

2014 C L D 853**[Sindh]****Before Nazar Akbar, J****NASIM BEG----Plaintiff****Versus****SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN through Chairman and 2 others----Defendants**

Suit No.139 of 2010, decided on 28th April, 2014.

Companies Ordinance (XLVII of 1984)---

---S. 224(2)---Specific Relief Act (I of 1877), Ss. 42 & 54---Discretion of court as to declaration of status or right---Bar to such declaration---Trading by director, officers and principal shareholders of a company---Show-cause notice under S.224(2) of the Companies Ordinance, 1984---Suit for declaration and permanent injunction challenging issuance of show-cause notice to plaintiff by the Securities and Exchange Commission of Pakistan (SECP), under S.224(2) of the Companies Ordinance, 1984---Maintainability of such suit---Contention of the plaintiff was *inter alia* that he had not realized any tenderable and/or other gain and was not therefore liable to tender any amount under S.224 of the Companies Ordinance, 1984---Held, that declaration sought by plaintiff was not in respect of any legal character of the plaintiff---Very fact that plaintiff had submitted a detailed reply to the show-cause noticed issued by the SECP, was contrary to his claim in the plaint and in the said reply plaintiff had not claimed that the defendants had acted illegally, in a *mala fide* way or that they were not competent to issue impugned notice under S.224 of the Companies Ordinance, 1984---Fact that plaintiff had submitted to the jurisdiction of the SECP unconditionally amounted to accepting jurisdiction of SECP to issue notice under the Companies Ordinance, 1984---Plaintiff should have appeared before the competent authority for personal hearing, which he had avoided--- Plaintiff had not sought declaration as to his own rights and status; and declaratory relief could only be granted in respect of legal character which was not under threat in the present case--- Plaintiff was therefore neither entitled to declaration or permanent injunction--- Suit being incompetent and not maintainable, was dismissed in circumstances.

Karsaz Construction Company v. Pakistan 1999 CLC 1719 and Alvi Sons Ltd. v. Government of East Pakistan PLD 1968 Kar. 222 rel.

Emad-ul-Hassan for Plaintiff.

Naveed-ul-Haq for Defendants Nos.1 and 2.

Date of hearing: 10th December, 2013.

ORDER

NAZAR AKBAR, J.---The plaintiff through this suit for declaration and permanent injunction has challenged the show-cause notice dated 6-1-2010 issued by Securities and Exchange Commission of Pakistan under section 224(2) of the Companies Ordinance, 1984, whereby he was directed to submit documentary proof within ten days for his illegal gain of a sum of Rs.3,669,660 (Rupees three million six hundred sixty-nine thousand and six hundred only). The plaintiff was further directed to appear before the competent authority on Thursday January 21st, 2010 at 11-00 a.m. for personal hearing in the office of the defendant No.1 at Islamabad.

2. The plaintiff first sought time through letter dated 11-1-2010, addressed to the defendant No.2 to submit his explanation. His request was conceded by the respondent No.2 and he was allowed to submit written reply by 29-1-2010. Simultaneously date of personal hearing was re-fixed at Thursday February 4th, 2010 at 11:00 a.m. The plaintiff on 21-1-2010, submitted a comprehensive reply. However, he did not avail the opportunity of personal hearing on 4-2-2010 at 11-30 a.m. and preferred to file present suit for declaration and permanent injunction on 1-2-2010 and obtained injunction orders on 3-2-2010.

3. The defendants have filed a comprehensive written statement on 5-11-2010 as well as counter-affidavit to the application for interim Orders bearing C.M.A. No.943 of 2010. The defendants amongst other, have taken two legal pleas i.e. Suit is barred under sections 42 and 56 of the Specific Relief Act, 1877 and there is no cause of action against the answering defendants, therefore, the plaint be rejected under Order VII, Rule 11, C.P.C.

4. At the time of hearing of C.M.A. No.943 of 2010, the parties were put on notice that they should also address the Court on the question of maintainability of this suit. It is even otherwise the duty of the Court in terms of Order VII, Rule 11, C.P.C. that the question of maintainability is to be decided at the earliest. I have heard the counsel for either side and examined the plaint and its annexures. The plaintiff has sought the following reliefs:

A. For a declaration that the plaintiff has not realized any tenderable and/or other gain by selling 33,300 shares of the defendant No.3 company on 18-4-2008;

B. For a declaration that the plaintiff has not realized any tenderable and/or other gain by purchasing 478,900 shares of the defendant No.3 company between the period from 23-6-2008 to 29-9-2008, which are still held by the plaintiff;

C. For a declaration that the plaintiff is not liable to tender any amount/alleged gain to the defendant No.1 under the provisions of section 224 of the Companies Ordinance, 1984, and under Rule 16 of the Companies (General Provisions and Forms) Rules, 1985, and that the aforesaid provisions are not applicable to the above mentioned sale and purchase of shares by the plaintiff;

D. For a declaration that the impugned show-cause notice dated 6-1-2010 issued to the plaintiff by defendants Nos. 1 and 2 is misconceived, arbitrary, discriminatory,

unjustified, illegal and void ab initio;

E. For permanent injunction restraining the defendants Nos.1 and 2, jointly severally, from demanding or claiming any amount from the plaintiff and/or from taking any coercive action against him in pursuance of the impugned show-cause notice dated 6-10-2010, and/or from acting upon the said show-cause notice in any manner whatsoever;

F. For any other, additional or further relief(s) that this honourable Court may deem fit and proper in the facts and circumstances of this case; and

G. Cost of the suit.

5. The declaration sought by the plaintiff is not in respect of any legal character of the plaintiff. In fact the defendants have not denied/disputed status of the plaintiff which he has narrated in paragraph 1 of the plaint. In prayer clauses A, B and C, plaintiff had sought a negative declaration to the effect that "the plaintiff has not realized any tenderable and/or other gain" and "the plaintiff is not liable to tender any amount/alleged again to the defendant No.1". The prayer clause 'D' is a consequential relief to the three prayer clauses wherein he has sought a negative declaration. The very fact that the plaintiff has submitted a detailed reply to the show-cause notice given to him under section 224(2) of the Companies Ordinance, 1984, is contrary to his claim in the plaint. I have examined the contents of the reply to the notice. The plaintiff has not claimed in the reply to the defendants that the defendants have acted illegally, malafidely or that the defendants otherwise are not competent to issue a notice under section 224(2) of the Companies Ordinance, 1984. The very fact that he has submitted to the jurisdiction of the authority unconditionally amounts to accepting the jurisdiction of Securities and Exchange Commission of Pakistan to issue notice under section 224(2) of the Companies Ordinance, 1984. The prayer clause D is merely an afterthought. In paragraph 11 of the plaint, plaintiff has almost repeated the reply of show-cause notice and the pleas, which he could have raised even at the time of personal hearing before the competent authority on 4-2-2010 at 11-30 a.m. Even otherwise in the plaint, he has nowhere mentioned that the defendants have no right to issue a notice of this nature to the plaintiff or anybody else, who is guilty of selling shares within a period of less than six months to obtain illegal gain. The defendants cannot be permanently restrained from exercising the authority under the Companies Ordinance, 1984 unless it is shown that the authority is not vested in them. The cause of action claimed to have been accrued on issuance of show-cause notice dated 6-1-2010 seized to exist once the show-cause notice has been replied by the plaintiff without any reservation against the authority, and having submitted his explanation for withdrawing the notice. If the plaintiff is not guilty of an offence as stated in reply to the show-cause notice, after the reply, the plaintiff should have appeared for personal hearing to satisfy the authority about his claim. The plaintiff was only required to appear before the competent authority for personal hearing, which he had avoided and obtained injunction orders and seeking negative declaration. The plaintiff has never appeared before the competent authority for personal hearing though through the same show-cause notice he was directed to appear for personal hearing followed by his written reply. He has not sought any declaration to his own rights and status. The declaration to the effect that the plaintiff has not realized any gain in breach of section 224(2) of the Companies Ordinance, 1984 is a declaration neither with regard to any legal character nor any right to or in any property, thus the relief sought by the

plaintiff is outside the purview of section 42 of the Specific Relief Act, 1877. Section 42 reads as follows:--

"42. Discretion of Court as to declaration of status or right. Any person entitled to any legal character, or to any right as to any property, may institute as suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Bar to such declaration. Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation. A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom if in existence, he would be a trustee."

6. The plaintiff has not challenged that the provisions of section 224(2) of the Companies Ordinance, 1984 are not applicable in his case. He has clarified his position in reply. In the suit the plaintiff has claimed only a declaratory relief, which could be granted only in respect of legal character of the plaintiff and the said character is not under threat, therefore, the provisions of section 42 of the Specific Relief Act, 1877 cannot be invoked for any negative declaration. In this regard I am fortified with the case-law reported as Karsaz Construction Company v. Pakistan (1999 CLC 1719). In this case my Lord Mr. Justice Rasheed A. Razvi (as he then was) on the date of recording of evidence in the suit for declaration, while exercising powers of the Court to examine the maintainability of the suit, postponed recording of evidence and after hearing the parties' counsel dismissed the suit by following the law laid down by this Court in Alvi Sons Ltd. v. Government of East Pakistan (PLD 1968 Karachi 222) for simple declaration on the ground that the plaintiff has sought negative declaration and not a declaration in respect of his legal character or his right in respect of any property.

7. In view of above discussion the plaintiff is neither entitled to the declaration nor permanent injunction. The suit is dismissed as incompetent and not maintainable, with no order as to costs.

KMZ/N-15/Sindh Suit dismissed.

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