



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 07 of 2011

1. Mr. Khurram Iftikhar, CEO
2. Mr. Shahzad Iftikhar
3. Mr. Nadeem Iftikhar
4. Colonel (R) Muhammad Zafar Saleem
5. Mrs. Sajida Shahzad
6. Mrs. Faiza Khurram
7. Mrs. Nusrat Parveen
(All directors of Amtex Textile Limited)

...Appellants

Versus

Commissioner (CLD) Enforcement Department
SECP

...Respondent

Dates of hearing:

15/02/12, 13/03/12, 23/05/12,
16/07/12, 02/01/15, 15/01/15
13/05/15 and 14/10/15

Present:

For Appellants:

Mr. Adil Bandial, Advocate High Court, CLM

For Respondent:

- i. Mr. Ali Azeem Ikram, Executive Director (CSD)
- ii. Mr. Shahzad Afzal Khan, Joint Director (CSD)

ORDER

1. This order shall dispose of Appeal No.07 of 2011 filed by the Appellants under Section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the orders dated 20/12/10 passed by the Respondent in the matter of Amtex Textile Limited (the Company).

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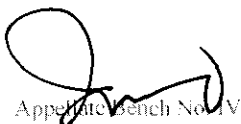
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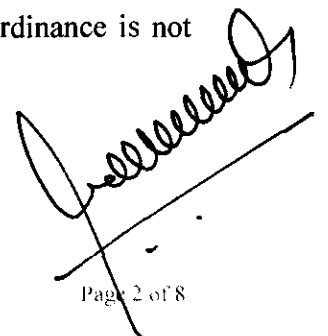


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2. Brief facts of the case are that on 23/09/10, the Company secretary notified that the Annual General Meeting (the AGM) of the Company will be held on 15/10/10 to consider different matters including the approval of final cash dividend @30% (i.e. Rs.3 per share) as recommended by the Board of Directors. Thereafter, on 30/09/10, the Company's major creditor, the Bank of Punjab (the Bank) took notice of the aforesaid dividend recommendation and raised strong objections by drawing attention towards clause 10 of restructuring/rescheduling package no. SAM/CORP/570 dated 21/05/10 (the Agreement), which expressly barred payment of dividend without prior permission of the Bank. In consequence of the objection, the shareholders of the Company unanimously reduced the dividend to nil, so as to comply with terms of the Agreement.
3. The Respondent took notice of the aforesaid material loan covenant which was not disclosed by the Company in its annual accounts filed in pursuant to the requirements of section 233 of the Companies Ordinance, 1984 (the Ordinance). Therefore, a Show Cause Notice was issued to the Appellants under section 492 of the Ordinance and hearing in the matter was held on 14/12/10. The Respondent being dissatisfied with the response of the Appellants passed the Impugned Order and imposed a penalty of Rs.300,000 each on the seven (7) Appellants.
4. The Appellants have preferred the instant appeal against the Impugned Order on the following grounds:
 - a) The Respondent has failed to establish that undisclosed information was "material" at the relevant time and the Appellants had specific "knowledge" as to the materiality of the same, therefore Section 492 of the Ordinance is not applicable.


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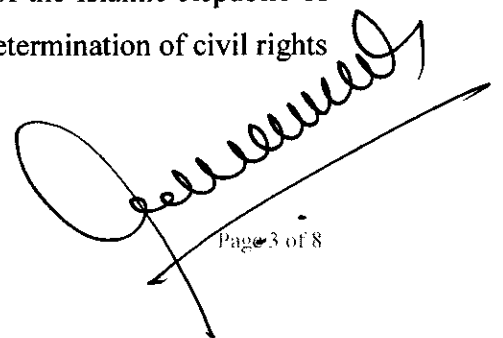


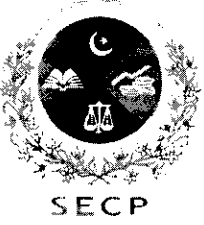
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- b) The annual accounts of the Company were prepared in accordance with the guidelines of ICAP and the International Financial Reporting Standards, general accounting practices and checklists made available by ICAP. Further the annual accounts were also audited by an external auditor and no observation was made at any stage that the information was material and had been omitted, therefore, it cannot be termed as omission of material information.
- c) As per IFRS, materiality of information is to be adjudged on a subjective level. Further, law does not require the information as to the covenants of the companies with banks for annual accounts.
- d) The Respondent has not considered the bonafide of the Appellants because said information was disclosed in the quarterly accounts for the quarter ending September 2010, by which time it had become evident that the said information ought to be disclosed as applicable accounting standards.
- e) The Respondent has applied the judgments pertaining to breach of fiduciary duty without context in a pick and choose manner.
- f) The judgment cited as City Equitable Fire Insurance Co. Ltd. Re. 1925 Ch 407 by the Respondent has been referred and relied out of its original context.
- g) The Respondent has not given due consideration to the grounds and issues raised by the Appellants, hence the Impugned Order is not a speaking order.
- h) The Respondent has passed the Impugned Order without affording the Appellants any real opportunity of being heard.
- i) The requirements of section 24-A of the General Clauses Act, as well the pronouncement of superior courts in leading judgments have been ignored by the Respondent while deciding the matter.
- j) Impugned Order has been passed in violation of the principle of equality of arms enshrined in Article 10 A of the Constitution of the Islamic Republic of Pakistan, 1973 i.e. fair trial and due process for the determination of civil rights and obligations.


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- k) The Respondent cannot act in dual capacities i.e. the executive and judicial for the determination of an issue, therefore, the Impugned Order is patently illegal. Further the Impugned Order is beyond jurisdiction and invalid.

5. The Respondent has denied and rebutted the grounds of appeal in the following manner:

- a) As per record and facts of the case, the conditions and requirements of materiality of information and knowledge of Appellants as required by Section 492 were present in the instant case.
- b) The annual accounts were prepared in violation of applicable laws because Para 79 (a)(v) of IAS 1 requires that "An entity shall disclose the following, either in the statement of financial position or the statement of changes in equity, or in the notes:

"for each class of share capital: the rights, preferences and restrictions attaching to that class including restrictions on the distribution of dividends and repayment of capital"

The same is also referred to in ICAP disclosure checklist on the subject. Moreover, through SEAP circular No. 1 of 1982 in wake of similar events listed companies were advised to assure that in case a company has to obtain clearance of financial institutions before declarations of dividend the announcement regarding dividends should not be made till the clearance has been obtained. Hence adequate guidance existed on the subject both in the accounting as well as legal framework, which the directors should have been aware of the same. Moreover, since, the responsibility for preparation of annual accounts is that of the Company management, any omission on part of Company auditors for not pointing out the omission cannot be seen as a valid argument for justifying the default on part of the Company.

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- c) It is important to advert to the definition of materiality as per the applicable accounting framework i.e. the International Financial Reporting Standards (IFRS) as also referred to in the impugned order. It states "Information is material if its omission or misstatement could influence the economic decisions of users taken on the basis of the financial statements."

The information which bars a shareholders' right attached to the shares of the Company is material by any definition of the term as no investor would like to spend a penny on scrip that has a restriction of dividend payout and which restriction is also public. Hence as soon as the covenant for restricting dividend was imposed by the bank and the same was agreed to by the Company it was imperative on part of the management to disclose the same in the next due accounts for the period.

- d) The directors were duty bound to disclose the restriction on dividend in the annual accounts for the year ended June 30, 2010 presented before the members in October 2010. Therefore any disclosure of the covenant in the subsequent quarterly accounts does not rectify the default of nondisclosure in the annual accounts.
- e) The referred case law was mentioned in response to the argument presented during the hearing that the default was an unintentional omission. The legal counsel has tried to distort the context for creating undue confusion in an otherwise clear open and shut case.
- f) It is reiterated that the counsel has attempted to distort the essence of judgment for creating confusion. The allegation is again denied. It is true that the referred judgment has also differentiated the duties of trustees from that of directors. However, the charge for which directors have been penalized under the Impugned Order is loud and clear. There is no analogy drawn between directors' responsibility and trustees' responsibilities with reference to following facts apparent from record:

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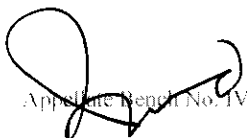
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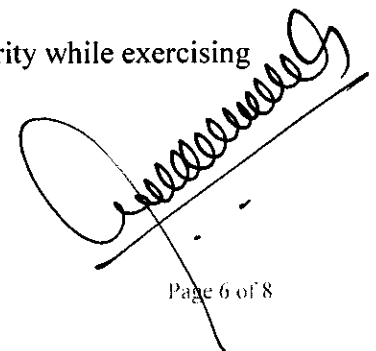


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- At the time of issuing of annual accounts there was a covenant in existence that required the Company to obtain NOC from a major creditor bank prior to announcing of dividend.
 - The covenant was in the knowledge of directors by virtue of their position and due to the fact the rescheduling agreement was signed by the Chief Executive of the Company.
 - The decision regarding disclosure of the bank covenant required exercise of ordinary prudence.
 - The materiality of covenant to the financial position of the Company as well as for the minority shareholders of the Company was also manifest from the facts available on record.
 - Accounting standards which the Company is required to follow as required by the Companies Ordinance, 1984 clearly require such disclosure. Additional guidance was available from SEAP circular referred above.
- g) The grounds presented during hearing as well as written representations of the Appellants have been duly considered by the Respondent.
- h) In line with the principles of natural justice the Appellants were given an opportunity of being heard in person or through their authorized representatives. The directors opted to be heard through their authorized representatives, who submitted a duly signed power of attorney.
- i) The standards mentioned by the Appellants have been duly complied and the Impugned Order was passed in accordance with the operating procedures.
- j) Both Fair trial and due process are amply evident from facts of the case and procedure followed by the Respondent.
- k) The Impugned Order was passed by the competent authority while exercising the jurisdiction as per law.


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6. We have heard the arguments and perused record with the able assistance of parties i.e. Appellant and the Respondents.
7. The record exhibits that the Appellants had not disclosed the material information of restriction imposed by the Bank on declaration and distribution of dividend in the annual accounts of the Company as required by Section 492 of the Ordinance, hence committed misstatement. The argument of the Appellants that the information was not material at the time of preparation of annual accounts and that same was not omitted knowingly cannot be accepted as the applicable law clearly requires the disclosure of material information. It is important to mention that materiality of information has no relevance to the time of event rather it is about the impact and effect of such material information on the rights of related parties, if not disclosed in the required manner. In the instant case a bar was imposed on shareholders right attached to the shares of the Company, however such fact was not disclosed to them.
8. The Appellants were required to disclose the covenant for restricting dividend imposed by the Bank in annual accounts. However they failed to discharge their fiduciary duty in accordance with the law. The Company and its directors were aware of the covenant because the Bank in its letter dated 21/05/10 communicated that "the obligor will not pay any dividend in future without obtaining NOC from BOP". Hence the Appellants being directors were duty bound to disclose the restriction in the annual accounts for the year ended 30/06/10 presented before the members in October 2010.
9. The preparation of accounts is the exclusive responsibility of Company's directors. In the instant case the directors have been careless in performance of responsibility devolved upon them by the law. The Directors admittance of negligence cannot be an excuse for omission of material statements from the annual accounts presented before the Respondent and the shareholders. In the instant case the Company was not allowed to pay dividends without prior NOC from the Bank and this fact was material for the

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shareholders. However this material information was not included in annual accounts presented before the Respondent and the shareholders.

10. In the view of the aforesaid facts, it is evident that the annual accounts of the Company were misstated due to omission of material information by the Appellants, and the Respondent has rightly invoked the penal provision of Section 492 of the Ordinance. The Appellants have failed to discharge their statutory responsibilities. We find no reason to interfere with the Impugned Order therefore, the appeal is hereby dismissed.

11. Parties to bear their own cost.

(Fida Hussain Samoo)
Commissioner (Insurance)

Announced on: **18 NOV 2015**

(Zafar Abdullah)
Commissioner (SCD)