



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO.III

In the matter of

Appeal No. 23 of 2013

1. Pakistan Mobile Communications Limited
2. Mr. Rashid Naseer Khan, Chief Executive
3. Mr. Ahmed Abou Doma, Director
4. Mr. Javed Saifullah Khan, Director
5. Mr. Iskander Shalaby Naguib Rezk Shalaby, Director
6. Mr. Emad Shawky Farid, Director
7. Mr. Khalid Ellaicy, Director
8. Mr. Anwar Saifullah Khan, Director
9. Mr. Mikhail Gerchuk, Director
10. Mr. Niaz Hussain Brohi, Company Secretary
(of Pakistan Mobile Communications Limited)

....Appellants

Versus

Mr. Nazir Ahmed Shaheen
Executive Director (Corporatization and Compliance Department)
Securities Exchange Commission of Pakistan

....Respondent

Date of Hearing

03/12/14

ORDER

For the Appellants

1. Barrister Faisal Khan, Khan & Muezzin Barristers
2. Mr. Asad Gulzar, Khan & Muezzin Barristers
3. Mr. Fatim Arbab, PMU Mr. Asad Gulzar, Khan & Muezzin Barristers

For the Respondents

1. Mr. Mubashar Saddozai, Director (Corporatization and Compliance Department)
2. Mr. Muhammad Akram, Assistant Director (Corporatization and Compliance Department)



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1. This order is in appeal No.23 of 2013 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 08/04/2013 (the "Impugned Order") passed by the Respondent.
2. The brief facts of the case are that the Commission received complaints against Pakistan Mobile Communications Limited (the "Company") with reference to the news item that published in weekly "Talagang News" alleging that the Company has been engaged in illegal and unauthorized reward schemes and prize draws (hereinafter referred to as "reward schemes") designed to induce the general public, through short messaging system (SMS), to part with their money. The objects for which the Company was incorporated are contained in its Memorandum of Association which do not contain any clause under which the Company was authorized to launch and introduce such reward schemes.
3. Show Cause Notice ("SCN"), dated 4/10/12, was issued under section 496 read with section 476(1)(c) of the Companies Ordinance, 1984 (the "Ordinance") to the Company and its directors for indulging in *ultra vires* business. The Company submitted its reply on 15/10/12 and several hearings on the matter were held on 28/11/12, 06/12/12, 20/12/12, 22/01/13 and 24/01/13. The hearings were attended by Shahibzada Uzair Hashim, Manager Legal, Mr. Fatim Arbab, Associate Legal of the Company, Mr. Zohaib Younus, Specialist Finance of the Company and Mr. Mesum Mehdi, Manager Legal Affairs ("Authorised Representatives") who reiterated the arguments already expressed in their reply to the SCN. Moreover, Mr. Sibtain Fazli, Advocate Supreme Court of Pakistan on behalf of the Company vide his letter dated 14/12/12 informed the Commission that the issue raised in the SCN regarding illegality of the reward/prize schemes of their client was pending adjudication before the Honourable Islamabad High Court and the learned Court had granted interim relief to the parties. On the date of the hearing on 24/01/13, the authorized representative Mr. Mesum Mehdi, Manager Legal Affairs argued that the matter was *sub-judice* and, therefore, the Commission should keep it pending till a decision in the matter is taken by the Honourable Islamabad High Court. The Respondent, however, informed him that the issue of *ultra-vires* activities of the Company has not been under scrutiny in the proceedings pending in the Honourable Islamabad High Court.



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4. The Respondent, dissatisfied with the response, imposed a penalty of Rs.250,000 on the Chief Executive, Rs. 50,000 on the Company Secretary and Rs.10,000 each on the directors of the Company with the total amount aggregating to Rs.370,000 under section 476(1)(c) of the Ordinance. The Chief Executive and other directors were also further advised to cease continuation of any such reward schemes in terms of section 472 of the Ordinance.

5. The Appellants have preferred to file the instant appeal against the Impugned Order. The Appellant's counsel has argued that the prize scheme, known as "SMS Khazana Scheme" ("the Promo"), was fair, transparent and in accordance with the laws of Pakistan. The Promo was purely a marketing activity of the Company's telecommunication business, which was allowed by clause III (33) of the Memorandum of Association. The Company did not earn any revenue from the Promo, in fact this scheme resulted in a net expense to the Company, as evidenced by the audited financial statements of the Appellant for the period ended 31/12/11 and the details of expense and revenue of the Promo submitted by the Company vide its letter dated 05/12/12. The fact that the Promo was purely a marketing activity for the promotion of its telecommunication business is also evidenced by the Value Added Services Agreement dated 12/12/12 executed between the Company and M/s Mobizone FZ-LLC, a value-added services provider, engaged by the Company for the provision of certain technical and support services in relation to the Promo in Pakistan. Furthermore, the Company never maintained that Promo was a separate (ancillary or identical) business of the Company, nor sought to rely on clause III (38) of the Memorandum of Association to justify the said business. The Respondent, therefore, wrongly concluded that such business was not covered by the said principle, whilst conveniently ignoring the argument of the Company that this was a purely marketing activity initiated for the promotion of its existing business of telecommunication, under clause III (33) of its Memorandum of Association

6. The department's representative argued that the objects for which the Company was registered are contained in the memorandum of association of the Company. The Memorandum of the Company do not contain any clause under which the Company was authorized to launch the reward schemes. It has been established, therefore, that the Company has indulged in *ultra vires* business and transactions in violation of the mandatory provisions of section 496 of the Ordinance as the said business of the Promo seems to be a parallel business carried out by the Company without any authorization. The contention of the Company that it could launch the



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above said “reward schemes” in light of the object clause III (33) of the Memorandum of Association of the Company do not seem to be plausible. The core business of the Company, as per its Memorandum of Association, is “Telecommunication” and launching of the said “reward scheme”, cannot be treated as ancillary or identical business of the Company. Any company may carry on any other ancillary or identical business other than business set out in its memorandum to enhance the value of or render profitable any of the company’s property or rights subject to applicable approvals. In the instant case the Company has started “reward scheme” and has also started earning money which was not supported by its Memorandum of Association.

7. We have heard the arguments. Sections 496 and 476 of the Ordinance are reproduced for ease of reference:

Section 496 of the Ordinance:

496. Penalty for carrying on ultra vires business. - If any business or part of business carried on or any transaction made, by a company is ultra vires of the company, every person who acted as a director or officer of the company and is responsible for carrying on such business shall be liable to a fine not exceeding five thousand rupees and shall also be personally liable for the liabilities and obligations arising out of such business or transaction.

Section 476 of the Ordinance:

476. Punishment and adjudication of fine or penalty. - (1) Where a fine (other than a fine in addition to, or in lieu of, imprisonment) is provided for any offence, contravention of, or default in complying with, any of the provisions of this Ordinance or a directive of the Commission or the registrar or other authority empowered to issue a directive under any provisions of this Ordinance, it shall be adjudged and imposed. -

(c) where the maximum fine provided is one hundred thousand rupees or more and whether or not there is fine for continuing default, by the Commission or an officers to whom the Commission has delegated its powers and functions in this behalf.

Emphasis Added

The above provisions of the law are explicit and clear. The Appellant’s counsel has argued that the Promo was purely a marketing activity authorised by clause III (33) of the Memorandum of Association which states that *“To adopt such means of making known the business and products of Company as seem expedient and in particular by advertisement in press, by circulars, by purchase and exhibition of works of art or interest by publication of books and by periodicals and by granting prizes, rewards and donation.”*



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The Appellant's counsel has further argued that it was a marketing activity in accordance with Clause III (33) of the Memorandum of Association of the Company and is evidenced by the fact that the Company has not made any gains and instead this resulted in net loss of rupees thirteen million Scheme to the Company. The Respondent has argued that Company has been indulged in *ultra vires* business and transactions in violation of the mandatory provisions of section 496 of the Ordinance as the said business of the Promo was not included in the Memorandum of Association.

Pakistan Telecommunication Authority (PTA) vide their letter dated 06/07/12 with reference number CPD-1(215)/12-PTA has directed all telecom sector companies to stop all types of prize schemes. We place our reliance on the Islamabad High Court Judgment of Warid Telecom & others vs. Pakistan Telecommunication Authority, Islamabad cited at 2013 CLD 1085, wherein, it was held that. *"the consumers cannot be left upon the mercy of the companies, who have launched these schemes without any accountability...it inheres the duty of the court to help them, relieving their miseries..., throughout the dispute, general public has not been paid any attention despite a decision arrived at between the companies and PTA authorities...under these circumstances, no way remains except to dismiss the petition as well as FAQs as the relief claimed is against the rights of general public."*

In view of the Islamabad High Court Judgment mentioned above it has been established that all prize schemes are illegal and unauthorized. The Impugned Order is upheld with no order as to costs.



Zafar Abdullah
Commissioner (SMD)

Announced on: 01/01/15



Tahir Mahmood
Commissioner (CLD)