

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 3076 of 2005

Haji Saifullah Khan Bangash

Versus

S.E.C.P Etc

Date of Hearing: - 19th June, 2013
Petitioner By: - Mian Abdur Rauaf, learned ASC.
Respondent By: - Mr.Azad Nafis ASC for respondent No.1.
Mr.Ahmad Bashir Advocate for respondent
No.2.

J U D G M E N T
MUHAMMAD ANWAR KHAN KASL, CJ:

This constitutional petition is preferred by Haji Saifullah Khan Bangash with the averments that he had been trading in the Stock Exchanges of Pakistan through M/S Khadim Ali Shah Bukhari Securities Ltd. [respondent No.2] till the market crisis due to which the latter suffered a liquidity crunch and in order to save himself from complete default, illegally sold and embezzled his shares and securities and also dealt with over the counter market besides carrying on un-authorized transactions of purchase of securities and shares.

2- It is further averred that the petitioner retains recognized sound business status, but due to the illegal acts of respondent No.2, was subjected to pecuniary disadvantage approximately to the tune of Rs.1.5 billions and for re-dressal of grievances, he approached the Security & Exchange Commission of Pakistan [respondent No.1], being the regulatory authority, by way of a complaint against respondent No.2 for taking action under the Brokerage & Agents Registration Rules, 2001 and Section 24 of the Securities & Exchange Ordinance, 1969 for awarding appropriate punishment under applicable provisions of law, but the respondent No.1 transferred the complaint to the management of the Karachi Stock-Exchange [Guarantee Ltd] for arbitration on the claim which has not even been filed by him and without realizing that the petitioner filed a complaint and not a claim for recovery, therefore, reference of matter

for adjudication before the arbitration committee of the Karachi Stock Guarantee Ltd is un-warranted and illegal which necessitated filing of this petition for declaring the impugned act of respondent No.1 as being illegal, without lawful authority and jurisdiction and ultra virus of the provisions of constitution. The petitioner also prayed for issuance of a writ of mandamus to the respondent No.1 to act and to investigate the complaint itself in accordance with law.

3- Learned counsel for petitioner, inter alia, contends that the respondent No.1 could not refuse to exercise its powers under the Securities & Exchange Ordinance, 1969, Securities Ordinance 1984, Rules and Regulations, governing the working of Stock Exchange and Brokerage Houses including the Stock Exchange Members [Inspection of Books and Records] Rules, 2001 and the Brokers and Agents Registration 2001, being the exclusive vested authority and cannot absolve of its basic responsibilities being a regulatory authority.

4- It is further contended that the issue involved in the complaint cannot be a subject matter amenable to the jurisdiction of a Committee of the Stock Exchange or any other body except that of Security & Exchange Commission of Pakistan, but the respondent No.1 did not even consider the contents of the complaint and proceeded to transmit the same to an in-competent authority without due application of mind and advancing reasons thereof.

5- On the other hand, respondent No.1 through their separate written comments resisted the petition by stating that a dispute for recovery is not within the purview of the Commission and that Commission exercised its functions in accordance with law & rules provided on the subject. It is further maintained that the petitioner, by way of signing the account opening form with respondent No.2, agreed upon resolution of disputes through the Arbitration Committee of Stock Exchange. Moreover, Clause 30 of the General Rules of Karachi Stock Exchange clearly provides that disputes between the Members and the Clients are to be referred to Arbitration.

6- The respondent No.1 has further highlighted that Section 24 of the Securities & Exchange Commission Ordinance, 1969 [hereinafter referred to as the Ordinance] does not provide any remedy for taking action,

rather under Section 21 the Commission is vested with the powers to investigate the complaint. However, even if the petitioner's complaint is considered under Section 21 of the Ordinance, no right is given therein to demand investigation by the Commission, itself. It is further contended that **if every individual investor is granted a right to force the Commission to hold the inquiry in respect of their grievances, it would open a flood-gate rendering Commission unable to do any thing else.**

7- It is next averred that the petitioner has not referred to any specific provision of law under which Commission was bound to hold inquiry on his complaint and that the Commission is vested with the power of investigation only under Section 29 of the S.E.C.P Act, 1997 that is *suo moto* power of the Commission. Similarly, violation of any specific provisions of Companies Ordinance, Brokers & Agent Registration Rules, 2001 or Stock Exchange Members [Inspection of Book and Record] Rules 2001 has not been mentioned in the complaint or petition.

8- The main objection of respondent No.1 is that since the petitioner has expressly requested for the claim of recovery while seeking compensation and a direction to make good the loss determined through investigation, therefore, the matter exclusively falls within the domain of Arbitration Committee.

9- Respondent No.3, in their separate written comments also endorsed the version of respondent No.1 by maintaining that KSC has framed its Regulations called "General Rules & Regulations" and in terms of Clause 30, disputes are referred to the Arbitration Committee. It is next submitted that upon receipt of the complaint by mode of transfer from S.E.C.P, the Committee initiated the arbitration proceeding by calling comments from the parties, which has been received from respondent No.2 i.e. KASB.

10- It is finally submitted that the petitioner had other forums for redressal of his grievances, yet he preferred to approach this court, therefore, this Constitutional Petition, is not maintainable.

11- Heard & record perused.

12- The objection qua jurisdiction of this Court in presence of alternate remedy, under the circumstances, is of no legal significance as this Court, in case of any illegal commission or omission by a

public functionary is competent and can come to the aid of aggrieved person through the mandate of Article 199 of the Constitution.

13- The question which requires determination is as to whether the impugned act of the respondent SECP, whereby complaint of the petitioner was sent to Arbitration Committee, is in accordance with law on the subject ? for resolution of this controversy, the complaint of the petitioner is of great significance, therefore, its relevant portion [nature of claim-violation of any particular provision of law] is reproduced hereunder for ready reference:-

Nature of claim-violation of any particular provision of law	<ul style="list-style-type: none">• Unjustified liquidation/sale of complainant's position.• Execution of unauthorized transactions in the Complainant's Account.• Tampering of documents/trade record of the Complainant's account.• Violation of Section 17 of the Securities and Exchange Ordinance, 1969. [Emphasis provided]• Violation of the provisions of Brokers and Agents Registration Rules, 2001 (Rules).• Violation of the Code of Conduct prescribed in the (Rules).• Commission of fraud and forgeries in the books.• Pilferage, embezzlement of securities and proceeds thereof.
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14- The prayer of the complaint, being relevant, is also reproduced hereunder:-

i.	Action may be taken against KASB under section 24 of Securities & Exchange Commission Ordinance 1969 for violation of section 17 SE Ordinance.
ii.	Action may be taken against KASB for violation of the provisions of the Brokers and Agents Registration Rules, 2001 and for violation of the provisions of the Code of Conduct prescribed in Rules
iii.	In Order to unearth the fraud and violations of rules and instructions committed by KASB, it be ordered to hold inspection of the books of the Brokerage House of KASB in exercise of the powers of Stock Exchange Members (Inspection of Books and Records) Rules 2001 with mandate to determine the quantum of violations, fraud, misappropriation, embezzlement and

pilferage of stock held by Complainant with KASB.

[Emphasis provided]

- iv. KASB may kindly be directed to restore the Complainant's position after reversal of wrongful entries caused on account of unauthorized transactions or otherwise done without due process of law.
- v. It be declared after thorough probe into the matter, that the Complainant is entitled for the Compensation for the losses sustained on account of the impugned acts of commission and omission by KASB. KASB be directed to make good the loss so determined.
- vi. Any/all other relief(s) that the Commission deems fit.

15- The complaint clearly shows that violation of Section 17 of the Ordinance has been alleged, rather it is the pivotal point, therefore, relevant portion of said Section is also reproduced hereunder:-

"17-Prohibition of fraudulent acts, etc.- No person shall, for the purpose of inducing, dissuading, effecting, preventing or in any manner influencing or turning to his advantage, the sale or purchase of any security directly or indirectly,-

(a) Employ any device, scheme, artifice, or engage in any act, practice or course of business, which operated or is intended or calculated to operate as a fraud or deceit upon any person; or....."

16- Penal clause of Section 17 is Section 24 which reads as under:-

"24- Penalty:- (1) whoever contravenes the provision of Section 17 shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five hundred thousands Rupees, or with both"

17- It is thus clear that Section 24 is a penal provision; hence violation of Section 17 can safely be termed as an offence. Like every other offence, SE Ordinance 1969, provides a mechanism of

prosecution of this offence under Section 25 of SE Ordinance 1969 and Section 38 of the SECP Act 1997, which reads as under:-

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

"38. Conduct of prosecution.- (1) No prosecution for any offence under this Act against any person shall be instituted except with the consent in writing of the Commission signed by any two Commissioners..

(2) Prosecution of any offence under this Act shall be conducted by any officer of the Commission authorized in writing by the Commission."

18- The Commission has further been vested with the power of investigation and inquiry through two provisions of law i.e. Section 21 of the Ordinance and Section 29 of the Act. The relevant portions of both the Sections are reproduced hereunder for facilitation:-

"21. Inquiry.- the commission may, on its own motion or on representation of not less than One-tenth in number of the members of the Stock Exchange or, in the case of the business or any transaction mentioned in clause (b), on the representation of the stock exchange or any person interested or affected by such business or transaction, at any time by order in writing, cause any inquiry to be made by any person appointed in this behalf into.-

(a) the affairs of, or dealings in, any stock exchange; or

(b) the dealings, business or any transaction in securities by any broker, member, director or officer of a stock exchange....."

"29.- Investigation and proceedings by the Commission.- (1) the commission may suo moto conduct investigations in respect of any matter that is an offence under this Act. (2) the Commission may appoint such number of investigating officers to be known as Investigating Officers of the Commission as it considers necessary for the purpose of carrying out investigation of any offence or inspection under this Act, the Ordinance or any other law in respect of which it has been empowered to exercise the powers of the authority and such investigating officer shall have all the powers given to any person for the purposes of carrying out investigation of any offence under this Act, the Ordinance or any other law."

19- In addition the Commission is mandated with various powers and functions under Section 20 of the SECP Act 1997 which inter-alia provides for the protection of investors and prohibition of fraudulent and unfair trade practices. Relevant portion reads as follows:-

20- Powers and functions of the Commission.-

..... 3

(g) prohibiting any fraudulent and unfair trade practices relating to securities market..... ;

i) conducting investigations in respect of matters related to this Act and the Ordinance and in particular for the purpose of investigating inside trading in securities and prosecuting offenders

o) Performing such functions and exercising such powers of Authority, including any power of the Federal Government delegated to the Authority (other than the power to make any rules or regulations).

Under the provisions of the Ordinance, [the Securities and Exchange Ordinance 1969 (XVII) of 1969], the Modarba Companies and Modarba (Floatation & Control Ordinance, 1980) (XXXI of 1980) and under any other law for the time being in force under which any function or power has been conferred on the Authority including, but not limited to the functions or powers set out in the schedule to this Act

20- The portion of complainant is also considered whereby, Complainant/Petitioner has alleged that respondent No3 i.e. KASB Brokerage has provided incomplete record for the account of the petitioner, therefore, where sufficient documents are not provided to the complainant, probe through inspection of record has been demanded by petitioner. To avoid unnecessary details only relevant portion of complaint is reproduced:-

"7-....The exact nature of violations and the loss caused thereby cannot be determined without the examination and inspection of record of the brokerage house."

21- Discretion vested with the Commission under section 29 of the SECP, Act 1997 is to be exercised with caution by applying a yardstick for examining every case on its own merits. In the present case, there is a specific allegation of non provision of documents and loss of billions which cannot be treated in causal manner and cannot be rest aside by taking the stance that it will open a floodgate of such complaints. The function of the Commission is not of mere post office but of an agency, under duty, to conduct prosecution of offences in fit cases and such fitness can only be determined through investigation/inquiry, concluding with a speaking order.

22- The contention of the respondents that the petitioner himself signed the account opening form, therefore, in terms of its Clause 19, the matter was rightly referred to Arbitration Committee, is devoid

of force for the reason that the same account opening form also contains Clause 12 & 24 wherein it is specifically mentioned that laws of Pakistan, Securities & Exchange Commission Ordinance, 1969 along-with all other ancillary laws and rules are applicable to the contract.

23- The reliance of respondent No. 3 KSE on Clause 30 of General Rules and Regulations of the KSE is also not worthy of credence as the said Clause refers to “**disputes**” and not “**complaint**” which patently corresponds to report of an offence to the agency vested with power of investigation.

24- The above discussion leads to the conclusion that on receipt of a complaint, the respondent No.1 is duty bound to conduct preliminary inquiry for ascertaining as to whether any offence falling under section 17 is, prima facie, made out or not? And in case if it is made out, itself proceed with the same in terms of Section 29 read with Section 38 of the Act. In case, the complaint, after preliminary probe, does not find trace of such violation/offence, it can be referred to alternate dispute resolution by treating it as a **dispute complaint** under Regulation 30 of KSE or Clause 19 of account opening form.

25- Resultantly, this Writ-Petition is allowed and in consequence thereof, the impugned action of respondent No. 1 qua transfer of petitioner’s complaint to Karachi Stock Exchange [the respondent No.3] is set-aside as being unjust & improper. The respondent No.1 is directed to proceed with the complaint of the petitioner in the light of observations made hereinabove. There is no order as to costs.

CHIEF JUSTICE

Announced in Open Court, on this 17th day of September, 2013

CHIEF JUSTICE

APPROVED FOR REPORTING

M. Suhail
17.09.2013