ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

M.A. No. 11 of 2013

DATE	ORDER WITH SIGNATURE OF JUDGE

Appellants: **Shahzad Dawood & others Through Mr. Shahan Karimi, Advocate.**

Respondents: **The Appellate Bench Securities & Exchange Commission of Pakistan Through Mr. Ravi R. Pinjani, Advocate.**

1. For Orders on CMA No.1677/2013.
2. For hearing of CMA No.1678/2013.
3. For hearing of Main Case.

Date of hearing: **18.09.2018**
Date of Order: **18.09.2018**

J U D G M E N T

Muhammad Junaid Ghaffar J. Through this Appeal, the Appellants have impugned Order dated 10.01.2013 passed by the Appellate Bench of Securities and Exchange Commission of Pakistan (**SECP**), whereby, Order dated 25.5.2010 passed by the Executive Director (Enforcement) SECP was maintained through which a fine of Rs.100,000/- each was imposed on appellants No.1 to 7. The precise case of SECP through Show Cause Notice was that Appellants violated the provisions of Section 208 of the Companies Ordinance 1984 (**"Ordinance"**), read with its proviso, whereby, they were required to ensure that return on investment (in a wholly owned subsidiary or associated company, in the shape of loan) shall not be less than the borrowing cost.

2. It is contended by the learned Counsel for the Appellants that the impugned Orders passed by Respondents No.1 & 2 are not

correct and are based on incorrect appreciation of law inasmuch as the Appellants were exempted from the application of Section 208 of the Companies Ordinance 1984 (**"Ordinance"**), pursuant to issuance of SRO 819(I)/2007 dated 10.08.2007, and therefore, no fine could have been imposed. Per learned Counsel Section 208(1) of the Ordinance provides that no investment can be made by a Company in its associated Companies except through a Special Resolution, whereas, the SRO as above grants exemption from passing of any such Special Resolution; therefore, the Proviso to this subsection which requires that return on investment in the form of loan shall not be less than the borrowing cost of investing Company would not apply. He has contended that by now it is settled law that Proviso cannot extend the main statute and is always an exception to the main clause and after grant of exemption from applicability of a Special Resolution as provided in section 208 the Proviso appended to section 208 (ibid) would not apply. He has further submitted that there is no Non-obstante clause involved and if sub-section (1) is not applicable by way of exemption through SRO, then Proviso would also not apply. Per learned Counsel subsequently another SRO 704(I)/2011 dated 13.07.2011 has been issued superseding the earlier SRO and as per clause (f) now the entire section is not applicable, therefore, in the alternative, retrospective benefit of this SRO must be accorded to the Appellants. As to the imposition of fine he submits that this is not a case of any willful default or performing an act knowingly, as it is not an offence of strict liability. Whereas, admittedly two interpretations were possible; hence per settled law no fine ought to have been imposed. Finally he has contended that while interpreting a provision of law, the grammar and punctuation must also be kept in mind as sub-section (1) of S.208 ibid, ends with a colon(":"), which is always used

to contrast two parts of a sentence; hence, the proviso does not apply to the main part of sub-section (1), ibid. In support he has relied upon the cases reported as ***Collector of Customs Appraisement, Collectorate, Customs House, Karachi Vs. Messrs Gul Rehman, Proprietor Messrs G. Kin Enterprises, Ghazali Street (2017 SCMR 339), Mst. Nawab Bibi and 3 others v. Ch. Allah Ditta and others (1998 SCMR 2381), Ibrar Hussain and others v. Government of N.W.F.P through Secretary Board of Revenue and others (2001 SCMR 914), Habib Ahmad and 5 others v. Director (Enforcement) (2015 CLD 1098), Messrs Army Welfare Sugar Mills Ltd. and others v. Federation of Pakistan and others (1992 SCMR 1652), State bank of Pakistan through Chief Manager Peshawar and another v. Securities and Exchange Commission of Pakistan and others (2018 CLD 177).***

3. On the other hand, learned Counsel for respondents submits that the exemption through SRO 819(I)/2007 was only to the extent that the holding Company while making any investment was not required to pass a Special Resolution; but was not in respect of the entire Section including the Proviso. He submits that if a Special Resolution was dispensed with as contended, even then, the investment could only be made subject to wordings of Proviso, which puts a restriction on the investment vis-à-vis its return on such investment and this is for the reason that no holding Company should be given an option to make investment for making losses. He submits that it is the fiduciary duty of the Directors to act diligently and in the interest of the Company and not to make investments at losses. According to the learned Counsel the Proviso is there to reinforce the law and not to give any exception as contended, whereas, it is to be read together and not independently. He has also

contended that the present proceedings are under a Special Law i.e. the Ordinance, wherein, strict interpretation is to be given for compliance of Regulations failing which people would be permitted to avoid applicability of such laws and thereby cause losses to the investor and shareholders. As to retrospectivity of SRO 704(I)/2011, learned Counsel submits that no such ground was raised in the memo of Appeal rather a contrary stance has been taken vis-à-vis this SRO. In response to the contention that there is no willful default, learned Counsel submits that the law is plain and clear and there are no ifs and buts attached to the provisions in question; therefore, it is a case of willful default and appellants have acted knowingly to circumvent the restriction placed through and under Section 208 (ibid). He finally submits that the investment was made without mentioning the return on such investment and this was knowingly done and so its consequences must follow, therefore, no case for indulgence is made out. In support he has relied upon the cases reported as ***Gulistan Textile Mills Ltd. and another v. Soneri Bank Ltd. and another*** **(2018 CLD 203)**, ***Messrs Hamdard Dawakhana v. Commissioner of Income Tax, Karachi*** **(PLD 1980 Supreme Court 84) and** ***Karachi Development Authority through Director General, Civic Centre, Gulshan-e-Iqbal, Karachi v. Mst. Hawa bai and 6 others.***

4. I have heard both the learned Counsel and perused the record. Precisely the facts leading to these proceedings are that a Show Cause Notice dated 18.02.2010 was issued to the Appellants for alleged contravention of Section 208(1) of the Ordinance for having made advances to one of its Associated Company "**TGL**" without any special Resolution and any return on such investment. The Show Cause Notice was replied and exemption was sought in

terms of SRO 819(I)/2007 and it was contended that holding companies are exempted from passing a special Resolution for making investment in its wholly owned subsidiary. This stance was not accepted and an order was passed by imposing fine of Rs.100,000/- each on Appellants No.1 to 7, which was maintained by the Appellate Bench of SECP through impugned order as according to SECP, the exemption was only to the extent of dispensing with passing of a Special Resolution, and not from the proviso. For understanding the controversy in hand, it would be advantageous if the relevant provisions of Section 208 of the Ordinance are referred which reads as under:-

> "⌈208. Investments in associated companies and undertakings (1) [Subject to sub-section (2A) a] company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a special resolution which shall indicate the nature, period and amount of investment and terms and conditions attached thereto:
>
> ***Provided that the return on investment in the form of loan shall not be less than the borrowing cost of investing company.***
>
> Explanation.-The expression 'investment' shall include loans, advances, equity, by whatever name called, or any amount which is not in the nature of normal trade credit.
>
> (2A) The Commission may–
>
> (a) By notification, in the official Gazette, specify the class of companies or undertakings to which the restriction provided in sub-section (1) shall not apply; and
>
> (b) Through regulations made thereunder, specify such conditions and restrictions on the nature, period, amount of investment and terms and conditions attached thereto, and other ancillary matters, [] companies as it deems fit.}
>
> (3) If default is made in complying with the requirements of this section, **[or the regulations,] every director of a company who is knowingly and wilfully in default shall be liable to fine which may extend to ***[ten] million rupees and in addition, the directors shall jointly and severally reimburse to the company any loss sustained by the company in consequence of an investment which was made without complying with the requirements of this section."

5. Perusal of the aforesaid section reflects that, first of all it is a provision which puts a restriction under subsection (1) and provides that a Company shall not make any investment in any of its associated companies or associated undertakings except under a authority of a special Resolution, which shall indicate the nature, period and amount of investment and terms of condition attached

thereto, provided, that the return on investment in the form of loan shall not be less than the borrowing cost of investing Company. It would also be relevant to refer to the exemption from applicability of this provision, which has been provided in SRO 819(I)/2007, which reads as under:-

> "S.R.O. 819(I)/2007.—In exercise of the powers conferred by clause (a) of sub-section (2A) of Section 208 of the Companies Ordinance, 1984 (XLVII of 1984), the Securities and Exchange Commission of Pakistan is pleased to notify that the following class of companies shall be exempt *from the requirement of obtaining the authority of a special resolution* for making investment in associated companies or undertakings as required under subsection (I) of section 208 to the extent provided hereunder:
> (a) …….
> (b) ……
> (c) …….
> (d) ……
> (e) ……..
> (f) a holding company, to the extent of investments made in its wholly owned subsidiary:
> Provided that any disinvestment by a holding company which would reduce its holding in the subsidiary, in which an investment was made pursuant to this exemption, to less than 75% shall be made under the authority of a special resolution.
> (g) ……"

6. On perusal of the exemption in question on which reliance has been placed, it appears that by exercising powers conferred under clause-(a) of the Subsection 2A of Section 208 of the Ordinance it has been notified that the holding Company shall be exempted from the requirement of obtaining the authority through Special Resolution to the extent of investment made in its associated companies or undertakings. This clearly reflects that the exemption is not from the applicability of the entire provision, i.e. Sub-section (1), as contended, and it is only limited to the extent of passing of a Special Resolution to that effect. On the other hand, the provision of Section 208 ibid, as observed earlier, is in a manner of restriction in respect of investments to be made in the Associated Companies or undertaking. The arguments of the learned Counsel for the

Appellant that exemption from passing of a Special Resolution also applied from the restriction regarding the manner of investment and its return is not correct. Sub-section (1) of Section 208 ibid, puts a complete restriction on making any such investment except by a Special Resolution, which in the instant matter has been exempted for the present purposes. However, the Proviso in this case even otherwise qualifies making of investment in the form of loan by putting an embargo that such return on investment shall not be less than the borrowing cost of the investing company. There appears to be a conscious legislation in this situation and the primary objective appears to be and as rightly contended by the Respondents' Counsel is that no holding Company should be permitted to make investment in its wholly owned subsidiary to incur losses on such investment. It must be linked with return on such investment and which must not be less than the borrowing cost of such investment. The exemption under SRO is only in respect of passing of a Special Resolution and has got nothing to do with the restriction otherwise provided in Subsection (1) read with the Proviso thereof. As noted earlier it is a restriction within a restriction, and therefore, the contention that the Proviso must be construed strictly and must not be so interpreted so as to make it a substantive law is not appropriate. Here in this matter the Proviso is and must be read together with sub-section (1), failing which it will be redundant, and therefore, literal interpretation of a Proviso as has been contended and done in various citations as relied upon would not apply. In fact the proviso along with Sub-section (1) has to be read in the following manner;

> "**Investments in associated companies and undertakings** [Subject to sub-section (2A) a] company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a special resolution [***Provided that the return on investment in the form of loan shall not be less than the borrowing***

> ***cost of investing company]*** which shall indicate the nature, period and amount of investment and terms and conditions attached thereto"

7. As to the contention that investment was not a stricto-senso loan but by way of equity is also misconceived, inasmuch as according to the Appellants own pleadings such shares [by way of equity] were issued on 10.5.2010, after issuance of Show Cause Notice on 18.2.2010, whereas, investment was made on 2008; hence cannot be considered. Even otherwise, the explanation to Sub-section (1) of section 208, clearly provides that expression *investment* shall include loan, advances, equity by whatever name called or any amount which is not in the nature of normal credit. It is not denied that investment was made, therefore, it is immaterial for the present purposes that whether it was loan or equity.

8. As to the argument regarding colon (":") at the end of sub-section (1) of s.208, it would suffice to observe, that though in interpretation of statutes, grammar and punctuation is to be given due consideration, but that is not always so. There is always a possibility that draftsman may have committed a mistake while using the grammar or punctuation, and in fact it is the pith and substance of the statute being interpreted which always has to be kept in mind and is to be accorded preference, as against the mistake in grammar or punctuation. In the case reported as ***Bakhsh Elahi v Qazi Wasif Ali*** (**1985 SCMR 291**), the Hon'ble Supreme Court had the occasion to deal with a similar situation while interpreting Section 14 of the Sind Rented Premises Ordinance, 1979, and has observed as under;

> 10. Now the tense used in a statutory provision may have a decisive effect on the interpretation of such provision *but it is not an absolute test for construing a statute, for, the literal construction according to the rules of grammar although a primary rule in the matter of construction of statutes, has not been universally applied in every case. If the grammatical*

construction is found to be at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, it has been held that in such cases the language may be varied or modified, so as to avoid inconvenience. See Muhammad Zaki v. Rehabilitation Commissioner P L D 1962 Kar. 285 and Islamic Republic of Pakistan v Abdul Wali Khan PLD S C 57.

9. In the case reported as ***Dr. Muhammad Anwar Kurd v The State*** (**2011 SCMR 1560**), the Hon'ble Supreme Court has been pleased to interpret proviso to Section 15 and 25 of the National Accountability Ordinance, 1999, and it has been held as under;

22. When confronted by the Court with the legal issue of exclusion of application of subsection (3) to section 25 (ibid) to the case of appellants due to exception to its general application provided by its proviso, Mr. Gillani made valiant attempt to save the appellants from this legal position. He contended that though on facts, case of the appellants is hit by the said proviso, as proceedings before NAB were at the stage of enquiry/investigation, but its application, as such, to their cases will virtually nullify the whole effect of subsection (3) to section 25 (ibid), and will make it redundant in their cases in a situation where otherwise said subsection starting from non obstante clause "notwithstanding" has overriding effect on the application of section 15 (ibid) to the case of appellants. This submission of the learned Senior Advocate Supreme Court has again no legal force, as the very object and purpose of legislature by inserting a proviso with a section/subsection is to provide an exception, and to control or bar the application of main section/subsection in certain cases. Thus, natural presumption of providing such proviso is to exclude the general application of the relevant section/subsection in the matter notified under the proviso. In the words of Hadayatullah, J. "As a general rule, a proviso is added to an enactment to qualify or create an exception in what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule" (see: AIR 1961 SC 1596). It is, therefore, understandable that proper function of the proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment. *Thus, to say that proviso shall normally be construed not merely to limit or control, but nullifying the enactment and taking away completely a right conferred by the enactment, is incorrect.* We may add here that application of well recognized rule of harmonious interpretation of statute, to the facts of these cases, also does not lend any support to the arguments of Mr. Gillani, keeping in view that there is no such inconsistency or conflict in various provisions of Ordinance of 1999, and the principle that, unless inevitable, no redundancy can be attributed to any part of a statute, which is to be read and interpreted as a compact and complete single document. To add force to the above legal proposition, here a reference to the case of S. Sundaram v. V. R. Pattabhiraman (AIR 1985 SC 582) will be useful, wherein, after detailed discussion about the scope,

object and purpose of "proviso", with reference to number of cases on the subject from Indian Supreme Court, Court had observed as under:-

> "42. We need not multiply authorities after authorities on this point because the legal position seems to be clear and manifestly well established. To sum up, a proviso may serve four different purposes:-
>
> (1) qualifying or excepting certain provisions from the main enactment:
>
> (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
>
> (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
>
> (4) it may be used merely to act as an option addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

10. In the case reported as ***Hamdard Dawakhan (Supra)***, the Hon'ble Supreme Court has been pleased to reiterate the view that though function of proviso is to except out what it precedes; but such rule is not absolute and inflexible. It has been held as under;

> It is true that ordinarily the function of the proviso is to except out of a previous enacting part of a statute something which, but for the proviso, would have been within the enacting part, *but it is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment.* Generally, the natural, presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso; *but the clear language of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the main provision, but is in itself a substantive provision.* .....In the words of Maxwell "the true principle is that the sound view of the enacting clause, the saving clause and the proviso taken and construed together is to prevail".

11. The main focus and punch line of the arguments which were raised by the learned Counsel for the Appellants rests on the interpretation of the proviso that it excludes the application of the part of statute to which it is appended, and in support he has relied upon the precedents as noted hereinabove. Though under normal circumstances and in most of the cases it is like this; however, there is also an exception to this rule and has also been recognized by the

Courts, when the main part of the Statute has been found to be worded in a manner, that the proviso has to be recognized as a substantive part of the said statute and is to be read together. As though ordinarily the proviso is regarded as an exception to the main part of the statute to which it is attached; however, in exceptional cases it could be regarded as falling within or to the main statute. What is relevant for present purposes is that it is well accepted that sometimes a proviso is not to be regarded as a "true" proviso but rather as an independent substantive provision in its own right[1]. Such an interpretation of a proviso is rare but recognized and supported by various authorities. It may, however, be added that there may be cases in which the language of the statute is so express and clear that a proviso may be construed as a substantive clause[2]. While in many cases that is the function of a proviso, it is substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a proviso may itself add to and merely limit or qualify that which precedes it[3]. But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so called proviso has substantially altered the main section[4]. What we have stated earlier should suffice to establish that the proviso now before us is really not a proviso in the accepted sense but an independent legislative provision by which to a remedy which is prohibited by the main part of the section, an alternative is provided[5].

---

[1] **Pakistan International Freight Forwarders Association v Province of Sindh (2017 PTD 1)**
[2] **Commissioner of Income Tax v Phillips Holzman A.G. Ameejee Valeejee & Sons (PLD 1986 Karachi 95)**
[3] **Commissioner of Stamp Duties v Atwill [1973] 1 All ER 576.**
[4] **Hiralal Rantalal v State of U.P. and another (AIR 1973 SC 1034)**
[5] **State of Rajasthan v Leela Jain (AIR 1965 SC 1296)**

12. As to the contention that it is not a willful default or an act knowingly done it may be observed that again this stance is also misconceived inasmuch as all along the appellants have contested the matter and have sought exemption under the said SRO from even passing of a Special Resolution and so also disclosing the return on investment. This definitely was intentional so as to gain from such exemption and the only purpose was not to give any return on the investment to the Holding Company from its subsidiary, in violation of the provisions of Section 208 ibid, therefore, this cannot be termed as a case of inadvertence or error for that matter; rather it appears to be an act done knowingly.

13. In view of hereinabove facts and circumstances, of this case, I am of the view that the Appellants have failed to make out any case for indulgence and the Order appealed before this Court appears to be correct in law and is to be maintained, therefore, by means of a short Order on 18.09.2018, instant appeal along with all pending applications was dismissed and these are the reasons thereof.

Judge

Ayaz P.S.