

Appellate Bench Orders
Order in the matter of Appeal No. 8 of 2001

January 03, 2002

Before Appellate Bench No. 2

In the Matter of

Appeal No. 8 of 2001

1. The Chief Executive,
Barex Limited,
41-Jail Road, Lahore
2. Barex Limited,
41-Jail Road,
Lahore.....
.....Appellant

VERSUS

1. Executive Director (Company Law Division)
Securities and Exchange Commission of Pakistan
NIC Building Jinnah Avenue, Islamabad
2. Fahmina Gul Niazi,
R/o 347-Westridge-I,
Peshawar Road, Rawalpindi
3. Sardar Khan Niazi,
R/o 347-Westridge-I,
Peshawar Road,
Rawalpindi.....Respondents

Date of hearing: *05th December, 2001*

Present:

1. Mr. Muhammad Kamran Sheikh, Advocate
2. Mr. Mujeeb-ur-Rehman Shami

3. Mr. Umer Mujib Shami.....On behalf of Appellants
4. Sardar Khan Niazi.....Respondent in person and on behalf of Respondents No.2
5. Mr. Ahmad Muzammal, Joint Registrar SEC
6. Mr. Munawwar Bhatti, Dy. Registrar SEC.....On behalf of Respondent No.1

Order

This is an appeal by M/s. Barex Limited and its Chief Executive against the Order dated May 5, 2001 passed by the Executive Director (Company Law Division), hereinafter referred to CLD, Securities and Exchange Commission, thereby appointing Mr. Abdur Rehman Mir of M/s Rehman, Sarfraz & Co., Chartered Accountants, Lahore to investigate into the affairs of M/s. Barex Limited (hereinafter referred to as the company) under section 263 of the Companies Ordinance, 1984 (the Ordinance) and to submit a report to the Commission within a period of 30 days from the date of the impugned Order.

2. In paragraph 6 of the impugned Order, the Executive Director (CLD) identified the area of investigation as under: -

- i) Circumstances leading to illegalities with regard to holding of elections of directors and continuation of Chief Executive in violation of the provisions of section 180, 199 and 200 of the Companies Ordinance, 1984.
- ii) Alleged non-presentation of accounts in the AGMs and appointment of auditors in violations of provisions of section 158, 233 and 252 of the Companies Ordinance 1984.
- iii) Alleged dispute relating to transfer and allotment of shares; mismanagement and misappropriation of funds of the company.
- iv) Relationship between M/s. Barex Limited and the Daily Pakistan.
- v) Any other matter relating to and incidental to the above matters.

3. The appeal was initially heard by the Appellate Bench No. 3 of the Commission consisting Mr. Tariq Iqbal Khan and Mr. Zafar-ul-Haq Hijazi, who suspended operation of the impugned Order vide their Order dated 27.6.2001.

4. Subsequently, the appeal came up for hearing before us on 05.12.2001 and Mr. Kamran Sheikh, Advocate appearing on behalf of the appellants stated that the impugned Order for the appointment of an inspector to investigate into the affairs of the Company has been passed in haste and without providing proper and adequate opportunity of hearing to the appellants to put forward their point of view. He stated that the appointment of inspector without any valid ground is causing irreparable damage to the goodwill and reputation of the company and its shareholders. He further said that the impugned order passed by the Executive Director is not merely an administrative exercise and the discretion vested in the Executive Director is not of such a nature to be exercised in an arbitrary or whimsical manner. The exercise of jurisdiction under section 263 has, therefore, been conditioned by the requirement of evidence under section 264 of the Ordinance. He said that investigation should not be ordered except on good grounds. The learned counsel in support of his contention, relied upon the judgment reported as "Service Industries Textile Limited Ltd. Vs. SECP 2000 MLD 1880". He further submitted that as regards the violation of

certain specific provisions of the Ordinance relating to the election of Directors and appointment of Chief Executive within the prescribed period, the law provides for penalties which may be imposed by the regulatory authorities after completion of the legal process. As for the delay in holding of elections and appointment of Chief Executive is concerned, he attributed the same to the Respondent No.3 and stated that it was due to non-cooperative attitude of the Respondent No.3 towards the affairs of the company. The counsel further submitted that no documentary proof of any financial irregularities has been attached by the Respondents with their application seeking investigation of the affairs of the company. He further submitted that the company has been holding its AGMs and the relevant returns and accounts have been filed with the Registrar of Companies in accordance with the statutory requirements. As regards the dispute relating to the transfer and allotment of shares, he clarified that in fact, Mr. Mujeeb ur Rehman Shami took over management from the previous owners as a result of an agreement signed between them on September 3, 1998 and later on 25% shares of the company were purchased by Respondent No.3 and his associates. The Respondents No.2 & 3, as such, have no concern with the agreement between Mr. Mujeeb ur Rehman Shami and the previous owners of the company.

5. Mr. Irfan Ahmed Sheikh, Advocate appearing on behalf of the Respondents submitted that Appellate Bench of the Commission is not competent to interfere in the investigation against a company because these are non judicial proceedings but a process of collection of evidence. According to him, the matter was finally decided by the Executive Director and is not open to question by the Commission in its appellate jurisdiction. He further stated that the company and its management has miserably failed to comply with the statutory provisions and not even a single statutory document has been filed with the regulatory authority. Similarly, the company's shareholders have also been deprived of their rights to receive the annual accounts and to discuss in the Annual General Meetings. In this regard, he referred to the notice of Annual General Meeting held on 31.12.2000 wherein the statutory requirement of sending a notice 21 days before the meeting was not fulfilled and according to his claim, the notice was received after a delay of two days. The counsel for the Respondents further submitted that Mr. Mujeeb ur Rehman Shami entered into an agreement on September 3, 1998 with the previous management which was finalized later on into valid and binding contract between the parties but he did not take into confidence any other member of the company including the Respondents who had deposited with him Rs.10 million for the purchase of shares. He, however, stated that the payment for the said shares was made in the account of Daily 'Pakistan' considering it to be an asset of the company.

6. Mr. Irfan Ahmed Sheikh took the plea that an interim order passed by the Executive Director for collection of evidence has not caused any grievance to the appellants. He said that no appeal lies against an order either in civil laws or in the criminal law.

7. While concluding his arguments, the counsel for the Respondents stated that his clients have a legal right to approach for investigation of a company in which they have made a substantial investment. He also contended that the appeal has not been filed with the approval of the Board of Directors.

8. The counsel for the appellants in his counter arguments clarified that Mr. Shami had made an agreement with the previous management of the company in his individual capacity. He stated that the company and the Daily Pakistan are two separate legal entities. As regards, the filing of appeal by a competent person, he referred to the resolution dated March 21, 2001, which was passed by the Board of Directors of the appellant company in favour of its Chief Executive, Sh. Ashfaq Rauf. He stated that the resolution of the Board was passed after complying with all the legal requirements. He also pointed out that section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 unambiguously provides a remedy of appeal against any order passed by the Commission. Similarly, an order passed by an officer of the Commission exercising its powers is also subject to revision by the Commission. He also clarified that the impugned order is not at all an interim order and is subject to an appeal before an appellate bench of the Commission.

9. The Joint Registrars, appearing on behalf of the Respondent No.1 informed that they processed the application for appointment of inspectors but the record of the concerned Registrar was not consulted before passing the final Order. They were of the view that investigation into the affairs of the company is a

fact-finding exercise and it has nothing to do with the conviction of the management of the company. Thus, the company should not avoid the investigation as the same has been ordered within the parameters of section 263 of the Ordinance.

10. If a company does not hold the Annual General Meetings within the prescribed time without any special reasons, it can be inferred that the company is not taking interest to protect the interest of the shareholders. Further more no sufficient evidence has been brought before the Executive Director (Company Law) in rebuttal by the Appellants to show compliance with certain statutory requirements of the Ordinance. Keeping in view that many allegations were raised by the Respondents Nos. 2&3 in the initial complaint and the Appellants' admission to having committed violations of the Ordinance, it is our considered view that an investigation into the affairs of the company in the terms set out in the order by the Executive Director (Company Law) is necessary and it is in the interest of justice to ascertain the extent of the violations committed by the Appellants and, as a consequence, the prejudice caused to the minority shareholders.

11. For what has been discussed above, we find no merit in the Appeal. The order of Executive Director (Company Law) is upheld and the appeal is dismissed.

Announced : 03 January, 2002

(N.K. SHAHANI)

Commissioner

(Insurance and Information Technology)

(ABDUL REHMAN QURESHI)

Commissioner

(Enforcement & Monitoring)