



BEFORE APPELLATE BENCH NO. III

In the matter of

Appeal No. 13 of 2006

1. Monnoo Industries Limited
2. Shahzada A. Monnoo, Chief Executive Officer
3. Kashif J. Monnoo, Director
4. Jahangir A. Monnoo, Director
5. Danish K. Monnoo, Director
6. Shahbaz A. Monnoo, Director
7. Kaiser A. Monnoo, Director
8. Sheraz J. Monnoo, Director

..... APPELLANTS

Versus

Executive Director (CLD)

Securities and Exchange Commission of Pakistan

..... RESPONDENT

ORDER

Date of hearing

13-10-11

Present:

For the Appellant:

Mr. Asif-ur-Rehman, Advocate

For the Respondent Department:

Mr. Mubasher Saeed Saddozai, Director

Mr. Waseem Ahmad Khan, Joint Registrar



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

1. This order shall dispose of appeal No 13 of 2006 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 16-12-05 (the "Impugned Order") passed by the Respondent.
2. On examination of the annual audited accounts of Monnoo Industries Limited (the "Company") for the year ended 30-09-04, Additional Registrar of Companies, Company Registration Office, Lahore (the "Additional Registrar") reported that an amount of Rs. 8.516 million was disclosed as due from associated undertakings (note 20.1 to the annual audited accounts of the Company). On being inquired, the Company acknowledged the default of failure to make the requisite disclosures in the directors' report of the Company, and requested for pardon of the same. The Company also submitted details of names and amount due from the associated undertakings and a copy of the special resolution on form 26 passed on 31-01-05 purporting to ratify the advances made to associated undertakings and showing compliance with provisions of section 208(1) of the Companies Ordinance, 1984 (the "Ordinance"). The Additional Registrar after examining the notice of the meeting filed with the special resolution, reported that the same did not comply with the mandatory provisions of section 160 (1) (b) of the Ordinance. The Company was also communicated the observations of the Additional Registrar, but the Company failed to offer any explanation of the aforesaid contravention, which attracted penal provisions contained in section 160 (8) (b) of the Ordinance.
3. The Additional Registrar also reported that the auditor of the Company has raised certain observations in his report to the members dated 05-01-05 (the "Auditors' Report"), however, the directors' report of the Company did



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

not disclose any information/explanation with regard to the observations and qualifications contained in the Auditors' Report, in contravention of section 236 (2) (c) of the Ordinance.

4. Show cause notice dated 11-10-05 ("SCN") was issued to the Chief Executive Officer (the "CEO") and directors of the Company, calling upon them as to why penal action may not be taken against the Company, as provided under section 208 (3) and section 160 (8) (b) of the Ordinance and proceedings may not be initiated for prosecution of the Company and its directors in the Court of Session under section 236 (4) (b) read with 476 (4) of the Ordinance. The Appellants filed reply to the SCN and hearing in the matter was held. The Respondent, dissatisfied with response of the Appellants, passed the Impugned Order and imposed a penalty of Rs. 10,000 for each default on the CEO and each director of the Company which aggregates to sum of Rs. 30,000 each on the CEO and directors of the Company.
5. The Appellants have preferred the instant appeal against the Impugned Order. The Appellants' counsel appeared and argued that:
 - a) the Company had ratified the default of section 208 of the Ordinance. It was argued that a shareholders' meeting was held to ratify the default of section 208 of the Ordinance and special resolution dated 31-01-05 was passed in order to ratify the advances made to associated undertakings. It was argued that the ratification, through special resolution dated 31-01-05, was passed in compliance with all pre-requisites prescribed in the Ordinance. It was stated that the default in compliance of section 208 of the Ordinance was of no consequence as neither the Company had suffered any loss nor any director of the Company enriched him/her self. Reliance was placed on *Shahbaz-ud-din vs. Service Industries Textiles*



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Limited [PLD 1988 Lahore 1] and *M. Shahid Saigol vs. Kohinoor Textile Mills Limited [PLD 1995 Lahore 264]*. It was argued that approval through ratification of the default reflects that the requisite level of transparency had been maintained by the Company; hence, the Impugned Order is harsh in nature and the penalty for the said violation may be set aside;

- b) the issue regarding non-compliance of section 160 (1) (b) of the Ordinance was a technical deviation and the spirit of section 160(1) (b) of the Ordinance was fully observed as the shareholders of the Company were duly informed about the nature of business to be transacted in the meeting held on 31-01-05 and they were fully cognizant of the issues dealt in the meeting. It was argued that full disclosure to shareholders was, therefore, made and penalty for the said violation may be set aside; and
- c) regarding non-compliance of section 236 of the Ordinance, it was argued that the said non-compliance cannot be treated as willful as all necessary information relating to the investment made by the Company in its associated undertaking was disclosed to the shareholders. The Appellants' counsel requested that a lenient view be taken and the penalty for the said violation may be set aside.

6. The department representatives argued that:

- a) section 208 of the Ordinance requires that a company shall not make any investment in its associated companies or associated undertakings except under the authority of a special resolution. It was pointed out that in the instant case the Company ratified the default of section 208 of the



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Ordinance *after* the objection was raised by the Additional Registrar. It was argued that there is no provision in the law which envisages the ratification of the default of section 208 of the Ordinance by passing a special resolution after the investments have already been made. Reliance was placed on *Gharibwal Cement Limited vs. Executive Director (Enforcement and Monitoring) Securities Exchange Commission of Pakistan [2003 CLD 131]* where it was held that prior consent of shareholders should be sought by the company and the investment made in associated company cannot be validated by virtue of subsequent ratification by shareholders;

- b) in terms of section 160 (1) (b) of the Ordinance, statement detailing the ratification of investment made in the associated company was not annexed with the notice of the meeting held on 31-01-05; and
- c) the directors' report of the Company did not contain any information with regard to the observations and qualifications raised in its Auditors Report which was a contravention of section 236(2) (c) of the Ordinance. The Appellants acknowledged their default of non-disclosure in the directors' report and the penalty was rightly imposed on the Appellants.

7. We have heard the parties. Our finding on the issues argued before us are as follows:

- a) section 208 (1) of the Ordinance, as was in force at the time of issuance of the SCN, is reproduced for ease of reference:



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

208. *Investments in associated companies and undertaking.-*

(1) A company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a special resolution which shall indicate the nature, period and amount of investment and terms and conditions attached thereto:

Provided that the return on investment in the form of loan shall not be less than the borrowing cost of investing company.

Explanation: The expression 'investment' shall include loans, advances, equity, by whatever name called, or any amount, which is not in the nature of normal trade credit.

Emphasis added

Section 208 of the Ordinance requires that a special resolution be passed by the Company *before* making investment in its associated company. The requirement of law is unequivocal and cannot be avoided. The investment made by the Company in its associated company was not approved by the shareholders through special resolution as required by section 208 of the Ordinance. On the issue of whether or not prior approval is required, we place our reliance on 2003 CLD 131 in case titled *Gharibwal Cement Limited and Others vs. Executive Director (Enforcement and Monitoring), Securities and Exchange Commission of Pakistan*, where our predecessors have decided whether or not prior approval is required and have made a comparative analysis of the provision with the Indian Companies Act 1956; the relevant extract is reproduced for ease of reference:



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

"We have considered the arguments and rationale from both sides and closely examined the provision of section 208 under the Ordinance and section 372(4) under the Indian Companies Act. It needs to be appreciated that the principle of plain and ordinary meaning from reading of section 208 of the Ordinance appears none other than seeking prior permission of both the shareholders as well as the Commission. In our view the two provisions are distinguishable. The words "under the authority" as used in section 208 of the Ordinance are much stronger than the word "sanctioned" used in section 374 of the Indian Companies Act. In our view, by no stretch of imagination an act can be termed as "under the authority" when the authority is subsequently acquired. The appellant has also submitted his arguments regarding the interpretation and relevance of the word "prior" and "previous" "approval" which does not appear convincing to us. The expression "approval" has nowhere been used in section 208 of the Ordinance, therefore, applying the principle of plain and ordinary meaning and the principle of redundancy we should not read into a statute words that are not provided for. It is relevant to see the context in which a word is used and only then a word should be interpreted or a meaning can be assigned to it. To us, the plain and ordinary meaning of the words "under the authority" means having consent of the shareholders prior to investment."

The case laws cited by the Appellants' counsel have been reviewed by us. The case titled *M. Shahid Saigol vs. Kohinoor Textile Mills Limited [PLD 1995 Lahore 264]* goes against the stance taken by the Appellants, whereas, the judgment in *Shahbaz-ud-din vs. Service Industries Textiles Limited [PLD 1988 Lahore 1]* held that, applying harmonious reconstruction, where an investment was made in associated companies without a special resolution under section 208 of the Ordinance, the shareholders may either reverse the



transaction or regularize the investment by passing a special resolution. This does not absolve the shareholders from penalty for non-compliance with section 208 of the Ordinance, hence, the case laws relied upon are not attracted in this case. The post facto approval of investment made in associated company through a special resolution is not envisaged by the Ordinance and subsequent ratification of the default does not exonerate the Appellants from non-compliance of section 208 of the Ordinance;

b) Section 160 (1) (b) of the Ordinance is reproduced for ease of reference:

160. Provisions as to meetings and votes. -

(1) The following provisions shall apply to the general meetings of a company or meetings of a class of members of the company, namely:-

(a).....

(b) where any special business, that is to say business other than consideration of the accounts, balance-sheets and the reports of the directors and auditors, the declaration of a dividend, the appointment and fixation of remuneration of auditors, and the election or appointment of directors, is to be transacted at a general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business, including, in particular, the nature and extent of the interest, if any, therein of every director, whether directly or indirectly, and, where any item of business consists of the according of an approval to any document by the meeting, the time



when and the place where the document may be inspected shall be specified in the statement;

(c)

(d).....

Section 160(1) (b) of the Ordinance specifically states that when any special business other than the ordinary business is to be transacted at a general meeting, a statement setting out all material facts concerning such business shall be *annexed* to the notice of the meeting. The argument of the counsel for the Appellants that the deviation from section 160(1) (b) of the Ordinance was a technical deviation is unacceptable; and

c) 236(2) (c) of the Ordinance is reproduced for ease of reference:

236. Directors' report.

(2) In the case of a public company or a private company which is a subsidiary of a public company, the directors report shall, in addition to the matters specified in sub-section (1), -

(c) contain the fullest information and explanation in regard to any reservation, observation, qualification or adverse remarks contained in the auditor's report;

In the instant case the directors' report failed to contain information with regard to the observations and qualifications raised in the Auditors Report which is a clear contravention of section 236(2) (c) of the Ordinance.



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

In view of the foregoing, we do not see any reason to interfere with the Impugned Order. The appeal is dismissed with no order as to cost.

(Mohammed Asif Arif)
Commissioner (Insurance)

(Intiaz Haider)
Commissioner (SMD)

Announced on: 12-01-12