

Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO 1

In the matter of

Appeal No. 70 of 2011

Haji Ghani Haji Usman Appellant

Versus

Director (SMD) Respondent

ORDER

Date of hearing 19/09/12

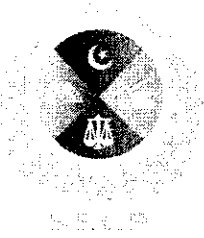
Present:

For the Appellant:

Mr. Rabeel Akhund, Advocate

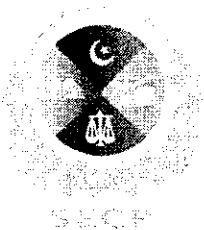
Department representative:

Mr. Aamir. M Khan Afridi, Director (CI), SMD



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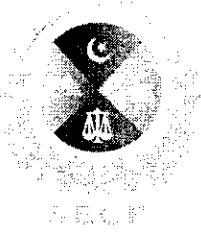
1. This order is in appeal No. 70 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 06/10/11 (the "Impugned Order") passed by the Respondent.
2. Brief facts of the case are stated as under:
 - (i) shares of the Thatta Cement Company Limited (the "Company") were offered to the general public by Haji Ghani Haji Usman (the "Appellant") for subscription from 26/02/08 to 27/02/08 through Offer for Sale Document (OFSD) dated 16/02/08 which was issued, circulated and published with the approval of the Commission under section 62 read with section 57 of the Companies Ordinance, 1984 (the "Ordinance").
 - (ii) after the Initial Public Offering and the post ballot scrutiny, Arif Habib Limited, Consultant to the Offer, vide letter dated 17/03/08, reported 185 cases comprising 257 applications being multiple and/or fictitious which were submitted for subscription of shares of the Company in violation of section 18A of the Securities and Exchange Ordinance, 1969 (the "SEO").
 - (iii) all the above mentioned cases were examined by the Commission and after calling explanations of the applicants (the person named in the applications) vide various letters dated 23/04/08 (for multiple applications) and 04/07/08 (for fictitious applications); issuing show cause notices during the period from December 2008 to May 2009 and providing each



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of the applicant opportunity of hearing, 185 orders were passed during the period March to June 2009 (“Order/s”) under section 18A of the SEO.

- (iv) The Appellant was advised vide the above referred Orders to:
- (a) deposit the confiscated subscription money of 254 applications amounting to Rs. 2,857,500/- in the Commission’s bank account; and
 - (b) to issue 1500 shares against 3 applications.
- (v) Despite repeated reminders dated 12/05/09, 02/06/09, 20/07/09, 03/08/09, 07/12/09 and 28/06/10, the Appellant failed to deposit the confiscated subscription money of 254 applications amounting to Rs.2,857,500/- within the time period stipulated in each Order, which tantamount to the non-compliance of the Orders of the Commission. The Appellant also failed to ensure that the shares have been issued to three (3) applicants whose applications were restored by the Commission:
3. Show cause notice dated 23/08/11 (“SCN”) was issued to the Appellant under section 22 of the SEO. The Appellant filed reply to the SCN. The Respondent after taking into consideration the submissions made by the Appellant passed the Impugned Order and imposed penalty of Rs. 300,000 (three hundred thousand rupees) on the Appellant. The Appellant was further required to ensure compliance with the Orders in the following manner:-

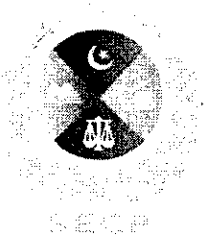


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- (i) deposit in the Commission's account within thirty (30) days of the issue of the Impugned Order, subscription money amounting to Rs. 2,857,500/- of 254 applications confiscated by the Commission under section 18A of the Ordinance;
- (ii) ensure within thirty (30) days of the issue of Impugned Order that shares of Company have been issued against three (3) applications.

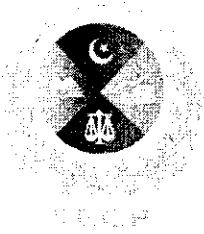
4. The Appellant has preferred the instant appeal against the Impugned Order. The Appellant's counsel adopted the arguments made in appeal No 68/11 (Arif Habib Securities vs. Director (CI) SMD), which have been reproduced for ease of reference:

- a) the Impugned Order fails to appreciate that section 18-A of the SEO does not give the Commission power to confiscate money so that it becomes the property of the Commission. The Appellant's fundamental right to acquire, hold and dispose of the property envisaged by Article 23, 24(1) and (2) of the Constitution of Islamic Republic of Pakistan, 1973 (the " Constitution") have been violated by the Respondent;
- b) the Impugned Order required the Appellant to hand over the confiscated money when the Appellant had fully complied with all the legal requirements. One and half year after subscription list had closed, the Commission determined that the applications were fictitious and/or duplicate and had been made in contravention of section 18-A of the SEO. The delay has resulted in the Appellant holding on to the shares whose market value has drastically fallen from the level at which they were offered for sale by the Appellant;



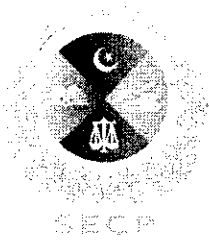
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- c) section 18-A (2) of the SEO provides that in case of contravention of section 18-A (1) of the SEO, the application money shall be liable to confiscation. The sub-section does not go on to say that the 'confiscation' shall be done by the Commission. There can be two interpretations as to who should confiscate the application money: the confiscation can either be done by the Commission *or* by a company offering its share to the public in an IPO/ the offerer offering shares for sale to the public. It is settled principle of statutory interpretation that where there are two interpretations possible, the one which is consistent with the fundamental rights should be protected and in this case the second interpretation giving the right of confiscation to a company or the offerer should take precedence; and
- d) the Impugned Order fails to appreciate that the Appellant's refusal to take the required action was not '*willful*' so as to attract section 22 of the SEO, instead it has been based on the Appellants boni fide view of the correct legal position applicable to the facts of this case. The Impugned Order is wrong in imposing penalty upon the Appellant under section 22 of the SEO, as such, the penalty may be set aside.
5. The department representative adopted arguments in appeal No 68/11 (Arif Habib Securities vs. Director (CI) SMD) which have been restated in accordance with facts of the instant case:
- a) section 18-A of the SEO gives the Commission power to confiscate money in case of violation of its provision. The Appellant's fundamental rights to acquire, hold and dispose of the property envisaged by Article 23, 24(1) and



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- (2) of the Constitution have not been violated by the Respondent, as right to the property are subject to the law and in the instant case the law provides for confiscation of shares for the violation of the stated provision;
- b) the procedure laid down in the law was strictly followed to ensure that the right of an individual applicant is not effected. Each application was treated separately: explanation was called followed by SCN during the period December 2008 to May 2009; hearing was afforded to each applicant followed by the Orders during the period March to June 2009 to meet the end of justice. The delay was caused due to aforesaid process followed in each case, wherein, violation of 18-A of the SEO was found (over 1000 cases). Moreover, the rise and fall in the market value of shares is not related to the issue at hand and any consequent loss alleged by the Appellant can only be attributed to the market dynamics, which are not under the control of the Commission;
- c) in case of contravention of section 18-A (1) of the SEO, the application money is liable to be confiscated by the Commission. Neither the Company nor the Appellant can be given the right to confiscate the money. No authority other than the state or the departments performing the functions of the state can confiscate the money of public for violation of a provision of law; and
- d) the Appellant refused to take the required actions in accordance with law despite repeated reminders dated 12/05/09, 02/06/09, 20/07/09, 03/08/09, 07/12/09 and 28/06/10. The Appellant failed to deposit the confiscated subscription money of 254 applications amounting to Rs.2,857,500/- within the time period stipulated in each Order. The requirement of 'willful' under



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section 22 of SEO is fully met in the instant case as the Appellant has failed to act in accordance with the requirement of section 18(A) of the SEO despite repeated reminders.

6. We have heard the parties and have gone through the record. Our para-wise findings in the appeal No 68/11 (Arif Habib Securities vs. Director (CI) SMD) have been restated in accordance with facts of the instant case as under:
- a) the relevant provisions of the Constitution cited by the Appellant's counsel are reproduced for ease of reference:

23. Provision as to property

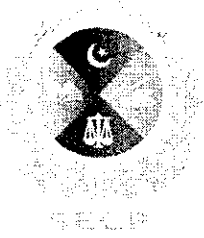
Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in public interest.

24. Protection of property rights.

(1) No person shall be compulsorily deprived of his property save in accordance with law

(2) No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation or specifies the principles on and the manner in which compensation is to be determined and given

Emphasis Added



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The fundamental right to acquire, hold and dispose of the property envisaged by Article 23, 24(1) and (2) of the Constitution is not an unfettered right and is subject to the applicable laws of the country. Section 18-A of SEO is reproduced for ease of reference:

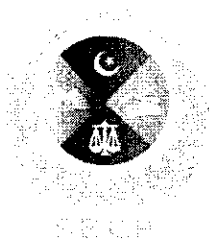
18A. Prohibition of making fictitious and multiple applications for new issues.—

- (1) No person or any other person on his behalf shall make a fictitious application or submit more than one application for share of companies offered to the public.*
- (2) In case of contravention of the provisions of sub-section (1), the application money shall be liable to confiscation:*

Provided that no action under this sub-section shall be taken without giving the applicant an opportunity of being heard

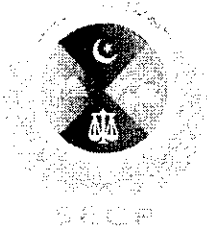
Emphasis added

The power entrusted to the Commission to confiscate the application money is to create deterrence in the market and to ensure that no applicant indulges in malpractice of making *fictitious* or *multiple* applications. The stated provision of law is reasonable restriction in public interest and is not violative of Article 23, 24(1) and (2) of the Constitution;



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- b) the due process including issuance of SCN, followed by hearing and passing a reasoned order was followed in each case. The department representative contended that over 1000 cases for violation of section 18-A of the SEO have been processed and disposed of during December 2008 to May 2009. It is apparent that the delay was on account of the large number of cases involved and cannot be attributed to the Commission. The loss, if any, caused to the Appellant is due to fluctuation in the price of shares in the market. On the other hand, if the price of shares had risen, the Appellant would have reaped profit. The Impugned Order has directed the Appellant to pay the subscription money of Rs.2,857,500/- of 254 applications confiscated by the Commission and to issue 1,500 shares against 3 applications. The directions made in the Impugned Order have no relation to the market value of the shares and have been issued to ensure the compliance of requirements of section 18-A of the SEO;
- c) the right to confiscate the application money has to be determined by an authority which is entrusted with the powers to protect the investor and regulate the market. Neither a company nor the offerer has been conferred such rights in the SEO. The intention of the legislature can be gathered from the formal procedure laid down in 18-A of the SEO and the powers entrusted to the Commission as regulator for the markets in general and for dealing in securities and matters ancillary thereto. The application money confiscated by the Commission becomes part of the Fund of the Commission in terms of section 23 of the SECP Act; and
- d) section 22(1)(b) of the SEO provides penalty for refusal or failure to comply with any order or direction of the Commission. The Appellant has refused to



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implement the Orders issued by the Commission under section 18-A of the SEO. It is pertinent to mention that no appeal was preferred by the applicants against the Orders before the Appellate Bench of the Commission, as such, the Orders had attained finality. The act of the Appellant was '*willful*' as the Appellant despite numerous reminders of the Commission failed to submit the confiscated amount. Moreover, the prayer of the Appellant that the shares are lying with the Share Registrar of the Company and the Commission may direct the Share Registrar of the Company to offer shares of the rejected applications at prevalent market price and deposit the sale proceed in the Commission's bank account as confiscated money shows that the Appellant is defying the directions of the Commission *willfully*.

In view of the above, we see no reason to interfere with the Impugned Order. The appeal is dismissed with no order as to cost.

(Mohammed Asif Arif)
Commissioner (Insurance)

(Tahir Mahmood)
Commissioner (CLD)

Announced on: 02/11/12