2013 C L D 158

[Securities and Exchange Commission of Pakistan]
Before Imran Inayat Butt; Director/ HOD (MSCID)
MUHAMMAD AAMIR: In the matter of
Show Cause Notice No. I[I8)IT/MSW/SIVID/ I(5)2004/10
dated 20-I-2012, decided on 31st May, 2012.

(a) Securities and Exchange Ordinance (XVII of 1969)-----15-E---Insider Trading---While reviewing_the trading data of Modarba and Bank during the review period, it was noted that trading by the respondent in certain illiquid scrips through his different trading accounts, was in correlation with the trading of Modarba. and the Bank; it was noted that in majority of the instances, he G 2013] Muhammad Aamir: In the matter of 159 (Imran Inayat Butt, Director/ HOD (MSCID)) bought the scrip prior to the purchase by Modarba and the Bank; and subsequently sold all or major portion of the same to the Modarba and the Bank and the rest in the market at higher price, around the same time Modarba and the Bank started buying the shares, which resulted in considerable- gain to him~~-During the period from July 1, 2008 till January 31, 2011, he undertook .bulk trading activities in 147 scrips---Out of said 147 scrips traded by him during the period, his trading in only 22 scrips as given in show~cau.se notice, matched with either Modarba or the Bank---Record established that during the Review Period, he was an active investor/trader in the market---Data provided by him regarding his trading during the review period corresponded to the data available with the Commission---Neither in written reply, nor during the course of hearing, he himself or his representative had denied execution of any of the transactions mentioned in show-cause notice--Contention of the respondent that due to his bulk trading, a minor percentage of his trading matched with Modarba and the Bank, which was insignmcant, immaterial and completely accidental, and unintentional, was not true---No documentary evidence was provided, which could prove that the payments as mentioned in the show-cause notice, were made in connection with the business mentioned in Partnership Deed-"Mere presentation of the Partnership Deed and payment through Banking Channel, did not prove that payments made, were the result of any other business transaction-»Person who was Equity Investment Portfolio Manager at Modarba and was also looking after Investment Portfolio of the Bank, by virtue of his position, was in possession of material inside information regarding the investment decisions of Modarba and the Bank-#Respondent was held guilty of contravention of S.15{A)(1) and in exercise of the powers under S.15-E of Securities and Exchange Ordinance, 1969, respondent was directed to deposit a _fine of Rs.4.500 million (Rupees Four million Five Hundred Thousands only). Ipp. 160, 165, 169, 171, 175]A, B, D, E & F Central Insurance Company and others v. The CBR and others 1993 SCMR 1232 and Mir Muhammad Idris v. The Federation of Pakistan and others Constitutional Petition No.58 of 2010 ref.

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160 CORPORATE LAW DECISIONS lVo1. XII '(b) Securities and Exchange Ordinance (XVII of 1969)-----Ss. 15-A, 15-D & 15-E---Prohibition of Insider Trading"-Purpose and intent behind the prohibition of Insider
Trading was to prevent a person from making a gain, or avoiding a loss by trading in listed securities based on inside information relating to such listed securities before the issuer of such securities disclose such information as required by S.15-D of Securities and Exchange Ordinance, 1969---In order to come within the ambit of S.15~A of Securities and Exchange Ordinance. 1969, the insider information, the insider and security should relate directly to the issuer. Ip. 167].

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Shahid Melimood Tabassum representing Muhammad Aamir. Muhammad Atif I-lameed, Deputy Director, SECP and Mian`Ahmad Ibrahim, Deputy Director, SECP assisting the Director/HOD (MSCID).
Date of hearing: 30th March, 2012.
ORDER

IMRAN INAYAT BUTT, DIRECTOR/ HOD (MSCID).....This order shall dispose of the proceedings initiated through Show Cause Notice No.ll18)IT/MSW/SMD/1(5)2004/10 dated January 20, 2012 ("SCN") issued by the Securities and Exchange Commission of Pakistan (“the Commission") under section 15E of the Securities and Exchange Ordinance, 1969 ("0rdixi¢fnce") to , Mr. Muhammad Aamir ("the Respondent").
2. The brief facts of the case are that while reviewing the trading data of B.R.R Guardian Modaraba (“BRRGM"] and First Dawood Investment Bank Limited ("FDl'BL") during the period from July l, 2008 to January 31, 2011 ("the Review Period"), it was noted `that trading by the Respondent in certain illiquid scrips through his different trading accounts was in correlation with the trading of BRRGM and FDIBL. It
was noted that in majority of the instances the Respondent bought the scrip prior to the purchase by BRRGM and FDIBL and subsequently sold all or major portion of the same to BRRGM and FDIBL and the rest in the market at higher price, around the same time BRRGM and FDIBL started buying the shares ["Correlated Trading"), which resulted in

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3. During the Review Period the Respondent traded through his accounts with the following brokers of KSE:--
Sr. No. I Broker Name I Client Code
1 | H_M. Idrees 1-1. Adam f 385 and 404
2 | Multiline Securities (Pvt) Ltd. | 5801
3 | First National Equities Ltd. 1 703
The trading pattern of the Respondent led to suspicion that the trading was executed on the basis of prior information regarding trading decisions by BRRGM and FDIBL.
4. Meanwhile, the Enquiry Team of the Commission conducted Enquiry, under section 21 of the Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980, into the affairs of BRRGM, scrutinized different records and information including the telephonic records of B.R.R Investments (Pvt.) Limited, ("BRRl"), which is management company of BRRGM and Multiline Securities
[Pvt.) Limited. The Enquiry Team unearthed. information that during the Review Period the Respondent was in Contact with Mr. Muhammad Yousuf ("YT") who was Equity Investment Portfolio Manager at BRRGM and was also looking after investment portfolio of FDIBL during the Review Period. The aforesaid findings showed that the Respondent and YT knew each other and were in contact during the Review Period. Moreover, the examination of YT and the Respondents bank account statements by the Enquiry Team also revealed that during the Review Period, the Respondent through his different bank accounts transferred an amount of Rs.3.6l4 million through various cheques to YT’s bank account, The details of said transactions are given in the following Table-2:
5. The pattern of Respondents trading, his acquaintance with YT and transfer of funds by him to YT, rima facie, transpired that the trading by the Respondent was done on the basis of confidential and material non public information, disclosed to the Respondent by YT, pertaining to the investment decisions by BRRGM and FDIBL. Since it was evident from the available record that YT in his official capacity was privy to inside information pertaining to investment decisions by

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BRRGM and FDIBL and thus was an insider. Therefore, SCN was issued to the Respondent as to why action should not be taken against him under
section 15E of the Ordinance for engaging in Insider Trading. The details of the Correlated Transactions were annexed withthe SCN. The Respondent was required to submit his written reply to the SCN within ten days of the date of the SCN and appear before the undersigned on February 6, 2012 for hearing in the matter.
6. The Respondent vide letter dated January 25, 2012 requested for extension in date of submission of reply to the SCN till March 5, 2012 and also requested for change in venue of hearing from Islamabad to Karachi. The Respondent was informed vide letter dated January 30, 2012 that his request for extension in time for submission of written reply till Match 5, 2012 can not be acceded to, however in the interest of justice, date of submission of reply was extended till February l3, 2012. Moreover, the Respondent was informed that decision regarding his request for change in venue of the hearing will be communicated later on. Subsequently; vide'letter dated February ll, 2012 Mr. Shahid Mehmood Tabassum of Shahid Kamboh Law Chambers ("Representative of the Respondent") requested for extension of 21 days in submission of written reply to SCN and also provided copy of authority letter from the Respondent to represent him in the matter of the SCN. The

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20 13] Muhammad Aamir: In the matter of 165 (Imran Inayat Butt, Director/ HOD (MSCID)) 7 said request of the Representative of the Respondent was acceded to vide letter dated February 13, 2012 and the date of submission of written reply to the SCN was extended till March 5, 2012.
7. The Representative of the Respondent -submitted the reply to the SCN vide letter dated March 3,' 2012. The assertions made by the Legal Counsel in its written reply are summarized below:--
(i) The Respondent is dealing in stock exchange since A 1995. During this period he had been engaged with different brokerage houses. The detail of which A are as follows:
Sro. Period Title Brokerage House
11995 96 Runner Abdul Aziz Securities
A 2 1996 - 98 Settlement lncharge Tahir Shafique Amin
31998 - 99 Manager Amin Karim Dehdi
41999 - 00 Dealer Haroon Suleman
5 2000 - 07 'Dealer MAC Securities
6 2007 4 08 Dealer First National Equity
7 2008 to date Dealer Multiline Securities

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While working in above mentioned positions, the Respondent engaged in equity trading for his own account. A During the period from July 1, '2008 till'January 31, 2011 the Respondent undertook bulk trading activities in 147 scrips. The Respondent purchased 87,736,225 shares through Multiline Securities (Pvt.) Limited ("MLS") and 68,855,600 shares through First National Equities Limited ("FNEL") and sold 82,923,568 shares through MLS and 64,215,200 shares through FNEL and » incurred a loss of Rs.12,935,699 on the total trading activity. Summary of .trading by the Respondent in different shares and resulting profit and loss calculation was also provided withthe reply. A Out of 147 scrips traded by the Respondent during the period his trading in only 22 scrips, as given in……

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CORPORATE LAW DECISIONS [Vol. XII SCN, matched with either BRRGM or FDIBL. Further out of 156.591 million shares purchased by the Respondent only 292,912 shares (O.18% of the total

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shares) have matched with either BRRGM or FDIBL. Moreover, out of 147.139 m illion shares sold by Respondent only 11985 million shares (1.34% of the total shares) have matched with either BRRGM or FDIBL. The said figures clearly shows that the matching of trades with BRRGM or FD IBL amounts to very insignificant and immaterial fraction of total trades which are completely accidental and unintentional.
The Respondent has not committed any wilful act while trading in said shares. Keeping in View the current mechanism of trading 'in KSE it is impossible for a trader to know with whom he is trading. Since
the act of the Respondent is not wilful" penalty under section 15-E of the Ordinance cannot be imposed on the Respondent. The Enquiry Team has shown a rather pick and choose approach by considering only
few segments of the trading by the Respondent while completely ignoring his bulk trading activity. Admittedly, the Respondent and YT are familiar with each other over the last many years, Both have
mutual business interests and have trading ties in the field of prize bonds and other commodities. Most of the time, Respondent buys prize bonds from YT. The payment of which are made by the Respondent
through his personal bank account in order to clear his liabilities. The banking transactions during the Review Period were also in this context. Further, the payment through banking instrument strengthens the fact that they were conducting legal transactions in good faith. lf the ,consideration of the payment were illegal, the payment could have been made through any channel other than the documented channel. YT had to make calls to the Respondent through mobile phone and sometime on landline telephone mostly as a payment reminder, The Enquiry Team has acted in a discriminatory manner in obtaining and scrutinizing the telephone record of MSL and BRRGM. Since telephone records do not come under the definition of material and definite information, nobody can determine……

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Muhammad Aamir: In the matter of 167 (Imran Inayat Butt, Director/ HOD (MSCID)) meaningful conclusion of any telephone conversation. In_support of his argument the Representative of the Respondent relied on the judgment of Hon'ble Supreme Court of Pakistan in the case of "Central Insurance Company and others V. The CBR and others (1993 SCMR 1232)".
The Respondent has .never been subject to any enquiry or investigations under provisions of the Ordinance. The Respondent has no nexus with the BRRGM. The enquiry as' mentioned in SCN was initiated against the BRRGM under section 21 of the Modaraba Companies and Modaraba (Floatation and Control) Ordinance, whereas SCN has been issued under section l5E of the Ordinance which is contrary to the law and with out proper jurisdiction. It would have been in the interest of justice that enquiry may have been initiated separately under the provision of the Ordinance.
(viii) The definition of the "inside information" as
(ix) stated in section 15B of the Ordinance has not been interpreted in the spirit and entirety of the sections 15A to l5E of the Ordinance. A collective reading of the aforementioned sections along with section l5E of the Ordinance shows that the purpose and intent behind prohibition of insider trading is to prevent a person from making a gain or avoiding a loss by trading in listed securities based on inside
information relating to such listed securities before the issuer of such securities disclose such information as required_ by section 15D of_the Ordinance. ln order to come within the ambit of section 15A of the Ordinance, the inside information. the insider and security should relate

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directly to the issuer. Further the investment decisions by an entity are never required to be made public in terms of section 15D of the Ordinance. Moreover, the investment decision by an en`tity cannot be concretely considered, as price sensitive information as there may be different investment decisions by different traders at the same time for the same shares, Therefore, the application of the sections 15A to l5E to the Respondent in subject case is merely on the basis of hypothesis, conjecture and misunderstanding of the law. The amendments to chapter IIIA of the Ordinance……

168 CORPORATE LAW DECISIONS - [Vol. XII have not been properly legislated as they were introduced in the Ordinance through Finance Act 2008. This is contra to the Article 73 of the Constitution of lslamic Republic of Pakistan. All the provisions contained in the Chapter III A of the Ordinance were added through section 6(2) of the Finance Act, 2008 with effect from June 27, 2008. The Finance Act is a culmination of a "Money Bill" which is passed by the National Assembly not by the Senate. The addition of Chapter lllA in the Ordinance through Finance Act, 2008 is ultra vires of the Constitution and no action whatsoever can be initiated on the aforementioned provisions. ln support of this argument the Representative of the Respondent also relied on the judgments of the Hon'ble Supreme Court of Pakistan in the case of Mir Muhammad Idris v. The Federation of Pakistan and others, The Legal Counsel
also asserted that the said orders of the Hon'ble Supreme Court of Pakistan are binding on the Commission and failure to abide by the same will renders all its actions completely unlawful and , without jurisdiction. Therefore, the changes made in the section 15, of the Ordinance through Finance Act, 2008 are ultra vires of the Constitution of Pakistan and consequently the impugned SCN is also illegal and liable to be set aside.
(X) The Representative of the Respondent requested that lenient view in the matter may be taken.
8. Subsequently, 'the date of hearing was fixed for March 30, 2012 at 10-30 a.m, at the Head Office of the Commission. On the said date, the Representative of the Respondent appeared along with authority letter ,from the Respondent. During the hearing the Representative of the Respondent while reiterating the arguments submitted through the written reply to the SCN and pointing out some corrections in the same made the assertion that payments were made in connection with business of the Respondent with YT and agreed to provide proof of said business between them. He also quoted a numbers of orders passed by the Commission for violation of section 15A of the Ordinance and stated that in most of the cases there was direct/blood relationship between tipper-and tippee, whereas in the instant case there is no direct/blood relationship between Respondent and YT. He further argued that since the Commission has taken lenient view in its previous orders;

2013] Muhammad Aamir: In the matter of 169 (Imran Inayat Butt, Director/ HOD (MSCID)) therefore, Commission should also take lenient view in this matter as well. It was further asserted by the Representative of the Respondent that since the enquiry was ordered by Registrar Modaraba, therefore. the SCN should ,also have been issued by him. He stated that copy of enquiry report was not provided to the Respondent. The copies of judgments relied on in the written reply to the SCN were also provided
by him.

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9. I have thoroughly analyzed and examined the facts, evidence and documents on record, in addition to the-written replies to SCN and assertions made by the Representative of the Respondent during the hearing. My findings on the issues are as follows:-
(i) It is established from the record that during the Review Period the Respondent was an active investor/trader in the market. The data provided by the Respondent regarding his trading during the Review Period corresponds to the data available with the Commission. Further, neither in written reply nor during the course of hearing, the Respondent or his Representative denied execution of any of the
transactions mentioned in the SCNL
(ii) The contention of the Respondent that due to his bulk trading a minor percentage of his trading matched with BRRGM and FDIBL which is insignificant, immaterial and completely accidental and unintentional is not true. The review of the Respondents trading showed that Correlated Trading only occurred in illiquid scrips, whereas, no such pattern was observed in his trading in liquid scrip. Although the matched trading constitutes a minor percentage of the overall_trading volume of the Respondent, however, when his trading volume in 22 illiquid scrips is considered the matched volume constitutes major percentage of the same and resulted in significant profit to the Respondent. It is also observed that in most of the instances of Correlated Trading, only one leg (i.e. buy 'side or sell side) of the Respondents trading matched with BRRGM or FDIBL, whereas, the other leg of the trading was executed in the market with other market participants. The trading pattern of the Respondent in the scrips mentioned in the SCN, illiquid nature of scrips and the amount of profit made in each instance……..

CORPORATE LAW DECISIONS [V0l. Xll the Correlated Trading with was not accidental and the scheme was thoroughly planned before execution of trading.

clearly shows that

BRRGM and FDIBL

unintentional' and

The Respondent's contention that the ' Correlated Trading was not intentional is untenable. lt may be noted that trading pattern of the Respondent in the scrips. timing of placement of ~orders by Respondent and BRRGM/FDIBL clearly shows the intention of the Respondent. Although the current trading mechanism is based on anonymity of the buyer ,and seller, however, in order to circumvent this mechanism the Respondent selected scrips which were illiquid and the -timing, of the placement of orders by the Respondent and BRRGM/FDIBL also ensured that orders are matched. This discovery finds strength from the fact that during most of the trading days as mentioned in Table-l above, the buying and selling of the Respondent and BRRGM/FDIBL constituted major portion of market volume of that serip.
The Respondents contention that the Enquiry Team has shown pick and choose approach by considering few segments of the trading by the Respondent while completely ignoring his bulk trading activity is incorrect, It may be noted that the Respondents complete trading activity during the Review Period was
analyzed which showed matching transactions and dubious trading pattern in 22 scrips. Therefore, the
SCN was only issued'in reference to the Correlated Trading in 22 illiquid scrips.
The Representative of the Respondent was also informed during the hearing 'that the Respondent‘s

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trading was under observation of Securities Market Division of the Commission since May 2009, however, during preliminary investigation no evidence of any link between the Respondent and any person (Tipper) at BRRGM/FDIBL could be found. Subsequently. when Registrar Modaraba initiated an enquiry into the affairs of BRRGM the Enquiry Team found concrete evidence of link between the Respondent and YT. The said findings of the Enquiry Team were subsequently communicated to Securities Market Division of the Commission. The SCN, thereafter, was issued to the Respondent after' corroborating the information……..

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Muhammad Aamir: In the matter of 17 1 (Imran -Inayat Butt, Director/ HOD (MSCID)) already available with the Securities Market Division and obtained from other sources with theinformation received from the Enquiry Team. During the hearing and in his written reply the Respondent admitted that YT, is known to him for many years and they have combined business interests in the field of prize bonds and other commodities. During the hearing, the Representative was asked to provide any proof in this regard especially any documentary evidence that payments made by the Respondent to YT were in lieu of some other business transaction between them. The Representative of the Respondent during the hearing agreed to provide the said documentary evidence. Subsequently, the Legal Counsel vide letter dated April 4, 2012 provided the following documents: Statement on non judicial paper by the Respondent stating that he knows YT for many years and the payment of Rs.3.6O million from his account to YT is related to priie bonds. 1 Copy of Partnership Deed of Messrs AY Enterprises made at Karachi on July 4. 2007 between the Respondent and YT. The Deed mentioned/ that nature of business of partnership shall be trading of Prize Bonds, Gold, Import, Export, Wholesaler, Retailers. Distributor, General Trading and Supplies and or any other related business(s) or any other business with mutual consent of all the partners. The profit sharing percentage was 50%. However, no documentary evidence was provided which could prove that the payments, as mentioned In the SCN, were made in connection with the business mentioned in the Partnership Deed i.e. tax return of the4Partnership, copies of receipts. vouchers any other documentary evidence. Mere presentation of the Partnership Deed and payment through banking channel does not prove that payments made by the Respondent to YT were result of any other business transaction between them. Therefore, in absence of any documentary evidence the said contention of the Respondent cannot be accepted. With regard to the contention of the Respondent regarding telephonic record, it may be noted that……

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CORPORATE LAW DECISIONS [Vol. XII nowhere in the SCN it is mentioned that the inside information was communicated through telephone. The SCN only stated that the Respondent and YT were in contact with each other though telephone and mobile, which shows that they knew each other; Nowhere in the SCN it is ,mentioned that the inside information was communicated by telephone or mobile. The reference of the telephonic recording which is admitted by the Respondent was given in the SCN only to establish link between Respondent and YT. The trading pattern in the scrips mentioned in Table l clearly shows that the Respondents trading was based on inside information which resulted in considerable gain to the Respondent and a part of which was transferred to YT from time to time. The contention of the Respondent that the enquiry was initiated under section 21 of the Modaraba Companies 'and Modaraba (Floatation and Control) Ordinance 1980, whereas SCN was issued under section l5E of the Ordinance and hence is contrary to law and with out proper jurisdiction is not correct. It may be noted that under Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980, the Registrar of Modaraba has the powers to order enquiry into the affairs of any modaraba, whereas, the powers under section l5E of the Ordinance have been delegated to Director (SM), therefore, Registrar of

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Modaraba does not have the power to initiate proceeding under the section 15E of the Ordinance. Moreover, it may be noted that the SCN was not issued only on the basis of the findings of the enquiry
of BRRGM. the Respondents suspicious activities in the market were being monitored well before initiation of enquiry of BRRGM and during the course of enquiry only the tipper i.e. YT was identified. The findings of the Enquiry Team were analyzed and verified 'again by the Securities Market Division of the Commission and only after thorough review and considering all facts on record, SCN was issued to the Respondent. Moreover, initiation of proceedings under section 15E of the Ordinance does not require initiation of any formal enquiry. The interpretation of the sections' 15A to 15E of the Ordinance by the Respondent is also not correct.

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Muhammad Aamir: In the matter of 173 (Imran Inayat Butt, Director/HOD (MSCID)) said sections do not state that the inside information includes only that information that should be disclosed `to the general public. The reading of section l5(B)(c] of the Ordinance transpires that inside information also includes information relating to the client's pending orders. lt may be noted that section l5(B)(a) of the Ordinance is worded to cover 'wide range of information that may relate to listed securities which is not in public domain and is price sensitive in nature. Therefore, any information regarding trading decision by any person is price sensitive in nature. In the instant case YT was taking investment decisions on behalf of BRRGM and FDIBL and communicated the said decisions -to the Respondent before execution. This information although is not required to be disseminated to general public but it'still qualifies as inside information. lf the said information regarding investment decisions of BRRGM and FDIBL would have been available to public, same would have had an effect on the price of scrips thus it constitutes to be inside information. The section l5(D) of the Ordinance requires every listed company to inform the public as soon as possible regarding inside information which directly concerns the listed securities. However, it may be noted that decisions by any investor/ trader to trade in a scrip is never in knowledge of the listed company, therefore, the listed company cannot possibly disseminate the same to the general public, Therefore, it is entirely incorrect to restrict the scope of these provisions to information that the issuers are bound to disclose in terms of section 15D of the Ordinance as it would defeat the intent of the law. Further, the definition of the term "Inside Information" is wide enough to cover investment decisions which have an impact on the price of listed securities. With regard to the 'Respondents assertion regarding the amendment in the section 15 of the Ordinance through Finance Act 2008, the Representative of the Respondent relied on the judgment of the Honorable Supreme Court of Pakistan in Constitutidnal Petition No.58 of 2010 Mir Muhammad Idris v. Federation of 'Pakistan and others. While discussing this issue, it may be noted that this forum is not competent to adjudicate on the constitutional issues and vires of…….

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CORPORATE LAW DECISIONS [Vol. XII the law. However, I am in complete agreement with the argument of the Representative of the Respondent that the orders of the Supreme Court and High Court are considered as precedent and are binding on this forum. However, it needs to be considered whether the judgment of the superior judiciary constitutes ' as a binding precedent or whether the superior judiciary has limited the scope of its judgment to a set of facts in a given case. In the judgment relied ,by the Representative of the 'Respondent the Hon'ble Supreme Court of Pakistan, while considering the concerns expressed by the Attorney General of Pakistan and

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effect of the judgment on other amendments carried out through Finance Act has categorically held as under:--

"As for(sic.) the fear expressed by the learned Attorney General, suffice it to say that no other provision either of the Act of 1974 or of any other law amended by a Finance Act having been challenged by anyone before us, this judgment will be confined to the issue involved in the present case, namely, the

unconstitutionality of the amendment of section 1 1(3)(d) of the Act of 1974 brought about by the Hnance Act, ZO07."

Therefore, the judgment relied on by the Representative of the Respondent is not relevant to the instant case. The Representative of the Respondent did not provide any case-law wherein the section 15A-E is held to be ultra vices of the Constitution. Therefore, in absence any findings, or judgment to this effect from any superior court, sections 15A-E of the Ordinance is valid law.

With regard to the reference of different orders passed by the Commission for violation of section 15A of the Ordinance it may be noted that the referred orders were passed on the basis of the facts peculiar to each case and lenient views were taken only in those cases where either the quantum of violation was subsequently found to be relatively small or after preponderance of evidence on record, the balance of the 'probability was in favour of the accused. In the Muhammad Aamir: In the matter of 175

(Imran Inayat Butt, Director/ HOD (MSCID)) 2013] instant case the Respondent or his Representative has

failed to provide any evidence which' could create doubt that Respondent has not traded on the basis of

inside information. The facts available on- the xccord clearly establish that YT by virtue of his position was in possession of inside information. YT and the Respondent knew each other and were in contact

with each other during the period when Correlated Trading with BRRGM/FDIBL was executed. Moreover. the Respondent has failed to provide any evidence that the payments made by him to YT related to any business transaction by their partnership firm. In absence of any cogent evidence to the

contrary the transfer of money can only be attributed to the amount of gain made as a result of Correlated Trading. It also needs .to be noted that it is not necessary that penalty should be confined only to wilful acts of omission and commission in contravention of the provisions of the enactment. For proper enforcement of provisions of Law, it is common knowledge that absolute liability is imposed and the acts without

(X)mens rea are made punishable. The notion that a, penalty or a punishment cannot be cast in the form of an absolute or no fault liability but must be preceded by mens rea must be rejected. The classical View that "no mens rea, no crime" has long ago been eroded especially regarding economic crimes. I am of a view that the Ordinance is intended to regulate the securities market' and the related aspects, the

imposition of penalty, in the' given facts and circumstances of the case, cannot be tested on the ground of "no mens rea, no penalty". For breaches of provisions of Ordinance and secondary legislation made thereunder, which are civil in nature, mens rea is not essential.

10. reply and the arguments made by the Representative of the Respondent during the course of hearing it is abundantly clear that YT, by virtue of his position at both BRRGM and FDIBL was in possession of material inside information regarding the investment decisions of BRRGM. and FDIBL. YT being privy to the inside information by virtue of his influential position at BRRGM and FDIBL passed on said Based on the contentions submitted in the written……..

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from the trading pattern. In terms of section 15[A)(2) of the Ordinance, insider trading shall include:
(a) an insider person transacting any deal, directly or indirectly, using inside information involving listed
securities to which the insideinformation pertains, or using others to transact such deals;
(b) any other person to whom inside information has been passed or disclosed by an insider person transacting any deal, directly or indirectly, using inside information involving listed securities to which the inside information pertains, or using others to transact such deals; Therefore, the contravention of section 15A(1) stands established against the Respondent. A 12. In light of thcrabove, Respondent is hereby held guilty of contravention of section" 15[A)(1] and- in exercise of .the powers under section 15E of the Ordinance, I hereby direct the Respondent to deposit a fine of Rs.4.5O0 million (Rupees Four million Five Hundred Thousand Only).
12. The matter is disposed of in the above manner and the Respondent is directed to deposit the fine as mentioned in paragraph 11 above, in the account of the Commission being maintained in the designated branches of MCB Bank Limited not later than thirty (30) days from the date of this Order and furnish the copy of thedeposit challan to the undersigned.
13. This Order is issued without prejudice to any other action that the Commission may initiate against the Respondent in accordance with law on matters subsequently investigated or otherwise brought to the knowledge of the Commission or on the same facts for violation of any other provision of the Ordinance.
HBT/ 35 / SEC
Order accordingly.

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[Lahore]
Before Mehmood Maqbool Bajwa and Shahid Waheed, JJ
Messrs KHAN TRACTORS, ALIPUR ROAD,
KHAN GARH DISTRICT MUZAFFARGARH
through Proprietor and 2 others-»~Appellants
VEYSUS V
HABIB BANK LIMITED, RAILWAY ROAD BRANCH,
MUZAFFARGARH through Manager---Respondent
Execution First Appeal No. 20 of 2012, decided on 17th May, 2012.
Financial Institutions (Recovery of Finances)

Ordinance, (XLV1 of 2001)----S. 22--- Limitation Act (IX of 1908), Ss. 5 & 29--- Appeal---Application under S.5, Limitation Act, 1908 for condonation of delay for appeal filed under S.22 of the Financial Institutions (Recovery of Finances) Ordinance, '2001-"Maintainability---Section 5 of the Limitation Act, 1908 by virtue of ouster clause was not applicable to the proceedings of the appeal, under S.22 of the Ordinance;
as the same prescribed a period of 30 days for filing of the appeal--No enabling and permissive provisions of the law existed in the said Ordinance in order to apply S.5 of the Limitation Act, 1908--Provisions of S.5 of the Limitation Act, 1908 were not attracted to the appeal preferred under S.22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001---Application for condonation of delay was not maintainable---Appeal, being barred by time, was dismissed. Ipp. 179, 180]A & B Allah Dino and another v. Muhammad Shah and others 2001 SCMR 286: Abdul Rasheed and another v. Bank of Punjab through Branch Manager 2004 CLD 800; Protein and Fats International (Pvt.) Limited through Chief Executive and 2 others v. Capital Assets Leasing Corporation Limited through Manager 2005 CLD 857; Sikandar Hayat v. Agricultural Development

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Bank of Pakistan through Manager -2005 CLD 870: Industrial Devel0prnent'Bank of Pakistan v. Rehrnania Textile Mills (Pvt.) Limited through Chief Executive and 3 others 2006 CLD 81 and Messrs S. Malik cw.

178 CORPORATE LAW DECISIONS [Vol. XII Traders and another v. Saudi Pak Leasing Company Ltd. 2009 CLD 171 rel.
Mian Babur Saleem for Appellants.

ORDER

The appellants by way of present appeal preferred under section 22<of the Financial Institutions [Recovery of Finances) Ordinance, 2001, have called in question the legality of orders dated 21-3-2012 and 3~4-2012 whereby the learned Banking Court No.1, Multan, directed to put the property of appellants into auction. 2. Since the appeal is barred by time, therefore, the appellants have filed application under section 5 of the Limitation Act, 1908, (C.M. No.3-C of 2012) , seeking condonation of delay in preferring E.F.A. No.2O of 2012 titled "Messrs KHAN TRACTORS ETC. v. HABIB BANK' LIMITED"
contending that valuable rights of the applicants- are involved and as such while granting premium appeal be decided on merits.
3. Heard Specific question was posed to the learned counsel for the applicantsappellants regarding the applicability of the provisions of Section 5 of the Limitation Act, 1908 (Act No. IX of 1908) to the proceedings arising out of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (XLVI of,2001). Tliough it was maintained that provision of section 5 of the Limitation Act, 1908, is applicable to the proceedings arising out of matters under the Ordinance (XLVI of 2001) but half-hearted attempt has least impressed us in view of well-settled proposition of law.

4. According to section 29 of the Limitation Act, 1908 (hereinafter called the Act), where time is prescribed by any special or local law for any suit, appeal or application, different from the period prescribed by the First Schedule of the 'Act', then the provisions of said Act contained in sections 4, 9, 10, 18 and 22 shall apply in so far as and to the extent to which they are not expressly excluded by such
special or local law. g Clause (b) of subsection (2) of section 29, ekcludes the application of remaining provisions of the Act.

2013] Khan Tractors u. Habib Bank Limited 179 In view of the matter, provisions of section 5 of the Limitation Act by virtue of ouster clause are not applicable to the proceedings ,of the appeal under section 22 of the Financial Institutions (Recovery of Finances) Ordinance. 2001, as the later mentioned provisions prescribe a period of 30 days for preferring an appeal.
5. It is Worth mentioning that there is no enabling and permissive provisions of law in the said Ordinance in order to apply section 5 of the Act.
GQ The honourable apex Court, while examining the provisions of section 29(2) and section 5 of the Act has held in "ALLAH DINO and another v. MUHAMMAD SHAH and others"(200l SCMR 286) that where the law under which proceedings had been initiated itself prescribed a period of limitation, then the benefit of section 5 of the Limitation Act, 1908, could not be availed unless the 'same had been made applicable as per section 29(2) of the Act.
6-A. Question of applicability of section 5 of the Limitation Act, 1908, to the proceedings initiated under section 22 of the Financial Institutions (Recovery of Finances) Ordinance,
(XLVI) of 2001, was dealt with by this Court in "ABDUL RASI-IEED and another v. BANK OF PUNJAB through Branch Manager" (2004 CLD 800). "PROTEIN AND FATS INTERNATIONAL (PVT.) LIMITED through Chief Executive and 2 others v. CAPITAL ASSETS LEASING CORPORATION LIMITED through

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Manger" (2005 CLD 857), "SIKANDAR HAYAT v. AGRICULTURAL DEVELOPMENT BANK OF PAKISTAN through Manager" (2005 CLD 870) and "INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN v, REHMANIA TEXTILE MILLS (PVT.) LIMITED through Chief Executive and 3 others" (2006 CLD 81) and it was held that since special law has provided different period of limitation for filing appeal in the 'court than the ordinary law, therefore, section 5 of the Limitation Act is not attracted to the appeal preferred beyond period of limitation provided in section 22 of the Financial Institutions (Recovery of Finances) Ordinance.
(XLVI of 'zoo 1).
7. Learned Division Bench of the Karachi High Court dealing. with the same proposition in "Messrs S. MALIK TRADERS and another u. SAUDI PAK LEASING COMPANY LTD." (2009 CLD 171) also held that provisions of section 5 of the Limitation Act, 1908, cannot be made applicable in an appeal, having been preferred under a special CU).

182 CORPORATE LAW DECISIONS [Volt XII Government of Pakistan through Secretary, Finance Division,
Islamabad and others 1991 SCMR 1041; Abdul Baqi and others v. Muhammad Akram and others PLD 2003 SC 163; Syed Kamal, Shah v. Government of N.-W.F.P. 2010 SCMR 1377; Dr. Shahid Masood and others v. Federation of Pakistan and others 2010 SCMR 1849; G Sambasiva Rao v. APSRTC (1997) I An LT 219 at 230 and Muhammad Bashir v. Abdul Karim PLD 2004 SC 271 ref.

Asim Mansoor Khan for Petitioner. Kashif l-ianif for Respondent No.2.
Date of hearing: 29th August. 2012.
ORDER

SYED MUHAMMAD FAROOQ SHAH, J .Extraordinary jurisdiction of this Court under Article 199 of the Constitution with regard to breach of fundamental rights has been invoked by the petitioner against the respondents through non-issuance of licence and suspension of broadcastingpand transmission of the TV Channel (QTV).
2. 'Relevant facts as transpired from the captioned petition are that the petitioner applied to PEMRA (respondent No.2) for licence of landing rights of satellite TV channel QTV, which is not a commercial channel and is running to transmit religious and educational knowledge. It is averred that PEMRA sent a letter to the petitioner regarding the application dated 16-9-2005 filed by the petitioner for depositing Rs.lO5,000 for processing and licence fee, which was deposited in favour of PEMRA but the-landing rights licence was not ,issued in favour of the petitioner. The petitioner again sent a letter to PEMRA along with required documents for issuance of licence of satellite broadcasting station along with cheque dated 21-6~2006 in the sum of Rs.43,50,000 in favour of PEMRA and provided required documents for processing of licence and sent a letter on 17-4=2007 to PEMRA stating that they had applied for uplinking licence for QTV through application dated 31-8-2006 and reference was made to section '22 of the PEMRA Ordinance 2002, wherein -an application was to be processed within one hundred days of its receipt. In response the petitioner was informed by PEMRA vide letter dated 10-5-2010 that the case for issuance of satellite TV licence for QTV is under process and the petitioner was requested to apply for short term of uplinking.

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2013] ARY Communication (Put) Ltd. u_. Federation 183 of Pakistan (Syed Muhammad Farooq Shah, J) permission for QTV channel as-the same was being broadcast without any licence.
3. On 8-6-2010, PEMRA (respondent No.2) sent a show cause notice to the petitioner that QTV was being broadcast illegally without obtaining prior licence from the Authority and the petitioner was directed to immediately stop the illegal operation within 7 days. Petitioner, duly replied to the show cause notice and asked the PEMRA to immediately resume the transmission of QTV channel. lt is submitted that the action of respondent No.2 is illegal and contrary to the freedom of trade and expression guaranteed by the Constitution and inordinate delay of almost five 'years from the date of application is being clearly in violation of .section 22 of the 'PEMRA Ordinance 2002, the V respondent interrupted the broadcast of the channel in the holy month of Ramzan without appreciating the fact that QTV is a Television Channel provides for Islamic and Quranic learning and has immense viewership due to the religious significance of the holy month of Ramzan. The following prayer has been made by the petitioner:--
(i) declare that the interruption of broadcast of QTV at lftar time on 25-8-2010 is illegal and without due
process of law;
(ii) direct the respondent No,2 to restore the broadcast of QTV interrupted at Utar time on 25-8»2010 at the sarne frequency upon which it was interrupted;
(iii) grant permanent irgunction 'against the respondent No,2 from interrupting the broadcast of QTV in future without due process of law;
(iv) direct the respondent authority to issue license to the petitioner in accordance with law;
(v) grant interim relief by directing the respondent No.2 to ' restore the broadcast of QTV interrupted at Utar time on 25-8-2010 atthe same frequency upon which it was interrupted during the pendency of the petition.
(vi) grant costs of the petition;
(vii) any other relief which this Hon'ble Court may deem fit and proper in consideration of the facts and
circumstances of the case.
4. Respondent No.2 (PEMRA) filed para-wise comments

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184 CORPOlU\TE LAW DECISIONS [Vol. XII by raising preliminary objections - regarding non-maintainability of the Petition within the meaning of ,Article 199 of the Constitution of Pakistan, however, admitted that petitioner was running QTV channel without a licence from the Authority in violation of section 19(2) of PEMRA Ordinance 2002, that constitutes an offence under section 33 of the Ordinance. Moreover. the petitioner did not exhaust the remedy of filing an appeal as provided under PEMRA (Appeal and Review Regulation 2008). In reply to other submissions narrated in the petition, it is stated that under rule 14 of S.R.O. 1120(l)/2009 dated Islamabad, the 12th December, 2009, no foreign channel shall be distributed unless landing rights permission of such channel has been obtained from the authority. However, PEMRA Ordinance 2002 Constitute it a cognizable .offence and Cable TV Operators are obliged to relay only those TV channels to whom licence are issued by the Authority. Rule 14 of aforementioned Notification has been reproduced which reads as under:--
14. Proscription of a foreign broadcasting service:---No foreign channel shall be distributed unless landing rights permission for such channel has been obtained from the Authority: Provided that a distribution service operator shall relay only TV channels licensed by the Authority."
5. It is further stated by the respondent No.2 that illegal activity by the petitioner in violation of section 19(2) of PEMRA Ordinance 2002 constitutes a cognizable offence under section 33 of PEMRA Ordinance 2002 and that the Authority reserves its right to take legal action against the petitioner in this regard. The petitioner was duly served with a show cause notice whereby he has

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been directed to stop illegal activity. It is submitted that if the petitioner feels aggrieved by any order of the Authority, he has an alternate, efficacious remedy by way of filing of appeal under section 30A of PEMRA Ordinance 2002. In reply to legal grounds raised 'by the petitioner, it is stated by the respondent No.2 (PEIVIRA) that broadcasting of QTV is an illegal act, therefore, no question of interrupting the broadcast arises, as answering respondent is only performing its duty under the law, directed the cable TV operators to air only licensed TV channels as provided under the PEMRA laws. lt is reiterated that under section 19(2) of PEMRA Ordinance 2002 no person shall engage in any broadcast media or distribution…..

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2013] ARY Communication (Pvt) Ltd. U. Federation 185 of Pakistan (Syed Muhammad Farooq Shah J] service except after obtaining the licence issued under this Ordinance. PEMRA clarified that they have transmitted a number of proposals to the Ministry of Information and broadcasting and have also been in close liaison with Ministry of Religious Aflairs to sort out this impending issue and Ministry of Religious Affairs has forwarded some recommendations with regard to the licensing of religious channels to be made part of the code of conduct and status of application of religious channels pending with the Authority as_under:-- V
(i) QTV [Messrs ARY Communication (Put) Limited, Karachi), The channel is being up»linked from Dubai. Some of its program are also being up-linked from Pakistan illegally. Messrs ARY Communication (Put)
Limited had applied for reasons of QTV in September 2`000 by depositing RS.3.0 Million Pius Rs.200.00l) as requisite processing fee. But, PEMRA has been unable to issue license due to non-availability of the
Government policy regarding religious channels. 6. Learned counsel for the petitioner argued that the
respondent Authority under the garb of the order dated 20-10-2011 of this Court raised demands from the petitioner to seek temporary up»linking permission on monthly basis despite the fact that 'the petitioner have already paid Rs.2.9 million which were deposited with the respondent Authority since 2006 butthe respondent Authority has failed to decide the application for issuance of licence to the petitioner for broadcasting religious channel namely QTV. It is contended that petitioner's case is pending for the last five years and the respondent Authority applied delay tactics after they allowed the petitioners demand for obtaining temporary up-linking permission on monthly basis. Thereby causing harassment and undue pressure upon the petitioner. It is next contended that notice dated 4-12012, served upon the petitioner smacks after-thought and is no more than a belated attempt to harass the petitioner by the respondent Authority as they have acted in violation of law and did, not comply with the requirements of section 22 of the PEMRA Ordinance, whereby they were required to decide the application of the petitioner for ‘issuance of license within 100 days, and non-availability of Government Policy for religious Channels, does not relieve the respondent No,2 from compliance of section 22 of the PEMRA Ordinance 2002, the claim through the notice dated 4-1-2012 is thus, colourful.

186 CORPORATE LAW DECISIONS ' [Vol. XII exercise of power and authority, not sustainable in law. Learned counsel for the petitioner, during arguments, laid considerable stress on the point that it was mandatory for the respondent No.2 to decide fate of the application, filed by the petitioner for issuance of license for the establishment and operation of QTV “nthin one hundred days from the receipt of the application which has not been decided by the Authority within a period of more than five years.
7. Show cause notice dated 17-2-2012 issued by PEMRA required the petitioner todeposit US S 570,750 on account of temporary up linking permission fee, however, the said fee has not been deposited within time, therefore, the petitioner was directed to pay the same within 7 days of the

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issuance of notice, else necessary action. which includes suspension of QTV Chahnel will be taken. It appears that the petitioner has not deposited the'aforementioned license fee with reasons that the said notice is belated attempt to harass the petitioner by the respondent, who acted in violation of law and have not complied with the requirement of section 22 of the PEMRA Ordinance, whereby they were required to decide the application of petitioner for issuance of license within 100 days. Learned Counsel for the petitioner Mr, Asim Mansoor Khan contended that on one side the PEMRA is reluctant to issue license to a religious channel/petitioner and on the other side'PEMRA is illegally allowing other channels to broadcast, causing huge loss to the national exchequer. PEMRA is also illegally allowing the broadcast of 56 Indian Entertainment Channels, which facts have not been denied by, the Chairman PEMlU\ and such gross
irregularity and illegality has not been checked by the Regulatory Authority. 8. We have considered the arguments advanced by both sides- and perused the material available on the record including PEMRA Laws in it's perspective,
9. Leamed counsel for the respondent No.2 argued that according to section 19 of the PEMRA Ordinance, no person can engage in any broadcast media pr distribution service except after obtaining the licence issued under the said ordinance and the PEMRA was given the exclusive right to issue licence for establishment and operation of all broadcast media and distribution service, as per section 27 thereof, it is only the PEMRA and they also draw order in writing, giving reasons to prohibit any broadcast or……

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ARY Communication (Pvt.) Ltd. U. Federation 187 of Pakistan (Syed Muhammad Farooq Shah, J) transmission of' any program or new item. In PEMRA U.O. No.l(Ol)EM/PEMRA/2010 dated, August 26th 2010, the Chairman has also given a reason of non-issuing of license to the aforementioned channel that security agencies have also raised serious concem on licensing of religious channels. From contention raised by the learned Counsel for the respondent, it appears that Constitution Petitions bearing Nos.46 and 47 of 2010 were filed earlier before the Hon'ble Supreme Court of Pakistan in its original jurisdiction
(commonly known as Geo and ARY cases] and during the proceedings the Hon'ble Supreme Court was pleased to pass an order dated 13-8~2Ol0, wherein the Hon'ble Supreme Court reiterated and enshrined that under section 19(2) of the PEMRA Ordinance, 2002 no person can engage in any broadcast media or distribution services except after obtaining a license issued under said ordinance and in this respect the PEMRA is given the exclusive right to issue license for the establishment and operation of all broadcast media and distribution services. A perusal of the record transpires that the petitioner has filed an application for issuance of license for establishment, operation and distribution services of the said channel to the Authority (PEMRA) and in response the Authority served him with a show case notice, on 8-6-2010, wherein it is stated that broadcasting of "QTV", TV channel from Pakistan is illegal, in violation of PEMRA laws and without obtaining prior permission from the Authority was found in operation service, the petitioner was directed to stop the' illegal operations and show cause Within 7 days as to why appropriate legal action should' not be taken against them which may include criminal prosecution and confiscation of equipment. For the sake of convenience show cause notice is reproduced as under;--

"PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY ISLAMABAD F.No.7(258)/Legal 2009 ~ Dated: 8-6-2010 Chief Executive Officer QTV ARY Communication Pvt. Ltd. 6th Floor, Madina City Mall.

Abdullah Haroon Raod, Sacldar, Karachi Ph: O21-2564724, 1259, 5496 Fax: 021-2578060, 7899.

188 _ CQRPORATE LAW DECISIQNS [Vol Xll Subject: Show Cause Notice It has been noticed that you are broadcasting "QTV" TV channel from 'Pakistan illegally in violation of PEMRA laws, pertinently, under section 19(2) of the PEMRA Ordinance 2002 a person cannot engage in broadcast media or distribution service without obtaining prior license from the Authority. An operation without obtaining prior permission from the Authority is defined as illegal operation under section 2(ka) of the PEMRA Ordinance 2002, The said provisions are reproduced below for ready reference. 19. Licence to broadcast or operate.
(2) No person shall engage in any broadcast media or distribution service except after obtaining a licence iwucd under this Ordinance.
(3)(ka} "illegal operation" means the broadcast or transmission or distribution of or provision of access to, programmes or advertisements in the form of channels without having a valid licence from the Authority. r Therefore, you are hereby directed to immediately stop your illegal operations and show cause immediately but not later than 'seven days as to why appropriate legal action should not be taken against you that may include criminal prosecution and confiscation of your equipment. In the event no response is received from you within given time. the matter shall be decided in your absence. This issues with the approval of the competent authority 10. From the overall picture, which emerges out from the material brought on the record. it has been proved that on receipt of the application along with applicable licence fee and security deposited by the petitioner, the respondent No.2 neither issued licence with certain terms and conditions nor refused to grant a licence for reasons to be recorded in 'writing within prescribed period of one hundred days, in transparent manner as the Authority shall have to exercise its exclusive right in conformity with the principles of fairness and equity applied to all potential applicants for licence whose eligibility shall have vested on principle criteria notified in advance and that this shall be done through…….
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ARY Communication (Pvt) Ltd, U. Federation 189 of Pakistan (Syed Muhammad Farooq Shah, LD open bidding process. Section 19(1) of PEMRA Ordinance 2002 and Rule ll of PEMRA Rules 2602, and Regulations made thereunder prescribed the condition and the criteria for issuance of licence under terms and conditions, lt would be advantageous to reproduce the mentioned provisions of PEMRA Ordinance and rules and regulations made thereunder as follows:

Eakistan Electronics Media Rgaulatorv Authorig Qrder 2002 as amended llthe PEMRALAMENDMQNTQ
Act, 2007 (Act No.II of 2007) -"19. License to broadcast or operate:--(1) The Authority shall have exclusive right to issue licences for the establishment and operation of all broadcast media and distribution services, provided that this exclusive right shall be used by the Authority inconformity with
the principles of fairness and equity applied to all potential applicants for licences whose eligibility shall
be based on prescribed criteria notyied in advance and that this shall be done through an open, transparent bidding process:
Provided that the bidding shall be held if the number of applications exceeds the number of licences to be issued by the Authority " (PEMRA) Rules 2002. "ii, ISSUANCE OF LICENCE
(1) The Authority -shall processveach application and on being satisfied that the applicantls) fumlls the
conditions and the criteria and procedure as provided for in section Z9 of the Ordinance, may, on receipt of the applicable licence fee, as determined through the bidding process, and the prescribed security deposit, issue license to the applicant(s) concerned.
(2) In addition to General Terms and Conditions contained 'in the Schedule, the Authority may impose on the licencee such other terms and conditions as appear to it necessary.

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(3) The Authority will consult the Govemment of the Province, with regard to proposed location of the
broadcast station and the possible area of coverage, through the Chief Secretary of the Province or an quicer so authorized by him. A V

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190 CORPORATE LAW DECISIONS [Vol. XII (4)~ The Authority, Q' satisfied that the issue Qf the licence to
a particular person is not in the public interest, may, for reasons to be recorded in writing and after giving ,the applicant an opportunity of being heard, refuse to grant a licence.
(5) 'The Authority shall take decision on the application for a licence within one hundred days from receipt of the application;
(6) The Authority shall make regulations setting the procedures for an open and transparent bidding process in such cases_uJhere' the number of the applicants is likely to exceed the number of licences which the Authority has fbced for that category of . llicence. ll. From a careful perusal of the aforementioned provisions it appears that the required eligibility criteria for issuance of licence as provided under'Ordinance 2002, its rules and regulations have not been followed by respondent No.2 in letter and spirit. The Authority did not decide the application filed by the petitioner for issuance of licence for about (5) years, contrary to section 22 of PEMRA Ordinance, read with .rules and regulations made thereunder, which provides decision on application within one hundred days. Section 19(1) as mentioned supra stipulates the exclusive right of the Authority to issue licence in conformity with the principles of fairness and equity applied to all potential applicants for licence Whose eligibility shall be based on criteria notified in advance. Perusal of the record reveals that the discretion has been exercised by the Authority discriminately by issuing licence to as many as 87 channels including entertainment and other channels as pointed out by the learned Counsel for the petitioner, which is gross violation of golden principles enshrined by the Constitution of Pakistan 1973, which provides that all citizen are equalbefore law and are entitled to equal protection- of law, be treated alike. In ABID HUSSAIN SHIRAZI v. SECRETARY M/0 INDUSTRIES AND OTHERS (2005 SCMR 1742) the apex Court held that there should be no denial of any special privilege by reason of birth, creed, or the like also equal subjection to all individuals and classes to the ordinary law of the land. Doctrine of equality as contained' in Article 25 of the Constitution of Pakistan 1973 has enshrined golden rules of Islam, which mandate that every citizen, no matter howhighersoever he was, must be accorded equal treatment

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ARY commimicauan (Pvt) Lcd. v. Federation 191 of Pakistan (Syed Muhammad Farooq Shah, J) with similar situated person, which meant that similar situated people -should be treated equally. In,the case
reported as DR. TARIQ NAWAZ AND ANOTHER v. GOVERNMENT OF PAKISTAN THROUGH THE SECRETARY, HUVISTRY OF HEALTH, GOVERNMENT OF PAKISTAN, I 'AND ANOTIER (2000 SCMR 1956) their lordships have been pleased to hold that equity is to be between the person who are placed in the same set of circumstances. In MESSRS ARSHAD AND COMPANY v. CAPITAL DEVELOPMENT AUTHORITY, ISLAMABAD THROUGH CHAIRMAN (2000 SCMR 1557).

it was held that discretion becomes an act of discrimination only when it is improbable or capricious exercise in abuse of discretionary authority.
12. It is settled principle of law that equality should be administered in its true perspective in light of the

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Constitution of Pakistan. In plethora of superior Courts judgments, it is held that persons equally placed must be treated alike in the matter of privileges, in the rule of equal protection of law, public functionaries are expected to exercise jurisdiction honestly, fairly, reasonably and within the sphere of authority. Reliance in the regard made conveniently be placedron the cases reported as.

SHERAZ ATA ULLAH KHAN (MDVOR) THROUGH HIS' REAL MATERNAL UNCLE v. NAZIR AHMAD KHAN AND OTHERS (1993 CLC 945), CHAUDHRY SHUJAT HUSSAHV u. THE STATE (1995 SCMR 1249). ABDUL RAEAK RATHORE THE- STATE (PLD 1992 Karachi 39), MESSRSARMY WELFARE SUGAR MILLS LTD. AND OTHERS u.' FEDERATION OF PAKISTAN AND' OTHERS (1992 SCMR' 1652), MESSRS GADOON TEXTILE MILLS AND 814 OTHERS v. WAPDA AND OTHERS (1997 SCMR 641), Messrs SHADMAN COTTONMILLS IJMITED, RAWALPHVDI u. FEDERATION OF PAJUSTAN THROUGH SECRETARY, 'MINISTRY or FINANCE. FEDERAL SECRETARIAT, ISLAMABAD AND ANOTHER (2001 CIJC 385). LA. SHARWANI AND OTHERS v. GOVERNMENT OF PAKISTAN THROUGH SECRETARY. FINANCE DIVISION, ISLAMABAD AND OTIERS (1991 SCMR 1041) and ABDUL BAQI AND OTHERS v. AKRAMAND OTHERS (PLD 2003 SC 163).

13, It is a matter of grave concern that the respondent No.2 in show cause notice including other correspondence suppressed section 19(1) of the Ordinance which speaks that "they Authority in conformity with the principles of…..

192 CORPORATE LAW DECISIONS [Vol. XII faimess any equity applied to all potential applicants for licenses whose eligibility' should' be based on prescribed criteria notified in advance and that this shall be done through an open, transparent bidding process". in non-compliance of the mentioned provision, the discretionary relief has not been extended in favour of the petitioner within prescribed period, which in circumstances smacked of arbitrariness and departure from the rules of natural justice, equity and law, which had resulted into serious miscarriage of justice. Even no plausible explanation has furnished by the Authority for such inordinate delay. We would not be justifiable to disagree with the contentions raised by the petitioner that he has vested right and non- exercise of discretion against the subject by the Authority should be based on sound principle of justice, equity, fairness and in accordance with spirit of the relevant provisions of law and should not be merely at the whims of
the Authority, in order to meet the end of justice and equity the application of the petitioner should meet the same treatment likewise other applicants. In SYED KAMAL SHAH ir. GOVT. OF N.-W.F.P. (2010 SCMR 1377) the Hon'ble Supreme Court held that Constitutional jurisdiction is always discretionary and equitable and the court has to look into the conduct of the petitioner. PEMRA shouldhave to decide the application on merits and not to pend the application for indefinite period without any sufficient reasons and cause. The petitionerapproached this court with clean hands, entitled for equitable relief, more particularly the provision of the ordinance; as mentioned supra clearly speaks about equitable relief with all fairness and that too in a transparent manner. So far as contention raised by the learned counsel for the respondent in respect of non-filing of appeal is concerned, section 30A inserted by the PEMRA (Amendment) Act, 2007 (Act No. II of 2007] provides that "Any person aggrieved by any decision or order of the Authority may, within thirty days of the receipt of such decision or order, prefer an appeal to the High Court"however, in the instant case the Authority did not pass any decision or an order, therefore, mentioned provision `of filing appeal was not attracting in the circumstances.
14. Suffice to say that material available on the record reveals that the respondent No.2 a'cted against the well guaranteed fundamental rights by the constitution, discrirninately,v and by exercising unjust/unfair discretion…

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2013 ARY Communication (Pvt.) Ltd. v. Federation 193of Pakistan`(Syed Muhammad Farooq Shah. J) against the principle of Qfaimess" and '%quity" as provided under subsection (1) of section 19 of PEMRA Ordinance 2002.

ln the case of DR. SHAHID MASOOD AND OTHERS v. FEDERATION QF PAKISTAN AND OTHERS reported 2010 SCMR 1849 paras 13 and 14 as under:-

13.-In this view ofthe matter, we find that the act of the respondent Operators of the Cable T.V. Networks blocking/obstructing the transmission of ARY News and GEO News and the consequent denial of distribution service to the said Channels and to the viewers who were paying the said operators for the said service, prima facie. was a gross violation of the terms and conditions of the licenses granted to them under sections 20 and 24 read with the provisions of sections 27 and 28 of the said Ordinance of 2002 and thus attracted penal provisions of sections 30 and 33 of the said Ordinance in respect of not only the ones committing the said violations but also those abetting the same.

14. The PEMRA must realize that the licence issued by it to a T.V. Cable operator is a certification by it`for'a1l concemed that such an operator had committed and consequently stood obliged to offer un-distributed distribution service to the broadcasters as also the viewers. And it is on the basis of the said certification by the PEMRA that on the one hand, the said broadcasters entrust the transmission of their

broadcasters to these operators and on, other, the hundreds and thousands of viewers/subscribers pay

their hard-earned money to the said operators to . receive the said servrre. Therefore, besides being a legal, it is also a moral obligation of the PEMRA; through its Chairman. to ensure that the promised and

the legally obligated services are provided by the operators not only to the broadcasters but also to the

hundreds and thousands of the public who are paying money to the operators for the said semice. Needless 'to add ‘that any derelictibn of duty on the part of the officials of the PEMRA including its Chairman, which appears lacking in good faith, could fall within the purview of abetment of the penal offences and the consequent punishment in terms of section 33 of the said Ordinance.

194 CORPORATE LAW DECISIONS [Vo1 XII 15. In G Sambasiva Rao v. APSRTC (1997) 1 Ari LT 219 at 230 discretionary power interpreted in the words that--“Discr*etion, when applied to public or statutory functionaries, means power or right conferred upon them by law of acting judicially in ' 'certain circumstances. according to the dictates of their own judgment and conscience uncontrolled by the judgment or conscience of others. Discretion implies power to make a choice between alternative courses of action.

The sphere of judicial discretion includes all questions, as to what Ls r1ght,just, equitable orvreasonable so far as not determined by authoritative rules of law but committed to the liherum ~arbitruim of the donee of the power. A question of discretion is a‘ question as to what out to be as opposed to a question of what is. In the matter of judicial or quasijudicial discretion, it is the duty of the donee of the discretionary power to exercise his olyective moral judgment in order to ascertain the right and justice of the case."

16. To control executive action, so as to bring it in conformity with the law, the power has been conferred on the High Court to exercise it under Article 199. Reference in this behalf may be made to BASHIR v. ABDUL KARIM (PLD 2004 Supreme Court 271). Relevant para there from reads as under:-

The scope of Article 199 Ls limited and such like controversy could not have been dilated upon and decided by the High Court while exercising constitutional jurisdiction for the simple reason that record was crystal clear and accordingly the controversy being not ticklish and complicated could have been decuied. It is, well settled by now that 'Article 199 casts an obligation on the High Court

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to act in aid of law, protect the rights of the citizens within framework A of the Constitution by the executive of authorities, strike a rational compromise and a fair balance between the rights of the citizens and the actions of the state functionaries, claimed is to be in the larger interest of society. 'This power is conferred on the High Court under the Constitution and is to be exercised subject to consttttutional `limitations. The Article is intended to enable the High Court to control executive action so as to ,bring it in conformity with the….

ARY Communication (Pvt) Ltd. v. Federation 195 of Pakistan (Syed Muhammad Farooq Shah, J),2013]

law, Whenever the executive acts in violation of law, an approprmte order can be granted, which will relieve the cituzen of the effects of illegal actibn. It is an omnibus Article under which. relief can be granted to the citizens of the country against infringement of any provision of law or ‘of the constitution. lf the citizens of this country are deprived ef the guarantee given to them under the Constitution, illegally or, not in accordance with law, then Article ,199 can always be invoked for redress.

(Ghularn Mustafa Khar v. Pakistan. and others PLD 1988 Lah. 49, Muhammad Hussain Khan v. Federation of Pakistan PLD 1956 Karachi. 538 (FB), S.M. Yousuf v. Collector cj Customs PLD 1968 Karachi. 599 (FB). It is to be noted that 'paramount consideration in exercise of constitutional jurisdiction is to foster justice and right awrong". (Rehmatullah v. Hameeda Begum 1986 SCMR 1561, Raunaq Ali v. Chief Settlement Commissioner -PLD 1973 Supreme Court 236). There is no cavil with the proposition that "so long as statutory bodies and ' executive authorities act without fraud and bona fuie within the powers conferred on them by the Statute, the judiciary cannot intedere with them. There is ample power vested in the High Court to issue direction to an executive authority when such an authority is not exercising its power bono. fide for the purpose contemplated by the law or is injluenced by. Extraneous and irrelevant considerations. Where `a statutory functionary acts mala fide or in a partial. unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction has ample power to grant relief to the aggrieved party". (East and West Steamship Co. v. Pakistan PLD 1958 _Supreme Court (Pakistan) 41). In

our considered view technicalities cannot prevent High r Court from exercising its constitutional jurisdiction and ' affording relief which otherwise respondent is found entitled to receive .... " From perusal of record, it appears that in its absolute

17. unfettered discretion, the Authority (PEMRA) acted arbitrarily and discriminately by issuing license to Entertainment, Sports, English and others TV channels by ignoring the QTV Channel without any sufficient reasons and cause. We have examined the . entire field of powers conferred on the Authority in pursuance to which the order on application for issuance of license has been delayed to 'such an extent that the, petitioner was kept, awaiting for years together, without ….

196 CORPORATE LAW DECISIONS ' lVo1.XIl any fault on his part. In this way the respondent No,2 (PEMRA) did not act fairly. transparently, judiciously and above any suspicion. A vested right of an individual is protected by the Constitution of Pakistan and fundamental rights guaranteed to the citizensof Pakistan. Functionaries like -PEMRA lexerclsing statutory powers are legally and constitutionally bound to discharge their function strictly in accordance with law, otherwise the action contrary to law would not be sustainable and such Authority shall expose itself for discriminatory treatment which amounts to denial of valuable fundamental rights of people as ordained from Constitution of Pakistan 1973, for whose benefit such Authority has been created. Crux of the aforementioned discussion is that apparently the said action of PEMRA is ultra virus, contrary to the Constitution and -law,.h_aving no legal sancity.

18: ‘ln view of above discussion, particularly in' light of the rulings of Superior Courts cited above, the petition is accepted for the following terms and manners--

(I) Specific words 'equity' and 'fairness' used by the legislature, appears in section 19(1) of PEMRA Ordinance for taking decision on application for licence should be followed strictly, without any

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discrimination. Of course, in this case the action taken by the respondent No.2 is beyondthe sphere allotted to them by law and, therefore, such action amounts to usurpation of power warranted by law and such an act is a nullityf that is to say that the result of a purported exercise of authority has- no legal effect whatsoever. lt is a case where the-Authority exercised discretionary jurisdiction unjustly; unlawfully and discriminately, therefore, the genuine grievance of the petitioner needs -to be redressed at an earliest. Accordingly. matter is remitted to -the Authority constituted under PEMRA Ordinance 2002, to decide the same afresh within a period of two weeks strictly in accordance with law after giving fair opportunity ofhearing to the petitioner. A
(II) Respondent<No.2 should provide equitable relief in a 7 transparent manner, likewise treatment which has already been extended 'to the other TV Channels for the purpose of providing education to the public, in discharge of its duties under the law and if at all the TV channels are found indulged in any mischievous……

2013] Industrial Development Bank of Pakistan v. 197 Zahid S. Sheikh (Khalid Mehmood, J) activities touching to the moral turpitude, against the Islamic teachings. they may have the liberty to initiate any proceedings as provided under the law. 19. The parties are left to bear their own costs, V
MH/A-117/K 1
Petition allowed.

2013 CLD 197
[Peshawar]
Before Khalid Mehmood. J
INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN
through Vice President/ Chief Manager--Appellant
Verises
ZAHID S. SHEIKH andf4 others---Respondents
Criminal Appeal No. 22 of 2011, decided on 1st November, 2012.
(a) Financial Institutions (Recovery of Finances)

Ordinance (XLV1 of 2001)--- ----S. 20---Criminal Procedure Code (V of 1898). ,Ss. 265-K & 4-03---Constitution of Pakistan, Art. 13-~Default in payment of bank loan---Double jeopardy, principle of-- Applicability---Acquittal ' before trial--Accused' persons availed' various loans from complainant bank and on default of payment of loan, bank _filed complaint under S. 20 of Financial Institutions (Recovery of Finances) Ordinance, 2001---On application _filed by accused persons, Trial Court acquitted them in exercise of powers 'under S.265-K, Cr.P.C.»--Validity---All liabilities against alleged misappropriation were admitted by co-accused, who was real beneficiary of the deal--Bank had already filed similar nature of complaint on 17-1-2001 and after its dismissal on. 4-9-2002, bank kept mum from the date of dismissal till _filing of present complaint---Bank failed to render any. reason for filing second complaint after lapse of seven years---No appeal or application against order of dismissal was preferred---Complaint in question also amounted to double jeopardy, which was against S.403, Cr.P.C. and also against Art.13 of the Constitution---High Court did

198 CORP6RATE LAW DECISIONS (V0l. XII not find any probability of conviction of accused persons for alleged offence, even if prosecution would have allowed to produce evidence against them---Charge
leoied against accused persons being without substance and groundless, therefore, Trial Court had rightly acquittedaccused persons under S.265-K,`Cr.P.C., which needed no interference---Appeal

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was dismissed in circumstances. lp. 2001A 82. C-an criminal Procedure code rv of 1-ses)------S. 265-K---Acquittal before framing of charge---Scope--Trial Court under S.265-K, Cr.P.C. can acquit accused at any stage, 'if charge against accused facing trial is groundless and there is no likelihood of his conviction"- Trial Court can acquit accused even before framing of charge. Ip. 200].

Malik Mahmood Akhter for Appellant. K 'Syed Amjad All Shahand Zahid ldrees Mufti for Respondents.
Date of hearing: lst November, 2012.
JUDGMENT

KHALID MEHMOOD, J.---The Industrial,Development Bank of Pakistan has filed this criminal appeal against impugned acquittal order of respondents passed by learned Judge Banking Court, Hazara Division, Abbottabad dated 3-12-2010.
2. Briefly stated the facts of the case are that respondents obtained various loans from the appellant/Bank and an amount over and above Rs_22,79,32,227 is still outstanding against them. In default of payment of loans, the appellant/Bank filed complaint under section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 against Zahid S. Sheikh and others respondents.
3. The Judge Banking Court summoned the accused. Respondent No.1 appeared in response to notice while others did not appear in Court whereas respondent No.5 died and trial against him was abated- During trial, accused respondent`No.l moved an application for his acquittal under section 265-K. Cr.P.C. and learned trial Court vide impugned judgment/order dated 3»12-2010 acquitted the accused respondent.

2013] industrial Development Bank of Pakistan U. 199 Zahid St Sheikh '(Khalid Mehmood, J)Learned counsel for appellant argued that respondents being directors of Messrs Atal Pak Marbles Ltd. had obtained loan and were custodian of the mortgaged properties Le. plot, superstructure, equipments and
machinery etc. installed in the factory and executed various agreements -deeds from time to time but dishonestly and illegally removed the machinery from the lactory and thereby damaged the bank security. It was also argued that on 7-8-2000 the NAB Authorities filed Reference No.8 of 2000 against Sultan Ali Lakhani and others, which was withdrawn on 23-2-2001 due to the execution of memorandum of understanding between Sultan All Lakhani and the Bank but the same has not been fulfilled by him. V
4. On the other hand, learned counsel' for respondent opposed the contentions of appellant and supported the impugned acquittal order. lt was argued that it was Sultan Ali Lakhani who had obtained the loan and was prosecuted by the NAB Authorities whereas respondents are guarantors for payment of loan and said Sultan Ali Lakhani, who has also filed a suit for specific performance against the Bank and regarding adjustment of loans' facilities civil and criminal proceedings against are in progress.
5. Arguments heard and record perused.
6. Respondent No.1 was allegedly employed by Sultan Ali Lakhani for processing of Marble at Hattar and IDBP sanctioned a loan of Rs.45.223 millions in the name of Messrs lltaf Pak Maribles Ltd. and Sultan Ali Lakhani was the beneficiary of the saidfloan facility. Later on Sultan Ali Lakhani got incorporated the factory and 14 other factories in the names of /the employees and took huge loan from the banks. The respondent No.1 lodged a complaint against said Sultan Ali Lakhani and others before the NAB Authorities and ultimately Reference No.8 of 2000 was submitted against him and others, wherein Sultan Ali Lakahani accepted his liabilities and paid partial loans etc, and committed to pay the remaining loan amount. Prior to the present complaint a similar nature complaint' under the same section of law was filed against the present respondents on 17-1-2001 but the same was dismissed on 4-9-2002. lt_is an admitted fact that Sultan Ali Lakhani is the real

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beneficiary of the loan. Respondents being benami Directors ` stood paper beneficiaries of the loan, whereas NAB has filed Reference No.8 of 2000 only against Sultan Ali Lakhani for enjoying the loan facility including the alleged loan against the mortgage….

200 .CORPORATE LAW DECISIONS [Vol. XII of the machinery subject-matter of dispute. It is interesting
feature of the case that all liabilities against the alleged misappropriation.. being real beneficiary of the deal was admitted by Sultan Ali Lakhani. Appellant has already filed a similar nature complaint ' on 17-1-2001 and after its dismissal on 4-9-2002. the appellant kept mum from the date of its dismissal till filing of present complaint. No reason for filing the second complaint after lapse of seven years has been rendered. No appeal or application against the said order has been preferred. The present complaint also amounts to double jeopardy, which is against section 403, Cr.P.C. and also against Article 13 of the Constitution of Islamic Republic of Pakistan, 1973.
7. The appellant thereafter filed Suit No.B-60 of 2011 against S.A. Lakhani and its paper directors, which was decreed only against Messrs ltal Pak Marble Ltd. and no decree was passed against the paper directors. Sultan Ali Lakhani filed Suit No.B-17 of 2003* for speciflcvperfnrmance against the appellant whereas the appellant also filed Suit No.B-36 of 2003 for recovery of Rs.1,286.756,000 in which present alleged loan facility is also included. After settlement an agreement was executed between the parties and Suit No.B-36 of 2003 was decreed on 12-12-2005 but instead of tiling execution petition the appellant has filed the instant complaint. In the light of above civil litigation for recovery of amount against Sultan All Lakhani and dismissal of earlier complaint, the very proceeding on the basis of subsequent present complaint is only abuse the process of court as in the light of above stated facts and' legal aspects of- the case charge levied against the respondents is found groundless. It has been laid down under section 265-K, Cr.P.C. that trial Court can acquit the accused at any' stage if charge against the accused facing trial is groundless and there 'is no likelihood of his conviction. The trial Court can acquit an accused ,even before framing of the charge. Section 265-K, Cr.P.C. reads as under:-- "265-K.' Power of Court to acquit accused at any Stagg. .Nothing in this Chapter shall' be deemed to prevent a Court from acquitting an accused, at any stage of the case, U' after hearing the prosecutor and the accused and for reasons to be recorded, it considers that there is no probability of the accused being convicted of any offence".
8. In the facts and circumstances, there appears nolg 2013] Pioneer Cement Limited u. Fecto Cement Ltd. 201 (Muhammad Farrukh Irfan Khan, J) probability of conviction of accused for the alleged offence
even if prosecution is allowed to produce the evidence against the respondents. As 'the very charge levied against the respondent is without substance and is groundless, hence. learned trial Court has rightly passed the impugned order under section 265-K, Cr.P.C., which needs no interference.
9. Resultantly, this appeal being without substance 'is hereby dismissed.
MH/403/P
Appeal dismissed.

2013 CLD 201
[Lahore]
Before Muhammad Farrukh Irfan Khan, J
PIONEER CEMENT LIMITED
through Company Secretary---Appellant
Versise
FECTO CEMENT LIMITED through Chief Executive Officer and' 3 others---Respondents
First Appeal from Order No.2l3 of 2012, decided on 28th September, 2012. g '

(a) Civil Procedure Code (V of 1908]-------0. VH, R. 14 81. 0.XL1, R.1--First appeal---Documents filed along with appeal---Such documents not filed along with plaint before the Trial Court---Appellantjiling such documents at appeal stage without seeking permission of court by making a separate application---alidity--- Had such application been made by appellant, then court would 'have issued notice thereof to respondent before allowing or disallowing such request on merits"-Such documents were, held, to be inadmissible at stage of appeal against impugned order. Ip. 206].

A & B Messrs Ghulam Muhammad Dossul & Co. `v. Messrs Vulcan Co. Ltd. and another l984 SCMR 1024 rel. -

(b) Trade Marks Ordinance (XIX of 2001)----S. 5(2)--Use of specific trademark to goods to be exported from Pakistan---Scope---Specmce trademark, if applied to goods to be exported from .Pakistan,

202 CORPORATE LAW DECISIONS (VOI. XII would be deemed to have been actually used in Pakistan, thus, its prior use, reputation and goodwill would be deemed to have existed in Pakistan giving right to its owner (prior user) to restrain its infringement by third party. ha. 207].

(c) Trade Marks Ordinance (XIX of 2007l)-----S. 39---Distributor in trademark matters, role QF--Scope--Distributorfor being a representative qf owner of trademark could not get its registration in his own name--Principles. " Unless otherwise shown. the concept of a distributor In trademark matters is that a distributor ls merely a representative of the owner of the trademark for a specified territory for supply or distribution of goods manufactured/assembled/packed by the owners under his trademark. For such service. the distributor gets a certain commission. In such cases. distributor has no other relationship with the manufacturer/packer/assembler of goods, who is also the owner of trademark. and merely by distributing goods on behalf of the owner, a 'distributor does not and cannot become entitled to clalm ownership of a mark to register the said trademark in his own name and even if he succeeds in securing trademark registration, that will be liable to be cancelled/rectified after the true owner obtains knowledge of existence of such registration. Ip. 208] D

(d) Trade Marks Ordinance (XIX of 2001)----Ss. 39 & 40-- Prior user and proprietor of an unregistered trademark, principle ojl-Applicability and proof--Such principle would 'be applicable when none of contesting parties had a registered trademark-Prior use and praprletorship of an unregistered trademark could be proved at interim stage by filing independent documentary evidence such as copies of undisputahle sale' invoices, advertisements, sale and ' publicity figures etc. Ip. 209] E, F & 6.

The Welcome Foundation Limited v. Messrs Karachi Chemicals Industries (Private) Limited 2000 YLR 1376; Mehtabur Rehman v, Saeed Ahmed and 2 others 1986 CLC 348 and Syed Muhammad Maqsood v. Naeem All Muhammad 1985 CLC 3015 rel.

2013] Pioneer Cement Limited v. Fecto Cement Ltd. 203 (Muhammad Farrukh Irfan Khan. J).

(e) Trade Marks Ordinance (XB of 2001)----S. 39-- Trade mark rights, infringement of--Consequences stated. Trademark rights are lifeline of businesses and un-authorised use of owner`s trademark by third parties results in un-quantitlable loss and damage to its goodwill and business, which is irreparable in nature. lp. 210] H
(f) Trade Marks Ordinance (XR of 2001)-----S. 46(2)--Civil Procedure Code (V of 1908),,0.XXX1X, Rr.1 & 2--Infringement of trademark---Suit _for damages, injunction .and accounts---Relieji-Scope---

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Under S.46(2) of Trade Marks Ordinance, 2001 all such reliefs by may of damages, injunction, accounts were available to the proprietor of a trademark simultaneously and not as an alternate to each other--Where in addition' to interim injunction a plaintiff had claimed damages and compensation in a suit relating to trademark rights, interim relief could not be denied to proprietor of trademark on such ground. Ip. 210].

V Syed Azeem Abbas Nagvl for Appellant. Mian Bila`l Ahmad for Respondents.
Date of hearing: 24th August, 2012.
JUDGMENT

MUHAMMAD FARRUKH IRFAN KHAN. J.----Appellant herein is a public limited company and claims to be- the creator, originator, owner and user of trademark "P" in stylized form (hereafter stylized "P" logo) which it claims to be using since the inception of its business of cement manufacturing, marketing and selling for more ‘than two decades. lt claims to have launched a new brand of cement for export to Afghanistan and Central Asian Republics with the stylized "P" logo and Two Elephants device. It is claimed that cement bags with the said trademark stylized "P" logo and Two Elephants device were designed and printed for the appellant first time by a company called Syntronics Limited in May 2010.

2. The appellant claims ,to have ‘engaged respondent No.3. a Pakistani company having its office in Peshawar as its distributor and submits that respondent No.3, as a ….

204 CORPORATE LAW DECISIONS , [Vol. Xll distributor of the appellant, entered into a contract with an

Afghan company named Shirkat-ul-Faisal and started exporting cement to Afghanistan under the trademark stylized "P" logo with Two Elephants device. It is alleged that after some time relationship between ' the appellant and respondent No.3 came to an end, whereafter respondent No.3 contracted appel1ant's competitor, respondent No.1, and started exporting cement to Shirakat-ul-Faisal in Afghanistan under appellants trademark stylized "P" logo with 'I‘wo Elephants device in utter disregard of law and violation of business ethics and with dishonesty and mala fide.

3. It appears that appellant as well as' respondent No.3 have filed theirrespective applications for registration of trademark comprising of stylized "P" logoand Two Elephants device and the matter is still pending with the Registrar of Trademarks and none of the parties so far has obtained trademark registration thereof.

4. Torestrain respondents from using the aforesaid trademark, the appellant filed a suit for infringement

coupled with passing off the goods before the learned District Judge, Lahore, along 'with an application under Order XXXIX, Rules 1 and 2, C.P.C. and the learned Additional District Judge granted a restraining order on 24th June, 2011 which was withdrawn through the impugned order dated 29-3-2012.

5. The respondents resisted the suit and inter alia challenged the claim of proprietorship of the trademark by the appellant. Certain allegations about concealment of some facts concerning dealership were also raised and it was also asserted that Shirkat-ul-Faisal Limited has obtained registration of Elephants device in Afghanistan. Strong reliance by the respondents was placed on obtaining trademark registration in Afghanistan by Shirkat-ul-Faisal Limited in Afghanistan.

6. After hearing both sides the learned Additional District Judge dismissed the injunction application vide

order dated 29-3-2012 which has been assailed by the appellant herein through the' present appeal. In the operating part of the impugned order, the learned Additional District Judge has mentioned that it is an admitted fact that the plaintiff Company (appellant herein) is using the trademark with Two Elephants and letter "P" for which plaintiff has applied for its registration and the application is still pending with the Trademarks Registry.

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CLD

2013] Pioneer Cement Limited U. Fecto Cement Ltd. 205 (Muhammad Farrukh Irfan Khan, J).

7. The learned Additional District Judge also specifically noted that the defendants (respondentsherein) are sellingtheir cement with similar get up with the difference that the letters "Ps" have been used instead of letter "P" and noted that in trademarkcases most important factor is "who is \prior user of the trademark". The main ground for refusing the injunction application which prevailed with the learned Additional District Judge was that though the appellant claimed to be using alleged trademark with 'l`wo` Elephants with letter "P" but the appellant company did not produce any cogent and convincing material before the learned trial Court in that regard and he also seems to be influenced by
the argument that Shirkat-ul-Faisal Limited has obtained the trademark registration in Afghanistan.
8. The respective trade marks of the parties are reproduced below:--
9. I have heard, the learned counsel representing the parties in detail, who mostly repeated the same arguments as they advanced before the learned Additional District Judge, and which have been succinctly mentioned in the impugned order and also noted above by me briefly..
10. I have gone through the impugned order, .pleadings and documents attached thereto filed, before the learned Additional District Judge and also the memo of appeal and l am constrainedto observe that pleadings before the learned Additional District Judge have not been prepared and filed by the parties adequately and sufficiently as is necessary in trademark disputes. Also, unfortunately, the appellant has
not made sufficient efforts to prepare the memo of appeal with clarity and sufficiency.
11. At the hearings both the counsel argued their respective cases very. strenuously.

CLD

206 CORPORATE LAW DECISIONS [Vol. XII 12. It appears that with the memo of appeal several documents have been filed, which were not accompanied with the plaint filed before the trial Court or thereafter and such A documents are inadmissible at this stage in Appeal against the impugned order. Reliance is placed on Messrs Ghulam Muhammad Dossul & Co. v. Messrs Vulcan Co. Ltd. And another (1984 SCMR 1024). Also no effort has been made by the appellant to make a separate application and seek permission of this Court to introduce such documents so that the Court, if it deemed appropriate, may have issued notice of such documents to the respondents; before allowing or disallowing such a request on merit B.
13. The respondents have neither denied the existence of their distributorship with the appellant cement company at the relevant 'time nor export of cement in the said capacity to Afghanistan with' the trademark in dispute. It was, however, strongly stressed by respondents that Do Pheel/two Elephants was the brainchild of respondent No.4 and appellant is not the proprietor thereof and therefore appeal be dismissed. On the facts and circumstances of the case this argument has no force at all.
14. If Do Pheel/Two Elephants was the brainchild of respondent No.4. a Director of respondent No.3, it seems inconceivable that they would continue to use it with stylized "P" logo, as stylized "P" logo is admittedly the trademark of appellant. This. prima facie, showsldlshonesty on the part of the respondents. In this respect even if. for argument's sake. it is considered that Two Elephants was the brainchild of respondent No.4, then if, as per respondent's ownstance that their dealership was unlawflxlly cancelled by the appellant, it was their legal, moral and ethical duty to have only taken their alleged Two Elephants device trademark to respondents Nos.l and 2' (Fecto Cement Limited) to start export with two Elephants device replacing appellant"s stylized "P" logo

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with that of Fecto‘s own logo. This' was apparently not done for obvious reasons that respondents deslre'd to take advantage of ,the reputation and goodwill acquired by Two Elephants and stylized "P" logo as a trademark of the appellant by virtue of its use on cement exported to Afghanistan.
15. There is a further aspect to respondents' prima facie dishonest act and their efforts to deceive the Courts. If 'I`wo Elephants was the brainchild of 'respondent No.4 (Mr. S. Meht_ab Hussain), a Director of respondent No.3, then it is not understandable why they would allow Shirkat-ul-“p

2013 CLD 207

Pioneer Cement Limited ,v. Fecto Cement Ltd. 202 (Muharnmad Farrukh Irfan Khan, J)Faisal Limited, which is a separate entity, to register it in its name in Afghanistan and not- 'in the name of the said respondent or respondent No.3. To my mind the above prima facie shows that_respondents Nos.3 and 4 are not owners of the mark Two Elephants devices. After respondent No.3 was appointed distributor for Afghanistan through appellant's letter dated 29th March, 2010 for sale of Two Elephants
brand cement, respondent No.3 applied to register the said trademark in its own name on 31st August, 2010, which is also much subsequent to the date of said distributors appointment letter.
16. As far as registration of Two Elephants device and stylized "P" in Afghanistan is concemed, that has no bearing on the present proceedings as these are concerned with the manufacture, sale and export of cement from Pakistan. Also Shlrkat-ul-Faisal is not a party to these proceedings:-
17. Moreover, under subsection (2) of section 5 of the Trade Marks Ordinance, 2001 applying in Pakistan a trademark to the goods to be exported from Pakistan and any other act done in Pakistaniin relation to goods to be so exported constitutes ,use of the trademark within Pakistan. Therefore, even though cement under the trademark Two Elephants and stylized "P" logo was exported and sold in Afghanistan but as the said trademark was applied to goods within Pakistan, with an intention to export such goods to Afghanistan, it will be deemed as if the trademark Two Elephants and stylized "P'f has actually been used in Pakistan by the appellant by virtue of the said provision of law and hence prior use and reputation and goodwill would be deemed to have existed in Pakistan as well giving the appellant a right to restrain the respondents from manufacturing or exporting cement unde r the trade mark in dispute to another country or selling it in Pakistan.
18. As far as Dlstributorship is concerned it is pertinent to note that respondents in their written. statement have admitted the existence of distrlbutorship and have referred to it as well as attached a copy of said letter in paragraphs 1, 2 and 3 of ‘the Factual Matrix of the writtenstatement asreproduced below:--
(l) That the plaintiff approached defendant(s) Nos.3 and 4 in order to subscribe to their services as exclusive and sole distributor(s)/dealer(s). The plaintiff, at all ' material times, represented and assured that……

208 CORPORATE LAW DECISIONS (Vol. defendant No.3 would be engaged to the exclusion .of all others. lt is submitted that Dho Pheel/(the two elephants) was the brainchild of defendant No.4, who is and was at all material times, the Director of defendant No.3. 4 A V
(2) That the plaintiff through its General' Manager (Marketing and Sales), Mr. Rizwari Butt, confirmed the appointment of defendant_No.4 as the authorized Sole Distributor for Afghanistan and CARs (Central , Asian Republics) through a letter dated 29-3-2010. A copy of the letter dated 29-3-2010 is placed herewith as Annex-E.
(3) That the albeit it is beyond the scope of the present proceedings, it is nevertheless the case that the
plaintiff flagrantly breached the Dealership Agreement, which it had struck with defendant No.3. Consequently, the latter, on the plaintiffs contractual repudiation, was but only impelled to enter into a

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Dealership Agreement dated 20-4-2011 with defendant No.1 (viz, Fecto Cement Limited). A copy of an email written by defendant No.4 to the General Manager of defendant No, l substantiating these state
of affairs is placed herewith as Annex -F." 19. Unless otherwise shown, the concept of a distributor in trademark matters is that a distributor is merely a representative of the owner of the trademark for a specified territory for supply or distribution of goods manufactured/assembled/packed by 'the owners under his trademark. For such service the distributor gets a certain commission in such cases distributor has no other relationship with the manufacturer/packer/assembler of goods, who is also the owner of trademark, and merely by distributing goods on behalf of the owner, a distributor does not, and cannot, become entitled to claim ownership of a mark to register the said trademark in his own name and even if he succeeds in securing trademark registration, that will be liable to be cancelled/rectified after the true owner obtains knowledge of existence of such registration. Therefore respondents' admission to be distributors of appellant for selling Two Elephants brand cement to Afghanistan, prima facie, prevents them from claiming to be the owners of the said trademark and, prima facie, the appellant is the owner
of the said trademark as if respondents were the owners of the trademarkwin dispute there was no need for the……

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2013 Pioneer Cement Limited u. Fechto Cement Ltd. 209 (Muhammad Farmkh [dan Khan, J] respondents to accept their appointment as distributors of appellant, and this aspect alone is sufficient to prima facie conclude that respondents are not the owners of the trademark in dispute.
20. The learned trial Court has stated the correct principle that in trademark cases most important factor is who is prior user of trademark. This principle is in particular applicable when none of the contesting parties is armed with a registered trademark. Despite stating the correct principle, in my humble view, the learned trial Judge committed a serious error when he concluded that the plaintiff company (appellant) did not produce any cogent and' convincing material in this regard. This apparently' reflects that the learned trial Judge did not pay much attention to the pleadings of the parties norperused the documents available on the record; While it has been observed earlier that appellant did not diligently prepare and file the suit and supporting documents, the factual situation remains that at
the time of arguments on application under Order XXXIX, Rules 1 and VZ, C.P.C. and passing of impugned order the learned 'trial Court had on record the distributorship appointment letter from appellant to respondent No.3 appointing the latter distributor for sale of 'l`wo Elephants cement in Afghanistan and this letter of appointment ofrespondent No.3 as the distributor is admitted by the respondents inn their written statement in paragraphs 1, 2 and 3 of the "Factual Matrix" of the written statement as reproduced above tiled by the respondents with their written statement."
21. It is a settled principle of Trade Mark law that prior use and hence proprietorship of an unregistered trademark can be," prima facie, proved' at the interim stage by filing' independent documentary evidence such as copies of undisputable sale invoices, advertisements. sale figures, publicity figures etc. Reference to this respect 'is mode to the cases of The Welcome Foundation Limited v. Messrs Karachi
Chemicals Industries (Private) Limited (2000 YLR 1376).

Mr. Mehtabur Rehman v. Saeed Ahmed and 2 others (1986 CLC Karachi 348) and gfed Maqsood v. Naeem Ali Muhammad (1985 CLC Karachi 3015). I may add here that such proof does not merely depend on the volume of the documents but on the quality and their undisputable character to clearly show that a certain party is a prior user, and hence prior proprietor of a trademark.

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210 CORPORATE LAW' DECISIONS '[Vo1. XII 22. In the present case, however, there is admittance on the part of the respondents that respondent No.3 has-acted' as a distributor for the appellant and sold appellant‘s cement with the trademark stylized “P" and 'I`wo Elephants device to Afghanistan. Therefore, there is no denial'or challenge that the trademark styllied "P" and Two Elephants device was not first used by the appellant and cement with this trademark was not sold in Afghanistan through respondent No.3 as a distributor of appellant and thus there is no denial that appellant is the prior user of the disputed trademark.

23. In my humble opinion the distributors appointment letter and above admitted facts were sufficient' to, prima facie, show that appellant was the prior user and prior owner of the Two Elephants and stylized "P" trademark for cement. Moreover the respondents have not explained the reason for their choice to use the stylized "P" logo along with Two Elephants, when respondent No.1 itself seems to be a well known company; it should have chosen to use its own independent logo and not that of itslcompetitors. It ls in particular not appreciable that big business groups resort to copying their competitors trademarks, as, prima facie, seems to be the case here.

24. In the light of the above, lt clearly appears that the appellant has made out a prima facie case in its favour and is likely to suffer irreparable loss if the respondents are not restrained from using the stylized “P" logo and the Two Elephants device. I must add here that trademark rights are lifelines' of businesses and unauthorized use of owner’s trademark by third parties results in un-quantifiable loss and damage to its goodwill and business which is irreparable in nature. Thus the loss that the appellant is likely to suffer as a result of use of appellant as trademark by 'the respondents cannot be calculated in terms of monetary compensation and would be irreparable in nature. The balance of convenience is also in favour of the appellant. I must also observe that under section 46(2) of the Trade Marks Ordinance, 2001 all such reliefs by way of damages, injunction, accounts are available to the proprietor of a trademark simultaneously and not as an alternate to each other and just because *in addition to interim injunction al plaintiff may claim damages and compensation in a suitrelating to trademark rights, interim relief cannot be denied on that ground.

25. In the light of the above, this appeal is allowed and 2013] Pearl Capital Management (Pvt) Limited: In the 211 matter of (Imran Inayat Butt; Director/ H OD (MSCID)) consequently the Impugned order dated 29-32012, is set aside. The respondents are restrained to use the appe11ant‘s trademark stylized “P" logo and Two Elephants device till the final disposal of the suit. ,lt is however noted that the observations made above are tentative in nature and would not influence the decision of the suit` on merits after recording of evidence. As valuable rights of parties are involved it is ordered that the trial Court shall decide the suit within six months from the date of receipt of certified copy of this judgment;

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Appeal accepted.

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