



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

BEFORE APPELLATE BENCH I

In the matter of

Appeal No. 59 of 2009

Siddiq Moti

....Appellant

Versus

1. Director (SMD), Securities and Exchange Commission of Pakistan
2. Mr. Naeem Hussain

.... Respondents

Date of hearing

09-03-2015

ORDER

Present:

For the Appellant

Mr. Ali Rana, Advocate

For Respondent No. 1

Mr. Murtaza Abbas, Deputy Director

For Respondent No. 2

Mr. Naeem Hussain

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1. This order shall dispose of appeal No. 59 of 2009 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (the SECP Act) against the order dated 25-09-2009 (Impugned Order) passed by the Respondent No. 1.
2. The brief facts of the matter are that Respondent No. 2 has filed a complaint against Appellant before Securities and Exchange Commission of Pakistan (the Commission) alleging therein that the Respondent No.2 was the client of Junaid Ali (**Agent**), who was an agent of Mr. Siddiq Moti/Appellant, member Karachi Stock Exchange (KSE). Respondent No. 2 conducted the business of sale/ purchase of shares with the said agent for about 4 years on the basis of faith. He is resident of Hyderabad and due to his good reputation; certain close relatives and friends also trusted him and invested in shares through him. On 19-5-2000, when he checked the CDC delivery position report, a lot of shares were available in the account. Certain shares which were given to the Agent and his partner Mr. Khalid Waheed were also available. In November, 2000, his relatives asked him to sell their shares and return their investment. Resultantly, he placed order with the Agent, however the agent delayed and gave indications of loss. Consequently, Respondent No. 2 checked CDC account position on 24-11-2000 and observed that all shares were almost finished whereas he neither sold these shares before 24-11-2000 nor asked the Agent to do so and had never given authority to the Agent or the Appellant for this. He got the matter inquired through KSE and came to know that the shares had been transferred from Appellant to Mr. Munir Khalid, member, KSE. Respondent No. 2 stated that due to fraud committed by the Agent and Appellant, his reputation has been damaged and an attempt was also made to get an authority letter from him in back date.

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3. The Respondent No. 1 took cognizance of the matter and after lengthy proceedings including, obtaining para-wise comments of parties at dispute, replies, investigation, collection of the relevant evidence and record from concerned parties/ institutions and giving opportunity of personal hearing on many occasions has decided the matter in favour of Respondent No. 2 through Impugned Order dated 25-09-2009.
4. The Appellant has filed the instant appeal against the impugned order on the following grounds:
 - a. Respondent No.1 has overlooked the documents provided by the Appellant regarding the account of Respondent No. 2 and had passed the Impugned Order considering the submissions and placing reliance on documents provided by Respondent No.2 as gospel truth.
 - b. It has specifically been mentioned in Karachi Stock Exchange Rules and Regulations that whenever any dispute arises between members inter-se, or between any of the members and their constituents/clients, or between any of the members and their authorized agents or between authorized agent(s) and their constituents/clients in connection with the trade or transaction and is not otherwise settled amicably, it shall be referred to arbitration.
 - c. Respondent No. 2 has submitted a totally different claim in the year 2006 than the one filed in the year 2000 therefore is self-contradictory. Furthermore on filing of new claim, the Respondent No.1 instead of appointing an inspector for investigation, has passed the Impugned Order without appraising the new facts.
 - d. Respondent No. 1 has not chosen to verify the debit balance outstanding against Respondent No. 2 due to paucity of time.
 - e. Respondent No. 2 has never provided any evidence whatsoever in support of his claim therefore the Impugned order is arbitrary, illegal, unjust and biased which is liable to be set aside.

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- f. Respondent No. 1 has failed to consider that other five complaints were also pending and this complaint cannot be decided in isolation.
5. The Respondents, in return have filed their comments. The Respondent No. 1, in his comments has raised serious objections on the grounds agitated by the Appellant and stated that the Impugned Order was passed with due care and diligence and stated that:
- a. The impugned order was passed in accordance with the Rules and Regulations. An inquiry was conducted on the basis of which the matter was decided. The order is well reasoned, lawful and in compliance with Securities and Exchange Commission of Pakistan Act, 1997.
 - b. KSE General Regulation as referred in the ground does state that the disputes if not settled amicably shall be referred to arbitration and shall be dealt according to the procedure laid down in KSE Regulations. However it does not in any form restrict Respondent No.1 from taking up investor complaints for protection of investors in accordance with SECP Act, 1997.
 - c. Claim filed by Respondent No.2 in 2006, was not different from the one initially filed in 2000. However, it included the claim of Dividend and bonus accrued till the date of claim filing against the disputed scripts and certain adjustment in accordance with the information provided by the Appellant. The Impugned Order was passed after considering all the information provided by both the Appellant and Respondent No. 2. All facts and records were taken into consideration to ensure independence and objectivity.
 - d. The claim of Respondent No. 2 was duly referred for investigation and debit balance was also looked into by the investigators. The investigation report was issued after taking into consideration all facts on record.
 - e. Various hearing opportunities were provided to both the Appellant and Respondent No. 2 for substantiating their claims and each and every

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document was taken into consideration before issuance of the impugned order.

- f. Award announced dated September 25, 2009 by Respondent No. 1 incorporates all the claims of the complainants on whose behalf, Respondent No. 2 was trading with Appellant. The said award also holds that Respondent No. 2 would submit an undertaking that no one from the referred claimants will approach Appellant for their claim.

6. Respondent No. 2 stated that:

- a) The Impugned Order has been passed after due care and considering all the relevant documents provided by the parties.
- b) KSE Rules and Regulations do not create any bar on Commission to entertain the investors' complaint.
- c) The claim submitted in the year 2006 was not in contradiction to the earlier claim rather in this respect Respondent No.1 has provided a specific format to both parties which was followed accordingly. The claim submitted in 2006 was in line with the previously submitted claim.
- d) There was no debit on account of Respondent No.2. The evidence provided in this respect by the Appellant is fake and frivolous.
- e) He has provided all the relevant documents and evidence to substantiate his claim.
- f) The Respondent No. 1 has passed the award in favour of all the complainants through the Impugned Order.

7. We have heard the parties and their representatives.

8. Before discussing the issues between the parties, we feel it necessary to mention the points of agreement and consensus which either one party or the other has admitted in arguments or through written correspondence. In this

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respect, it is admitted that Respondent No. 2 was a client of Appellant through his agent namely Junaid Ali. It is also admitted that Respondent No.2 has invested time to time in shares and maintained account for the transactions. However, this business was being conducted through the Appellant who was the member of KSE. The very important letter in this respect is dated 12-02-2001 addressed to the Commission on the Letter Head of Appellant and signed by the Appellant wherein the relation and business is admitted as mentioned above. With respect to availability of shares on the relevant date, both the parties have admitted and CDC report is also evidencing such claim of Respondent No. 2. However whether the Appellant has any legal right whatsoever to move such shares is a question of high importance which will ultimately provide the ground for decision of the instant appeal.

9. It is important to observe that although Karachi Stock Exchange Rules and Regulations have provided a way to settle the disputes amicably or through arbitration however it does not create any bar on the jurisdiction of Securities and Exchange Commission of Pakistan to take cognizance of investors' complaints. In this respect, the general presumption will remain of permissibility and not of prohibition.
10. The perusal of documents expressly reveals that appellant has taken two different stances with respect to handling of shares of Respondent No. 2. Firstly through the letter referred above wherein it has been mentioned that the Respondent No. 2 has shifted his business from the Appellant to another member KSE therefore his shares were also transferred and secondly that his account has created debit which was settled accordingly. Surprisingly in both these stances, the main question remained un-addressed that what was the legal authority for the transfer of shares of Respondent No. 2 which can legally justify the act of Appellant. It is settled law that whenever a Broker will move/handle the securities of client, he will move them with the consent

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of client and not otherwise. Section 24(2) of Central Depository Act, 1997 is very clear in this respect. The relevant provision is reproduced for ease of reference;

"A participant shall not, except with the authority of his clients, handle or authorize or permit any handling of book-entry securities beneficially owned by such clients and entered in his account"

11. When confronted with this provision of law and rule enshrined therein, the counsel for Appellant failed to provide any legal document to satisfy the Bench. He has taken plea of trust and confidence however admittedly these cannot rescue a legal wrong and specially an act where the property rights of others are infringed. It is further observed that Respondent No. 1 has in explicit terms written to Appellant through letter dated 30-04-2009 for provision of any authority in this regard however no document in this respect was provided. Although, the response on other points was submitted vide letter dated 15-05-2009, however no comment or document was given to answer the question of authority.
12. Now we intend to deal with the question of debit which as alleged by the Appellant was created against the account of Respondent No. 2 and the same was adjusted through the disputed transactions. In this respect we have gone through the Impugned Order very carefully and find that the Appellant has not provided any documentary evidence. Respondent No. 1 has dealt this issue in length inviting the parties to submit the supporting evidence. It will not be out of place to mention that an investigation officer was also appointed by the Commission to find the true facts. However, he has submitted report ex-parte on account of non-cooperation of Appellant. The relevant paragraph is reproduced for ready reference,

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“Accordingly, due to the continuous strategy of prolonging the investigation proceedings through non-compliances and non-submission of complete details adopted by the Respondent and his representatives, and after taking up lenient course for the investigations in the interest of justice and allowing several opportunities to the Respondent in the favor of justice, the investigator finds no option to frame an ex-parte report on this case.”

13. The said observation of investigating officer depicts two important points; the presumption of non-availability of evidence with the Appellant and lack of interest. These presumptions are further strengthened from the fact that this report has gone unchallenged throughout the proceedings before Respondent No. 1. Furthermore, the same was not challenged through the instant Appeal as well.
14. Having said that, we would like to discuss the evidentiary angle of this point as well. It is admitted position that the adjustment of debit was claimed by the Appellant therefore it was the duty of Appellant to prove the existence of debit as per law. Chapter IX of Qanun e Shahadat Order, 1984 (the “QSO”) is very relevant to these facts. Article 117 of the QSO provides that burden to prove a fact lies on a party who claims its existence; for ready reference it is hereby reproduced;

*“**Burden of proof:** (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.¹*

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

15. In continuation of Article 117 of QSO, Article 119 says that;

*“**Burden of proof as to particular fact:** The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

16. The above provisions clearly suggest that in the case before us, the fact of debit was alleged by the Appellant therefore the Appellant was under obligation to prove this and in absence of any evidence; it will be decided

¹ Emphasis added



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against the Appellant. This proposition is dealt in section 118 of QSO.
Reproduced hereunder:

118. On whom burden of proof lies: The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.²

17. The crux of the matter is that the Appellant although alleged the existence of fact of debit however failed to prove this and as the burden of proof was upon him therefore it will be assumed that no such debit was in existence.

18. In light of the discussion above, we find no substance in Appeal and see no reason to interfere with the Impugned Order. The appeal is dismissed with no order as to cost.

(**Fida Hussain Samoo**)
Commissioner (Insurance)

(**Tahir Mehmood**)
Commissioner (CLD)

Announced on: **22 MAY 2015**

² Emphasis added