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[Blue Seal]

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1343 of 2008

<u>Date</u>	<u>Order with signature of Judge</u>
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Plaintiff through Mr. Shahab Sarki, advocate.
Defendants Nos.1 and 3 through Mr. Ejaz Ahmed, advocate.
Defendant No.2 through Mr. Jehanzeb Awan, advocate.
Intervenor-Muhammad Irfan Nisar through Mrs. Masooda Qureshi, advocate.

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MUHAMMAD KARIM KHAN AGHA, J., The brief facts of the case are that the plaintiff is a corporate brokerage house, whose operations were suspended by the defendant No.2 pursuant to a Notice dated 02.9.2008, issued by defendant No.1 in exercise of its powers under Section 7 of the Central Depository Company (Establishment and Regulation), Rules, 1996 read with Section 6(g) of the Securities and Exchange Commission of Pakistan Act, 1997 (hereinafter referred to as the "**Impugned Notice**").

2. Through the Impugned Notice the plaintiff has been prevented from carrying out its business until the findings of an Inquiry by the defendant No.1. The case of the plaintiff is that due to the Impugned Notice it has suffered irreparable loss, hence the plaintiff has filed this suit for Declaration, Permanent Injunction and Damages of Rs.206,000,000/-, against the defendants.

3. Alongwith the suit the plaintiff filed an application under Order XXXIX, Rules 1&2, CPC, for suspension of the Impugned Notice.

4. Learned counsel for the plaintiff has contended that if there has been any wrong doing on the part of Norrie Textile Mills Limited (hereinafter referred to as "**NORT**"), whose shares were traded through the plaintiff's brokerage house, the plaintiff has no liability and that the liability, if any, rests with NORT and as such it has been penalized for no reason. As such the operation of the Impugned Notice should be stayed. According to the plaintiff, NORT wanted to increase its share capital from approximately 4.8 million to around 5.9 million through a rights issue. According to the plaintiff, NORT applied to defendant No.2 to enter its share capital of Rs.48,600,000/-, which defendant No.2 mistakenly entered as Rs.589,600,000/-. This error enabled millions of NORT's shares which were not in existence to be traded by the public through defendant No.3. The contention of the plaintiff is that if there was any fraud involved, the defendant No.2, acting on the directions of defendant No.1, should have frozen the sub-accounts of Abdul Ghani and Basant Kumar, who were trading in the shares of NORT. Instead, the defendant No.2, acting

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on the instructions of defendant No.1, suspended the plaintiff from its CDC participant status and froze CDC sub-account of Abdul Ghani and Basant Kumar. According to the plaintiff, they should not be blamed because the CDC had failed to verify that NORT's shareholding was not 589,600,000/-.

5. Furthermore, learned counsel has contended that other brokerage houses have been treated differently by the defendants since where such suspected fraudulent activity has been detected the brokerage house as a whole has not been prevented from carrying on business only the suspicious sub-accounts have been frozen. He has alleged that the plaintiff has been discriminated against and that he has been deprived of his right to carry out business. He contends that the plaintiff has nothing to do with the affairs of NORT except that Chief Executive Officer (Noor Qadir) of the plaintiff has a minimum shareholding (500 out of approximately 4.6 million) in NORT in which he is also a Director, however, he played no active role in the affairs of NORT and was more of a sleeping Director.

6. In addition, the plaintiff submits that it was given no right of being heard prior to the suspension by the defendant No.2 of its participation status. The plaintiff was not even issued with a show-cause notice. It had, therefore, not been given the right to defend itself in accordance with the principles of natural justice.

7. In essence, the case of the plaintiff is that the plaintiff is distinct from NORT, which is a separate legal entity and, therefore, no action should be taken against it. The plaintiff, therefore, has a prima facie case, the balance of convenience is in his favour and the plaintiff will suffer irreparable loss to the tune of Rs.300,000/- to Rs.500,000/- per day if the operation of the Impugned Notice is not suspended.

8. Mrs. Masooda Qureshi, has filed an application on behalf of the Intervenor-Muhammad Irfan Nisar and contends that she supports the grant of the stay against the Impugned Notice as the Intervenor is one of the customers of the plaintiff and is being seriously prejudiced by the suspension of the plaintiff's trading rights. She has contended that due to the suspension of the plaintiff, many innocent account holders like the Intervenor have become worst sufferers.

9. On the other hand, learned counsel for the defendants, claim that the plaintiff, in collusion with NORT, have been involved in a massive scam in order to defraud the public by deliberately and knowingly allowing the trading in non-existence shares. According to the defendants there has been no mistake on the part of the defendant No.2 in registering NORT's shares rather the plaintiff has mis-represented NORT's shareholding as 589,600,000/- to the CDC as it was the plaintiff which confirmed to the defendant No.2 that NORT paid up capital was 59,860,000 ordinary shares. He, therefore, contends that the plaintiff was directly involved in the fraud.



10. Learned counsel for the defendants contends that there is a close link between the plaintiff and NORT by pinpointing that the Chief Executive Officer of the plaintiff is Noor Qadir, who despite only being a minority shareholder in NORT with 500 shares was a Director, who played a major role in the running of NORT's affairs.
11. NORT's Accounts dated 31.12.2007 reveal that not only was Noor Qadir a Director but he was also a member of the Audit Committee and the Managing Committee, which are the only significant Committees of NORT. He contends that NORT deliberately mis-declared its shareholding to the knowledge of Noor Qadir, who is Chief Executive Officer of the plaintiff and this is borne out by the Issuer Admission Form dated 29.2.2008, which reveals that NORT had a paid-up capital of Rs.598,600,000/- and that there was no question of mistake being made by the defendant No.2 in registering NORT's shareholding. He further contends that the plaintiff and NORT are interlinked by the fact that the plaintiff has, by an Underwriting Agreement dated 17.12.2007, agreed to underwrite NORT's share issue and that this Agreement is signed by Noor Qadir on behalf of the plaintiff. It is significant that this is the only Underwriting Agreement, which the plaintiff has ever entered into. He has also pointed to a number of important documents on record associated with NORT's affairs in connection with this alleged fraud, which Noor Qadir has signed in his capacity as Director. He further contends that Noor Qadir has admitted his own involvement in this fraud, by virtue of a letter dated 19.9.2008, copy of which is reproduced below:-

"The Chief Executive Officer
Al-Mal Securities & Services Limited
Corporate Member-KSE
7th Floor, PRC Tower
M.T. Khan Road
Karachi.

Subject: Suspension of trading rights of Al-Mal Securities & Services Limited

Dear Sir,

This is with reference to the meeting held on September 05, 2008 at KSE office attended by yourself and officials of KSE and CDC to resolve the issue relating to Al-Mal Securities and Services Limited trading right suspension by the Board of Karachi Stock Exchange. The said suspension was put in place due to the improper induction of about 55 million unpaid shares of Norrie Textile Mills in CDC. Since the major chunk of these shares i.e. about 22 million shares were inducted by your brokerage house [Al Mal Securities & Services Ltd.] in CDC.

In view of the above and as suggested by SECP and CDC, as a first step, you are required to communicate to us the total number of these shares presently held in your account along with an authorization to move the same to the participant Account of KSE. SECP will then issue necessary direction to give effect to this transfer. With regard to

the balance shares already transferred by your House to other accounts, you are required to deposit in Cash the amount equivalent to average price of these shares prevailing during the period from March 2008 to August 2008 i.e. Rs.2.52 per share as soon as possible but not later than Wednesday, September 24, 2008.

Once the above mentioned process is completed from your end and the required shares/cash are received by the Exchange within the above-referred specified time, the Management will have no hesitation to put up the case of suspension of trading rights of Al Mal Securities & Services Ltd. before the Board for its review.

Thanking you.

Yours sincerely

HAROON ASKARI
General Manger-Operations

Copy to: Mr. Adnan Afridi, Managing Director-KSE
Mr. Waqar Ahmad Siddiqui, Joint Director, SMD-SECP
Mr. Aftab Dewan, Chief Operating Officer-CDC"

12. With regard to issuance of the show-cause notice the defendants contend that the plaintiff was provided with a show cause notice on the same day as the suspension and that negotiations have already taken place between the plaintiff and the defendants, as evidenced by the above letter. In this situation the plaintiff has not been deprived of the right of being heard. Learned counsel has placed reliance on the case of COLLECTOR, SAHIWAL v. MOHAMMAD AKHTAR (1971 SCMR 681).

13. The defendants have also argued that it is in the public interest that stay be granted in order to stop the plaintiff in engaging in any further fraud and in order to protect the public.

14. Learned counsel for the defendants have emphasized that the defendant No.1, being regulatory body, had the duty to act early in order to protect the public interest. He has placed reliance on the case of ABDUL WAHID v. SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN (2008 CLD 57) and SECURITIES AND EXCHANGE BOARD OF INDIA v. ALKA SYNTHETICS LTD. (AIR 1999 Gujrat 221).

15. I have heard the learned counsel at length and have carefully reviewed the documents on record.

16. Order XXXIX, Rules 1&2 of Code of Civil Procedure, 1908, provides that the following three ingredients must be met for grant of temporary injunction:-

- (i) Existence of prima facie case;
- (ii) Irreparable damage or injury; and
- (iii) Balance of inconvenience

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17. In essence the plaintiffs need to show that for the stay to be granted all three of the above ingredients have been satisfied.

18. Without going into the merits of the case, which will need to be decided at the time of final disposal of the suit after recording of the evidence, I am of the view that the plaintiff has failed to make out a prima facie case at this stage. There seems to be ample documentary evidence on file to link the plaintiff to NORT and, in particular, the plaintiff's Chief Executive Officer Noor Qadir, who is also a Director and shareholder in NORT, who seems to be playing a prominent role in the management of NORT.

19. In my view it is essential that the public should be protected from any potential fraud and place reliance on the case of ABDUL WAHID (supra), wherein the learned Judge of this Court has observed at page 69 as follows:-

"20. It is one of the duties of the Securities and Exchange Commission to ensure adequate protection to the investors by detecting unfair trade practices. In case any unfair practice is detected it should take all necessary measure to undo the wrong. This is necessary in order to maintain the confidence of ordinary shareholders of a company who are sitting at a distance waiting to reap the fruits of their investments. They not being part of every decision making process of the company repose faith in the management which is expected to make sound commercial decisions for the collective benefit of all the share-holders. Such faith and trust cannot be allowed to be breached with impunity. The detection of scam by the officers of the Commission in the present case is commendable."

20. It is also the obligation of regulatory body, like defendant No.1, to act in advance if need be in order to protect the public interest, as observed in the case of SECURITIES AND EXCHANGE BOARD OF INDIA (supra), wherein it was held at page No.222 as follows:-

"The very nature of the orders passed by SEPI, shows that the orders were of interim nature, no finality is attached to the action taken by SEBI at this stage and hence it cannot be said to be case in which the money stood impounded or forfeited finally. In this view of the matter, the orders cannot be said to be the orders so as to take away any earned benefit for all times to come or an action to the prejudice of any party entertaining any penal consequences for all times to come. In absence of any express provision making it obligatory for the SEBI to hear the parties before taking such measures, it cannot be successfully argued that it must have followed the principles of natural justice before passing the impugned orders."

21. With regard to the right to be heard this right is not absolute in cases where it has not been provided by Statute. Of course under the rules of natural justice no party should be condemned unheard, however, I find in this case that the plaintiff has been fully heard and he has even agreed to certain commitments with the defendants

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and as such this argument is redundant at this stage. I rely on the case of COLLECTOR, SAHIWAL (supra) wherein the Hon'ble Supreme Court has held as under:-

"The Courts in Pakistan have taken the view that where the giving of a notice is provided for by the statute itself, then the failure to give such a notice is fatal and cannot be cured. But where there is no specific statutory provision and reliance is only placed on the principles of natural justice and *audi alteram partem*, there if at some stage or other the person aggrieved has been given a fair opportunity of representing his point of view, then the defect, if any, in the initial order may be deemed to have been cured. Each case will have to be determined on its own facts."

22. Bearing in mind the above, I am not inclined to suspend the operation of the Impugned Notice and grant stay order in favour of the plaintiff. I am, however, fully aware that it is unfair for the plaintiff to suffer considerable loss on a daily basis without having the case proven against it.

23. Learned counsel for the defendants have submitted that there is an ongoing inquiry by the defendants against the plaintiff concerning its involvement in the alleged fraud. I hereby direct that:

(a) the plaintiff provide all the information, which the defendants have so far, requested, within seven days hereof, a copy of which is also filed in the Court and attached to this order;

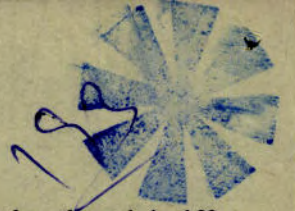
(b) the plaintiff within seven days provide any further information, requested by the defendants, which the defendants deem relevant in order to complete its inquiry into this fraud.

(c) the plaintiff fully cooperate with the defendants in its inquiry; and

(d) that defendant No.1 shall complete its inquiry within four weeks from the date of this order.

24. Notwithstanding that there is no stay in place to ensure that the other innocent customers of the plaintiff, who have inadvertently been caught-up in this matter through no fault of their own, will not suffer undue hardship, the defendants, within seven days hereof, will put in place a mechanism whereby the customers of the plaintiff may move their accounts to other brokerage houses, if they so choose.

25. Put up within four weeks. If by that time defendant No.1 has not completed the inquiry against the plaintiff through no fault of the plaintiff, the question of



whether a stay should be granted or not can again be re-agitated by the plaintiff under this application (CMA No.9249/2008).

Adjourned to a date to be fixed by the office. May be fixed according to Roster.

For hearing of CMA No. 9249/08
(U/s 39 Rule 1 & 2 / epc)