Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 02 OF 2021

Crescent Star Insurance Limited

Vs

Securities and Exchange Commission of Pakistan, etc.

PETITIONER BY:	Mr. Adam Hassan Malik, Advocate.
RESPONDENTS BY:	Mr. Ibrar Saeed and Mr. Husnain Arshad Khokhar, Special Public Prosecutors, SECP
DATE OF HEARING**:**	27.04.2021.

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BABAR SATTAR, J.- The petitioner is aggrieved by the hearing notice issued by the Insurance Division of Securities and Exchange Commission of Pakistan **("SECP")** dated 22.12.2020, whereby the SECP purportedly summoned the petitioner in compliance with the order of this Court dated 24.09.2020 passed in W.P No. 2439 of 2020.

2. Learned counsel for the petitioner submitted that the impugned notice was in relation to solvency requirement under the Insurance Ordinance, 2000 **("Ordinance")** in relation to which show cause notice was issued by respondent No.2, dated 05.11.2019. That the petitioner filed a reply dated 13.07.2020 in response to the show cause notice and hearing of the said matter had been concluded and the matter was reserved for announcement of orders. Learned counsel for the petitioner further submitted that

the impugned notice was issued notwithstanding the fact that adjudication proceedings had already been completed and an order had been reserved therein and consequently it was a case of double jeopardy. That a prerequisite for issuance of a hearing notice under section 63(2)(d) of the Ordinance was that a directive should be in the field and upon failure of an insurer to comply with the same, a direction can be passed for which hearing is conducted pursuant to the proviso of section 63(2)(d) of the Ordinance.

3. Learned counsel for the petitioner made the following main submissions:

(i) The impugned notice has been issued in breach of requirements prescribed under section 63 of the Ordinance and consequently suffers from a jurisdictional defect against writ petition is maintainable.

(ii) The impugned notice has been issued in exercise of Commission's powers under section 63(2) of the Ordinance as para.8 of the impugned notice states that it has been issued, "*without prejudice to powers of the Commission under section 63(1) of the Insurance Ordinance, 2000*", and that consequently the Commission was obliged to comply with the mandatory requirements prescribed under section 63(2)(d) of the Ordinance.

(iii) Pursuant to section 63(2)(d) a direction to cease entering into new contracts of insurance can only be issued if there exists a prior directive issued to an insurer who fails to comply with such directive. That in the instant case as no prior directive concerning a contravention of the Ordinance had been issued to the petitioner, the impugned notice for purposes of section 63(2) of the Ordinance could not be issued either.

(iv) The impugned notice is in breach of interpretation accorded to section 63 of the Ordinance by the learned Sindh High Court in ***Crescent Star Insurance Company Limited Vs. Securities and Exchange Commission of Pakistan*** ***(2011 CLD 173)*** and this Court in **Crescent Star Insurance Limited Vs. Securities and Exchange Commission of Pakistan and another** ***(2020 CLD 1250)***.

(v) The impugned notice amounts to subjecting the petitioner to double jeopardy as the question of compliance with solvency requirement by the petitioner has already been adjudicated by the appellate bench of the Commission by order dated 18.12.2019 wherein the issue was decided in favour of the petitioner. And the Commission issued a show-cause notice dated 05.11.2019 related to the same subject-matter, in which a penalty was imposed on the petitioner through order dated 01.03.2021. However, during the pendency of said show cause proceedings the impugned notice was also issued, which amounts to vexing the petitioner twice for the same alleged contravention.

(vi) The petitioner furnished arguments to contend that the petitioner was in compliance with the requirements imposed by section 11 of the Ordinance and consequently the allegations against the petitioner in the impugned notice were without merit.

4. In support of these arguments the learned counsel for the petitioner relied on ***Messrs Mubarak Textile Mills Limited Vs. Director (Enforcement)*** ***(2014 CLD 263)***, ***Messrs Pakistan Oilfields Limited Vs. Federation of Pakistan through Ministry of Finance*** ***(2020 PTD 110)***, ***Chairman, Federal Land Commission Vs. Mst. Sanam Iqbal and others*** ***(PLD 2021 Lahore 42)***, ***Dr. Sher Afghan Khan Niazi Vs. Ali S. Habib and others*** ***(2011 SCMR 1813)***, ***Crescent Star Insurance Company Limited Vs. Securities and Exchange Commission of Pakistan*** ***(2011 CLD 173)***, **Crescent Star Insurance Limited Vs.**

Securities and Exchange Commission of Pakistan and another ***(2020 CLD 1250),*** ***Golden Graphics (Pvt.) Ltd. Vs. Director of Vigilance, Central Excise, Customs and Sales Tax and others (1993 SCMR 1635)*** and ***Rehmat Khan Vs. D.G. intelligence and Investigation (PLD 2000 Karachi 181).***

5. Learned counsel for the Commission raised an objection to the maintainability of the instant petition by arguing that the impugned notice was not an adverse order against the petitioner and had been issued in compliance with the judgment of this Court cited as **Crescent Star Insurance Limited Vs. Securities and Exchange Commission of Pakistan and another** ***(2020 CLD 1250)***. That if the petitioner had any objection in relation to the impugned notice it could be raised before the authority that issued the impugned notice. He further contended that as the impugned notice had been issued in compliance with the direction of this Court in the matter in which both the petitioner and the Commission were parties, the petitioner could not claim to be aggrieved by a hearing opportunity afforded to the petitioner on the direction of this Court. He then contended that the interpretation accorded to section 63 by the learned Sindh High Court in the judgment reported as ***Crescent Star Insurance Company Limited Vs. Securities and Exchange Commission of Pakistan*** ***(2011 CLD 173)*** was not good law as sub-sections (1) and (2) of section 63 are independent provisions which are not to be read together. That section 63(1) was an independent provision that conferred on the Commission the emergency power to prohibit an insurer from entering into new contracts of insurance in order to protect the interest of policy makers in the event that such insurer was in breach of requirements prescribed under section 11 of the Ordinance. And as the

Commission had issued the impugned notice under section 63(1) of the Ordinance, the requirements of section 63(2)(d) could not be read into section 63(1). The impugned notice thus suffered from no infirmity. The learned counsel for the Commission also submitted that the petitioner was liable for various infractions and the Commission had initiated appropriate proceedings in relation to each such infraction. That the previous proceedings referred to by the petitioner to argue that the impugned notice amounted to subjecting the petitioner to a double jeopardy was without merit. He also rebutted the arguments of the learned counsel for the petitioner in terms of merits of the allegations made in the impugned notice to support his arguments. He relied on ***Saeed Ahmed and others Vs. Chairman, O.G.D.C.L*** ***(2020 PLC 27)***, ***Khalid Mahmood Ch. and others Vs. Government of Punjab through Sectary Livestock and Dairy Development*** ***(2002 SCMR 805)***, ***Sardar Muhammad and another Vs. Akram and another*** ***(2002 SCMR 807)***, ***Depilex Smileagain Foundation Vs. Securities and Exchange Commission of Pakistan*** ***(2019 CLD 861)***, ***Attock Refinery Ltd. Vs. Executive Director, Enforcement and Monitory Division, S.E.C.P*** ***(2010 CLD 774)***, ***Diamond Industries Limited Vs. Appellate Bench of the Securities and Exchange Commission of Pakistan*** ***(2002 CLD 1714)*** *and* ***Mian Miraj Din and others Vs. Brother Steel Mills and others*** ***(1996 CLC 516)***.

6. The crux of the dispute before this Court relates to the interpretation of section 63 of the Ordinance read together with sections 11, 60 and 62 of the Ordinance. As the only determination

to be made by this Court is whether or not the impugned notice suffers from a jurisdictional defect, which is liable to be adjudicated in exercise of this Court's constitutional jurisdiction, the arguments made by the learned counsel for both the parties in relation to the merits of the allegations in the impugned notice will not be addressed or considered to ensure that this Court does not pass any observations in relation thereto which might prejudice the interest of either party in proceedings before the Commission.

7. The interpretation of section 63 of the Ordinance was undertaken by the learned Sindh High Court in ***Crescent Star Insurance Company Limited Vs. Securities and Exchange Commission of Pakistan (2011 CLD 173)***, wherein the following was held.

> *"Though, under subsection (1) of section 63, the Commission may issue a direction to cease entering into new contract of insurance if it believes on reasonable ground that an insurer registered under this Ordinance has failed, or is about to fail, to comply with the condition of registration set out in section 11 but simultaneously, subsection (2) of section 63 provides the conditions in which the commission may issue directions. Clause (d) of subsection (2) clearly stipulates reasons for issuing directives, if the insurer has failed to comply with directive issued under the Ordinance concerning a contravention of the Ordinance or, the rules made there under, within the time specified in the Ordinance or, if not so specified, within the time specified the directives or three months whichever is longer and directive had stated that failure comply would lead to a direction to cease entering new contracts of insurance. The proviso attached to this clause clearly provides that the direction shall not be issued under clause (d) without giving the insurer an opportunity to be heard. So in my view subsection (1) of section 63 cannot read in isolation but it has to be read along with subsection (2), particularly clause (d) in which the legislature has provided a*

procedure and f mechanism to deal with the situation when the commission deems it fit and proper to issue directives and non compliance of the directives may result further repercussions which may include the direction to cease entering into new contracts of insurance but this can only be done after giving insurer an opportunity to be heard."

It was further held that:

"…[S]ubsection (1) of section 63 of the Insurance Ordinance, 2000 cannot be read or applied in isolation but it will be read in conjunction with subsection (2), which provides that a Commission may issue directions to cease entering into new contracts on happening of some events or pre-conditions, ,which are mentioned in sub-clause (a) to clause (d) in subsection (2) and the proviso attached to clause (d) makes it mandatory that directions shall not he issued under clause (d) .without giving the insurer an opportunity to be heard."

8. This Court in **Crescent Star Insurance Limited Vs. Securities and Exchange Commission of Pakistan and another *(2020 CLD 1250)*** relied on the judgment of the learned Sindh High Court and held the following:

"In view of above judgment and also the plain reading of sections 63(1) and 63(2) ibid, though on the fact of it, shows that both are independent of each other yet in a way they are not inasmuch as under section 63(1), direction is to be issued where there are reasonable grounds where insurance company is violating or about to violate conditions set out in section 11 of the Ordinance, whereas under section 63(2)(d) of the Ordinance, where there is violation of the provisions of the Ordinance or Rules made there-under issuance of direction is mandatory but opportunity of hearing is to be granted. Naturally, section 11, referred to in subsection (1), is part of the Ordinance hence reconciling the two provisions, it would be seen that where even there seems to be violation of terms of conditions of license as provided in section 11, an opportunity

> *of hearing be granted under section 63(2)(d) of the Ordinance."*

9. Let us now consider the relevant provisions of the Ordinance. Section 11 lists the conditions that a registered insurer is obliged to comply with. Section 59 of the Ordinance vests in the Commission the power to order investigation and pursuant to its power under section 59(3), the Commission may require the insurer to take action in relation to any matter arising out of the investigation. The terms used here is "require" and not "direct", which is a defined term. Section 2(xviii) defines the term "direct" as follows:

> *"direct" in relation to the business of insurance, means insurance other than reinsurance.*

As is apparent this is not happily worded definition but includes any direction in relation to the business of insurance, while excluding from its scope "reinsurance".

10. Section 60 vests in the Commission the power to give directions to the insurer. For our present purposes such power is subject to two conditions. Section 60(1) states that the Commission may issue such directions under this subsection that is not otherwise provided in this Ordinance. As the direction to cease entering into new contracts of insurance is explicitly provided in section 63(1), such direction cannot be issued under section 60(1). The power under section 60(1) is not to be exercised unless rules consonant with the provisions of section 22(3) and 22(4) of the SECP Act have been made. For our present purposes section 60 is

therefore not relevant. Section 61 then grants the Commission the power to call for information and access.

11. It is section 62 which is relevant for purposes of interpretation of sub-sections (1) and (2) of section 63 and consequently the said provisions are reproduced below:

> ***62. Power of Commission to require plan.- (1)*** *The Commission may direct an insurer to prepare, present to its directors and to the Commission, and to report to its directors and to the Commission on the implementation of, a plan for action to rectify or to prevent an actual or apprehended contravention by the insurer of the conditions of registration set out in section 11.*
>
> ***(2)*** *The Commission may in making a direction under sub-section (1) direct that such a plan or report on the implementation thereof contain such information and be accompanied by such opinions or certificates as the Commission shall specify.*
>
> ***63. Power of Commission to issue direction to cease entering into new contracts of insurance.- (1)*** *The Commission may issue a direction to cease entering into new contracts of insurance if it believes on reasonable grounds that an insurer registered under this Ordinance has failed, or is about to fail, to comply with the conditions of registration set out in section 11.*
>
> ***(2)*** *The Commission shall issue a direction to cease entering into new contracts of insurance if:*
>
> > *(a) a petition is presented for the winding up of the insurer and has not been withdrawn or vacated within a period of sixty days;*
> >
> > *(b) the whole of the business of an insurer has been transferred to any person;*

(c) the Tribunal has made an order that a direction be given to that insurer to cease entering into new contracts of insurance; or

(d) the insurer has failed to comply with a directive issued under this Ordinance concerning a contravention of the Ordinance or the rules made thereunder, within the time specified in the Ordinance or, if not so specified, within the time specified in the directive or three months, whichever is longer, and the directive had stated that the failure to comply would lead to a direction to cease entering into new contracts of insurance:

Provided that a direction shall not be issued under clause (d) without giving the insurer an opportunity to be heard.

12. From perusal of section 62 it is apparent that it bestows on the Commission the authority to direct an insurer to prepare *"a plan for action to rectify or to prevent an actual or apprehended contravention by the insurer of the conditions of registration set out in section 11."* Thus section 62 vests in the Commissions the power to issue a direction to create a plan. And section 62(2) further authorizes the Commission to issue a direction to the insurer to present a report to the Commission regarding the implementation of such plan.

13. Now let us consider the structure of section 63(1). Section 63(1) creates the power vested in the Commission to issue a direction to an insurer to cease entering into new contracts of insurance after it has failed or is about to fail to comply with conditions as set out in section 11. These are the same considerations in relation to which section 62(1) authorizes the Commission to require an insurer to put in place a plan of action to

rectify or to prevent an actual or apprehended contravention of the conditions of registration set out in section 11. Section 62(3) then prescribes the preconditions and the manner in which the power created in favour of the Commission under section 63(1) is to be exercised. A perusal of preconditions mentioned in clause (a) to (d) of section 63(2) reflects that it is only under dire circumstances the exercise of Commission's powers under section 63(1) is envisaged. For example, section 63(2)(a) mentions the winding up of the insurer and section 63(2)(b) refers to a situation where the entire business of the insurer has been transferred to another person. In other words, the penalty of directing an insurer to quit entering into new contracts of insurance is an extreme measure that would naturally have the effect of bringing the continuing business of the insurer to a sudden halt. The statutory intent in the scheme of exercise of authority in view of sections 59 to 63 clearly reflects that the Commission cannot approach the power under section 63(1) in a trigger-happy fashion. The penalty prescribes under section 63(1) is of an extreme nature and in view of the principle of proportionality that must be borne in mind in exercise of penal powers, section 63(1) power is to be exercised as a measure of last resort where no lesser penalty is capable in protecting the interests of policy maker. Sub-sections (1) and (2) of section 63 are therefore independent provisions in a sense that section 63(1) creates the power to be exercised by the Commission and section 63(2) prescribes the preconditions for exercise of such powers and the procedural requirements that must be complied with prior to the exercise of such powers. This is what was held by this Court in **Crescent Star Insurance Limited Vs. Securities and Exchange**

Commission of Pakistan and another ***(2020 CLD 1250)***. The present case if considered under section 63, falls within the domain of section 63(2)(d). This clause requires that (i) there must be prior directive issued under the Ordinance concerning a contravention of the Ordinance, (ii) the insurer should have failed to comply with such directive, (iii) the directive should have spelled out a consequence that the insurer's failure to comply with such directive it would attract the penalty of prohibiting it from entering into new contracts of insurance, and (iv) prior to exercising the power under section 63(1) read together with section 63(2)(d), the insurer would be given an opportunity to be heard.

14. The power to issue a direction is clearly provided under section 62(1) and 62(2) of the Ordinance. The intent of the legislature appears to be that the Commission, where it takes cognizance of a contravention of the conditions prescribed under section 11 or apprehends such contravention, as a first step, would require the insurer to put together a plan to rectify or to prevent an actual or apprehended contravention within a certain period of time and submit an implementation report to that effect. In the event that contravention is such that could jeopardize the interests of policy makers, the direction issued under section 62 would also state that in case that the insurer fails to put together a plan and impellent it within the required period, the consequence would be exercise by the Commission of its powers under section 63 (1) read together with 63(2)(d). Such direction would then constitute a directive referred to in section 62(3)(d) of the Ordinance and upon failure of the insurer to comply with such directive the Commission

would have the authority and discretion under section 63(1) of the Ordinance to take the extreme step of barring the insurer from entering into new contracts of insurance. The use of word 'may' in section 63(1) refers to such discretion. In the event that the Commission elects to exercise such discretionary authority to inflict the extreme penalty of prohibiting the insurer from entering into new contracts of insurance, it is mandatory to comply with preconditions and mechanism prescribed under section 63(2) of the Ordinance which is why section 62(3) uses the word 'shall' which is to be read together with the word 'if' within section 63(2) which states the following:

> *"The Commission shall issue a direction to cease entering into new contracts of insurance if:…"*

15. Thus the power under section 63(1) can be exercised if one of the preconditions mentioned in clauses (a) to (d) of section 63(2) is satisfied. And in case that the case falls within section 63(2)(d), an opportunity of hearing is also to be provided prior to issuance of direction to the insurer to cease entering into new contracts of insurance.

16. In terms of interpreting section 63(1) and section 63(2) it cannot be countenanced that while structuring section 63(2) the legislature would go to great lengths to structure the Commission's discretion (by laying out the preconditions for exercise of the power to issue directions to cease entering into new contracts and also laying out the precondition of affording the insurer in question an opportunity to be heard) it would simultaneously create an independent power under section 63(1) to do exactly the same

thing but without any preconditions or procedural requirements thereby vesting completely unstructured discretion in the Commission to issue a direction to an insurer to cease entering into new insurance contracts as its whim.

17. The exercise of powers under section 63(1) would naturally have the effect of largely suspending the business of the insurer. The exercise of such power would fetter the right of the insurer to conduct a lawful business which is guaranteed under Article 18 of the Constitution. The said right, however, is not unconditional and is subject to qualification as may be prescribed by law. Section 11 of the Ordinance, *inter alia*, prescribes the qualification pursuant to which an insurer is to conduct his business. Article 18 rights can therefore be fettered in the event that an insurer fails to meet the qualifications prescribed by law. However, it is settled law that where the actions of a public authority have the effect of encumbering fundamental rights, such authority must be exercised in a manner that is least restrictive for the fundamental rights in question. This is where the principle of proportionality kicks in. The legislative intent embedded within the provisions of the Insurance Ordinance is not that the Commission should take the extreme step of suspending the Article 18 rights of an insurer at the first infraction. The exercise of power under sections 59 through 62 are in accord with the principle of proportionality wherein the Commission is initially expected to require the insurer to take precautionary measures to ensure compliance with the provisions of the Ordinance prior to exercise of penal powers and inflicting prohibitory provisions on an insurer under section 63 of the

Ordinance. As the Commission is the apex regulator of insurers, it is expected to provide continuing oversight over the business of insurance companies. In the event that the Commission is providing such oversight, the scheme envisaged by the Ordinance is that it would first seek to put in place a plan to ensure compliance with provisions of section 11 failing which the Commission would move towards taking penal action. In this context, section 63(2) in the event of winding up of an insurer or the complete transfer of its business to another person does not envisage the issuance of prior directive or grant of an opportunity to be heard, which conditions are applicable for purposes of section 63(2)(d) of the Ordinance. In other words, when where the insurance business is a going concern, the preconditions and procedure mentioned in section 63(2)(d) must be complied with prior to the exercise of power by the Commission under section 63(1) of the Ordinance.

18. Applying the aforesaid interpretation of statutory provisions of the Ordinance to the instant case, it is patent that the Commission has not issued any directive to the petitioner to prepare any plan to comply with the conditions mentioned in section 11 together with a time line to implement the same, failing which the petitioner would have attracted the penalty under section 63(1) of the Ordinance. In the event that such direction had already been in place and the petitioner had acted in breach thereof, the Commission could then issue a hearing notice for purposes of section 63(2)(d) to the petitioner to show cause as to a direction to cease entering into new contracts should not be issued. As the statutory pre-requisites of section 63(2)(d) have not been complied

with the impugned notice suffers from a jurisdictional defect and is liable to be set aside.

19. On the question of maintainability, this Court after discussing the law in relation to the maintainability of a constitutional challenge to a notice or a show-cause notice as laid out by the superior courts (PLD 1984 Karachi 462, PLD 1996 SC 246, 1999 SCMR 1881, PLD 2003 Karachi 83, 2003 MLD 279, 2009 SCMR 1279, 2015 PTD 2052 and 2020 PTD 808), summarized the principles for exercise of jurisdiction in relation to such notice in ***P.K.P Exploration Limited Vs. Federal Board of Revenue through its Chairman, etc. (Writ Petition No. 886 of 2015)*** as follows:

1. Where the impugned notice is without jurisdiction for being coram non judice or being issued by a person not vested with the authority under law to issue such notice.

2. Where the impugned notice is non-est for purporting to exercise power and jurisdiction for purposes alien to the empowering statute, thereby rendering it palpably or wholly without jurisdiction.

3. Where the impugned notice suffers from malafide for having been issued (i) for a collateral purpose that can be easily inferred from the facts and circumstances of the matter or (ii) in clear breach of procedural preconditions and pre-requisites prescribed by statute that is tantamount to colourable exercise of jurisdiction or abuse of authority.

4. Where the alternative remedy is inadequate and illusory, because it lies before an adjudicatory

forum that is conflicted or otherwise incapable of deciding the matter with an open mind in accordance with law as the authority or discretion vested in it stand fettered.

5. Where the impugned order violates the fundamental rights of the aggrieved person to due process guaranteed by the Constitution.

6. Where the controversy involves the interpretation of a statutory instrument, which makes it a case of first impression, provided that the High Court is not the repository of ultimate appellate, revisional or reference powers within the adjudicatory scheme prescribed by statute for remedying such grievance.

20. In the instant case, there is a clear breach of preconditions and pre-requisites prescribed by section 63 of the Ordinance and consequently the issuance of the impugned notice is tantamount to colourable exercise of jurisdiction by the Commission which is why the petition qualifies the test laid down in ***P.K.P Exploration Limited Vs. Federal Board of Revenue through its Chairman, etc. (Writ Petition No. 886 of 2015).*** Consequently, the objection of the respondent (SECP) to the maintainability of the instant petition is without force.

21. For the reasons stated above, the instant petition is **allowed** and the impugned notice is set-aside. The Commission is at liberty to pass a direction in exercise of its powers under section 62 of the Ordinance read together with section 63(2)(d) and in the event of failure of the petitioner to comply with such direction, the Commission could initiate proceedings to exercise its power to issue

a direction for purposes of section 63(1) of the Ordinance read together with section 63(2)(d).

(BABAR SATTAR)
JUDGE

Announced in the open Court on _____/2021.

JUDGE

Saeed.