IN THE HIGH COURT OF SINDH AT KARACHI

M.A. NO. 48 / 2017

Appellants:	**M/s. Dadabhoy Cement Industries Ltd. through Mr. Muhammad Saleem Thepdawala along with Mr. Khadim Ali Metlo Advocates.**
Respondents:	**Securities & Exchange Commission of Pakistan & another through Mr. Imran Shami along with Saad Abbasi and Syed Ebad Advocates.**

1) For hearing of CMA No. 4777/2017.
2) For hearing of main case.

Date of hearing: **16.11.2018.**
Date of order: **16.11.2018.**

O R D E R

Muhammad Junaid Ghaffar, J. This is an Appeal under Section 34 of the Securities and Exchange Commission of Pakistan Act, 1997 ("SECP Act") through which order dated 20.03.2017 passed by the Appellate Bench of the Securities and Exchange Commission of Pakistan has been impugned, whereby, the order dated 05.04.2016 passed by the Commissioner has been upheld.

2. Learned Counsel for the Appellant submits that a Show Cause Notice under Section 160 read with Section 100 of the Securities Act, 2015 was issued for alleged default in payment of annual listing fees of Karachi Stock Exchange for two years, and through order of the Commissioner, a very harsh penalty of Rs.0.5 million each was imposed upon the Company and all Directors. He submits that the

violation alleged was in respect of Regulation No. 5.11 of the Listing Regulations, whereas, the penalty has been imposed under the Securities Act, 2015 which is against the law; hence, is not sustainable. According to him, the Appellant No.1 was closed for all its operations since 2008, and when the impugned listing fee was demanded, the Appellant No.1 through its Letter dated 26.10.2015 requested the Commission to permit payment of the same through installments which was not accepted and an adverse order was passed. He submits that subsequently, the requisite fee with surcharge and penalties as provided under the Listing Regulations has been deposited with the Stock Exchange, and therefore, the impugned orders of the Commissioner as well as the Appellate Bench of SECP are not sustainable and must be set aside. According to him, the Appellant could not be subjected to double jeopardy, as on the one hand they have already made payment of listing fee in accordance with the Stock Exchange Regulations along with surcharge; and on the other, for payment of penalty under the Securities Act, 2015. In support he has relied upon ***Imran Ahmed V. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and 2 others (P L D 2014 Sindh 218) and Hassan and others V. The State and others PLD 2013 SC 793).***

3. On the other hand, learned Counsel for SECP submits that admittedly the appellants have defaulted and failed to pay the listing fee for the years 2014-2015, whereas, the trading was suspended hence, SECP was justified in taking the impugned action so as to protect the interest of the shareholders. He further submits that matter pertains to the year 2015 when the directions of SECP were not complied with, and therefore, the Show Cause Notice was issued,

whereas, the payment as claimed has been made in 2017 therefore, the appellants are not entitled for any relief.

4. I have heard both the learned Counsel and perused the record. As per facts of the case it does not appear to be in dispute that Appellant No.1 went into default in payment of listing fee as required under the then Karachi Stock Exchange Regulations and now the Pakistan Stock Exchange Regulations. At the first stage SECP issued directions to Appellant No.1 for making such payment(s), purportedly by exercising powers in terms of Section 100(b) of the Securities Act, 2015, under which SECP can issue directions. The directions as stated were not complied with and a Show Cause Notice dated 16.10.2015 was issued. The Show Cause Notice besides referring to Section 100 (b) ibid, also alleged an offence under Section 159(5)(c), whereas, the relevant provision which deals with defaulter segment, suspension and delisting is provided in Stock Exchange Regulations 5.11.1(e). It would be advantageous to refer to all these relevant provisions together which reads as under:-

> **"5.11. DEFAULTER'S SEGMENT, SUSPENSION AND DE-LISTING:**
>
> 5.11.1 A listed Company may be placed in the Defaulters Segment if:
>
> (a) ----------
> (b) ----------
> (c) ----------
> (d) ----------
>
> (e) It has failed to pay within the time specified by the Exchange:
>
> (i) The annual listing fees for two (2) years; or
> (ii) Any penalty imposed by the Exchange under these Regulations though final order; or
> (iii) Any other dues payable to the Exchange under these Regulations;"

> "**100. Power of the Commission to issue directives to listed companies.—** Where it appears to the Commission that—

(a) ----------
(b) The listed company is in breach of listing regulations; or

"159. Offences and penalties:-- (1)Any person who commits and offence under Section 128 (insider trading) shall be liable—

(a) ----------
(b) ----------
(2) ----------
(a) ----------
(b) ----------
(3) ----------
(a) ----------
(b) ----------
(c) ----------
(4) ----------
(5) ----------
(a) ----------
(b) ----------
(c) obstructs or contravenes or does not comply with any order or directions of the Commission including an employees of the Commission, or an authorized person or investigator, in the performance of his duties under this Act,

5. A combined Perusal of the aforesaid provisions reflects that first action has been initiated under the Securities Act, 2015; however, insofar as the power of Commission to issue directions is concerned, Section 100(b) provides that such directions can be issued by the Commission where it appears to the Commission that the listed Company is in breach of *Listing Regulations*. This is the only power which entitles the Commission in the present facts to initiate proceedings. Now once it has been alleged that a Company is in violation of the listing regulations, then, as a consequence thereof, it would be the *Listing Regulations* under which further proceedings can take place. However, what the Commission has done is, that they have resorted to the general provisions of offences and penalties as provided under Section 159 ibid, which per-se is not appropriate in the given situation. It may be appreciated that a direction for making payment of

the listing fee would not be an offence within the Securities Act itself; but only empowers the Commission to issue certain or any directions and offence as a corollary would be covered by the special provisions i.e. the *Listing Regulations* of the Stock Exchange. The Show Cause Notice is not for recovery of the listing fee, but is in respect of violation of the listing regulations and for that the only consequence could be found in the Listing Regulations of the Stock Exchange. Any other resort is not understandable. Para 5.11 ibid clearly provides that a listed Company may be placed in the defaulter segment if it has failed to pay within the time specified by the Exchange the annual listing fee for two years. For such violation there is a complete procedure provided in the listing regulations in 5.18.1(e) which reads as under:-

> **"5.18. LISTING OF ANNUAL SCHEDULE:**
>
> (a) ----------
> (b) ----------
> (c) ----------
> (d) ----------
> (e) Failure to pay the annual fee by 30th Septemebr shall make the company liable to pay a surcharge at the rate of 1.5 percent (one and a half per cent) per month or part thereof, until payment. However, if reasonable grounds are adduced for nonpayment or delayed payment of annual fee, the Exchange may, reduce or waive the surcharge liability."

6. It is a matter of admitted position that in compliance of the above regulations the Appellant No. 1 has deposited the arrears of the annual fee along with surcharge which even otherwise, provides that if reasonable grounds are adduced for nonpayment or delayed payment of annual fee, the Exchange may reduce or waive the surcharge liability.

7. After having considered the above legal position, I am of the view that the Commission has misdirected itself by taking such a harsh action of imposing penalties of Rs.3.5 million in the aggregate (Rs.0.50

Million on each Appellant) as against the liability of Rs. 400,000/- which also stands paid. The Commission was not supposed to take such action under the offence of penalties as provided in the Securities Act, 2015 but under the Stock Exchange Regulations as Section 100(b) limits itself to the violation of such listing regulations. It is settled law that if an offence is covered by a specific provision, then the action can only be taken under the specific provision, and not under a general provision as has been done by the Commission in this matter. In the case reported as ***Kaghan Ghee Mills (Pvt) Limited v Collector of Customs*** (**2013 PTD 1259**), the petitioner was issued a show cause notice for having violated the provisions of Section 156(1)(90) of the Customs Act, 1969, which provided a penalty equal to ten times the value of the goods, whereas, the contention of the petitioner was that the offence so alleged was more specifically covered under Section 156(1)(62) which provides a maximum penalty of Rs.25000/-. The learned Peshawar High Court agreed with the contention of the petitioner and was of the view that a plain reading of two clauses juxtaposed, would indicate without difficulty to comprehension or interpretation that to the circumstances of the present case, it is clause 62 of the section which applies and not clause 90. I am fully in the agreement with the said observations of the learned Peshawar High Court. It is further settled that the penalty so imposed must have nexus with the gravity of the offence committed by an offender, whereas, punishment disproportionate to the guilt is as much illegal as the act calling for imposition. Reliance in this regard may be placed on the case reported as ***Nafa Trade Impex v Additional Collector of Customs*** (**2002 PTD 1464**). It is further held by the Hon'ble Supreme Court in the case reported as ***G.M. Pakistan Railways v Muhammad***

Rafique (**2013 SCMR 372**), that competent authority while awarding the penalty had to keep in mind the gravity of the charge. Again the Hon'ble Supreme Court in the case reported as ***SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN V FIRST CAPITAL SECURITIES CORPORATION LIMITED*** **(PLD 2011 SC 778)** has been pleased to hold that **"**It should also be clarified that since the penal provision is stringent in nature it should be applied in an appropriate manner. In applying such a provision SECP should always bear in mind the importance of determining not merely a technical contravention but a substantial finding of guilt in relation to the person on whom the fine or penalty is being levied. It is not sufficient either in the case of this law, or any other law, merely on the basis of a technical contravention to arbitrarily impose a fine of either the full amount or 50% or 75% or any other arbitrarily chosen figure; a condign punishment is the requirement of law and equity". In this matter there appears no justification for imposition of such an excessive penalty on the Company as well as its Directors for a meager amount of Rs. 400,000/- which is no more in default and at least the Appellate Bench ought to have considered the same.

8. In view of hereinabove facts and circumstances of this case, I am of the view that the order of the Commission as well as the Appellate Bench dated 20.03.2017 and 05.04.2016 cannot be sustained and therefore, by means of a short order on 16.11.2018, this Appeal was allowed by setting aside the same and these are the reasons thereof.

J U D G E

ARSHAD/