

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P.No.2862/2021

Saif Ur Rehman Khan

Versus

Securities and Exchange Commission of Pakistan & 2 others

Petitioner by : Sardar Muhammad Latif Khan Khosa, ASC.
Sardar Shahbaz Ali Khan, Advocate.
Malik Javaid Iqbal Wains, Advocate.
Syed Mehmood H. Gillani, Advocate.
Ms Suzain Khattak, Advocate.

Respondents by : Sardar Muzaffar A. Khan Abbasi, DPGA, NAB.
Mr Irfan Ahmed, Spl. Prosecutor NAB.
Mr Shahzad Ali Khan, Mr Ibrar Saeed, Advocates for SECP.
Syed Jamil Ur Rehman, A.D. /I.O. NAB.

Date of Hearing : **26-08-2021.**

ATHAR MINALLAH,C.J.- Saif Ur Rehman Khan, son of Abdul Rehman Khan (*hereinafter referred to as the '**Petitioner**'*), has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the '**Constitution**'*) by filing three constitutional petitions. In Writ Petition No.1244/2021 the Petitioner, besides challenging notice, dated 02-03-2021, has sought ad interim pre arrest bail. Through Writ Petition No. 1242/2021, call up notices have been challenged and ad interim pre arrest bail has been sought. Writ Petition No.2862/2021 was subsequently filed on 10-08-2021, wherein

reference, dated 09-07-2021 (*hereinafter referred to as the 'Reference'*) was challenged. The impugned Reference has been sent by the Securities and Exchange Commission of Pakistan (*hereinafter referred to as the 'Commission'*) to the National Accountability Bureau (*hereinafter referred to as the 'Bureau'*) in exercise of powers conferred under section 41-B of the Securities and Exchange Commission of Pakistan Act, 1997 (*hereinafter referred to as the 'Act of 1997'*). We will decide the three aforementioned constitutional petitions through this consolidated judgment.

2. The Commission had received multiple complaints and reports from various sources alleging that the Petitioner was involved in the prohibited, restricted and unlawful business of inviting and accepting unauthorized deposits from members of the general public. It was further alleged that he was operating pyramid schemes and was trading in virtual currency in violation of the provisions of the Companies Act, 2017 (*hereinafter referred to as the 'Act of 2017'*). The Petitioner is the sponsor, Chief Executive and one of the Directors of eighteen juridical persons incorporated under the laws of Pakistan between 2018 to June 2020. He was also alleged to have been involved in illegal practices and engaged in unlawful business of cheating the public at large under the name of purported concerns/entities which were not registered or incorporated as legal juridical persons under the laws of Pakistan. The Commission, therefore, issued a show cause notice, dated 22-01-2021 and, after concluding the proceedings, penalties were imposed against one of the incorporated juridical persons, namely M/s B4U Soft (Private)

Limited, vide order dated 20-05-2021. We have been informed that an appeal has been preferred against the said order passed by the Commission, which is pending. The Petitioner had allegedly induced members of the general public to invest in schemes by holding out a purported non registered and un incorporated entity, 'B4U Group'. No such juridical person existed or was incorporated under the laws of Pakistan. It was alleged that the Petitioner had fraudulently induced the public to deposit their funds in 'ponzi schemes'. It appears that complaints were simultaneously received by the Federal Investigation Agency (*hereinafter referred to as the 'Agency'*) and the Bureau. The latter had initiated proceedings against the Petitioner for allegedly 'cheating public at large' and, pursuant thereto, the impugned call up notices were issued. However, later the Bureau received from the Commission a reference, dated 09-07-2021, in exercise of powers conferred under section 41-B of the Act of 1997. The Petitioner, through the petitions in hand, has challenged the jurisdiction assumed by the Bureau and the power of the Commission to send the reference, dated 09-07-2021. Moreover, the Petitioner has also sought anticipatory bail.

3. *Sardar Muhammad Latif Khan Khosa*, Sr ASC, has argued at length on behalf of the Petitioner. Placing reliance on the case titled '*Dr Arsalan Iftikhar v Malik Riaz Hussain and others*' [PLD 2012 SC 903], he has argued that before summoning a person it is an obligation of the Bureau to particularize the information; reliance has also been placed on '*Mrs Shahina Shakeel and another v The Chairman NAB and others*' [2020 PCrLJ(Lahore) 1004] and '*Messrs*

Memon Motors Private Limited through General Manager v National Accountability Bureau through Chairman and 2 others' [2014 PCrLJ(Sindh) 1378]; section 41-B of the Act of 1997 clearly bars any proceedings by the Bureau; the Commission has already imposed heavy penalties and, therefore, the same matter cannot be inquired into, investigated or reopened by the Bureau; it would be a case of double jeopardy if the Bureau proceeds against the Petitioner; the reference sent by the Commission was received by the Bureau after the inquiry had been initiated by the latter and, therefore, the proceedings are *coram non judice* and without lawful authority; reliance has been placed on '*Yousaf Ali v Muhammad Aslam Zia and 2 others'* [PLD1958 SC 104]; the Act of 2017 and the Act of 1997 provides a complete mechanism for conducting investigation and proceedings by the Commission; the Bureau, therefore, was bereft of jurisdiction to proceed against the Petitioner; the assumption of jurisdiction by the Bureau was illegal, based on malafide and without lawful authority.

4. *Sardar Muzaffar Ahmed Khan Abbasi*, Deputy Prosecutor General Accountability of the Bureau has, on the other hand, contended that; the Act of 2017 read with the Act of 1997 are distinct from the National Accountability Ordinance, 1999 (*hereinafter referred to as the 'Ordinance of 1999'*); the Ordinance of 1999 is a special law and the Commission is not empowered to inquire, investigate or prosecute a person for the offences described under section 9 *ibid*; the Commission is not empowered to recover the deposits illegally received from the public; the Bureau is competent to inquire,

investigate and proceed against the Petitioner because the latter has cheated public at large; proceedings under the Act of 1999 are not barred due to the imposition of penalties by the Commission in exercise of powers conferred under the Act of 2017 read with the Act of 1997; multiple bank accounts had been illegally opened and operated by the Petitioner in order to defraud and cheat the public at large; reliance has been placed on the case titled '*Muhammad Nadeem Anwar v Securities and Exchange Commission of Pakistan through Director NBFCs Deptt., Islamabad*' [2014 SCMR 1376].

5. The learned counsel for the Petitioner and the learned Deputy Prosecutor General Accountability of the Bureau have been heard and the record perused with their able assistance.

6. It has been alleged that the Petitioner had fraudulently induced members of the general public to invest in sham schemes by holding out a purported entity, 'B4U Global/Group'. No such entity was registered or incorporated under the laws of Pakistan. The Commission has confirmed that the Petitioner holds significant interest in multiple incorporated companies and the bank accounts of some were also used for receiving investments from members of the public who had been allegedly cheated fraudulently. It was alleged that the Petitioner was also using and operating bank accounts in his name for this purpose. Proceedings were initiated by the Commission under the Act of 2017 read with the Act of 1997 against the Petitioner and one of the juridical persons. The proceedings had culminated with the imposition of penalties vide order, dated 20-05-2021. The penalties were imposed in exercise of powers conferred under sections 84 and

502 of the Act of 2017 because on culmination of the proceedings the Commission had concluded that violations of sections 84(1) and 26(2) ibid stood established against an incorporated juridical person. The Bureau had also initiated a probe under the Ordinance of 1999 in the context of the offence under section 9, described as 'cheating public at large'. It is noted that the probe by the Bureau was regarding the alleged acts and omissions of the Petitioner relating to an unincorporated purported concern, 'B4U Group'. It was also alleged that several bank accounts were opened and operated in the Petitioner's name in order to cheat the public at large. The proceedings initiated by the Bureau were not regarding contraventions relating to the provisions of the Act of 2017. The probe by the Bureau was regarding the acts relating to the alleged offence of cheating the public at large by deceptively holding out an unregistered or incorporated purported entity. The Bureau asserts that during the probe it has unearthed multiple bank accounts which were being managed and operated by the Petitioner for receiving funds from members of the general public. On the other hand, the show cause notice issued by the Commission which had led to imposition of penalties vide order, dated 20-05-2021, was focused on the violations committed by an incorporated company. The penalties were imposed under sections 84 and 502 of the Act of 2017 in the context of the violations committed under sections 84(1) and 26(2) of the Act of 2017 by one of the incorporated companies. It is noted that the Commission was neither empowered nor vested with jurisdiction under the Act of 2017 read with the Act of 1997 to proceed against the Petitioner for committing the offence of cheating the public at

large nor to recover the investments of the citizens. Moreover, the Commission was also bereft of taking any action against the Petitioner for his alleged acts and omissions relatable to an unregistered and unincorporated purported entity i.e B4U Group. The Commission, therefore, simultaneously sent the Reference, dated 09-07-2021, to the Bureau for initiating proceedings under the Ordinance of 1999 for allegedly defrauding the public at large and the freezing of assets. The Petitioner has assailed the Reference, dated 09-07-2021, and the pending proceedings before the Bureau, mainly on the ground that the latter was bereft of jurisdiction. It is the case of the Petitioner that since the Commission has completed proceedings under the Act of 2017 and has imposed penalties vide order, dated 20-05-2021, therefore, proceedings before the Bureau under the Ordinance of 1999 would amount to double jeopardy. The learned counsel for the Petitioner has laid great stress on the interpretation of section 41 B of the Act of 1997 to demonstrate that the Bureau does not have the power nor jurisdiction to proceed against his client. The questions that have arisen out of the arguments advanced on behalf of the parties are; whether the proceedings under the Act of 2017 read with the Act of 1997 and, pursuant thereto, passing of order, dated 20-05-2021 by the Commission, proceedings by the Bureau under the Ordinance of 1999 were barred; whether the Commission was not competent to send the Reference to the Bureau in exercise of powers conferred under section 41B of the Act of 1997; and lastly, if the Bureau was vested with jurisdiction to proceed pursuant to receiving the Reference then, whether a case is made out to extend the concession of anticipatory bail in favour of the Petitioner. It would be beneficial to

survey the relevant provisions of the Act of 2017, Act of 1997 and the Ordinance of 1999 in order to answer the aforementioned questions.

(i) The Act of 2017

7. The object of promulgating the Act of 2017 has been described in its preamble as to reform and re-enact the law relating to companies and for matters connected therewith. Section 26(2) provides that an incorporated company shall not engage in a business which is either prohibited or is restricted by any law, rules or regulations, unless necessary license, registration, permission or approval has been obtained or compliance with any other conditions has been made. Section 84(1) explicitly provides that no company shall invite, accept or renew deposits from the public. The proviso excludes a banking company and such other companies or class of companies or such deposits as the Commission may notify in this behalf. The expression 'deposit' has been described in the explanation. Sub section (2) of section 84 provides that where the company accepts or invites or allows or causes any other person to accept or invite on its behalf, any deposit, the company shall be punishable in the manner described in clauses (a) and (b), as the case may be. Section 502 empowers the Commission to impose a penalty for which no punishment is provided elsewhere in the Act of 2017. In the case in hand the Commission had issued show cause notice, dated 22-01-2021, alleging violations committed by an incorporated company and its Chief Executive and Directors under sections 84(2) and 502 of the Act of 2017. It was alleged that the incorporated company and its

Chief Executive and Directors had violated the provisions of sections 84(1) and 26(2) of the Act of 2017. The penalties were adjudicated in the context of the aforementioned provisions.

(ii) The Act of 1997

8. The Act of 1997 was enacted and duly notified in the official gazette on 26-12-1998. Its preamble describes its object as to provide for the establishment of the Commission and for matters connected therewith and incidental therewith. The expression 'regulated activity' has been defined in section 2(pa) as meaning any activity which is required to be registered with or licensed by the Commission under the Act of 1997 or any administered legislation. Since section 41 B is most relevant for adjudication of the petitions, therefore, it is reproduced as follows.-

"41B. Inquiry, investigation and other proceedings in respect of regulated person. – (1) Notwithstanding anything contained in any other law, including National Accountability Ordinance, 1999 (XVIII of 1999) and Federal Investigation Agency Act, 1974 (VIII of 1975) no action, inquiry, investigation or proceedings in respect of any regulated activity, regulated securities activity, transaction, process or permission granted under this Act or any administered legislation, shall be taken, initiated or conducted by any Federal or Provincial investigation agency, bureau, authority or institution by whatever name called without reference from the Commission.

(2) No proceedings shall lie before any agency, bureau, authority or institution at the instance of any

party to a matter which is or has been in issue before the Commission, in respect of a matter which is actually or has been or might or ought to have been a proper subject of complaint to the Commission under the administered legislation.

Provided that cases pending before any court having jurisdiction before coming into force of this Amendment Act, shall continue to be prosecuted and conducted without reference from the Commission.”

A combined reading of the Act of 2017 and the Act of 1997 shows that the provisions deal with all matters relating to the regulation of incorporated juridical persons and matters incidental and ancillary thereto. The two statutes provides for a comprehensive and self-contained regulatory framework governing the corporate sector and incorporated entities. The heading of section 41B of the Act of 1997 explicitly restricts the scope of the inquiry, investigation or any other proceedings in respect of a 'regulated person'. The latter expression has been defined under clause (pb) of sub section 1 of section 2 of the Act of 1997. The statutes listed in Schedule 1 have been declared as 'administered legislation' under section 2(1)(aa) *ibid*. The expression 'regulated person', therefore, extends to only such persons or entities which are licensed or registered under the Act of 1997 or one of the statutes listed in Schedule 1 of the Act of 1997. Likewise section 2(1)(pa) defines the expression 'regulated activity' as meaning any activity which is required to be registered with or licensed by the Commission under the Act of 1997 or one of the 'administered legislations'. The scope of the restrictions or powers of

the Commission under section 41B of the Act of 1997 are, therefore, confined to an inquiry, investigation or any proceedings relating to a regulated person and a regulated activity. It is a settled principle of interpretation that a heading is regarded as a key to the interpretation of the provision unless the language used by the legislature is inconsistent therewith. Moreover, in case of ambiguity the heading can be resorted to for the purposes of interpretation of the provision. The wordings and language used in the two subsections of section 41B further affirms that its scope is confined to an inquiry, investigation or other proceedings relating to any regulatory activity of a regulated person. A plain reading of sub sections 1 and 2 of section 41B clearly shows that the jurisdiction of the Bureau relating to a regulatory activity of a regulated person is not absolutely barred but rather its exercise has been expressly made subject to sending a reference by the Commission. It is important to note that there is a clear distinction in subsection 2 between a 'party' and the 'Commission'. This distinction is crucial for discovering the legislative intent.

A plain reading of section 41B as a whole thus unambiguously affirms that the jurisdiction of the Bureau is not barred but the proceedings relating to a regulated person under the Ordinance of 1999 are subject to receiving a reference from the Commission. As would be noted later, the reference in the context of section 41B of the Act of 1997 is not regarding any matter that falls within the ambit of the powers and jurisdiction of the Commission under the Act of 2017 or the Act of 1997, as the case may. The reference is, rather, for initiating proceedings and taking action

relating to a regulated person for an offence triable under a distinct statute. As an illustration, an incorporated or regulated person may have 'cheated public at large' which is an offence under the Ordinance of 1999. There is no provision under the Act of 2017 or the Act of 1997 empowering the Commission to proceed against the delinquents nor to recover the illegally invested funds of the general public. There is no force in the argument advanced by the learned counsel that since the Commission has the power to prosecute under various provisions of the Act of 2017 and a special procedure has been prescribed there under for referral to a court, therefore, the jurisdiction of the Bureau is barred. If this argument is accepted then it would render the provision of section 41B of the Act of 1997 as redundant. It is settled principle that redundancy cannot be attributed to the legislature. The power of the Commission to prosecute or to refer the matter to a court relates to specific offences and not those described and triable under the Ordinance of 1999.

We, therefore, declare that the power and jurisdiction of the Bureau is not barred relating to a regulated person and a regulated activity but its exercise is subject to receiving a reference from the Commission. Moreover, we further declare that the restrictions and conditions prescribed under section 41B of the Act of 1997 are not attracted nor applicable in case of persons who do not fall within the ambit of the definition of 'regulated person'. The Commission enjoys the exclusive power to send a reference and no party before it is competent to put the provisions of the Ordinance of 1999 into motion. In order to initiate proceedings against an

unregulated person or activity, the exercise of power and jurisdiction by the Bureau under the Ordinance of 1999 are not subject to a reference by the Commission nor subject to any other condition.

(iii) The Ordinance of 1999.

9. The Ordinance of 1999 was enacted and published in the official gazette on 16-11-1999 and its object has been described in its preamble as to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misappropriation of property, kickbacks, commissions and for matters connected and ancillary or incidental thereto. The offences have been described under section 9 of the Ordinance of 1999. The offences under sections 9(a)(ix) and (x) are reproduced as follows.-

"9. *Corruption and corrupt practices:*

- (a) *A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices;-*
 - (ix) *if he commits the offence of cheating as defined in section 415 of the Pakistan Penal Code, 1860 (Act XLV of 1860), and thereby dishonestly induces members of the public at large to deliver any property including money or valuable security to any person; or*
 - (x) *if he commits the offence of criminal breach of trust as defined in section 405 of the Pakistan Penal Code, 1860 (Act XLV of 1860) with regard to any property including money or*

valuable security entrusted to him by members of the public at large;"

The Commission, under section 41B of 1997, has the exclusive power to send a reference to the Bureau for initiating an inquiry, investigation and other proceedings under the Ordinance of 1999 relating to a regulated person. The reference obviously would be regarding proceedings relating to the offences of corruption and corrupt practices described under section 9 of the Ordinance of 1999. The powers under section 41B of the Act of 1997 can be exercised by the Commission notwithstanding proceedings concluded or penalties imposed under the Act of 1997 or the Act of 2017, as the case may be.

10. We will now discuss the facts and circumstances of the case in hand in the light of the above discussed provisions. The Petitioner has considerable interest in and related to several 'regulated persons'. He was alleged to have been involved in cheating the public at large. The material brought on record prima facie shows that investments were received from the general public and deposited in bank accounts operated in the names of the regulated persons as well as in the personal name of the Petitioner. The inducement to the public was also through a purported entity, B4U Group, which was not a regulated person as defined under the Act of 1997. The Bureau had initiated an inquiry against the Petitioner relating to alleged acts amounting to the offence of cheating the public at large. Later, the Commission sent a reference in exercise of powers conferred under

section 41B of the Act of 1997. We have carefully perused the reference and we have found it to be in consonance with the provisions of the Act of 2017 read with the Act of 1997. We are also satisfied that the Bureau was vested with the power and jurisdiction to initiate proceedings against the Petitioner for the alleged acts relating to a purported entity other than a regulated person defined under the Act of 1999. Likewise, the proceedings pursuant to receiving a reference from the Commission do not suffer from jurisdictional error nor any other legal infirmity. Moreover, sufficient incriminating material has been brought on record by the Bureau against the Petitioner. The latter was also reluctant to effectively cooperate with the Investigating Officer during the course of investigations. We are not persuaded nor a reasonable ground could be raised before us for confirming the ad interim bail granted in favour of the Petitioner. The petitions are, therefore, declared to be without merit and consequently liable to be dismissed.

11. The above is the reasoning for the dismissal of the aforementioned petitions through the short orders, dated 26-08-2021.

(AAMERFAROOQ)
JUDGE

(CHIEF JUSTICE)

Approved for reporting.