IN THE HIGH COURT OF SINDH AT KARACHI

M. A. No. 02 of 2015

Appellant:	**Hashoo Holdings (Pvt.) Limited through Mr. Furqan Ali Advocate.**
Respondents:	**Securities & Exchange Commission of Pakistan & another through Mr. Khurram Rasheed Advocate.**
Date of hearing:	**22.11.2018**
Date of judgment:	**04.02.2019**

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is an Appeal under Section 34 of the Securities and Exchange Commission of Pakistan Act, 1997 ("**SECP Act**") against order dated 01.12.2014 passed by the Appellate Bench of Securities and Exchange Commission of Pakistan ("**SECP**") whereby, the order dated 09.02.2010, passed by the Executive Director (SMD) of SECP has been set aside with directions that the gain has to be transferred to the Issuer Company and not to SECP.

2. Precisely stated facts are that on 20.10.2004 a notice was issued by SECP, wherein, it was alleged that Appellant entered into sale and purchase of various shares of Pakistan Services Limited ("**PSL**") in four transactions within a period of six months and allegedly made a gain of Rs. 135,019,644/-. It was further alleged that in terms of Section 224 of the then Companies Ordinance, 1984 ("**Ordinance 1984**") the appellant was required to tender such gain, back to PSL and at the same time, was further required to send such intimation to the Registrar of SECP. The notice dated 20.10.2004 was responded on 08.11.2004, and thereafter, various correspondence took place and it is the case of the Appellant that the matter was settled and closed without any need of further hearing. It is further stated that on 14.07.2009, another Show Cause Notice was issued on identical terms which was again responded, whereafter, Order in Original dated 09.02.2010 was passed, whereby; the Appellant was directed to tender

Rs. 135,019,644/- to SECP on account of its failure to pay the said amount to PSL within six months of such alleged gains. The said order was challenged in Appeal and through impugned order; the Appellant has been directed to pay such gain / amount to PSL and not to SECP.

3. Learned Counsel for the Appellant has contended that Appellant is a beneficial shareholder in excess of 10% in PSL and purchased as well as sold various shares of PSL on 25.08.2003, 16.09.2003, 26.12.2003 and 19.01.2004. Per learned Counsel, first notice was issued in 2004 which was duly replied and several hearings and meetings were conducted till 2006, and no adverse order was passed giving an impression to the Appellant that the matter stands closed and settled. However, once again in 2009 a fresh Show Cause Notice with same allegations was issued, which in law could not have been done so, on the same set of allegations. Per learned Counsel, unreasonable delay on the part of SECP in issuing Show Cause Notice and passing of the Order in Original is bad in law and it cannot be sustained. According to him, the last date of transaction was 19.01.2004, whereas, the Show Cause Notice was issued on 14.07.2009, and according to him in view of the dicta laid down by the Hon'ble Supreme Court in the case reported as ***Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited, Rawalpindi (PLD 1991 SC 14)***, the official act must be performed within a reasonable time, whereas, delay of more than five years in this case is not only unjustified; but so also unreasonable. He has further contended that the Order in Original itself states that matter was revived in 2009 after appointment of a new Executive Director; therefore, this conduct is unreasonable and amounts to arbitrary exercise of discretionary powers by the said Executive Director, whereas, a past and closed transaction has been simply revived on the whims and fancy of an officer. In support of this proposition he has relied upon ***Abid Hassan and others v. P.I.A.C. and others (2005 S C M R 25)*** and ***Mithu Bawa Padiyar v. Union of India and another (2003 (86) ECC 485).*** On merits of the case learned Counsel has relied upon ***Securities and Exchange Commission of Pakistan through Commissioner V. First Capital Securities Corporation Limited and another (P L D 2011 SC 778),***

Para 14, 15 & 17 of the said judgment and has contended that the Appellant is only required to tender the gains to the Company in terms of Section 224 ibid if the Appellant had done something which is unjust or inequitable or in violation of its duties and obligations to the company, whereas, the Respondent's case is not that any unjust or inequitable act was committed; rather in the impugned order of the Appellate Bench, it has been held that it is difficult to establish whether the transactions are bonafide or not, and therefore, the impugned order is liable to be set aside. Per learned Counsel, in the judgment of the Hon'ble Supreme Court it has been observed that the person making the transaction in question shall be entitled to retain the profits if he has acted in good faith, therefore, per learned Counsel, since there is no adverse finding on merits as to the good faith; hence, the Appellant is fully entitled to retain the gains made in the said transactions. According to him, it is not the case of SECP that the gains in question were made on the basis of any inside information; nor, there is a finding of guilt in relation thereto. He has further contended that case of SECP is premised on the assertion that the offence is of strict liability, whereas, the Hon'ble Supreme Court has interpreted the same otherwise. Learned Counsel has also relied upon the impugned order, wherein, it is observed that the transactions were done in the ordinary course of business; hence, in view of such findings the impugned order cannot be sustained. In these circumstances he has prayed that instant Appeal be allowed.

4. On the other hand, learned Counsel for SECP has contended that insofar as the law on the subject i.e. Section 224 as well as the gains made by the Appellant are concerned, it is not under challenge, and it is only the retention of the gains by the Appellant, which is a matter of concern and is to be decided by this Court in this Appeal. He has at the very outset, admitted that insofar as the gains are concerned, they must not be retained by SECP, and should be paid to the Company i.e. PSL in this case. Learned Counsel has referred to Section 224 of the Ordinance 1984 and has contended that whatever gains are made by any of the Directors or a beneficial owner of more than 10% of a listed company within a period of less than six months, such gain has to be tendered to the Company and the only exception

is in the proviso to the said section, which states that sub-section (1) shall not apply to a Security which has been acquired in good faith in satisfaction of a debt previously contracted. Per learned Counsel, the Appellant admittedly does not fall within the ambit of the proviso; nor has a case to this effect been pleaded, except that it was a bonafide transaction. According to him, the judgment of the Hon'ble Supreme Court in the case of ***SECP (supra)*** was only to the effect that whether the entitlement of SECP to retain gains to the exclusion of shareholder(s) or beneficial owner is justified or not, and the Hon'ble Supreme Court came to the conclusion that such gains cannot be retained by SECP. According to him, while doing so, the said provision has though been interpreted, but in no manner it entitles the Appellant to seek shelter under the observations in the said judgment and retain the gains, which otherwise are to be tendered to the public listed company / PSL, for the ultimate benefit of the general shareholders. Insofar as the Appellant's case on merits is concerned, learned Counsel has contended that the four transactions in question were not bonafide; nor do they fall within the exception so stated in the proviso to Section 224 of the Ordinance, 1984. Per learned Counsel, the stance that the transaction was also entered into for repossessing of shareholding within the Group is also misconceived as every company is a separate legal entity, and there is no exception whatsoever to any such Inter Group transfers in law. According to him, the real gain was made when shares were bought and sold of within six months by the Appellant, who is a shareholder of more than 10% and had inside information. Learned Counsel has also referred to a judgment from the United States Court of Appeal in the case of ***Smolowe v. Delendo Corporation, (136 F.2d 231 (2d Cir. 1943)***, wherein, Section 16(b) of the Securities Exchange Act, 1934 has been dealt with, which according to the learned Counsel for SECP is identical in terms to Section 224 ibid, and has contended that the Court went to hold that, "A subjective standard of proof, requiring a showing of an actual unfair use of inside information, would render senseless the provisions of the legislation". Insofar as the delay in passing of the Order in Original is concerned, learned Counsel has contended that the matter was never settled or closed, whereas, the first notice was not a Show Cause Notice and it was only seeking

information as to the transaction in question and thereafter, communication continued till 2006, after which the office of the Executive Director was vacant and finally in 2009 a Show Cause Notice was issued and Order in Original was passed; therefore, per learned Counsel, no benefit can accrue to the Appellant for delay, if any, as there is no restriction or limitation in law for either issuing a Show Cause Notice or passing of an Order in Original.

5. I have heard both the learned Counsel and perused the record. The Appellant admittedly is a beneficial shareholder of PSL (a Public Listed Company) in excess of 10%, and conducted transactions of purchase of PSL shares on 25.08.2003 and 16.09.2003, whereas, sold the shares of PSL on 26.12.2003 and 19.01.2004. According to SECP this was in violation of Section 224 of the Ordinance, 1984 which reads as under:-

> **"224. Trading by directors, officers and principal shareholders. -**
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> (1) Where any director, chief executive, managing agent, chief accountant, secretary or auditor of a listed company or any person who is directly or indirectly the beneficial owner of more than ten per cent of its listed equity securities makes any gain by the purchase and sale, or the sale and purchase, of any such security within a period of less than six months, such director, chief executive, managing agent, chief accountant, secretary or auditor or person who is beneficial owner shall make a report and tender the amount of such gain to the company and simultaneously send an intimation to this effect to the registrar and the Commission:
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> Provided that nothing in this sub-section shall apply to a security acquired in good faith in satisfaction of debt previously contracted.
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> (2) Where a director, chief executive, managing agent, chief accountant, secretary, auditor or person who is beneficial owner as aforesaid fails or neglects to tender, or the company fails to recover, any such gain as is mentioned in sub-section (1) within a period of six months after its accrual, or within sixty days of a demand therefore, whichever is later, such gain shall vest in the Commission and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an area of land revenue.
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> (3) For the purposes of sections 220 to 224, the term "auditor of the company" shall, where such auditor is a firm, include all partners of such firm.
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> ***Explanation. -*** (a) For the purposes of this section and section 222, beneficial ownership of securities of any person shall be deemed to include the securities beneficially owned, held or controlled by him or his spouse or by any of his dependent lineal ascendants or descendants not being himself or herself a person who is required to furnish a return under section 222, and
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> (i) in the case where such person is a partner in a firm, shall be deemed to include the securities beneficially held by such firm; and
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> (ii) in the case where such person is a shareholder in a private company, shall be deemed to include the securities beneficially held by such company:

> Provided that for the purposes of sub-section (1) the gain which is required to be tendered to the company by such person shall be an amount bearing to the total amount of the gain made, as the case may be, by the firm or private company the same proportion as his relative interest bears to the total interest in such firm or private company.
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> (b) For the purposes of this Explanation, "control", in relation to securities, means the power to exercise a controlling influence over the voting power attached thereto.
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> (4) Whoever knowingly and willfully contravenes or otherwise fails to comply with any provision of section 222, section 223 or section 224 shall be liable to a fine which may extend to thirty thousand rupees and in the case of a continuing contravention, non-compliance or default to a further fine which may extend to one thousand rupees for every day after the first during which such contravention, non-compliance or default continues."

6. The above Section provides that where any director, chief executive, managing agent, chief accountant, secretary or auditor of a listed company or any person who is directly or indirectly the beneficial owner of more than ten per cent of the listed company, makes any gain by the purchase and sale, or the sale and purchase, of any such security within a period of less than six months, such person shall make a report and tender the amount of such gain to the *company* and simultaneously, send an intimation to this effect to the Registrar and the authority, provided that this sub-section shall not apply to a security acquired *in good faith in satisfaction of debt previously contracted*. For the present purposes, it is only sub-section (1) and the proviso thereof which is to be considered by the Court. In this matter through the Order in Original it was ordered that such amount of gain is to be deposited with SECP, whereas, the Appellate / impugned order has directed that such amount be paid to the listed Company, whereas, the case of the Appellant is that their case is covered by the proviso, and therefore, no amount of gain is to be paid to anyone except; but is to be retained by the Appellant itself. It is their further case that since there are no adverse findings in the Appellate Order; therefore, the transaction is otherwise bonafide. The Hon'ble Supreme Court in the case of ***SECP (supra)*** has been pleased to interpret the aforesaid provision of law and it has been held that in case of any contravention of sub-section (1) of Section 224 ibid, the gains are only to be paid and tendered to the listed Company in question and not to SECP. To that extent the Order in Original was erroneous, and in fact this settled position of law was not even

disputed on behalf of SECP in this case. Therefore, before this Court the issue is only to this extent that whether it could be retained by the Appellant or not. It may further be noted that in the impugned order, nor in the Order in Original, any fine, penalty or any other coercive action was initiated against the Appellant.

7. The first question which has been raised by the Appellant is in respect of the delay; firstly in issuance of Show Cause Notice, and thereafter in passing of the Order in Original vis-à-vis. the last date of transaction. Learned Counsel has contended that the last transaction was entered into on 19.01.2004, whereas, the first notice which is termed as a Show Cause Notice by the Appellant was issued on 20.10.2004. However, when the said purported notice is examined, it appears that in fact this was not a Show Cause Notice *stricto senso,* but only a letter seeking clarification and explanation from the Appellant in respect of the transaction(s) in question and the gains made thereon. Therefore, the objection as to issuance of Show Cause Notice and passing of the order after so much delay is not tenable. In fact no Show Cause Notice was issued until 2009, whereas, as to the objection regarding issuance of Show Cause Notice in 2009 in respect of transactions entered into in 2004, learned Counsel for the Appellant was confronted as to whether any limitation has been prescribed in law for issuance of such impugned Show Cause Notice, and to this he frankly conceded that no such limitation has been provided. He, however, contended that notwithstanding the fact that in law there is no limitation; but it must be issued within a reasonable time. In support he relied upon the case from Indian jurisdiction reported as ***Mithu Bawa Padiyar (Supra)***. Insofar as the objection regarding limitation is concerned, admittedly, there is no prescribed limitation; hence, merely for delay as contended, the entire transaction cannot be termed to be invalid merely for this reason. Nonetheless, the transaction was entered into by the Appellant and was confronted immediately in 2004, through an explanation; therefore, the ground that in 2006 the matter stood settled has no basis. For the sake of argument if it is assumed that the first letter of explanation was a Show Cause Notice, as contended, even then, the order could have been passed subsequently, even belatedly, as again there is no

limitation to this effect as well. Moreover, since there is neither any limitation nor a consequence, for not passing an order within any such time limit, the objection is otherwise also liable to be discarded. The Hon'ble Supreme Court in the case reported as ***Assistant Collector Of Customs AFU, Airport, Lahore v. Messrs Tripple-M (Pvt.) Ltd. through Managing Director and 4 others*** **(PLD 2006 SC 209)** had the occasion to deal with a more or less similar situation, wherein, a Show Cause Notice was issued on 10.07.1989 and thereafter, the matter was kept pending and no Order in Original was passed. Subsequently, the order was passed on 26.09.2009 and it was contended that the last notice of hearing was issued on 31.08.1992; which resultantly had the earlier Show Cause Notice vacated, and therefore, the Order in Original was time barred. However, the Hon'ble Supreme Court went on to held that the first notice was issued within time, whereas, even if the order was not passed thereafter, the same would not annul and set aside or scrap the Order in Original. The relevant finding of the Hon'ble Supreme Court is in the following terms:-

> "It is thus concluded that the above-said proceedings initiated against the respondent through the show-cause notice dated 10-7-1989, were well within time, were not hit by the period of limitation then prescribed under section 32(3) of the Act and were never dropped. **As regards the observations of the learned Single Judge of the High Court that the order-in-original dated 26-9-1992 passed by the appellant was not within a reasonable time from the date of the issuance of notice dated 10-7-1989, the same are neither here nor there. No order can be scraped or annulled or set aside, only on the ground that the same has been C passed with unreasonable delay. There is no such concept attached to the judicial and quasi-judicial proceedings, unless provided in the statute.** The above-mentioned observations of the learned Single Judge have attained seriousness because of the contention of the learned Senior Advocate Supreme Court of the appellant that this issue may be involved in a large number of customs cases and the department would suffer because of the above-said observations made in the impugned judgment especially when the judgment has been approved for reporting. It is, therefore, held that the said observations have no value in the eye of law. No other point was urged before us."

8. Therefore, insofar as the first objection raised by the learned Counsel for the Appellant is concerned, I am of the view that no case is made out to this extent and the Order in Original cannot be set aside or annulled, merely on this ground that it was passed after a delay of six years from the date of first notice.

9. Insofar as the second point regarding interpretation of the provisions of s.224 ibid by the Hon'ble Supreme Court in the case of

SECP (supra) is concerned, it would be advantageous to refer to the relevant findings of the Hon'ble Supreme Court at Paras 14, 15, & 17 which reads as under:-

> "14. Apart from the above error, there is a more substantial question which arises in relation to the interpretation of section 224. What was the objective underlying this section? No direct answer to this is provided by the language used in it. It merely states that in the event of a person falling within any of the categories mentioned therein making a profit in relation to a sale and purchase within a period of less than 6 months failing to tender the said profit within the prescribed time limit to the said company, or the company failing to recover it from the said person, the quantum of the gain is to vest in the SECP. But why? What is the justification for such a provision? What objective, rooted or based in public policy, is sought to be achieved thereby?
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> 15. Although no direct answer is contained in this section, an answer can reasonably be inferred. It is clear that this section proceeds on the tacit assumption that the person in question was privy to inside information and, taking advantage of the same, obtained a gain to which accordingly he was morally not entitled and this was required it to surrender it to the company. In other words, there is a presumption, which is tacit, to the effect that the person has done something which is unjust or inequitable, or in violation of his duties and obligations to the company as a person falling within any one of the prohibited categories, and thus should be compelled to surrender his gains to the company. Obviously, it would have been better if this presumption had been made explicit and not tacit but, accepting that the presumed legislative intent was the above, we can proceed further with our analysis.
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> 17. We can now examine the comparative rights and liabilities of all three parties to the dispute. They are respectively (i) the person who has carried out the transaction, (ii) the company whose shares have been bought or sold, and, finally, (iii) the SECP.
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> > **(i) As has been pointed out in the above the section has been made on the tacit assumption that the person who has carried out the transaction has acted in an inequitable or illegal manner by relying on inside information. His position, therefore, legally speaking is the weakest.**
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> > (ii) & (iii) We now turn to the company and SECP. The most important point to note here is that the section is confined to listed companies. These are, of course, those companies whose shares are quoted on the Stock Exchange and who have numerous shareholders, perhaps running into hundreds or even thousands, who are, on any conceivable version of the matter completely innocent. The SECP exists not in order to deprive them of their rights but to protect them. If the SECP fails to do so there is very little justification for the existence of its regulatory powers. The question, therefore, arises as to what justification there is, if a person with inside information has carried out a transaction on the basis of inside information, to deprive the innocent shareholders of their equitable entitlement by penalizing the company as a whole. On any conceivable view of the matter the only two persons or entities entitled to retain the profits are either the person in question, assuming he has acted in good faith, or the company whose shares he has bought or sold within 6 months. Clearly neither the State of Pakistan nor any of its statutory instrumentalities is entitled to share in the profits. The argument on behalf of SECP, in essence, is that the company ought to have recovered the amount of the gains from the said person within the time limits specified in the section, which are either six months from the date of accrual of the gain, or sixty days from the date of demand by SECP. Two questions are immediately raised by this proposition:

(a) What is the modality provided in terms of which recovery can be made by the company from the said person within the drastically short time limits prescribed? The answer is none of course. All that the company can do is to file a suit for recovery of the amount in question. If there is a legal system in force in terms of which suits for recovery can be routinely decided within these time limits it is not within our knowledge. Suits for recovery of money normally run into five or ten years or even more and the execution proceedings would further add to the delay, to say nothing about the time taken in appeals. It should be borne in mind that it is the responsibility of the State to ensure speedy and expeditious justice to its citizens. The present, however, is a case in which on the one hand the State provides no mechanism for recovery of the amount by the Company within this time-frame and, on the other, hand decides to penalize its citizens by appropriating it. This is certainly unconscionable conduct. On the face of it, it seems very doubtful that this could be the legislative intent, either actual, presumed or implied.

(b) On the face of it, it seems to be a violation of Articles 23 and 24 of the Constitution. It is also arguably a violation of Article 4. On the interpretation of SECP the section is clearly unconstitutional and has to be struck down. However, if a more restricted interpretation is placed on section 224 in terms whereof the word "vest" is not interpreted as amounting to an absolute transference of title to the gains in question to SECP the section can be sustained. On this interpretation the entitlement of SECP to recover the amount in question from the company would be treated as being in the nature of an enforcement mechanism to ensure that the wrongful gains do not remain with the person who has violated the section but are transferred to or for the benefit of the Company. Such a restrictive interpretive procedure is well-recognized and established in law. For example, in the case of KP Varghese v. Income Tax Officer (1981) 131 ITR 597 the facts of the case were that a person who had purchased a house at a certain price in the year 1958 disposed it of seven years later at the identical price to his daughter-in-law and five of his children although in the meanwhile the price had risen substantially. Placing reliance on section 52(2) of the Income Tax Act 1961 the Revenue sought to tax him on the ground that on the date of transfer the market price was substantially higher than the price declared by him, which was factually correct. The literal language of the section clearly supported this contention. The case ultimately came up before the Supreme Court of India with conflicting verdicts having earlier been delivered by different benches of the High Court. The .Supreme Court accepted that on the literal interpretation of the section the Revenue had an unanswerable case. However, the court then proceeded to consider the parliamentary intent in enacting such a section. The objective underlying the section was clear: in numerous cases it happens that a transaction is not recorded at the true market value but at a lower amount and the official payment is supplemented by an unofficial or cash payment. Clearly this could not have happened in the facts of the given case since the purchasers were the daughter-in-law and children of the, assessee. The transaction was therefore obviously a genuine one. The question was whether it was still hit by the section since the declared price was well below the market price. The Supreme "Court came to the conclusion that the action of the Revenue was not justified. The following paragraph (page 617) setting out the rationale for the decision is instructive:

"Moreover, if subsection (2) is literally construed as applying even to cases where the full value of the consideration in respect of the transfer is correctly declared or disclosed by the assessee and there is no understatement of the consideration, it would result in an amount being taxed which has neither accrued to the assessee nor been received by him and which from no view point can be rationally considered as capital gains or any other type of income. It is a well-settled rule of interpretation that the court should as far as possible avoid that construction which attributes irrationality to the Legislature. Besides, under entry 82 in List I of the Seventh Schedule to the Constitution, which deals with "Taxes on income other than agricultural income" and

> under which the I.T. Act, 1961, has been enacted, Parliament cannot "choose to tax as income an item which in no rational sense can be regarded as a citizen's income or even receipt. Subsection (2) would, therefore, on the construction of the revenue, go outside the legislative power of Parliament and it would not be possible to justify it even as an incidental or ancillary provision or a provision intended to prevent evasion of tax. Subsection (2) would also be violative of the fundamental right of the assessee under Art. 19(1)(f) which fundamental right was in existence at the time when subsection (2) came to be enacted--since on the construction canvassed on behalf of the Revenue, the effect of subsection (2) would be to penalize the assessee for transferring his capital asset for a consid0ration lesser by 15% or more than the fair market value and that would constitute unreasonable restriction on the fundamental right of the assessee to dispose of his capital asset at the price of his choice. The court must obviously prefer a construction which renders the statutory) provision constitutionally valid rather than that which makes it void."

10. In the aforesaid case the issue before the Hon'ble Supreme Court was more or less identical to the present case inasmuch as the Respondent was a beneficial owner of more than 10% of the listed company, and within a period of six months entered into sale and purchase of the shares of the listed company. The factual backdrop of the said case is to be appreciated in some detail so as to come to a just and fair conclusion that whether in effect, the benefit of it, is even available to the Appellant or not. In that case the respondent (the beneficial owner/ like the Appellant in this case) having more than 10 per cent shareholding of Messrs. World Call Communication Ltd. (the issuer / PSL in this case), made certain sales and purchases and vice versa transactions of the issuer's stocks within a period of 6 months with favourable differential price. In that case the said transaction was reported to SECP as required under section 222 of the Ordinance, whereas, the total gain made was Rs7.715 million. According to SECP respondent was required to tender such gain in terms of s.224 ibid to the issuer within 6 months of the accrual thereof or within 60 days of demand (whichever is later) raised by the issuer within a period of 6 months of the accrual of the gain. In brief, in that case SECP issued a letter for not complying with the said provision, and in response, it was submitted that *such gain has already been paid to the issuer company and there is nothing left in the matter*. However, the stance of SECP was that such compliance was never made, and even if it was made, it was done subsequent to the letter of SECP after lapse of the stipulated time; hence, it was required that such gain be tendered to SECP. In the above context, it was held by the learned Lahore High Court that no fraud and collusion has been established on record, *the amount has been*

remitted to the issuer by the respondent (the beneficial owner) which has been accordingly accepted. The money, in fact, belonged to the issuer in absence of any proof of collusion between the two, therefore the appellant (SECP), in the circumstances, cannot claim the tenderable gain from the respondent. The restriction of period to tender and claim the gain within specific time was also held not an impediment in this regard. Therefore, before proceeding to analyze the dicta laid down by the Hon'ble Supreme Court and its applicability on the Appellant's case in this matter, it is to be taken note of that it was never the case on facts that the *beneficial owner was claiming that such gain has to be retained by it*; but was accordingly paid to the issuer company, and it was only the delay, if any, which was an issue in that matter. In fact the Hon'ble Supreme Court has maintained the judgment of the Lahore High Court (barring certain part, which is not relevant here) and has done so on its own reasoning and has further elaborated and interpreted the provisions of s.224 ibid. It has no nexus with the case of the Appellant in hand at least in respect of the facts. The precise issue decided by the Hon'ble Supreme Court and as rightly contended by the learned Counsel for SECP was that can such gains be retained by SECP and for what purposes. The Hon'ble Supreme Court went on to hold that it is no business of SECP to retain any such gains. It is either to be retained by the person making such gains, (which definitely is an exception to the general rule), or by the listed Company. In the present case insofar as the transaction in question and the gains made thereafter is concerned, there is apparently no dispute. The only contention which has been raised on behalf of the Appellant is to the effect that even otherwise, the transactions were bonafide and fall within the proviso to s.224; hence, the impugned orders are liable to be set-aside. And in support reference has been made to the observations of the Hon'ble Supreme Court in Para 17(ii) & (iii) that "*On any conceivable view of the matter the only two persons or entities entitled to retain the profits are either the person in question, assuming he has acted in good faith, or the company whose shares he has bought or sold within 6 months*" (emphasis supplied). In fact the entire case as set-up and argued on behalf of the Appellant is on this very ground that notwithstanding the very provisions of s.224, if the transaction is bonoafide, then the gain is not to be returned to the Company or Issuer (PSL). For this it would be advantageous to refer to the

contention of the Appellant in the memo of appeal regarding these four transactions in question. The contention briefly reads as under:-

> "(i) The ownership of 8000 shares did not change when they were 'transferred' from one group company to another as Mr. Hashwani was 100% owner of the transferee company. Therefore, there was no purchase.
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> (ii) 1,377,200 shares from Commonwealth Development Corporation was in satisfaction of a debt previously contracted, as part of a buy-back liability which had been negotiated between CDC and Mr. Hashwani/Pakistan Services Ltd (agreement on page 121 of court file – Annexure F to the appeal).
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> (iii) The ownership of 1,377,200 shares did not change when they were 'repositioned' from one Group Company to another as Mr. Hashwani was 100% owner of the transferor company. Therefore, there was not sale.
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> (iv) The ownership of 2,400,000 shares did not change when they were 'repositioned' from one Group Company to another as Mr. Hashwani was 100% owner of the transferor company. Therefore, there was no sale."

11. If the above stance / contention is read with Section 224(1) and the proviso thereof, it appears that at least three out of the four transactions as above, do not seem to be acquisition of securities / shares in good faith, and in satisfaction of debt previously contracted. The law is very clear and unambiguous. It has been the stance of the Appellant that ownership of shares in effect did not changed when they were transferred from one group Company to another as Mr. Hashwani was 100% owner of the transferee Company. It has also been argued that it was repositioning from one Group Company to another. This contention appears to be misconceived and against the very intent and the need to enact this law. It puts a restriction on such a transaction barring the proviso and the exception contained therein. Any other act will require the gains to be returned to the issuer Company so that it benefits the entire shareholders of such a listed Company. It must not be permitted to capitalize on the profits of others. And this is what this provision is for. Mere saying that these were in effect fictional in nature as argued would not suffice. The gains so made within last six months are to be paid to the listed company and cannot be held or remain credited with the buyer or seller as the case may be. Again, for the sake of repetition, it is not in dispute that Appellant is holding more than 10% shares of the listed Company / PSL and through transactions in question, certain gains have been made. Therefore, at least in respect of the three transactions at serial

Nos. (i), (iii) & (iv) as above, the benefit of proviso cannot be claimed as it does not apply on the very transaction, whereas, the benefit of acquisition in good faith is only relatable and applicable *in case of satisfaction of a debt previously contracted*. Insofar as the fourth transaction at Serial No. (ii) as above, of 1,377,200 shares from Commonwealth Development Corporation is concerned, an attempt has been made to argue and plead that it was in good faith in satisfaction of a debt previously contracted under the Loan and Share Subscription Agreement dated 23.3.1993 and a part of a buy-back liability which had been negotiated between Commonwealth Development Corporation and Mr. Sadruddin Hashwani. However, it has been brought on record by SECP that, firstly, the agreement of debt was between *Commonwealth Development Company* and *PSL* and the Appellant was not a party to it. Secondly, the stipulated repayment duration had already expired before the date of first transaction and so it was in respect of an expired loan subscription agreement; hence, the question of good faith could never arise. Therefore, the fourth transaction as referred to hereinabove also does not fall within the exception which has been provided in law, whereas, reliance on the partial observations (and not in its entirety) of the Hon'ble Supreme Court in the judgment of ***SECP (Supra)*** is misconceived inasmuch as the Hon'ble Supreme Court has referred to classification of shares in good faith; but it could only be in relation to the proviso hereinabove, and not a general classification of shares in good faith. The shares falling in good faith could only be in respect of "*satisfaction of debt previously contracted*" and not otherwise. It is not conceivable, nor is a case to that effect has been made out that the Hon'ble Supreme Court in the referred case had made any observation or had given its findings in respect of all transactions as against the exception mentioned in the proviso. This could never have been the intention of the Hon'ble Supreme Court. The judgment of the Hon'ble Supreme Court is to be read in its entirety and so also with relevance to the peculiar facts as well. Mere picking up one sentence or a paragraph from the judgment would not suffice to make out any case in support thereof. Even otherwise the observation of the Hon'ble Supreme Court in the case of ***SECP (Supra)*** at Para 17(i) to the effect that "*As has been pointed out in the above the section has been made on the tacit assumption that the person who has carried out the transaction has*

acted in an inequitable or illegal manner by relying on inside information. His position, therefore, legally speaking is the weakest" fully applies to the case of the Appellant as nothing has been satisfactorily brought on record otherwise.

12. After the above discussion it is implicit that the Appeal has to be dismissed as gain has to be paid to PSL in this case. But there is one difficulty in doing so straightaway. And this brings me to the question that what order is to be passed in this matter. Is the Appeal required to be dismissed simplicitor?. Or any other order has to be passed. This is for the reason that while passing the impugned order, the learned Appellate Bench, without dilating upon with any supportive discussion, has simply set aside the entire Order in Original, and has directed the Appellant to pay the amount of gain to PSL and not to SECP. However, this could have been done even without setting aside the entire order by modifying it. There is nothing of any substance to justify this setting aside of the entire order, which on perusal reflects that it was passed after considering the entire case as set-up on behalf of the Appellant, and thereafter, rejected all such grounds with a cogent reasoned and a justifiable order. The only mistake committed was in respect of paying the entire gain to SECP and not to PSL, as at that point of time the Officer could not have had any knowledge of the judgment of the Hon'ble Supreme Court in the case of ***SECP (Supra)*** which was passed subsequently on 2.5.2011. The present Appeal has been filed in terms of s.34 of the SECP Act, relevant part whereof reads as under;

> 34. Appeal to the Court (1) An appeal shall lie to the Court referred to in Part II of the Ordinance in respect of an order of the Commission comprising two or more Commissioners or the Appellate Bench or order made under sub-section (2) of section 32B
>
> (2) The appeal under sub-section (1) shall be filed within sixty days of the date of the decision and shall by accompanied by a fee of one hundred rupees.
>
> (3)The Court may, on an appeal made to it under sub-section (1), ***accept, set aside or vary the order referred to in sub-section (1) or make such other order as the interest of justice require***.
>
> (4).....
>
> (5).....

13. Perusal of the above provision reflects that the Court in respect of an Appeal against orders referred to in sub-section (1), may accept, set-aside or vary the order. This provision confers a very extended and broad jurisdiction and authority upon the Court, and the order appealed can be varied and even any other order could be passed which appears to the Court to be in the interest of justice. Even otherwise it is settled law that in an appeal, the entire case and or order is open before the Court. In this case the learned Appellate Bench has though finally arrived at a correct decision by holding that the gain is to be paid to PSL and not to SECP; but while doing so it only ought to have modified the Order in Original instead of setting aside it fully, whereas, the finding to the effect that *"in the instant case it is difficult to establish whether the transactions were bonafide or not"* could only come to the rescue of the Appellant in respect of any proceedings if initiated in terms of s.224(4) ibid, and not for retaining the gains with it. In that the Appellate Bench of SECP has erred, and such part of the order needs to be varied and or corrected while dismissing the Appeal.

14. In view of hereinabove facts and circumstances of this case, I am of the view that the Appellant has failed to make out a case as apparently the gains were made and the case is fully covered in terms of Section 224(1) of the Ordinance, 1984, whereas, the transaction in question do not fall within the exception as contained in the proviso thereof; hence, appeal is though dismissed; but at the same time the portion of the order of the Appellate Bench in respect of setting aside of Order in Original is varied to read as the Order in Original is modified to the extent that the gain is to be paid to PSL / Company / issuer.

15. Appeal stands dismissed; however, with the above observations.

Dated: 04.02.2019

J U D G E

ARSHAD/