



**BEFORE APPELLATE BENCH NO. II**

In the matter of  
**Appeal No. 36 of 2008**

Gharibwal Cement Limited ..... Appellant

Versus

Director (Enforcement)  
Securities and Exchange Commission of Pakistan ..... Respondent

Date of hearing 14/03/12

**ORDER**

**Present:**

**For the Appellant:**

Ashfaq A Khan

**Departmental representative:**

° Aqeel A. Zeeshan -Deputy Director -



## SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

**SECP**

1. This order shall dispose of appeal No. 36 of 2008 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 15/09/08 (the "Impugned Order") passed by the Respondent.
2. The brief facts of the case are that the annual audited accounts (the "accounts") of the Gharibwal Cement Limited (the "Company") for the year ended 30/06/07 revealed in Note 15.7 that an amount of Rs.17.5 million was disclosed as payable to Provident Fund Trust ("Trust") by the Company along with mark-up at the rate of 10% per annum. The Company in response to the query of the Commission regarding the amount payable to provident fund, submitted a loan agreement with the Trust. It was further noted that the Company did not adhere to the loan agreement as it had not repaid the loan along with mark-up till 31/12/03 as the accounts were disclosing an outstanding balance of Rs 15.843 million. The Liquidation damages @ 10% per annum as agreed in the loan agreement had also not been paid by the Company after the year 2003.
3. Show cause notice dated 30/4/08 ("SCN") under section 227 and section 229 read with section 476 of the Ordinance was issued to all the directors of the Company. The company secretary on behalf of the Company responded to the SCN and hearing in the matter was held. The Respondent dissatisfied with the response of the Appellant, passed the Impugned Order and taking a lenient view imposed penalty of Rs 5,000 on the Chief Executive Officer ("CEO") and directed the CEO to arrange special audit of the Trust through statutory auditor of the Company.



**SECURITIES & EXCHANGE COMMISSION OF PAKISTAN**

**SECP**

4. The Appellants preferred the instant appeal against the Impugned Order. The Appellant's representative argued that:

- a) the Respondent failed to give consideration to the fact that the employees of the Company under the banner of union were the trustees of the Trust. The management of the Company had no influence over the Trust who willingly provided loan facility to the Company. The Company was facing liquidity crunch at that time and was not even able to pay salary to its employees;
- b) the terms of the agreement of the Trust with the Company had been revised through a revised agreement dated 10/09/09 under which no liquidated damages are to be charged on the outstanding balance of the provident fund and the rate of interest on the outstanding balance has been revised to 16% instead of 10%;
- c) there is a genuine fear that in case the entire provident fund is paid back to the Trust, it would be misappropriated. Reference was made to the submission made before the Respondent where it was stated that the Trust was managed by the employees working under a banner of a union and the Trust is run in an arbitrary manner. It was further alleged that the Trust is advancing funds to the members in excess of the contribution and even to the non-members of the Company;
- d) the Company is ready to pay the entire outstanding amount to the Trust in 24 equal monthly installments after determination of exact payable amount by the auditors. Reliance was placed on cases under section 227 of the Ordinance where the installment plans have been accepted by the Commission.

*[Handwritten signature]*  
*[Handwritten initials]*



SECP

5. The departmental representative argued that the Company entered into an agreement with the Trust and the Trust advanced a sum of Rs 17.5 million to the Company. The Company by entering into a contract with the Trust contravened section 227(2) of the Ordinance and the penalty was rightly imposed on the Appellant. The Respondent in order to ensure that the Trust is run in accordance with the requirements of section 227(2) of the Ordinance called upon the CEO to conduct a special audit of the Trust through statutory auditor of the Company ,however, the CEO has failed to comply with the directions of the Respondent.

6. We have heard the parties. Section 227 of the Ordinance is reproduced for ease of reference:

**227. Employees' provident funds and securities.-** (1) *All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company within fifteen days from the date of deposit in a special account to be opened by the company for the purpose in a scheduled bank or in the National Saving Schemes, and no portion thereof shall be utilized by the company except for the breach of the contract of service on the part of the employee as provided in the contract and after notice to the employee concerned.*

(2) *Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such funds, whether by the company or by the employees, or received or accruing by way of interest, profit or otherwise from the date of contribution, receipt or accrual, as the case may be, shall either—*

- (a) *be deposited—*
  - (i) *in a National Savings Scheme;*
  - (ii) *in a special account to be opened by the company for the purpose in a scheduled bank; or*



## SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

- (iii) *where the company itself is a scheduled bank, in a special account to be opened by the company for the purpose either in itself or in any other scheduled bank; or*
- (b) *be invested in Government securities; or*
- [*(c) in bonds, redeemable capital, debt securities or instruments issued by Pakistan Water and Power Development Authority and in listed securities subject to the conditions as may be prescribed by the Commission*].
- (3) *Where a trust has been created by a company with respect to any provident fund referred to in sub-section (2), the company shall be bound to collect the contributions of the employees concerned and pay such contributions as well as its own contributions, if any, to the trustees within fifteen days from the date of collection, and thereupon, the obligations laid on the company by that sub-section shall devolve on the trustees and shall be discharged by them instead of the company.*

**229. Penalty for contravention of section 226, 227 or 228.-** *Whoever contravenes or authorises or permits the contravention of any of the provisions of section 226 or section 227 or section 228 shall be punished with a fine which may extend to five thousand rupees and shall also be liable to pay the loss suffered by the depositor of security or the employee on account of such contravention.*

Section 227(3) of the Ordinance deals with the Trust and specifically states that, where a Trust is constituted for managing provident fund, the obligations laid on a company under section 227(2) of the Ordinance shall devolve on the trustees and shall be discharged by them instead of the company. By virtue of this provision, the onus for managing the affairs of the Trust are completely devolved on the trustee, who are bound to deal with the fund in accordance with the requirements of section 227(2) of the Ordinance. The trustee in the instant case entered into an agreement with the Company and advanced a sum of Rs 17.50 million in contravention of the requirements of section 227(2) of the Ordinance, which mandates them




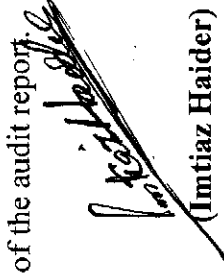
## SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

to use the funds only in the manner prescribed therein. The cognizance for the default of the trustees should have been taken into account by the Respondent. The trustees are, hereby, reprimanded for having failed to comply with the provisions of the Ordinance and are called upon to strictly comply with the requirements of section 227(2) of the Ordinance. The trustees are further directed to facilitate the special audit of the Trust in accordance with the directions made in the Impugned Order.

In so far as the CEO is concerned, the CEO ought to have exercised his powers within the framework of the section 227 of the Ordinance and failure on his part cannot be condoned merely on the ground that the primary responsibility lies with the trustees. Section 229 of the Ordinance provides that whosoever contravenes or authorises or permits the contravention of any of the provisions of section 227 shall be punishable with a fine which may extend to five thousand rupees, as such, the penalty was rightly imposed. Further, the CEO is directed to conduct the special audit of the Trust by the statutory auditors and submit a report to the Appellate Bench and the Respondent within 30 days of this Order.

Finally, we are not in concurrence with the proposal of the Company to pay back the amount in installments as considerable time has already lapsed and the Company is directed to pay back the total outstanding amount within 15 days of the conclusion of the audit report.

  
(Mohammed Asif Arif)  
Commissioner (Insurance)

  
(Imtiaz Haider)  
Commissioner (SMD)

Announced on: 05/04/12