

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Syed Mansoor Ali Shah
Mrs. Justice Ayesha A. Malik

CIVIL PETITION NO.3263 OF 2022

[Against judgment dated 06.06.2022 passed by the Islamabad High Court
Islamabad in W.P. No.2607/2012]

Saif Power Limited

...Petitioner(s)

Versus

Federation of Pakistan through Secretary, ...Respondent(s)
Ministry of Law, Civil Secretariat Islamabad
and others

For the Petitioner(s) : Mr. Salman Aslam Butt, Sr.ASC
Mr. Muhammad Shoaib Rashid, ASC

For the Respondent(s) : Mr. Sultan Mazhar Sher Khan, ASC
Mr. Ibrar Saeed and
Syed Asif Ali
Public Prosecutors (SECP)

Date of Hearing : 02.11.2022

JUDGMENT

AYESHA A. MALIK, J.- This Civil Petition under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973, has arisen out of judgment dated 06.06.2022, passed by the Islamabad High Court, Islamabad (**High Court**) whereby writ petition filed by the Petitioner, was dismissed.

2. The Petitioner, Saif Power Limited, is a public limited company aggrieved by notice dated 26.07.2012 and an order of same date, both issued by the Security and Exchange Commission of Pakistan (**SECP**), wherein the Petitioner was informed that the SECP sought to inspect its books of account and books and papers in terms of Section 231 of the Companies

Ordinance, 1984 (**Ordinance**) and further that the inspection was to be carried out to scrutinize the record and books of account of the company with reference to the causes of concern stipulated within the order.

3. Counsel for the Petitioner argued that SECP with reference to its power of inspection under Section 231 of the Ordinance cannot indulge in an investigation as contemplated under Sections 263 and 265 of the Ordinance as there is a difference between the power of inspection and the power of investigation. The counsel submitted that similar notices and orders were issued to eight other Independent Power Producers (**IPPs**) who challenged those notices and orders before the Lahore High Court in W.P. No.20088 of 2012 titled Atlas Power Limited v. Federation of Pakistan, etc. (**Atlas Power case**) and the said notices and orders were set aside by judgment dated 18.01.2016. This judgment was never challenged by the SECP whereas a petition was filed by the Petitioner before the High Court which was dismissed vide the impugned judgment on the ground that the Petitioner had not appointed a statutory auditor, hence, there was no way of ascertaining the accuracy of the alleged violations and illegalities against the company. Therefore, the inspection notice and order as contemplated were upheld.

4. The SECP responded by arguing that it acted as per the mandate of its power under the Ordinance as an inspection under Section 231 of the Ordinance is the first step before invoking powers under Sections 263 and 265 of the Ordinance as this is the fact-finding stage. That is to say that it is on the basis

of the fact-finding report under the power of inspection that SECP can determine whether it needs to investigate and probe into any specific matter. When asked about the eight other IPPs and the fact of similar notices and orders, counsel did not deny the fact that other IPPs were sent similar notices and orders and that the same had been set aside by the High Court which decision was never challenged by the SECP.

5. The issue before the Court is with reference to the scope and nature of the power of inspection under Section 231 and the power of investigation under Sections 263 and 265 of the Ordinance. Provisions of Sections 231, 263 and 265 of the Ordinance are reproduced below for ready reference:

"231. Inspection of books of account by registrar, etc.

(1) The books of account and books and papers of every company shall be open to inspection by the registrar or by any officer authorised by the Commission in this behalf if, for reasons to be recorded in writing, the registrar or the authority considers it necessary so to do.

(2) It shall be the duty of every director, officer or other employee of the company to produce to the person making inspection under sub-section (1) all such books of account and books and papers of the company in his custody or under his control, and to furnish him with any such statement, information or explanation relating to the affairs of the company, as the said person may require of him within such time and at such place as he may specify.

(3) It shall also be the duty of every director, officer or other employee of the company to give to the person making inspection under this section all assistance in connection with the inspection which the company may be reasonably expected to give.

(4) The person making the inspection under this section may, during the course of inspection,—

(i) make or cause to be made copies of books of account and other books and papers, or

(ii) place or cause to be placed by marks of identification thereon in token of the inspection having been made.

(5) *Where an inspection of the books of account and books and papers of the company has been made under this section by an officer authorised by the Commission, such officer shall make a report to the Authority.*

(6) *Any officer authorised to make an inspection under this section shall have all the powers that the registrar has under this Ordinance in relation to the making of inquiries.*

263. Investigation of affairs of company on application by members or report by registrar.

The Commission may appoint one or more competent persons as inspectors to investigate the affairs of any company and to report thereon in such manner as the Commission may direct -

(a) *in the case of a company having a share capital, on the application of members holding not less than one-tenth of the total voting power therein;*

(b) *in the case of a company not having a share capital, on the application of not less than one-tenth in number of the persons entered on the company's register of members;*

(c) *in the case of any company, on receipt of a report under sub-section (5) of section 231 or on a report by the registrar under sub-section (6) of section 261.*

265. Investigation of company's affairs in other cases. *Without prejudice to its power under section 263, the Commission-*

(a) *shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Commission may direct, if-*

(i) *the company, by a resolution in general meeting, or*

(ii) *the Court, by order,*

declares that the affairs of the company ought to be investigated by an inspector appointed by the Commission; and

(b) *may appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Commission may direct if in the opinion of the Commission there are circumstances suggesting-*

(i) *that the business of the company is being or has been conducted with intent to defraud its creditors, members or any other persons or for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members or that the company was formed for any fraudulent or unlawful purpose; or*

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance, breach of trust or other misconduct towards the company or towards any of its members or have been carrying on unauthorized business; or

(iii) that the affairs of the company have been so conducted or managed as to deprive the members thereof of a reasonable return; or

(iv) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect; or

(v) that any shares of the company have been allotted for inadequate consideration; or

(vi) that the affairs of the company are not being managed in accordance with sound business principles or prudent commercial practices; or

(vii) that the financial position of the company is such as to endanger its solvency;

Provided that, before making an order under clause (b), the Commission shall give the company an opportunity to show cause against the action proposed to be taken."

Section 231 of the Ordinance empowers the SECP, as a regulator, to inspect the books of account and related books and papers of a company. So, inspection is limited to books of account and related papers and books, and it does not include other record of the company which is unrelated to the accounts of the company. The exercise of this power is administrative in nature, essentially to ensure compliance with the regulatory requirements pertaining to the books of account. Books of account are the journals and ledgers which contain financial information related to the business and include books such as purchase books, cash books, sales books, debit ledger and credit ledger amongst others. There is also a corresponding obligation on the directors, officers and employees of the company to provide all books of account and papers and to give all assistance in connection with the

inspection. An inspection under Section 231 of the Ordinance is, therefore, restricted in its scope and requires every director, officer or employee of the company to produce the books of account and is not an open ended inspection. Further the officer who conducts the inspection must make a report to the SECP on the inspection. This goes to the scope of inspections which is to ensure regulatory compliances and to ensure that the books of account are duly maintained as required under the law. While, there exists an obligation to record reasons in writing for the exercise of power under Section 231 of the Ordinance, there is no requirement under the Ordinance for the issuance of a show cause notice stating the reasons for the inspection, for which a reply is required before passing an order under Section 231 of the Ordinance. The obligation is to issue notice to inform the company of the reasons of the inspection simpliciter. The difference being that the former contains allegations for which a reply and right of hearing is needed whereas the latter simply contains information of the inspection and the reasons for it.

6. On the other hand, Sections 263 and 265 of the Ordinance deals with the exercise of power of *investigation* by the SECP. The powers under Sections 263 and 265 are wider and also come with more procedural requirements. The SECP is empowered to initiate an investigation on an application by the members or on the basis of a report of the Registrar or it can initiate an investigation if there are circumstances suggesting that the business of the company is being conducted with intent to defraud the creditors, members or any other person, or if the

business is being conducted for a fraudulent or unlawful purpose, or if the members concerned with the formation of the company are guilty of fraud, misfeasance, breach of trust or other misconduct. The spirit of Sections 263 and 265 of the Ordinance is to ensure that the business is managed in accordance with sound business principles or prudential commercial practice and that the financial position of the company is not threatened. When carrying out an investigation, before passing an order, SECP is obligated to give an opportunity to the company to show cause against the investigation proposed to be taken. As per Section 268 of the Ordinance, all officers, employees and agents of the company and all persons dealing with the company are to assist in connection with the investigation. The scope of who is to assist in investigations is wider than that of inspections. The inspector's report under Section 269 of the Ordinance can form the basis of prosecution under Section 270 of the Ordinance and an action under Sections 271 and 272 of the Ordinance. The scope of the investigation is based on the allegations pertaining to the affairs of the company and requires a probe into the allegations to ascertain their veracity.

7. Thus, we find that the provisions relating to inspection and investigation are distinct. An inspection is an administrative power exercised by the SECP to ensure compliance of regulatory requirements. This power is limited to the inspection of books of account of a company after recording of reasons for the inspection in this regard. Whereas, an investigation against a company is a serious matter, as it is capable of entailing

consequences both financial and penal which will impact the goodwill of the company. Consequently, an investigation cannot be ordered except on statutory grounds which include allegations of fraud, illegalities into the affairs of the company, or misuse and misappropriation of funds of the company. It is then the duty of the SECP to consider and weigh multiple factors, such as the nature of the complaint and its source, ensure due process and follow the statutory process in good faith, without any bias, prejudice or ulterior motives. The Ordinance does not prescribe the same process for an inspection simply because its scope is limited as are its consequences.

8. The dispute between the parties arises on account of the impugned order dated 26.07.2021 issued by the SECP. The emphasis is on the reasons provided in this order being *indicators of cause of concern* for the SECP on the basis of which they opted to inspect the books of account of the Petitioner. As per the order, the inspector shall conduct an inspection of *all aspects of the company after scrutiny of all records, books and papers and provide a report on any unusual transaction or occurrence relating to the affairs of the company*. These reasons are beyond the books of account, hence, beyond the scope of an inspection. We find that the order contains specific allegations, for which it seeks to investigate the matter in order to ascertain the merits of the allegations, this is beyond the scope of Section 231 as the SECP is clearly looking to investigate into the allegations contained in its order dated 26.07.2012 and not to inspect books of account. Even the *causes of concern* are based on potential allegations of misuse

of funds and running the business against sound business practices as fictitious costs are being built into different accounts. Effectively, SECP issued a notice and order under Section 231 of the Ordinance, while, in fact, exercising powers under Section 265 of the Ordinance, without meeting the necessary requirements of the said section. In this context, the section mentioned is immaterial for this Court for the purposes of assessing whether it was an inspection or an investigation as it is the substance that matters and the powers that are sought to being exercised that determine which section of the law is being invoked.

9. The High Court allowed the investigation on the understanding that no auditors were appointed under Section 252 of the Ordinance, hence, the SECP could appoint its own auditors/inspectors to look into the violations and illegalities contained in the order. At the same time, the High Court finds that an inspection under Section 231 of the Ordinance is administrative in nature to look into the affairs and accounts of the company; that it is for conducting a preliminary inquiry into the affairs and accounts of the company, and so concluded that the Petitioner's challenge that it is an investigation under the garb of an inspection is not made out and the petition was dismissed. We find that the High Court has misconstrued the requirements of an inspection under Section 231 of the Ordinance and that of an investigation, and has blurred the difference between the two. This is evident from the fact that the requirements of Section 231 of the Ordinance have been connected with Section 268 of the Ordinance which is incorrect as only directors, officers, and

employees are obligated to assist in an inspection whereas Section 268 of the Ordinance obligates every person, officer, staff and people who have dealings in connection with the affairs of the company to assist in the investigation. An inspection is not into the affairs of the company and only limited to books of account and related books and papers. As already stated, inspection is administrative in nature where regulatory compliance is the objective and not a probe into allegations against how the affairs of the company are being managed. Under the circumstances, the impugned judgment has not appreciated the scope of inspections under the Ordinance and its difference from an investigation. Furthermore, the justification with reference to the lack of a report of statutory auditors is totally misplaced.

10. In view of the aforesaid, the impugned judgment dated 06.06.2022 passed by the High court is set aside. Further ordered that the writ petition filed by the Petitioner is allowed and the impugned order of the SECP dated 26.07.2012 and actions taken thereunder are declared illegal being in excess of the authority under Section 231 of the Ordinance. Consequently, Civil Petition is converted into appeal and allowed.

JUDGE

JUDGE

Islamabad
02.11.2022
'APPROVED FOR REPORTING'
*Azmat/Alizeh**