



Securities and Exchange Commission of Pakistan

EFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No.07 of 2014

1. Mrs. Shama Bashir Khan,
2. Mr. Shahnawaz Khan,
3. Ms. Hina Khan,
4. Mr. Sheraz Khan
5. Ms. Minal Khan

...Appellants

Versus

Securities and Exchange Commission of Pakistan ...Respondent

Date of Hearing 03/02/15

ORDER

Present:

Appellants:

1. Mr. Syed Hassan Ali Raza, Senior Associate, Orr Dignam & Co
2. Mr. Anjum Tanweer, Senior Associate, Orr Dignam & Co

For the Respondent:

1. Mr. Irfan Afzal, Deputy Registrar (C&CD)



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1. This order is in appeal No. 07 of 2014 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 ("SECP Act") against the order (the "Impugned Order") dated 16/01/14
2. The brief facts of the case are that Mrs. Shama Bashir Khan, Ms. Hina Khan, Mr. Sheraz Khan & Ms. Minal Khan (the "Appellants") are shareholders of Data Steel Pipe Industries (Private) Limited (the "Company"). The Appellants filed an application on 19/03/13 (the "Application") under section 263 of the Companies Ordinance, 1984 (the "Ordinance") with the Commission for an investigation into the affairs of the Company. The Application was made on the basis of alleged mismanagement of the affairs of the Company and alleged illegal transfers of shares of the Company. On the advice of the Commission, the Application was forwarded to the Commission in Islamabad on 12/11/13. The Commission vide its letter dated 10/12/13 advised that it was constrained from proceeding further as the allegations made in the Application pertain to transfer of shares and changes made in the register of members and the Courts are invested with the exclusive jurisdiction to entertain complaints of such nature in accordance with the Ordinance. Furthermore, the Commission is constrained to proceed further in the matter as there are insufficient grounds to warrant investigations into the affairs of the Company.
3. The Appellants replied to the Commission through their Counsel's letter dated 27/12/13, clarifying the legal position i.e. the applicability of section 263 of the Ordinance. The Respondent's replied to the Appellants' Counsel's letter vide its letter dated 06/01/14 reiterating that it could not proceed with an investigation as the main grievance of the Appellants pertained to the illegal transfer of shares. The Respondent's also cited section 264 of the Ordinance stating that sufficient tangible documentary evidence had not been provided as required by law. In response, the Appellant's Counsel vide their letter dated 09/01/14 clarified that the Appellants do not have access to the Company's offices and have no knowledge of its affairs which were the reasons behind the Application for an investigation.



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4. The Commission vide its letter dated 16/01/14 maintained its earlier position and stated that in so far as the matter relates to transfer of shares and the register of members, the courts are vested with "exclusive jurisdiction". While the Commission agreed to proceed against the Company in relation to "other corporate non-compliances", it did not pass an order for appointment of inspectors for an investigation into the affairs of the Company.

5. The Appellants have preferred to file the instant appeal against the Impugned Order. The Appellants' counsel argued that the Company was established by Mr. Muhammad Bashir Khan who is the father and the husband of the Appellants and Mr. Sarfaraz Khan and Mr. Shehzad Khan who are currently managing the Company. After Mr. Bashir Khan's death in 2003, Mr. Sarfaraz Khan and Mr. Shehzad Khan took over the management of the Company to the exclusion of other shareholders. During the time, they proceeded to make several unauthorized and illegal transfer of shares into their own names whereas neither of them held any shares or any office in the Company at the time of Mr. Bashir Khan's death and have illegally diluted the shareholding of the Appellants. The Appellants have been denied any access to the Company or information as to its affairs which they have on several occasions requested. Further, no notice of AGM has been served on the Appellants; therefore, they have not participated in any of the alleged AGMs of the Company held since 2005. The Appellants had also requisitioned an extraordinary general meeting ("EGM") of the Company, however, no information has to date been provided to the Appellants by Mr. Sarfaraz Khan and Mr. Shehzad Khan nor has an EGM been held. Mr. Sarfaraz Khan and Mr. Shehzad Khan have also recently removed Appellant No.2 i.e. Mr. Shahnawaz Khan from his post as Company Secretary and have disbarred him from entering the premises of the Company. Meanwhile, the Company's books indicate significantly increased losses over the years and Mr. Sarfaraz Khan and Mr. Shehzad Khan, in complete disregard of the law and of the rights of the Appellants, have continued to avail financing on the assets of the



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Company. The Appellants thus apprehend that Mr. Sarfaraz Khan and Mr. Shehzad Khan are siphoning off the funds of the Company into their personal accounts. An investigation into the affairs of the Company in these circumstances is, therefore, required.

Further, the Respondent has stated it could not proceed with the investigation as the main grievance of the Appellants pertained to the illegal transfer of shares. The Appellants as mentioned above requisitioned an EGM of the Company which has not taken place and the Clients' requests for information as to the affairs of the Company had not been complied with. The Application for investigation also indicated that the Appellants apprehend siphoning of the funds of the Company by Mr. Sarfaraz Khan and Mr. Shehzad Khan into their personal accounts which has negatively impacted the financial health of the Company. The Respondent also cited section 264 of the Ordinance stating that not enough tangible documentary evidence had been provided as required by the law. In response, the Appellant's Counsel vide their letter dated 09/01/14 clarified that the Appellants do not have access to the Company's offices and have no knowledge of its affairs which are the reasons behind the Application for an investigation, however, documentary evidence obtained from the Company's file at the Companies Registration Office ("CRO") of the Commission at Karachi had been attached to the Application. The Application, therefore, disclosed several non-compliances of the provisions of the Ordinance relating inter alia, to general meetings, service of notice, requisitions and mismanagement of company affairs on the basis of which the investigation is sought. The jurisdiction granted by the Ordinance to the Commission and the Courts in respect of initiating an investigation/inspection of the affairs of a Company is concurrent on the basis of the following provisions:

- (i) Section 263 states that "*the Commission may appoint one or more competent persons as inspectors to investigate the affairs of any company [...] in the case of a company having share capital, on the application of members*



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holding not less than one-tenth of the total voting power therein". As indicated the Appellants even after the illegal dilution of their shareholding, still hold over 44% of the shares which is well above the threshold stipulated by section 263. The provision does not stipulate any further restrictions on an application seeking appointment of an inspector.

(ii) section 265(b) of the Ordinance empowers the Commission to appoint one or more competent persons as inspectors to investigate the affairs of a company if, in the opinion of the Commission, there are circumstances as set out in section 265(b)(i) to (vii). It is submitted that sufficient grounds for an investigation have been made out in the Application as prescribed by section 265(b)(i) to (vii).

(iii) section 281 of the Ordinance enables the Commission to proceed with an enquiry/investigation even where a company is being wound up or where *"any other civil or criminal proceedings have been initiated against the company or its officers under any provision of this Ordinance."*

In light of the above, the Commission has been granted the jurisdiction in terms of the Ordinance to order an investigation of the affairs of the Company and that refusal on its part to initiate the same is contrary to the provisions of the Ordinance.

6. The department representatives argued that the Appellant was advised in reply to the petition under section 263 filed by the Appellant cannot take cognizance of allegations pertaining to the illegal transfer of shares and changes made in the register of members. The Appellant was informed by the Respondent that they were not competent to entertain complaints of such a nature since the Courts are invested with the exclusive jurisdiction in accordance with the Ordinance. Moreover, there was no proper tangible documentary evidence on record with regard to the other allegations



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which would warrant investigation. The matter relating to the other corporate non-compliances was forwarded to the concerned CRO for further action who have informed that the Appellant through his consultant had agreed to file a complaint with reference to the violations of the Ordinance, being conducted by company's management other than the matter of dispute over shareholding. The Company had already filed application under section 170 of the Ordinance. As the matter falls under the jurisdiction of CRO, provisions of section 263 of the Ordinance cannot be invoked on this account. The Appellant has failed to file any such complaint as agreed as to date and the matter, therefore, could not be proceeded further. The main grievance seeking prayer of investigation into the affairs of the Company pertains to illegal transfer of shares and changes made in the register of members and the Respondent is competent to entertain companies of such nature since the Courts are invested with the exclusive jurisdiction in accordance with the Ordinance.

7. We have heard the arguments. Sections 263 and 264 of the Ordinance are reproduced for ease of reference:

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 powers 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.

264. Application by members to be supported by evidence and power to call for security - An application by members of a company under clause (a) or clause (b) of section 263 shall be supported by such evidence as the Commission may require for the purpose of showing that the applicants have good reason for requiring the investigation, and the Commission may, before appointing an inspector, require the applicants to give such security for payment of the costs of the investigation as the Commission may specify.

Emphasis Added



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SECP

The Appellant has argued that the reason for making the application to the Respondent for investigation into the affairs of the Company is that the Company has not complied with several provisions of the Ordinance and it is not based on only illegal transfer of shares. The Respondent on the other hand has argued that the issue of the illegal transfer of shares is the exclusive jurisdiction of the courts. As far as the illegal transfer of shares is concerned, the Appellants are already pursuing the case before the Honourable Sind High Court. Moreover, the issues regarding other non-compliances has been forwarded to the CRO, therefore, 263 of the Ordinance cannot be invoked on this account. The Appellants have not provided any tangible documentary evidence and section 263 of the Ordinance cannot be invoked on the basis of apprehension. We are of the view that the Respondent has not taken into account the facts outlined in the application when deciding the same under section 263 of the Ordinance. The allegations are of a very grave nature made by the shareholders of the Company and the response of the Respondent vide letters dated 10/12/13 and 27/12/13 related to only one aspect i.e. transfer of shares and changes made in the register of members. The rest of the remaining allegations made in the Application were not addressed such as failure of service of notice, general meetings and mismanagement on part of the Company. The Appellants cannot be expected to provide documentary evidence, however, the Appellants as shareholders have a genuine case and it should have been thoroughly investigated. The issue of transfer of shares may be one aspect for which the courts have exclusive jurisdiction; however, it does not bar the Commission from investigation into other grave allegations made by its shareholders. The Respondent cannot at face value accept every assertion made by the Company regarding holding of AGM and must independently investigate to verify the claims made by the Company as well as its shareholders. The filing of application by the Company under section 170 of the Ordinance and the matter pending before CRO does not prevent the Respondent from conducting an investigation into the affairs of the Company in terms of section 263 of the Ordinance.

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In view of the foregoing, we set aside the Impugned Order and the Respondent are directed to investigate the affairs of the Company in terms of section 263 of the Ordinance and report back to the Commission within (30) days of the Impugned Order.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Zafar Abdullah)
Commissioner (SMD)

Announced on: **19 FEB 2015**