

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui

Misc. Appeal No. 02 of 2022

Mckinsey & Companies Pakistan (Private) Limited
Versus
Securities & Exchange Commission of Pakistan

Date of Hearing: 06.12.2022, 20.12.2022 and 18.01.2023

Appellant: Through Mr. Mayhar Kazi Advocate.

Respondent: Through Mr. S. Imran Ali Shamsi, Law Officer

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This appeal under section 34 of Securities & Exchange Commission of Pakistan Act, 1997 impugns an order dated 05.07.2021 passed by Appellate Bench of SECP in Appeal No.88 of 2020. Initially only a letter was forwarded by SECP to disclose the decision to the appellant, through its director vide letter dated 25.11.2021 which letter was impugned. Later however, in pursuance of the direction of the Court, copy of impugned order was provided to Court, which fact was brought on record vide statement dated 13.12.2022. Thus, this Miscellaneous Appeal essentially impugns order of 05.07.2021. With this understanding the counsels have argued in support of their respective pleadings.

2. I have heard the learned counsel for parties and perused material available on record.

3. Brief facts of the case are that for past several years the appellant had been filing applications under section 225(2) of the Companies Act 2017, seeking exemption from disclosure requirements enumerated in the relevant schedule applicable and each time, on appellant providing same reasons, such exemptions were granted. Such

applications were being allowed in consideration of the reasons assigned to the SECP in terms of section 225(2) of the Companies Act, 2017, which concerns with the public interest.

4. It is to be seen whether such disclosure would in fact be against public interest; such as remuneration of CEO/director as it would go unattended and undeclared and also that the delinquent would get away from the consequences of its disclosure.

5. The cause triggered when last such application was moved in the year 2021 under section 225(2) of the ibid Act stating same reasons as had consistently been pleaded on which a different view was formed and exemption application was rejected followed by impugned order of Appellate Bench, referred above. This impugned decision/order was passed in consideration and understanding of law as settled by the Appellate Bench of SECP in the case of Salim Habib Foundation v. Registrar SECP. With the assistance of the counsels I have gone through this order which discussed the aspects involved in rejection of the application. It applied provisions of Section 228 in rejecting application.

6. For the purposes of present controversy we need to understand the frame of the Companies Act, 2017, in particular sections 225 and 228 of the ibid Act under which provisions, the exemption application was moved and considered.

7. The Act defines a company under section 2(17) as a company formed and registered under the Act 2017 or the company law; whereas section 2(35) describes foreign company, which means any company or body corporate incorporated outside Pakistan, which:

(a) has a place of business or liaison office in Pakistan whether by itself or through an agent, physically or through electronic mode; or

(b) conducts any business activity in Pakistan in any other manner as may be specified.

Section 2(37) describes holding company which means a company which is another company's holding company if, but only if, that other company is its subsidiary; whereas private company is defined under section 2(49) i.e. the one which:

(a) restricts the right to transfer its shares;

(b) limits the number of its members to fifty not including persons who are in the employment of the company; and

(c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures or redeemable capital of the company:

Provided that, where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition, be treated as a single member;

8. Section 220 of the Companies Act requires books of accounts to be kept by the companies whereas section 225(1) requires that financial statement, as required by such companies, shall give a true and fair view of the state of affairs of the company and that it should comply with the financial reporting standards notified by the Commission and shall be prepared in accordance with the requirements contained in the third schedule for different class or classes of the companies.

9. The first proviso of *ibid* section caters for a situation for preparation of financial statements and relevant accounting methods for associated companies whereas second proviso exempts its application to insurance or banking companies or to any other class or company whose requirement of financial statement are specified in the law regulating such class of companies.

10. Subsection (2) of Section 225 requires that the Commission of its own motion or upon application by a company, may modify, in relation to that company, the requirements of the relevant schedule for the purpose of adopting it to the circumstances of a company whereas subsection (3) of section 225 provides that the Commission shall have power from time to time to grant exemption to any company or any class

of companies if it is in the public interest so to do, from compliance with all or any of the requirements of the relevant Schedule.

11. Section 228(1) of the Companies Act, 2017 insists for a consolidated financial statement of the group in relation to holding company having subsidiary or subsidiaries, at the end of the financial year at which the holding company's financial statements are to be made through a consolidated financial statement as a "single enterprise". Such consolidated financial statements shall then comply with the disclosure requirements of the relevant Schedule and financial reporting standards notified by the Commission. It however restricts its application to private companies and its subsidiary where none of the holding and subsidiary company has the paid up capital exceeding one million rupees whereas Subsection (7) of Section 228 requires that the commission may, on an application of a holding company, direct that the provisions of this section shall not apply to such extent as may be specified in the directions. This proviso is not pressed by appellant.

12. In the instant case the company though is a private limited company incorporated in Pakistan however its 99% shares are held by Mckinsey Pakistan Holdings Inc. a company incorporated in the State of Delaware, U.S.A. The record does not speak as to the classification of company under consideration in terms of Third Schedule and the consequential disclosure requirement under the following Fourth and Fifth Schedule of the Act. The Commission could only exempt the company or any class of company if it is in the public interest, so to do from compliance or any of the requirements of the relevant schedule.

13. The exemption was sought on the count that the disclosure of the remuneration of the CEO/director is a cause of concern since such financial statement would reveal such facts for public and would then be available for public inspection. It is, in my tentative view, not a cause

where exemption could be granted in the public interest. Appellant before me is itself a company whose shares are being held by holding company and is incorporated in State of Delaware, United States of America. It is not a company strictly in terms of section 2(49) of the Companies Act which even itself restricts the right to transfer its shares; on the strength of pleadings and the record it rests with the holding company. So, if at all, for a company being a subsidiary, whose shares are being held by a holding company and a consolidated financial statements of the group is attached with the financial statement of that holding company, then such consolidated financial statement of the group would serve as a single enterprise and such consolidated financial statement shall comply with the disclosure requirement of the relevant law and financial reporting standards notified by the Commission, which is not the case here. It is nobody's case that holding company has discharged such obligations, if at all it is under such duty. It is not stated that the holding company has disclosed such data in the consolidated financial statements of the group and presented as those of single enterprise and that such would be within domain of SECP, so that the purpose of non-disclosure of the remuneration of CEO or director of the relevant company whose shares are being held, would be inconsequential.

14. With this understanding I reject appeal of the appellant however if the requirement of section 228(1) is achieved; by any means, the application shall then for such exemption stands matured for consideration.

Dated: 13.02.2023

J U D G E