



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

[Islamabad]

Before Abid Hussain, Director (Enforcement)

Order in the matter of

Bawanyair Products Limited

(Under Section 495 read with Section 229 and Section 476 of the Companies Ordinance, 1984)

Number and date of notice :	No.EMD/233/480/2003-1336-37 November 26, 2008
Date of Hearing:	December 19, 2008
Present:	Nil
Date of Order	March 04, 2009

Order

This order will dispose of the proceedings against Chief Executive and Directors of Bawanyair Products Limited (hereinafter referred to as the "Company") initiated vide show cause notice dated November 26, 2008 under the provisions of Section 495 read with Section 229 and Section 476 of the Companies Ordinance, 1984 (hereinafter referred to as the "Ordinance") for not complying with the directions of the Commission under Section 473 of the Ordinance and also for continuous default under Section 227 of the Ordinance.

2. The Company was established as a public limited company on August 16, 1978 and is currently listed on Karachi Stock Exchange. Its authorized and paid-up capital, as per annual audited accounts for the year ended June 30, 2008 (hereinafter referred to as the "annual accounts"), was Rs.150.00 million and Rs.68.205 million respectively. The principal activities of the Company are production and trading of oxygen gas, dissolved acetylene and nitrogen gas. The manufacturing facilities are located at Hub Industrial Estate, Balochistan. The registered office of the company is situated in Lesbella District, Balochistan.

3. Brief facts leading to this case are that Director (Enforcement) of the Company Law Division of Securities & Exchange Commission of Pakistan ("the Commission") has passed an order on November 08, 2007 for non-compliance of mandatory provisions of Section 227 of the Ordinance and

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following directions under Section 473 of the Ordinance were given to Chief Executive of the Company:-

- (a) To arrange for disbursement of the balance amount of the provident fund along with the interest due thereon by December 31, 2007 to the provident fund trust;
- (b) To submit a report to this effect to the Commission by January 15, 2008; and
- (c) A certificate from the statutory auditors may also be submitted in this regard.

4. Review of the annual accounts of the Company for the year ended June 30, 2008 (the "accounts") revealed that the Company on one hand has not followed the directions of the Commission given to the Chief Executive as per aforesaid order and on the other hand have also continuously contravened the mandatory provisions of Section 227 of the Ordinance. This non-compliance of the directions and contravention of the requirement of Section 227 of the Ordinance is observed from the accounts, relevant notes of which are reproduced below:

"(7) An amount of Rs.6,006,683 (Rs.3,727,554; 2007) is payable on account of staff provident fund which is in use of the Company."

"(7.1) This amount represents equal contribution of the Company and the employees and interest @12% (2007: 12%) per annum on the fund utilized by the company."

"(26) a sum of Rs.580, 909 (Rs.331,999; 2007) has been shown as interest /mark-up on provident fund during the year."

The aforesaid disclosure directly reflects the non-compliance of Section 227 of the Ordinance. The objective of the provisions of Section 227 of the Ordinance is to secure the amount of the provident fund of the employees from the Company and this fund is for the use and benefit of the employees only.

5. The aforesaid situation required action under section 495 of the Ordinance. Moreover, in view of continuous default under Section 227 of the Ordinance a show cause notice dated November 26, 2008 under Section 495 read with Section 229 and 476 of the Ordinance was served on the Chief Executive and all the directors of the Company namely:

1. Mr. M.Hanif Y. Bawany, Managing Director /Chief Executive
2. Ms. Momiza Kapadia, Director
3. Mr. Vali Mohammad M. Yahya, Director
4. Mr. Danish Amin, Director
5. Mr. Wazir Ahmed Jozezi, Director
6. Mr. Zakaria A. Ghaffar, Director
7. Mr. Mohammad Ashraf, Director.



6. In response to the show cause notice, Mr. M.Hanif Y. Bawany, Chief Executive of the Company on behalf of all the directors vide his letter dated December 04, 2008 submitted that "the fine imposed has already been paid by us. Copy of letter and paid challans are attached for ready reference."
7. In order to provide an opportunity of personal hearing, the case was fixed on December 19, 2008. However, Mr. Sohail Razzak, Company Secretary on behalf of all the directors vide letter dated December 15, 2008 requested to conduct the hearing at Karachi instead of Islamabad. Further more, Mr. Sohail Razzak, Company Secretary in response to this Commissions letter dated December 16, 2008 submitted that the case can be decided on the explanation already provided vide our letter dated December 04, 2008.
8. It was observed that the response of directors was insufficient and incomplete to conclude the case therefore, this Commission once again vide letter dated December 24, 2008 required the directors to provide the detail comments on the show cause notice with regards to non-compliance of the directive of the Commission given through Order dated November 08, 2007 and continuous default under Section 227 of the Ordinance by not depositing the provident fund amount with the provident fund trust and instead utilizing the same for the purpose of business. Further more, a hearing was also fixed for January 08, 2009 at Islamabad Office, through the aforesaid letter.
9. The directors vide letter dated December 29, 2008 expressed their inability to attend the hearing at Islamabad and stated that we highly appreciate and hope that the Commission will understand the company's financial position and grant us further time for paying off the entire amount of the provident fund along with the interest on monthly basis from March 2009. However, the Commission in response to this submission requested the certified copy of financial plan duly approved by the board of directors of the Company as well as the trustee of the trust, for making payment to the Provident Fund Trust (the "Trust").
10. The Company vide letter dated February 03, 2009 submitted a re-payment plan duly approved by the Board of Directors of the Company as well as the Trustees of the Trust paying off the outstanding provident fund amount of Rs.6,006,683 in installments from March, 2009 to March 2014 i.e. in 5-years time period.



11. Before going ahead, I feel it necessary to advert the following relevant provisions of law, which clearly states as:

Section 227 of the Ordinance regarding the Employees' provident funds and securities states that:

(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 National Savings Scheme;

(ii) in a special account to be opened by the company for the purpose in a scheduled bank; or

(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,

(c) in bonds, redeemable capital, debt securities or instruments issued by the 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 contribution 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."

Section 495 of the Ordinance states as:

"Where any directive is given or order is issued by the Court, the officer, the Commission, the registrar or the Federal Government under any provision of this Ordinance, non-compliance thereof within the period specified in such direction or order shall render every officer of the company or other person responsible for non-compliance thereof punishable, in addition to any other liability, with fine not exceeding fifty thousand rupees and, in the case of a continuing non-compliance, to a further fine not exceeding two thousand rupees for every day after the first during which such non-compliance continues."



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12. I have analyzed the facts of the case, provisions of Section 227 and 495 of the Ordinance, arguments put forward by the respondents of the show cause notice and observed as follows:

i. The Company has failed to follow the Commission's directions under Section 473 of the Ordinance given through Order dated November 08, 2007. The Company is under the control of current management for a long span of time, enough for a company to streamline its financial matters and reporting framework and to update and maintain its books of accounts in accordance with the prevailing laws. There appears to be no serious effort from the management of the Company to make the arrangement for disbursement of the balance amount of the provident fund as appearing in the accounts for the year ended June 30, 2006 along with the interest due thereon by December 31, 2007 to the provident fund trust. The management also failed to submit a report to this effect to the Commission by January 15, 2008 and any certificate from the statutory auditors in this regard.

ii. The Company has continuously violated the provisions of Section 227 of the Ordinance as evident from Note No.7 and 26 to the annual accounts of the Company. From the analysis of the annual accounts it appears that the amount payable to the provident fund trust by the Company has increased to Rs.6,006,683 (2008) from Rs.3,727,554 (2007) on account of staff provident fund which is in use of the Company. This amount represents equal contribution of the Company and the employees. Moreover a sum of Rs.580,909 (Rs.331,999; 2007) has been shown as interest /mark-up on provident fund during the year. The above disclosure and the information available in the annual accounts revealed that the Company is continuously utilizing the fund and accruing the interest thereon, instead of paying it to the trust within 15-days from the date of collection in terms of Section 227 of the Ordinance. The moneys deposited with a company by its employees in pursuance of their contract of service cannot be put in use by the Company in terms of Section 227 of the Ordinance.

13. The aforesaid provisions of law are clear and unambiguous. The objective of these provisions is to keep the management away from utilizing any portion of the fund collected as contributions to a provident fund and to secure the amounts collected from the employees of the company for the benefits of the employees of the Company. The law requires that when a trust has been created by a company with respect to any provident fund, the company has an obligation to pay the contributions including its own contributions to the trustees within fifteen days from the date of collection. The amounts collected from the employees as contributions to a provident fund are in the nature of trust



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moneys in the hand of the company and the same must be paid to the trustees within stipulated time whereas the trustees are responsible to invest the moneys of the fund in accordance with the provisions of law.

14. From the above discussion and submission of the Company I am of the considered view that the Company has not complied with the directions of the Commission and mandatory provisions of Section 227 of the Ordinance have also been breached which attracts the penal provisions of Section 229 and Section 495 of the Ordinance. An action therefore is necessary under the aforesaid provisions of the Ordinance. Considering the admitted default and circumstances of the case, I am inclined to take a lenient view and instead of imposing the maximum penalty, impose a fine of Rs.35,000 (Rupees thirty five thousand only) on all the directors including Chief Executive of Company @Rs.5,000 per person under Section 227 of the Ordinance and Rs.50,000 under Section 495 of the Ordinance on Chief Executive of the Company, Mr. M.Hanif Y. Bawany.

15. The Chief Executive and directors of the Company are hereby directed to deposit the following amounts of fine in the designated bank account maintained in the name of the Commission with Muslim Commercial Bank Limited within thirty days from the receipt of this order and furnish receipted bank vouchers to the Commission. In case of non-deposit of the penalty, proceedings under the Land Revenue Act, 1967 will be initiated for recovery of the fines as an arrear of land revenue. It may also be noted that the said penalty is imposed on the Chief Executive and directors of the Company in their personal capacity; therefore, they are required to pay the said amount from their personal resources.

S. No.	Name of Director	Amount (Rs.)
1	Mr. M.Hanif Y. Bawany, Chief Executive / Director	5,000 + 50,000 = 55,000
2	Ms. Momiza Kapadia, Director	5,000
3	Mr. Vali Mohammad M. Yahiya, Director	5,000
4	Mr. Danish Amin, Director	5,000
5	Mr. Wazir Ahmed Jozeai, Director	5,000
6	Mr. Zakaria A. Ghaffar, Director	5,000
7	Mr. Mohammad Ashraf, Director	5,000
	Total	85,000

Chief



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16. Before departing with the order, I hereby direct Mr.M.Hamid.Y.Bawany , the Chief Executive of the Company to arrange for the payment of the outstanding balance along with the interest accrued thereon (till the date of deposit) verified by the statutory auditors of the Company and to pay the same to the Provident Fund Trust before the close of financial year on June 30, 2010 and to submit the auditors' certificate along with evidence of payment of the said outstanding amount to the provident fund trust to the Commission within 30-days of June 30, 2010. The Chief Executive is further directed to ensure the compliance of Section 227 of the Ordinance, with respect to the monthly contribution of the provident fund due from the date of this order.

Abid Hussain
Director-Enforcement

Announced:
March 04, 2009
Islamabad