

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
M.A. No.S-04 of 2016

DATE ORDER WITH SIGNATURE OF JUDGE

Appellant: **AKD Securities Limited Through
Mr. Altamash Arab, Advocate.**

Respondent: **Securities and Exchange Commission of
Pakistan. Through
Mr. Khurram Rasheed, Advocate.**

1. For hearing of CMA No.6389/2015.
 2. For hearing of Main Case.
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Date of hearing: **19.9.2018**

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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**") impugning the Order of the Appellate Bench dated 13.10.2015 through which Order dated 10.07.2013 passed by the Director (HOD) MSRD, Securities & Exchange Commission of Pakistan ("**SECP**"), has been maintained, whereby, penalty to the extent of 500,000/- was imposed on the Appellant.

2. Briefly the facts as stated are that in 2010 SECP observed some abnormal trading activity from 22.03.2010 to 15.04.2010 in the Shares of Chenab Limited, which increased to 179% and on 03.05.2010, exercising Powers under Section 21 of the SECP Ordinance 1969 read with Section 29(2) of the SECP Act, two Investigation Officers were appointed to conduct enquiry pertaining to the business and transaction in respect of Shares of Chenab Limited. The Investigation Officers reported that two persons namely

Mr. Sohail Badar and Mr. Irfan Maqbool traded heavily in the Scrip of Chenab Limited through the Appellant during such period and thereafter relevant data was called, which was furnished and Appellant fully cooperated. Subsequently pursuant to Notice issued under Section 32 of the SECP Act, the Chief Executive Officer of the Appellant appeared personally and responded to the queries of the Investigation Officers. However, after a lapse of 30 months on 12.03.2013, a Show Cause Notice was issued to the Appellant under Section 22 of the 1969 Ordinance and Brokers Rules alleging contravention of Clause-A(1), Clause-A(2), Clause-A(4) and Clause-B(4) (1) of the Code of Conduct set forth under the third Schedule of the Brokers Rules. Such Show Cause Notice was responded, however, an Order dated 10.07.2013 was passed and a Penalty of Rs.500,000/- was imposed which was appealed before the Appellate Bench of SECP, but has been maintained through impugned Order dated 13.10.2015.

3. Learned Counsel for the Appellant submits that at the very outset the issuance of Show Cause Notice after more than 30 months of the Investigation speaks of malafides and discrimination against the Appellant. Per learned Counsel the appellant fully cooperated in the proceedings of the investigation and it is a matter of record that no adverse finding was brought on record and after having failed to prove anything; in 2013 impugned Show Cause Notice was issued, wherein, minor discrepancies in respect of the business with the aforesaid two persons was made basis for issuance of Show Cause Notice, which is an illegality in law and is an act of damaging the reputation of the Appellant. He submits that all requisite formalities were followed and completed, whereas, Show Cause Notice is based on a fishing enquiry after clearance from main

allegation. He submits that the requirement of KYC (Know Your Customer) came into field in 2012, whereas, the matter pertains to the year 2010, therefore, the same does not apply. As to the failure to fill in the nomination on the Account Opening Form he submits that the same is always optional and even otherwise the Succession Act is to prevail in case of death of a person maintaining any account with the Appellant. Insofar as the allegation regarding difference in signatures is concerned, he submits that again that is a normal situation, whereas, the Banks had verified the said signatures, therefore, nothing could be attributed against the Appellant. As to the non-submission of attested copy of CNIC he submits that was also fulfilled and is of no relevance. Per learned Counsel, the Appellant is a reputable Stock Broker and imposition of penalty is a stigma on its reputation, which has been tarnished without any justifiable reason. He submits that proceedings were initiated and maintained being a malafide act and to punish the Appellant and to settle personal grudge. Therefore, according to him the impugned Order as well as Order in Original are liable to be set-aside.

4. Learned Counsel for SECP submits that two persons as above traded heavily in the shares of Chenab Limited, whereas, the Appellant failed to maintain proper records and follow procedures, therefore, after conduct of investigation, Show Cause Notice was issued and considering the fact and situation a very meager penalty has been imposed. He submits that there are various discrepancies in the Account Opening Forms, which ought not to have been permitted and creates doubts as to the genuineness of the transaction. According to him criminal proceedings were also initiated against the said two Investors, which are pending. As to the completion of enquiry in 2010 and issuance of Show Cause Notice

in 2013, he submits that this was due to change in management and final approval, whereas, the investigation was never closed. Learned Counsel has referred to the Account Opening Forms and the discrepancies as alleged and submits that all these discrepancies were found against the Appellant, hence the penalty is justified. He submits that the Appellant was required to maintain margin deposit, which it did not, rather admitted, therefore, no case is made out. According to the learned Counsel the Brokers are required to abide by the Regulations of SECP and Stock Exchange and any deviation, either minor or major, can result into proceedings culminating in imposition of penalties.

5. I have heard both the learned Counsel and perused the record. Insofar as facts are concerned they have been stated hereinabove briefly and it appears that on 12.03.2013 a Show Cause Notice was issued under Section 22 of the 1969 Ordinance read with Rule 8 of the Brokers and Agents Registration Rules 2001. The precise allegations was to the effect that between 22.03.2010 and 15.04.2010 abnormal trading activity and heavy volumes were observed in the scrip of Chenab Limited, wherein the share price of Chenab Limited increased from Rs.4.72 to Rs.8.99, whereas, in the last six months the daily traded Volume was 102,674 shares and during the above period the daily traded volume increased to 2,232,914 shares. It is further alleged that Investigation Officers were appointed and on examination of trading data it was observed that one Sohail Badar and Mr. Irfan Maqbool traded heavily in the scrip of Chenab Limited through the Appellant. It is further alleged that after scrutiny of documents, various anomalies were found. The precise allegations were noted in Para-7 of the Show Cause Notice, which is as under:-

“7. AND WHEREAS, after the scrutiny of the documents provided by Respondent and statement recorded by CEO, various anomalies were found. After the examination of Account Opening Forms of SB and MI, it was revealed that the Respondent has failed to properly maintain the Standard Account Opening Form (“SOAF”) of SB and MI:

- The date of opening of account was not found on SAOFs.
- There were no nominations on SAOFs.
- The signatures appearing on SAOF of SB were different from his National Identity Card of Overseas Pakistanis (‘NICOP’).
- Attested copy of CNIC of MI was not attached with the SAOF.”

6. The Appellant responded to these allegations and denied the same. However, the Director HOD MSRD did not agreed with such submissions and passed the impugned order by imposing penalty of Rs.500,000/- under Section 22 of the 1969 Ordinance. Matter went into Appeal and Appellate Bench maintained the said Order on the same premise.

7. It is not in dispute that investigation was carried out in the year 2010 and the Appellant participated as well as cooperated fully to that effect. There is no adverse finding as to the main and core issue on the basis of which the investigation was initiated. It has not been pleaded nor is it the case of SECP, that this heavy trading in the scrip of Chenab Limited, caused any financial loss to somebody. Though in allegations of such nature, (i.e. Insider trading and front running), this is not always relevant; but since in this case this allegation was dropped (at least to the extent of the Appellant), never proceeded with and is nowhere mentioned in the Show Cause Notice, therefore, while imposing penalty and to have it maintained, it is of utmost relevance. It is trite law that penalty is to be imposed when there is a guilty mind present with an element of Mensrea. The same is lacking in this case. It is also a settled proposition that punishment disproportionate to the gravity of offence / guilt is as

much illegal as the act itself calling for its imposition. In fact in the Order-in-Original, at Para-11(ii) it has been observed that “The contention made by CEO that Respondent is one of the leading brokerage houses with impeccable integrity and professional record is true”. Again at Para-11(iii) it has been observed that “the contention of the Respondent that during the investigation in 2010 all the requisite information and record was provided to the Commission is true”. After this observation regarding the integrity and professional record, and compliance without showing any resistance, imposition of penalty does not seem to be justified and this Court cannot maintain the same.

8. Having said that it is also an admitted position that Show Cause Notice was issued after lapse of almost 30 months of the investigation and for this lapse and delay there is no satisfactory response on record. Even the learned Counsel for SECP was confronted as to what is the exact reason for such delay in issuing a Show Cause Notice as the investigation stood completed in 2010, but the learned Counsel could not satisfactorily respond, except that investigation was never closed. However, firstly the investigation report has not been placed before this Court, and therefore, whether it was closed or not in the year 2010, no conclusive finding can be given; and secondly the delay of 30 months in issuing the Show Cause Notice (and that too on altogether irrelevant observations and allegations) on the basis of investigation carried out in 2010 raises serious questions. Malafides can easily be attributed against SECP for first withholding the investigation report from the Court, and secondly issuing a Show Cause Notice after 30 months. It is to be appreciated that this is a case of imposition of penalty, whereas, it has a stigma on the reputation of the Appellant as well, as admittedly the Appellant is a leading Stock Broker at Karachi

(Pakistan) Stock Exchange. Therefore, in this scenario it was incumbent upon SECP to clear these anomalies to the fullest. Though may not be relevant, but it is a fact and an admitted position that time and again when there is change in Government, the management and control of SECP is also changed by bringing in the officers at the helm of affairs which are close to such Government. Therefore, again the question of malafides cannot be so lightly ignored considering the facts of this case. Keeping a matter pending for issuance of Show Cause Notice for two and a half years is a classic example of keeping the sword hanging.

9. Notwithstanding the above observation, it further appears that the first allegation is to the effect that date of opening of account was not found on the Account Opening Form. However, learned Counsel for the Appellant has referred to Page-65, which is the Account Opening Form and has contended that such date is not relevant inasmuch as the actual date is the date when the account is registered and operated before the National Clearing Company. This in fact appears to be weighty and logical. As to the difference of signatures in the Account Opening Form and the National Identity Card is concerned, firstly, I may observe that this is a normal routine that signatures of person do change after a period of time and this cannot be made a ground for imposing penalty. Moreover, the Account Opening Form placed on record also reflects that these signatures have been verified by the Bank, who are always in a better position to verify such signatures, therefore, this allegation also appears to be meaningless. As to the Nomination on the Account Opening Form and its nonfulfillment is concerned, again the same cannot be made mandatory and even if it is a mandatory, it cannot prevail upon the provisions of Succession Act which is to

take care of such issues in case of death of a Customer. Therefore, again it is not a case for imposition and sustaining any penalty. As to the attestation of CNIC, the allegation is only in respect of one Account Opening Form and as informed the same was subsequently cured by attestation and therefore once again is of no significance.

10. On the basis of the above facts and discussion and for the fact that primary allegation in respect of heavy trading and market manipulation in the scrip of Chenab Limited stands dropped and the appellant stands exonerated to that extent, whereas, after a fishing expedition in inspection of documents provided by the Appellant, the investigation continued and a Show Cause Notice was issued after 30 months of such investigation; hence, cannot be lightly ignored and apparently appears to be a case of malafides as well as discrimination and a classic example of hanging the sword, therefore, the penalty so imposed appears to be unjustified and must not be sustained.

11. Accordingly, be means of a short order on 19.09.2018, this Appeal was allowed in the following terms and these are the reasons thereof;

For reasons to be recorded later on, the appeal is allowed and the impugned order dated 13.10.2015, whereby, the order of Director (HOD) MSRD, Securities & Exchange Commission of Pakistan was maintained imposing penalty is hereby set aside. Nazir is directed to release Rs.500,000/- deposited pursuant to order dated 16.12.2015 along with profit, if any, to the Appellant.

Judge