

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.74 of 2019
Haji Muhammad Shafiq
Versus

The Registrar of Companies, Company Law Division S.E.C.P. and others

Date of Hearing: 20.06.2022
Appellant by: Raja Waqar Abid, Advocate
Respondents by: Mr. Abdul Rehman Qureshi, Advocate for
respondent No.4,
Barrister Minaal Tariq, Special Prosecutor S.E.C.P.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 34 of the Securities and Exchange Commission of Pakistan Act, 1997, the appellant, Haji Muhammad Shafiq, impugns the order dated 18.03.2019 passed by the Appellate Bench of the Securities and Exchange Commission of Pakistan (“S.E.C.P.”) whereby his appeal against the order dated 08.01.2018 passed by the Assistant Director of the Corporatization and Compliance Department of S.E.C.P., was dismissed.

2. The record shows that a private limited company by the name of Coldage (Private) Limited (“Coldage”) was incorporated on 23.06.1993 under the provisions of the erstwhile Companies Ordinance, 1984 (“the 1984 Ordinance”). It was engaged in the business of cold storage. The appellant and respondent No.4 were the promoters and directors of the said company.

3. Vide Circular No.7 (reference No.CLD/620/1/2002) dated 01.04.2002, the S.E.C.P. introduced the ‘Companies Easy Exit Scheme’ (“CEES”) which provided an opportunity for having the names of defaulting companies struck off from the register of companies. The said Circular prescribed the mechanism for the dissolution of a company. Paragraph 2(d) of the said Circular required an application for striking off the name of a company from the register of companies to be supported by a resolution of the Board of Directors of a company to apply under the CEES for striking off the name of the company from the register of companies. Paragraph 2(e) of the said Circular required the Chief

Executive of the company or its Director to furnish a declaration to the effect that the company has no assets or liabilities and that it cannot carry on any business or operation, and that it has no liabilities outstanding in relation to any loans obtained from banks / financial institutions, taxes, utility charges, or any obligations towards government departments or private parties. The applicant was also required to furnish a certificate from the company's auditors stating *inter alia* that the company had not been carrying on any business or operation and that it had no assets or liabilities. Paragraph 2(g) of the said Circular provided that on receipt of an application, notices will be published in the official Gazette inviting objections from interested parties against striking off the company's name from the register of companies. Where no objection was received and the Registrar was satisfied that the company is not in operation and has no assets or liabilities, the name of the company was to be struck off from the register of companies.

4. On 14.05.2002, the Board of Directors of Coldage resolved to apply for striking off the name of Coldage under Section 439 of the 1984 Ordinance read with the provisions of Circular No.7. A declaration of respondent No.4, the Chief Executive Officer of Coldage, was also sworn on 15.05.2002 stating that the said company was not in operation and did not have any assets or liabilities. On 27.04.2002, the auditors of Coldage had issued a certificate to the effect that the said company was not carrying on any business or operation and did not have any assets or liabilities.

5. Section 439(1) of the 1984 Ordinance provided that where the Registrar has reasonable cause to believe that a company is not carrying on business or is, not in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or is in operation. Section 439(3) of the said Ordinance provided *inter alia* that if the Registrar either receives an answer from the company to the effect that it is not carrying on business or is not in operation, he may publish in the official Gazette, and send to the company by post a notice that, at the expiration of three months of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved. Section 439(5) of the

Ordinance *ibid* provided that at the expiration of the time mentioned in the notice the Registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the official Gazette, and, on the publication in the official Gazette of this notice, the company shall be dissolved.

6. It is not disputed that the said resolution dated 14.05.2002, the declaration dated 15.05.2002 and the auditors' certificate dated 27.04.2002 are in accordance with the formats provided in Circular No.7, dated 01.04.2002. Upon submission of the said documents to the S.E.C.P., it issued notice dated 20.05.2002 under Section 439(3) of the 1984 Ordinance. The said notice provided *inter alia* that unless some cause is shown to the contrary, the name of Coldage shall, with the expiration of three months, be struck off the register and the said company will be dissolved.

7. It is an admitted position that the appellant did not file any objection to the said notice before the S.E.C.P. Furthermore, the appellant had not filed an objection to the publication made in the official Gazette inviting objections to the application for striking off the name of Coldage from the register of companies.

8. With the expiration of three months from the issuance of the said notice dated 20.05.2002, Coldage's name was struck off the register of companies. It is also not disputed that Coldage stood dissolved once its name was struck off the register of companies.

9. It was not until 25.08.2017 (i.e., fifteen years after Coldage's name was struck off the register of companies) that the appellant filed a petition under Section 425(9) of the Companies Act, 2017 (which is in *pari materia* to Section 439(9) of the 1984 Ordinance) praying for the restoration of Coldage's name on the register of companies. The essential grounds taken in the said petition were that Coldage owned 16 *kanals*, 07 *marlas* of land in *Khasra* Nos.142 and 146 in *Mouza* Dhing Shah, District Kasur, which, according to the balance sheet of Coldage for the year ending on 31.12.2000, was worth Rs.6.467 million. It was also asserted that the said land was purchased by the appellant and respondent No.4 in equal shares vide registered sale deed No.3045, dated 28.06.1993 and thereafter transferred to Coldage. In other words, it was the appellant's

stance that the contents of the certificate, resolution and declaration (referred to in paragraph 06 above) stating that Coldage had no assets was not truthful.

10. The said petition was dismissed vide order dated 08.01.2018 passed by the Assistant Director of the Corporatization and Compliance Department of the S.E.C.P. The said order was assailed by the appellant in an appeal before the Appellate Bench of the S.E.C.P., which was dismissed vide order dated 18.03.2019. The said concurrent orders have been assailed by the appellant in the instant appeal.

11. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that an essential pre-requisite for filing an application for striking off a company's name under Circular No.7 read with Section 439(3) of the 1984 Ordinance was that the company should not have any assets or liabilities and should not be carrying on any business; that when the application was filed in the year 2002, Coldage owned 16 *kanals*, 07 *marlas* of land in *Khasra* Nos.142 and 146 in *Mouza* Dhing Shah, District Kasur; that respondent No.4 concealed the fact as to the ownership of the said land by Coldage in the declaration filed in support of the application for striking off Coldage's name from the register of companies; that in the year 2015, respondent No.4 had filed a suit for declaration to the effect that he is the sole owner of the said 16 *kanals*, 07 *marlas* of land; that perusal of the said suit shows that Coldage had been entered as co-owner of the said land in the revenue record; and that since Coldage did have assets in the form of immovable property when the application for striking off its name from the register of companies was filed, the requirements of Circular No.7 and Section 439(3) of the 1984 Ordinance for dissolving the said company had not been fulfilled. Learned counsel for the appellant prayed for the instant appeal to be allowed and for the impugned order dated 18.03.2019 to be set-aside.

12. On the other hand, learned counsel for respondent No.4 submitted that Coldage was dissolved on 18.09.2002 in terms of Section 439(5) of the 1984 Ordinance under the CEES; that the application for its dissolution was filed by the Members / Directors holding 93.75% of its total shareholding whereas the appellant had only 6.25% stake in its

share capital; that the appellant had filed a petition (C.O.No.14/2013) before the Hon'ble Lahore High Court seeking the restoration of Coldage's name in the register of companies under Section 439(6) of the 1984 Ordinance; that the Hon'ble Lahore High Court had sought a report from the Registrar of the Companies who, after inquiring into the matter, submitted his report on 29.03.2004; that after taking into account the contents of the said report, the Hon'ble Lahore High Court dismissed C.O.No.14/2013 vide order dated 14.10.2004; that the said order dated 14.10.2004 was not assailed by the appellant any further; that the appellant's petition before the S.E.C.P. seeking the restoration of Coldage's name on the register of companies is hit by the principle of *res judicata*; that the appellant has not submitted any financial statements of Coldage showing that it had any assets or had earned profits; that Coldage's name had been struck off the register of companies after fulfillment of all the conditions set out in Circular No.7 and Section 439(3) of the 1984 Ordinance; that the impugned orders dated 08.01.2018 and 18.03.2019 do not suffer from any legal infirmity; and that the instant appeal is not just frivolous and vexatious but also has been filed with the intended purpose of blackmailing respondent No.4. Learned counsel for respondent No.4 prayed for the appeal to be dismissed.

13. Ms. Minaal Tariq, Special Prosecutor, S.E.C.P. defended the order dated 18.03.2019 passed by the Appellate Bench of the S.E.C.P. dismissing the appellant's appeal against the order dated 08.01.2018 passed by the Assistant Director of the Corporatization and Compliance Department of the S.E.C.P. She submitted that Coldage's name had been struck off the register of companies after fulfillment of all the requirements under Circular No.7 and Section 439(3) of the 1984 Ordinance; and that the appellant ought to seek a declaration from a Court of plenary jurisdiction to the effect that at the time when Coldage was struck off the register of companies, it owned assets in the form of immovable properties. Learned counsel for the S.E.C.P. prayed for the appeal to be dismissed.

14. I have heard the contentions of the learned counsel for the contesting parties as well the Special Prosecutor, S.E.C.P. and have perused the record with their able assistance. The facts leading to the

filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 10 above and need not be recapitulated.

15. At page 203 of the instant appeal, the appellant has annexed notice dated 20.05.2002 issued by the S.E.C.P. under Section 439(3) of the 1984 Ordinance to the effect that unless cause is shown to the contrary, Coldage's name will be struck off the register of companies and it will stand dissolved at the expiration of three months of the said notice. It is an admitted position that the appellant did not submit any objections to the said notice. There is no denying the fact that vide notification published in the official Gazette on 18.09.2002 in terms of Section 439(5) of the 1984 Ordinance, Coldage was struck off the register of companies and stood dissolved.

16. It was not until the year 2004 that the appellant filed C.O.No.14/2003 before the Hon'ble Lahore High Court under Section 439(6) of the 1984 Ordinance praying *inter alia* that the Coldage's name be restored on the register of companies. Section 439(6) provided *inter alia* that if a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on the application of the company or a member or creditor made before the expiry of three years from the publication in the official Gazette of the notice aforesaid, may, if satisfied that the company was at the time of striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and, upon the filing of a certified copy of such order with the registrar, the company shall be deemed to have continued in existence as if its name had not been struck off, and the Court may by order give such directions and makes such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

17. In the said petition, the petitioner is described as "*M/s. Coldage (Pvt.), (a company whose name is struck off) through Haji Muhammad Shafiq son of Muhammad Rafiq, Adult, Muslim, resident of 774-Neelum Block, Allama Iqbal Town, Lahore, Ex-Director.*" In the said petition, it is pleaded *inter alia* that Zaigham Rashid Ghauri (who is respondent No.4 in the instant petition) had signed a false declaration to the effect that the

company did not have any assets or liabilities and that it was not carrying on any business or operation. It was also pleaded that when the said declaration was filed, Coldage owned 16 *kanals*, 7 *marlas* of land. In the said petition, the factum as to the issuance of the notification dated 18.09.2002 in the official Gazette was also pleaded.

18. Learned counsel for the appellant did not deny the fact that the Hon'ble Lahore High Court had vide order dated 18.03.2004 required the representative of the Registrar Joint Stock Companies to ascertain the facts and submit a report within seven days. For the purposes of clarity, paragraph 3 of the said order is reproduced herein below:-

“3. For factual inquiry, the matter is referred to the Registrar Joint Stock Compan[ies], whose representative shall ascertain the facts and shall be rendering report to this Court within 7 days’ time. The matter is now posted for 30th of March 2004. Whether the Registrar will be entitled to a fee, this question will be taken up on the next date.”

19. The order sheet of C.O.No.14/2003 shows that the Assistant Registrar, S.E.C.P. submitted his report which was handed over to the learned counsel for the petitioner (appellant herein) in the said matter. The report shows that at that time the appellant owned 2,500 shares whereas respondent No.4 owned 37,500 shares out of the 40,000 ordinary shares of Coldage, as per the returns filed on 07.05.1994. It also shows that Form 29, dated 15.05.1994, had been submitted showing the appellant's resignation from the post of Chief Executive of Coldage with effect from 10.05.1994. Although the appellant denies having signed the resignation, the fact remains that he did not object to the notice dated 20.05.2002 issued by the S.E.C.P. under Section 493(3) of the 1984 Ordinance or to the notification dated 18.09.2002 published in the official Gazette. The said report also shows that Coldage's name had been struck off the register of companies in accordance with the provisions of Section 439 of the 1984 Ordinance read with Circular No.7 dated 01.04.2002, providing for the CEES. This report was not challenged by the appellant. Once this report was submitted before the Hon'ble Lahore High Court and its copy given to the appellant's counsel, the appellant decided to absent himself and not pursue the matter any further before the Hon'ble Lahore High Court.

20. On 14.10.2004, no one tendered appearance for the petitioner before the Hon'ble Lahore High Court. Vide order dated 14.10.2004,

C.O.No.14/2003 was dismissed. I deem it appropriate to reproduce herein below the order dated 14.10.2004 whereby C.O.No.14/2003 was dismissed:-

“No one represents the petitioner, whereas learned counsel for respondents No.3 to 5 is present in the Court. The Assistant Registrar SECP has explained the facts, which he has already entered in his report.

2. This petition is made under section 439(6) of the Companies Ordinance, 1984 challenging a resolution for striking off the name of the Company under “companies easy exit scheme”. No one represents the petitioner today, who must have seen the report by now. Consequently, this petition is dismissed.”

21. The appellant neither sought review of the said order nor assailed the same before a superior forum. The said order, whereby the said petition was dismissed by the Hon'ble Lahore High Court, cannot be termed as an order for dismissal of the said petition for non-prosecution. The said order explicitly refers to the detailed report submitted by the Assistant Registrar, S.E.C.P. The Hon'ble High Court also observed that the petitioner must have seen the report. The said report adequately justifies the S.E.C.P.'s order for striking off the petitioner's name from the register of companies. Since the said order attained finality having not been challenged any further, the appellant could not have re-agitated the matter before the S.E.C.P. under Section 425(9) of the Companies Act, 2017 which is in *pari materia* to Section 439(9) of the 1984 Ordinance.

22. The appellant had also filed a petition (C.O.No.13/2003) under Sections 152 and 153 of the 1984 Ordinance before the Hon'ble Lahore High Court seeking the rectification of Coldage's share register. In the said petition, it was pleaded that the appellant had never resigned from the position of Chief Executive of Coldage and that 35,000 shares had been fraudulently allotted to respondent No.4. It is an admitted position that the said petition was also dismissed.

23. It was not until 25.08.2017 that the appellant filed a petition before the S.E.C.P. under Section 425(9) of the Companies Act, 2017 seeking the restoration of Coldage's name on the register of companies. Section 425(9) of the Companies Act, 2017 is in *pari materia* to Section 439(9) of the 1984 Ordinance and provides that if due to inadvertence or otherwise the name of any company which had any assets and liabilities or which had been in operation or carrying on business or about whose affairs any inquiry or investigation may be necessary has been struck off the

register, the registrar may, after such inquiries as he may deem fit, move the commission to have the name of the company restored to the register and thereupon the commission may, if satisfied that it would be just and proper to do so, order the name of the company to be restored in the manner provided in Section 439(6).

24. The grounds taken by the appellant in his petition under Section 425(9) of the Companies Act, 2017 are essentially the same as the ones taken by him in his petition under Section 439(6) of the 1984 Ordinance before the Hon'ble Lahore High Court *viz* that when Coldage was dissolved in 2002 it had assets in the form of land. Till date the Court of plenary jurisdiction has not issued any decree to the effect that when declarations had been filed in the year 2002 to the effect that Coldage did not own any assets, the said company did indeed own 16 *kanals*, 07 *marlas* of land in *Khasra* Nos.142 and 146 in *Mouza* Dhing Shah, District Kasur. I do not find any legal infirmity in the observation made by the Appellate Bench of the S.E.C.P. that if the appellant feels that he was fraudulently removed from the position of Chief Executive of Coldage and his shareholding had been reduced, he ought to pursue the matter before the Court of competent jurisdiction and not before the S.E.C.P. It is indeed the Court of plenary jurisdiction which can afford an opportunity to the appellant to produce evidence to prove that it was the result of fraud that he was removed from the position of Chief Executive Officer or that his shareholding in Coldage had been reduced. It is well settled that a question of fraud is never purely a question of law and the burden of proof lies on the party alleging fraud. Reference in this regard may be made to the law laid down in the case of Abdul Wahid Vs. Mst. Zarmut (PLD 1967 SC 153). It is also well settled that fraud must be proved by producing unimpeachable and confidence inspiring evidence. Mere allegations could not partake proof of fraud under the law.

25. As regards the reliance made by the appellant on the pleadings in respondent No.4's suit for declaration etc. filed before the Court of the learned Civil Judge, Kasur, suffice it to say that pleadings of the parties are not evidence, and facts alleged in the pleadings must be proved through evidence of a party which claims the existence of such facts. This is a requirement under Article 117 of the *Qanun-e-Shahadat* Order, 1984.

The maxim *secundum allegata et probata* postulates that a party to a litigation can only succeed according to what it alleged and proved. Pleadings of the parties cannot be equated with evidence, as held in the case of Messrs Society Oil Dealers Karachi Vs. District Judge, Karachi (2003 MLD 205).

26. The appellant's conduct of remaining silent for far more than a decade after his petition seeking the restoration of Coldage's name on the register of companies was dismissed by the Hon'ble Lahore High Court before he filed a petition under Section 425(9) of the Companies Act, 2017 seeking the same very relief is most inequitable and unjust to say the least.

27. The right to file an application under Section 439(6) of the 1984 Ordinance before a High Court for the restoration of the company's name on the register of companies inheres in a company or any member or creditor thereof. This is explicitly provided in Section 439(6) of said Ordinance. As regards Section 425(9) of the Companies Act, 2017, a member or a creditor of a company is not invested with a right to invoke the jurisdiction of the registrar or the commission for the restoration of the company's name on the register of companies. There is no prohibition on any member or creditor for placing information or material before the registrar who may, after conducting such inquiries as he may deem fit, move the commission to have the name of the company restored to the register of companies. However, in the instant case, an inquiry had already been conducted on the question whether the striking off Coldage's name from the register of companies was done in accordance with the law. This had been done pursuant to the orders passed by the Hon'ble Lahore High Court. An inquiry report dated 29.03.2004 to this effect was submitted before the Hon'ble Lahore High Court. The appellant had left the said inquiry report unchallenged and lost interest in pursuing his petition (C.O.No.14/2013) before the Hon'ble Lahore High Court. Since the essential grounds on which the appellant seeks the restoration of Coldage's name on the register of companies was that it owned assets at the time when it was dissolved pursuant to the CEES and since it was this very ground that the appellant had taken before the Hon'ble Lahore High Court, I am of the view that in the absence of any decree from a Court of

plenary jurisdiction to the effect that Coldage owned land in the year 2002 when it was dissolved, the appellant was estopped from re-agitating the matter before the S.E.C.P. and that too almost thirteen years after his petition under Section 439(6) of the 1984 Ordinance was dismissed by the Hon'ble Lahore High Court.

28. In view of the above, I am left with no option but to dismiss the appeal with costs throughout payable to respondent No.4. Additionally costs of Rs.1,00,000/- is imposed on the appellant in terms of Section 35(1)(iii) C.P.C. as amended by the Costs of Litigation Act, 2017. The said costs shall be deposited by the appellant in the National Treasury and the deposit receipt submitted to the Additional Registrar (Judicial) of this Court within a period of thirty days.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON 26/07/2022

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

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