



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. III

In the matter of

Appeal No. 31 of 2015

- (i) The Pakistan Mutual Insurance Co. Ltd
 - (ii) Mr. Ch. Abdul Karim, Chief Executive Officer
 - (iii) Mr. Ch. Shahbaz Ali, Director
 - (iv) Mr. Asif Javaid, Director
 - (v) Mr. Yasir Naseer, Director
 - (vi) Mr. Jawad Amin, Director
 - (vii) Mr. Muhammad Saleem, Director
 - (viii) Mr. Hassan Ahmed Khan, Director
- (Appellant No.(ii) Chief Executive and Appellants (iii) to (viii) all
directors of Pakistan Mutual Insurance Co. Ltd ...Appellants

Versus

- (i) Chairman, Securities and Exchange Commission of Pakistan
- (ii) Director (Insurance), Securities and Exchange Commission of
Pakistan ...Respondents

Present:

Appellant (ii):

- (i) Mr. Ch. Abdul Karim, Chief Executive Officer, Pakistan Mutual
Insurance (Guarantee) Ltd

For the Appellants:

- (ii) Mr. Hafiz M. Farooq Afzal, Manager Finance, Pakistan Mutual
Insurance (Guarantee) Ltd



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For the Respondent:

- (i) Mr. Syed Nayyar Hussain, Director (Insurance)
- (ii) Mr. Farrukh M. Qureshi, Deputy Director (Insurance)

ORDER

1. This order is in appeal No. of 31 of 2015 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order dated 30/03/15 (the Impugned Order) dated passed by the Respondent.
2. The brief facts of the case are that an onsite inspection of the Pakistan Mutual Insurance Company (Guarantee) Limited (Company) was conducted on the order dated 23/04/13 under section 59A of the Insurance Ordinance, 2000 (Insurance Ordinance) during which it was observed that the Company held its election of directors in the Annual General Meeting (AGM) of 14/04/11, in which seven directors were elected. In view of section 2(xxxix) of the Ordinance, having no share capital, the company has members and not shareholders. At the time of convening of the AGM on 14/04/11, there were 762 Qisas and Diyat policyholders of the Company, who were essentially members of the Company. Given the minimum quorum of a general meeting, as laid down under section 160(2)(b) of the Companies Ordinance, 1984 (Ordinance) atleast 190 members were required to be present in the aforesaid AGM of 14/04/11 in order to meet the minimum quorum requirement of twenty-five percent of the total members. The findings of the onsite inspection as well as the minutes of the AGM of 14/04/11 depicts that only 29 members were present in that AGM, so the requirement relating to the minimum quorum was not met for the AGM in which election of the directors were held. In view of the foregoing, it appeared that the Company violated section 160(2)(b) of the Ordinance for which the penal action could be initiated against the Respondents in terms of section 160(8) of the Ordinance.



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3. Show Cause Notice dated 21/02/14 (SCN) was issued under section 160(2)(b) read with section 160(8) of the Ordinance to the Appellants, calling upon them to show cause as to why the fine, as provided under section 160(8) of the Ordinance should not be imposed for non-compliance with section 160(2)(b) of the Ordinance. The Appellants submitted their response to the SCN vide letter dated 06/03/14 and hearing in the matter was conducted on 11/03/15 via video conferencing connecting the Head Office with the Lahore Office of the Commission. The hearing was attended by Ch. Abdul Karim, Chief Executive of the Company, Mr. Hafiz M. Farooq Afzal, Manager Finance of the Company, Mr. Owais and Mr. Irfan Ilyas, Partner, M/s Ilyas Saeed & Co., Chartered Accountants, for and on behalf of the Appellants.
4. The Respondent No.2 dissatisfied with the response of the Appellants held that the default of section 160(2)(b) read with section 160(6) of the Ordinance is established. Therefore, the fine as provided under section 160(8) of the Ordinance can be imposed onto the Appellants i.e. the chief executive and directors of the Company. The directors, in addition to the day-to-day running of the Company and the management of its business, also have some fiduciary duties i.e. duties held in trust and some wider duties imposed by statute. Therefore, it could be legitimately inferred that the default was committed knowingly and willfully and in exercise of the powers conferred under section 160(8) of the Ordinance, a fine of Rs.10,000 was imposed on each of the Appellants due to the willful default of section 160(2)(b) of the Ordinance. Further, failure to comply with the Order would compel the Respondent to initiate proceedings under section 472, section 473 and section 495 of the Ordinance. However, in case of any misstatements in the submissions made by the Appellants, the Respondent No.2 shall initiate proceedings under section 492 of the Ordinance.



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5. The Appellants have preferred the instant appeal against the Impugned Order. The Appellant's counsel in his written submissions and the Appellant No (ii) at the hearing argued that:

- (a) It would not be possible for the Appellants to ensure presence of at least twenty-five percent of the total number of members at any general meeting. The Company does not have the resources to send notices for meeting to such a large number of members. The directors of the Company are not its shareholders and derive no monetary benefits, perks, salaries, bonus, and profit, dividends etc. from the funds of the company, so the penalty imposed upon them is against the principles of justice, equity and fair play. The Respondent No.2 has erred in law by inferring without any lawful justification that the default committed by Appellants No. 2 to 8 is willful and deliberate which it is neither. Further, the Appellants cannot afford to pay the respective penalties, as the Company is unable to meet even its most basic administrative costs. The Impugned Order, therefore, is liable to be set aside.
- (b) The Impugned Order passed by Respondent No.2 does not have the sanction of the law as section 160(8) of Ordinance confers no jurisdictional powers upon him, nor can he derive the same by way of delegation the powers to adjudicate and decide the matter in dispute. The order being "Coram non judice", is liable to be set aside.
- (c) The Respondent No. 2 has failed to appreciate the fact that the Appellant company is "Mutual" on nature and formation as stipulated in section 28 of the Insurance Ordinance, 2000, it has no share capital or shareholding, in the circumstances the penalty imposed in individual capacity upon Appellants 2 to 8, who have no financial involvement or stakes in the Company is unjust and harsh.

6. The Respondent rebutted the arguments as follows:



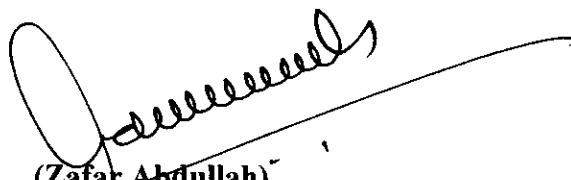
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- (a) The intent of the provisions of Section 160(2)(b) of the Ordinance is to ensure that a sizable voting power (i.e. at least twenty-five percent of the overall voting power) is present at the time of convening of the general meeting. Moreover, the Articles do not have an overriding effect on the provisions of the Ordinance. The provisions of the law have to be complied with as required therein. The quorum laid down under the Articles of Association of a company would take precedence if it surpasses the quorum laid down under Section 160(2)(b) of the Ordinance, however, the baseline voting power has to be greater than or equal to twenty-five percent of the overall voting power, and this is what the intent of the law is. Therefore, in this view, the Appellants had willfully failed but have also refused to ensure compliance with the provisions of Section 160(2)(b) of the Ordinance by stating that it is not possible for the Appellants to fulfill the quorum of a general meeting, as aforesaid, for which they were penalized in terms of Section 160(8) of Ordinance. Furthermore, winding up proceedings are to be initiated against the Company as the Company is unable to comply with the requirements of the law.
- (b) The Impugned Order was passed within the bounds of the law and the Respondent No. 2 was fully empowered by the Commission to take cognizance under Section 160(8) of the Ordinance, by virtue of the S.R.O. No. 1354(I)/2012 dated 31/10/12 and S.R.O. No. 221(I)/2015 dated 11/03/15. The Impugned Order, therefore, is not liable to be set aside and must be upheld.
- (c) Section 2(xxxix) of the Insurance Ordinance provides that, “‘Mutual Insurance Company’ means an Insurer, being a company incorporated under Law of Pakistan or any country or state other than Pakistan, which has no share capital and of which, by its constitution, only and all policy holders are members”. The reason for taking action against the Appellants was protection of the interests of the policyholders of the Company, who are its only members.



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7. We have heard the parties and perused the record provided to us by the parties i.e. Appellant and the Respondent.
8. The Appellants are unable to comply with the requirements of the law in terms of section 160(2)(b) of the Ordinance as they have stated that it would not be possible for them to ensure presence of at least twenty-five percent of the total number of members at any general meeting, as they do not have the resources to send notices to all the members. The Respondents have rightly penalized the Appellants for the contravention, however, given the state of affairs of the Company which is unable to even meet its basic expenses and administrative costs and the fact that winding up proceedings have now also been initiated by the Respondent, taking a lenient view, we set aside the Impugned Order to the extent of penalty. The Appellants are warned that they must ensure compliance of the laws and regulations and directions of the Commission in future.
9. Parties to bear their own costs.


(Zafar Abdullah)
Commissioner (SCD)


(Tahir Mahmood)
Commissioner (CLD)

Announced on:

14 SEP 2015