

IN THE HIGH COURT OF SINDH AT KARACHI

CR. MISC. APPLICATION NO.23/2016

Applicant : Wahid Khursheed Kunwar,

Respondent : The State.

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CR. MISC. APPLICATION NO.6/2017

Applicants : Muhammad Farid Alam and others,

Respondent : The State.

Date of hearing : 15.05.2018.

Date of announcement: 01.06.2018.

Appearance:

Mr. Raj Ali Wahid Kunwar advocate for applicant in Cr. Misc. Application No.23/2016.

Mr. Amel Khan Kanshi advocate for applicant in Cr. Misc. Application No.6/2017.

Mr. Ameruddin advocate for respondent-EOBI.

Mr. Muhammad Aslam Bhutta, Assistant Attorney General, appearing for respondent-State in Cr. Misc. Applications No.23/2016 and 6/2017.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Through the captioned criminal miscellaneous applications, the applicants seek quashment of proceedings emanating from FIR No.27/2015 under section 409, 109, 34 PPC read with section 5(2) PCA Act 1997, PS FIA, CCC, Karachi.

Succinctly, facts of the prosecution are that :-

As per the FIR No.34/2014, lodged by FIA after enquiry and challan, the allegations detailed against accused persons are as follows:-

1. The shares of M/S.Amtex Limited were purchased in trading portfolio. The *trading committee* that approves the purchase / sale of shares in trading portfolio comprises of the following two members:

- i) Chairman EOBI (Mr. Zafar Iqbal Gondal)
- ii) Investment Advisor & Director (Investments) (Mr. Wahid Khursheed Kunwar).

2. As per record seized by FIA dated 30.09.2011, EOBI purchased shares of M/S.Amtex Limited as under:

Script	No of Shares	Amount (PKR)	Cheque No.	Date of purchase	Date of settlement
Amtex Ltd	11,700,000	227,172,818	6779818 dated 16.08.2010 of NBP Main Branch, Head Office, Karachi in favour of M/S Foundation Securities (Pvt.)Ltd.	10.08.2010	16-08-2010
Amtex Ltd	5,650,000	110,487,106	6779829 dated 27.08.2010 of NBP Main Branch, Head Office, Karachi in favour of M/S Foundation Securities (Pvt.)Ltd.	25.08.2010	27-08-2010
Total	17,350,000	337,659,924			

3. Muhammad Ayoub Khan (Director Investment) wrote illegal office letter dated August 10, 2010 with malafide intentions to the M/s Foundation Securities (Pvt) Ltd that Zafar Iqbal Gondal (Chairman EOBI) and Wahid Khusheed Kunwar (DG Investment, EOBI) are authorized to trade in the equity market on behalf of EOBI Investment w.e.f. July 1,2010. This letter was written with the malafide intention and mensrea as no authorization was sought from Board of Trustees of the EOBI as required by The Employees' Old-Age Benefits (Board of Trustees) Rules, 1977. Whereas, the so called Trading Committee consisting of Zafar Iqbal Gondal (Chairman EOBI) and Wahid Khusheed Kunwar (DG Investment, EOBI) was not authorized to purchase 17,350,000 shares of M/s, Amtex Limited of Rs. 337,659,924. It is established that Muhammad Ayoub Khan (Director Investment) hand in glove with Zafar Iqbal Gondal (Chairman EOBI), Wahid Khusheed Kunwar (DG Investment, EOBI) and Mirza Imtiaz Ahmed DG (F&A) EOBI illegally with malafide intention and ulterior motives purchased 17,350,000 shares of M/s. Amtex Limited for Rs. 337,659,924/-. Mirza Imtiaz Ahmed DG (F&A) EOBI was Ex-Officio member of Investment and Audit Committees of EOBI.

4. The accused persons namely (1) Zafar Iqbal Gondal, the then Chairman EOBI, (2) Kanwar Khursheed Wahid, the then DG Investment EOBI, (3) Muhammad Iqbal Dawood, Convenor of the

Investment Committee EOBI, Investments, Karachi (4) Mirza Imtiaz Ahmed DG (F&A) EOBI, and (5) Muhammad Ayub Khan the then Director (Investment) EOBI, in connivance with each other purchased the shares of M/s. Amtex Limited in trading portfolio.

5. The total 17,350,000/- shares of M/s. Amtex Limited were purchased by EOBI against PKR 337,659,924!-. The above shares were purchased unscrupulously / dishonestly with ulterior motives on recommendation and approval of Investment Committee of EOBI comprising of Wahid Khursheed Kunwar, the then DG Investment, and Zafar Iqbal Gondal the then Chairman EOBI. The current per share price is PKR 2.54. Resultantly, wrongful loss to public exchequer/EOBI to the tune of PKR 290 million and corresponding wrongful gain to the accused persons.

6. Whereas as per record of the Karachi Stock Exchange (Guarantee) Limited, Ws. Amtex was enlisted with the Karachi Stock Exchange in April 2010 and EOBI invested on 16.08.2010 and 27.08.2010, whereas the Employee's Old Age benefits (Investment) Rules, 1979 do not permit to do so.

7. The Seller/ Director (Amtex) could not sell shares directly to EOBI. They need a brokerage house to execute the deal and Amcap Securities and other brokerage houses abridged that gap. The CEO/Directors of M/s Amtex Limited namely Khurram Iftikhar (CEO), Shahzad Iftikhar (Director), Nadeem Iftikhar (Director), Zafar Saleem (Director), Faiza Khurram (Director), Sajida Shahzad (Director), Nusrat Parveen (Director) in connivance and in abetment with the CEO/Directors of Amcap Securities namely Abdul Rauf Ghani s/o Abdul Karim (Chief Executive), Hail Iftikhar-ud-Din s/o Alla-ud-Din (Director), Sonia Nadeem w/o Nadeem Iftikhar (Director) succeeded in accomplishing their nefarious designs of selling those shares to EOBI. Amcap Securities is owned by family members of Amtex. The founding member of Amcap Securities is Mr. Iftikharuddin who is father of CEO of Amtex Ltd i.e. Mr. Khurram Iftikhar. It is a matter of record that Amcap securities played pivotal role in the trading of Amtex Shares, executed sales to EOBI. Section-187 of the Companies Ordinance 1984 clearly says about the ineligibility of certain persons that no person shall be appointed as a director of a company if he is engaged in the business of brokerage, or is a spouse of such person or is a sponsor, director or officer of a corporate brokerage house.

8. The CEO/Directors of AKD Securities Limited namely Muhammad Fond Aram (CEO), Hina Junaid Balamgamwata (Director), Tariq Adam Ghumra 'ctor), Muhammad Iqbal (Director) also played (not readable) role in the commission of crime.

9. M/s AKD Securities Limited was Lead Manager, Arranger, Book Runner, and Underwriter of M/s Amtex Limited. M/s AKD Securities Limited was mandated by the M/s Amtex Limited to act as a Lead Manager and Book Runner to the Issue/Shares, which was done through Book Building process as laid down in Appendix 4 of the Listing Regulations of the Karachi Stock Exchange 2009. It has also

come on record that Initial Public Offer (IPO) of 61 Million Ordinary Shares was 25.26% of the Total Post IPO Paid up Capital of M/s. Amtex Limited i.e. Rs. 2,414,901,340/, The face value of each share was Rs. 10.00. There were two portions of Issue / shares as under:

- i) Book Building Portion of the issue/Share comprises 42.70 million Ordinary Shares (70% of the Issue) at a floor price Rs.13 per Share.
- ii) General Public Portion of the Issue/Shares comprises of 18.30 million ordinary shares (30% of the Issue/shares) at a price of Rs.13.00 per share. (Including premium of Rs. 3.00 per share).

10. M/s AKD Securities Limited was mandated to act as the Book Runner, Lead Manager to the Issue! Shares of M/s Amtex Limited. As Book Runner, Mis AKD Securities Limited had underwritten the Book Building Portion of 42.70 million ordinary shares at the strike price of Rs.13 per share. MIS AKD Securities Limited has underwritten 3.84 million Issue/Shares out of 18.30 million Issue/Shares of General Public Portions. Underwriter to Issue/ Share takes responsibility that if shares are not sold, he will purchase/pay for the shares he/she has underwritten. M/S AKD Securities Limited earned underwriting commission Rs.4,559,750/- from M/S Amtex Limited.

11. CEO/Directors of M/s AKD Securities Limited hand in glove with CEO/Directors of M/S Amtex Limited got enlisted M/s Amtex Limited by concealing the fact that M/s Amtex Limited has defaulted of Rs 6,373.121 Million with Bank of Punjab since 30 June 2008. The sister companies of M/s Amtex group viz. Shama Exports (Pvt) Ltd and Amfort (Pvt) Ltd have also defaulted with Bank of Punjab of Pak Rs 1,433.410 Million on 30.06.2008 and Rs 290.206 Million on 30,06.2009 respectively. Bank of Punjab vide letter dated 01,01.2016 confirmed that M/s Amtex Ltd and its sister companies namely M/s Shama Exports (Pvt) Ltd and M/s Amfort (Pvt) Ltd defaulted in loans. The material fact of defaulting by M/s Amtex Limited with Bank of Punjab of Rs 6,373.121 Million on 30.06.2008 was concealed dishonestly, deliberately and with criminal intentions by CEO/Directors of M/s Amtex Limited and M/s AKD Securities Limited in order to deceive, mislead and defraud EOBI and public at large.

12. M/s AKD Securities Limited issued Research Reports in April, 2010 & June, 2010 induced the investors including EOBI to purchase the M/s Amtex Limited shares. M/s Amtex Limited and its sister company M/s Amcap Securities (Pvt) Ltd with the connivance of M/s AKD Securities Limited manipulated the price of M/s Amtex Limited shares and took it to Rs. 20 per share artificially by manipulating market forces, indicators and financial ratios with ulterior motives, personal gains and by way of causing loss to EOBI/Public Exchequer and Public at Large.

13. ADK research report submitted by AKD brokerage house was based on manipulated facts. Earning per share was wrongly quoted.

In research report of ADK securities on m/s. amtex, EPS of the company in 2010 was shown as 5.17 whereas the company itself shown EPS in its annual report of 2010 as Rs.3. Initial public offer and enlistment in karachi Stock Exchange of Amtex limited was done through AKD securities limited. Besides, AKD securities were lead manager, arranger, book (not readable) and underwriter of the Amtex limited and being lead manager, arranger, book runner, and underwriter securities was not supposed to issue such research report / advisory to any client / investor and specifically suggesting to purchase such shares, as the same falls within the meaning of conflict of interest. 515,634 shares were sold to EOBI through AKD securities on 10.08.2010 as CDC report dated 08.12.2011. AKD research report also shows the forecasts of EPS Rs. 7.10 and Rs. 9.93 for the year 2011 and 2012, but on grounds the Amtex suffered huge losses and its EPS went down in minus i.e. Rs. 7.19 in the year 2011 and Rs. 10.4 in 2012. The long term deposits were also decreased during the year 2009 & 2010 from Rs. 27,469,171 to Rs. 21,448,203 which shows that the Amtex Limited was crunching its assets to manage the financial liquidity problems. The forecasts of AKD Securities were based on malafide intentions and ulterior motives so as to cause wrongful monetary loss to EOBI/public exchequer and corresponding wrongful gain to themselves. Brokers and Agents Registration Rules, 2001 Code of Conduct as mentioned in the Third Schedule was grossly violated.

14. The research report issued in April and June 2010 of AKD can be established to be misleading and fraudulent, aimed at causing wrongful monetary loss to public exchequer and corresponding wrongful gain to the accused persons, in the light of below mentioned financial analysis:

AKD Research Report (Amount in Millions)					Annual report of m/s. amtex Limited (amount in millions)			
Description	2009	2010 F	2011 F	2012 F	2009	2010	2011	2012
Net Sales	-	16.9	20.5	23.8	14.1	11.1	6.4	3.1
EPS	-	5.17	7.10	9.3	5.19	3.74	(-7.19)	(-10.4)

15 The financial position of M/s. Amtex Limited was not promising during the year 2009 and 2010 as the intangible assets were decreased during the year 2009-10 from Rs.10, 702,584 to Rs.8, 3248232 and the long term deposits were also decreased during the year 2009 & 2010 from Rs. 27,469,171 to Rs. 21,448,203 which shows that the !Ns Amtex Limited was crunching its assets to manage the financial liquidity problems. Besides, it is also submitted that:

i) In contrary to the Research report submitted by (AKD) brokerage house shown in the tabular form above the report shows the (EPS) of the company in 2010 is 5.17 and its actual EPS shown in the annual report 2009-10 of the company is Rs.3.74 in the year 2010, again AKD research report shows the forecasts of EPS Rs.7.10 and Rs.9.93 for the year 2011 and 2012, but on grounds the M/s Amtex Limited suffered huge losses and its EPS went down in minus i.e. (-) Rs.7.19 in the year 2011 and (-) Rs.10.4 in 2012.

ii) Accordingly the research report forecasts the continuous increase in sales which has proved misleading as the sales went continuously down from 2009 to 2012. The research report wrongly

says that "Amtex is amongst largest vertically integrated textile setups in Pakistan and is a predominantly export oriented company with over 90% export sales" whereas the Bank of Punjab vide letter dated 01.01.2016 informed that there is no repatriation against export bills of M/s Amtex Ltd, from which it is established that the research report of AKD Securities was misleading, based on malafide intention, for causing wrongful monetary gains to themselves and corresponding wrongful loss to the investors like EOBI and others. The AKD research report was compromised and the true facts regarding loans on company, etc. were deliberately concealed in the research report whereas the company, itself, was showing the facts in its annual report.

iii) It has been found from the Annual reports of M/s Amtex Limited that the company's other receivables have also come down from Rs.174,538,211 to Rs.151,604,395 from the year 2009 to 2010.

iv) The sales of M/s Amtex Ltd shares were declined in the year 2010 to Rs.11,066,128,618 from Rs. 14,119,587,545 in the year 2009 (not readable) in this decrease in the sales the administrative expenses increased from Rs.126,535,980 in the year 2009 to Rs.157,874,895 in 2010 which (not readable) resulted in the sharp decline in the net profits of the company from Rs.920,862,941 in 2009 to Rs. 730,512,401 in 2010, which is reflected in the EPS of the company which was recorded at Rs. 5.19 in 2009 and Rs.3.74 in the year 2010.

v) During the year 2011-12 the long terms liabilities of the company increased drastically from Rs. 50,000,000 in 2009 to Rs.1,906,629,334 in 2010 on other side the deferred liabilities have increased from Rs.49,393,749 in 2009 to Rs.2,297,239,143 in the year 2010.

vi) Further the Sales of Amtex Limited during the year 2011-12 have been badly hit as it decreased from Rs.6,426,927,017 in the year 2011 to Rs.3,001,816,336 in 2012. In result of decline in sales the Administrative Expenses increased from Rs.126,737,941 to 1,383,279,784 in the year 2011 & 12.

vii) Finally company sustained the negative EPS in year 2011 which was Rs. (7.19) and Rs. (10.40) in 2012. In the light of these facts I analysis, it is established that the research report of AKD was misleading and based on malafide intentions for the purpose of gaining wrongful monetary benefits and corresponding wrongful loss to public exchequer.

16. Earning Per Share (EPS) is the most important statistical indicator for Pakistani investors AKD Research Report submitted by (AKD) brokerage house shows the historic EPS of five years prior to IPO was deliberately and fraudulently fudged to portray a false record of the growth of the company succeeding years. AKD Research Report made fraudulent and unsubstantiated projection of next three years of the EPS as well as sale to defraud and deceive investors into a false sense of profitability of the company deliberately falsifying company's data. The Research Report forecasts the continuous increase in sales which has proved misleading as the sales went continuously coming down from 2009 to 2012. Brokers and Agents Registration Rules, 2001 Code

of Conduct as mentioned in the Third Schedule was violated for personal gains of AKD Securities at the cost of public exchequer.

17. From the above enquiry/Investigation so far, it is safely deduced that Khurram Shahzad played a main role between Amcap/Amtex Vz Executive Investment Committee to brokerage the sale I purchase transactions of Amtex Ltd shares and is believed to be a front man of Wahid Khurshid. Besides, from the relevant bank record, the criminal role Khurram Shahzad, Marium Shahzad and Naveed Shahzad is substantiated. In the month of August 2010, Rs. 9.5 million was credited in two different joint Bank Accounts of Khurram Shahzad, one with his wife Marium Shahzad and other with his brother Naveed Shahzad at Lahore, in these accounts Rs. 5 million have been transferred into the joint account of Khurram Shehzad from the bank account of Amcap Securities. These payments were made to Khuram Shahzad by Amcap Securities and were immediately withdrawn in cash by Khuram Shahzad. No trades were executed through Amcap Securities during 2010 and even Khurram Shahzad did not have any trading account with Amcap Securities. As per the account opening form provided by SBP, Khuram Shahzad was working as head of sales at Trust Leasing and Investment Bank Limited at Lahore.

18. Imran Afzal s/o Mian Muhammad Afzal CNIC No. 33100-1991316-3 on behalf of Amtex Limited voluntarily submitted post-dated cheque No. CDA-22518631 dated 31.01.2016 of Rs. 40 million in favor of EOBI through FIA to compensate losses to EOBI in purchase of Share of M/s Amtex Limited through Affidavit dated 05.01.2016 in which he undertook that if any losses found on the part of M/s Amtex limited the same will also be paid to EOBI through FIA Sindh Karachi.

19. The role of other public functionaries namely Securities Market Division (SMD) of SECP, State Bank of Pakistan, Karachi Stock Exchange (Guarantee) limited, and auditors namely M. Yousuf Adil (not readable) & Co Chartered Accountants, shall be determined during further investigation as to how a defaulter (not readable) got enlisted with KSE and succeeded in defrauding EOBI and public at large.

From the above mentioned facts, circumstances, and evidences, it has been established that accused persons namely (1) Zafar Iqbal Gondal, the then Chairman EOBI, (2) Kanwar Khursheed Wahid, the then DG Investment EOBI, (3) Muhammad Iqbal Dawood, Convener of the Investment Committee EOBI, Investments, Karachi (4) Mirza Imtiaz Ahmed DG (FM) EOBI, (5) Muhammad Ayub Khan the then Director Finance EOBI,CEO/Directors of M/s Amtex Limited namely (6) Khurram Iftikhar (CEO), (7) Shahzad Iftikhar(Director), (8) Nadeem Iftikhar (Director),(9) Zafar Saleem (Director), (10) Faiza Khurram (Director), (11) Sajida Shahzad (Director), (12) Nusrat Parveen (Director), CEO/Directors of Amcap Securities namely (13) Abdul Rauf Ghani sic Abdul Karim (Chief Executive), (14) Haji Iftikhar-ud-Din s/o Ala-ud-Din (Director),(15) Sonia Nadeem w/o Nadeem Iftikhar (Director),CEO/Directors of AKD Securities Limited namely (16) Muhammad Farid Alam (CEO), (17) Hina Junaid Balamgamwala (Director),(18) Tariq Adam Ghumra (Director), (19) Muhammad Iqbal (Director), (20) Khurram Shahzad, (21) Marium Shahzad and (22) Naveed Shahzad and others in connivance with

each other have committed the offences punishable under Sections 409/109/34 PPC r/w 5(2) PCA 1947 for which they are liable to be prosecuted before this Hon'ble Court, however, it is submitted before this Hon'able Court that since the investigation of the case has not yet been completed, some more documentary/oral evidences are to be collected on record, and since the mandatory period is to be expired, therefore, in order to fulfill the legal requirement, this Interim Charge Sheet is submitted before this Hon'ble Court with the prayer to adjourn the proceedings of the case under the provisions of Section 344 Cr.P.C. r/w 173(1)(b) Cr.P.C.

2. Case is pending before trial Court for adjudication. Applicant in criminal miscellaneous application No.6/2017 filed application under section 265-K Cr.P.C. on 24.09.2016 whereupon learned judge without passing final order observed by order dated 17.11.2016 that *"This would be considered after examination of material witnesses."* Whereas criminal miscellaneous application No.23/2016 is earlier filed before this Court.

3. Learned counsel for applicant in criminal miscellaneous application has argued that applicant is a company enlisted M-Tax and M-Cap with SECP in April 2010 and this case pertains to the shares purchased by EOBI hence applicant has no direct link in between EOBI and the companies registered with the SECP. Applicant as a company has complied all 48 regulations approved by SECP; EOBI purchased shares of 17 million without approval of competent authority as Purchase Committee's limit was upto 50 lacs; he contends that admittedly SECP is not an accused; report available at page 147 to 151 is relied upon which is that :-

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He further contends that section 2(27) of Companies Ordinance 1984 defines prospectus and section 60 provides punishment upto two years as well section 474 of Companies Ordinance 1984 provides complete mechanism

with regard to lodgment of any complaint. In instant case FIA failed to ask the SECP to initiate proceedings; offence under section 475 of Companies Ordinance is non-cognizable, he also emphasized on section 25 of SECP Ordinance and relied upon criminal revision application (UR) as well 2009 SCMR 517 and PLD 2001 Karachi 112.

4. Learned counsel for applicant in miscellaneous application No.23/2016 has argued that purchase of shares was the mandate of purchase committee; EOBI Act is not falling with the schedule of F.I.A; no sufficient evidence is available against the applicant hence further trial would be abuse of the process of law.

5. I/O present alongwith Assistant Attorney General contends that he recorded statement of concerned SECP persons; according to his statement all formalities were completed and there was no illegality. Learned Assistant Attorney General as well SECP's counsel contend that in criminal miscellaneous application No.23/2016, applicants have not approached trial Court and have approached this Court directly while bypassing the trial Court.

6. I have heard the respective sides and have also perused the available material.

7. At the very outset, it would be pertinent to state that since the law *no where* restricts an accused to make an application under section 265-K Cr.PC therefore disposal of such an application *legally* cannot be withhold for want of *evidence* rather the application has either to be allowed or dismissed, as per the merits of the case.

8. The provisions of Section 561-A as well 249-A / 265-K of the *Code* are exceptions to normal procedure for determining the *innocence*. Since, it is a deviation from normal procedure hence it would only be exercised if it is *prima facie* established that either the charge is groundless or trial, if allowed, would be nothing but an abuse to process of law as there is no possibility of his being convicted of *any* offence. Both the remedies are *equal* in nature hence it is not always necessary to first resort to remedy, provided by Section 249-A/265-K of the *Code* but a departure thereof may be allowed but if circumstances so justifies.

9. Since two *separate* applications are there hence to make out a case of such an *exceptional* relief, each applicant (set of applicants) is required to establish that there are grounds justifying exercise thereof. I would also add that an acquittal on such grounds would not necessarily result in acquittal of other accused persons nor would result in prejudicing the merits of case of prosecution against other accused persons nor to merits of the defence.

10. To properly appreciate the case of respective application (s), it would be appropriate to discuss case of each application separately. As per prosecution case *itself* the allegations / roles have been classified against each applications (applicants of respective application), which I would summarize further as:

AGAINST APPLICANT OF CR.MISC APPLICATION NO.23/2016
(Wahid Khursheed Kunwar)

Shares were purchased unscrupulously / dishonestly with ulterior motives on recommendation and approval of Investment Committee of EOBI comprising of **Wahid Khursheed Kunwar, the then DG Investment**, and Zafar Iqbal Gondal the then Chairman EOBI.

EOBI OFFICIALS (APPLICANTS IN CR.M.A.NO.6/2017)

Issued Research Reports thereby induced the investors including EOBI to purchase the M/s Amtex which allegedly based on manipulated facts thereby facilitated Amtex/Ampec to gain *huge* benefit while *huge* loss to EOBI.

It is *prima facie* not a matter of dispute that purchase of *shares* of Amtex by EOBI resulted in causing *huge* loss to it (EOBI) and present applicant Wahid Khursheed Kanwar, *undeniably* was the “*DG Investment*” of ‘EOBI’ and was also one of the members of Trading Committee therefore, *prima facie* he (applicant Wahid Khursheed Kanwar), at this stage, cannot claim that the charge against him is *groundless* particularly when the authority of ‘**purchase committee**’ to avoid such *purchase* was never under any dispute. Such fact even was *categorically* insisted by the prosecution (FIA) in *interim* as well *final* report (s) submitted before the trial court in following words:-

“In view of the above, the **alleged officers of EOBI were in a position to avoid the loss to EOBI** but they willfully and intentionally caused huge wrongful monetary loss to EOBI in violation of investment rules.”

Therefore, in such circumstances, it would always be fair to allow both prosecution and the accused (applicant Wahid Khursheed Kunwar) to prove their respective claims which could only be possible by *trial*.

11. Now would take the case of the applicants (Cr.M.A.No.06/2017). It is a matter of record that the allegation against them is that of preparing a “*Research Reports*” thereby *allegedly* induced the EOBI to purchase the shares of Amtex. Since this (*research reports*) is the root hence a referral to subsection (29) of Section 2 of the Companies Ordinance, 1984, being relevant, is made hereunder:-

Sub-section (29) of Section 2. “**prospectus**” means any document described or issued as prospectus, and includes any notice, circular, advertisement, or other communication,

inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate, or inviting deposits from the public, other than deposits invited by a banking company or a financial institution approved by the Federal Government, whether described as prospectus or otherwise;

From above, it is quite clear and obvious that such report does fall within meaning of **prospectus**. Now, the first question which could creep into mind would be nothing but that per relevant law as to who is competent to determine legality or illegality in a **prospectus**?

Since there could be no denial to another well-established principle of law that if a Special Law deals with a particular subject then for examining *pros & cons* of such particular subject, it shall always be that Special Law. Here, without making a direct referral to relevant provisions of Companies Ordinance, 1984, no further discussion could be made hence the same are referred hereunder:-

“57. Approval, issue and registration of prospectus: (1) No listed company, and no company which proposes to make an application to a stock exchange for listing of its securities, shall issue, circulate or publish any prospectus or other document offering for subscription or publicly offering for sale and security unless approval of the Authority to its issue, circulation or publication has been obtained within the period of sixty days preceding the date of its issue.

“57(5) The registrar shall not registrar a prospectus unless the requirement of Sections 52,53,54 and 55 and this section have been complied with and the prospectus is accompanied by the consent in writing of the person, if any, named therein as the auditor, legal adviser, attorney, solicitor, banker or broker, being a member of a stock exchange of the company, to act in that capacity.

(6) If a prospectus is issued, published or circulated without complying with, or in contravention of any provision of this section, the company, and every person who is knowingly a party to the issue, publication or circulation of the prospectus, **shall be liable to a fine** not exceeding ten thousand rupees and in the case of a continuing default to a further fine not

exceeding two hundred rupees for every day from the date of issue, publication or circulation, as the case may be, of the prospectus, until a copy thereof complying with all the requirements of this section has been delivered to the registrar.”

From a *bare* reading of the above, it is obvious that **prospectus** can *legally* not be issued / publicized unless approved and registered by the **registrar** who, per law, is competent to see whether requirements of law are made or *otherwise?*. It has been a matter of record that the SECP has *nowhere* claimed any violation in the **prospects** rather stand of the SECP, as evident from its report, is:

“1.8 In respect of the details of EOBI/(not readable) by the broker/TREC holder, it was observed that Wahid Khurshid Kunwar (Wahid DG/Investment Advisor EOBI, **used to place order in stock market for purchase and sale of securities on behalf of EOBI.** As per the information provided by EOBI, **the investment decisions in the stock market were basically approved by the investment committee comprising of the Chairman, EOBI and DG/Investment Advisor EOBI.** However, as per the statement of Wahid this approval was generally obtained after the execution of the trades in the stock market.

1.9. Analysis of information received (not readable) Holders revealed that the mobile number used by Wahid on placement of order was used in the name of some mpex international.

10. While the enquiry was underway, the investigation officer went through the order issued by the honorable Supreme Court of Pakistan in the matter of Constitutional petition No.35 of 2013 in the recent EOBI land purchasing scam. The said order referred to an individual namely Shaikh Farrukh Saleem (Farrukh) who has been pointed out in the court order, as front man and close friend of Wahid. **The order further provides that Farrukh voluntarily disclosed that he directly made payment to Wahid and the Chairman EOBI.**

1.11. When probed further, it was observed that Farrukh being at international impex was the president of the managing committee of Karachi Customs Agent Association during 2002-2003. Wahid during the past was a custom's officer and as mentioned earlier the mobile number used by Wahid for placement of orders in the stock market was issued in the name

of international impex. Analysis of the trading activity revealed that few (not readable) executed by Farrukh during the month of May 2013 matched with EOBI.

Overall conclusion:

1.12 In the light of above and on the basis of available record this trail of money deposited and withdrawn from the bank account of KSS, matching of majority of trade with EOBI and payment by AMCAP to KSS in August 2010 during which period trade of EOBI matched with AMCAP, and no trade by KSS was executed through AMCAP raise suspicion in terms of KSS relationship with the investment advisor of EOBI. The amount credited during the period -I and in August 2010 in the joint bank account of KSS amounts to Rs.15.196 million approximately which was withdrawn by KSS in cash immediately.

1.13. Furthermore the bank record revealed that KSS was employed at Trust Lessing and Investment bank Limited at some salary. KSS failed to provide the income returns and wealth statements to support the transactions shown in his bank account.

1.14. The timing of the sale orders placed by KSS and ZY during the month of October 2011 were such that it matched with the buy orders placed by EOBI during the same period. However, since money trails breaks up at the cash withdrawal by KSS and ZY, the relationship of the parties could not be established.”

In view of above, legally I find myself safe in saying that view of FIA (prosecution) regarding **prospects** to be illegal *normally* would not prevail over competent *authority* (SECP). In addition, it is also a matter of record that per SECP that :

“CEO and CFO of the AMTEX Limited have given separate affidavits on non-judicial stamp papers on accuracy of the prospectus.”

Thereby *owning* the *accuracy* of the **prospects**, so prepared by AKD.

Be that as it may, the *legal* position, being so, shall stand further clear and evident from referral to subsequent sections which not only

provide a *civil action* but *criminal action* against any **misstatements**. I will come to *civil action* later but would *first* refer to section, dealing with *criminal liability* which reads as:-

“60. **Criminal liability for mis-statements in prospectus.**- (1) Where a prospectus includes any **untrue statement**, every person who signed or authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to ten thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.”

From above, it is clear that *criminal liability* for such act (untrue statement in prospects) has *specifically* been dealt with and has been defined as an *independent* offence therefore, such offence shall proceed as dictates by the Special Law *itself*.

“474. **Cognizance of offences, etc.**- (1) Save as provided in section 476, no Court or Commission or officer shall take cognizance of any offence against this Ordinance (other than an offence with respect to which proceedings are instituted under section 418) which is alleged to have been committed by any company or any officer or auditor thereof, except on the complaint in writing of -

(a) the Commission or the registrar; **or**

(b) **in the case of a company having a share capital**, by a member or members holding not less than five per cent of the issued share capital of the company or a creditor or creditors of the company having interest equivalent in amount to not less than five per cent of the issued share capital of the company; or

(c) in the case of a company not having a share capital, **by any member or creditor** entitled to present a petition for winding up of the company:

Provided that nothing in this sub-section shall apply to a prosecution by a company of any of its officers or employees:

Provided further that, where the registrar is himself empowered to impose a penalty, he may take cognizance of the offence and start proceedings on the basis of a memorandum of allegations placed on record by him or an officer subordinate to him.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898) where the complainant under sub-

section (1) is registrar or the Commission or a person authorized by the Federal Government, the personal attendance of the complainant before the court or Commission trying the offence shall not be necessary unless the Court, the Commission, the registrar or other officer, as the case may be, for reasons to be recorded, requires his personal attendance at the trial.

(3) Sub-section (1) shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters included in Part XI, or in any other provision of this Ordinance relating to the winding up to companies.

(4) A liquidator of a company shall not be deemed to be an officer of the company within the meaning of sub-section (1)."

From above, it is quite obvious that persons, *authorized* by law, can competently resort to such action (*criminal liability*) on ground of **prospects**, having some *untrue statement*, which view (complaint) shall be subject to an **affirmation** by a competent court of law. For which, the Section 474 of the *Securities & Exchange Ordinance, 1969* says as:-

"25. **Cognizance of offence.** - No court shall take cognizance of any offence punishable under this ordinance except on a report in writing of the facts constituting the offence by **an officer authorized in this behalf by the Commission; and no court inferior to that of a court of Session shall try any such offence.**"

The above, not only affirms the *criterion* for proceeding for such like offence, but also reaffirms that FIA or any other institution is not competent to determine legality or illegality in a **prospectus**. Thus, legally the applicants cannot be tried for an *allegation* relating to **untrue statement**, if any, in a **prospectus**. Thus, trial of the applicants for such offence would be nothing but an *illegality*. I find strength in such conclusion with the case of *Muhammad Shabbir v. State of Islamic Republic of Pakistan* (2005 SCMR 834) wherein it is held as:-

"4. The construction as such is an illegality / irregularity

which can be fully dealt with under the provisions of the Sindh Building Control Ordinance, 1979. A detailed procedure is already laid down under section 19 of the Ordinance read with Karachi Building and Town Planning Regulations. A show cause notice is given to such constructor and if he fails to show sufficient cause to the satisfaction of the authority, he can be required to demolish the building or part thereof or bring construction in conformity with the regulation or compound the offence and deposit composition fine whereafter the unauthorized construction gets regularized. As a Special Law already exists to deal with such matters, any violation can be referred to such law. The provisions of Ehtesab Ordinance, 1996 would be attracted only if, like in the circumstances of the present allegations, he happens to obtain undue favour by corruption or by corrupt means. It may be clarified at this juncture and before entering into further discussion that the unauthorized construction as such is not an offence under Ehtesab Ordinance, 1996 but if any undue advantage has been obtained within the contemplation of section 3 of the Ehtesab Ordinance, it would of course tantamount to an offence.”

The reason for limiting cognizance in a *particular* manner only seems to be nothing but that ‘*a prospects*’ , *prima facie*, is never meant to target a particular person/company but to all *interested/general public* which *too* after its approval by the **registrar**. It has never been the claim of the prosecution that such *prospects* was confined to *EOBI* only which *stand* alone was always sufficient to negate possibility of any *linking / conspiracy* between the AKD and EOBI.

Even otherwise, legally it can never be believed that a *sale / purchase* is solely done on such a ‘**prospects**’ but a *purchaser* continues with his obligation to act *bona fide*. Here, I worth to refer *categorical* observation of Honourable Apex Court, made in Criminal Petition No.292/2016, which, being *undeniable*, may be referred even though made in a *bail-matter*. The same reads as:-

“8.... The presently available prosecution evidence that the petitioners and AKDS prepared the above mentioned misleading reports about the investment profile and potential

of M/s Amtex shares is cited as the means employed by the petitioners to influence EOBI decision making. Upon perusal, these printed reports appear to be aimed at all investors, both institutional and the general public, who purchased the entire offering of 61 million M/s Amtex shares at a premium price of Rs.13/- per share in the IPO. It is also a fact that the M/s Amtex shares were thereafter traded at higher prices on the stock market. ..Indeed hundreds of investors may have read and relied on the AKDS reports before and after the M/s Amtex IPO in April 2010.."

Such *position* was never a matter of dispute even by the *prosecution* rather prosecution categorically admitted such fact and legal position *both* in its interim and *final* report (s) in following words:-

IN INTERIM REPORT

"In view of the above, the alleged officers of EOBI were in a position to avoid the loss to EOBI but they willfully and intentionally caused huge wrongful monetary loss to EOBI in violation of investment rules."

IN FINAL REPORT

"In view of the above, the alleged officers of EOBI were in a position to avoid the loss to EOBI but they willfully and intentionally caused huge wrongful monetary loss to EOBI in violation of investment rules."

In absence of a *proof* to effect that '**prospectus**' was aimed only to a particular *purchaser* (violation of sections 52,53,54 and 55 of the Companies Ordinance, 1984) one, cannot be tried by any other Court, except the one specified by Section 25 of Securities & Exchange Ordinance, 1969 on any *allegation* with reference to a *mis-statement* in a **prospectus**.

I would further add that an '*untrue statement*' in a **prospectus** may well be claimed as one of the *circumstances* in making a *wrong* decision thereby sustaining loss but this however would not prejudice to legal consequences which a *purchaser* shall face, being guilty of breach of any of his

obligation (s) as *purchaser*. This has been the reason that Special Law does provide a *civil action* for any such *loss / damage* by resort to course, as detailed in section 59 of the Ordinance. The section 59(1) of the Ordinance says as:

“59. Civil liability for mis-statements in prospectus: (1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for sharers in or debentures of a company, the following persons shall be liable to pay **compensation to every person who subscribes for or purchase any share or debentures on the faith of the prospectus for any loss or damage** he may have sustained by reason of any untrue statement, included therein namely:-- ”

The above *civil action prima facie* provides a right to claim compensation to **every person'** so as to get any *loss or damage* compensated without prejudice to what such *guilty* will face in consequence of *criminal action* (section 60 of the Ordinance). This is *another* aspect which makes the intention of the *legislature* clear in limiting the *criminal action* to a *specific court; specific person* and *specific procedure*. It may be added here that it is evident from challan/report that:

“18. Imran Afzal s/o Mian Muhammad Afzal CNIC No. 33100-1991316-3 on behalf of Amtex Limited voluntarily submitted post-dated **cheque No. CDA-22518631 dated 31.01.2016 of Rs.40 million in favor of EOBI** through FIA to **compensate losses to EOBI** in purchase of Share of M/s Amtex Limited through Affidavit dated 05.01.2016 in which he undertook that **if any losses found on the part of M/s Amtex limited the same will also be paid to EOBI** through FIA Sindh Karachi.”

Since, the Amtex *also* independent affirmed accuracy of **prospectus**, so prepared by AKD; the illegality / error and omission, if any, in **prospectus** is an independent offence as per applicable *law*, therefore, I am in agreement with the submission of learned counsel for the applicants that cognizance of such offence could only be taken and tried by the Court specified in section 25 of Securities & Exchange Ordinance, 1969 in the manner, provided by

section 474 of the Companies Ordinance. As regard allegation of getting Amtex (*defaulted company*) enlisted with KEC, it would suffice to refer specific stand of SPEC, as is evident from statement of its official, recording during course of investigation wherein he to a categorical question, responded as:-

Question No.6: KSE & SECP can a defaulter company listed with Stock Exchange?

Answer: **No. Defaulter company cannot be listed with the Karachi Stock Exchange.**

However, since the prosecution claims the *role* of applicant as that of *abetment* (section 109 PPC) for committing offence u/s 409 PPC it was/ is always obligatory upon the prosecution to bring on record material to establish the same. Thus, it was always obligatory upon the prosecution to have brought some material on record in that line or *least* to have referred existence of such *conclusive* conclusion from so far collected material which, never attempted *even*.

12. From perusal of all the material, including *final report*, it appears that though prosecution is claiming a *nexus* (conspiracy) between AKD & EOBI but such very *root* / foundation claim of prosecution to effect of *conspiracy* between AKD and EOBI (accused officials) was negated by prosecution *itself*. It is *categorically* claimed in FIR; interim and final challan, in following words:-

“The Seller/ Director (Amtex Ltd) could not sell shares directly to EOBI. They need a brokerage house to execute the deal and Amcap Securities, ADK Securities, RAH Securities, Pearl Securities, (not readable) Capital Market, Foundation Security bridged that gap.”

From above root allegation, it appears that prosecution *in reality* never claimed a *conspiracy* between AKD and EOBI rather *conspiracy*, if any, was in between Amtex and EOBI. The AKD Securities, therefore, can never be

believed to have made any *instigation*. The illegalities / errors and even *untrue statement*, in **prospectus** on part of AKD can never be taken as *conspiracy* between AKD and EOBI particularly when it is also a matter of record that:-

“EOBI purchased shares of M/s Amtex. Ltd through broker M/s Foundation Securities (Pvt) Ltd as the **M/s Foundation Securities was on the panel of EOBI.**”

The prosecution has not collected a *single* document which could establish any *nexus* (conspiracy) between the AKD and EOBI which could *least* suggest a possibility of any *abetment/conspiracy* between them particularly when purchase was *admittedly* through its (EOBI's) own *broker*. On the other hand report, available at page 147 to 151 says that :-

“The information contained in this I.M has been provided by AML to assist prospective investors in proceeding with further analysis of the Initial Public Offer. None of the information contained herein or upon which it is based has been independently verified. Neither the FA nor AML give, have given or have any authority to give, any representations or warranties (express or implied) in relation to the Offer, or as to the truth, accuracy or completeness of this IM or as to any opinion expressed herein.

This IM may include certain statements, estimates and projections with respect to anticipated future performance of the Company. Such statements, estimates and projections reflect assumptions concerning anticipated results, which may or may not be correct. Whilst the statements, estimates and projections contained in the IM represents the view of the AML's Management/Sponsors based on what they consider to be reasonable assumptions at the time these are prepared, the same should not be considered as an accurate representation of future results. Neither the Company nor AKDS nor any of their respective affiliates have independently verified the estimates and projections, and accordingly they do not express any opinion or provide any form of assurance with regard to such estimates and projections.

Nothing contained in this IM is or should be relied upon as a promise or representation in respect of the future prospects of AML. This IM should neither be considered as an indication of the current state of affairs of the Company nor an indication that there has been no change in the state of affairs of AML since the date of this IM.

The Company, AKDS and their respective affiliates expressly disclaim any and all ability that may be based on any errors or omissions from, or mistakes in assumptions With respect to any information, estimates or projections Contained in this IM or any other written or oral communication transmitted to any potential investor/syndicate member in the course of its evaluation of the possible investment in the Company.

In furnishing this EM, AML and AKDS or any of their respective affiliates undertake no obligation to provide the recipient with any additional information as may be required or requested.

Potential investors should obtain their own legal and tax advice with regard to their rights and liabilities from legal and tax standpoint resulting from this transaction.

The contents of this information Memorandum constitute confidential information. Any further distribution or reproduction of this IM in whole or in part, or the divulgence of any (not readable) contents by any of the recipient, is unauthorized."

From above, following facts are *quite* obvious which shall never change as these are from a *competent* person (SECP) that:-

- i) **Such statements, estimates and projections reflect assumptions concerning anticipated results, which may or may not be correct.** Whilst the statements, estimates and projections contained in the IM represents the view of the AML's Management/Sponsors based on what they consider to be reasonable assumptions at the time these are prepared, the same should not be considered as an accurate representation of future results;
- ii) **Neither the Company nor AKDS nor any of their respective affiliates have independently verified the estimates and projections, and accordingly they do not express any opinion or provide any form of assurance with regard to such estimates and projection;**
- iii) Nothing contained in this IM is or should be relied upon as a promise or representation in respect of the future prospects of AML. **This IM should neither be considered as an indication of the current state of affairs of the Company nor an indication that there has been no**

change in the state of affairs of AML since the date of this IM;

- iv) Potential investors should obtain their own legal and tax advice with regard to their rights and liabilities from legal and tax standpoint resulting from this transaction.

Thus, leaves *no* doubt that any *untrue-statement* , if any, would not turn into *conspiracy* even if the trial of the present applicants is allowed to continue. Further, the *expert* view (s) with reference to practice, custom and rules, shall always prevail over mere *suspicion* of the FIA. The position, being *undeniably* so, leaves no possibility of the applicants to be found *guilty* of offence of *abetment* merely with reference of an *error* or *illegality* even in **prospectus**.

13. Moreover, *abetment* is an *independent* offence therefore, mere suspicion / words alone would never be sufficient to hold such charge / allegation but a *conclusive* proof, must be there. Though *conspiracy* is suspected by prosecution yet the prosecution further stand parted with such allegation i.e '*conspiracy between AKD & EOBI* as is evident from statement of *Assistant Director*, FIA Sindh, Karachi wherein he at last page *categorically* stated that:

"AKD Securities, Pearl Securities, Amcap..... With the collusion of each other artificially with manipulation raised the price of share. Their targets were Government institutions i.e EOBI and NBP.

Though such claim is *yet* a claim but is sufficient to negate that there had been any *conspiracy* (abetment) between AKD and EOBI.

Besides, it is also a matter of record that AKDS has a commercial, professional, investment advisory role with M/s Amtex for promoting the sale of its shares prior to and after the IPO in April 2010. Therefore, preparing *prospects* and playing a role of Lead Manager,

Arranger, Book Runner, and Underwriter. The responsibilities *Lead Manager* and *Book Runner*, per statement of Mr. Haroon Askari, SECP official, are:

The Lead Manager to the issue/offer shall be responsible to;

- i. Conduct awareness campaigns like presentations, meetings, road shows etc jointly with BR;
- ii. ensure that all disclosures as required under the Companies Ordinance 1984 and this appendix of the regulations have been made in the prospectus;
- iii. ensure that necessary infrastructure and electronic system/software is available to collect bids and to carry out book building process in a fair, efficient and transparent manner;
- iv. obtain, on behalf of the Issuer/Offerer, all approvals/consents/NOCs relating to the issue/offer;

The **Book runner** to the issue/offer shall be responsible to;

- i) conduct awareness campaigns like presentations, meeting, road shows etc. jointly with LM;
- ii) arrange and ensure that necessary infrastructure and electric system/software is available to collect bids and to carry out book building process in a fair, efficient and transparent manner;
- iii) collect bid applications and applications money, security, margin as the case may be from the Institutional Investors and HNWI in the manner as mentioned in this appendix of the Regulations;
- iv) put serial number, date and time on each building from at the time of collection of the same from the bidders;
- v) vet the bidding applications;
- vi) build an order book showing demand for the shares at various prices;
- vii) discover the strike price at the close of the bidding period;
- viii) enter into underwriting agreement with the issuer/offerer; and
- ix) maintain record of the bids received for subscription of the shares.

The above *no where* gives an impression that such *obligations* necessarily ensure a *sale* but are confined only to make arrangement for awareness campaign as well *bidding* process thereof for / by *interested*. These *obligations* and *responsibilities* may contain an *untrue* statement but *legally* and *logically* cannot compel and force a *purchaser* / *bidder* in purchasing *shares* nor such *untrue statement* itself could be taken as *abetment* / *conspiracy*.

Further, the AKD also has played a role of *under-writer*. A specific question was *posed* to said official of SECP in this regard to which he responded as:-

Question No.5: What is the underwriting?
 & What are the responsibilities of underwriter?

Answer: If shares are not fully subscribed then under writer is obliged to purchase unsold portion of the shares. However under writing with Book Building is far the portion of 75% of the strike price where Financial Institution has paid 25% at the time of Book Building. **Remaining 75 % payment is not paid the underwriter is obligated to take up these share after payment to issuer.**

This would mean that if **shares would not have been fully subscribed** then the AKD would have to purchase the 75% share at the payment, estimated by it. The *legal* position, being so, would have trapped the AKD *itself* if the interested, including EOBI, would have avoided the sale which it (EOBI) could competently have done. Even otherwise, since legally the AKD was not restrained from playing the roles Lead Manager, Arranger, Book Runner, and Underwriter, hence mere playing of such roles would never be sufficient to establish *abetment*, particularly when any *illegality* or *irregularity* in discharge of such obligations have been dealt with properly in the Ordinance, 1984.

Further, it is also not the claim of the *prosecution* that the AKD has obtained any *illegal* gain except the **commission** which, being recognized by law, cannot be termed as *illegal gain*. The position, being so, would also bring the charge / allegation against the AKD out of the jurisdiction of FIA (Special Court, constituted for offence under its schedule). Thus, I am of the clear view that proceedings against the AKD on *allegation*, relating to any *illegality* or *error* in **prospects** could not be a *sufficient* ground for their prosecution in instant FIR.

14. In consequence of what has been discussed above, the CrI. Misc. Application No.23/2016 is dismissed; while Cr. Misc. Application No.06/2017 is allowed, in consequence thereof, the proceedings only to extent of present applicants stands quashed which *however* shall cause no prejudice to proceedings pending against other accused persons.

However, while parting it is needless to mention that this would not operate as a *bar* against prosecution of the AKD for criminal liabilities (Section 60 of the Companies Ordinance) if resorted by proper authority nor it would be a *defence* in Civil action (59 of the Companies Ordinance), if *any* aggrieved person seeks compensation for loss / damage, sustained by it under claim of *untrue statement*, in **prospects**, so prepared by the AKD.

J U D G E