



Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 108 of 2020

1. Mr. Waqar Ahmad, Chairman
2. Mr. Naseer Ahmad, Chief Executive Officer
3. Mr. Muhammad Arshad, Director
4. Mr. Zubair Hussain Akhtar, Director
5. Mr. Muhammad Arif, Director
6. Mr. Zafar Iqbal, Director
7. Mian Khalid Nasim, Director

...Appellants

versus

Executive Director, Adjudication-I, SECP

...Respondent

Dates of hearing:

March 10, 2022, March 31, 2022 and
December 30, 2022

Present:

For the Appellants:

Mr. Muhammad Hamza Khokhar, Advocate High Court

For the Respondent:

1. Mr. Amir Saleem, Additional Director, Adjudication-I, SECP
2. Mr. Sardar Sohaib Amin, Assistant Director, Adjudication-I, SECP
3. Mr. Adnan Naseer, Assistant Director, Adjudication-I, SECP

ORDER

1. This Order shall dispose of Appeal No.108 of 2020 filed by seven directors (the Appellants) of M/s. Gulistan Textile Mills Limited (the Company) against Order dated February 14, 2020 (the Impugned

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Order) passed by the Executive Director, Adjudication-I, SECP (the Respondent) under Section 132 read with Section 479 of the Companies Act. 2017 (the Act).

2. The brief facts of the case are that the Company failed to convene annual general meeting for the financial year ended June 30, 2017 (the AGM) within a period of one hundred and twenty days following the close of its financial year pursuant to sub-section (1) of Section 132 of the Act. Therefore, a show-cause notice dated January 21, 2019 (the SCN) was issued to the Appellants. Final hearing in the matter was held on February 3, 2020 wherein, the Appellants' authorized representatives stated that the Company has already convened the AGM as per directive dated February 26, 2019 issued under Section 147 of the Act. The Respondent concluded the SCN proceedings and imposed a fine of Rs. 10,000/- on each Appellant (Aggregate Rs. 70,000/-).
3. The Appellants have preferred this appeal *inter alia* on the grounds that they are well aware of their fiduciary duty towards the Company and its shareholders to hold the AGM within time prescribed in law, however, delay was caused due to the reasons beyond control of the Appellants. The Appellants further stated that due to financial crunch and inadequate staff, the Company failed to comply with the requirements of Section 132 of the Act. The Company stated that the AGM was held on March 29, 2019, as per directive dated February 26, 20219 issued under Section 147 of the Act. The Appellants prayed for a lenient view on account of subsequent compliance, and in support thereof, they relied on the Appellant Bench's orders, cited as 2018 CLD 44 (M/s. Saudi Pak Leasing Company Limited) and 2017 CLD 1704 (M/s. Husein Industries Limited). The Appellants also stated that delay in holding of the AGM had not caused harm to the rights of the stakeholders, therefore, penalties may be waived off or be converted into a warning.
4. The Respondent rebutted the grounds of Appeal and put forth the following arguments:
 - i. The compliance history of the Company was not satisfactory. There had been multiple instances of delays and non-compliances and in many cases the compliances were made only after SECP took notice of the matter.
 - ii. The Appellants admitted their failure to comply with the requirement of Section 132 of the Act.



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- iii. The Appellants acted irresponsibly by delaying the AGM without seeking direction of the SECP/extension to hold the AGMs.
- iv. Subsequent holding of AGM as per directive issued under Section 147 of the Act, does not absolve the Company and its directors from the consequences of breach of Section 132 of the Act.
- v. Holding of the AGM in a timely manner is not only the requirement of law but it also ensures transparency and provides necessary information about company's state of affairs to all stakeholders. In order to foster a culture of compliance, the SECP ought to enforce the relevant legal requirements in an effective manner.
- vi. The facts of case laws mentioned by the Appellants are different from the case in hand, therefore, not applicable in this case.

5. The Appellate Bench (the Bench) has heard the parties and perused the record. In view of the arguments put forth by the parties, the Bench's analysis and findings are as under:

- i. The Appellate Bench Registry has drawn the Bench's attention towards three previously decided cases of the Appellate Bench (Appeal No. 1 of 2019, Appeal No. 40 of 2019 and Appeal No. 94 of 2019) wherein proceedings of SCNs and impugned orders were set aside on the sole ground that under Section 132 of the Act only the company is liable to penal consequences, hence, imposition of penalty on the directors is *void ab initio*. In the aforesaid three cases, the Bench had based its decision on the ground that under section 158 of the erstwhile Companies Ordinance, 1984 (the Ordinance) a company and its directors were liable for non-holding of AGM, whereas, under section 132 of the Act, only the company is liable to penal consequences. For comparative reference both provisions are reproduced in below table;

The Companies Ordinance, 1984	The Companies Act, 2017
158. Annual general meeting. -(4) If default is made in complying with any provision of this section, the company	132. Annual general meeting. — (5) Any contravention or default in complying with



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<p>and every officer of the company who is knowingly and willfully a party to the default shall be liable,--</p> <p>(a) if the default relates to a listed company, to a fine not less than [fifty] thousand rupees and not exceeding [five hundred] thousand rupees and to a further fine not exceeding two thousand rupees for every day after the first during which the default continues; and</p> <p>(b) if the default relates to any other company, to a fine not exceeding [one hundred] thousand rupees and to a further fine not exceeding [five] hundred rupees for every day after the first during which the default continues.</p>	<p>requirement of this section shall be an offence liable—</p> <p>(a) in case of a listed company, to a penalty of level 2 on the standard scale; and</p> <p>(b) in case of any other company, to a penalty of level 1 on the standard scale.</p>
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As per above para a legislative shift has been made with regard to specific attribution of responsibility in case of violation of Section 132 of the Act whereas, under Section 158 of the Ordinance responsibility was specifically fixed on a company and every officer of the company (As per Section 2(1)(24) of the Ordinance, officer include directors). As per Section 132 of the Act, a company is bound to hold its AGM within stipulated time and any violation thereof, will trigger penal provision provided under sub-section 5 of Section 132 of the Act. The Bench has gone through the above-mentioned comparative matrix, which

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revealed that the law does not specifically mention that who shall be responsible for such violation and liable to the penalty provided under Section 132 of the Act.

A company is a juristic person, therefore, to carry out its functions and duties, company law has authorized a body of natural persons i.e. Board of Directors (the BOD), which is entrusted to manage and ensure smooth and transparent functioning of a company. The BOD of a company is responsible to perform multiple functions and duties prior to the AGM, which includes preparation and finalization of audited annual accounts and approval of AGM agenda. Keeping in view the scheme of law, holding of AGM in a timely manner is the responsibility of the BOD. In the instant case the directors have failed to perform their prime duty. Therefore, we are not inclined to endorse the above-mentioned orders of the Appellate Bench wherein it was held that under Section 132 of the Act, only the company is liable to penal consequences.

In contrast to the Section 158 of the Ordinance, by omitting specific classes of persons, the legislature has extended the scope of Section 132 of the Act, with respect to any person liable for violation. Keeping in view the overall scheme of the Act, wherein the directors and company secretary have vital roles to do needful acts to ensure holding of the AGM, in our view, the penal provision of Section 132 of the Act should have been imposed on them. Furthermore, as the company is also a person, therefore, *inter alia* persons it will also be liable to the violation of requirements contained under Section 132 of the Act. We are of the view that under Section 132 of the Act, company as a juristic person and directors and company secretary as natural persons are liable to penal consequences.

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- ii. A public listed company has a higher responsibility to disseminate true and accurate state of affairs to all the stakeholders by holding the AGM within the stipulated time so that appropriate and timely decisions are made. Therefore, the Appellants should have conducted the AGM as per applicable legal framework.



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- iii. The Appellants have an unsatisfactory compliance history as there have been multiple instances of non-holding of AGMs in recent years. Furthermore, as per record, the Company has convened its AGM on March 29, 2019 as per directive dated February 26, 2019, however, such compliance cannot undo the default committed under Section 132 of the Act.
- iv. The Appellants have admitted their default, however, despite admitting their default, they have not made any payment on account of penalty so far. Due to high inflation in recent years, the delay has already lowered the real value (time value) of the penalty.
- v. The Appellants' argument, that due to adverse financial conditions of the Company and inadequate staff, preparation of financial statements was delayed, which in turn caused the delay in holding the AGM, is not a plausible reason to exonerate them. Hiring of adequate staff is within the Appellants' control and holding of the AGM within due time is the Appellants' responsibility. If such arguments are accepted, all companies will find one reason or another to justify non-compliance with the law.
- vi. The Appellants' have argued that, as a rule, the delay in compliance should be condoned and penalty should not be imposed in all cases where compliance is eventually made. They have referred to a few past decisions of the Appellate Bench in which penalties were waived by the Bench by considering subsequent compliance as one of the reasons for the relief. This Bench is of the opinion that such decisions cannot act as binding precedents for the future. Subsequent compliance can neither be the sole reason, nor be the rule, for complete waiver of a penalty. The decision, whether or not to reduce or waive a penalty, must be based on full appreciation and consideration of the facts and circumstances and to what extent the reasons of non-compliance were within or outside the control of the person. Any attempt to interpret a past decision of Appellate Bench in this manner needs to be discouraged.

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6. In view of the above, the Bench decides as under:

- i. The decision made in the Impugned Order is maintained.
- ii. Although the real value (time value) of the penalty amount has significantly reduced due to high inflation, the amount of the penalty is not enhanced by giving due regard to the admission of default by the Appellants.
- iii. While taking further lenient view, we restrain ourselves to direct the Respondent to proceed against the Company and its secretary as well. However, in all future cases, we hereby direct the Respondent to ensure issuance of SCNs to all persons including the company, directors and company secretary for alleged violation of Section 132 of the Act.
- iv. The Appeal is dismissed without any order as to cost.

(Mujtaba Ahmad Lodhi)
Commissioner

(Abdul Rehman Warraich)
Commissioner

Announced on:

20 MAR 2023