behalf of the Company and not the directors. As the Chief Executive of the Company appeared in person before us, we have decided to entertain his revision along with the Company's. We however, are unable to adjudicate on the rights of the directors.

This revision petition is accordingly disposed off.

(ETRAT H. RIZVI)
Commissioner (Insurance)

(SHAHID GHAFFAR)
Commissioner (Securities Market)

Islamabad

Announced: February 10, 2003