



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 33 of 2010

- i. Mr. Jahangir Elahi, Chief Executive
- ii. Mr. Tanvir Elahi,
- iii. Mr. Amir Jahangir
- iv. Mr. Shahrukh Elahi
- v. Mr. Muhammad Ashraf
- vi. Mr. Tariq Latif
- vii. Mr. Mohammad Ashfaq Nadeem
(All Director of Genertech Pakistan Ltd)

.... Appellants

Versus

Director (Enforcement), Securities and Exchange
Commission of Pakistan

.... Respondent

Date of hearing:

28/06/12, 16/07/12, 02/01/15, 15/01/15, 13/05/15

Present:

For Appellants:

Adil Bandial, Cornelius, Lane and Mufti

For Respondent:

- i. Ali Azeem Akram, Director Enforcement
- ii. Shahzad Afzal, Joint Director Enforcement



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ORDER

1. This order shall dispose of appeal no. 33 of 2010, filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 , against the order dated 25-06-10 (the Impugned Order) passed by the Respondent under section 204-A(2) of the Companies Ordinance, 1984 (the Ordinance).
2. The facts leading to the case are that during the examination of annual audited accounts for the year ended 30-06-09 (the Accounts) of Genertech Pakistan Ltd (the Company), revealed that the Company has not appointed an independent share registrar (the Registrar), therefore has prima facie contravened the provisions of section 204-A (2) of the Ordinance. The Respondent issued a Show Cause Notice (the SCN) dated 05-05-10 to the Chief Executive and Directors of the Company.
3. In reply of the SCN the Appellant no.1 (The Chief Executive) submitted that the Company shares are processed through Central Depository System (CDS) and almost ninety percent shares have been transferred on CDS. Further, the shares of the Company are not in active trade on Stock Exchange. He further submitted that the Company is not in operations for last several years and it caused serious financial constraints therefore extra cost for appointment of the Registrar cannot be afforded, however the Company is negotiating with Commissions approved Registrars to become the Registrar of the Company.
4. The Respondent being dissatisfied with the response of the Appellants passed the Impugned Order and imposed a penalty of Rs.15,000 on the Appellants. The Appellants, being aggrieved by the Impugned Order preferred an appeal before the Appellate Bench on the following grounds and prayed to set aside the Impugned Order being unlawful, unwarranted and unjust:

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- a. The Impugned Order has been passed without affording the Appellants any real opportunity of being heard. The Impugned Order has been passed in violation of established principle of law, that no person should be condemned unheard.
 - b. The Impugned Order has been passed without considering the facts and circumstances of the case and bad financial position has been ignored while passing the Impugned Order. Further the Company was ready to comply with the subject provision of the Ordinance, therefore the imposition of fine is completely unwarranted.
 - c. The Respondent has issued a direction in Impugned Order to appoint the Registrar which clearly shows, that the Respondent has failed to appreciate the Company's readiness and willingness to comply with the requirement.
 - d. The Respondent has failed to establish the willful default of the Appellants. In the present case there was no willful default since the Appellants were always ready and willing to comply with the requirements of the Ordinance and merely required some time in order to do so.
 - e. The Impugned Order is beyond jurisdiction, invalid, without lawful authority and void as a consequence. Further, the Appellants reserve the right to agitate additional grounds at any subsequent stage or at the time of hearing of the instant appeal.
5. The Respondent replied to the appeal through para wise comments and rebutted the grounds of appeal and arguments of the Appellants against the Impugned Order. The Respondent reiterated the arguments stated in the Impugned Order and prayed to dismiss the appeal. The Respondent rebutted the grounds of appeal in the following manner:
- a. - The directors of the Company were afforded the opportunity of hearing and they were advised in the notice to inform this Commission in writing within 14 days of receipt of the notice if they wish to be heard in person or through an authorized representative but they did not opt for it.

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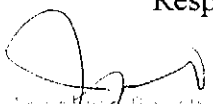
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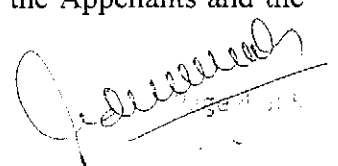


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- b. Section 204-A of the Ordinance is mandatory and has to be met by all the listed companies. Non-compliance of this provision of the Ordinance only because of Company's weak financial position cannot be justified because the provisions of the aforesaid section are clear and explicit.
 - c. The Appellants were in contravention of section 204-A of the Ordinance at the time of issuing the Order. The Commission directed the management of the Company to comply with the mandatory provisions of the Ordinance within 30 days of the issue of the Order.
 - d. It was evident that the Appellant has not been complying with the provisions of the Ordinance since July 2007. In *Burton v. Bevan* (1908) 2 Ch 240, it was held that the term 'Knowingly' signifies knowledge of the facts on which the contravention depends and 'willfully' signifies that the person concerned realizes that there is a contravention. As a director of listed Company appointed by the shareholders, the Appellants had fiduciary duties. Characteristically, the fiduciary is required to have greater knowledge and expertise about the corporate matters. More significantly, Appellant has admitted in clear terms while giving consent to act as director that they are aware of their fiduciary duties. In the case of *City Equitable Fire Insurance Co. Ltd. Re*, 1925 Ch 407, it was held that default, in case of breach of duty, will be considered 'willful' even if this arises out of being recklessly careless, even though there may not be knowledge or intent. It is therefore established that the Appellant has committed a breach of his fiduciary duty with knowledge and intent.
 - e. The Impugned Order is within the jurisdiction of the Director Enforcement of the Commission and is justified in light of law and circumstances of the case and is completely in accordance with the statute.
6. We have heard the parties i.e. Appellant and Respondent at length and perused the relevant record with the able assistance of the parties. The Appellants filed the appeal, inter alia, on the ground that they were not afforded opportunity of hearing by the Respondent. Therefore, by keeping in view the contention of the Appellants and the


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record, without going into the merits of the case we are of the view the Appellants should have been given an express opportunity of hearing rather to give an option in the SCN dated 05/05/10. Therefore, in the interest of justice and equity the Impugned Order is set aside and the case is remanded to the Respondent with the direction to provide an opportunity of hearing in the instant matter within 30 days of this order and thereafter decide the case afresh in the light of record and submissions of the Appellants during the hearing.

7. Parties to bear their own cost.

(**Fida Hussain Samoo**)
Commissioner (Insurance)

(**Zafar Abdullah**)
Commissioner (SCD)

Announced on:

06 JUL 2015