Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

IN THE MATTER OF

APPEAL No. 20 OF 2020

SADRUDDIN HASHWANI & OTHERS

... APPELLANTS

VERSUS

EXECUTIVE DIRECTOR, ADJUDICATION DEPARTMENT-I, SECP

... RESPONDENT

Date of hearing: September 23, 2021

Present: (Via Video Conferencing)

For the Appellants:

Mr. Furkan Ali, Barrister at Law (FGE Ebrahim Hosain)

For the Respondent:

Mr. Amir Saleem, Additional Director, Adjudication Department – I, SECP

ORDER

1. This Order shall dispose of Appeal No. 20 of 2020, filed by Sadruddin Hashwani and others (the **"Appellants"**), under Section 33 of the Securities and Exchange Commission of Pakistan Act, 1997, against the Order dated 07-02-2020 (the **"Impugned Order"**) passed by the Respondent where Directors, including the Chairman and Chief Executive Officer (**CEO**), of *Pakistan Services Limited* (the **"Company"**) are aggrieved.

2. *Brief facts* for disposal of this matter are that the annual audited financial statements of the Company for the year ended on 30-June-2017 revealed an amount of Rs.626.820 million (the **"Amount"**) was paid to Associated Builders Private Limited (**"ABPL"** or the **"Associated Company"**) for purchase of two plots of land in Golden Palm Scheme, Gwadar (the **"Property"**). In this regard, the Board of Directors (the **"BOD"**) of the Company had resolved on 07-Aug-2008 that the Property shall be purchased by the Company from ABPL. The Company entered into two

sale agreements with ABPL on 27-Aug-2008 for purchase of the two plots (the **"Sale Agreements"**) for PKR 223,539,800/- (*Two Hundred and Twenty-Three Million Five Hundred and Thirty-Nine Thousand Eight Hundred Only*) and PKR 436,271,000/- (*Four Hundred and Thirty-Six Million Two Hundred and Seventy-One Thousand Only*) respectively. The Company made an advance payment of PKR 626,820,260/- (*Six Hundred and Twenty-Six Million Eight Hundred and Twenty Thousand Two Hundred and Sixty Only*) according to the terms and conditions of the Sale Agreements dated 27-Aug-2008.

3. Pursuant to the Sale Agreements, the Property was to be delivered to the Company by 30-06-2012, after completion of development work. However, neither the Property was delivered to the Company by ABPL, nor the amount, inclusive of any mark-up for the overdue period i.e. beyond 30-Jun-2012, was charged. Therefore, proceedings under section 199 of the Companies Act, 2017 (the **"Act"**), were initiated through the Show Cause Notice (**SCN**) dated 7-May-2019 against the Appellants. Relevant provisions of Section 199 of the Act are as follows:

> *"199.* ***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, amount of investment and terms and conditions attached thereto.*
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> ***Explanation:*** *The term "investment" shall include equity, loans,* ***advances****, guarantees, by whatever name called, except for the amount due as normal trade credit, where the terms and conditions of trade transaction(s) carried out on arms-length and in accordance with the trade policy of the company.*
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> *(6) Any contravention or default in complying with requirements of this section shall be an offence liable to a penalty of level 3 on the standard scale and in addition, shall jointly and severally reimburse to the company any loss sustained by the company in consequence of an investment which was made without complying with the requirements of this section."*

4. Consequently, penalties were imposed through the Impugned Order on all the 9 Appellants in this matter in terms of Sections 199 (6) of the Act, for contravention or default in complying with section 199 (1) of the Act for extending the Amount to ABPL for purchase of the Property without the authority of a Special Resolution and for not charging any mark-up. The penalty under the Impugned Order amounts to Rs.100,000/- each, except the CEO, who was penalized for Rs. 200,000/-. Feeling aggrieved, the Appellants filed this Appeal.

5. *Learned counsel for the Appellants mainly argued* that section 199 of the Companies Act does not apply to the transaction in the instant matter as the Company paid consideration for purchase of the Property in pursuance of the Sale Agreements and thus, cannot be considered as an investment in its associated company. The Property, however, could not be transferred to the Company till date due to the change in the Gwadar's Master Plan, which delayed ABPL from carrying out development work. Nevertheless, merely because a sale cannot be completed due to the act of a third party does not in any way dilute the Sale Agreements and convert the transaction into an "abnormal trade credit". The advance payment was duly made in order to execute the business transaction and the same is a normal business practice within the industry. In view thereof, the advance payment did not in any case constitute to be an investment in accordance with Section 199 of Act since it was made in the normal course of business and therefore, it cannot be claimed to be an "abnormal trade credit". Furthermore, the question of Amount being overdue does not arise since the advance payment was made as a purchase price for the Property.

6. Hence, it was contended on behalf of the Appellants that since the Amount paid as an advance payment to ABPL is not an investment within the scope of Section 199 of the Act, therefore, it does not require approval from the shareholders through a special resolution under this Section 199 or charging mark-up for this transaction.

7. Learned representative for the Respondent rebutted the arguments of the Appellants, *inter*-alia, that the Appellants are non-compliant with the requirements of section 199 of the Act by extending the Amount to its associated company as an "abnormal trade credit" against the Property which was to be delivered to the Company by 30-06-2012. They contended that neither the Property was delivered, nor the Amount, inclusive of any mark-up for the overdue period i.e. beyond 30-06-2012, was charged.

8. It was submitted on behalf of the Respondent that the advance Amount paid to ABPL by the Company for acquisition of the Property cannot be considered an amount due as normal trade credit within the explanation provided under Section 199(1) of the Act. This argument is primarily based upon the fact that after payment of an amount by the Company to ABPL in 2009, the Company had to receive vacant and physical possession of the Property by 30-06-2012. However,

the Company did not receive the Property till present, even after a lapse of over eight (8) years from the agreed date of delivery of the Property, nor did it charge any mark-up or receive any recovery on the Amount already paid. Therefore, the Amount paid in advance to ABPL cannot be considered as normal trade credit, rather, falls within the definition of investment under Section 199 of the Act, as investment in an associated company and, hence, required approval of members of the Company through a special resolution under this Section.

9. On the issue of delayed development work, it was argued by the Respondent that even if there was any practical difficulty in delivery of the Property to the Company by the associated company, the matter was required to be brought into the notice of the shareholders for any changes to be made in the terms and conditions under the authority of a special resolution in terms of Section 199 of the Act. Moreover, the Company also compromised the interest of the shareholders by blocking the Amount with its associated company without any mark-up or claim of loss or damage for delay in physical possession of the Property.

10. The Appellate Bench (the **"Bench"**) has heard the parties and perused the record. Representatives of the Appellants and the Respondent reiterated their grounds of appeal and rebuttal thereof.

11. The basic contention in the instant matter, amongst others, is whether the amount paid by the Company was an "investment" in its associated company within the purview of section 199 of the Act for which a special resolution was necessary along with mark-up or a penalty clause in case of default. Plain dictionary meaning of the term "investment" is the act of investing or putting money into something to make profit or get an advantage, etc. Particularly, the term used in the explanation of "Investment" under this section 199 of the Act includes "Advances", which is generally defined as an amount of money paid before it is due or for work only partly completed or (as provided in the Black's Law Dictionary) the furnishing of money before any consideration is received in return.

12. In the instant matter, it is reflected from perusal of the record and the arguments put forward before the Bench that the Amount was paid to ABPL by the Company for purchase of the Property. However, possession of the Property could not be delivered to the Company till present for which 30-06-2012 was the date for delivery of the Property under the Sale Agreements.

13. It transpires from the record that the Company has benefitted one of its associated companies by parking / blocking a huge Amount of funds for a long period of time, i.e. since 2009 till present. The Amount was transferred to the Associated Company which was developing land in Gwadar and therefore, the Amount paid by the Company was benefitting its associated company. Although it was meant for the purchase of property, however, the Amount paid to the Associated Company falls within the definition of "advances" under "investment" in terms of Section 199 of the Act where money was furnished and the consideration in the form of the Property was to be developed by ABPL and handed over to the Company. Moreover, the Company took no measures to recover the Amount upon lapse of the agreed term for delivery of the Property or any mark-up thereupon against non-delivery of the Property on 30-06-2012.

14. Thus, this transaction cannot be distinguished from investment as advance to its associated company for its profiting and promotion at the cost of an Amount from the Company. Hence, such transaction should have been catered for within the scope of Section 199 of the Act in order to protect the interests of the shareholders by being authorized through a special resolution indicating the nature, period, amount of investment, and terms and conditions along with such transaction. The Bench is of the view that paying an associated company, and that too for a long period of time, without any recourse for the shareholders to take appropriate decision in protection of their own interests, falls within the boundaries of contravention with requirements of Section 199 of the Act.

15. For the foregoing reasons and discussion, the appeal in hand is dismissed being devoid of merits. Impugned Order dated 07-02-2020 is maintained and upheld for the penalty imposed under section 199 (6) of the Act, along with the direction under section 475 of the Act therein.

(Sadia Khan)
Commissioner

(Farrukh Hamid Sabzwari)
Commissioner

Announced on: 10 NOV 2021