

9 SCOB [2017] HCD 6

**HIGH COURT DIVISION
(Special Original Jurisdiction)**

WRIT PETITION NO. 538 OF 2012

Md. Nur Islam
Vs.
Securities and Exchange Commission and others

Mr. Tanjib-ul Alam
.....For the petitioner.

Heard on the 29th November, 2nd & 8th
December

Mr. Probir Neogi with
Mr. Suvra Chakravorty
.....For respondent No.1

And
Judgment on the 9th December, 2015

Present:
Ms. Justice Zinat Ara
And
Mr. Justice A.K.M. Shahidul Huq

Securities and Exchange Ordinance, 1969

Section 17:

In the instant case, after following due process of law and the principle of national Justice i.e. show cause notice was issued to the petitioner to explain his position, opportunity was also given for personal hearing before the penal order was passed. Moreover, the penal order has been passed elaborately considering the materials on record i.e. the confessional statement and explanation of the petitioner, the investigation report and the evidence on record. The said order has been affirmed by the quasi judicial body in revision/review. ... (Para 15)

Securities and Exchange Ordinance, 1969

Section 26:

On consideration of the materials on record, it appears to us that the impugned order dated 08. 12. 2011 can not be said to be unlawful merely because it is without elaborate reasoning and non-speaking one. The impugned order appears to be otherwise sustainable. ... (Para 16)

Judgment

Zinat Ara, J:

1. In this Rule Nisi, the petitioner has called in question the legality of the order under Memo No. SEC /Enforcement/ 908/2011/789 dated 08.12.2011(Annexure- A to the writ petition) passed by Respondent No.2 rejecting the revisional application dated 20.09.2011 preferred by the petitioner under section 26 (1) of the Securities and Exchange Ordinance,

1969 (hereinafter referred to as the Ordinance) against the Penal Order being Order No. SEC/Enforcement/908/2011/ 569 dated 06.09.2011.

2. Admitted facts.

The petitioner-Md. Nur Islam, was the Secretary of a company namely, Beach Hatchery Limited (hereinafter stated as the Company). He had been working there for 18 years. At the instruction of the Securities and Exchange Commission (hereinafter stated as SEC), vide letter No. SEC/ Surveillance/2003-0041/369 dated 21.09.2010, regarding unusual share trading of the Company, respondent No.3, the Chief Executive Officer, Dhaka Stock Exchange Limited (shortly, DSE) conducted an investigation hearing on 26.10.2010 at Monitoring, Investigation and Compliance Department of DSE. After investigation hearing was conducted, DSE sent letter No. DSE/LC/20-10/Inv/ 3458 dated 26.10.2010 to the Company informing about the outcome of hearing and requested the Chairman of the Company to inform about the action taken against the persons, who were involved in the illegal selling of unclaimed bonus shares of the Company. Thereafter, following issuance of the said letter SEC sent letter No.SEC/Surveillance/2003-0041/413 dated 08.11.2010 to the Company quoting the investigation report and requesting the Managing Director of the Company to comment on the findings as quoted. Whereupon, the Managing Director of the Company informed the Director of SEC vide letter No. BHL/HO/2010-591 dated 23.12.2010 that the Company management duly investigated the matter and found that entire illegal share trading has been conducted by the Company's Computer Operator of Shares Department Md. Abdul Alim without involvement of any other executive/officer of the Company. After the investigation report was submitted by DSE, SEC issued a show cause-cum-hearing notice being Notice No. SEC/Enforcement/908/2011/133 dated 07.03.2011 to the petitioner to explain his position and to appear before SEC for hearing. The petitioner submitted written explanation to the show cause-cum-hearing notice. Upon hearing and considering the petitioner's written explanation dated 21.04.2011, eventually, respondent No.2 issued a penal order being SEC/ Enforcement /908/ 2011/ 570 dated 06.09.2011 (annexure-E to the writ petition) on the basis of petitioner's written confession given to the investigation team.

3. Being aggrieved by penal order No. SEC/ Enforcement/ 908/2011/569 dated 06.09.2011 issued by SEC, the petitioner filed a revisional application dated 20.09.2011 but the said application was rejected by the impugned order dated 08.12.2011 and thereby, upheld penal order dated 06.09.2011.

4. The petitioner's Case

The Managing Director of the Company by letter dated 23.09.2010 informed that only Computer Operator of Shares Department namely Abdul Alim was involved in illegal trading of bonus shares of 21,000 of the share-holders of the Company; that the petitioner's confession was forcibly obtained by Md. Kh. Asadullah of DSE; that the petitioner was not involved in the alleged illegal share transaction but the transfer of shares was done behind his back by Md. Abdul Alim; that inspite of petitioner's explanation about the facts, penal order was passed unlawfully against him; that the review petition of the petitioner was rejected without considering the facts and circumstances of the case unlawfully.

5. Respondent No. 1's Case.

Respondent No. 1, SEC contested the rule by filing an affidavit-in-opposition controverting and denying the statements made in the writ petition contending, inter alia, that the petitioner was the Secretary of the Company and was the authorized person of Md. Abdul Alim being Proforma respondent No.5 of the writ petition; that the petitioner operated two

accounts in the Company, one account was operated in his own name and the other in the name of Abdul Alim; that Abdul Alim, the Computer Operator of the Shares Division of the Company, holding BO Account No. 1201570026013352 client code-17110 used to transfer the bonus shares of various clients to his account upon discussion with the petitioner; that the petitioner embezzled Tk. 8,50,000/- and Abdul Alim also embezzled Tk.4,50,000/- out of the total illegal share sell proceeds of the Company; that investigation was conducted by DSE legally; that the investigating team after investigation and considering the petitioner's own confession and the material on record, submitted investigation report against the petitioner and Abdul Alim; that penal order was passed by SEC after following the legal Procedure; that the revision order has also been passed legally though not an elaborate one; that in the facts and circumstances of the case, the rule is liable to be discharged.

6. Mr. Tanjib-ul Alam, the learned Advocate for the petitioner, takes us through the writ petition, the connected materials on record, the impugned order dated 8.12.2011, the relevant provision of section 26(1) of the Ordinance and submits that the order passed by SEC is neither elaborate nor a speaking one and therefore, the same is unlawful. He next submits that the revisional authority has not considered that the penal order was passed against the petitioner merely on the basis of his confessional statement obtained forcibly. He further submits that impugned order has been passed without appreciating the facts and circumstances of the case. He also submits that respondent No.2 also failed to appreciate that the Chairman of the Company by a letter dated 15.9.2012 had informed that upon inquiry, only Abdul Alim was found responsible for illegal transaction of 21,000 bonus shares. He lastly submits that respondent No.2 has not applied his judicial mind in passing the impugned order and therefore, the impugned order is liable to be struck down.

7. In reply, Mr. Probir Neogi, the learned Advocate for respondent No.1-SEC, takes us through affidavit-in- opposition, the investigating report, penal order dated 06.09.2011, the impugned order and contends that the petitioner only challenged the order of revision without challenging the original penal order and so, the writ petition is not maintainable. He next contends that from the investigating report, it transpires that both Abdul Alim and the petitioner were involved in the unlawful transaction of bonus shares. He further contends that admittedly, show cause-cum-hearing notice was served upon the petitioner for violation of the provision of section 17(a) of the Ordinance, he gave reply to the show cause-cum-hearing notice and upon hearing, and penal order was passed by describing the evidence in details with statements of witnesses. He also contends that at the time of passing the penal order, confession of the petitioner, the other evidence, the petitioner's reply, etc. were duly considered by the authority. He next contends that it is true that the revisional order is a short order and not an elaborate order but, for that reason, the impugned order ought not to set-aside if, on consideration of the materials on record, it is seen that the order so passed is sustainable. Mr. Neogi lastly contends that the order has been passed by an executive authority in quasi judicial capacity and so, affirmation of the original order without reasoning cannot be set aside, if it is found lawful.

8. In support of his submissions, Mr. Neogi has relied in the decisions of the cases of Saeeda Yasmin and others vs. Capital Service Center Ltd. and others, reported in 57 DLR (AD) 189 and Government of Bangladesh represented by the Secretary, Ministry of works vs. Md. Jajil and others, reported in 48 DLR (AD)10.

9. In reply, Mr. Tanjib-ul Alam, the learned Advocate for the petitioner, submits that the decisions as reported in 57 DLR (AD) 189 and 48 DLR (AD)10 are not applicable in the facts and circumstances of the instant case.

10. Examination of the Record

We have examined the writ petition, affidavit-in opposition and the annexure thereto and the relevant provision of section 26 of the Act. We have also carefully studied the decisions as referred to by Mr. Probir Neogi.

11. Deliberation of the Court.

To examine the legality of the impugned order, the said order (annexure-A to the writ petition) is quoted below for better understanding:-

“.....This refers to your letter no. Nil dated NIL against penal order no. SEC/ Enforcement/ 908/2011/569 dated September 06, 2011.

The Commission has considered your request as review petition under section 26 of the Securities and Exchange Ordinance, 1969 and rejected the review petition against above mentioned penal Order and decided to uphold it's earlier decision of penalty.....”

12. From the impugned order, it is evident that it is neither an elaborate one nor with reasoning.

13. From the decision as referred to by Mr. Neogi as reported in 48 DLR (AD) 10, it transpires that their lordships of the Appellate Division decided as under:

“The High Court Division was not a Court of appeal required to make determination of facts on its own. It could interfere with the findings of a tribunal of fact under its extraordinary jurisdiction under Article 102, only if it could be shown that the tribunal had acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the complaining party or that it had acted malafide or in violation of any principle of natural justice. In the absence of any of these conditions the interference by the High Court Division will itself be an act of without jurisdiction. This precisely has happened in the present case and therefore this appeal must succeed.”

(Bold, emphasis given)

14. In 57 DLR (AD) 189 case, it was decided by the Appellate Division as under:

“The order of the trial Court as well as of the High Court Division is not an elaborate one assigning reasoning in detail in support of the order so passed. The law is now settled that merely because an order of a Court is not an elaborate one or that is not speaking one as should have been but for that the same is not liable to be set aside if on consideration of the materials on record it is seen that the order so passed is sustainable. We have perused the plaint sought to be amended and the application filed seeking amendment of the plaint as well as the other materials on record. The amendment so sought in major part is formal one and the rest is elaboration of the facts already averred in the plaint.”

(Bold, emphasis given)

15. In the instant case, after following due process of law and the principle of national Justice i.e. show cause notice was issued to the petitioner to explain his position, opportunity was also given for personal hearing before the penal order was passed. Moreover, the penal order has been passed elaborately considering the materials on record i.e. the confessional statement and explanation of the petitioner, the investigation report and the evidence on record. The said order has been affirmed by the quasi judicial body in revision/review.

16. On consideration of the materials on record, it appears to us that the impugned order dated 08. 12. 2011 can not be said to be unlawful merely because it is without elaborate reasoning and non-speaking one. The impugned order appears to be otherwise sustainable.

17. Therefore, the principle as enunciated the above mentioned cases are applicable in the instant case.

18. In view of the discussions made in the forgoing paragraphs vis-a-vis the law, we find no merit in the arguments of Mr. Alam and we find merit and force in the arguments of Mr. Neogi.

19. Accordingly, we find no merit in the Rule.

20. In the result, the rule is discharged without any order as to cost.

21. Communicate the Judgment to respondents No. 1 & 2 at once.