



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH

In the matter of

Appeal No. 33 of 2017

M/s. M. Nazir & Company, Cost & Management Accountants,
through Muhammad Nazir, FCMA.

.... Appellant

Versus

Executive Director (Corporatization & Compliance Department) SECP.

.... Respondent

Date of hearing:

21/02/19

Present:

For Appellant:

- i. Sardar Azam Mehmood Kasana, Advocate High Court
- ii. Mr. Saif Ullah

For Respondent:

Mr. Mahboob Ahmad, Additional Registrar (CCD-SECP)

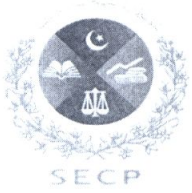
ORDER

1. This Order is in the matter of Appeal No. 33 of 2017 filed under Section 33 of the Securities and Exchange Commission of Pakistan Act, 1997, against the order dated April 12, 2017 (the Impugned Order) passed by the Executive Director, CLD-CCD (the Respondent) under Section 492 read with Section 476 of the Companies Ordinance, 1984 (the Ordinance).
2. Brief facts of the case are that the Prince Flexipack (Pvt.) Limited (the Company) submitted an application for striking off its name from the register under section 439 of the Ordinance on May 15, 2002. The Application was accompanied by an auditor's certificate dated May 14, 2002 (the Auditor's Certificate), issued by M/s. M. Nazir & Company (the Appellant) that the Company had no assets and liabilities. Thereafter, a notice under Section 439(5) of the Ordinance was published in

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the Official Gazette on September 18, 2002, subsequently the name of the Company was removed from the register of companies. On August 17, 2016 the Company submitted an application for restoration of its name in terms of Section 439(9) of the Ordinance and informed that the Company has a piece of land measuring 17 Kanals and 4 Marlas having Khewat No. 1668, Khatooni No. 2966, Khasra No. 4651 and 4654 near Chenab Bridge, Wazirabad, District Gujranwala. It was further informed that the said property is in possession of Mr. Atta-ur-Rehman, Chief Executive Officer (the CEO) of the Company. Therefore, the Respondent issued a Show Cause Notice dated February 27, 2017 (the SCN) to the Appellant, for of the Auditor's Certificate. Thereafter, the Respondent passed the Impugned Order and imposed a fine of Rs. 500,000/- on the Appellant.

3. The Appellant has challenged the Impugned Order before the Appellate Bench (the Bench) *inter alia* on the grounds that that Respondent had not issued the SCN, therefore, Impugned Order is liable to be set aside. The Appellant further argued that the CEO already admitted his mistake and accordingly a fine of Rs. 100,000/- was imposed on him vide an order dated March 9, 2017, passed by the Commissioner, CLD-CCD. During the course of hearing the Appellant's representative argued that the Respondent cannot impose a fine of Rs. 500,000/- because at the time of commission of the alleged offence, prescribed penalty under Section 492 of the Ordinance was Rs. 20,000/-.
4. The Respondent's representative has rebutted the grounds of Appeal and stated that the order against the CEO and the Impugned Order were passed on different grounds. The CEO and the Appellant had been penalized for their respective roles and defaults.
5. The Bench has perused the record of Appeal with the able assistance of the parties. The Appellant's plea with regard to issuance of SCN is not tenable because the Commissioner (CLD-CCD) duly served a SCN, thereafter; the Commission delegated the adjudication powers of Section 492 of the Ordinance, to the Respondent. The law does not require the Respondent to reissue the SCN therefore, the Respondent had rightly relied upon the SCN issued by the Commissioner (CLD-CCD).
6. The Appellant's other argument that instead of imposition of Rs.500,000/- penalty, the Respondent was required to proceed in accordance with the penalty of Section 492 of the Ordinance, provided at the time of submission of Auditor Certificate, is a correct legal position. The Appellant claimed that at the time of issuance of Auditor's Certificate the prescribed penalty under Section 492 of the Ordinance was Rs.20,000/-. In order to assess the claim of Appellant, the Bench has decided to peruse

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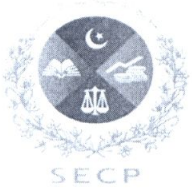
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the chain of amendments in Section 492 of the Ordinance. The record revealed that the Auditor's Certificate was issued on May 14, 2002 and at that time, penalty under Section 492 of the Ordinance was, up to three years imprisonment and fine not exceeding twenty thousand rupees (the Repealed Section), later on, the Section was substituted by the Companies (Amendment) Ordinance, 2002, dated October 26, 2002, whereby, three years imprisonment was abolished and fine was enhanced to rupees one hundred thousand (First Amendment). Thereafter, the Finance Act, 2007, further enhanced the fine, to five hundred thousand rupees (Second Amendment).

7. The Bench has observed that in the present case, the appropriate forum to adjudicate the matter was court of competent jurisdiction because the offences, which are punishable with the imprisonment and fine, only the court had the power to take the cognizance. It is also important to note here that the Appellant is neither natural, nor the legal person therefore; its principal should had been penalized under the Repealed Section. Before the First Amendment, the Repealed Section was purely criminal in nature and the court had jurisdiction to proceed with the matter. Although, the First and Second Amendments had not changed the criminal nature of the Repealed Section however, after deletion of punishment of imprisonment, the power to impose fine had been duly exercised by the Securities and Exchange Commission of Pakistan. In present case, the Respondent had exercised the same power however, it is not applicable to Appellant's case.
8. The Bench find it appropriate to elaborate the principle of retrospective effect in criminal/civil substantive provisions and criminal/civil procedural provisions. The provision, which describes the rights and liabilities of the parties are known as substantive provisions whereas, the provisions, which prescribe the procedure to enforce the substantive provisions are called procedural provisions. Any amendment in criminal substantive provisions, cannot be applied retrospectively however, amendments in civil substantive provisions may be enforced retrospectively, if expressly authorized. Amendments in criminal and civil procedural provisions are equally enforceable retrospectively. The Respondent was not authorized to implement the First or Second Amendments, , retrospectively, because the Repealed Section was criminal in nature however, without prejudice to the aforesaid, if at all we assume that the Repealed Section was civil in nature, even then the Respondent was not empowered to apply the amendments, retrospectively, because the Second Amendment had not been expressly implemented retrospectively. In view of preceding facts, the Respondent was required to proceed in accordance with the requirements of the Repealed Section. Above all, imposition of Rs.



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500,000/- penalty was also a violation of Article 12(1)(b) of the Constitution of the Islamic Republic of Pakistan, 1973 (the Article), which prohibits imposition of a penalty, of a kind different from the penalty prescribed at the time the offence was committed. The relevant part of the Article is reproduced below for ready reference;

“Protection against retrospective punishment.__(1) No law shall authorize the punishment of a person—

(a); or

(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2.....”

Emphasis Added

9. The Bench has also observed that the legislature has placed Section 492 under Part XVI, General, Legal Proceedings, Offences, etc. of the Ordinance. This Section contains the statutory penalty of false statement (offence). The term “penalty” has not been defined by the Ordinance therefore, to understand the nature of penalty, we rely on Black’s Law Dictionary, eight Edition, which, defined the penalty in the following manner;

“Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine ;esp. .a sum of money exacted as punishment for either a wrong to the state or a civil wrong”

The above definition has made it clear that the term penalty may be used interchangeably for civil and criminal cases. However, placement of Section 492 of the Ordinance under the chapter of legal proceedings and offences has made it criminal in nature.

10. The Appellant also argued that the Auditor’s Certificate was prepared as per the available record of the Company and the information provided by the CEO. The Appellant further argued that the CEO had already been penalized upon admission of his negligence and responsibility, caused issuance of the Auditor’s Certificate. In this regard, the Bench has viewed the application dated August 17, 2016 submitted by the CEO and para three of the order dated March 9, 2017, which are self-explanatory to the extent of CEO responsibility, however, CEO’s admission cannot exonerate Appellant from his responsibilities. As per the contents of the Auditor’s Certificate, the Appellant had examined the books and record of the Company, however, the Impugned Order is silent to corroborate Appellant’s claim. The Respondent was required to call/inspect books of accounts and other relevant record of the Company to verify Appellant’s claim. The available record and facts are not sufficient to decide



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this Appeal on merits. we are of the considered view that if books of accounts and other relevant record has no information with regard to the asset of the Company then Appellant may not be penalized and *vice versa*. Therefore, for the just conclusion of the Appeal we hereby *set aside* the Impugned Order and remand this matter, with the direction to Respondent, to call/inspect the books of accounts and other relevant record of the Company to verify Appellant's claim. If, the Respondent find information of Company's asset in books of accounts and other relevant record, then, he will be required to refer the matter to the competent court for adjudication. Moreover, if there is no information of Company's asset in books of accounts and other relevant record, then, there will be no case against the Appellant. In view of the above discussion, observations, and direction, we hereby, dispose of this Appeal, without any order as to cost.

11. In view of the discussion made in para six to para nine above (both inclusive) , we intend to pass a general direction for all the officers and the departments of the Commission to observe the principles, envisaged in the Article, while exercising the adjudication powers. We, further direct the Registrar Appellate Bench, to ensure communication of this Order to all concerned within the Commission, through appropriate manner.

(Shauzab Ali)

Commissioner (SMD)

(Aamir Ali Khan)

Commissioner (SCD-PRDD)

Announced on: 09 APR 2019