

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

**W.P. No. 2607 of 2012**

**Saif Power Limited**

Versus.

**Federation of Pakistan and others**

Date of Hearing	:	28.03.2022
Appellant by	:	Mr. Waleed Khalid, Advocate
Respondent by	:	Mr. Sultan Mazhar Sher, Advocate. Syed Nazar Hussain Shah, AAG.

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**ARBAB MUHAMMAD TAHIR, J.** Through the instant writ petition, the petitioner, Saif Power Limited (“hereinafter referred to as “**the Company**”), has called in question the order dated 26.07.2012 and letter dated 27.07.2012 (“hereinafter collectively referred to as “**the impugned orders**”) passed by respondent No.3 (Director (Enforcement), Head of Department and respondent No.4 (Assistant Director (Enforcement), Securities and Exchange Commission of Pakistan (“hereinafter referred to as “the **Commission**”), respectively, under Section 231 of the Companies Ordinance, 1984 (hereinafter referred to as “**the Ordinance**”) authorizing the Commission’s Inspectors to investigate the issues/affairs of the Company highlighted in the said orders and to inspect all the records and Books of Accounts of the Company.

2. The facts forming background of the present petition are that the Company was incorporated in Pakistan as a public limited company on 11.11.2004 under the provisions of the Ordinance of 1984. The key functions of the Company were (i) to own, operate and maintain two Gas Turbines and one Steam Turbine having

nameplate capacity of 225 MW (ISO) in District Sahiwal, Punjab and selling electricity to the National Transmission and Dispatch Company. The Company's sponsors included Saif Holdings Limited, which held majority of the shares in the Company coming around 61.54%, whereas the other shareholders were (i) Orastar Limited (Equity Trust (BVI) Limited United Kingdom, an offshore investment company holding capital shares of the said Company up to 30.11% and (ii), Habib Bank Limited holding share capital of the Company up to 8.35% as on December, 31, 2011. The record shows that on 28.06.2012, the Commission received a complaint against the Company from Transparency International Pakistan, alleging fictitious loading of production costs by IPPs to avail the additional income. The annual audited accounts of the Company for the year ended on December, 31, 2011 reflected certain violations committed under the provisions of the Ordinance which were a cause of concern to the Commission. On the basis of the complaints received against the Company and the auditors' observations, the Commission in order to satisfy itself as to the actual status of the Company's affairs, decided to issue an inspection order under Section 231 of the Ordinance of 1984 impugned through the present writ petition.

3. Mr. Waleed Khalid, Advocate, learned counsel for the petitioner/company contended that the impugned orders were passed by the Commission without issuing any show cause notice to the Company; that the non-issuance of a show cause notice to the Company amounts to gross violation of the Company's rights coupled with the provisions of the law on the subject in general and the provisions of the Ordinance in particular; that the Commission, through the impugned orders, has effectively ordered an investigation into the affairs of the Company without even giving an adequate opportunity of a hearing to the Company; that affording of an opportunity of hearing to the Company was must particularly in

the matters of the audited books/accounts; that the impugned orders being *corum-non-judice*, illegal and *ex-facie* discriminatory in nature, are in conflict with the norms of natural justice; that the impugned orders do not take into account the mandatory requirements of the provisions of the Companies Act, 2017 (hereinafter referred to as “**the Act of 2017**”) as well as the Securities and Exchange Commission of Pakistan, Act, 1997 (“hereinafter referred to as “**the Act of 1997**”); that the impugned orders were passed with *mala fide* intent; that the Act of 2017 as well as Act of 1997 provide for an opportunity of hearing to be afforded to an affected party; that while issuing the impugned orders, the Commission had in fact undermined the basic principles of natural justice as well as the constitutional rights of the petitioner/company as guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973; that the powers given by the Commission to the Inspectors to inspect the record/books of accounts of the Company were wide and unlimited in nature.

4. It was next contended by the learned counsel for the Company that the impugned orders are bereft of reasons and are against the provisions of Section 24-A of the General Clauses Act, 1897 (hereinafter referred to as “**the Act of 1897**”) as well as the leading pronouncements of the Superior Courts, which cast a duty upon an adjudicating person/authority to abide by the laws of the land while deciding a controversy; that the Commission has indeed exceeded its mandate and the scope as envisaged under Section 231 of the Ordinance; that the directions given in the impugned orders are illegal and unlawful rendering the said orders to be set aside; that it is well settled that the orders for investigation/inspection must be based on solid reasons; that there is no allegation of fraud or misappropriation against the Company warranting the Commission’s intervention; that at the time of the issuance of the impugned orders,

the Commission was not properly constituted in terms of Section 5 of the Act of 1997; that the impugned orders are based on *mala fides* and *ex-facie* contrary to the provisions of the Ordinance and the Act of 1997; and that it is well settled principle of law that the authority exercising discretionary powers is required to exercise the same reasonable, justly, and fairly and in accordance with the objects of the law, concluded the learned counsel for the Company. He prayed for the writ petition to be allowed in terms of the relief sought therein.

5. On the other hand, Mr. Sultan Mazhar Sher, Advocate, learned counsel for the respondent/commission has opposed the contention of the learned counsel for the Company by raising a preliminary objection as to maintainability of the present writ petition on the ground that Section 231 of the Ordinance relates to the inspection of books, books of accounts and paper of every company, whereas it does not require the issuance of any show cause notice to be issued to a company as alleged by Company. It has been further contended by the learned counsel for the Commission that the present writ petition is premature and thus, untenable; that the Company has no *locus-standi* to invoke the extraordinary constitutional jurisdiction of this Court under Article 199 of the Constitution; that the petition in hand does not specify as to which of the provisions of the law has been violated by the Commission bearing direct effects on the Company; that the present petition is based on misreading of the mandatory provisions of the law inasmuch as the appointment of the Inspectors to investigate into the affairs of the Company and inspect its books and accounts under Section 231 of the Ordinance is a fact finding exercise and not an adverse order; that the impugned orders are in fact in the nature of administrative orders, which cannot be challenged/appealed against; that no show cause notice was required to be issued to the Company since the Commission had no

intention to take a punitive/adverse action against the Company; that since the impugned orders are administrative orders, and mere issuance of an administrative order by the Commission does not warrant the issuance of a show cause notice; that the Commission's powers to inspect or inquire into the affairs of a Company are not subject to "first providing of an opportunity of a hearing to a company"; that since the Act of 1997 and the Ordinance provide for a self-contained mechanism of appeal, review and revision, therefore, the present writ petition merits outright dismissal. Learned counsel for the Commission has prayed for present writ petition to be dismissed with costs.

6. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts necessitating the filing of this petition are discussed, details whereof is mentioned at paragraph No.2 above and need not be reiterated.

7. The record shows that the Commission while examining the annual audited accounts of the Company for the year ended on December, 2011, observed certain violations, which caused it to issue an inspection order under Section 231 of the Ordinance of 1984. The said order was issued by the Commission after scrutinizing the annual audited accounts of the Company for the said period. The annual audited accounts of the Company reflected the Inspectors/Auditors' observations/comments as to the financial status of the Company giving an untrue and unfair picture of its financial status. The said observations/comments, according to the Company, were adverse inasmuch as it perturbed the repute of the Company. The violations/indications witnessed by the Inspectors/Auditors during the annual audit of the Company were as follows:-

- a) *The company has accumulated a liability of Rs.221 million as support service fee payable to Saif Holdings Limited in the current year as against Rs.71 million in the last year and expensed Rs.150.509 million thereby overstating the Company's expenses and resultantly understating the Net Profit.*
- b) *Expenses incurred on import of stores and spares amount to Rs.26.326 million (2011) whereas the purchase and consumption during the year show a Nil position.*
- c) *Abnormal increase in Finance Cost of Long-term borrowing for Rs.1.345 billion (2010) to Rs.2.034 billion (2011) whereas the Company's Long-term borrowing has reduced from Rs.11.817 billion (2010) to Rs.11.025 billion (2011).*
- d) *Operation and Maintenance expenses have increased from Rs.289 million (2010) to Rs.439 million (2011).*
- e) *Miscellaneous expenses have increased from Rs.0.507 million (2010) to Rs.1.420 million (2011).*
- f) *Consultancy expenses have increased from Rs.1.187 million (2010) to Rs.9.068 million (2011).*
- g) *The Company has converted foreign currency loan into equity amounting to USD 2.048 million issued to M/s Orastar Limited otherwise than right.*
- h) *The revenue of Energy Purchase Price (EPP) as reflected in the financial statements for the year ended on December, 31.2010 was Rs.3.359 billion, whereas revenue for the same period has been stated at Rs.2.906 billion in financial statements for the year ended on December, 31.2011.*
- i) *The consumption of raw material reflects huge increase from 79% of EPP during the financial year 2010 to 92% of EPP in the year 2011.*

8. At this juncture, it would be of an immense importance to have a glimpse of the provisions of the Ordinance authorizing the Commission to conduct the audit/inspection of the companies incorporated under the provisions of the Ordinance and/or the Rules made thereunder. Section 231 of the Ordinance provides that the books of accounts and books and papers of each company shall be open to an inspection by the Registrar of the Commission or any other officer of the Commission so authorized by the Commission in this behalf. It needs to be emphasized that in terms of the provision

of Sub-section (3) of Section 231 of the Ordinance, it is the duty of every Director, Officer or other employee of the Company, who has dealings with the Company, to provide all assistance to the Auditors/Inspectors so required by them in connection with the inspection of the Company, and any contravention thereof is punishable under Section 232 of the said Ordinance. For ease of reference, it would be advantageous to reproduce Section 231 of the Ordinance in its entirety, which reads thus:-

*“231. Inspection of books of account by registrar, etc.-*

*(1) **The books of account and books and papers of every company shall be open to inspection by the registrar or by any officer authorised by the Commission in this behalf** if, for reasons to be recorded in writing, the registrar or the Commission considers it necessary so to do.*

*(2) It shall be the duty of every director, officer or other employee of the company to produce to the person making inspection under sub-section (1) all such books of account and books and papers of the company in his custody or under his control, and to furnish him with any such statement, information or explanation relating to the affairs of the company, as the said person may require of him within such time and at such place as he may specify.*

*(3) **It shall also be the duty of every director, officer or other employee of the company to give to the person making inspection under this section all assistance in connection with the inspection which the company may be reasonably expected to give.***

*(4) The person making the inspection under this section may, during the course of inspection — (i) make or cause to be made copies of books of account and other books and papers, or (ii) place or cause to be placed by marks of identification thereon in token of the inspection having been made.*

*(5) Where an inspection of the books of account and books and papers of the company has been made under this section by an officer authorized by the Commission, such officer shall make a report to the Commission.*

*(6) Any officer authorized to make an inspection under this section shall have all the powers that the registrar has under this Ordinance in relation to the making of inquiries”*

**Emphasis supplied:**

9. Section 265 of the Ordinance empowers the Commission to appoint one or more auditors to investigate the affairs of a company. The said Section reads in the following terms:-

**“265. Investigation of company’s affairs in other cases.** - Without prejudice to its power under section 263, the Commission—

- (a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Commission may direct, if— (i) the company, by a resolution in general meeting, or (ii) the Court, by order, Companies Ordinance, 1984 178 declares that the affairs of the company ought to be investigated by an inspector appointed by the Commission; and
- (b) may appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Commission may direct if in the opinion of the Commission there are circumstances suggesting— (i) that the business of the company is being or has been conducted with intent to defraud its creditors, members or any other person or for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members or that the company was formed for any fraudulent or unlawful purpose; or (ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance, breach of trust or other misconduct towards the company or towards any of its members or have been carrying on unauthorized business; or (iii) that the affairs of the company have been so conducted or managed as to deprive the members thereof of a reasonable return; or (iv) that the member of the company have not been given all the information with respect to its affairs which they might reasonably expect; or (v) that any shares of the company have been allotted for inadequate consideration; or (vi) that the affairs of the company are not being managed in accordance with sound business principles or prudent commercial practices; or (vii) that the financial position of the company is such as to endanger its solvency: Provided that, before making an order under clause (b), the Commission shall give the company an opportunity to show cause against the action proposed to be taken.”

10. The record is silent on the question as to whether the Company had called its Annual General Meeting (“AGM”) so as to appoint an auditor or auditors to hold the office from the date of the conclusion of that meeting until the conclusion of the next AGM as mandated by



Section 252 (1) of the Ordinance of 1984, which reads in the following terms:-

*252. Appointment and remuneration of auditors. - (1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting."*

11. It is my view that had the auditors been appointed by the Company as contemplated by Section 252 *ibid*, it could not have necessitated the Commission to have appointed its own auditors/inspectors for the purposes of the Company's inspection, and the alleged violations/illegalities could not have been pointed out by the auditors/Commission.

12. Additionally, Section 268 of the Ordinance obligates every person, officer and allied staff of the company dealing in connection with the affairs of such a company to cooperate, assist and provide all necessary assistance to the officer(s) making the inspection/investigation, and to produce before him/them all such records, books of accounts, statements, information or explanation relating to the affairs of the company which the inspection officer may require from time to time. Section 268 of the Ordinance reads as below:-

*"268. Duty of officers, etc., to assist the inspector.-*

*(1) **It shall be the duty of all officers and other employees and agents of the company and all persons who have dealings with the company to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.** (2) Any such person who makes default in complying with the provisions of sub-section (1) shall, without prejudice to any other liability, be punishable in respect of each offence with imprisonment of either description for a term which may extend to one year and shall also be liable to a fine which may extend to ten thousand rupees.*

*(3) In this section — (a) the expression "agents", in relation to any company, body corporate or person, includes the bankers, legal advisers and auditors of the company; (b) the expression "officer", in relation to any company or body corporate, include any trustee*

*for the debenture-holders of such company or body corporate; and (c) any reference to officers and other employees and agents shall be construed as a reference to past as well as present officers and other employees and agents, as the case may be."*

**Emphasis supplied.**

13. The record shows that vide letter dated 27.07.2012, the Inspectors appointed by the Commission in the matter of the Company called upon the Company to make available to them all the necessary record/documents coupled with the supported documents as set forth in the said letter. As regards the contention of the learned counsel for the Company that the auditors/inspectors so appointed by the Commission have been given wide and unlimited powers to inspect and call for any of the records maintained by the Company, it would not be out of context to mention that the Commission is well within its rights to appoint an auditor and/or auditors as it may consider necessary for the purposes of an inspection and the auditor(s) so appointed have been vested with ample powers to call upon the company, whose audit is being conducted, to provide them with the books of accounts and all other necessary documents/records as they may require to be inspected and such a company would be under a legal obligation to comply with the directions of the auditors by producing before them the entire record/books of accounts.

14. Perusal of the impugned inspection orders reveals that the powers exercised by the Commission under the *proviso* to Section 231 *ibid* were administrative in nature and limited only to the extent of the Company's inspection and conducting an inquiry into the affairs and accounts of the Company and the mere issuance of an order under Section 231 of the Ordinance does not visualize any punitive or adverse action against a Company, thus, it is my view that the directions given by the Commission under Section 231 *ibid*

were administrative in nature and such directions cannot be subjected to a challenge in the extraordinary constitutional jurisdiction of this Court under Article 199 of the Constitution. Furthermore, it is a matter of fact that before invoking the provisions of Section 231 of the Ordinance, no provision for issuance of a show cause notice has been provided by the Legislature nor the same could be read into this Section as no adverse/punitive action is contemplated in the said Section. In my view, in appropriate cases and by assigning reasons in writing, the Registrar or any other officer authorized by Commission can invoke the provisions of Section 231 of the Ordinance in order to inspect the books of accounts and other books and papers required to be kept and maintained by a Company under law, and to ensure compliance with the provisions of the Ordinance.

15. In the case of Ofspace (Private) Limited Vs. Federation of the Islamic Republic of Pakistan Through Secretary Ministry of Finance and 3 others (2012 CLD 923), the Hon'ble High Court of Sindh, while dealing with the question arising out and relating to Section 231 *ibid* has inter alia held that:-

*“From perusal of the provisions of section 231 of the Companies Ordinance, 1984, it is seen that through instant provision of law, the registrar or any officer authorized by Commission has been empowered to inspect the books of accounts and, books and papers of every company which shall be kept open to inspection by every company. It has been further provided that every director, officer or employee of the company shall be duty bound to produce to the person making inspection of such books of accounts and books and papers of the company in his custody or under his control and to furnish him with any such statement, information or explanation relating to the affairs of the company. After conducting inspection of the books of accounts and books and papers of the company, the authorized officer is required to make a report to the Commission. It may be further noted that the officer authorized to make an inspection under this section has been given such powers, that the registrar has under the Companies Ordinance, in relation to the making inquiries. **It appears that the exercise of powers under section 231 of the Companies Ordinance, 1984 by registrar or the***

authorized officer by the Commission is administrative in nature and limited to the extent of inspection and conducting an inquiry into the affairs and accounts of a company, whereas no adverse action is visualized under this section. It is further seen that before invoking the provisions of section 231, no provision for issuance of show cause notice has been provided by the legislature nor the same could be read into this section as no adverse action is stipulated in this section. We are of the view that, in appropriate cases and by assigning reasons, in writing, the registrar or any authorized officer by Commission can invoke the provisions of section 231, to inspect the books of accounts and other books and papers required to be kept and maintained by a company under law, and to ensure the compliance of the provisions of Companies Ordinance, 1984."  
**Emphasis supplied:**

16. In the case of Ofspace (Pvt.) Limited (supra), it has further been held that the exercise of the powers by the Commission under Section 231 of the 1984 Ordinance were **administrative in nature and limited to inspection and conducting of preliminary inquiry into the affairs and accounts of a company and there was no requirement regarding the issuance of a show cause notice before passing an order under Section 231 *ibid*.** However, if compliance has been shown by the company, whose audit is being conducted, with the inspection order under Section 231 *ibid*, and then the Commission proposes to take any adverse action against a company, a show cause notice is must in such like eventuality and affording of an opportunity of a hearing to the Company would be essential. In the case of Commissioner of Income Tax and others Vs. Messrs Media Network and others (PLD 2006 SC 787), it has been held that --- while examining the validity of the policy guidelines issued by the Board for the purposes of selecting the returns for audit upto 20% for the year 2002-2003 on the touch stone of the principles of "due process of law" and the "principles of natural justice" has held as under:--

"Depending upon the facts and circumstances of each case, there is no mandatory requirement of natural justice that in every case the other side must be given a notice before preliminary steps are taken. It might

*suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him. However, it is not possible to lay down an absolute rule of universal application governing all situations as to the exclusion or otherwise of the audi alteram partem rule during the course of preliminary inquiries or investigations."*

17. This Court in the case of Mubarak Textile Mills (Pvt.) Ltd. Vs. Director (Enforcement), Head of Department Securities and Exchange Commission of Pakistan and others (2016 CLD 2293 Islamabad), has *inter alia* held as follows:-

**"Section 231 of the Companies Ordinance, 1984, mandates that the books of accounts etc of every company, shall be open to inspection by inter alia, any officer authorized by the SECP, where considered necessary, for reasons to be recorded in writing. A duty has been cast on every Director, Officer and an employee of the company to give all assistance to the officer making the inspection, and to produce before him all such records, books of accounts, statements, information or explanation relating to the affairs of the company which the inspection officer may require."**

18. Furthermore, it was held that "in the case at hand, the appellant company could not challenge the order dated 31.01.2012, passed by the SECP under section 231 of the Companies Ordinance, 1984, simply because prior to the passing of the same, a show cause notice had not been issued.

10. Section 33 of the SECP Act, *inter alia*, provides that an appeal shall lie to an Appellate Bench of the SECP against an order of the SECP, passed by Commissioner or an officer authorized in this behalf by the SECP. **The proviso to the said section 33 bars an appeal against an administrative direction given by a Commissioner or an Officer of the SECP. As the order dated 31.01.2012 was an administrative order, an appeal against the same could not be filed under section 33 of the SECP Act. As mentioned above, in the case of Ofspace (Pvt.) Limited v. Federation of Islamic**

**Republic of Pakistan (supra), it was held that an order under section 231 of the Companies Ordinance, 1984, is administrative in nature.”**

**Emphasis supplied.**

19. In the case of Attock Refinery Limited Vs. Executive Director Enforcement and Monitoring Division, S.E.C.P. (2010 PLD 946 SC), the Hon’ble Supreme Court

*“The matter clearly remains before the SECP for this duration and the mere appointment of an investigator does not "dispose of the entire case". The obvious purpose of the proviso to section 485(1) of the Companies Ordinance is to avoid fragmentary decisions and to ensure that delays do not occur so as to hamper the regulatory role of the SECP. We can also take guidance from the provisions of section 115 of the Code of Civil Procedure, where the words "case---decided" have been used. These words have received a broad interpretation from the Courts, which allows for the exercise of revisional jurisdiction in the interlocutory matters. In the proviso section 485(1) *ibid* the use of the words "dispose of the entire case" is a significant manifestation of the legislative intent that the appellate jurisdiction of the Courts under the said provision is not to be invoked (in the context of the present case) until the investigators have done their job of investigating the affairs of the company”.*

**Emphasis supplied:**

20. Furthermore, in the cited judgment it has further been held as follows:-

*“We are, therefore, of the opinion that considering the issues highlighted by SECP, **the investigation of the affairs of the petitioner company must be undertaken.** The company itself should have no reluctance in joining the investigation. If it can explain and answer the significant and well founded questions which have been raised by the SECP.*

**Emphasis supplied:**

21. Additionally, Section 33 of the Act of 1997, *inter alia*, provides that an appeal shall lie to an Appellate Bench of the Commission

against an order passed by Commissioner or any other officer authorized by the Commission in this behalf. The *proviso* to Section 33 *ibid* bars an appeal against an administrative order/direction given by a Commissioner or an Officer of the Commission. Suffice it to say, that since the impugned orders were administrative orders, an appeal against the same could not be filed under Section 33 of the Act of 1997. As mentioned above, in the case of Ofspace (Pvt.) Limited (supra), it was held that an order under Section 231 of the Ordinance is administrative in nature. Therefore, I am of the view that a writ petition against an order of the Commission which is purely in the nature of “an administrative order” is not maintainable. Moreover, if the orders passed by the Commission in terms of Section 231 of the Ordinance are subjected to a challenge, it would paralyze the functions of the Commission and the Commission cannot be expected to perform its regulatory functions. Furthermore, it needs to be emphasized that it is Commission’s prime responsibility as a Regulator to collect information for effective enforcement of the laws being administered by it. In the absence of such information, the Commission cannot be expected to make fair and impartial decisions. Furthermore, the concerned/responsible persons are under a statutory obligation to fully cooperate in providing such information to the Commission as and when it so requires for the purposes of an investigation/inspection. The legislature being fully cognizant of the critical importance of this provision of information to the Commission prescribes and ascribes not only special status to the auditors/inspector, but also recommends severe consequences for non-provision of the information to the auditors/inspectors, a punishment for a term which may extend to one year under section 232(1) of the Ordinance. In the present case, the Company is not well within its rights to approach this Court under Article 199 of the Constitution by way of filing the present writ petition challenging the inspection orders

under Section 231 of the Ordinance simply for the reasons that prior to the passing of the said orders, neither any adequate opportunity of hearing was afforded to the Company nor a show cause notice had been issued to it.

22. In view of what has been discussed above, I do not find any merits in this writ petition, which is accordingly **dismissed** leaving the parties to bear their own costs.

**(ARBAB MUHAMMAD TAHIR)**  
**JUDGE**

Announced in an open Court on 06.06.2022.

**JUDGE**

ISLAMABAD | 06.06.2022  
APPROVED FOR REPORTING.

**\*\*//Kamran//\*\***